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## Privatization of Corrections: Defining the Issues

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# The Privatization of Correctional Institutions: The Tennessee Experience

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Recently, the privatization of correctional institutions has been a topic of intense interest both in Tennessee and other parts of the Nation. In the hope that we might learn from the past, we undertook to examine Tennessee's convict leasing practices of the nineteenth century. This Article summarizes that research and provides a narrative and analysis of the recent events regarding privatization of correctional institutions in Tennessee.

In 1829 the Tennessee General Assembly, in accordance with a national reform movement, abolished traditional methods for the punishment of crimes. Imprisonment replaced whipping, branding, and stocks.<sup>1</sup> A law mandating the erection of Tennessee's first penitentiary implemented this new policy.<sup>2</sup> The officials who were to administer this prison also were authorized to provide work for each prisoner "best adapted to his or her age, sex and state of health, having due regard to that employment which is most profitable."<sup>3</sup> Thus Tennessee went on record as favoring humanitarian reform, but it was reform for which the beneficiaries would pay: profits from the convicts' labor were to defray the costs of prisoner confinement.

In 1831 a 200-cell brick and frame prison opened in Nashville, approximately one mile from the public square.<sup>4</sup> Within two years

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1. 1829 Tenn. Pub. Acts ch. XXIII, § 1.

2. *Id.* at ch. V.

3. *Id.* at ch. XXXVIII, § 25, Rule 15.

4. Crowe, *The Origin and Development of Tennessee's Prison Problem, 1831-1871*, 15 TENN. HIST. Q. 111-14 (1956).

of its opening, officials established a small manufacturing plant at the prison.<sup>5</sup> Through the end of the decade, prisoners engaged in a variety of industries, including coopering, blacksmithing, and making harnesses, wagons, and shoes.<sup>6</sup> Later, convicts quarried and cut stone for use in the State capitol building.

During the first twenty years of its existence, prison officials praised the penitentiary as a profitmaking institution.<sup>7</sup> Free mechanics and tradesmen, however, criticized the use of prison labor as competing with free labor and degrading their respective trades. By 1853 the Governor of Tennessee agreed. In his annual legislative message of December 19, 1853, Governor Andrew Johnson strongly condemned the prison as operating a "*State Mechanic Institute*" in competition with free laborers.<sup>8</sup>

Tennessee legislators soon began seeking alternatives to the penitentiary. Representative Morris of Wayne County introduced a bill "To farm out the Penitentiary." Representative Hebb of Lincoln County moved to amend Morris' bill to include "giving the person the power who leased the penitentiary to learn the convicts various trades, etc."<sup>9</sup> The general assembly quickly reconsidered and tabled this amendment.<sup>10</sup> The bill was postponed indefinitely on second reading.<sup>11</sup> Representative Wood's bill "To lease out, regulate and change the present system of penitentiary labor," met a similar fate, despite the apparent support from a minority report of the House Penitentiary Committee.<sup>12</sup> The senate defeated a final bill, "To provide for building a public jail and Penitentiary," introduced by Senator Farquharson of Franklin and Lincoln Counties.<sup>13</sup>

The first gubernatorial endorsement of convict leasing in Tennessee probably was made by Governor Isham G. Harris in his legislative message of October 4, 1859. Governor Harris stated that in light of government's poor record of financial management, "I do not doubt that the best interests of the State would be promoted

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5. *Id.*

6. *Id.* at n.14, citing White, *Early Experiments with Prison Labor in Tennessee*, 12 E. TENN. HIST. SOC'YS PUBLICATIONS 49 (1940).

7. *Id.* at 114.

8. 4 MESSAGES OF THE GOVERNORS OF TENNESSEE 552 (R. White ed. 1957) [hereinafter MESSAGES] (emphasis in original).

9. 1853 TENNESSEE HOUSE JOURNAL at 698 [hereinafter TENN. H. J.].

10. *Id.* at 698.

11. *Id.* at 913.

12. *Id.* at 741, 923.

13. 1853 TENNESSEE SENATE JOURNAL at 604 [hereinafter TENN. S. J.].

by leasing out the entire labor of the prison annually."<sup>14</sup> His reasoning in support of convict leasing is somewhat suspect, however, in view of penitentiary officials' claims that the prison actually was showing a profit.<sup>15</sup>

Soon after Governor Harris' message, state legislators introduced two bills designed to lease out convict labor. Representative Hebb of Lincoln County introduced House Bill No. 53, which subsequently was withdrawn.<sup>16</sup> Senator Stovall of Henry, Weakley, and Obion Counties introduced legislation in the senate entitled "A bill to lease out the Penitentiary."<sup>17</sup> The bill authorized and directed the Governor to lease the penitentiary for four years, after posting notice and taking an inventory. Three inspectors and a keeper were to be appointed by the Governor to insure that the convicts were treated humanely, kindly, and properly and to make periodic reports to the Governor.<sup>18</sup> The senate rejected the bill on the third reading,<sup>19</sup> and later refused to reconsider its action.<sup>20</sup>

The Civil War left the penitentiary "barren of resources, and with an indebtedness, large in aggregate, uncertain in amount, and held by many known, as well as unknown creditors."<sup>21</sup> Used as a military prison during part of the war, the prison was in poor physical condition.<sup>22</sup> Moreover, Union military authorities had utilized the labor of the State's prisoners, which denied profits to the State.<sup>23</sup> Perhaps the greatest damage to the prison's financial condition resulted from the war-time and postwar inability to acquire supplies.<sup>24</sup> All of these problems were exacerbated by a rapid increase in the prison population.<sup>25</sup>

The postwar economic situation forced Tennessee to seek new methods of controlling its debt. Leasing the labor of convicts to private parties was an attractive solution to the prison problem because it clearly was less expensive than refurbishing the old prison

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14. 5 MESSAGES, *supra* note 8, at 122 (1959).

15. *Id.* at 153. According to two prison inspectors the prison "showed a profit to the State of over fifty thousand dollars." *Id.*

16. 1859-60 TENN. H. J., *supra* note 9, at 34, 643.

17. 1859-60 TENN. S. J., *supra* note 13, at 198.

