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The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding

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COMMENTS

The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding

Five days after being released from prison, after serving only fifteen months of a fifteen-year sentence, Lamonte Fields stood naked over the bodies of his three victims—his ex-girlfriend, her mother, and her stepfather.[1] Fields had been released from prison under an Oklahoma program providing for mandatory release of prisoners when prison capacity is reached.[2] In fact, a number of crimes have been committed across the country by inmates released through programs created in response to the prison over-population crisis.[3] In addition to statutory prison capacity limitations,[4] prisoners also have been released under court orders addressing unconstitutional conditions that arise when overcrowding occurs.[5] In

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1. *See* Deacon New, *Public Safety Should Be a Nonpartisan Subject*, THE SATURDAY OKLAHOMAN, August 10, 1996, at 6.

2. *See* Paul English, *Keating Declaration Recalled Vowed Not to Free Inmates*, THE SATURDAY OKLAHOMAN, Aug. 10, 1996, at 12 ("The law mandates [prisoners'] early release when prison crowding reaches 97.5 percent of capacity for 10 days.").

3. In Massachusetts, a similar incident occurred involving Willie Horton, a convicted murderer, who upon his early release from prison murdered one victim and raped and murdered another. *See* Connie Paige, *Rapists Freed Under Weld Watch, Gov Calls for Registry as Records Show Paroled 13*, BOSTON HERALD, Apr., 23, 1996, at 1. In Georgia, murderer Ronald Kinsman was set free after serving only seven years of his sentence; soon after his release he killed another victim. *See* Nancy E. Roman, *GOP Ads on Parole Spark Comebacks Georgia, Louisiana Senate Races Tighten*, THE WASHINGTON TIMES, Oct. 23, 1996, at A9.

4. North Carolina passed the Emergency Prison Population Stabilization Act in 1987 to control overcrowding in the state prison system. *See* N.C. GEN. STAT. § 148-4.1 (1997). The Act requires an emergency reduction in the inmate population whenever the state prison population exceeds a specified number for 15 consecutive days. *See id.*; *see also* N.C. DEP'T OF CORRECTION, A MASTER PLAN FOR THE ALLOCATION OF $87,500,000, REPORT TO THE 1993 SESSION OF THE GENERAL ASSEMBLY OF NORTH CAROLINA 26 (Feb. 25, 1993) (explaining the state's Emergency Prison Population Stabilization Act). Other states also have enacted legislation limiting prison capacity. *See, e.g.*, FLA. STAT. ANN. § 947.146(1), (2) (West 1996) (giving the Control Release Authority power to release prisoners if the prison system reaches full capacity); *id.* at § 944.023 (defining capacity); GA. CODE ANN. § 42-2-14 (1997) (allowing a state board to release prisoners when prisons reach full capacity if the state's governor declares state of emergency); IOWA CODE ANN. § 906.5(2) (West 1994 & Supp. 1998) (allowing the early release of prisoners in order to control prison population).

5. *See* Carty v. Schneider, 986 F. Supp. 933, 935 (D.V.I. 1997) (requiring the reduction of a particular prison's population to improve its unconstitutional conditions);

1984 alone, more than 17,000 state prisoners were released early due to overcrowding.[6]

Prison populations almost tripled between 1975 and 1990.[7] One commentator has pointed out, "only half in jest, that if the same rate of incarceration continues or the rate increases somewhat, the number of people in prison in the year 2053 will be greater than those who are out of prison."[8] Prison construction has failed to keep up with the demand for prison space. In 1990, federal and state prisons housed 771,200 prisoners in space designed to accommodate between 586,500 and 641,800 inmates.[9]

Albro v. County of Onondaga, 627 F. Supp. 1280, 1288 (N.D.N.Y. 1986) (same); Gates v. Collier, 423 F. Supp. 732, 743-44 (N.D. Miss. 1976), *aff'd*, 548 F.2d 1241 (5th Cir. 1977) (same); *see also* Battle v. Anderson, 564 F.2d 388, 396 (10th Cir. 1977) (holding that remedial measures must be taken to improve unconstitutional prison conditions); Paul Feldman & Eric Lichtblau, *L.A. County Jail Inmates Serve Only 25% of Sentences*, L.A. TIMES, May 20, 1996, at A1 ("The burgeoning early release crisis has its roots in court edicts beginning in the 1970s that capped the County Jail population when chronic overcrowding collided with constitutional obligations requiring humane treatment of prisoners.").

6. *See* JOHN D. DONAHUE, PRISONS FOR PROFIT: PUBLIC JUSTICE, PRIVATE INTERESTS 25 n.11 (1988) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN, PRISONERS IN 1984, at 1, 7 tbl.11 (1985)). In 1983, over 21,000 prisoners were released early to relieve overcrowding. *See* Jeff Bleich, *The Politics of Prison Crowding*, 77 CALIF. L. REV. 1125, 1173 (1989); *see also* Wesley Smith & Douglas Seay, *Reining in Federal Judges: The Crime Bill's Unexpected Gift to the States*, F.Y.I NO. 40 (The Heritage Foundation, Washington, D.C.), Oct. 11, 1994 <http://www.heritage.org/library/categories/crimelaw/fyi40.html> (commenting that hundreds of thousands of violent offenders have been released early due to judicial orders requiring reduced prison populations).

7. *See* Charles W. Thomas & Charles H. Logan, *The Development, Present Status, and Future Potential of Correctional Privatization in America*, *in* PRIVATIZING CORRECTIONAL INSTITUTIONS 213, 215 (Gary W. Bowman et al. eds., 1993); KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 89 (1997) (noting that the U.S. prison population tripled between 1980 and 1994); THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 15 (Steven R. Donzinger ed., 1996) (same). Several commentators have blamed legislators for the prison population crisis, criticizing the enlargement of anti-crime legislation without planning for the resulting increase in prisoners. *See* Warren I. Cikins, *Partial Privatization of Prison Operations: Let's Give It a Chance*, *in* PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* at 13; *see also* CHARLES R. RING, CONTRACTING FOR THE OPERATION OF PRIVATE PRISONS: PROS & CONS 1 (1987) ("Americans have always been far more willing to support policies aimed at increasing the certainty and severity of punishment for convicted offenders than they have been to pay the costs of incarcerating the influx of prisoners which result from such policies."); Gary W. Bowman et al., *Introduction* to PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra*, at 1 (identifying the reasons for the national high rate of incarceration as "adoption of federal and state mandatory minimum sentences, tightened parole eligibility criteria, and greater reliance on imprisonment.").

8. Cikins, *supra* note 7, at 14.

9. *See* Dana C. Joel, *The Privatization of Secure Adult Prisons: Issues and Evidence*,

The United States Department of Justice has determined that in order to manage periodic maintenance as well as to provide special housing for protective custody, disciplinary cases, and emergency needs, a prison should maintain reserve capacity.[10] In 1996, however, a report issued by the Department of Justice revealed that on average, state prisons were operating at 116 percent of capacity, and federal prisons were operating at 125 percent of capacity.[11] As a result of prison overpopulation and declining funds for prison maintenance and rehabilitative programs, many prisoners are being placed in "understaffed, vermin-infested" facilities.[12] In addition, overcrowding has also increased the instances of violence and the development of infectious and stress-related diseases within confinement facilities.[13]

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in PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* note 7, at 51, 51.

10. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN, PRISONERS IN 1996, at 8 (June 1997).

11. *See id.* at 1; *see also* Justin Brooks, *How Can We Sleep While the Beds are Burning? The Tumultuous Prison Culture of Attica Flourishes in American Prisons Twenty-Five Years Later*, 47 SYRACUSE L. REV. 159, 179 (1996) (explaining that "the average American prison is operating at 114.9% of its rated capacity"). In December 1995, state prisons operated at 14% to 25% over capacity and federal prisons operated at 26% over capacity. *See* James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 HOUS. L. REV. 1003, 1004 n.1 (1997) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN, PRISON AND JAIL INMATES 1995, at 1 (Aug. 1996)).

12. Richard D. Nobleman, Note, Wilson v. Seiter*: Prison Conditions and the Eighth Amendment Standard*, 24 PAC. L.J. 275, 279 (1992). At the beginning of the decade, federal prisons were operating at 170% of capacity. *See* DAVID N. AMMONS ET AL., THE OPTION OF PRISON PRIVATIZATION: A GUIDE FOR COMMUNITY DELIBERATIONS 4, 6 (1992) (citing Thomas & Logan, *supra* note 7, at 216). Nine state prisons were also overwhelmed, operating at 150% of capacity. *See id.* Prison conditions have deteriorated to the point that they "shock the conscience, if not the stomach." Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813, 815 (1987).

13. *See* Hutto v. Finney, 437 U.S. 678, 688 (1978) (discussing how the "atmosphere of violence" was at least partly attributable to prison overcrowding). Several circuit courts and district courts already had come to this conclusion. *See* Jones v. Diamond, 636 F.2d 1364, 1373-74 (5th Cir. 1981); Ramos v. Lamm, 639 F.2d 559, 567-68 (10th Cir. 1980); Newman v. Alabama, 559 F.2d 283, 288 (5th Cir. 1977), *modified on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978); Gates v. Collier, 501 F.2d 1291, 1299 (5th Cir. 1974); Palmigiano v. Garrahy, 443 F. Supp. 956, 968-70 (D.R.I. 1977); Pugh v. Locke, 406 F. Supp. 318, 329 (M.D. Ala. 1976), *modified on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978); *see also* Barton L. Ingraham & Charles F. Wellford, *The Totality of Conditions Test in Eighth Amendment Litigation*, *in* AMERICA'S CORRECTIONAL CRISIS: PRISON POPULATIONS AND PUBLIC POLICY 13, 24-28 (Stephen D. Gottfredson & Ralph B. Taylor eds., 1987) (explaining that prison overpopulation increases the amount of violent acts); Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373, 404 (1995) ("Are the potential enhanced dangers associated with prison overpopulation—increased violence and unchecked housing of dangerous and possibly virus-infected

The majority of states operate prisons that are in violation of prisoners' Eighth Amendment rights.[14] Overcrowding has resulted in nearly one quarter of all American prisons being placed under court orders or judicial consent decrees.[15] At the end of 1984, thirty-three states had prisons subject to court orders or consent decrees mandating improved conditions, with overcrowding as the foremost complaint.[16] By 1990, the number of states with prisons operating under court order had risen to forty-one.[17] Many of these court orders have assigned felons to inadequate and "unsuitable local jails and prisons that cannot provide for productive rehabilitation and employment activities."[18] In addition, in order to alleviate overcrowding, court orders have forced open prison doors, awarding violent criminals early and unwarranted release.[19]

A 1985 report estimated that states planned to spend five billion dollars just to meet estimated prison growth from 1985 to 1995.[20] The growth in prison population in the United States in 1989 alone would have required "*one 700-bed jail and one 1,600-bed prison during each and every week*" costing "*$115,000,000 per week and 5.98 billion*

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inmates with the general prison population—a sufficiently substantial intolerable risk to call the Eighth Amendment into play?"); Carl B. Clements, Case/Comment, *Crowded Prisons: A Review of the Psychological and Environmental Effects*, 3 LAW & HUM. BEHAV. 217, 217-25 (1979) (discussing deteriorating prison conditions); Pamela M. Rosenblatt, Note, *The Dilemma of Overcrowding in the Nation's Prisons: What are Constitutional Conditions and What Can Be Done?*, 8 N.Y.L. SCH. J. HUM. RTS. 489, 492-93 (1991) ("When jails and prisons are overcrowded, even the most benign administrators have difficulty with sanitation, feeding, recreation schedules, work arrangements, and health service. Overcrowding causes fire hazards, inadequate or delayed medical services, unsanitary food and kitchen conditions, and increased rates of violence." (citations omitted)); *see generally* Garvin McCain et al., *The Relationship Between Illness Complaints and Degree of Crowding in a Prison Environment*, 8 ENV'T & BEHAV. 283, 283-89 (1976) (discussing the negative effects overpopulation has on prisoner health).

14. *See* Nobleman, *supra* note 12, at 276 ("As of January 1, 1990, 41 states and the District of Columbia had some or all of their prisons operating under court order due to unconstitutional conditions of confinement."); *see also* Stephen D. Gottfredson & Sean McConville, *Introduction* to AMERICA'S CORRECTIONAL CRISIS: PRISON POPULATIONS AND PUBLIC POLICY, *supra* note 13, at 4 (noting that "[a]s of February 1986, 46 States and U.S. territories either were under court order, or were involved in litigation likely to result in court orders").

15. *See* Nancy Gibbs, *Truth, Justice and the Reno Way*, TIME, July 12, 1993, at 20, 26.

16. *See* Ingraham & Wellford, *supra* note 13, at 13.

17. *See* Nobleman, *supra* note 12, at 276.

18. Bowman et al., *supra* note 7, at 2. Such activities exist in prisons in order to reduce recidivism. *See id.*

19. *See* Gibbs, *supra* note 15, at 26; *see also* note 5 (listing cases in which courts required the reduction of prison population).

20. *See* JOAN MULLEN ET AL., OFFICE OF DEV., TESTING AND DISSEMINATION, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE PRIVATIZATION OF CORRECTIONS 33 (1985).

dollars for the entire year."[21] Because reports estimate that federal correctional facilities are operating at 25 percent above capacity and that states are struggling between 16 percent and 25 percent above capacity, the prison crisis does not appear likely to subside in the near future.[22]

Given the alarming growth of the prison population, the unconstitutional conditions of current prison facilities, and the high costs of incarceration,[23] new alternatives must be considered to provide adequate prison facilities.[24] This Comment proposes that privatizing prison facilities may provide a legitimate solution to America's prison overpopulation crisis.

Part I briefly discusses the history of private prisons in America.[25] Part II analyzes the legal issues presented by privatization of prisons, specifically addressing the applicability of the nondelegation doctrine and § 1983 civil liability to the private prison context.[26] It also discusses the applicability of § 1983 immunity to private parties, reviewing how the district courts and the Supreme Court have dealt with this issue in both the public and private sectors.[27] Finally, Part II reviews the Supreme Court's recent analysis in *Richardson v. McKnight*,[28] which limited the extension of qualified immunity for prison guards at private facilities.[29]

Part III of this Comment notes that clear statutory guidelines and performance-oriented contracts may not only reduce current expenditures on prison facilities but also improve their quality and help alleviate the current prison crisis.[30] Finally, Part IV concludes that despite the legal issues, prison privatization offers a legitimate, cost-effective alternative for reducing the population crisis faced by

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21. Thomas & Logan, *supra* note 7, at 216. It would be less expensive to finance a college education for each prisoner. *See* Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 540 (1989).

22. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 10, at 8; Thomas & Logan, *supra* note 7, at 216.

23. *See supra* notes 12-22 and accompanying text.

24. Gottfredson and McConville see only four possibilities: (1) "build more prisons"; (2) "reduce the intake into the prison system"; (3) "accelerate releases from the prison system"; or (4) "tolerate the existing and deteriorating situation." Gottfredson & McConville, *supra* note 14, at 5. This Comment considers the first of these options.

25. *See infra* notes 32-66 and accompanying text.

26. *See infra* notes 67-176 and accompanying text.

27. *See infra* notes 177-274 and accompanying text.

28. 117 S. Ct. 2100 (1997).

29. *See infra* notes 275-359 and accompanying text.

30. *See infra* notes 360-418 and accompanying text.

American prisons.[31]

I. THE HISTORY OF PRIVATE PRISONS IN AMERICA

Although concerns over current prison conditions have just recently brought prison privatization to the public's attention, private prisons are rooted in the history of the American penal system.[32] Incarceration was originally used to punish and detain convicted criminals so that they could repent for their sins.[33] Initially, private prisons in the American colonies operated under an entrepreneurial system, requiring prisoners to pay for the expenses of staying in the prison, including all transactions between entry and discharge.[34] Consequently, a prisoner was denied release until he paid off all of his debts to the prison as well as to society.[35] As a result, poor prisoners were abused by the system and forced to work to near starvation, and sometimes death, in order to pay for their expenses.[36]

In 1666, Raymond Stapleford tried a different approach when he built a prison in Maryland, one of the first privately-run colonial prisons.[37] Stapleford contracted the prison labor to private parties.[38]

In 1790, Pennsylvania's Walnut Street Jail was "the new nation's first true penitentiary."[39] The Walnut Street Jail was state

31. *See infra* Part IV and accompanying text.

32. *See* AMMONS ET AL., *supra* note 12, at 4 ("The current interest in privatization of prison operations is more aptly characterized as a rebirth of that option rather than as a discovery of it.").

33. *See* Jack Betts, *A Short History of Corrections in North Carolina, in* NORTH CAROLINA FOCUS: AN ANTHOLOGY ON STATE GOVERNMENT, POLITICS, AND POLICY 695, 695 (Mebane Rash Whitman & Ran Coble eds., 1996); GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM OF THE UNITED STATES AND ITS APPLICATION IN FRANCE 80-81 (Herman R. Lantz ed., S. Ill. Univ. Press 1964) (1833) (writing that the Quakers believed that a penitentiary provided a place for a convict to repent his sins as well as suffer punishment for them).

34. *See* Sean McConville, *Aid from Industry? Private Corrections and Prison Crowding, in* AMERICA'S CORRECTIONAL CRISIS: PRISON POPULATIONS AND PUBLIC POLICY, *supra* note 13, at 221, 223; David N. Wecht, Note, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L. J. 815, 815-16 (1987) ("In the early years of the United States, . . . private jailers fulfill[ed] a task that the young nation was initially unable to perform.").

35. *See* McConville, *supra* note 34, at 223.

