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## Tennessee's Private Prison Act of 1986: An Historical Perspective With Special Attention to California's Experience

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# Tennessee's Private Prison Act of 1986: An Historical Perspective With Special Attention to California's Experience

Ward M. McAfee\*

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## I. INTRODUCTION

In 1918 James H. Wilkins proudly proclaimed that crime was on the wane. Speaking at the end of a long career in California's state prison system, Wilkins had seen the presumed eradication of the opium habit among State prisoners, the reduction and supposed elimination of corporal punishment in the State's prisons, and the introduction of the parole system. He wrote:

all this tends to material betterment in the present condition and future outlook of prison populations. . . . It is a long cry before our prisons, jails and other like institutes of detention will bear upon their rusty gates the legend "closed for want of inmates." But we are heading in the right direction, and in that direction I trust society will persevere.<sup>1</sup>

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1. J. WILKINS, EVOLUTION OF A STATE PRISON, HISTORICAL NARRATIVE OF THE TEN YEARS FROM 1851 TO 1861, DURING THE PERIOD WHEN THE CARE AND EMPLOYMENT OF CONVICTS WAS TURNED OVER TO LESSEES 94-95 (1918) (manuscript available in Bancroft Library, University of California, Berkeley).

We, however, live in another time. Today, few share Wilkins' unabashed optimism for the possibility of reforming America's prisons and their inhabitants. Far more common now is the concern that past and present experiments in prison reform have proven too costly. The dominant mood today is that prison management should be more cost-effective. At a time when all social services are under review, state prison expenses are experiencing especially close scrutiny. Within this context, private, for-profit prisons are viewed as a possible alternative.<sup>2</sup>

## II. THE WISDOM OF CAUTION

Some are as sanguine about the prospects of private prisons today as Wilkins was about progressive reforms in the early twentieth century. Richard L. Mitchell, who served in New York's Department of Correctional Services in the 1970s, has claimed that a prison run by private enterprise "should be able to reduce its administrative costs by as much as a third."<sup>3</sup> Tennessee has taken the national lead in moving toward a private, adult, general purpose prison. But wisely, Tennessee has not moved headlong in this direction. Exercising proper caution, Tennessee enacted the Private Prison Act on May 1, 1986, "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."<sup>4</sup> This Act identified only one correctional facility as a possible private prison and charged the State's Department of Correction with inaugurating the process that ultimately could result in a contract with a private concern for the management and operation of the facility.<sup>5</sup>

Private prisons are not a new idea. In the nineteenth century, a number of states committed their entire prison systems to private entrepreneurs.<sup>6</sup> Kentucky inaugurated the lease system in

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2. For an excellent review of the private prison issue in our time, see *Corrections and Privatization: An Overview*, 65 PRISON J., Autumn-Winter 1985.

3. Mitchell, *A New Idea: Private Enterprise Prisons*, L.A. Times, Feb. 7, 1978, at 7, col. 5.

4. An Act to Enable Contracts with Private Contractors for the Construction, Operation and Maintenance of Certain Correctional Facilities and the Management of Said Facilities and the Monitoring of Said Contracts, 1986 Tenn. Pub. Acts ch. 932, at 1208 [hereinafter *Tenn. Private Prison Contracting Act of 1986*].

5. *Id.* § 3(c).

6. Convict labor was leased to private parties in the southern states impoverished by the Civil War. Many American private prison experiments, however, antedated this experience. See B. MCKELVEY, *AMERICAN PRISONS, A STUDY IN AMERICAN SOCIAL HISTORY PRIOR TO*

1825, followed by Michigan, Missouri, Louisiana, Alabama, Indiana, Illinois, California, Nebraska, Montana, Wyoming, and Oregon.<sup>7</sup> Then, as now, the movement was driven by the expectation that private management would save the states money. In Nebraska, however, the experiment was an acknowledged failure.<sup>8</sup> Similarly, upon California's resumption of prison control in 1861, the Governor proclaimed that he would "seriously object ever again to allow the prison or its management to pass out of the exclusive control of the State."<sup>9</sup>

This Essay will use perspectives gained from these past experiences with private prisons to examine the 1986 Tennessee Private Prison Act. This comparison will focus primarily on California's private prison contracts of the 1850s, although other states' statutes will be referred to as well. In light of this perspective, Tennessee's Statute reflects caution and careful concern for the negative scenarios that could occur. The Statute generally reflects an appreciation of this historical experience because the law responds appropriately in most situations when experience would suggest caution.