18. This senate bill is reprinted in 5 MESSAGES, *supra* note 8, at 153-55 (1959).

19. 1859-60 TENN. S. J., *supra* note 13, at 505 (rejecting bill by 9-12 vote).

20. *Id.* at 666.

21. *Report of the Directors of the Tennessee Penitentiary, 1866-67 TENN. H. J., supra* note 9, app. at 93 [hereinafter *Report of the Directors*].

22. R. CORLEW, TENNESSEE, A SHORT HISTORY (2d ed. 1981).

23. Crowe, *supra* note 4, at 122.

24. *Id.*

25. R. CORLEW, *supra* note 22, at 387.

or building additional facilities.<sup>26</sup> It even offered the tantalizing possibility of a profit. Consequently, on May 12, 1866, the general assembly enacted Chapter 34,<sup>27</sup> which authorized the directors of the penitentiary to lease out the labor of convicts for a four-year term to the highest and best bidder. The directors, however, retained the authority to make rules to govern the prison so as "to promote the health, comfort, order and discipline of the convicts, and the proper department of the lessee, officers, keepers and guards of the prison."<sup>28</sup>

Six parties responded to advertisements for bids. The lease was awarded to Hyatt, Briggs, and Moore, a Nashville furniture manufacturer, for forty-three cents per day.<sup>29</sup> This price was higher than that of any other state of which the directors were aware.<sup>30</sup> The directors clearly were enthusiastic about this undertaking<sup>31</sup> and had a definite concept of their responsibilities.<sup>32</sup> The lease was signed July 16, 1866.

Within a year of the lease's signing however, the promise of profits had vanished and the lease was mired in litigation. On June 22, 1867, a fire gutted one of the prison workshops, destroying much of the lessees' machinery, stock, and material.<sup>33</sup> Although the lessees previously had made prompt payments, after the fire the lessees discontinued payments and claimed damages. The legislature disagreed with the lessees' claim and ordered that a suit be filed.<sup>34</sup>

On January 8, 1869, the lessees submitted a written proposition to surrender the lease and to request an independent appraisal.<sup>35</sup> On February 15, 1869, the legislature passed a resolution authorizing the suspension of the lawsuit pending arbitration.<sup>36</sup> Four days later the general assembly passed an act accepting the

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26. *Id.* at 125.

27. 1865-66 Tenn. Pub. Acts ch. XXXIV, § 1.

28. *Id.* § 15.

29. *Report of the Directors, supra* note 21, at 94.

30. *Id.* at 95.

31. "The experience and practice, of all our older states, approve the system of leasing out convict labor to responsible parties, as superior to that of self-supervise." *Id.* at 94.

32. "It shall be our duty, to see that the least possible expense is incurred to the State for the management of the convicts, now under our control." *Id.* at 96.

33. *Tennessee v. Ward & Briggs*, 56 Tenn. 100, 102 (1871).

34. *Id.* at 103.

35. *Id.*; see 1868-69 Tenn. Pub. Acts ch. L.

36. See *Ward & Briggs*, 56 Tenn. at 103; TENN. H.R. J. RES. LXXX, 35th Gen. Assembly, 2d Sess., reprinted in 1868-69 Tenn. Pub. Acts (first sess.) no. LXXX.

lessees' proposition.<sup>37</sup> The arbitrators disagreed, and the umpire they selected ruled for the lessees.<sup>38</sup> The lessees then sought a warrant from the comptroller, who declined to issue one.<sup>39</sup> Consequently, the lessees filed a mandamus action to compel issuance of the warrant.<sup>40</sup> The State and comptroller sought to enjoin the mandamus action and asked that the appraisals and the State's acceptance of the lessees' proposal be set aside for fraud.<sup>41</sup> The State also asked that the award be amended or set aside because of mistake of law and other reasons.<sup>42</sup>

Governor Senter voiced concern in his legislative message of October 12, 1869, that the suspension of the inmates' work during litigation with the lessees would increase the financial burden of the penitentiary on the State.<sup>43</sup> The general assembly apparently shared the Governor's concern. On December 18, 1869, the legislature passed an act to pay the lessees over 132,000 dollars for their property and improvements pursuant to the February 19, 1869 act, provided that the lessees surrendered possession of the prison and other leased property without prejudice to the pending suits.<sup>44</sup> The lessees agreed.<sup>45</sup> On the same day the general assembly passed a resolution which provided that the prison could not be leased unless the lease was submitted to and approved by the general assembly.<sup>46</sup>

The Tennessee Supreme Court ruled that the appraiser's valuation was fair.<sup>47</sup> The court's other rulings, however, were in the State's favor.<sup>48</sup> The court held that the penitentiary's directors had no authority to insert a provision in the lease requiring the State to furnish a guard for each workshop.<sup>49</sup> Additionally, the court held that the lessees were not entitled to damages incurred when the Governor pardoned 350 convicts—approximately three-fourths of the laborers—within a period of a few weeks, reasoning that the

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37. 1868-69 Tenn. Pub. Acts (first sess.) ch. L.

38. *Ward & Briggs*, 56 Tenn. at 105.

39. *Id.* at 106-07.

40. *Id.* at 107.

41. *Id.*

42. *Id.*

43. 6 MESSAGES, *supra* note 8, at 44 (1963).

44. *Ward & Briggs*, 56 Tenn. at 107; 1869-70 Tenn. Pub. Acts ch. XL.

45. *Ward & Briggs*, 56 Tenn. at 108.

46. *Id.*; H.R. J. RES. XLVII, 36th Gen. Assembly, 1st Sess., *reprinted in* 1869-70 Tenn. Pub. Acts (first sess.) no. XLVII.

47. *Ward & Briggs*, 56 Tenn. at 108.

48. *Id.* at 118-36.

