

**“Prison Privatization: Possibilities and Approaches to the Privatization of Prisoner
Security and Services.”**

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Abstract:

This examination of prison privatization begins with an explanation of prison privatization and its place in the recent debates over California prison reform. Focusing on the privatization at the staff level, it continues by exploring the difficulties in any analysis and implementation of prison privatization: the calculation of costs savings, the making and enforcement of contract at the state level, and the California State Civil Service Act. The four proposals for privatization at the staff-level focus on the ability of the state to maneuver around the civil service act by serving specialized groups of inmates in both private and public facilities.

1. Introduction:

Privatization is the contractual transfer of a combination of ownership, operation, or responsibility for government functions to private actors. In the context of prison facilities and prisoner services, “privatization” encompasses a wide range of services—from contracting with a private business for the laundry needs of a facility, privately owned and operated maximum security prisons, specialized private prison facilities designed to meet the needs of a segment of the inmate population such the elderly, or requiring a parolee to post a bond prior to release to stimulate the creation of a parolee bond market. In addition to a wide range of activities falling within the rubric of prison privatization, the issue is clouded by contradictory research originating from ideologically or financially invested researchers.¹

Therefore, in order to better understand how privatization might be involved in reforming the California prison system, it is necessary to examine utility and efficacy of the various modes of prison privatization—full-scale operations as well as more individualized services. Additionally, after identifying the modes of privatization best suited to California prisons, this paper will analyze the costs and benefits of implementing the various modes of prison privatization in order to determine to the extent to which the California Department of Corrections and Rehabilitation (CDRC) should utilize prison privatization in its efforts to improve the services it delivers.

A. Description of History and Existing Policy

The California Department of Corrections experimented with prison privatization as early as the 1850’s, when it opened San Quentin—the first facility constructed and

¹ See Generally www.bop.gov/news/research_projects/published_reports/pub_vs_priv/oreprcampgaes.pdf [explaining generally the flaws and interest driven research in the area of prison privatization]

operated by a private entity. Following a series of scandals, this early experiment with privatization was deemed a failure and the facility was returned to state control.²

It is generally agreed that the modern era of prison privatization began in 1976, when Florida awarded a contract to a private company to assume control of the Weaversville Intensive Treatment Unit for Juvenile Delinquents.³ Florida privatized a second facility, the Okeechobee School for Boys, in 1982.⁴ Shortly thereafter, the federal government awarded contracts to private businesses to run detention centers for illegal aliens. By 1988, the Immigration and Naturalization Service (INS) was housing inmates in seven private facilities.⁵ Prison privatization received an additional boost in the mid 1990's, when the Clinton administration declared that it would privatize most of the federal prisons then under construction.⁶

California was also began hiring private companies to house inmates in 1986 when the first private prison facility was opened at LaHonda.⁷ The following year, California opened a second facility in Baker.⁸ By 1996, the state housed approximately 1,100 inmates in private prison facilities.⁹ Two years later the state was contracting with private companies for nine prison facilities¹⁰—and just six months later, California had the second most private prison facilities in the country, trailing only Texas (which had

² James Austin & Garry Coventry, *Emerging Issues on Privatized Prisons* 11 (Nat'l Council on Crime and Delinquency Feb. 2001), www.ncjrs.org/pdffiles1/bja/181249.pdf (last visited Oct. 4, 2005).

³ Logan and Rausch, 1985: 307

⁴ Logan and Rausch, 1985: 307

⁵ James Austin & Garry Coventry, *Emerging Issues on Privatized Prisons* 12 (Nat'l Council on Crime and Delinquency Feb. 2001), www.ncjrs.org/pdffiles1/bja/181249.pdf.

⁶ Joseph T. Halliman, *Going Backwards: Federal Government Saves Private prisons As State Convict Population Level Off*, WALL ST. J., Nov. 6, 2001, <http://www.commondreams.org/headlines01/1106-05.htm> (last visited Oct. 1, 2005).

⁷ Karyl K. Kicenski, *The Corporate Prison: The Production of Crime & the Sale of Discipline* 7 (April 2002) (Unpublished paper, George Mason University), <http://www.csun.edu/~hfspc002/karyl.prison.pdf>.