Few states adopting prison privatization in the nineteenth century seriously considered at the outset that the experiment might fail. California, which inaugurated privatization within a year after becoming a state, made no provision for resumption of state control of the prison prior to termination of the prison contract.<sup>10</sup> The California prison contract of 1851 was to run for ten years. After four years, however, the Legislature and the Governor of California deemed the experiment a failure and regained control of the State's only prison under legally questionable circumstances.<sup>11</sup> After one year of public administration, California con-

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1915, at 31-34 (1936) (discussing various convict lease systems adopted prior to the Civil War).

7. See B. McKELVEY, *supra* note 6, at 31-34, 103, 191-92, 195-97, 202-03; J. SELLIN, *SLAVERY AND THE PENAL SYSTEM* 142 (1976).

8. B. McKELVEY, *supra* note 6, at 196.

9. Annual Message of Governor John G. Downey (Jan. 7, 1861), *reprinted in CAL. SENATE J.*, 12th Sess. 33 (1861).

10. See An Act Providing for Securing the State Prison Convicts, 1851 Cal. Stat. ch. 114, at 427-30 (passed during the second session of the legislature on April 25, 1851) [hereinafter Cal. Private Prison Act of 1851].

11. See An Act to Provide for the Government of the State Prison, 1855 Cal. Stat. ch. 224, at 292-96 (passed during sixth session of the legislature on May 7, 1855) [hereinafter Cal. State Prison Government Act of 1855]; J.M. Estell to Governor Bigler (May 16, 1855), *CAL. SENATE J.*, 7th Sess. 55 (1856); Governor Bigler to J.M. Estell (May 17, 1855), *id.*; Governor John Bigler's Farewell Address (Jan. 9, 1856), *id.* at 24.

cluded that the State was unable to manage the prison in a cost-effective manner and again turned over its operation to private enterprise. Apparently California's legislators were unable to learn from their own experiences. Again, the California Legislature drafted an overly optimistic statute devoid of any provision indicating how the State could resume public control if private management proved unsatisfactory.<sup>12</sup> Subsequently, California paid for this oversight by incurring years of litigation and costly legal judgments.<sup>13</sup> In contrast, the Tennessee Private Prison Act of 1986 addresses this point directly. Section 6(1) of the Act stipulates that "prior to entering a contract . . . [a] plan shall be developed and certified by the Governor which demonstrates the method by which the state would resume control of the prison upon contract termination."<sup>14</sup> Ancient Hindu philosophers admired the wisdom of the elephant who carefully tests whether a path will bear his weight before traversing it. The Tennessee Statute reflects a similar caution.

### III. THE DESIRABILITY OF BROAD CONSULTATION

The Tennessee Act reflects additional wisdom in establishing a consultation process for the evaluation and selection of private prison contract bids. Specifically, the Act requires that four separate committees review any request for proposals as well as the proposed contracts themselves.<sup>15</sup> Clearly, the authors of the Act foresaw the need for openness in the development of any private prison contract. California's experience of 130 years ago again highlights the intelligent drafting of the Tennessee statute. Although the California enabling legislation of 1856 provided for contract approval by the lieutenant governor, comptroller, and treasurer, the law did not require consultation concerning the bidding process or proposed contracts.<sup>16</sup> As a result, those three officers, who comprised the Board of Prison Commissioners, kept the public uninformed until the board officially approved the contract. Consequently, rumors circulated that the bidding process had not been truly competitive and that other entrepreneurs were willing

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12. See An Act Creating a Board of State Prison Commissioners and Defining Their Duties, 1856 Cal. Stat. ch. 38, at 48-49 (passed during the seventh session of the legislature on March 21, 1856) [hereinafter Cal. Private Prison Act of 1856].

13. J. WILKINS, *supra* note 1, at 70-82.

14. Tenn. Private Prison Contracting Act of 1986, *supra* note 4, § 6(1).

15. *Id.* § 4(a)(2).