36. *See id.*

37. *See* Alexis M. Durham, III, *Origins of Interest in the Privatization of Punishment: The Nineteenth and Twentieth Century American Experience*, 27 CRIMINOLOGY 107, 111 (1989). Stapleford built the prison in exchange for 10,000 pounds of tobacco and was made keeper of the prison for life. *See id.*

38. *See id.* For an argument that prisons should return to the old contract system of labor, see Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 342, 374-98 (1998).

39. Garvey, *supra* note 38, at 348.

supervised, but private contractors purchased raw materials that prisoners turned into products that could be sold by the contractors on the open market.[40] The Walnut Street system, however, was an economic disappointment.[41]

In 1816, New York experimented with prison privatization by building the Auburn Prison.[42] The New York legislature insisted that the Auburn facility be both self-supporting and profitable.[43] To achieve this goal, the prison actively contracted with private companies who willingly paid for the cheap prisoner labor.[44]

Louisiana took the New York experiment a step further, leasing an entire penitentiary to the private sector, which took the prisoners at no charge.[45] Both Texas and California used similar systems, leasing out entire prisons to private industry.[46] Connecticut, Florida, Massachusetts, and Kentucky also leased their prisons and were able to turn a profit during the early to mid-1800s.[47] In order to compensate for prison overpopulation and escalating costs, Virginia contracted with private parties to feed, house, and pay daily labor fees to the prisoners.[48] In addition to these private prison experiments, Arkansas, Oklahoma, and Michigan all have had prisons either privately run or leased to private firms at one time.[49]

Although profitable and innovative, the early combination of incarceration facilities and private industry turned abusive.[50] Private contractors often "worked inmates to death, beat or killed them for minor rule infractions, or failed to provide them with the quantity and quality of life's necessities (food, clothing, shelter)."[51] In addition to the affront to human dignity, businesses and laborers

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40. *See id.* at 349.

41. *See id.*

42. *See id.* at 350.

43. *See* Alexis M. Durham III, *The Future of Correctional Privatization: Lessons from the Past, in* PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* note 7, at 33, 35-36; John G. Dipiano, Note, *Private Prisons: Can They Work? Panopticon in the Twenty-First Century*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 171, 176 (1995).

44. *See* Durham, *supra* note 43, at 36.

45. *See id.*

46. *See id.* at 37.

47. *See id.* at 37-38. Florida made $300,000 from its lease with a private company in 1911. *See id.* at 38.

48. *See id.* at 36.

49. *See* JOHN J. DIIULIO, JR., PRIVATE PRISONS 2-3 (U.S. Dep't of Justice, Nat'l Inst. of Justice Crime File Study Guide No. NCJ-104561, 1988).

50. *See* AMMONS ET AL., *supra* note 12, at 5.

51. DIIULIO, *supra* note 49, at 3. In one private prison, the menu for prisoners included such delicacies as "spoiled beef, maggoty hams, wormy flour, rusty mackerel and coarse brown bread." KENNETH LAMOTT, CHRONICLES OF SAN QUENTIN 45 (1961).

alike protested against the unfair competition created by private individuals using less expensive inmate labor.[52] Furthermore, a desire to use prisons for reformatory purposes gained support.[53] As a result of these factors, the private prison industry fell apart. The last relics of prisoner leasing by private contractors ended in Florida and Alabama in the 1920s.[54]

The shift to public administration of prisons did little to improve the conditions facing prisoners.[55] Although private prisons may have historically provided inhumane living conditions, the current problems of overcrowding and high costs have led to a resurgence of support for prison privatization.[56] President Reagan's creation of the

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52. *See* DIIULIO, *supra* note 49, at 3. Protests led to the Labor Law of 1842, prohibiting prisoners from working at a trade unless they had learned the trade prior to prison. *See* Durham, *supra* note 43, at 38. A report read at the Louisiana State Democratic Convention in 1883 declared:

> "The employment of convicts outside the walls of the Penitentiary is detrimental to the interests of the honest labor[,] . . . bring[ing] . . . slave labor in competition with honest industry to the great pecuniary profit of the penitentiary lessee, but with disastrous results as far as the honest free labor of the state is concerned."

Id. at 38 (quoting M.T. CARLETON, POLITICS AND PUNISHMENTS 39 (1971)). The most visible protest of the use of inmate labor occurred in 1891 when protesting miners in Tennessee stormed a private prison, releasing over 400 inmates. *See id.* at 39. These protests, as well as the Great Depression, led to additional legislation to limit the profitability of prisoner labor. *See* AMMONS ET AL., *supra* note 12, at 5. The Hawes-Cooper Act, passed by Congress in 1929, allowed states to enact legislation banning the importation of prisoner manufactured products from other states, further limiting the profitability of private prisons. *See* Act of Jan. 19, 1929, Pub. L. No. 669, ch. 79, § 1, 45 Stat. 1084, 1084 (codified at 49 U.S.C. § 11507 (1994)). In 1935, legislation was enacted requiring prison goods to be labeled as made by prisoners. *See* Act of July 24, 1935, Pub. L. No. 215, ch. 412, § 2, 49 Stat. 494, 494-95 (codified at 18 U.S.C § 1762 (1994)). This legislation also prohibited the entry of prison goods into states banning their sale. *See id.* § 1, 49 Stat. at 494 (codified at 18 U.S.C. § 1761 (1994)). In 1936, the Walsh-Healey Act prohibited the use of prison labor in federal government contracts exceeding $10,000. *See* Walsh-Healey Act, Pub. L. No. 846, ch. 881, § 1(d), 49 Stat. 2036, 2037 (1936) (codified as amended at 41 U.S.C. 35(c) (1994)). Four years later, the Sumners-Amherst Act made it a federal criminal offense to sell prisoner-made goods through interstate commerce. *See* Sumners-Amherst Act, Pub. L. No. 851, ch. 872, 54 Stat. 1134, 1134 (1940) (codified as amended at 18 U.S.C. § 1761 (1994)).

53. *See* McConville, *supra* note 34, at 223.

54. *See id.* at 222-23.

55. *See id.* at 222 (citing THORSTEN SELLIN, SLAVERY AND THE PENAL SYSTEM 176 (1976)). Public prison "scandals, defects, and abuses . . . [have been] so voluminous . . . that undoubtedly many of the difficulties that the early prison reformers thought arose exclusively from the entrepreneurial interest in prisons can now be demonstrated to inhere in prison systems of any complexion." *Id.*

56. *See* Garvey, *supra* note 38, at 342 (arguing that American prisons should return to the old contract system of labor); Robbins, *supra* note 21, at 540; David Yarden, Book Note, *Prisons, Profits, and the Private Sector Solution*, 21 AM. J. CRIM. L. 325, 326 (1994) (reviewing PRIVATIZING CORRECTIONAL INSTITUTIONS (Gary W. Bowman et al eds., 1993)); Daniel Klaidman, *Letting Private Companies Run Federal Prisons*, CONN. L.

President's Private Sector Survey on Cost Control and its subsequent investigation of opportunities to cut government spending through privatizing governmental functions helped add to a renewed enthusiasm for potential prison privatization.[57] The privatization movement was further bolstered by the 1994 congressional elections and the Republican Party's "Contract with America."[58]

To reintroduce the private sector to the prison industry, states, counties, and cities have been contracting with private corporations.[59] Since the early 1980s, a growing number of jurisdictions have enacted legislation authorizing the use of private prisons.[60] Until 1984, however, only nonsecurity and community-based facilities were privatized, including "halfway houses, holding centers for illegal aliens, and juvenile detention centers."[61] The savings provided by

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TRIB., Feb. 20, 1975, at 8.

57. In 1988, the President's Commission on Privatization recommended that the Bureau of Prisons contract with the private sector to operate medium and maximum security prison facilities. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/T-GGD-95-177, BUREAU OF PRISONS: RECENT CONCERNS AND CHALLENGES FOR THE FUTURE 6 (1995) (statement of Norman J. Rabkin, Director, Administration of Justice Issues, General Government Division).

58. *See* Alan K. Chen, *"Meet the New Boss . . ."*, 73 DENV. U. L. REV. 1253, 1253 (1996). The Contract with America was the Republican Party's alleged attempt to " 'end . . . government that is too big, too intrusive and too easy with the public's money.' " *Id.* at 1253 (quoting the Contract with America).

59. *See* Robert G. Schaffer, *The Public Interest in Private Party Immunity: Extending Qualified Immunity from 42 U.S.C. § 1983 to Private Prisons*, 45 DUKE L.J. 1049, 1049-50 (1996) (noting that about one-third of the states have adopted enabling legislation because of the chance that privatization will save costs). In 1988, the State of New Mexico awarded Corrections Corporation of America ("CCA") a contract to design, construct and operate a 200-bed multi-security level prison. *See* Charles H. Logan, *Well Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 J. CRIM. L. & CRIMINOLOGY 577, 577 (1992). In 1995, Texas awarded CCA a contract to operate a 2,000 bed facility. *See* CORRECTIONS CORP. OF AMERICA, CCA: A QUALITY, COST-EFFECTIVE SOLUTION 4 (July 1996) (corporate brochure). In 1990, Wackenhut Corrections Corporation was awarded a contract to manage a 610 bed medium-security facility in Louisiana and another contract for constructing and operating a 500 bed minimum-medium facility in Texas. *See Wackenhut Corrections Corporation*, CORRECTIONS TODAY, Oct. 1990, at 138. In 1996, North Carolina awarded a $70 million contract to U.S. Corrections Corporation for the operation of two 500 bed prisons. *See* Dennis Patterson, *Kentucky Company Wins $70 Million Contract for Two Private Prisons*, A.P. POL. SERV., July 3, 1996, *available in* WESTLAW, ASSOCPPS Database, 1996 WL 5392729.

60. *See, e.g.*, ALASKA STAT. § 33.30.031(a) (Michie 1996); COLO. REV. STAT. ANN. § 17-1-201 (West 1997); MONT. CODE ANN. § 53-30-106(3) (1997); TENN. CODE ANN. § 41-24-103 (1997); Thomas & Logan, *supra* note 7, at 214.

61. Bowman et al., *supra* note 7, at 7. In 1984, CCA, the largest private prison contractor had only contracted to manage three small, minimum-security prisons: a 50-bed juvenile detention center in Memphis, a processing center to house illegal aliens in Houston, and the Silverdale Work Farm in Chattanooga. *See* CORRECTIONS CORP. OF

these early experiments along with the continuing prison crisis has encouraged the development and acceptance of private prisons.[62] During the 1980s, Alaska, Arkansas, Colorado, Florida, Montana, New Mexico, Oklahoma, Tennessee, and Utah adopted legislation enabling the use of private prisons.[63] More than one hundred private prison facilities are now operating in the United States.[64] The number of inmates in private prisons is expected to grow thirty percent per year.[65]

Important lessons can be learned from America's bleak private prison history.[66] Knowledge gained from previous mistakes and the benefits achievable through effective use of privatization provide a foundation for current private prison experiments.

II. LEGAL ISSUES RELATED TO THE PRIVATIZATION OF PRISONS

Although prison privatization has already begun in several states,[67] unclear and often unanswered legal issues envelop the privatization process. First, opponents of privatization argue that the operation of prisons is solely a governmental function and that the nondelegation doctrine makes legislation authorizing prison privatization unconstitutional.[68] Second, there are concerns that prisoners will not receive the same constitutionally guaranteed rights

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AMERICA, *supra* note 59, at 4.

62. *See* Bowman et al., *supra* note 7, at 6-7.

63. *See, e.g.*, ALASKA STAT. § 33.30.031(a) (Michie 1996); ARK. CODE ANN. § 12-50-106 (Michie 1995); COLO. REV. STAT. ANN. § 17-1-201 (West 1997); FLA. STAT. ANN. § 957.03(1) (West 1996); MONT. CODE ANN. § 53-30-106(3) (1997); N.M. STAT. ANN. § 33-1-17 (Michie 1990 & Supp. 1997); OKLA. STAT. ANN. tit. 57, § 41 (West 1997); TENN. CODE ANN. § 41-24-103 (1997); UTAH CODE ANN. § 64-13-26 (1996).

64. *See Morning Edition: Tennessee Private Prisons Debate* (NPR radio broadcast, Nov. 13, 1997), *available in* WESTLAW, MORNED Database, 1997 WL 12823849.

65. *See* Warren L. Ratliff, *The Due Process Failure of America's Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371, 372 (1997). In 1996, 3% of the adult prisoner population was housed in private prisons, a 32% increase from the previous year. *See* James L. Ahlstrom, Note, McKnight v. Rees: *Delineating the Qualified Immunity "Haves" and "Have-Nots" Among Private Parties*, 1997 BYU L. REV. 385, 385 (1997).

66. *See* DAVID SHICHOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS 44 (1995) (discussing "warning signs" that are still of concern today).

67. *See* AMMONS ET AL., *supra* note 12, at 30 fig.5 (mapping locations of private prisons and listing the corporations that are operating them); *see also supra* notes 59-60 and accompanying text (discussing recent contracts and listing states).

68. *See* W.J. Michael Cody & Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829, 849 (1987); Robbins, *supra* note 21, at 562-63; Joseph E. Field, Note, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 662-63 (1987) (arguing that the United States Supreme Court may find a delegation unconstitutional when "the delegatee has private interests or motives at stake").

in a privately-operated facility as they would receive in a government-operated facility. Because § 1983[69] only provides protection against persons acting under color of state law, opponents fear that this protection is precluded when the government contracts with private industry.[70] Furthermore, assuming that civil rights protections will be extended to prisoners in private facilities, a third legal issue arises whether immunities commonly extended to government officials will be extended to employees of private facilities.[71] The following sections discuss these legal issues related to privatization and conclude that these concerns, although not unfounded, should not inhibit prison privatization.

A. The Nondelegation Doctrine[72]

The nondelegation doctrine is grounded in Article I, section 1 of the United States Constitution, which states that "[a]ll legislative Power herein granted shall be vested in a Congress of the United States."[73] Accordingly, no legislative powers may be delegated by Congress to another entity. In 1935, the Supreme Court in *Schechter Poultry Corporation v. United States*[74] applied the nondelegation doctrine to invalidate the National Industrial Recovery Act (the "Recovery Act"),[75] which had delegated certain legislative authority to the President.[76] Section 3 of the Recovery Act authorized the President to approve a code of fair competition offered by a trade or industrial association if he found the code did not impose unfair membership admission restrictions and was not designed to eliminate small businesses or promote monopolies.[77] The Court held that section 3 was an unconstitutional delegation due to its broad declaration of authority and the lack of both guidance and

69. 42 U.S.C. § 1983 (1994).

70. *See infra* notes 132-76 and accompanying text (discussing the applicability of civil rights protection to prisoners in private prisons).

71. *See infra* notes 177-359 and accompanying text (discussing the availability of immunity for private prison guards).

72. Although delegation issues exist at the state level based on state constitutions, this section focuses on the nondelegation doctrine from a federal standpoint. Delegation issues have been dealt with inconsistently at the state level. *See* David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 649-51 (1986). For a comprehensive look at state-level delegation issues, see Robbins, *supra* note 21, at 557-73.

73. U.S. CONST. art. I, § 1.

74. 295 U.S. 495 (1935).

75. Pub. L. No. 73-67, ch 90, 48 Stat. 195, 195, *abrogated by Schechter*, 295 U.S. at 541-42.

76. *See Schechter*, 295 U.S. at 541-42.

77. *See id.* at 521-23.

restrictions on the President's authority.[78]

Under the *Schechter* Court's analysis, the nondelegation doctrine may be used to invalidate legislation if it authorizes private parties to "decide either what the law shall be or when a law shall be effective."[79] Therefore, anytime the government delegates legislative or executive authority to a private party, an issue arises as to whether that private party has any right to exercise that authority.[80] Citing the nondelegation doctrine, opponents of prison privatization argue that "only government can legitimately exercise the police power and that it cannot or should not be delegated to the private sector."[81] By analogy, opponents contend that just as Congress may not delegate legislative power to the President, governments may not delegate their power of incarceration to private corporations.[82] In 1986, the American Bar Association supported this argument, claiming that "incarceration is an inherent function of the government and that the government should not abdicate its responsibility by turning over prison operation to private industry."[83]

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78. *See id.* at 541-42.

79. 1 SUTHERLAND STATUTORY CONSTRUCTION § 4.11 (Norman J. Singer ed., 5th ed 1992).

80. *See, e.g.*, Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality in Federal Programs*, 67 TEX. L. REV. 441, 456-57 (1989) (noting that *Schechter*, as well as *Carter Coal Co.*, 298 U.S. 238 (1936), create concerns about government authority to delegate legislative tasks); Susan Ross-Ackerman, Comment, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1216 (1994) (noting government concern when delegating public tasks to private individuals).

81. Cikins, *supra* note 7, at 17. The concern about delegation is grounded in a fear that the private party will be "less accountable to the public than are legislators, who must face re-election, or administrators, who must report to the President." A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, 575 (1995); *see also* Field, *supra* note 68, at 668 (arguing that "[p]rison privatization represents the government's abdication of one of its most basic responsibilities to its people").

82. *See* Ratliff, *supra* note 65, at 382 (discussing the arguments of private prison opponents); *see also* Jan Elvin, *A Civil Liberties View of Private Prison*, PRISON J., Autumn-Winter 1985, at 48, 51 (arguing that "[n]o one but the state should possess the awesome responsibility or power to take away an individual's freedom; freedom should not be contracted to the lowest bidder"). Mark A. Cuniff, the executive director of the National Association of Criminal Justice Planners, claims imprisonment is " 'the ultimate sanction that a state has available to it to enforce laws. Because only the government can promulgate and enforce the laws, only the government should be involved in provision of those services.' " Elizabeth Leland, *Private Prisons: Businesses Want a Piece of the Rock*, *in* NORTH CAROLINA FOCUS: AN ANTHOLOGY ON STATE GOVERNMENT, POLITICS, AND POLICY, *supra* note 33, at 705, 708 (quoting Mark A. Cuniff); *see* Field, *supra* note 68, at 668-70.