⁸ *Id.*

⁹ State of California, Legislative Analyst's Office, *Lao Analysis of the 1996-1997 Budget Bill, P & I V-6: Privatization in California State Government (1996)* 179, http://www.lao.ca.gov/analysis_1996/p965-6.pdf

¹⁰ *Privatization: Viable Solution to California's Prison Crisis* CAL-TAX DIGEST (Cal. Taxpayer's Association, Cal.), July 1998.

43).¹¹ From 1995 to 2000, the nationwide number of private prison facilities increased 140 percent.¹² Overall, between 1995 and 2000, 154 of the 204 adult correctional facilities added to the national system were private.¹³ By the end of 2001, 5.8 percent of state prisoners and 12.3 percent of federal prisoners were being held in private prison facilities.¹⁴ In 2001, 4452 Californian inmates were being held in private facilities; only Texas (16,331), Oklahoma (6658), and Georgia (4561) held more state inmates in private prison facilities.¹⁵

B. Current State of California

In 2003, the future of private prison facilities in California was uncertain. Due to an unexpected decline in the state prison population California closed three of the state's nine corporate-owned private prison facilities.¹⁶ When Governor Schwarzenegger took office, his administration publicly considered closing the remaining private prison facilities.¹⁷

The California Department of Corrections and Rehabilitation currently employs a combination of public and private prison facilities and prisoner services. As of January 2005, California housed 2550 of its 165,000 inmates in its six corporate-owned prison facilities. A seventh corporate-owned private prison facility, a 200-bed minimum-security facility in Macfarland, was opened in July 2005¹⁸ with a five-year, 4.1 million-dollar-a-year contract.¹⁹ The CDCR currently has plans to open two more private prison facilities, each capable of housing 1000 inmates.²⁰

¹¹ James Austin & Garry Coventry, *Emerging Issues on Privatized Prisons* at 11 (National Council on Crime and Delinquency Feb. 2001), www.ncjrs.org/pdffiles1/bja/181249.pdf.

¹² U.S Department of Justice, Bureau of Justice Statistics, *Census of State and Federal Correctional Facilities, 2000* at , <http://www.ojp.usdoj.gov/bjs/abstract/csfcf00.htm> (Follow "Acrobat" hyperlink).

¹³ *Id.*

¹⁴ <http://www.ojp.usdoj.gov/bjs/pub/ascii/p01.txt>

¹⁵ U.S Department of Justice, Bureau of Justice, *Statistics, Prisoners in 2001* at 7, <http://www.ojp.usdoj.gov/bjs/abstract/p01.htm> (follow Acrobat hyperlink).

¹⁶ Dan Thompson, *Criticism Clouds Prison System as Population Hits All-time High*, CONTRA COSTA TIMES, Sept. 14, 2004.

¹⁷ Face Value: The Prophet of Prison (Economist, September 3, 2005)

¹⁸ Face Value: The Prophet of Prison (Economist, September 3, 2005)

¹⁹ Mark Galdstone & Kate Folmar, *Schwarzenegger Backer wins \$20-Million State Contract*, CONTRA COSTA TIMES, Aug. 6, 2005.

²⁰ Thompson *supra* note 11.

The CDCR also employs private companies to provide some prisoner services. As early as 1996, the CDCR was contracting with private entities for services such as medical treatment, management services, drug treatment services, inmate work programs, and emergency housing and treatment for parolees.²¹

The provision of inmate medical services is just one example of the CDCR's approach to privatization of prisoner services. In order to fulfill its responsibility to provide medical care to inmates, the CDCR operates various medical facilities, such as acute care hospitals and treatment centers.²² It also contracts with private health care providers such as hospitals, laboratories, and specialists to provide the services that it lacks the capacity to provide by itself. Between 2001 and 2003, 1149 contracts were awarded by the CDCR to outside medical service providers. Of these, only 259 were subject to competitive bidding.²³ In 2003, medical services provided by outside providers cost the CDCR \$239 million²⁴—up from \$65 million in 1996.²⁵ Despite a 2004 audit in which the California state auditor was highly critical of the contracts for private medical services for prisoners,²⁶ there has been an increased movement towards privatization of inmate medical services. Currently, Medical Development International, a private Florida-based company, is negotiating with California for a contract worth up to \$110 million a year to provide health services to 110 of the CDCR's correctional facilities.²⁷