16. See Cal. Private Prison Act of 1856, *supra* note 12.

to manage a private prison for far less remuneration than contractually provided.<sup>17</sup>

The California enabling legislation was passed on March 21, 1856. The prison contract was finalized within the following week. This secretive and hasty action resulted in an immediately suspect contract and insured that the lease would be politically controversial.<sup>18</sup> The open and deliberative process of contract negotiation required under the Tennessee Act portends a different result. This negotiation process ensures that a private prison contract will benefit from broad consultation and therefore not be a source of later political controversy.

#### IV. THE NEED TO ASSESS THE HIDDEN COSTS OF PRIVATE PRISON MANAGEMENT

State monitoring is one of the hidden costs of privately managed prisons.<sup>19</sup> Kentucky realized the need for state monitoring as early as 1825. In legislation passed that year, Kentucky provided for an inspection board to visit the privately run state prison "at least once in each month" and report to the legislature on "the health of the convicts," their diet, the cleanliness of their living facilities, and their treatment in general.<sup>20</sup> Missouri's private prison law of 1843 also provided for state supervision, but failed to specify the manner of its execution.<sup>21</sup> Perhaps the statute's lack of specificity later contributed to that State prison system's subpar reputation throughout the nineteenth century.<sup>22</sup>

California's legislation was far worse than that of Missouri, which at least provided for paid prison inspectors.<sup>23</sup> California's first prison contract called for state inspectors, but made no mention of their compensation.<sup>24</sup> Thereafter, California fluctuated between paying these inspectors and expecting them to serve without

17. Sacramento Daily Union, Mar. 26, 1856, at 2, col. 1; San Francisco Daily (Alta, California), Mar. 27, 1856, at 2, col. 4.

18. J. WILKINS, *supra* note 1, at 55-56.

19. Levinson, *Okeechobee: An Evaluation of Privatization in Corrections*, 65 PRISON J., Autumn-Winter 1985, at 89.

20. See An Act Further to Regulate the Penitentiary, 1825 Ky. Acts ch. 115, § 18, at 23 (passed during first session of the legislature on January 10, 1825) [hereinafter Ky. Private Prison Act of 1825].

21. See An Act to Lease the Penitentiary, 1843 Mo. Laws § 4, at 95-99 (passed during first session of the assembly on January 26, 1843) [hereinafter Mo. Private Prison Act of 1843].

22. B. MCKELVEY, *supra* note 6, at 32.

23. See Mo. Private Prison Act of 1843, *supra* note 21, § 29.

24. See Cal. Private Prison Act of 1851, *supra* note 10, §§ 6-7.

remuneration.<sup>25</sup> Eventually, systematic state supervision was eliminated in California's private prison experiment as an unnecessary expense. This decision was myopic because privatization will fail without regular state inspection. Regular inspections not only keep private lessees "honest," but they also keep the public informed of prison conditions under private management. In California's private prison experiment, which often lacked meaningful state supervision, rumor frequently influenced public policy more than fact.

The 1986 Tennessee Act provides for state monitoring of private prison contracts but leaves the exact nature of that state supervision somewhat vague. Under section 4(c), several state officials involved in corrections and state finance will determine the likely cost of state supervision, which will be borne by the leasing party.<sup>26</sup> Section 5(f) suggests that this state monitoring could involve "the Department of Correction or any other state agency."<sup>27</sup> The Act also establishes "the Select Oversight Committee on Corrections" as the authority on questions relating to the quality of services that the private prison lessee provides.<sup>28</sup> The Act does not contain an adequate provision for systematic supervision. Presumably, this provision will appear in the private prison contract.