83. Connie Mayer, *Legal Issues Surrounding Private Operation of Prisons*, 24 CRIM. L. BULL. 309, 319 (1986).

While the nondelegation doctrine may be an attractive tool for arguing against the government using privatization as a shield from liability, private prison opponents fail to recognize that the nondelegation issue regarding private prisons is not whether the government can eliminate its liability, but rather whether the government may delegate its incarceration function. The answer to this second concern seems to be yes.[84] In recognizing the need for flexibility, the drafters of the Constitution provided the Necessary and Proper Clause to compensate for future governing needs, allowing delegation of authority "sufficient to effect its purposes."[85] Delegation has become a necessary legislative tool in an increasingly demanding rulemaking society.[86]

While courts have not specifically addressed whether delegating incarceration authority to the private sector is a violation of the nondelegation doctrine, the Supreme Court has not invalidated any delegation of various governmental functions in the last half-century.[87] Furthermore, regardless of the current viability of the nondelegation doctrine, the doctrine does not appear applicable to

84. *See* Hampton v. U.S., 276 U.S. 394, 412 (1928). In *Hampton*, the Supreme Court upheld the Tariff Act of 1922, tit. 3, ch. 356, § 315, 42 Stat. 858, 941-42 (codified at 19 U.S.C. §§ 154, 156 (1928)), which authorized the President to regulate customs duties. The Court explained Congress's need to delegate certain authority and discretion out of convenience and responsiveness to changing future conditions. *See Hampton*, 276 U.S. at 406-07. The Court explained that the parties exercising the delegated authority are not actually encroaching on legislative authority vested in Congress because "the power has already been exercised legislatively by the body vested with that power under the Constitution." *Id.* at 407. " 'The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law.' " *Id.* (quoting Cincinnati, Wilmington & Zanesville R.R. Co. v. Commissioners, 1 Ohio St. 77, 88 (1852)). *See also* Bowman et al., *supra* note 7, at 9 ("The U.S. Constitution, and federal laws do not prohibit private companies of managing all security types of correction institutions."); Cikins, *supra* note 7, at 17 (explaining that although the government may not be able to avoid liability by using the public sector, that does not "preclude[] the utilization of the private sector"); Dipiano, *supra* note 43, at 199 ("[I]f ... private prison officials made improper decisions about how to manage their facilities the nondelegation doctrine is of no avail.").

85. U.S. CONST., art. I, § 8, cl. 18. In *McCullock v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court held that the Necessary and Proper Clause expanded Congress's powers, enabling Congress to create a federal reserve bank. *See id.* at 409-12. The Necessary and Proper Clause may similarly expand Congress's power by allowing legislation enabling the federal government to contract prison management to corporations. *See* Robbins, *supra* note 12, at 823.

86. *See* 1 KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE § 2.6 (3d ed. 1994).

87. *See* Linda G. Cooper, *Minimizing Liability with Private Management of Correctional Facilities*, *in* PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* note 7, at 131, 132.

prison privatization because a transfer of the incarceration function is not a delegation of legislative authority.[88]

The applicability of the nondelegation doctrine to privatizing prisons is further weakened by the fact that "a consensus of academic commentators and Supreme Court Justices view the nondelegation doctrine as a dead letter."[89] In order to fully address the topic, however, the following sections will analyze the applicability of the doctrine to the delegation of incarceration authority, applying several different tests that have been employed by courts in addressing issues of unconstitutional delegation. These tests include the analysis Justice Rehnquist proposed in *Industrial Union Department, AFL-*

88. *See* Dipiano, *supra* note 43, at 198-99. Article I, Section 1 of the Constitution—the basis of the nondelegation doctrine—vests all legislative authority in Congress. *See* U.S. CONST. art. I, § 1. Since the constitutional basis for the nondelegation doctrine limits unconstitutional delegation of legislative authority, authorization of private prison operation does not violate the doctrine because the private prisons are not authorized to perform legislative functions. Libertarians make another argument for the inapplicability of the nondelegation doctrine, stating that the "source of legitimate power is in the hands of the individual citizens;" therefore, private prisons are justified "on the basis of the limited role of the state and the individualistic concept of punishment." SHICHOR, *supra* note 66, at 51. The right of imprisonment is in the people and consequently can be performed as readily by a contractor. *Talk of the Nation: The Privatization of Prisons* (NPR radio broadcast, Jan. 9, 1997), *available in* LEXIS, NEWS Library, CURNWS File, Transcript No. 97010902-211 (comments of Professor Charles Logan, Associate Head of Sociology, University of Connecticut) [hereinafter *Talk of the Nation*].

89. Ratliff, *supra* note 65, at 383. The federal courts have "accepted, often without comment, delegations of federal power . . . ." Lawrence, *supra* note 72, at 648. Justice Marshall once stated that the nondelegation doctrine "has been virtually abandoned by the Court for all practical purposes." Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring in the result in part and dissenting in part). For cases upholding delegation of traditionally governmental authority to private parties, see *Mulford v. Smith*, 307 U.S. 38, 44, 51 (1939) (upholding the Agricultural Adjustment Act of 1938, 7 U.S.C.A. §§ 1281-1393 (West 1988 & Supp. 1998), even though it involved private farmers approving marketing quotas on crops); *Currin v. Wallace*, 306 U.S. 1, 15 (1939) (upholding procedure in Tobacco Inspection Act of 1935, 7 U.S.C.A. §§ 511-511q (West 1980 & Supp. 1998), which delegated authority to private tobacco farmers to vote on whether or not they wanted certain provisions of the act applied to them); *Building & Constr. Trades' Dep't, AFL-CIO v. Donovan*, 712 F.2d 611, 616-19 (D.C. Cir. 1983) (upholding the Davis-Bacon Act, 40 U.S.C. § 276a to 276a-5 (1994), which based wages for federal public works projects on private wages). For additional discussion of the Supreme Court's and state courts' acceptance of Congressional delegations, see George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 668-72 (1975). However, Justice Rehnquist, in his concurring opinion in *American Petroleum Institute*, attempted to revive the nondelegation doctrine. *See* Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 672-76 (1980) (Rehnquist, J., concurring in the judgment); *supra* notes 99-105 and accompanying text (discussing Justice Rehnquist's concurrence).

CIO v. American Petroleum Institute,[90] the delegation concerns discussed in *Carter v. Carter Coal Co.*,[91] and the analysis offered in *Todd & Co. v. Securities and Exchange Commission*.[92]

1. *Industrial Union Department, AFL-CIO v. American Petroleum Institute*

In 1935 and 1936, the Supreme Court used the nondelegation doctrine to declare unconstitutional three acts providing the President with unguided authority.[93] Since then, the Supreme Court has not used the nondelegation doctrine to declare any delegation of governmental authority unconstitutional.[94] In 1980, however, then-Justice Rehnquist, in a concurring opinion in *American Petroleum Institute*, reintroduced the nondelegation doctrine.[95] This case addressed Congress's delegation of authority to the Secretary of Labor to develop standards to ensure safe and healthy working conditions for American workers under the Occupational Safety and Health Act of 1970.[96] The case specifically dealt with exposure standards for benzene, a known carcinogen, which were set by the Secretary of Labor.[97] A plurality held that the benzene exposure limit set for workers by the Secretary of Labor was invalid because the Occupational Safety and Health Administration failed to use

90. 448 U.S. 607 (1980) (plurality).

91. 298 U.S. 238 (1936).

92. 557 F.2d 1008 (3d Cir. 1977).

93. *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (striking down a statute that granted coal workers the authority to vote on and set wages and hours that would be binding on all mine workers within the voting region); Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935) (holding that § 3 of the Recovery Act was an unconstitutional delegation of authority due to the broad authority delegated to the President and the lack of guidance and restrictions); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935) (holding that Congress's failure to establish any guiding policy or standard or to draft any limiting rules made the authority delegated to the President to regulate transportation of petroleum products between the states an unconstitutional delegation of legislative authority).

94. *See* Robbins, *supra* note 21, at 544.

95. *See American Petroleum Inst.*, 448 U.S. at 672-76 (Rehnquist, J., concurring in the judgment).

96. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-671 (1994). The Occupational Safety and Health Act (the "Act") was intended to ensure "safe and healthful working conditions." *American Petroleum Inst.*, 448 U.S. at 611. It authorizes the Secretary of Labor to promulgate health standards. *See* 29 U.S.C. § 651(b)(3) (1994). The Act defines an occupational safety and health standard as one that "requires conditions, or the adoption or use of one or more practices . . . reasonably necessary or appropriate to provide safe or healthful employment." 29 U.S.C. § 652(8) (1994).

97. *See American Petroleum Inst.*, 448 U.S. at 611 (plurality).

appropriate findings to support the standard.[98] In a concurring opinion, Justice Rehnquist explained the applicability of the nondelegation doctrine to this particular situation.[99] He defined the purpose of the nondelegation doctrine as "ensur[ing] to the extent consistent with orderly governmental administration that important [policy] choices . . . are made by Congress."[100] Drawing on precedent, he stated that the nondelegation doctrine guarantees that the party granted the governmental authority is provided with an " 'intelligible principle' to guide the exercise of the delegated discretion,"[101] and it enables "courts charged with reviewing the exercise of delegated legislative discretion . . . to test that exercise against ascertainable standards."[102]

Applying these purposes to the facts, Justice Rehnquist found the Occupational Safety and Health Act provision to be invalid as an unconstitutional delegation to a governmental agency.[103] He would have held that the vague standard provided by the statute created uncertainty.[104] Justice Rehnquist suggested that this uncertainty demonstrated that Congress, "the governmental body best suited and most obligated" to make the decision, had unlawfully delegated its authority to the Secretary of Labor.[105]

However, important differences exist between the situation in *American Petroleum Institute* and the situation created by privatizing prisons. First, since *American Petroleum Institute* dealt specifically with the Occupational Safety and Health Administration, a government agency, Justice Rehnquist's analysis may not be applicable to a private entity such as a private prison.[106] Second, Justice Rehnquist's concern "centered on delegation of congressional responsibility for deciding major social policy."[107] "A delegation to a private prison company that has adequate statutory guidelines does

98. *See id.* at 653 (plurality).

99. *See id.* at 672-76 (Rehnquist, J., concurring in the judgment).

100. *Id.* at 685 (Rehnquist, J., concurring in the judgment).

101. *Id.* at 686 (Rehnquist, J., concurring in judgment) (citing Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935); J.W. Hampton Co. v. United States, 276 U.S. 394, 409 (1928)).

102. *Id.* (Rehnquist, J., concurring in the judgment) (citing Arizona v. California, 375 U.S. 546, 626 (1963) (Harlan, J., dissenting in part); American Power & Light Co. v. SEC, 329 U.S. 90, 106 (1946)).

103. *See id.* (Rehnquist, J., concurring in the judgment).

104. *See id.* at 672 (Rehnquist, J., concurring in the judgment).

105. *Id.* (Rehnquist, J., concurring in the judgment).

106. *See* Robbins, *supra* note 21, at 556.

107. *Id.*

not involve the same issues."[108] Also, it should be noted that Justice Rehnquist was the only Justice to arrive at his conclusion using the nondelegation doctrine analysis, and he noted in *Flagg Brothers, Inc. v. Brooks*[109] that "while many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.' "[110] Therefore, it is unlikely that outsourcing of prisons poses any constitutional delegation problems under the analysis proposed by Justice Rehnquist.

2. Carter v. Carter Coal Co.

The Supreme Court in *Carter v. Carter Coal Co.*[111] provided a different analysis for delegation. Instead of applying the traditional nondelegation doctrine preventing delegation of legislative functions, the Court *struck down* a statute empowering coal producers and mine workers to vote on hours and wages within their particular region that would bind all employees.[112] The majority described the statute as "legislative delegation in its most obnoxious form; for [it is a delegation] ... to private persons whose interests may be and often are adverse to the interests of others in the same business."[113] As a result, the Court rejected the statute as an unconstitutional delegation of power.[114]

The Court's concern about potential conflicts of interest for a private party with governmental authority would be relevant to private prisons if, for example, the prison management set prisoners' release dates.[115] Such authority, however, is maintained by the state through both statutory and contractual provisions.[116] It is also

108. *Id.* Presumably, though Robbins does not specifically state this, the statutory guidelines would keep social policy in the hands of Congress.

109. 436 U.S. 149 (1978).

110. *Id.* at 158.

111. 298 U.S. 238 (1936).

112. *See id.* at 311; Froomkin, *supra* note 81, at 574. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), dealt specifically with the delegation of standardless legislative authority to the president. *See id.* at 541-42. The Court rejected this delegation of legislative power as being unconstitutional because of the lack of guidance provided to the executive. *See id.* at 542. *Carter Coal Co.*, while relying on *Schechter* as precedent, dealt with the delegation of legislative authority to private parties (coal producers and miners) and was more concerned with the conflicts of interest inherent in such a delegation. *See Carter Coal Co.*, 298 U.S. at 311 (1936).

113. *Carter Coal Co.*, 298 U.S. at 311.

114. *See id.*

115. Private prisons paid on a per prisoner basis have a financial interest in keeping the prison occupied, thus tempting the prison operators to disfavor inmate releases. *See* Ratliff, *supra* note 65, at 399-401.

116. Many states prohibit private prison operator involvement in computing good time

important to recognize that "[t]he Carter Coal rationale has not ... been used to invalidate any subsequent federal delegation to a private group."[117] As a result, carefully written statutes providing adequate government control and review of privately operated prisons' policies and retaining legislative authority in the government should prevent any conflicts with the nondelegation doctrine.

3. The *Todd* Test

As a result of the lack of cases applying the nondelegation doctrine to private prisons, commentators have looked to cases upholding the Maloney Act[118] to anticipate how the courts would apply the doctrine.[119] In *Todd & Co. v. SEC*,[120] the Third Circuit evaluated the constitutionality of the Maloney Act, considering three requirements of the Act to be particularly relevant in upholding its constitutionality: (1) any rules written by the private association must be approved by the Securities and Exchange Commission ("SEC") prior to becoming enforceable; (2) the SEC must review and make an independent decision on all private judgments of rule violations and penalties; and (3) the SEC must make de novo findings which may entail additional findings if necessary.[121] These factors can be applied by analogy to the privatization of prisons. Enabling legislation for private prisons should maintain rulemaking authority or, at the least, rulemaking approval in a governmental agency similar to the guidance provided by the Maloney Act.[122] This would

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credits. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1609.01(P) (West 1992 & Supp. 1997); COLO. REV. STAT. ANN. § 17-1-203(d) (West 1997); FLA. STAT. ANN. § 957.06(5) (West 1996); OHIO REV. CODE ANN. § 9.06(C)(1) (Anderson Supp. 1998); TENN. CODE ANN. § 41-24-110(5) (1997).

117. Froomkin, *supra* note 81, at 575. Professor Froomkin hypothesizes that "[i]n a world in which private police forces and private prisons are imaginable, if not yet commonplace, if a nondelegation rule applies at all, it probably applies only to legislative powers." *Id.*

118. 15 U.S.C. § 78o-3 (1994). The Maloney Act authorizes the self-regulation of the securities industry, granting both regulatory and adjudicatory power over securities markets to private securities associations. *See id.*

119. *See* Ratliff, *supra* note 65, at 392; Robbins, *supra* note 21, at 551-53; Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 922-25 (1988). Professor Robbins also suggests that the *Todd & Co.* test may be inapplicable to the private prison context because the Maloney Act and *Todd & Co.* concern property interests not involved in private prison legislation. *See* Robbins, *supra*, at 925; Robbins, *supra* note 21, at 553.

120. 557 F.2d 1008 (3rd Cir. 1977).

121. *See id.* at 1012.

122. *See* Robbins, *supra* note 21, at 552 (indicating that if a corrections agency made the prison's rules of operation, then the first prong of the *Todd & Co.* test would be met).

preclude prison corporations from promulgating self-serving rules. Under the *Todd & Co.* test, the government also should maintain authority over disciplinary matters related to prisoners.[123] Commentators have concluded that application of the *Todd & Co.* test establishes that the delegation of prison authority is "not per se unconstitutional"; however, the "private decision-making authority must be subject to exacting government control."[124]

The factors considered by the Third Circuit in its analysis can be used as guidance in preparing enabling legislation in order to prevent delegated authority from exceeding its constitutional scope. Statutes clearly specifying the goals and authority of private prisons and retaining authority over disciplinary proceedings in the state for violations of prison rules should eliminate concerns related to the nondelegation doctrine.

4. Nondelegation is a Nonissue

The current demands on governing bodies mandate delegation of authority in order to maintain at least some limited efficiency.[125] The Ninth Circuit has stated, "[w]hile Congress cannot delegate to private corporations or anyone else the power to enact laws, it may employ them in an administrative capacity to carry them into effect."[126] Such "employment" is essential, for "[w]ithout the delegation of subordinate rule-making (such as providing an adequate number of security personnel in private prisons within a statutorily established minimum), government would cease to function at all, let alone efficiently."[127] Recognizing this situation, the Supreme Court probably considers the nondelegation doctrine to be a "dead letter."[128] All that is required is an " 'intelligible principle' " when Congress delegates legislative power.[129] In addition, the tests and factors discussed in *American Petroleum Institute*, *Carter*, and *Todd & Co.* imply that the nondelegation doctrine would not be

123. *See id.*

124. Ratliff, *supra* note 65, at 392; *see* Robbins, *supra* note 119, at 924-25.

125. *See* Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 243-44 (1997) (discussing the Supreme Court's acceptance of delegation of government authority for efficiency).