49. *Id.* at 118, 121-28.

lessees voluntarily assumed this risk.<sup>50</sup> Finally, the court held that the stone quarry was not part of the leased property and that the State was entitled to payment for stone taken from the quarry by the lessees and for any unnecessary damages.<sup>51</sup>

The legislature enacted a new law providing for the management of the penitentiary on February 5, 1870.<sup>52</sup> The act expressly repealed the prior Act of May 12, 1866,<sup>53</sup> and authorized the three new inspectors to put convicts to work on the capitol grounds whenever there were more convicts than could be worked profitably inside the prison.<sup>54</sup> No convict, however, was to be worked outside the prison walls without the prisoner's written consent.<sup>55</sup> If a surplus still existed, those convicts could be leased to private individuals or corporations for work either inside or outside the prison.<sup>56</sup> Apparently in response to the prior litigation, the law expressly provided that the lease was subject to the Governor's pardoning power and the State had the right to manage the convicts during the course of any pending litigation between the State and the lessee.<sup>57</sup>

At first glance, the law of February 5, 1870, appears to be a cautious response by a general assembly wary of being burned again. Financial pressures, however, were the overriding concern of the act. Section 9 of the act gave the prison inspectors authority to lease out the convicts if the penitentiary became a financial burden on the State.<sup>58</sup> Moreover, under section 11 of the act, the general assembly did not care whether the leases were made publicly or privately.<sup>59</sup> The general assembly's only concerns were the security of the convicts and the achievement of financial self-sufficiency.

On May 5, 1870, a new state constitution went into effect.<sup>60</sup> Article I, section 32, addressed prisons specifically: "[T]he erection of safe and comfortable prisons, the inspection of prisons, and the humane treatment of prisoners, shall be provided for."<sup>61</sup> This sec-

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50. *Id.* at 118-21.

51. *Id.* at 135-36.

52. 1869-70 Tenn. Pub. Acts (first sess.) ch. LIX.

53. *Id.*

54. *Id.*

55. *Id.* at 76. This provision was deleted four months later. See 1869-70 Tenn. Pub. Acts (first sess.) ch. LIX, § 6.

56. *Id.*

57. *Id.* § 9.

58. *Id.*

59. *Id.* § 11.

60. See *Bilbrey v. Poston*, 63 Tenn. 232 (1874).

61. TENN. CONST. art. I, § 32 (1870).

tion was added to the Tennessee Constitution by the State Constitutional Convention of 1870, perhaps in response to the experiences of some of the State's leading citizens incarcerated by Union authorities during the Civil War.<sup>62</sup> Article I, section 32, did not address convict leasing expressly and did not appear to prohibit the practice. All laws not inconsistent with the new constitution were to continue in force until they expired, were altered, or were repealed.<sup>63</sup>

The act of February 1870 permitted authorities to work convicts anywhere in the State. Convicts were leased primarily to the railroads.<sup>64</sup> These leases were plagued with problems, including accidents, escapes, deaths, competition with free labor, administrative and supervisory difficulties, and the purely temporary nature of the railroad employment.<sup>65</sup> The mining industry seemed a more attractive area for convict leasing. In the first place, branch prisons could provide security. Second, because a labor shortage existed in this area, administrators foresaw steady employment and few conflicts with free laborers.<sup>66</sup> Thus, in early 1871 the legislature passed an act authorizing branch prisons to be established at Tracy City and Battle Creek Mines.<sup>67</sup>

In December 1871 the general assembly ratified a five-year lease of convict labor to Thomas O'Conner and Robert Looney at 30,000 dollars per year. The lessees were members of Cherry, O'Conner, and Company, manufacturers of agricultural implements.<sup>68</sup> Almost half the leased convicts manufactured wagons inside the prison.<sup>69</sup> The remainder of the convicts worked in mines, on farms or railroads, or were subleased.<sup>70</sup> Over a year later, Governor John C. Brown reported to the general assembly that the lessees were meeting their financial obligations promptly, had diversified the convicts' labor, and had reduced mechanical products by fifty percent, thus lessening competition with free men.<sup>71</sup> Accord-

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62. Laska, *A Legal and Constitutional History of Tennessee, 1772-1972*, 6 MEM. ST. U.L. REV. 563 (1976).

63. TENN. CONST. art. XI, § 1 (1870).

64. Crowe, *supra* note 4, at 131.

65. *Id.*

66. *Id.* at 131-32.

67. 1871 Tenn. Pub. Acts ch. CXXIII.

68. S. J. Res. LXXXI, 37th Gen. Assembly, 1st Sess., *reprinted in* 1871 Tenn. Pub. Acts no. LXXXI.

69. *See generally* J. WOOLRIDGE, HISTORY OF NASHVILLE, TENNESSEE (1890).

70. Crowe, *supra* note 4, at 134.

71. 6 MESSAGES, *supra* note 8, at 303-04 (1963).



ing to Governor Brown, Tennessee's prison system was more successful than that of Illinois, Pennsylvania, Arkansas, Mississippi, Missouri, or Virginia, because those states spent large amounts of money on their prisons.<sup>72</sup>

The Tennessee legislature passed a new convict lease act in 1875.<sup>73</sup> Apparently this act was not utilized or it created only short-term leases, because in 1877 another lease act was passed that permitted a six-year lease beginning August 1, 1877.<sup>74</sup> The second act required that the State receive at least 50,000 dollars a year from the lease after expenses.<sup>75</sup> A.M. Shook was awarded the lease for 70,500 dollars a year.<sup>76</sup> In 1883 the legislature extended Shook's lease to January 1, 1884.<sup>77</sup>

In March 1883 the general assembly also authorized a new six-year lease to begin January 1, 1884.<sup>78</sup> Its provisions were similar to the 1877 lease, but it increased the minimum annual rent to 100,000 dollars.<sup>79</sup> The lease was awarded to Tennessee Coal, Iron, and Railroad Company for 101,000 dollars a year.<sup>80</sup> Forty percent of the leased inmates were subleased to Cherry, Morrow, and Company for work in the main prison.<sup>81</sup> Before the bids were opened, these two companies agreed that, if either won the bid, they would divide the inmate labor: sixty percent for Tennessee Coal, forty percent for Cherry.<sup>82</sup> Critics publicly raised charges of fraud and collusion.<sup>83</sup> No action was taken in response to the charges, however, and obligations under both the lease and sublease were fulfilled. According to Governor Bate's legislative message of January 12, 1885, Tennessee Coal used 772 prisoners in mines, and no free laborers had been denied work because of the convict labor.<sup>84</sup> The remaining prisoners were used by Cherry, Morrow, and Company manufacturing wagons, making furniture, working in the foundry,

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72. *See id.* at 304.