The California enabling legislation of 1856 was far more specific than the 1986 Tennessee Act on the question of state supervision. The California law stipulated that one group of state prison monitors would live at the prison and make recommendations for improvement to the Board of Prison Commissioners, who had broad authority to make all rules and regulations governing the privately managed state prison.<sup>29</sup> In theory, the system appeared very thorough. In operation, however, the system fell apart. Within a year, the legislature eliminated the daily monitors as an unnecessary expense. In addition, the Board of Prison Commissioners was distracted by a state budgetary crisis that led to the impeachment

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25. See An Act to Provide for the Payment of State Prison Inspectors, 1852 Cal. Stat. ch. 16, at 53 (passed during third session of the legislature on May 3, 1852); An Act to Repeal "An Act to Provide for the Payment of State Prison Inspectors," 1853 Cal. Stat. ch. 172, at 167 (passed during the fourth session of the legislature on May 12, 1853); An Act to Provide for the Payment of State Prison Inspectors, 1855 Cal. Stat. ch. 172, at 213 (passed during sixth session of the legislature on April 30, 1855); An Act to Abolish the Office of Director of the State Prison, 1857 Cal. Stat. ch. 79, at 74-75 (passed during eighth session of the legislature on March 10, 1857).

26. Tenn. Private Prison Contracting Act of 1986, *supra* note 4, §§ 4(c)(1)(B)-(C), 5(f).

27. *Id.* § 5(f).

28. *Id.* § 5(e).

29. See Cal. Private Prison Act of 1856, *supra* note 12, at §§ 1, 3-4.

and resignation of one of its members.<sup>30</sup> In short, all state oversight ended in California in 1857. Tennessee's current lack of detailed description of supervision does not mean that effective state monitoring will not be forthcoming, anymore than California's elaborate provisions guaranteed satisfactory results. Nevertheless, the issue of adequate state supervision is something that should draw public attention when actual contracts are reviewed.

At the heart of California's oversight problems was a relatively deepseated attitude that prison oversight could occur without much, if any, cost to the State. In acknowledging that state supervision will be a cost included in the budget of any private prison, the Tennessee Act avoids this naive attitude. The Tennessee Act also anticipates court settlement costs from liability judgments against a private lessee.<sup>31</sup> No meaningful comparison can be drawn between the California statute and the Tennessee Act in this regard because the civil rights of prisoners were virtually nonexistent in the nineteenth century. In California's private prison experiment, convicts were treated as subhuman. Yet not even the most ardent critics of that system argued that the abused prisoners possessed legal rights.

#### V. THE NEED FOR ANNUAL COST ADJUSTMENTS

In 1831 and 1832, Gustave de Beaumont and Alexis de Tocqueville visited the United States to investigate America's prisons. In their subsequent study, de Beaumont and de Tocqueville noted that American state-run prisons invariably made short-term contracts with private entrepreneurs involving prison labor. De Beaumont and de Tocqueville wrote:

Particular care is taken never to make contracts for any great length of time. The contractors, therefore, cannot exact contracts disadvantageous to the prison, under the pretense of injurious contingencies to which the possible depreciation of the manufactured articles may expose them. The duration of a contract often does not exceed a year; it is sometimes of less duration for the labor, and generally of six months only for the food.<sup>32</sup>

The authors' comments were restricted to the contract system practiced by many states at that time. Under the contract system,

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30. See *Report of the Special Senate Comm. on State Debt*, CAL. SENATE J., app., 8th Sess. 3-4 (1857); *Report of the Assembly Comm. on Accounts and Expenditures*, Cal. ASSEMBLY J., app., 8th Sess. 3-8 (1857).

31. Tenn. Private Prison Contracting Act of 1986, *supra* note 4, § 7(a)(2).

32. G. DE BEAUMONT & A. DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* 110-11 (S. Univ. Ill. Press ed. 1964) (originally published 1833).

state-run prisons made specific, limited contracts with businessmen for convict labor. The authors made no mention of the more comprehensive lease system, whereby entire prisons or prison systems were contracted to private entrepreneurs. During de Beaumont's and de Tocqueville's stay, however, only the State of Kentucky had any experience with the lease system of prison operation, which today is called privatization. The introduction of the private prison concept tended to erode the use of short-term prison labor contracts previously praised by the French authors.<sup>33</sup>

The Kentucky private prison contract of 1825 was seven years in duration with no stipulation for revision short of outright termination by the State.<sup>34</sup> In other states, the lease term was even longer. Both Missouri's private prison contract of 1843 and California's contract of 1851 were to extend for ten years.<sup>35</sup> These long-term contractual provisions bred dissatisfaction both on the part of the state and the private lessee because its length made the contractual obligations overly vague. This problem encouraged California to nullify illegally its contract of 1851 after only four years.<sup>36</sup> In 1856 California entered into a second private prison contract that provided for monthly payments of 10,000 dollars to be made to the lessee over a five year term.<sup>37</sup> Changing business conditions quickly persuaded state officials that the 10,000 dollar sum was twice as high as it should have been. This perception bred widespread disenchantment with the private prison contract and privatization in general.<sup>38</sup>