126. Crain v. First Nat'l Bank, 324 F.2d 532, 537 (9th Cir. 1963) (citing Berman v. Parker, 348 U.S. 26, 33 (1954)).

127. Dipiano, *supra* note 43, at 200.

128. Ratliff, *supra* note 65, at 383; *see supra* note 70 and accompanying text (discussing nondelegation as a virtually abandoned issue).

129. Robbins, *supra* note 21, at 546 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

violated by the delegation of authority to private prisons and may possibly be wholly inapplicable because privatization does not involve the delegation of any legislative authority constitutionally vested in Congress. Under current enabling statutes, "[t]he operation of a private for-profit prison would come under the delegation of administrative powers [rather than legislative, law-making powers]; therefore it is unlikely that there would be serious grounds to question the constitutionality of private prison management."[130]

B. Applicability of Civil Rights Protection to Inmates in Private Prisons

Assuming, then, that contracting with private industry to operate prison facilities is not an unconstitutional delegation of authority, the next relevant question is whether prisoners in private facilities will benefit from the same constitutional protections offered to prisoners in government-operated facilities. The civil rights statute, 42 U.S.C. § 1983, protects every person's rights, as provided by the Constitution or statute.[131] The protection provided by this statute extends to inmates.[132] Opponents of private prisons have voiced concerns that private prisons will sacrifice prisoners' civil rights in pursuit of profit without anyone being held accountable.[133] Although the operation of prisons has been traditionally considered a state function, and private prisons will be performing this function according to state regulations and with state funding, an issue still remains as to whether private prisons, "for constitutional purposes, will be treated as if they were the state."[134] One Supreme Court justice has acknowledged that "it is

130. SHICHOR, *supra* note 66, at 79.

131. *See* 42 U.S.C. § 1983 (1994). Section 1983 provides in part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

132. In 1989 alone, prisoners filed 18,389 civil rights suits in the federal courts. *See* Joel, *supra* note 9, at 69.

133. *See* Brett R. Carter, Comment, *Civil Rights*—Richardson v. McKnight*: The Rise and Fall of Private Prison Guards' Qualified Immunity*, 28 U. MEM. L. REV. 611, 627-28 (1998) (explaining that the court in *Manis v. Corrections Corp. of America*, 859 F. Supp. 302 (M.D. Tenn. 1994), was concerned private prisons would skimp on civil rights in an attempt to maximize profits); Ahlstrom, *supra* note 65, at 401-03 (discussing the Sixth Circuit's concerns that private prison operators would not protect prisoners' civil rights).

134. Harold J. Sullivan, *Privatization of Corrections: A Threat to Prisoners' Rights*, *in* PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* note 7, at 141.

fair to say that 'our cases deciding when private action might be deemed that of the state have not been a model of consistency,' "[135] and that in the private prison context the Court has recognized the possibility that § 1983 is not applicable.[136]

Persons who act "under color of any statute, ordinance, regulation, custom, or usage" of any state may be held liable for a civil rights violation under § 1983.[137] Although the state may contract with private parties, according to Professor Charles W. Thomas, a private action does not constitute a state action as required by § 1983.[138] However, the Court in *Adickes v. S.H. Kress & Co.*[139] determined that private parties as well as state officials can " 'act under color of law.' "[140] A study of § 1983 cases involving private contractors reveals that courts have consistently required "some type or degree of linkage between private conduct and the state itself";[141] nevertheless, state funding or regulation of private agencies is insufficient by itself to establish state action under § 1983.[142]

In *Gomez v. Toledo*,[143] the Supreme Court described the elements of a § 1983 claim, explaining that a plaintiff must allege that a person acting under color of state law deprived him of a federal right.[144] In determining whether conduct was performed under color of state law, the Supreme Court has recognized three tests: (1) the public functions test; (2) the close nexus test; and (3) the state compulsion test.[145] The following paragraphs will discuss these tests

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135. Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 378 (1995) (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 633 (1991) (O'Connor, J., dissenting)).

136. *See* Richardson v. McKnight, 117 S. Ct. 2100, 2107 (1997) (observing that the Court has not addressed "whether the defendants are liable under § 1983 even though they are employed by a private firm"); *see infra* notes 343-59 and accompanying text (discussing issues left open by the Court in *McKnight*).

137. 42 U.S.C. § 1983 (1994).

138. *See* Charles W. Thomas, *Resolving the Problem of Qualified Immunity for Private Defendants in Section 1983 and* Bivens *Damage Suits*, 53 LA. L. REV. 449, 451-52 (1992).

139. 398 U.S. 144 (1970).

140. *Id.* at 152 (quoting United States v. Price, 383 U.S. 787, 794 (1966)).

141. Thomas, *supra* note 138, at 472.

142. *See* Sullivan, *supra* note 134, at 141 ("Generally, only those specific private actions that are directly 'ordered' or 'initiated' by the state or in which state officials have directly participated are subject to constitutional restraint.") (citing Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Iris, 407 U.S. 163 (1972)).

143. 446 U.S. 635 (1980).

144. *See id.* at 640 ("First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of any state or territorial law.").

145. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982) (recognizing the Court's use of the public function test, the close nexus test, and the state compulsion test).

and their applicability to private prisons.

1. The Public Function Test

The public function test is arguably the most common-sense approach to determining whether private action constitutes state action because it provides that a party contracted to act for the state is subject to the same legal constraints as the state.[146] The public function test focuses on the type of function being performed. Applying the public function test, the Supreme Court in *Rendell-Baker v. Kohn*[147] explained that a private entity acts under color of state law when it performs a function that "has been 'traditionally the *exclusive* prerogative of the State.' "[148] To resolve whether a private actor meets the public function test, the principal role of the actor must be reviewed to determine whether he is performing a public function. If the private party's conduct is identified as a public function, then for constitutional purposes, the private party is a state actor in the eyes of the court.[149]

A district court in Florida recently applied this analysis in *Blumel v. Mylander*,[150] stating that "when a government entity delegates one of its traditional 'public functions' to a private entity, the private entity may be held liable under the Constitution with respect to its performance of that function."[151] In *Medina v.*

The circuit courts have also recognized these tests. *See, e.g.*, George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1230 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 746 (1997) (noting the several tests used by courts); Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992) (recognizing the Court's use of the public function test, the close nexus test, and the state compulsion test); Howerton v. Gabica, 708 F.2d 380, 382-83 (1983) (discussing several tests used by the court to identify state action).

146. *See* Matthew M. Farley, Comment, *Crashing the Party—The Supreme Court Subjects Political Parties to Preclearance Under Section 5 of the Voting Rights Act of 1965 in* Morse v. Republican Party of Virginia, 31 U. RICH. L. REV. 191, 247 (1997) (explaining the public function test); Paul Ryneski, *Civil Rights*, 1996 DET. C.L. REV. 239, 254 (1996) (same); William H. ReMine, *Civil Suits for Civil Rights: A Primer on § 1983*, 26 COLO. LAW., Nov. 1997, at 5, 6 (same).

147. 457 U.S. 830 (1982).

148. *Id.* at 842 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)). The Supreme Court in *Evans v. Newton*, 382 U.S. 296 (1966), further explained the public function doctrine's application to § 1983 liability, noting that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Id.* at 299.

149. *See* Susan L. Kay, *The Implications of Prison Privatization on the Conduct of Prisoner Litigation Under 42 U.S.C. Section 1983*, 40 VAND. L. REV. 867, 880 (1987).

150. 919 F. Supp. 423 (M.D. Fla. 1996).

151. *Id.* at 426-27.

O'Neill,[152] a Texas district court used the same analysis and held that an untrained guard at a privately operated Immigration and Naturalization Service facility acted under "color of law" when he accidentally shot two inmates.[153] The court stated that private conduct is considered state action when a private contractor is exercising authority " ' "traditionally exclusively reserved to the State." ' "[154]

Although the operation of incarceration facilities has historically been performed by both private and public parties,[155] the responsibility of incarcerating convicts falls squarely on the shoulders of the government.[156] Therefore, under the public function analysis, prison management is a public function which, even when operated by a private party, constitutes state action.[157] As a result, under the public function test, it is likely that a private corporation operating a prison will be held responsible for maintaining prisoners' constitutional rights under § 1983. The Sixth Circuit reached this conclusion in *Skelton v. Pri-Cor, Inc.*,[158] holding that a private prison corporation's conduct under state contract was under color of law for the purposes of § 1983.[159] Because corrections and incarceration have traditionally been a responsibility of the state, the public functions doctrine has been recognized as "the most persuasive means of finding that conduct of a private corrections firm constitutes state action."[160]

2. The Close Nexus Test

Similar to the public functions test, the close nexus test requires

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152. 589 F. Supp. 1028 (S.D. Tex. 1984).

153. *See id.* at 1038.

154. *Id.* (quoting Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157 (1978) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974))).

155. *See supra* notes 32-66 and accompanying text.

156. *See* SHICHOR, *supra* note 66, at 87; J. Robert Lilly & Richard A. Ball, Special Comment, *Selling Justice: Will Electronic Monitoring Last?*, 20 N. KY. L. REV. 505, 518 (1993) (explaining that all 50 states as well as the District of Columbia and the federal government have some incarceration responsibility); Douglas W. Dunham, Note, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475, 1482-83 (noting that when the government incarcerates a person, it becomes responsible for his well-being).

157. *Cf.* Incata v. Prison Health Services, Inc., 769 F.2d 700, 703 (11th Cir. 1985) (explaining that although prison health services was a private entity, state action was present because the care of pre-trial detainees is traditionally the exclusive prerogative of the state).

158. 963 F.2d 100 (6th Cir. 1991).

159. *See id.* at 102.

160. Charles W. Thomas & Linda S. Calvert Hanson, *The Implications of 42 U.S.C. § 1983 for the Privatization of Prisons*, 16 FLA. ST. U. L. REV. 933, 943 (1989).

a close relationship between the conduct performed by the private party and the state itself in order for that conduct to constitute state action. For example, in *Jackson v. Metropolitan Edison Co.*,[161] the Supreme Court considered "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[162] The close nexus test was used by the Tenth Circuit in *Milonas v. Williams*[163] to determine whether a school using a behavior-modification program acted under color of state law because "the state ha[d] so insinuated itself with the [school] as to be considered a joint participant in the offending actions."[164] Four facts were significant for the court in finding a close nexus: (1) the involuntary nature of placement in the program by juvenile courts; (2) the detailed contracts between the school administration and local school districts; (3) the funding of tuition by the state; and (4) the significant regulation of the school program by the state.[165]

Using the factors in *Milonas*, operators of private prisons are likely to be subject to § 1983 liability under the close nexus test. Although the *Milonas* case is not directly on point, the factors the court considered may be applied by analogy to the private prison context. Similar to the school in *Milonas*, placement in private incarceration facilities is involuntary, and the private prisons receive their funding from the state. In addition, private prisons are operated under detailed contracts with the state and typically are subject to extensive state regulation.[166] As a result, a sufficiently close nexus exists between privately operated prisons and the state to subject private operators to § 1983 liability.

3. The State Compulsion Test

The state compulsion test requires a relationship between the conduct of a private party and the state in order to invoke § 1983 liability. Although not used as commonly as the other tests, the state compulsion test was recognized by the Supreme Court in *Lugar v.*

161. 419 U.S. 345 (1974).
162. *Id.* at 351.
163. 691 F.2d 931 (10th Cir. 1982).
164. *Id.* at 940.
165. *See id*; *see also* Woodall v. Partilla, 581 F. Supp. 1066, 1076 (N.D. Ill. 1984) (using the close nexus test to determine that a private food corporation acted under color of law); Kentucky Ass'n for Retarded Citizens v. Conn, 510 F. Supp. 1233, 1250 (W.D. Ky. 1980) (finding sufficient close nexus between private residential-treatment center and state), *aff'd*, 674 F.2d 582 (6th Cir. 1982).
166. *See* Robbins, *supra* note 12, at 821.

Edmundson Oil Co.[167] This test "requires that a state exercise such coercive power or provide such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state."[168]

In addition to the Supreme Court, several lower courts have recognized and applied the state compulsion test to determine whether private conduct constitutes state action.[169] In *Lombard v. Eunice Kennedy Shriver Center*,[170] a district court faced the question of whether the Shriver Center, a privately-operated facility that contracted to provide medical services to a school's residents, was liable for a § 1983 claim.[171] The *Lombard* court explained the state compulsion test's "general principle that private entities act under color of law only if their actions are compelled by rules of decisions imposed by the state."[172] The test as used in *Lombard* seems particularly relevant in the private prison context since the *Lombard* court found the critical factor to be "the duty of the state to provide adequate medical services to those whose personal freedom is restricted because they reside in state institutions."[173] Involuntary confinement in school is analogous to involuntary detainment faced by inmates in private prisons. The court in *Lombard* was concerned that if the private facility was not held responsible for violations of constitutional rights, "the state could avoid its constitutional obligations simply by delegating governmental functions to private entities."[174] Similarly, the State is compelled to operate prisons in order to house inmates. The same concerns regarding the state's ability to delegate government functions and constitutional

167. 457 U.S. 922, 939 (1982). The Supreme Court in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), used a similar analysis to hold that a private party acting jointly with the state or a state agent can be liable for violating the guaranteed protection of constitutional rights under § 1983. *See id.* at 152. The *Adickes* Court held that " '[t]o act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.' " *Id.* (quoting United States v. Price, 383 U.S. 787, 794 (1966)).

168. Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992).

169. *See* George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1231 (9th Cir. 1996); *Wolotsky*, 960 F.2d at 1335 (recognizing the applicability of the state compulsion test).

170. 556 F. Supp. 677 (D. Mass. 1983).

171. *See id.* at 677-78.

172. *Id.* at 680. The *Lombard* opinion then discussed other possible reasons for private action to be considered "state action," holding that "because Shriver voluntarily assumed that obligation [of mandated State medical care] by contract, Shriver must be considered to have acted under color of law, and its acts and omissions must be considered actions of the state." *Id.*

173. *Id.* at 678.

174. *Id.* at 680.

responsibilities exist in the private prison context. Therefore, operators of private prison facilities are likely to be actors under color of law. Consequently, private prison operators should be responsible for the same constitutional obligations to protect prisoners' rights that the state would be in managing a government-operated prison.

4. Section 1983 Likely is Applicable

In order to make the private prison experiment successful and to ease opponents' fears, "[p]risoners confined in private facilities will have to retain the same legal rights as inmates have in public facilities."[175] While the Supreme Court has not directly addressed whether private prison corporations act under color of law in managing prison facilities, it seems likely, given the tests used to establish "state action," that the constitutional rights of prisoners in private prisons will be protected by § 1983. The fact that private prisons are not publicly operated does little to render the civil rights statute inapplicable as long as the employees are found to be operating under color of state law. Although a private contractor is not equivalent to a state official, in performing the state function of incarceration, a private contractor likely acts under color of state law.

No matter which test a court uses to determine state action, application of all three tests leads to the same conclusion: Private prison operators act under color of state law and should be responsible for protecting prisoners' constitutional rights.[176]

C. *Applicability of Qualified Immunity to Private Prison Employees*

Once the requirement of state action is met and a constitutional violation has occurred, the next question is whether qualified immunity exists. Originally, the concept of immunity stemmed from

175. SHICHOR, *supra* note 66, at 108. The district court in *Plain v. Flicker*, 645 F. Supp. 898 (D.N.J. 1986), hypothesized that "if a state contracted with a private corporation to run its prisons [the state] would no doubt subject the private prison employees to § 1983 suits under the public function doctrine." *Id.* at 907.

176. *See* SHICHOR, *supra* note 66, at 87. Shichor concluded that:

> (a) the state delegates to the private operators of prisons a power that was traditionally (at least in the 20th century) in the exclusive domain of state authorities; (b) based on several court decisions, there can be a close nexus established between the actions of a private party operating a prison and the state; and (c) court decisions also indicate that the state does have an obligation to provide certain specific services, (including incarceration of offenders), and, if a private entity under contract with the state provides these services, then the state is responsible for them.

Id. (citing Robbins, *supra* note 21, at 593).

the premise that " 'the king can do no wrong,' "[177] and, therefore, was only applicable to government officials; however, due to policy and efficiency concerns, the application of immunity has been gradually extended.[178] In its text, 42 U.S.C. § 1983 "creates a species of tort liability that on its face admits of no immunities."[179] Even though immunity is not explicitly allowed by § 1983, courts have recognized qualified immunity under certain circumstances.[180] The following section reviews some of the methods the courts have applied to determine whether to grant immunity, specifically discussing the courts' use of tradition, function, and policy and fairness concerns.[181] This section then discusses the Supreme Court's first decision related to the extension of immunity to a private party in *Wyatt v. Cole*,[182] followed by a discussion of how the circuit courts have inconsistently dealt with immunity in the private prison context.[183] Next, this section analyzes the Supreme Court's 5-4 decision in *Richardson v. McKnight*,[184] which held that immunity should not be granted to private prison employees.[185] Questions left open by the majority opinion are also reviewed. It is proposed that immunity should be extended to private prison employees, as doing so is in the public's interest.[186] Alternatively, a good-faith defense limiting private prison guard liability is suggested.[187]

1. Methods of Determining Applicability of Immunity

The following section reviews several of the factors, approaches,

177. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131 (5th ed. 1984). However, it has also been asserted that this maxim "actually meant that the King was not privileged" to commit any wrongful acts. Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 2 n.2 (1924).

178. *See* Schaffer, *supra* note 59, at 1063-68 (explaining policy reasons for the extension of immunity).