73. 1875 Tenn. Pub. Acts 114 ch. LXXXII.

74. 1877 Tenn. Pub. Acts 114 ch. CLXX, § 2.

75. *Id.* ("But no lease shall be made in which the hire and rental secured shall be less than the sum of \$50,000 clear of all expenses. . .").

76. 6 MESSAGES, *supra* note 8, at 548 (1963).

77. 1883 Tenn. Pub. Acts ch. LII.

78. *Id.* at ch. CLXXI, § 2.

79. *Id.*

80. 7 MESSAGES, *supra* note 8, at 154 (1967).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 118-19.

and raising vegetables for the main prison.<sup>85</sup>

Despite the continued use of the lease system, it was not without opposition. Prison reformers and free laborers opposed it. During the 1870s and 1880s the legislature conducted a number of investigations concerning the system, which often resulted in majority reports finding the prisons satisfactory and minority reports condemning prison conditions and the lease system.<sup>86</sup> Governor Porter, in his message to the legislature of January 1, 1877, flatly stated, "[t]he present system of employing convict labor is wrong; but I am not certain that the general sentiment of the people of Tennessee is not in favor of it."<sup>87</sup> He also complained of the large number of escapes due to the subleasing of convicts to farmers and railroads.<sup>88</sup> Governor Bate also opposed the system, but felt that economic necessity required its continuance.<sup>89</sup> Nevertheless, in 1887 Governor Taylor argued that the lease system should be abolished.<sup>90</sup>

By 1889, however, Governor Taylor, recognizing that failure to authorize a new lease would require tripling the prison's capacity,<sup>91</sup> reluctantly recommended continuing to lease the prison "in order to give fair and intelligent consideration to what to do with [the prisoners] and with the prison."<sup>92</sup>

The legislature therefore passed a new lease act similar to the prior acts.<sup>93</sup> A prisoner challenged the act in *State ex rel. Warren v. Jack*,<sup>94</sup> alleging that he was detained illegally in a branch prison. The lower court held that the branch prison was illegal because it was not under the control of prison authorities.<sup>95</sup> The Tennessee Supreme Court reversed the lower court's judgment on the basis of Chapter 204 of the Public Acts of 1889, which established the leasing system.<sup>96</sup> That Act authorized branch prisons and imposed the duty of control, management, and custody of the convicts on state

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85. *Id.*

86. *Id.* at 308-09.

87. 6 MESSAGES, *supra* note 8, at 466 (1963).

88. *Id.*

89. 7 MESSAGES, *supra* note 8, at 66 (1967). Bate served as governor from 1883-87.

90. *Id.* at 248.

91. *Id.* at 286.

92. *Id.* at 287.

93. 1889 Tenn. Pub. Acts ch. 204.

94. 90 Tenn. 614 (1891).

95. Hutson, *The Overthrow of the Convict Lease System in Tennessee*, 8 E. TENN. HIST. SOC'YS PUBLICATIONS 82, 85 (1936), *citing* 1893 TENN. S. J., *supra* note 13, app., *Report of Commissioner of Labor*.

96. *Jack*, 90 Tenn. at 617.

officials.<sup>97</sup> Thus, the court held that the plaintiff was not denied his liberty illegally because he remained "in the custody of a Warden, acting under the supervision of the Board of Inspectors."<sup>98</sup>

By this time, resentment of the lease system was mounting, particularly among free laborers. In the fall of 1891 tensions exploded when miners in East Tennessee stormed the branch prisons.<sup>99</sup> Between October 31 and November 2, 1891, angry miners set free over 400 convicts from the branch prisons.<sup>100</sup> The State militia temporarily ended the crisis by bringing in more convicts to work the mines.<sup>101</sup> On August 10, 1892, however, the free miners at Tracy City torched the convict stockade, took the convicts from the mines, and placed them on a train bound for Nashville.<sup>102</sup> The convicts at the Inman Mine also were sent to the State capitol.<sup>103</sup> A few days later, miners in Oliver Springs placed more convicts on a train for Knoxville.<sup>104</sup> Although the miners and the State militia engaged in several skirmishes,<sup>105</sup> neither the State nor the lessees wished to terminate the lease.<sup>106</sup> Therefore, the stockades were reconstructed in the fall of 1892 and the convicts returned in the company of the militia.<sup>107</sup> The convicts continued to work in the mines until the lease system was abolished.<sup>108</sup>

In 1892 all four gubernatorial candidates promised to abolish the lease system.<sup>109</sup> The press and the public apparently approved this position.<sup>110</sup> The general assembly in 1893 authorized the construction of a new penitentiary and the use of convict labor by the State.<sup>111</sup> Only seven months before the existing lease was to end, however, the new penitentiary was unfinished. Governor Turney told the general assembly that it would be impossible for the State to care for the inmates.<sup>112</sup> Accordingly, he recommended a compro-

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97. 1889 Tenn. Pub. Acts ch. 204.

98. See *Jack*, 90 Tenn. at 617, quoting 1889 Tenn. Pub. Acts, ch. 204, § 10.

99. *Hutson*, *supra* note 95, at 87.

100. *Id.* at 87-88.

101. *Id.* at 90-91.

102. *Id.* at 92.

103. *Id.*

104. *Id.* at 94.

105. *Id.* at 94-97.

106. *Id.* at 98.

107. *Id.*

108. *Id.*

109. *Id.* at 100.

110. *Id.*

111. 1893 Tenn. Pub. Acts ch. 78.