In the nineteenth century the lessee's initial capital outlay justified long-term leases. The Tennessee Act of 1986 envisions a lessee assuming the management of an existing state facility. Consequently, no substantial initial capital outlay is anticipated. In this respect, the Tennessee Act integrates the brief and amendable contractual term, long ago applauded by de Beaumont and de Tocqueville, with the prison lease concept.<sup>39</sup> By allowing both parties to make necessary adjustments to the contract the Tennessee Act

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33. See *infra* notes 34-40 and accompanying text.

34. See Ky. Private Prison Act of 1825, *supra* note 20, § 2.

35. See Mo. Private Prison Act of 1843, *supra* note 21, § 1; Cal. Private Prison Act of 1851, *supra* note 21, § 3.

36. See Cal. State Prison Government Act of 1855, *supra* note 11.

37. Cal. Private Prison Contract of 1856, reprinted in *Report of the Joint Committee on State Prison Affairs*, CAL. SENATE J., App., 9th Sess. 13-16 (1858) [hereinafter Cal. Private Prison Contract of 1856].

38. See CAL. ASSEMBLY J., 8th Sess. 748 (1857).

39. See Tenn. Private Prison Contracting Act of 1986, *supra* note 4, §§ 3(c), 4(b)(1).

lays the foundation for a successful contractual relationship.

States considering private prison contracts that require large initial capital expenditures by the lessee should proceed with caution. States should be wary of contracts that combine both the construction and subsequent management of private prisons because these contracts too easily breed misunderstanding. California's experience can be useful in this regard. That State's private prison contracts of the 1850s were risky ventures. At the outset, each party hoped to get the better of the bargain. As one side began to be the loser in this contractual contest, recriminations, denials, and self-righteousness followed. Contracts that do not allow for annual cost adjustments to accommodate the legitimate needs of both parties do not foster cooperative behavior or an atmosphere of mutual trust. Tennessee's current law promises to avoid these problems by encouraging annual cost adjustments in the contract itself.<sup>40</sup>

## VI. THE NECESSITY OF AN ESCAPE CLAUSE

Fearful of state legislatures enacting inflationary monetary policies, the Nation's founding fathers drafted restrictive language in the Constitution.<sup>41</sup> Article I, section 10, declares "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."<sup>42</sup> In *Fletcher v. Peck*<sup>43</sup> the Supreme Court interpreted article I to apply to contracts to which a state itself was a party. In *Fletcher*, which involved the Georgia Legislature's nullification of a fraudulent land grant previously made by the State legislature, Chief Justice Marshall implied that state contracts could be voided by the legislative process only if the contract so provided.<sup>44</sup> Following the decision, most state legislatures took great care to include escape clauses in contracts to which the state itself was a party.<sup>45</sup> For ex-

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40. See, e.g., *id.* § 4(b)(1).

41. M. JENSEN, *THE NEW NATION, A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789*, at xiii, 245-56, 313, 326, 422-28 (1962).

42. U.S. CONST. art. I, § 10, cl. 1.

43. 10 U.S. (6 Cranch) 87 (1810).

44. Although Chief Justice Marshall did not address this point directly, it was implicit in the logic of his decision. If state contracts were binding, then it follows that any provisions for the undoing of the contract were also binding if written into the contract itself. *Cf. Fletcher*, 10 U.S. (6 Cranch), at 135-39 (discussing the binding nature of contracts entered into by a state and the inability of a state either to rescind or to modify the terms of a valid contract through subsequent legislation).

45. For telling examples of the extent to which *Fletcher* necessitated caution by the state legislature to avoid binding contracts with private entrepreneurs, see W. MCAFEE, *CALIFORNIA'S RAILROAD ERA, 1850-1911*, at 143-44 (1973).

ample, the Kentucky Legislature wrote a private prison contract in 1825 naming one Joel Scott the lessee "subject, however, to removal by the Legislature, whenever, in their opinion, said Scott shall fail to manage said institution in such manner as the interest of the State may require."<sup>46</sup> This provision encouraged the lessee to be a true state servant rather than merely a profit-seeking entrepreneur. The psychological impact of the provision was important to successful private prison management.