179. Imbler v. Pachtman, 424 U.S. 409, 417 (1976). The Supreme Court in *Owen v. City of Independence*, 445 U.S. 622 (1980), further explained that the language of § 1983 is "absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." *Owen*, 445 U.S. at 635.

180. *See* Thomas, *supra* note 138, at 462. Professor Thomas notes that a strong argument against qualified immunity can also be made, however. *See id.* at 462-63.

181. *See infra* notes 188-229 and accompanying text.

182. 504 U.S. 158 (1992). For the discussion of this case, see *infra* notes 230-49 and accompanying text.

183. *See infra* notes 250-74 and accompanying text.

184. 117 S. Ct. 2100 (1997).

185. *See infra* notes 275-312 and accompanying text (discussing the majority's opinion).

186. *See infra* notes 338-42 and accompanying text.

187. *See infra* notes 348-59 and accompanying text.

and tests that courts have employed in granting or rejecting immunity.

a. Tradition as a Basis for Extending Immunity

Some courts have used tradition as a guide in extending immunity to private parties. While § 1983 does not expressly provide immunity to constitutional violations, the Supreme Court in *Procunier v. Navarette*[188] and *Harlow v. Fitzgerald*[189] noted that the absence of the immunity doctrine from the statute does not preclude immunity's existence.[190] In *Owen v. City of Independence*,[191] the Court rejected the extension of immunity to a municipal corporation due to the lack of traditional extension of immunity under similar circumstances.[192] In doing so, the Court held that the extension of § 1983 immunity could only occur when the "tradition of immunity was so fairly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' "[193] Thus, the *Owen* Court relied on the absence of any common law tradition of extending immunity to corporate municipalities.[194] It is important to note, however, that tradition has typically been simply a factor to be considered in the extension of immunity, with function and public policy playing important roles in the final decision of whether to

188. 434 U.S. 555 (1978).

189. 457 U.S. 800 (1982).

190. *See Procunier*, 434 U.S. at 561; *Harlow*, 457 U.S. at 806-08; *supra* notes 210-14, 216 and accompanying text (discussing *Harlow*).

191. 445 U.S. 622 (1980).

192. *See id.* at 638. In *Owen*, the corporate municipality, through its employees, released false statements related to the police chief's character, resulting in his discharge. *See id.* at 625-29. The police chief successfully argued at the district court level that this action violated his Fourteenth Amendment right to due process and § 1983. *See id.* at 630. The municipality claimed immunity from such suits, but the Supreme Court rejected this assertion. *See id.* at 632-38.

193. *Id.* at 637 (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967)).

194. *See id.* In *Pierson*, the Supreme Court held that absolute immunity traditionally provided to judges was not precluded by the enactment of § 1983, noting that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Pierson*, 386 U.S. at 553-554. After tracing legislative privilege back to 16th century English common law, the Court in *Tenney v. Brandhove*, 341 U.S. 367 (1951), confirmed that § 1983 did not eliminate legislative immunity and concluded that Congress "would [not] impinge on a tradition so well grounded in history and reason by covert inclusion in the general language" of § 1983. *Id.* at 376. In addition, the Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976), determined that immunities to § 1983 are "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Id.* at 421.

grant or deny immunity.

Although history and tradition are considerations for the Court in determining the applicability of immunity, they should be of minimal relevance in the private prison context because private parties historically could not be held in violation of an individual's civil rights since they were not considered state actors. Courts, however, have since liberally expanded constitutional responsibility to private individuals.[195] Expanding the scope of civil remedies while continuing to use analyses based on history "places private defendants in an impossible position."[196] In the interest of equity, immunity should be expanded in accord with the extension of liability that has been placed on private parties conducting "state action."[197]

b. The Functional Approach

A review of the traditional common law tests for the extension of immunity reveals that courts often use a functional test when considering whether to grant immunity.[198] The Supreme Court has explained the functional approach as one in which it examines "the nature of the functions with which a particular official or class of officials has been lawfully entrusted and . . . evaluate[s] the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions."[199] Commentators and courts have both supported this approach for determining when parties should be allowed an immunity exception to § 1983 liability.[200]

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195. *See* Gomez v. Toledo, 446 U.S. 635, 640 (1980); *supra* note 144 and accompanying text (explaining that private parties cannot be held in violation of an individual's civil rights unless they act under color of state law); *see also* Thomas, *supra* note 138, at 487 (explaining that in the post-*Monroe* era, judicial decisions expanded the group of § 1983 plaintiffs to include private parties). Alternately, if tradition is relevant to the extension of immunity in the private prison context, Justice Scalia suggests that a functional approach traditionally is used to determine whether immunity should be granted; therefore, private prison guards should be granted the same immunity as their public counterparts. *See* Richardson v. McKnight, 117 S. Ct. 2100, 2108-09 (1997) (Scalia, J., dissenting).

196. Thomas, *supra* note 138, at 487.

197. "[C]onsiderations of simple fairness and equity recommend immunity when the alleged deprivations involve a constitutional right that was not clearly recognized at the time of the alleged misconduct." *Id.* at 492.

198. *See, e.g.*, Forrester v. White, 484 U.S. 219, 224 (1988) ("Running through our cases, with fair consistency, is a 'functional' approach to immunity questions.").

199. *Id.*

200. Commentators have argued that the availability of immunity should be based on a functional approach rather than a historical or exclusively governmental approach. *See* Thomas, *supra* note 138, at 459 (noting "the availability of either absolute or qualified immunity from damage suits flows in large measure from the function of the officials whose acts are said to have been the causes of injuries rather than from the positions they

In recognizing government immunity in *Scheuer v. Rhodes*,[201] the Supreme Court applied a functional analysis.[202] The Court explained that the purpose of the immunity was to protect persons who are "required, by the legal obligations of [their] position[s], to exercise discretion" from being subjected to liability and to avoid the threat that such liability would "deter [their] willingness to execute [their] office with the decisiveness and the judgment required by the public good."[203] Simply put, the Court recognized that immunity flows from the undesirability of placing those charged with execution of government policies in the untenable position of being required to exercise discretion while at the same time exposing themselves to personal liability for discretionary acts they reasonably believe are lawful.[204] As a result, the Court extended immunity so that the risk of liability would not deter people from serving the public interest.[205] The Court in *Cleavinger v. Saxner*[206] repeated this sentiment, holding that "immunity flows not from rank or title or 'location within the government,' but from the nature of the responsibilities of the individual official."[207] In *Forrester v. White*,[208] the Court went even further in establishing the functional approach to qualified immunity, stating that "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches."[209]

The application of the functional approach to private prison employees should require an extension of immunity. Private prison employees serve the same function as public prison employees. As a result, private prison employees are required to exercise the same

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hold."); Schaffer, *supra* note 59, at 1056-58 (discussing the functional approach to application of immunity); Ahlstrom, *supra* note 65, at 385-86 (arguing that a functional approach to granting immunity should be taken by courts). The Supreme Court also has used this analysis. *See* Burns v. Reed, 500 U.S. 478, 484 (1991); Anderson v. Creighton, 483 U.S. 635, 644-46 (1987); Scheuer v. Rhodes, 416 U.S. 232, 243 (1983). In *Warner v. Grand County*, 57 F.3d 962 (10th Cir. 1995), the Tenth Circuit applied the functional approach to private individuals, holding that "a private individual who performs a government function pursuant to a state order or request is entitled to qualified immunity if a state official would have been entitled to such immunity." *Id.* at 967.

201. 416 U.S. 232 (1974).

202. *See id.* at 243.

203. *Id.* at 240.

204. *See id.* at 239-42; *see also Anderson*, 483 U.S. at 638 (extending government immunity to officials required to perform discretionary functions); Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (same).

205. *See Harlow*, 457 U.S. at 814.

206. 474 U.S. 193 (1985).

207. *Id.* at 201 (quoting Butz v. Economou, 438 U.S. 478, 511 (1978)).

208. 484 U.S. 219 (1988).

209. *Id.* at 226.

discretion as their public prison counterparts in an attempt to comply with legal requirements, performance standards, and public interest. Therefore, the same immunity that is granted to government employees at public prisons should be extended to private employees under the functional approach.

c. Policy and Fairness Considerations

In addition to tradition and function, the courts also consider policy concerns related to the extension of immunity. In *Harlow v. Fitzgerald*,[210] the Supreme Court took policy concerns into consideration in granting a presidential aide qualified immunity.[211] Specifically, the *Harlow* Court feared that liability would deter independent decisionmaking by government officials.[212] In addition, the Court found it to be in the public's best interest to reduce the cost of defending § 1983 immunity claims[213] by using immunity to quickly eliminate insubstantial claims.[214]

In *Folsom Investment Co. v. Moore*,[215] the Fifth Circuit followed a similar analysis in determining that a party acting under color of state law was entitled to immunity from liability under § 1983.[216] Kenneth Scullin filed a § 1983 claim against Max Moore, Julian Holiday, and Tom Burns, who had relied on an attachment statute which allowed them to execute a judgment against Scullin's property.[217] In response to Scullin's § 1983 claim and his argument that the attachment statute was unconstitutional, the district court granted summary judgment for the defendants because these issues had already been litigated.[218] However, the Fifth Circuit reversed and proceeded to consider Scullin's § 1983 claim.[219] After determining that persons relying on state attachment statutes to execute a judgment against a defendant's property were acting under color of state law, the court weighed policy and fairness concerns and

210. 457 U.S. 800 (1982).

211. *See id.* at 813-14; *supra* notes 210-14 (discussing *Harlow*).

212. *See Harlow*, 457 U.S. at 814.

213. *See id.* The costs, both individual and societal, include "the expense of litigation; the diversion of official energy from pressing public issues; the deterrence of able citizens from acceptance of public office; [and the chilling effect on] the discharge of official duties." *Id.*; *see* 2 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF § 1983, § 8:5, at 8-16 (4th ed. 1997).

214. *See Harlow*, 457 U.S. at 814.

215. 681 F.2d 1032 (5th Cir. 1982).

216. *See id.* at 1037 (relying on *Harlow*, 457 U.S. 800).

217. *See id.* at 1034.

218. *See id.* at 1034-35.

219. *See id.* at 1036.

decided the defendants had qualified immunity from the § 1983 claim.[220]

Many of the same policy and fairness concerns that support granting immunity to employees in the public sector also support an extension of immunity to private prison employees. For example, prisoners have a great incentive to file numerous claims against the state. Judge Reavley has pointed out that "[u]nlike most litigants, prisoners have everything to gain and nothing to lose by filing frivolous suits" because the financial as well as the opportunity costs of filing a suit in forma pauperis are minimal to a prisoner, and sanctions for malicious or frivolous claims or perjury have little if any deterrent effect on prisoners already serving time.[221] Judge Reavley's argument is supported by the extraordinary number of claims filed by prisoners each year. In 1993, 53,451 prisoner suits were filed in the United States.[222] Of course, not all claims filed by prisoners are frivolous; however, one commentator has estimated that frivolous law suits filed by prisoners cost society $200 million annually.[223]

These statistics, as well as court decisions considering policy concerns, indicate the relevance of fairness as a consideration for the extension of immunity.[224] Logic and fairness support granting immunity to private prison officials in the same manner it is extended to public prison officials.[225] Extending identical immunities to private-prison operators would create a "flat playing field" on which publicly and privately-managed prison facilities can compete.[226] With the extraordinary number of prisoner lawsuits and the corresponding costs,[227] it would be an unfair cost advantage to provide the public sector with a qualified immunity not available to its private counterparts.[228] As the following section indicates, however, the

220. *See id.*

221. Green v. McKaskle, 788 F.2d 1116, 1119-20 (5th Cir. 1986).

222. *See* Robert G. Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 ST. LOUIS U. PUB. L. REV. 21, 23 tbl.1 (1994).

223. *See* Ahlstrom, *supra* note 65, at 419. This student commentator arrived at this figure by extrapolating from a $100 million estimate made by another scholar in 1986. *See id.* (citing Roger A. Hanson, *What Should Be Done When Prisoners Want to Take the State to Court?*, 70 JUDICATURE 223, 225 (1987)). Ahlstrom figured that since the state and federal prison populations have doubled since 1986, then the annual cost of law suits has also doubled. *See id.* at 419 & n.170.

224. The Supreme Court in *Harlow* recognized fairness and policy concerns. *See supra* notes 212-13 (discussing policy concerns considered by *Harlow* Court).

225. Thomas, *supra* note 138, at 452.

226. *Id.* at 454.

227. *See supra* notes 221-23 and accompanying text (discussing the costs of frivolous litigation).

228. *See* Thomas, *supra* note 138, at 454.

Supreme Court has limited the importance of fairness, determining that fairness cannot be the only or even the primary supporting rationale for granting immunity.[229]

2. The Rejection of Private Party Immunity in *Wyatt v. Cole*

In 1992, in *Wyatt v. Cole*,[230] the Supreme Court addressed the issue of whether private parties could enjoy the benefits of qualified immunity from § 1983.[231] The parties in *Wyatt* were two ranchers who had formed a partnership.[232] Bill Cole, one of the ranchers, wished to dissolve his partnership with Howard Wyatt.[233] Unable to reach an agreement with Wyatt, Cole filed a complaint in replevin against Wyatt in accordance with a Mississippi statute.[234] By court order, Cole seized twenty-four head of cattle, a tractor, and other property from Wyatt.[235] After a post-seizure hearing dismissing Cole's complaint, Cole refused to return the property to Wyatt, at which time Wyatt brought suit challenging the constitutionality of the Mississippi replevin statute and claiming damages under § 1983 for a violation of his constitutional right to due process.[236] The district court concluded that the statute's failure to afford judges discretion in denying writs of replevin violated due process and was therefore unconstitutional; however, the court determined that Cole was entitled to qualified immunity.[237] The district court only granted partial summary judgment for Wyatt by declaring the statute unconstitutional.[238] The judge ordered Wyatt to submit a motion detailing his claim and the amount of damages he was seeking.[239] In response to this motion, the judge dismissed the claims against the county and other defendants.[240] The Fifth Circuit affirmed the holding that Cole had immunity from the § 1983 claim.[241]

The Supreme Court, though, came to the opposite conclusion.[242]

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229. *See* Wyatt v. Cole, 504 U.S. 158 (1992).
230. 504 U.S. 158 (1992).
231. *See id.* at 159.
232. *See id.*
233. *See id.*
234. *See id.* at 159-60.
235. *See id.* at 160.
236. *See id.*
237. *See* Wyatt v. Cole, 710 F. Supp. 180, 182-83 (S.D. Miss. 1989), *aff'd in part, rev'd and remanded in part*, 928 F.2d 718 (5th Cir. 1991), *rev'd*, 504 U.S. 158 (1992).
238. *See id.* at 183.
239. *See id.*
240. *See* Wyatt v. Cole, 928 F.2d 718, 720 (5th Cir. 1991), *rev'd*, 504 U.S. 158 (1992).
241. *See id.* at 721-22.
242. *See* Wyatt v. Cole, 504 U.S. 158, 168 (1992).

The Court recognized an inconsistency among the circuit courts regarding granting immunity to private parties,[243] and determined that a qualified immunity should only be granted if the immunity was so well recognized that the statute would have specifically precluded the immunity if it intended to eliminate it.[244] To determine if such an immunity existed at common law prior to the enactment of § 1983, the *Wyatt* Court looked to the torts it found to be most analogous: malicious prosecution and abuse of process.[245] Within this class of cases, the Court did not find substantial support for a traditionally provided immunity to private parties.[246] As a result the Court concluded that "the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify . . . an extension of . . . immunity."[247] The Court then addressed the policy concerns involved in extending immunity and distinguished government officials from private parties performing discretionary functions by explaining that "the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes."[248] The legal issue answered by *Wyatt*, however, was admittedly narrow, dealing exclusively with private parties invoking a state replevin, garnishment, or attachment statute.[249] Therefore, *Wyatt* is conceivably inapplicable to the context of private prison employees acting under color of state law.

3. The Courts' Treatment of Immunity with Private Prisons

Several courts have specifically considered the extension of qualified immunity in private prison settings with mixed results.[250] Of the three district courts that have directly considered whether equivalent immunities should be granted to private prison employees, one court denied immunity[251] and two other courts granted the immunity to private prison employees.[252] In 1997, the Supreme Court addressed the issue of whether private prison

243. *See id.* at 161.

244. *Id.* at 163-64 (quoting Owen v. City of Independence, 445 U.S. 622, 637 (1980) (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967))).

245. *See id* at 164.

246. *See id.* at 165.

247. *Id.* at 168.

248. *Id.*

249. *See id.* at 168-69.

250. *See* Citrano v. Allen Correctional Ctr., 891 F. Supp. 312 (W.D. La. 1995); Manis v. Corrections Corp. of Am., 859 F. Supp. 302 (M.D. Tenn. 1994); Tinnen v. Corrections Corp. of Am., No. 91-2188-TUA, 1993 WL 738121 (W.D. Tenn., Sept. 20, 1993).

251. *See Manis*, 859 F. Supp. at 303.

252. *See Citrano*, 891 F.Supp. at 320; *Tinnen*, 1993 WL 738121, at *4.

employees should be granted immunity in *Richardson v. McKnight*.[253] The following section explains the district court decisions[254] and reviews the Supreme Court's 5-4 decision in *McKnight*. Finally, the section concludes by explaining that a decision recognizing immunity for private prison employees would be more effective in encouraging private prison experimentation and that such a decision would still meet the policy concerns of *McKnight*.[255]

a. Treatment of Private Prison Immunity Issues by Lower Courts

Manis v. Corrections Corporation of America[256] provides one example of how federal district courts have resolved the immunity question. In *Manis*, the district court ignored the functional approach commonly used in questions of immunity[257] and held that private prison employees are not subject to the same immunity as employees in government-operated prisons.[258] The court based its decision on both the lack of historical support for immunity of private prison officials as well as policy concerns related to providing such immunity in a profit-motivated setting.[259] The court feared that private prisons would neglect prisoners' rights in pursuit of increased profits,[260] and expressed concern that " 'a private party is governed only by self-interest and is not invested with the responsibility of executing the duties of a public official in the public interest.' "[261]

Citrano v. Allen Correctional Center[262] directly rebutted many of the concerns of the *Manis* court and arrived at a different conclusion

253. 117 S. Ct. 2100 (1997).