112. 7 MESSAGES, *supra* note 8, at 569-70 (1967).

mise with the lessees under which the convicts would build parts of the new penitentiary but the lessees would receive credit for that labor.<sup>113</sup> Thus the lessees would be able to reduce their debt to the State while the State was not forced to care for the convicts before the penitentiary was completed.<sup>114</sup> In apparent response to the Governor's remarks, the general assembly permitted the prison officials to lease "such of the convicts as cannot be used in the mines of the State or its farm, or in the construction of such parts of the walls, buildings or appurtenances of the new penitentiary as may not be let under contract."<sup>115</sup>

The shift from the former system of leasing out convicts was completed in 1897 when the legislature authorized the leasing of convicts not otherwise employed to persons or firms who would operate a manufacturing or other business within the State penitentiary.<sup>116</sup> The massive leasing of convicts for work outside the penitentiary ended. A return to the old leasing system, said Governor Turney, would be "cruel in the extreme."<sup>117</sup> He asserted additionally that "[t]he State really made no money, but rather lost, by leasing convicts on account of riots, outbreaks, and invasions."<sup>118</sup> Nonetheless, the State continued trying to make the prison profitable. When the leasing of convicts to manufacturers within the prison eventually became less profitable than using convict labor in the State-owned coal mines, Governor Cox recommended, in 1907, that prison officials engage more convicts in mining.<sup>119</sup> Thus, the early years of the twentieth century witnessed the end of the convicting leasing system in Tennessee.

Today, Tennessee law requires that inmates "be kept at labor when in sufficient health."<sup>120</sup> Convicts are to work within the prison, except as otherwise provided in the Tennessee Code.<sup>121</sup> Work outside the prison is permitted only "in connection with the duties and functions of the various departments, commissions and divisions of state, municipal and county governments, and upon property owned or leased to the state of Tennessee or its political

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113. *Id.* at 570. The nature of the litigation mentioned in the Governor's remarks is unknown to the authors.

114. *Id.* at 570.

115. 1895 Tenn. Pub. Acts ch. 7, § 19.

116. 1897 Tenn. Pub. Acts ch. 39.

117. 7 MESSAGES, *supra* note 8, at 600 (1967).

118. *Id.*

119. 8 MESSAGES, *supra* note 8, at 371-72 (1972).

120. TENN. CODE ANN. § 41-21-207(a) (1982).

121. *Id.* § 41-21-208(a).

subdivisions."<sup>122</sup>

Tennessee's present experiment in privatization stems from the State's apparent inability to operate the prison effectively. By 1978 a state court in *Trigg v. Blanton* found Tennessee's prison system to violate article I, section 32 of the Tennessee Constitution and the eighth amendment to the United States Constitution.<sup>123</sup> Chancellor Ben H. Cantrell based his findings on a number of disturbing conditions including frequent violent attacks among inmates; overcrowded, dilapidated, and outmoded facilities; inadequate plumbing, heating, lighting, and ventilation; and inadequate medical and mental health care.<sup>124</sup> The chancellor held that the inmates have a right not to be incarcerated where conditions threaten their health and well-being and cause physical, mental, or social deterioration.<sup>125</sup>

During the same period a number of prisoners had filed *pro se* civil rights lawsuits in federal court challenging the constitutionality of conditions in Tennessee prisons.<sup>126</sup> Until 1981, the federal courts in Tennessee abstained from exercising jurisdiction in deference to the pending state court action. In light of the Sixth Circuit's decision in *Hanna v. Toner*,<sup>127</sup> however, the United States District Court for the Middle District of Tennessee appointed counsel in the consolidated case *Grubbs v. Bradley* and determined to proceed despite the pending state action.<sup>128</sup> As a result, the Tennessee Supreme Court ordered abstention in *Trigg* pending the federal court's resolution of the *Grubbs* case.<sup>129</sup> The Tennessee

122. *Id.* § 41-21-208(b)(1).

123. See *Grubbs v. Bradley*, 552 F. Supp. 1052 (M.D. Tenn. 1982), citing *Trigg v. Blanton*, No. A-6047 (Davidson County Ch. Aug. 23, 1978), *retired on grounds of state abstention sub nom. Trigg v. Alexander*, No. 81-2-I (Tenn. July 2, 1981).

124. *Trigg v. Blanton*, No. A-6047, slip op. at 31, 43-44 (Davidson County Ch. Aug. 23, 1978).

125. *Id.*

126. *Grubbs*, 552 F. Supp. at 1055.

127. 630 F.2d 442 (6th Cir. 1980).

128. *Grubbs*, 552 F. Supp. at 1056-57.

129. *Id.* at 1057. The *Grubbs* court stated that

Unfortunately, there has been no state court decision. On July 2, 1981, the Supreme Court of Tennessee, in a decision that so far as this court is aware is wholly unprecedented in the annals of our federal system, ordered abstention by the state courts pending federal resolution of the present case. Without considering whether such action may have amounted to an abdication of the duties assigned to state courts by the Constitution and laws of Tennessee, the effect of the decision is clear: The task of resolving the serious and politically sensitive constitutional claims raised by inmates incarcerated by the State of Tennessee has been passed to the federal courts.

*Id.*

court believed that two such lawsuits would be against the public interest and cause duplication of effort.<sup>130</sup>

After a trial in November and December 1981, which resulted in over 20,000 pages of evidentiary material, the federal district court concluded in August 1982 that certain conditions and practices in Tennessee prisons constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution and article I, sections 16 and 32 of the Tennessee Constitution.<sup>131</sup> Specifically, the following conditions and practices were held unconstitutional: (1) "double celling" of inmates in certain facilities; (2) confinement for more than one week in a cell without hot water; (3) confinement in cell buildings unfit for human habitation; (4) failure to maintain sanitary conditions for food storage, preparation, and service; (5) failure to protect inmates adequately from violent attack; (6) failure to provide minimally adequate medical care; and (7) confinement for over one week without physical exercise.<sup>132</sup> The State did not appeal the court's decision. The court selected a special master to oversee the State's program to correct these problems. Over the next three years the State submitted and implemented plans addressing all of the prisons' inadequacies.

In spite of the State's efforts, certain problems, particularly overcrowding and the resulting violence, refused to disappear. An April 1984 court order threatened to release immediately 3000 inmates if an agreement to reduce violence could not be reached.<sup>133</sup> In June 1985 the court ordered that the prison population be reduced to 7019 by December 31, 1985.<sup>134</sup> On July 1, 1985, the Tennessee correctional system was rocked by inmate riots and disturbances in several facilities. The catalyst for the riots probably was a "striped prison uniform law."<sup>135</sup> The disturbances brought Tennessee's prison problems to the public's attention in a way few courts could.