Missouri's private prison legislation of 1843 was not as concise and provided for an elaborate system of arbitration between the State and the lessee in the event of a dispute.<sup>47</sup> California's prison contracts of 1851 and 1856 were even worse. In the 1856 contract no mention was made of the State's role in resolving potential disputes.<sup>48</sup> When California decided in 1855 that private prison management was a scandal that no longer could be endured, legislation was passed returning control of the prison to the State.<sup>49</sup> Despite the *Fletcher* decision, the lessee decided not to litigate this dispute, but chose instead to devote his energies to bringing about political change in California.<sup>50</sup> Within a year, a new governor and legislature adopted a new, far more lucrative prison contract, to which the previous lessee was the sole beneficiary. This new contract also was silent on the State's ability to resolve any future contractual dispute.<sup>51</sup>

Within two years, the California Legislature again was dissatisfied with private prison management and passed legislation returning the prison to state control.<sup>52</sup> This time, the lessee took the issue to court, which resulted in three separate decisions by the California Supreme Court.<sup>53</sup> In *McCauley v. Weller*<sup>54</sup> the State argued that prior practice, unresisted by the lessee in 1855, validated state seizure in 1858. The court, however, held that the lessee's

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46. Ky. Private Prison Act of 1825, *supra* note 20, § 2.

47. Mo. Private Prison Act of 1843, *supra* note 21, §§ 15-16.

48. See Cal. Private Prison Act of 1851, *supra* note 10; Cal. Private Prison Contract of 1856, *supra* note 37.

49. See Cal. State Prison Government Act of 1855, *supra* note 11.

50. See Sacramento Daily Union, Feb. 5, 1857, at 3, col. 2.

51. See Cal. Private Prison Act of 1856, *supra* note 12; Cal. Private Prison Contract of 1856, *supra* note 37.

52. An Act to Provide for the Temporary Government of the State Prison, and to Appropriate Money Therefore, 1858 Cal. Stat. ch. 43, at 32-33 (passed during the ninth session of the legislature on February 26, 1858).

53. See *McCauley v. Brooks*, 16 Cal. 11 (1860); *State v. McCauley*, 15 Cal. 430 (1860); *McCauley v. Weller*, 12 Cal. 500 (1859).

54. 12 Cal. 500 (1859).

contract could only be voided by judicial determination.<sup>55</sup> According to one judge “[t]he legislature cannot take upon itself, nor the officers of the government upon themselves, to adjudge what right has accrued to the State, and then proceed to enforce it, anymore than a private citizen.”<sup>56</sup> The next year in *State v. McCauley*,<sup>57</sup> the court held that the State had violated the lessee’s contractual rights by seizing the prison.<sup>58</sup> The court also held that constitutionally the State may delegate its police power to manage prisons to a private lessee.<sup>59</sup> In the end, California was forced to buy out the lessee’s contractual rights for 275,000 dollars.<sup>60</sup>

Later in the nineteenth century, Nebraska also had a disastrous experiment with private prison management.<sup>61</sup> Nebraska’s enabling legislation made no mention of the State’s power to nullify the contract.<sup>62</sup> Accordingly, the issue was left to the courts and, once again the state purchased the lessee’s rights. Tennessee avoids a possible recurrence of this problem by including an escape clause in its Private Prison Act of 1986. Section 4(a)(4) states: “Proposer must agree that the state may cancel the contract at any time after the first year of operation, without penalty to the state, upon giving ninety (90) days written notice.”<sup>63</sup>

## VII. THE NEED FOR STATE CONTROL OVER CONVICT LABOR

The 1986 Private Prison Act amends the Tennessee Code to allow convict labor to manufacture goods for sale on the open market, provided there is no detrimental effect on free labor in Tennessee.<sup>64</sup> Private prisons long have been associated with the use of convict labor for profit. For example, the lessee under Kentucky’s private prison law of 1825 was allowed one-half of the net profits derived from convict labor.<sup>65</sup> Under the Missouri law of 1843, the

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55. *Id.* at 533 (Field, J., concurring).