254. *See infra* notes 256-74 and accompanying text.

255. *See infra* notes 338-42 and accompanying text.

256. 859 F. Supp. 302 (M.D. Tenn. 1994).

257. *See supra* notes 198-209 and accompanying text (discussing the Court's use of a functionality test for applying immunity).

258. *See Manis*, 859 F. Supp. at 303.

259. *See id.* at 304 (relying on *Duncan v. Peck*, 844 F.2d 1261, 1264 (6th Cir. 1988)).

260. *See id.* at 305-06. The court concluded that "corporate employees always are compelled to make decisions that will benefit their shareholders, without any direct consideration for the best interest of the public." *Id.* at 305. One commentator explained, "[E]mployees of a private prison corporation are responsible to produce profit for their company and owe their direct responsibility to the management of the company. They do not have to answer to the public at large as do state employees . . . ." SHICHOR, *supra* note 66, at 97; *see also* Kay, *supra* note 149, at 887 ("A defense of qualified immunity, if awarded to . . . private employees, might encourage them to cut corners to maximize profits.").

261. *Manis*, 859 F. Supp. at 887 (quoting *Duncan*, 844 F.2d. at 1264).

262. 891 F. Supp. 312 (W.D. La. 1995).

regarding immunity.[263] Using *Procunier v. Navarette*[264] for guidance, the *Citrano* court explained the rationale behind providing state prison officials with qualified immunity and focused on two key components as reasons for extension of immunity: (1) the fact that a private party is performing a government function under contract with the State; and (2) the danger that lack of immunity would deter the private sector from contracting for public jobs.[265] The *Citrano* court took additional guidance from *Scheuer v. Rhodes*,[266] recognizing the consistent use of the "functional approach in determining the proper scope of immunity."[267] As a result, the court concluded that the granting of qualified immunity should be based on the function being performed.[268] The employee's private party status should not be the controlling consideration.[269]

The court also explained that *Wyatt* did not mandate a denial of qualified immunity to all private parties.[270] Rejecting the *Manis* argument that immunity should not be extended to private prisons due to the likelihood that the immunity would be abused in pursuit of profit, the *Citrano* court said public officials are not granted immunity because it is assumed that they are "subjectively motivated by desire to serve public interests."[271] Instead, the rationale is that they can better serve the public interest if they can exercise their public duties without the fear of being sued.[272] Therefore, because private prison employees "are the functional equivalent of state prison employees ... the same rationale[]" applies, and immunity should be extended.[273] A Tennessee district court followed a similar rationale in granting qualified immunity to private prison officials.[274]

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263. *See id.* at 318-20.

264. 434 U.S. 555 (1978).

265. *See Citrano*, 891 F. Supp. at 316.

266. 416 U.S. 232 (1974).

267. *Citrano*, 891 F. Supp. at 316.

268. *Id.* (noting that because the private employees were the equivalent of state prison employees who are provided with immunity, the same rationales for granting immunity exist).

269. *See id.*

270. *See id.* at 317.

271. *Id.* at 319.

272. *See id.*

273. *Id.* at 317. "The mere fact that [private and public prison officials'] contractual ties to the state are different does not provide a logical basis for denying these workers the benefit of qualified immunity." *Id.* In *Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983), the Eighth Circuit used this argument, holding that "it would be anomalous to hold that private individuals are state actors [under] § 1983" but then prohibit them the use of the immunity "because they technically are not state employees." *Id.* at 851.

274. *See* Tinnen v. Corrections Corp. of America, No. 91-2188-TVA, 1993 WL 738121,

b. *Richardson v. McKnight*

Richardson v. McKnight[275] offered the Supreme Court an opportunity to answer some questions that had been inconsistently dealt with by the lower courts.[276] In *McKnight*, the plaintiff, Ronnie Lee McKnight, alleged that two private prison guards had violated his constitutional rights by seriously injuring him with restraints.[277] The defendants, Darryl Richardson and John Walker, claimed they had qualified immunity from § 1983 liability as provided by *Harlow*.[278] The Sixth Circuit held that because the defendants were employed by a private corporation rather than the state, the rationale for granting the qualified immunity in *Harlow* was inapplicable;[279] therefore, the court rejected Richardson and Walker's immunity defense.[280] Recognizing discrepancies in the way similar cases had been handled by other courts, the Sixth Circuit focused on public policy reasons in concluding that privately employed prison guards were not entitled to the immunity provided their governmental counterparts.[281] The Sixth Circuit's concern that "privately employed prison officials would be prone to infringe on prisoners' rights in order to maximize profits" guided the decision.[282]

i. The Supreme Court's Two-Pronged Analysis

In *McKnight*, the Supreme Court granted certiorari and in a 5-4 decision affirmed the circuit court's decision.[283] The Court identified *Wyatt* as the relevant precedent for deciding whether qualified

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at *4 (W.D. Tenn., Sept. 20, 1993).

275. 117 S. Ct. 2100 (1997).

276. *See supra* 250-74 and accompanying text (discussing contradictory decisions in the district courts). Some courts have revealed a willingness to extend immunity to private parties, others indicate that qualified immunity only applies to public officials, and then others draw a less distinguishable line, providing qualified immunity to public officials and a good-faith defense for private persons. *See* Thomas, *supra* note 138, at 452-53. The *McKnight* Court recognized the discrepancy in the ways courts have extended immunities to private parties. *See* McKnight, 117 S. Ct. at 2102 (citing Eagon v. Elk City, 72 F.3d 1480, 1489-90 (10th Cir. 1996)); Williams v. O'Leary, 55 F.3d 320, 323-24 (7th Cir. 1995); Frazier v. Bailey, 957 F.2d 920, 928-29 (1st Cir. 1992)).

277. *See McKnight*, 117 S. Ct. at 2102.

278. *See id*; *supra* notes 210-14 (discussing *Harlow*).

279. *See* McKnight v. Rees, 88 F.3d 417, 423-24 (6th Cir. 1996), *aff'd sub nom.* Richardson v. McKnight, 117 S. Ct. 2100 (1998).

280. *See id.* at 424.

281. *See id.* at 424-25.

282. Ahlstrom, *supra* note 65, at 385.

283. *See McKnight*, 117 S. Ct. at 2102-03. Justice Breyer was joined in the majority opinion by Justices Stevens, O'Connor, Souter, and Ginsburg. *See id.* at 2102.

immunity should be extended to private parties.[284] Reviewing *Wyatt*, the majority recognized § 1983's goal of deterring " '*state* actors from using the badge of their authority to deprive individuals of their federally guaranteed rights.' "[285] The Court then addressed the source of immunity.[286] Although the Supreme Court has a history of granting immunity on a functional basis,[287] the majority instead applied a two-pronged analysis, considering whether immunity had historically been granted under the circumstances of the case and whether policy supported granting such immunity.[288]

In addressing the historical prong of the test, the majority concluded that "[h]istory does *not* reveal a 'firmly rooted' tradition of immunity applicable to privately employed prison guards."[289] Although earlier courts placed minimal weight on the historical prong,[290] the majority emphasized the absence of precedent that granted immunity to private prison employees.[291] The Court noted that prison guards in public prisons historically have been the beneficiaries of some form of qualified immunity arising out of their status as public employees, but that the same benefit traditionally has not been extended to private employees.[292] After a short review of the history of private prisons, the majority noted that even the common law did not extend qualified immunity to private prison officials who mistreated prisoners.[293] Although courts have provided immunity for some private defendants, including doctors, social workers, and private guards performing under the government's order,[294] the majority found "no indication of any more general

284. *See id.* at 2103.

285. *Id.* (quoting Wyatt v. Cole, 504 U.S. 158, 161 (1992)).

286. *See id.*

287. *See supra* notes 198-209 and accompanying text (discussing the Court's use of a functional approach to granting immunity).

288. *See McKnight*, 117 S. Ct. at 2104, 2106. "The Wyatt majority, in deciding whether or not the private defendants enjoyed immunity looked both to history and to 'the special policy concerns involved in suing government officials.' " *Id.* at 2102 (quoting *Wyatt*, 504 U.S. at 167).

289. *Id.* at 2104.

290. *See* Thomas, *supra* note 138, at 487-88.

291. *See McKnight*, 117 S. Ct. at 2104.

292. *See id.*

293. *See id.* The Court cited several cases that awarded prisoners recovery against private companies leasing prison facilities and prison labor, each of which failed to address the possibility of granting immunity to the private employees involved. *See id.* (citing Boswell v. Barnhart, 23 S.E. 414, 415 (Ga. 1895); Dalheim v. Lemon, 45 F. 225, 228-230 (C.C.D. Minn. 1891); Dade Coal Co. v. Haslett, 10 S.E. 435, 435-36 (Ga. 1889)).

294. *See* Warner v. Grand County, 57 F.3d 962, 963 (10th Cir. 1995) (granting immunity to a private citizen and a dispatcher who conducted a strip search under orders from a state employee); Sherman v. Four County Counseling Ctr., 987 F.2d 397, 405 (7th

immunity that might have applied to private individuals working for profit."[295] The majority therefore concluded that the lack of a historical immunity for employees and operators of private prisons militated against granting immunity in the circumstances offered in *McKnight*.[296]

Although the majority in *McKnight* concluded that the extension of immunity failed the historical test, the Court said that it was a closer question as to whether the policy underlying immunity justified granting it to private prison guards.[297] In addressing the policy considerations, the Court declared that the purpose of immunity, as defined by *Wyatt*, is to protect government officials' abilities to perform discretionary functions and to limit the deterrent effect that potential liability may have on public sector job applicants.[298] The Court feared that threats of liability would deter public officials from taking discretionary action.[299] The majority then rejected the defendants' claim that the goals of immunity supported granting private prison guards immunity, basing its decision on three distinct policy factors: market pressure, availability of insurance, and insufficiency of using the potential distraction of litigation to prompt a need for immunity.[300]

First, private officials will not face the same "unwarranted timidity" that public officials face because economic, contract, and statutory motivation encourage private officials to "do both a safer and a more effective job" in order to avoid potential damage and litigation expenses that would reduce profitability.[301] The majority distinguished the incentives available in the private and public sector by stating that public facility employees work under a system responsible to voters, who rarely consider the performance of civil servants, such as prison guards, when they vote.[302] In addition, civil service rules protecting employee job security limit government

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Cir. 1993) (granting immunity to private doctor and hospital that provided medication to a patient pursuant to a court order); Frazier v. Bailey, 957 F.2d 920, 928-29 (1st Cir. 1992) (extending immunity to private social workers under contract with the government who were performing a job traditionally performed by a public employee).

295. *McKnight*, 117 S. Ct. at 2105.

296. *See id.*

297. *See id.*

298. *See id.*

299. *See id.*

300. *See id.* at 2106-07.

301. *Id.* at 2106. Under this analysis, the majority concluded "marketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or 'non-arduous' employee job performance." *Id.* at 2106-07.

302. *See id.* at 2107.

employers' ability to use termination or compensation as incentives.[303] The majority therefore concluded that immunity is unnecessary in the context of private prison employees because profit incentives alone provide a great motivation for employees to perform their jobs vigorously and use the required discretion.[304]

Second, the Court determined that the availability of insurance, which is often required by statute, refuted the argument for immunity.[305] The majority reasoned that the availability and use of insurance makes it more likely that a private party will be indemnified, limiting the deterrent effect of potential liability to job applicants.[306] In addition, privately-operated facilities may "offset any increased employee liability risk with higher pay or extra benefits" and eliminate the "employment-discouraging fear of unwarranted liability potential applicants face" when accepting a public sector job.[307]

The final argument rejected by the majority was that litigation may distract the private contractor from fulfilling its obligations.[308] The majority determined that this concern alone was insufficient grounds for granting immunity primarily because qualified immunity precedent did not "contemplate" that all "lawsuit-based distractions" would be eliminated.[309] The majority also noted that the state reserved certain discretionary decisions for state officials, such as "those related to prison discipline, to parole, and to good time," thereby taking away some of the discretion that would submit them to the threat of litigation.[310] Since the private prison's tasks were not that different from other public tasks performed by private companies, the Court decided that the threat of litigation was not a sufficient justification for extending immunity to prison employees.[311] Thus, the Court affirmed the Sixth Circuit decision.[312]

ii. The McKnight *Dissent*

Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, dissented, reasoning that the same rationales

303. *See id.*
304. *See id* at 2106-07.
305. *See id.* at 2107.
306. *See id.* at 2106.
307. *Id.*
308. *See id.*
309. *Id.*
310. *Id.*
311. *See id.*
312. *See id.* at 2108.

that support providing government officials with immunity from § 1983 also support granting immunity to private employees performing government functions.[313] Although Justice Scalia agreed with the use of a historical analysis in determining whether immunity was abolished by the enactment of § 1983, he criticized the majority's conclusion for its reliance on the absence of a case providing immunity rather than on an express rejection of qualified immunity for private prison employees.[314] Justice Scalia pointed out that "it is irrational, and productive of harmful policy consequences, to rely upon lack of case support to create an artificial limitation upon the scope of a doctrine (prison guard immunity) that was itself not based on case-support."[315] Citing *Williams v. Adams*,[316] decided before the enactment of § 1983, Justice Scalia concluded that more case law supports granting immunity in the private prison context than for public prison officials.[317]

Justice Scalia's historical analysis focused on the two principles that courts have traditionally relied upon in granting immunity: (1) "Immunity is determined by function, not status, and (2) ... private status is not disqualifying."[318] Applying this functional approach, the dissent contended that the incarceration of inmates was a government function that merited qualified immunity.[319] In support of this conclusion, Justice Scalia offered the fact that private individuals regularly have been granted immunity in performance of traditional government functions.[320] In this case, the defendants perform a traditional government function deserving of qualified immunity; therefore, the same immunity granted to public prison employees should be extended to private guards.[321]

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313. *See id.* at 2108-09 (Scalia, J., dissenting).

314. *See id.* at 2109 (Scalia, J., dissenting). Pointing out the flaw in the majority's reliance on the absence of direct common law support of immunity for private prison employees, Justice Scalia noted that "[t]he [majority] observes that private jailers existed in the 19th century, and that they were successfully sued by prisoners. But one could just as easily show that government-employed jailers were successfully sued at common law, often with no mention of possible immunity." *Id.* (Scalia, J., dissenting) (citation omitted).

315. *Id.* (Scalia, J., dissenting).

316. 85 Mass. (3 Allen 16) 171 (1861).

317. *See McKnight*, 117 S. Ct. at 2109 (Scalia, J., dissenting).

318. *See id.* (Scalia, J., dissenting).

319. *See id.* at 2110 (Scalia, J., dissenting).

320. *See id.* (Scalia, J., dissenting). The courts have provided immunity for individuals acting in grand juries and as witnesses regardless of whether they were government employees. *See id.* (Scalia, J., dissenting) (citing Briscoe v. LaHue, 460 U.S. 325, 335 (1983); Imbler v. Pachtman, 424 U.S. 409 (1976)).

321. *See id.* (Scalia, J., dissenting).