On September 12, 1985, Nashville-based Corrections Corporation of American (CCA) made a dramatic offer to lease Tennessee's

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130. See *id.*; see also *Trigg v. Alexander*, No. 81-2-I (Tenn. July 2, 1981) (order retiring *Trigg v. Blanton* on grounds of state abstention).

131. *Id.* at 1057, 1131-32.

132. *Id.* at 1131-32.

133. *Grubbs v. Bradley*, No. 274 (M.D. Tenn. Apr. 6, 1984) (Morton, J.) (case no. 80-3404-Higgins-on appeal).

134. *Grubbs v. Bradley*, No. 329 (M.D. Tenn. June 27, 1985) (Higgins, J.).

135. 1984 Tenn. Pub. Acts ch. 982 (codified as TENN. CODE ANN. § 41-21-234 (Supp. 1986)).

prison system.<sup>136</sup> CCA promised to pay the State fifty million dollars immediately and another fifty million dollars over the next twenty years.<sup>137</sup> Additionally, the company indicated that it would spend one hundred fifty million dollars to build two maximum security institutions and renovate other facilities.<sup>138</sup> In return CCA sought a ninety-nine year lease of the facilities of an annual amount, not to exceed one hundred seventy-five million dollars the first year, to operate the system.<sup>139</sup>

During the fall of 1985 Tennessee's prison problems mounted. Unable to meet inmate population reduction targets, the system was operating far beyond its capacity. On October 25, 1985, Federal Judge Thomas A. Higgins ordered that no new convicts be admitted into the prison system's reception centers until the inmate population was reduced to the system's total designated capacity.<sup>140</sup>

Reacting to the State's difficulty in solving the prison problems, Governor Lamar Alexander called a special session of the general assembly to address the problems of the prison system.<sup>141</sup> Subjects to be addressed included criminal sentencing, parole, correctional facilities, and budgets. In addition, Governor Alexander specifically requested the legislature to consider the alternative of privatizing the prisons.<sup>142</sup>

CCA's September 1985 proposal to privatize the prisons raised as many questions as it purported to answer. In response to a number of questions about the legality of privatization, the Attorney General of Tennessee wrote several letters and one formal opinion. The Attorney General concluded that the State could not transfer to a private entity its sovereign powers over the prisoners, nor could it contract away its authority.<sup>143</sup> Traditionally, detention has been considered an exclusive prerogative of the state.<sup>144</sup> The sovereign powers delegated by the people are trusts that must be exer-

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136. *CCA Offers \$250 Million for Prisons*, Nashville Banner, Sept. 12, 1985, at 1, col. 1; *Correction Corp. Seeks Lease to Run Tennessee's Prisons*, Wall St. J., Sept. 13, 1985, at 45, col. 3.

137. See sources cited *supra* note 137.

138. *Id.*

139. *Id.*

140. *Grubbs v. Bradley*, No. 359 (M.D. Tenn. Oct. 25, 1985) (Higgins, J.).

141. Governor's Proclamation of Oct. 31, 1985 (on file with Authors).

142. *Id.*

143. Op. Tenn. Att'y Gen. No. 85-286 (1985); see also Letter from the Office of the Tennessee Attorney General to the Governor and Speakers of the Houses of the Tennessee General Assembly (Oct. 18, 1985) [hereinafter Letter] (on file with Authors).

144. *Medina v. O'Neill*, 589 F. Supp. 1028 (S.D. Tex. 1984).

cised personally by government officials. "[T]he idea of a transfer or delegation thereof, being in direct opposition to the design and ends of their creation."<sup>145</sup> Similarly, one Tennessee court has stated that "[n]o governmental entity can by contract deprive itself of inherent powers necessary to the performance of its functions or of power or duty imposed upon it by prior express statutory or constitutional provision."<sup>146</sup>

The Attorney General of Tennessee stated that allowing divestments of the State's sovereign power would permit "a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties."<sup>147</sup> The Attorney General viewed *State ex rel. Warren v. Jack*<sup>148</sup> as buttressing its conclusions. Under the act in question in *Jack*, the State retained the control, management, and custody of the convicts. The court held that the inmate was not illegally confined "[s]o long as he remains in the custody of a Warden, acting under the supervision of the Board of Inspectors."<sup>149</sup> The Attorney General did note that it might be permissible to delegate something less than "control and custody," which was defined as "the authority to promulgate the rules and regulations under which the prisoners will be governed, the determination as to when discipline is appropriate and the ability to ensure that non-state personnel are implementing the directives of the State."<sup>150</sup> The Attorney General concluded that "control and custody" did not require the State to administer and operate directly the daily operations of the prison.<sup>151</sup>

The Attorney General also reached the following conclusions: (1) Present law permitted the state to contract with a private contractor to build a prison, but legislative action probably was necessary to permit a private firm to operate one or more correctional facilities; (2) the general assembly could require by statute that certain provisions be included in the contract; (3) the State could not avoid continued civil rights litigation merely by privatizing one or more facilities; (4) a bankruptcy of the private contractor could

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145. *State v. Armstrong*, 35 Tenn. 634, 656 (1856).

146. *Batson v. Pleasant View Util. Dist.*, 592 S.W.2d 578, 581 (Tenn. Ct. App. 1979); *Davis v. Beeler*, 185 Tenn. 638, 207 S.W.2d 343 (1947), *appeal dismissed* 333 U.S. 859 (1948).

147. *Contributors to the Pa. Hosp. v. City of Philadelphia*, 245 U.S. 20, 23 (1917).

148. 90 Tenn. 614 (1891).

149. *Id.* at 617.