56. *Id.*

57. 15 Cal. 43 (1860).

58. *Id.* at 457-59.

59. *Id.* at 455.

60. See *Reports of the Board of Commissioners and Board of Directors of the State Prison*, CAL. SENATE J., app., 12th Sess. 24-26 (1861).

61. See B. McKELVEY, *supra* note 6, at 196.

62. An Act Establishing a Board of Public Lands and Buildings of the State of Nebraska, and Defining Their Duties, 1877 Neb. Laws §§ 1, 17, at 188-94 (passed during the fourteenth session of the legislature on February 13, 1877) [hereinafter Neb. Private Prison Act of 1877].

63. Tenn. Private Prison Contracting Act of 1986, *supra* note 4, § 4 (a)(4).

64. *Id.* § 16.

65. Ky. Private Prison Act of 1825, *supra* note 20, § 12.

lessees reaped all the profits of convict labor with the restriction that no work occur beyond the prison walls.<sup>66</sup> Nebraska's enabling legislation granted the lessees all the profits from prison labor without restricting where that work could take place.<sup>67</sup> California went even further. Section 7 of the Private Prison Act of 1851 explicitly stated: "[T]his Act shall not be so construed as to confine the labor of the prisoners within the walls of said prison, or to any particular place or labor."<sup>68</sup> The 1856 contract noted that the lessee "shall have the privilege, and be at full liberty to work said state prison convicts at any and all mechanical branches of business that he may choose," which the lessee interpreted as the right to work convicts outside the prison walls.<sup>69</sup>

The lessee under California's private prison contract frequently worked convicts in locations far from the state prison, which made escape prevention virtually impossible. The result was a serious breach in the lessee's contractual obligation to maintain prison security. In spite of the complaints against publicly run prisons, the escape prevention record of public prisons is excellent. By contrast, California's private prison suffered sixty-five escapes in 1856, seventy-two in 1857, twenty-three in 1858 when the prison temporarily returned to state control, and ninety-five in 1859 when again it returned to private management.<sup>70</sup> When the goals of prison security and profitability were in conflict, the lessee always chose the latter. This, more than any other factor, undermined California's willingness to experiment with privatization.

The Tennessee Private Prison Act of 1986 specifically denies the lessee the right to approve the type of work inmates may perform, and the wages or sentence credits which may be given to inmates engaging in such work.<sup>71</sup> The Commissioner of the State Corrections Department maintains this authority. This retention of state authority undoubtedly lessens the profit motive of the lessee but keeps prison security issues entirely under state control.<sup>72</sup> Tennessee Corrections Department officials certainly will never sanction the kind of uses of prison labor that marred the

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66. Mo. Private Prison Act of 1843, *supra* note 21, § 4.

67. Neb. Private Prison Act of 1877, *supra* note 62, § 17.

68. Cal. Private Prison Act of 1851, *supra* note 10, § 7.

69. "Supplementary Agreement" to Cal. Private Prison Contract of 1856, *supra* note 37, at 16.

70. *Report of Joint Standing Comm. on State Prisons*, CAL. SENATE J., app., 11th Sess. 12 (1860).

71. Tenn. Private Prison Contracting Act of 1986, *supra* note 4, § 10(4).

72. *Id.* §§ 4(a)(4), 5(e).

California experiment. For this reason, the inclusion of a provision in Tennessee's first lease agreement prohibiting the employment of convict labor outside the prison may be redundant. Nevertheless, this restriction would emphasize the value that society places on prison security.