Justice Scalia found the majority's policy argument to be not only irrelevant, since "history and not judicially analyzed policy governs this matter," but also inaccurate.[322] He first addressed the majority's belief that market pressures applicable to private prisons eliminate the need for immunity of private prison employees, finding two errors with this argument.[323] First, decisions related to privatizing prisons are not made under market circumstances because it is "a government decision, not a market choice."[324] Second, assuming the political arena is cost-conscious in its decisionmaking, the decision to privatize will be dominated by price rather than value.[325] Therefore, because a contractor's price is directly related to expenses, including the costs of defending § 1983 suits, corporate operators of prisons attempting to maintain competitive prices will be reluctant to allow employees to use the force which their public counterparts may use without fear of liability.[326] Based on these assumptions, the dissent concluded that "private prison managers have even greater need than civil-service prison managers for immunity as an incentive to discipline."[327]

The dissent then rejected the majority's argument that the presence of insurance in the private sector eliminates the deterrent effect of § 1983 claims.[328] The dissent pointed out that civil rights liability insurance also is available for public entities.[329] It also disregarded the majority's argument that salary and benefit incentives unavailable to government entities may be used by private corporations to overcome the deterrent effect of § 1983 liability on potential employees.[330] Justice Scalia noted the irony in the Court's "use [of] one of the principal economic benefits of 'prison outsourcing'—namely, the avoidance of civil-service salary and tenure encrustation's—as the justification for a legal rule rendering

322. *Id.* (Scalia, J., dissenting).
323. *See id.* at 2111 (Scalia, J., dissenting).
324. *Id.* (Scalia, J., dissenting). Justice Scalia believes that because the decisions involve political actors whose attentions are split between many issues and who are spending government funds rather than their own money, considerations of cost and quality of service will take a back seat to political considerations such as friendship, political alliances, and other concerns related to re-election. *See id.* (Scalia, J., dissenting).
325. *See id.* (Scalia, J., dissenting).
326. *See id.* (Scalia, J., dissenting).
327. *Id.* (Scalia, J., dissenting).
328. *See id.* at 2111-12 (Scalia, J., dissenting).
329. *See id.* (Scalia, J., dissenting).
330. *See id.* at 2112 (Scalia, J., dissenting).

out-sourcing more expensive."[331] Since governments could eliminate civil service salary rules and since civil rights insurance is readily available to public as well as private entities, the dissent concluded that government employers have no more need for a § 1983 immunity than private employers.[332]

Finally, the dissent addressed the Sixth Circuit's assertion that immunity should not be extended to private-prison employees because the profit motive makes them more likely to violate constitutional rights.[333] Although the majority chose not to address this concern, Justice Scalia thought it important to dismiss this myth by stressing that the threat of § 1983 liability and the subsequent expenses will actually encourage private prison contractors to exert more care in operation of the prison in order to minimize costs and maximize profits.[334] In addition, Justice Scalia pointed out that the House Subcommittee on Crime had stated that "[s]tates having experimented with prison privatization commonly report that the overall caliber of the services provided to prisoners has actually improved in scope and quality."[335]

The dissent concluded that "the historical principles on which common-law immunity was based, and which are reflected in our jurisprudence, plainly cover the private prison guard if they cover the non-private."[336] In conclusion, Justice Scalia contended that the only effect of the majority's decision would be to "artificially raise the cost of privatizing prisons" with "taxpayers and prisoners ... suffer[ing] the consequence[s]."[337]

iii. Conclusion Regarding McKnight *Analysis*

Justice Scalia's dissent provides the more logical analysis. He recognized that the majority's historical analysis mistakenly relied on the absence of a case providing immunity to private prison guards, rather than revealing "any explicit rejection of immunity by any common law court."[338] While the Supreme Court has not extended immunity to private prison officials in the past, it never directly

331. *Id.* (Scalia, J., dissenting).
332. *See id.* (Scalia, J., dissenting).
333. *See id.* (Scalia, J., dissenting).
334. *See id.* (Scalia, J., dissenting).
335. *Id.* (Scalia, J., dissenting) (citing *Matters Relating to the Federal Bureau of Prisons: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong. 110 (1996)).
336. *Id.* at 2109 (Scalia, J., dissenting).
337. *Id.* at 2113 (Scalia, J., dissenting).
338. *Id.* at 2108 (Scalia, J., dissenting).

addressed the question before, making the absence of traditional extensions to private prison employees irrelevant.[339] Moreover, as recognized in the dissent, the Court has traditionally extended immunity using a functional test.[340] Probably the only reason the *Wyatt* Court did not specifically discuss the functional approach was that the defendant in that case did not perform a function equivalent to that of a government official previously granted immunity.[341] The dissent's functional approach to granting immunity should have been followed, providing private prison employees with the same immunity offered to their public sector counterparts.[342]

iv. Issues Left Open After McKnight

Although the Supreme Court denied immunity for private prison guards under the circumstances presented in *McKnight*, the majority opinion did not resolve all the issues related to private prison employee liability and immunity. The majority stated that its decision should not be understood as holding that § 1983 liability applies to private prison officials.[343] Were the Supreme Court to determine that private prison operators cannot be held accountable for violations of inmates' constitutional rights under § 1983, the question of immunity would be irrelevant.[344] Second, the Court limited the context of the holding to "a private firm . . . with limited direct supervision by the government."[345] A narrow reading of *McKnight* leaves an opening for private corporations acting under

339. *See id.* at 2109 (Scalia, J., dissenting).

340. *See id.* at 2109-10 (Scalia, J., dissenting); *see supra* notes 198-209 and accompanying text (discussing the functional approach the courts have used to determine whether to grant immunity).

341. The defendant in *Wyatt v. Cole*, 504 U.S. 158 (1992), was a rancher who unknowingly used an unconstitutional Mississippi replevin statute to seize the plaintiff's property. *See supra* notes 230-49 and accompanying text (discussing *Wyatt*).

342. *See McKnight*, 117 S. Ct. at 2112 (Scalia, J., dissenting); *see also* Ahlstrom, *supra* note 65, at 410 (stating that "assertion[s] that profit motivation will cause private prison officials to infringe prisoners' rights [are] false").

343. *See McKnight*, 117 S. Ct. at 2108 (indicating that *McKnight* does "not address[] whether the defendants are liable under § 1983 even though they are employed by a private firm").

344. The Supreme Court accepted, for the purposes of deciding the immunity issue, the assumption of the court of appeals that a private prison guard was a state actor for the purposes of § 1983 liability. *See id.* at 2108. It is likely that a private prison operator acting according to a contract with the State will be held to be acting under color of state law and therefore responsible for protecting the constitutional rights of its inmates. *See supra* notes 175-76 and accompanying text (concluding that private prison employees will be considered state actors for purposes of § 1983 liability).

345. *McKnight*, 117 S. Ct. at 2108.

color of state law in the operation of prison facilities to receive immunity if the contract or statutes applicable to the corporation are closely controlled by the State.[346] The majority hinted at this possibility, stating that "the mere performance of a governmental function could make the difference between unlimited § 1983 liability and qualified immunity, especially for a private person who performs a job without government supervision or direction."[347] Although seemingly denying protection against liability to private prison officials, the *McKnight* majority left open the possibility of a good-faith defense to civil rights liability by recognizing that "a distinction exists between an 'immunity from suit' and other kinds of legal defenses."[348]

The Court's caveat that *McKnight* does not reject the possibility of a good-faith defense for private employees provides an important potential outlet to protect private employees from § 1983 liability. This opening left by the *McKnight* court for a possible good-faith defense to liability is the most viable way of counteracting the effect of the *McKnight* decision. In *Lugar v. Edmondson Oil Co.*,[349] the Supreme Court held open the possibility that private parties relying on statutes later held to be unconstitutional may have a good-faith defense.[350] Since the *Lugar* decision, at least two circuit courts have recognized a good-faith defense to private parties.[351] Also, the Fifth Circuit in *Folsom Investment Co. v. Moore*[352] supported the possibility of a good-faith defense for private parties by distinguishing between a good-faith defense and immunity.[353]

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346. *Cf.* Sullivan, *supra* note 134, at 145 (noting that "[i]f ... the state retains *some* continued role in the exercise of the power in question, the private party may be free from constitutional restraints as it exercises its share of what had been a government power").

347. *McKnight*, 117 S. Ct. at 2105 (citations omitted); *see also* 2 NAHMOD, *supra* note 213, § 8:97, at 8-298 (arguing that the language in *McKnight* indicates "that private parties ... who are carefully supervised by government, may well be protected by qualified immunity").

348. *McKnight*, 117 S. Ct. at 2103 (quoting *Wyatt v. Cole*, 504 U.S. 158, 166-67 (1992)).

349. 457 U.S. 922 (1982).

350. *See id.* at 942 n.23.

351. *See, e.g.*, Duncan v. Peck, 844 F.2d 1261, 1266-68 (6th Cir. 1988) (granting good-faith defense against § 1983 claim for party who relied on his attorney's invocation of an Ohio attachment statute that was later declared unconstitutional); Buller v. Buechler, 706 F.2d 844, 851-52 (8th Cir. 1983) (granting good-faith defense for creditors invoking an unconstitutional South Dakota garnishment statute). *But see* Downs v. Sawtelle, 574 F.2d 1, 16 (1st Cir. 1978) (holding that there is no good-faith defense available for private parties).

352. 681 F.2d 1032, 1038 (5th Cir. 1982).

353. *See id.*

The Sixth Circuit's decision in *Duncan v. Peck*[354] provides one example of the use of the good-faith defense. In *Peck*, the defendant—Peck—originally was awarded a $20,000 default judgment in a contract dispute with the plaintiff, Duncan.[355] Then, pursuant to state statute, Peck executed the default judgment award against Duncan's property.[356] The statute allowing Peck to claim Duncan's property was subsequently declared unconstitutional, so Duncan filed a § 1983 claim against Peck for unconstitutional deprivation of property under an invalid statute.[357] The district court granted Peck immunity, but the Sixth Circuit held that Peck was actually entitled to a good-faith defense against the civil rights claim because he had, in good-faith, relied on the statute as being enforceable.[358] Although the good-faith defense is not the same as a qualified or other immunity, "it is grounded in many of the same types of public policy justifications."[359]

Applying this good-faith defense to the private prison context should provide employees of private prisons with at least a limited defense to § 1983 liability. Private prison contracts and statutes provide guidance and performance measures which the prison employees must achieve. If private prison guards violate § 1983 in a good-faith attempt to comply with statutory and contractual requirements of the state, it seems reasonable for a court to grant the guards a defense to § 1983 liability. However, the good-faith defense has only been granted in cases in which defendants have relied on seemingly constitutional statutes, as opposed to performing a discretionary act. Therefore, if enabling statutes do not clearly define enforcement measures which may be exercised by private prison employees, courts may be unable to determine whether discretionary conduct meets a good-faith standard, eliminating the good-faith defense for private employees. In addition, the benefits offered by the good-faith defense are not equivalent to the immunity which could have been granted by *McKnight* since private prisons will still have to face litigation expenses and frivolous claims in order to prove that good-faith was exercised.

354. 844 F.2d 1261 (6th Cir. 1988).
355. *See id.* at 1262.
356. *See id.*
357. *See id.* at 1262-63.
358. *See id.* at 1263, 1266-68.
359. Folsom Inv. Co. v. Moore, 681 F.2d 1032, 1038 (5th Cir. 1982).

III. THE USE OF STATUTES AND CONTRACTS TO LIMIT LEGAL ISSUES AND IMPROVE FACILITIES

Legal issues and public concerns continue to inhibit the privatization process, leaving prisoners to question their rights in privately-operated facilities and leaving both the government and private prison corporations to question potential liabilities. Enabling legislation that clearly defines the goals of incarceration and precisely drafted contracts that provide performance measures can help alleviate these concerns and promote effective use of private prisons. The following sections discuss the use of enabling statutes and contracts as mechanisms for creating successful private prisons.

A. Enabling Legislation for Private Prisons

With issues of immunity and liability still not clearly resolved and the potential for violations of the nondelegation doctrine resulting from the authority granted to private corporations, enabling statutes are critical to the success of the private prison experiment. Enabling legislation is a prerequisite for privatization development.[360] At least twenty-five states and the federal government have enacted enabling statutes authorizing private prison development.[361] Through these statutes, state legislatures should set requirements for the use of private prisons, including goals, quality standards, maximum populations, facility maintenance, liability, and exceptions to liability.[362] Used in this manner, the statutes are a key tool for ensuring that the historical mistakes and corruption of the private

360. *See* Ellen Simon, *Who's Minding the Rights of Inmates When Justice Goes to the Lowest Bidder?*, 19 HUM. RTS., Spring 1992, at 22, 22.

361. *See* 18 U.S.C. § 4013 (1994); ALASKA STAT. § 33.30.031 (Michie 1996); ARIZ. REV. STAT. ANN. §§ 41-1609 to -1609.01 (West 1992 & Supp. 1997); ARK. CODE ANN. §§ 12-50-101 to -110 (Michie 1995); CAL. PENAL CODE. § 6256 (West 1982); COLO. REV. STAT. ANN. §§ 17-1-201 to -207 (West 1997); FLA. STAT. ANN. §§ 944.105, 944.710 - .801, 957.01 - .06 (West 1996 & Supp. 1998); IND. CODE ANN. §§ 11-8-3-1 (Michie 1992); KAN. STAT. ANN. § 75-5210(i) (1997); KY. REV. STAT. ANN. §§ 197.500-.990 (Michie 1995); LA. REV. STAT. ANN. §§ 15:1171 to 15:1179 (West 1997); MINN. STAT. ANN. § 241.021(1) (West 1992); MISS. CODE ANN. §§ 47-4-1 to -4-5, -5-1201 to -5-1251 (1993 & Supp. 1997); MONT. CODE ANN. § 53-30-106(3) (1997); NEB. REV. STAT. § 83-176(2) (1994); NEV. REV. STAT. ANN. § 209.141 (Michie 1996); N.H. REV. STAT. ANN. § 21-H:8(VI) (1988 & Supp. 1997); N.M. STAT. ANN. §§ 33-1-17, -3-1 to -3-19 (Michie 1990 & Supp. 1997); N.C. GEN. STAT. § 148-37 (1994 & Supp. 1997); N.D. CENT. CODE §§ 54-21-25, 54-23.3-04(12) (1989 & Supp. 1997); OHIO REV. CODE ANN. § 9.06 (Anderson Supp. 1997); OKLA. STAT. ANN. tit. 57, §§ 41, 57(D), 504(b)(7), 561 (West 1991 & Supp. 1998); TENN. CODE ANN. § 41-24-101 to -115 (1997); UTAH CODE ANN. § 64-13-26 (1996); W. VA. CODE §§ 25-5-1 to -20 (1992); WYO. STAT. ANN. §§ 7-22-101 to -114 (Michie 1997).

362. *See generally* Robbins, *supra* note 21, at 531 (discussing important considerations for drafting enabling legislation and providing a model statute).

prison industry are not repeated.[363]

Although the nondelegation doctrine has been dismissed as all but inapplicable to delegation of prison authority,[364] statutes can ensure that the powers vested exclusively in Congress remain in Congress. Statutes retaining such powers in the legislature can eliminate arguments over unconstitutional delegations.[365] To prevent such mistakes, statutes should deal with issues including prisoner release and disciplining procedures that may be exercised by private prison employees. Statutes also should provide for state review of the private institutions' policies and verification that due process concerns are adequately met.[366] In addition, statutes may be used to resolve liability and immunity issues, eliminating legal issues and public concerns over whether private facilities will be responsible for violating prisoners' constitutional rights.[367]

Concerns over the standards of care and quality of service may also be anticipated through drafting of enabling legislation. In order to maintain identical standards of care and rights of prisoners, several statutes directly state that all prisoners, whether incarcerated in

363. *See supra* notes 32-66 and accompanying text (discussing the historical problems with private prisons).

364. *See supra* notes 72-130 and accompanying text (discussing the nondelegation doctrine).

365. Although the nondelegation doctrine has been addressed from the federal perspective in this Comment, the doctrine may also be relevant at the state level under state constitutions. In such circumstances, state enabling legislation retaining law-making and other nondelegable authority in the appropriate government branch will be an effective tool to limit nondelegation concerns. States have commonly passed laws authorizing private prisons in order to preempt the delegation issue. *See* Nicole B. Cásarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 260-61 (1995).

States must be careful in drafting statutes authorizing the use of private prisons so they do not delegate authority which must be retained by the government. *See* Ratliff, *supra* note 65, at 373-74. In addition, other issues such as due process may be addressed by enabling statutes. *See id.* at 411-19 (discussing ways in which states have addressed due process concerns).

366. *See, e.g.*, Ratliff, *supra* note 65. at 398-402 (explaining that private operators should not control prisoner release dates, disciplinary rules, inmate classification systems, or work programs).

367. For example, the Tennessee enabling statute denies the private prison contractor any qualified immunity. *See* TENN. CODE ANN. § 41-24-107 (1997). To alleviate liability issues, several states require that private contractors maintain liability insurance. *See* Curtis R. Blakely & Vic W. Bumphus, *Private Correctional Management: A Comparison of Enabling Legislation*, 60 FED. PROBATION 49, 50 (1996). These states include Arizona, Arkansas, Kentucky, New Mexico, and Oklahoma. *See* ARIZ. REV. STAT. ANN. § 1609.1(N)(2) (West 1992 & Supp. 1997); ARK. CODE. ANN. § 12-50-106(f)(2) (Michie 1995); KY. REV. STAT. ANN. § 197.510(30) (Michie 1995); N.M. STAT. ANN. § 33-1-17(D)(2) (Michie 1990 & Supp. 1997); OKLA. STAT. ANN. tit. 57, § 561(m)(1)-(2) (West 1991 & Supp. 1998).

private or public facilities, are considered inmates of the state's corrections department.[368] According to one commentator, half of the states have enacted enabling legislation requiring that private "facilities comply with local and state regulations and meet American Corrections Association standards."[369] If contractors do not comply with the statutory terms, the contracts may be terminated.[370]

In addition, statutes may be used to help improve the conditions and quality of service in confinement facilities.[371] States have accomplished this by requiring private contractors to provide specific services for inmates, including mail, telephone, and visitation services.[372] Several states have gone a step further, using the statutes as an opportunity to redefine the goals of incarceration by requiring rehabilitative services including vocational training, educational programs, counseling, mental health programs, and chemical dependency counseling.[373]

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368. Colorado states in its enabling statute that any person sentenced to any correctional facility is deemed to be in the custody of the Executive Director of the Department of Corrections and therefore subject to the same rules and standards regardless of whether the facility is operated privately or by the state. *See* COLO. REV. STAT. ANN. § 17-22.5-102 (West 1997). *See also* Murphy v. Pakenham 923 P.2d 375, 376 (Colo. Ct. App. 1996) (holding that a private prison that adopts the state disciplinary code is subject to review in the same manner as a state agency).

369. Simon, *supra* note 360, at 22 (paraphrasing Professor Charles Thomas). *See, e.g.*, ARK. CODE. ANN. § 12-50-106 (Michie 1995); FLA. STAT. ANN. § 957.05 (West 1996); OKLA. STAT. ANN. tit. 57, § 561(b) (West 1991 & Supp. 1998).

370. States may include authorization to inspect the private facilities to ensure compliance with statutory mandates. *See, e.g.*, IND. CODE ANN. § 11-8-4-5 (Michie 1992).

371. Typically, enabling statutes have only required the same services and quality as state run prisons; however, legislation has been introduced requiring improvements to the existing system. *See* Blakely & Bumphus, *supra* note 367, at 52. Quality requirements should also be specified in statutes to verify that the goal of privatization is not merely to save money but also to improve the unconstitutional conditions currently provided by many public prisons.