150. Op. Tenn. Att'y Gen., *supra* note 143, at 20.

151. *Id.* at 9.



impair the State's ability to control the facility; (5) the contractor's guards probably would have the right to strike; and (6) the State might have problems resuming operation of a facility if the private operator ceased performance of the contract.<sup>152</sup>

The general assembly did not enact any legislation regarding privatization during the 1985 special session on prisons. In the 1986 regular session of the general assembly, Senate Bill No. 1684, sponsored by Senator Longley and others was introduced in the senate, and its companion bill, House Bill No. 1334, sponsored by Representative Tanner and others, was introduced in the house.<sup>153</sup> As introduced originally, the Bill authorized the Governor to enter into contracts with private prison contractors for the construction and operation of a new 500 bed maximum or medium security correctional facility and an existing regional correctional facility.<sup>154</sup> The contract could not exceed fifty years, and the Code provisions requiring approval and supervision of the construction, renovation, or lease by the State Building Commission would not apply.<sup>155</sup> The Commissioner of Corrections would monitor the contract and retain authority, among other things, to approve procedures for calculating inmate release and parole eligibility dates, approve recommendations regarding good time credits, and approve all furloughs and work releases.<sup>156</sup> The Bill also required that the contractor not benefit financially from the labor of inmates.<sup>157</sup>

The Bill was the subject of intense lobbying by CCA. Although the Bill passed the house committees without much problem, it almost failed in the senate State and Local Government Committee. On March 11, 1986, by a vote of five to four the committee tabled the Bill.<sup>158</sup> Several weeks later, after the Bill's sponsors had agreed to an amendment that placed more restrictions on the private lessee, one senator changed his position, enabling the Bill to be voted out of committee.

The senate adopted the amendment that effectively rewrote the Bill.<sup>159</sup> After lengthy debate, the senate passed the amended

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152. *Id.*; see also Letter, *supra* note 143.

153. 1986 TENN. S. J., *supra* note 13, at 1804; 1986 TENN. H. J., *supra* note 9, at 2069.

154. TENN. S. RES. 1684, 94th Gen. Assembly, 2d Sess. (1986); TENN. H. RES. 1334, 94th Gen. Assembly, 2d Sess. § 2 (1986).

155. TENN. S. RES. 1684, *supra* note 154; TENN. H. RES. 1334, *supra* note 154, § 3.

156. TENN. H. RES. 1334, *supra* note 154, § 5.

157. *Id.* § 6.

158. Now codified as TENN. CODE ANN. §§ 41-24-101 to 41-24-115 (Supp. 1986).

159. 1986 TENN. S. J., *supra* note 13, at 2957 (adopting the amendment).

Bill on April 11, 1986.<sup>160</sup> The house passed an identical Bill on April 17, 1986.<sup>161</sup> Governor Alexander signed the legislation on May 1, 1986, and the Bill became Public Chapter 932.<sup>162</sup>

The preamble of the Private Prison Contracting Act of 1986 makes clear the experimental nature of the Act:

[The Act authorized] the Executive to contract with private concerns on a limited basis to afford an opportunity to determine if savings and efficiencies can be effected for the operation of correctional facilities and at the same time assure that the interests of the state's citizens and employees can be fully protected.<sup>163</sup>

Although the Act authorizes contracts for a variety of services, including education, recreation, food services, medical services, transportation, and counseling,<sup>164</sup> contracts for the operation of correctional facilities are limited expressly to a three-year term<sup>165</sup> and to the Carter County Work Camp.<sup>166</sup> Moreover, all contract proposals are subject to an extensive review, comment, and approval process.<sup>167</sup>

In addition to limits on the scope of privatization, the Act also imposes several requirements on all contract proposals. For instance, the proposer's annual cost, defined as the proposed offer plus the estimated cost of monitoring the contract, must be at least five percent less than the estimated annual cost to the State of providing contracted-for services.<sup>168</sup> The level and quality of the proposed services must be at least equal to those provided by the State.<sup>169</sup> Additionally, the proposal must provide an adequate plan of insurance, whose adequacy will be determined by an independent risk management or actuarial firm.<sup>170</sup>

Apparently in response to the Attorney General's concern that the State retain control over the prisoners,<sup>171</sup> the Act expressly provides that the contractor can not be given the following responsibilities: (1) developing and implementing procedures for calculating inmate release and parole eligibility dates; (2) developing and

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160. *Id.* (passing the bill as amended).

161. 1986 TENN. H. J., *supra* note 9, at 1373.

162. Now codified at TENN. CODE ANN. §§ 41-24-101 to 41-24-115 (Supp. 1986).

163. 1986 Tenn. Pub. Acts ch. 932.

164. TENN. CODE ANN. § 41-24-103(b) (Supp. 1986).

165. *Id.* § 41-24-105(a).

166. *Id.* § 41-24-103(c).

167. *Id.* § 41-24-104(a).

168. *Id.* § 41-24-104(c).

169. *Id.* § 41-24-104(c)(2).

170. *Id.* § 41-24-107(a)(2).

171. Op. Tenn. Att'y Gen., *supra* note 145.

implementing procedures for calculating and awarding sentence credits; (3) approving inmates for furlough and work release; (4) approving the type of work inmates may perform and the wages or sentence credits that may be given to inmates engaging in such work; and (5) granting, denying, or revoking sentence credits; placing an inmate under less restrictive custody or more restrictive custody; or taking any disciplinary actions.<sup>172</sup>

Soon after the Act's passage, the Department of Correction formed an interdepartmental working group to issue a Request for Proposals (RFP).<sup>173</sup> The working group issued the RFP on October 1, 1986, but only one company made a proposal, which was rejected on November 17, 1986.

Despite its attempts to address the legal concerns outlined by the Attorney General's Office, the Act already has been challenged in the courts. Two lawsuits, one by Local 2173 of the American Federation of State, County, and Municipal Employees and three Department of Correction employees and the other by five inmates in the Tennessee State Prison, were filed to challenge the constitutionality of the Act on a number of grounds.<sup>174</sup> Davidson County Chancellor Robert Brandt, however, dismissed the complaints on November 24, 1986, holding that the plaintiffs' lacked standing and that there was no justiciable controversy under the Declaratory Judgment Act.<sup>175</sup>

#### OBSERVATIONS AND CONCLUSIONS

The present privatization initiative in Tennessee is neither identical to, nor wholly unlike, the past practice of convict leasing. Certainly, today's version of privatization does not seek to make convicts pay for their keep or to profit from the convicts' labor. On the other hand, the movements share the goal of reducing the cost of incarceration. The chief difference between the two movements is not so much the motivation as it is today's recognition that the State should bear the burden of funding the prison system. Today privatization is seen as a possible method of reducing that burden,

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172. TENN. CODE ANN. § 41-24-110 (Supp. 1986).