#### VIII. FINAL CONSIDERATIONS

This Essay suggests that, in light of past experiments with prison privatization, Tennessee's Private Prison Act of 1986 is, by and large, an effective piece of legislation. Nevertheless, the enabling legislation is only half of the contractual picture. The method of effective state oversight and the appropriate uses of convict labor should be included in the final contract. Other issues also may need to be addressed in the contract itself. Specifically, who will have the responsibility for building modification, construction, or the erection of machinery within the prison? And who will own these improvements? The Kentucky law of 1825 stipulated that any improvements made by the lessee became the property of the State upon the expiration of the lease.<sup>73</sup> Missouri's 1843 statute included a similar provision.<sup>74</sup> California's 1851 law implied that the State would be responsible for constructing all permanent buildings.<sup>75</sup> The 1856 California legislation and subsequent contract required the lessee to assume responsibility for all construction mandated by state officials, with the proviso that all additions would become state property.<sup>76</sup> The Nebraska statute of 1877 assumed that no construction would be necessary under the lease.<sup>77</sup> The Tennessee Act is silent on the issue of responsibility for construction, remodeling and unforeseen maintenance costs beyond normal wear and tear. The title of the Tennessee Act states that contracts for private construction of state prisons may be authorized under the Act.<sup>78</sup> The text of the legislation, however, does not reveal who bears responsibility for any necessary construction. Presumably, this obligation will be settled under the terms of the specific lease.

The nineteenth century Missouri and California legislation

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73. Ky. Private Prison Act of 1825, *supra* note 20, § 9.

74. Mo. Private Prison Act of 1843, *supra* note 21, § 25.

75. Cal. Private Prison Act of 1851, *supra* note 10, § 3.

76. Cal. Private Prison Act of 1856, *supra* note 12, § 2; Cal. Private Prison Contract of 1856, *supra* note 37, at 15.

77. Neb. Private Prison Act of 1877, *supra* note 62, § 17.

78. Tenn. Private Prison Contracting Act of 1986, *supra* note 4.

also required the lessee to post a substantial bond to ensure faithful performance of its contractual obligations.<sup>79</sup> The Kentucky and Nebraska statutes were silent on this issue as is the 1986 Tennessee Act. The requirement under the Tennessee Act that the contractor provide "an adequate plan of insurance" might be construed, however, as being similar to the nineteenth century bond requirement.<sup>80</sup>

Of the states reviewed here, only Kentucky established a minimum number of guards to be employed at the privately run prison. The Kentucky law also required state approval of every guard employed by the lessee.<sup>81</sup> The absence of such concerns in the California contracts resulted in the lessee cutting the number of guards below the level generally considered necessary for adequate prison security.<sup>82</sup> Yet, the lack of a numerical quota in the Tennessee Act should not be regarded as a flaw. Section 6(2) of the Act requires the Commissioner of the Department of Correction to certify that the standards for security at Tennessee's privately run prison will be "equal or superior" to those operational elsewhere in the State before the private prison contract can be finalized.<sup>83</sup> This is perhaps sufficient protection and is more flexible than a numerical standard.

One final factor needs to be addressed. The principal California prison lessee of the 1850s was a man of immense political ability who often used his talents for personal gain.<sup>84</sup> The lessee helped elect and defeat governors and was regularly a member of the State legislature.<sup>85</sup> The potential for abuse of the political process by those with an economic interest in private prison management suggests that limitations upon the lessee's political activities should be considered in the drafting of any modern contract.

It is hoped that some practical result might come from this venture into applied history. The Tennessee Private Prison Act of 1986 generally reflects an understanding of the pitfalls of private prisons that have been experienced in the past. Whether this un-

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79. See Mo. Private Prison Act of 1843, *supra* note 21, § 6; see also Cal. Private Prison Act of 1851, *supra* note 10, § 2; Cal. Private Prison Act of 1856, *supra* note 12, § 6.

80. Tenn. Private Prison Contracting Act of 1986, *supra* note 4, § 7(a)(2).

81. Ky. Private Prison Act of 1825, *supra* note 20, § 7.

82. See California Chronicle (San Francisco), Apr. 1, 1856, at 1, col. 3.

83. Tenn. Private Prison Contracting Act of 1986, *supra* note 4, § 6(2).

84. J. O'MEARA, BRODERICK AND GWIN, THE MOST EXTRAORDINARY CONTEST FOR A SEAT IN THE SENATE OF THE UNITED STATES EVER KNOWN, A BRIEF HISTORY OF EARLY POLITICS IN CALIFORNIA 113-15 (1881).

85. *Id.*

derstanding was acquired through historical research or from knowledge of comparable modern situations is immaterial. In the end, all that is required is a statutory foundation that will adequately serve the state during its experiment with private prison management. Tennessee appears to have accomplished this goal in its Private Prison Act of 1986.