372. Kentucky and West Virginia have enabling legislation requiring the contractor to provide these services. *See* KY. REV. STAT. ANN. § 197.510(19) (Michie 1995); W. VA. CODE § 25-5-11(b) (1992). Kentucky and West Virginia also require the availability of legal services to inmates. *See* KY. REV. STAT. ANN. § 197.510(19)(d) (Michie 1995); W. VA. CODE § 25-5-11(b)(4) (1992).

373. Enabling statutes in Arkansas, Kansas, Kentucky, Oklahoma, and West Virginia require vocational training or educational programs. *See* ARK. CODE ANN. § 12-50-106(e)(2) (Michie 1995); KAN. STAT. ANN. § 75-5201 (1997); KY. REV. STAT. ANN. § 197.510(19)(e), (f) (Michie 1995); OKLA. STAT. ANN. tit. 57, § 561 (West 1991 & Supp. 1998); W. VA. CODE § 25-5-11(b)(5), (6) (1992). Kansas, Kentucky, Oklahoma, and West Virginia all require counseling and mental health programs, supporting the use of prison time to rehabilitate prisoners, an effort which has largely been abandoned in overcrowded public prisons. *See* KAN. STAT. ANN. § 75-5201 (1997); KY. REV. STAT. ANN. § 197.510(19)(g) (Michie 1995); OKLA. STAT. ANN. tit. 57, § 561 (West 1991 & Supp. 1998); W. VA. CODE § 25-5-11(b)(7) (1992); *see also supra* note 18 (discussing the absence of rehabilitative programs in prisons).

Another concern that may be alleviated by statute is the credibility and qualifications of corporations bidding for incarceration contracts. To limit who may be authorized to operate a private prison, contractor qualifications may be and often are specified in the enabling legislation. To help protect against incompetent private party operation of facilities, several states have specified that the contractor must be experienced in the operation of a confinement facility or that such qualifications at least be included as a consideration in awarding contracts.[374] At least twenty-one states define some qualifications that the contractor must meet.[375] Several states require that the contractor have previous experience in the prison industry and also have a history of compliance with state regulations and court orders.[376]

Enabling statutes are the first step toward successful implementation of a private prison system. Time must be spent drafting proper statutes that will clearly define the goals to be met by confinement and the means by which they will be achieved.[377] Doing so will limit potential legal issues and liability for a state.

B. Contracts for Private Prisons

Supplementing the guidance provided by enabling legislation, states may use well-drafted contracts to reduce public concerns related to the privatization of prisons. Individual contracts with corporations offer state and federal government the opportunity to define the mission of the prison and to ensure that the specified goals

374. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1609.01(B) (West 1992 & Supp. 1997); ARK. CODE ANN. § 12-50-106(c)(3) (Michie 1995); KY. REV. STAT. ANN. § 197.520 (Michie 1995); LA. REV. STAT. ANN. § 39:1800.4 (West Supp. 1998); OKLA. STAT. ANN. tit. 57, § 561 (West 1991 & Supp. 1998).

375. *See* Blakely & Bumphus, *supra* note 367, at 52. Some qualification requirements include previous experience, a record of compliance with state regulations and court orders, state accreditation, and adequate liability insurance. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1609.01(B), (N) (West 1992 & Supp. 1997); ARK. CODE ANN. § 12-50-106(c), (f)(2) (Michie 1995); KY. REV. STAT. ANN. § 197.520 (Michie 1995).

376. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1609.01(B) (West 1992 & 1997); OKLA. STAT. ANN. tit. 57, § 561 (West 1991 & 1998); TENN. CODE ANN. § 41-24-104(a)(3) (1997). Private prison employees may also be required to meet specified training requirements. *See* W.VA. CODE § 25-5-19 (1992).

377. Five recommendations have been made to simplify the privatization process and increase the market benefits of competition: (1) develop uniform state legislation; (2) develop uniformity among contractors; (3) develop uniform standards for contractors; (4) form a committee to coordinate and facilitate cooperation between states; and (5) conduct additional studies to address these issues. *See* Blakely & Bumphus, *supra* note 367, at 52. Meeting these goals will simplify the privatization process and encourage states to learn from previous mistakes. *See id.*

are met.[378] The contract between the government and the private prison facility may be the key to the success of private prisons, offering the opportunity to unite public interests with the benefits offered by the private sector.[379] Careful contracting is critical to defining the authority of private prisons and limiting liability of the state. "The potential benefit of contracting-out depends upon the precision and durability of the contractual link between creating value and collecting profits."[380] For instance, the potential savings offered by privatizing prisons, and often recognized as the key motive behind the privatization movement, can be guaranteed through contract provisions. This goal has repeatedly been stressed in statutes and contracts requiring the contractor to save the government money.[381]

Professor Robbins has proposed that the following considerations, among others, can and should be specified in the contracts between the government and private prison operators: what expectations and standards will guide the prison's operation; how the implementation of these standards will be monitored; what recourse will be available for breach of specified standards; what procedures will be used for prison disciplinary hearings; whether the private facility can refuse inmates; and what measures may be taken to prevent government dependence and unfair bargaining by the private prison operator.[382] The contract documents both parties'

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378. Logan, *supra* note 59, at 585.

379. According to Charles Logan, "[c]ontractual arrangements have at least the potential for a high degree of symbolic significance. The responsibilities are laid out in the contract. The accountabilities are laid out in the contract. And the criteria for evaluation are laid out in the contract." *Talk of the Nation*, *supra* note 88.

380. DONAHUE, *supra* note 6, at 11. Factors that will affect the quality of the link include the existence of competition, complete specification of the product to be offered, effective monitoring of quality, and the government's willingness and ability to terminate the contract or penalize the contractor for inadequate performance. *See id.*

381. Contracts may specify a percentage savings the private prison must meet. Both Arizona and Tennessee have enacted legislation requiring that the private contractor reduce the cost of confinement. *See* ARIZ. REV. STAT. ANN. § 41-1609.01(G) (West 1992 & Supp. 1997); TENN. CODE ANN. § 41-24-104(2)(c)(B) (1997). The government must also learn from its mistakes in contracting. For instance, CCA took over Hamilton County's Silverdale Work Farm in Tennessee on a per diem basis, charging three dollars less per prisoner than the state had been paying in the previous year; however, at the time of contracting Silverdale was operating at 25% below capacity and within the first year of the contract an inmate population increase drove the contract cost over the county's corrections budget. *See* DONAHUE, *supra* note 6, at 17. The contract failed to account for "cost structures" or to anticipate a tougher drunken-driving sentencing law which drove up the prison population. *See id.*

382. *See* Robbins, *supra* note 12, at 825-26.

expectations and provides contingency plans.[383]

An additional provision that should be mandatory in government contracts with private prisons is a termination clause.[384] This provision will help ensure a smooth transition if the government finds it necessary to terminate a contract, by including clearly defined procedures to allow the government to reclaim the facility from the private operator.[385] Additionally, it should provide terms defining how private operators will be compensated for any improvements they made while controlling the facility.[386]

While many provisions are necessary in a contract which outsources the government's incarceration function, other terms may be used to ensure that prisoners as well as taxpayers benefit from privatization. Contract provisions, including "well-defined standards of performance," may ensure that profit motives do not "conflict with the government's interest in maintaining safe, secure, and humane conditions . . . [and avoiding] legal cases and litigation brought on by or on behalf of inmates."[387] As a result, many of the fears created by the dismal history of private incarceration facilities and concerns expounded by private prison opponents may be eliminated.[388] Contract provisions can be used to help ensure that required quality standards are maintained because corporations fearful of losing their contracts are forced to comply with the contract provisions.[389]

Both opponents and proponents of the privatization of prisons agree that delegating incarceration to private parties does not eliminate a government's liability.[390] Opponents of prison

383. *See* Cooper, *supra* note 87, at 134.

384. *See* Robbins, *supra* note 21, at 729-30. The enabling legislation can ensure that a termination clause is a mandatory piece of every contract by requiring that a satisfactory plan is incorporated into the contract and approved by the appropriate legislative body prior to the contract becoming effective. *See id.* at 730.

385. "The termination provisions help to ease the transition when control of the facility changes." *Id.*

386. *See, e.g.*, DONAHUE, *supra* note 6, at 7 (using a proposed contract between Tennessee and CCA as an example of a private prison initiative). For proposed model contract provisions related to the termination of a private prison contract, see Robbins, *supra* note 21, at 731-33.

387. SHICHOR, *supra* note 66, at 114-15.

388. *See* Cooper, *supra* note 87, at 135.

389. Recognizing historical contract mistakes which have allowed private prisons to cut corners in attempts to reduce expenses, New Mexico attorney Mark Donatelli acknowledged that "the state should have a contract stipulating that how much the provider gets paid is related to a full staffing complement." Simon, *supra* note 360, at 23.

390. *See* CHARLES H. LOGAN, PRIVATE PRISONS: PROS & CONS 184 (1990); Robbins, *supra* note 21, at 579. Professor Thomas has stated that "no representative of any private corporation has even one time in any document I have ever found—and I've reviewed

privatization argue that the inability of the government to shift liability away from itself is one more reason that privatizing prisons is an ineffective solution to high incarceration costs; however, proper contracting can remove government liability.[391] Agreements typically provide insurance requirements for the private facility, with indemnification clauses to protect the government from facing § 1983 liability for the private operator's violations.[392]

Prison management is another concern for opponents of private prisons that can be alleviated by careful contracting. Corrections facilities are "only as good as the staff, management program, facilities, resources and support that [they receive]; the formula for success is no different than publicly operated institutions. What does differ, though, is the need to have a tightly structured contract in order that the private sector . . . be held accountable."[393] As a result, proper legislation and well-drafted contracts can set forth necessary supervision of prison operations.[394] Contracts with private prisons offer an opportunity to improve prison management and conditions by reducing populations in currently over-crowded facilities and subsequently placing requirements for space, rehabilitation, and quality directly in the contract, uniting the goals of the incarceration facility with those of business.[395]

One of the greatest consequences of the privatization movement is the renewed interest in performance measures. According to one commentator, "[o]ne of the first consequences of privatization has been that government has been forced to ask the question of what it wants its prisons to do, to write them into the contract, and [to determine] how it is going to measure and evaluate the achievement of these purposes."[396] The resulting renewed interest in quality standards and the reevaluation of the purpose of incarceration has been applied to both private and public sector prisons, encouraging prisons to be more focused and effective.[397] Profits provide private

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hundreds of them—ever made [the] allegation [that contracting with a private prison operator eliminates government liability]." *Privatization Backers Criticize ABA for Issuing Negative Report*, 19 CRIM. JUST. NEWSL., Dec. 15, 1988, at 3, 4.

391. *See* Cooper, *supra* note 87, at 134. Although the government cannot technically shift liability, it can contract with corporations to ensure indemnification of damages resulting from liability.

392. *See* Joel, *supra* note 9, at 69-70.

393. NATIONAL INST. OF CORRECTIONS, U.S. DEP'T OF JUSTICE, PRIVATE SECTOR OPERATION OF A CORRECTIONAL INSTITUTION ix (1985).

394. Dipiano, *supra* note 43, at 200.

395. *See* Durham, *supra* note 43, at 35.

396. *Talk of the Nation*, *supra* note 88 (comments of Professor Charles Logan).

397. *See id.* (discussing the new interest in performance standards that has developed

prisons a great incentive to meet performance criteria, achieving contract specifications and maintaining marketable reputations.[398]

Although many opponents of private prisons are concerned that the profit motive and the per diem payment plan provided in many contracts create an incentive for private prisons to desire recidivism, commentators have proposed that contracts may actually be used to require reduced rates of recidivism.[399] Using contract-based fines to penalize private prison operators for violations of recidivism-reduction requirements, inmate safety, health care quality, or other standards, agreements between private contractors and the government can invoke the profit motive to encourage compliance with the state's defined goals of incarceration.[400] In addition, treatment services, operational services, and limits of authority should be specified.[401] Contracts may include requirements for availability of vocational and educational programs or other recreational activities.[402] Joseph Johnson, Chairman and Chief Executive Officer of National Corrections and Rehabilitation Corporation, recognizes the importance of the contract and its ability to define the goals of a private prison facility. Johnson has said that certain private facilities are "tied in a contractual way ... to get people into a vocational education program, to get them a particular skill level, to get them to pass a GED test, to get them an industry job while they're in [the] facility."[403] For inmates in drug or alcohol-abuse programs, contracts may commit prison operators to follow former inmates into communities and help them get the continued treatment they need, as well as help them secure employment.[404] Corrections Corporation of America's contract in Dallas uses the profit motive as an incentive to reduce recidivism, penalizing the corporation with contract reductions if it fails to find jobs for a specified number of inmates upon their release.[405] In addition, out-

as a result of privatization).

398. *Cf.* Ahlstrom, *supra* note 65, at 411-12 (explaining that the combination of the contract's visibility and the corporation's profit motivation forces prison contractors to protect prisoners' civil rights).

399. *See* Kenneth L. Avid, *On Private Prisons: An Economic Analysis of the Model Contract and Model Statute for Private Incarceration*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 265, 294-95 (1991); James Theodore Gentry, Note, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 YALE L.J. 353, 361-63 (1986).

400. *See id.*

401. *See* Blakely & Bumphus, *supra* note 367, at 49.

402. *See* SHICHOR, *supra* note 66, at 115.

403. *Talk of the Nation*, *supra* note 88.

404. *See id.*

405. *See id.*

sourcing payment plans can encourage humane prison conditions by prohibiting overcrowding.[406] By contract, the government will only be willing to pay for and the facility will only be allowed to house a specified number of inmates.[407] Public facilities fail to be protected by equivalent provisions.[408]

However, a very real concern exists regarding private involvement in "good time"[409] computation for prisoners. Private involvement in "good time" calculation creates a potential conflict of interest, allowing a corporation which gets paid according to occupancy to help determine when prisoners should be released. As a result, opponents of privatization are concerned that private prisons with vacancies will disallow "good time" if provided such authority, in order to maintain full occupancy and full compensation from the state. This inherent conflict creates a valid concern; however, proper contracting considerations can help eliminate or at least limit this potential problem.[410] Corrections Corporation of America has avoided this problem by being careful to keep "good-time" credits and sentencing credits out of its contracts, allowing government monitors to retain such authority.[411] Most states have attempted to avoid this problem before contracting by statutorily retaining the authority to calculate inmate release and parole eligibility in the state.[412]

Questions of private prison operator liability for violations of prisoners' constitutional rights in private prison facilities may also be put to rest through contracting. Contracts, in conjunction with statutes, can state that the private prison takes the responsibility to protect the constitutional rights that publicly operated prisons are obligated to protect under § 1983. Joseph Johnson has acknowledged that the contractual agreements treat the private facilities as if they were acting under color of law as a public entity, therefore, requiring the employees and the facilities to meet the same responsibilities and accreditation standards as a public facility.[413]

406. *See id.*
407. *See id.*
408. *See* Ahlstrom, *supra* note 65, at 412.
409. "Good time" is a type of disciplinary credit used as an incentive to encourage inmate's good behavior and cooperation through reduction of sentences and the potential for early parole. *See* Marjorie M. Van Ochten, *Prison Disciplinary Hearings: Enforcing the Rules Behind Bars*, 77 MICH. B.J. 178, 180 (1998).
410. *Talk of the Nation*, *supra* note 88.
411. *See id.*
412. *See* Blakely & Bumphus, *supra* note 367, at 51.
413. *Talk of the Nation*, *supra* note 88.

Of course a perfect contract is to no avail if performance is not monitored,[414] but private prison contracts are under the watchful eyes of "prison reform activists, civil rights groups such as the A.C.L.U., and more important the media" as well as "competitors, investors, shareholders, and insurers. A misstep in any of the variables incorporated into a contract places the private firm under intense scrutiny that can affect that firm's profitability . . . not to mention its integrity."[415] The profit motive and the heightened level of monitoring will mandate private facilities to maintain a greater level of quality or suffer contractual penalties, including possible contract termination. For instance, a 1995 riot at one privately operated facility provoked the government to shut down the facility even though no injuries were suffered in the incident.[416] Upon release of the news of the lost contract, the private corporation's stock dropped $13, more than fifty percent of the stock's prior market value.[417] Constant public scrutiny, concerns over profitability, and contractual requirements of government supervision will help ensure necessary monitoring.

The benefits of privatizing prisons extend beyond saving taxpayer money. One commentator explained that private prison contracts "are much more detailed than the 'legislative mandates public corrections agencies are obliged to follow,' setting forth the expectations of both parties and the consequences of failing to meet those expectations.[418] The benefits provided by the renewed interest in performance measures will help refocus the prison industry's objectives, benefiting both private and public prisons alike. Using effective contracts in conjunction with well thought out enabling statutes can limit the potential legal issues surrounding private prisons and ease public concerns related to prisoners' rights by requiring better conditions and reduced recidivism.

Enabling statutes and contracts can not eliminate all the potential risks of privatization; however, considering the prison overpopulation crisis this nation is currently facing, such tools make privatization of prisons a viable alternative.

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414. *See* SHICHOR, *supra* note 66, at 119.

415. Richard C. Brister, *Changing the Guard: A Case for Privatization of Texas Prisons*, 76 PRISON J. 310, 322 (1996).

416. *See* Ahlstrom, *supra* note 65, at 413.

417. *See id.*

418. Brister, *supra* note 415, at 322 (quoting Thomas and Logan, *supra* note 7, at 223).

IV. CONCLUSION

Private prisons offer one alternative to help alleviate the current prison population crisis. Although America's early attempts at prison privatization are marred by tales of abuse, applying lessons learned from previous mistakes to enabling statutes and performance measuring contracts can help bring private sector advantages to the prison industry. Regardless of whether prison privatization is successful, it offers an opportunity to redefine the goals of the prison system and improve confinement conditions, thus benefitting both prisoners and the public.

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