173. A "Request for Proposals" is a statement by the agency listing the requirements for a bid.

174. Local 2173 of the Am. Fed'n of State, County, & Mun. Employees v. Alexander, No. 86-1909 (Davidson County Ch. Aug. 21, 1986); Al-Mahagmin v. Alexander, No. 86-1910 (Davidson County Ch. Aug. 21, 1986).

175. Local 2173 and Al-Mahagmin were dismissed by order of Chancellor Brandt on November 24, 1986. Davidson County Ch. Ct. Minute Book 39, page 703.

not eliminating it.

While reducing costs is probably the most important reason for privatizing correctional facilities, frustration with an overcrowded, ineffective, and inefficient correctional system also has been a powerful motive. Rather than releasing persons who are willing to live within society's laws, Tennessee's prisons, statistically, turn out a large number of persons who will be repeat offenders. Instead of a "*State Mechanic Institute*," as Andrew Johnson labeled it, the prison system may have become a "*State Criminal Institute*" that turns out better prepared criminals. This frustration is compounded by the fact that Tennessee's prison system is no longer a problem that can be ignored. The federal courts will not permit the State to continue its past practices and have ordered major reforms to bring the prison system within constitutional limits. Facilities must be built or renovated, new educational and vocational programs implemented, and a host of other problems corrected before the federal courts will relinquish oversight.

The survey of past practice in Tennessee teaches a number of lessons. First and foremost, the State must retain custody and control of its inmates. This principle does not forbid contracts with private companies to operate correctional facilities, but it does limit to what extent the State may divest itself of the responsibility for operating a prison facility.

Second, the contract cannot limit the constitutional powers of the State or its officers. For example, the contractor assumes the risk that the Governor will exercise his pardoning power. Indeed, since the State cannot bargain away its police powers, it likely would possess the authority to alter the terms of the contract or abrogate it altogether if the agreement in any way limits those powers.<sup>176</sup>

Third, once an institution is privatized, reversing the process might be quite difficult. In 1889 Governor Taylor told the legislature that discontinuing the lease system would require a significant expansion of the State's prison facilities. He reluctantly recommended a new lease in order to provide time to decide what to do in the future.<sup>177</sup> Again, in 1895, with the new penitentiary not yet completed, Governor Turney was forced to recommend the contin-

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176. Op. Tenn. Att'y Gen., *supra* note 145.

177. 7 MESSAGES, *supra* note 8, at 286-87 (1967).

uation of leasing.<sup>178</sup> Today, as the Attorney General's Office has indicated the State would face the same problem upon termination of a prison contract.<sup>179</sup>

Fourth, litigation arises in the corrections area with regularity. At least five cases regarding convict leases were decided between 1879 and 1896.<sup>180</sup> There is no reason to believe, in an even more litigious society, that frequent litigation would not be a continual problem. Indeed, two lawsuits have been filed in Tennessee already and the State has yet to adopt a contract.<sup>181</sup> The State certainly will be involved in any lawsuits arising out of incidents at a privately operated facility, whether the suits relate specifically to the leasing arrangement or address the more common prison issues. Privatization will not lessen the burdens on the State's attorneys or reduce the need for them. Indeed, privatization itself may give rise to extremely complicated lawsuits.

Fifth, concerned State officials must closely and continually scrutinize the prison system if privatization is to work properly. The history of convict leasing shows that State supervision was often inadequate. Even when supervision did occur, State officials frequently allowed lessees to force the prisoners to live and work in unfit and unsafe conditions. The practice of convict leasing is not an aspect of this State's history that can be looked upon with pride. Although the federal courts will not allow that history to be repeated, Tennessee should not rely on the federal government to force the State to operate its prisons within constitutional bounds. The State prison officials have constitutional, statutory, and moral obligations to see that Tennessee's prisons are safe, comfortable, and humane. Strict oversight is the only way to ensure that privately operated facilities meet these obligations.

Privatization of correctional institutions offers possible benefits: reduced costs and better programs for inmates. The costs are

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178. *Id.* at 570.

179. According to the Attorney General's office, "immediate and significant expenses would be incurred when the State reassumed management of the institution. Administrative difficulties would also be present regardless of whether the State's management became a permanent arrangement or another private company was found to manage the facility." Op. Tenn. Att'y Gen., *supra* note 143. Similar problems could occur when a contract expires, but it would be possible to plan ahead for such problems.

180. *Tennessee v. Ward & Briggs*, 56 Tenn. 100 (1871); *State ex rel. Warren v. Jack*, 90 Tenn. 614 (1891); 7 MESSAGES, *supra* note 8, at 570 (1967).

181. Local 2173 of the Am. Fed'n of State, County, & Mun. Employees v. Alexander, No. 86-1909 (Davidson County Ch. Aug. 21, 1986); *Al-Managmin v. Alexander*, No. 86-1910 (Davidson County Ch. Aug. 21, 1986).

reduced through less burdensome purchasing requirements, more efficient management, and other innovations that are stimulated by the profit motive. Yet privatization has risks. The American Bar Association has urged a halt in the prison privatization movement "until the complex constitutional, statutory, and contractual issues are developed and resolved."<sup>182</sup> This is not an area analogous to providing hospitals or fire protection. Operating correctional facilities is more than a traditional state function: the state has no higher duty than to ensure that those persons who violate society's laws are punished. Fulfilling that duty is essential to the integrity of the government and to the protection of the public. It is not a duty that can legally or morally be handed to a private party and then ignored. The involvement of private parties in the corrections process may produce benefits, but it must be limited to its proper scope under state control.

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182. American Bar Association Resolution of February 1986.