C. Questions for Further Consideration

²¹ State of California, Legislative Analyst's Office, *Lao Analysis of the 1996-1997 Budget Bill, P & I V-6: Privatization in California State Government (1996)* 179, http://www.lao.ca.gov/analysis_1996/p965-6.pdf

²² *California Department of Corrections: It needs to Ensure that all Medical Services Contracts it Enters are on the State's Best Interest and that all Medical Claims it Pays are Valid Summary of Report 2003-117* (Bureau of State Audits, April 2004), <http://www.bsa.ca.gov/reports/summary.php?id=432>

²³ *Id.*

²⁴ It is unclear from the research what proportion of the \$239 million in fees to outsider medical services providers is awarded to private business versus other governmental agencies such as university hospitals.

²⁵ State of California, Legislative Analyst's Office, *Lao Analysis of the 1996-1997 Budget Bill, P & I V-6: Privatization in California State Government (1996)* 179, http://www.lao.ca.gov/analysis_1996/p965-6.pdf

²⁶ *See generally Id.*

²⁷ Urvaksh Karkaria, *Ponte Vedra Beach Company Provides Medical Service to Inmates*, FLA TIMES-UNION, May 23, 2005.

- Are there any legal barriers to the expansion of the privatization of prisoner services from its current state?
- Which prisoner services are currently contracted out to private companies?
- Have the prisoner services contracted out to private companies experienced the benefits of competition espoused by proponents of privatization?
- What models of privatization of prisoner services have been adopted in other states? What problems have other states experienced?
- Are there certain services which either private businesses or the government have proven to be particularly effective at delivering?

2. Possibilities for Prison Privatization:

As stated previously the focus of this examination will be on the privatization of staffing, services, and programming. Before examining the costs and benefits of each of the six scenarios it is necessary to examine the issues that are most likely to block the adoption of any privatization of prison staffing; financial savings considerations, and the state civil service code.

A. Savings:

Financial savings, an often-cited rationale for privatization, will not garner much attention in this analysis due to the nature of calculating state savings from prison privatization. In order to calculate the savings due to prison privatization, the specific contract creating the private prison must be very closely examined. Several factors can complicate the calculation of state savings due to prison privatization. The financial resources the state must dedicate to researching, creating, auditing, and enforcing the contract creating such a prison diminish the overall financial savings attributable to prison privatization.

In addition to the costs created by enforcing the contract, the state may also continue to incur some of the costs related to prisoners in private prisons. In September 2005, while conducting an audit of the CDRC's ballooning medical costs, the state auditor examined the contracts used to establish two of the state's Community Corrections Facilities (CCF)—the state's currently existing private prison facilities. The California the Bureau of State Audits concluded that the costs comparisons the CDRC used to approve the contracts were incomplete. On initial examination, the \$45 per diem per inmate contained the CCF contracts compared favorably to the \$59 per diem the state pays to county jails. The \$59 per diem was calculated by the state to reflect all of the

costs associated with housing an inmate. The state appeared to be saving over \$5,100 per inmate annually. However, upon closer examination the auditor identified several costs that were not included in the CCF's \$45 per diem rate. For example, for inmates housed in the CCFs, for which the private contractor was being paid the \$45 per diem, the state continued to incur costs such as: "health services provided for anything other than first aid, certain transportation costs, discipline costs when inmates are transferred back to a state institution, department peace officer staff employed at private CCF's, correctional counselors, administration of the inmate appeal system, administrative services the department performs at the state level that also apply to CCF inmates."²⁸ The exclusion of such costs from the per diem costs reported by private prison providers clearly skew the reported savings in favor of privatization advocates. The auditor concluded that when the additional costs were added to the CCF's \$45 per diem the state was paying an equivalent amount to county jails as it was to the new CCFs. Significantly, the CDRC based its decision to accept a no-bid contract for the CCF's on the lower per diem rate. It was able to accept a no-bid contract because the artificially low per diem rate made it appear that the CCF offer was "fair and reasonable" as was required by state law. The fact that the state happens to be paying the CCFs a per diem rate equivalent to that paid to county jails appear to be accidental.

Politics could also affect whether private prisons actually save money for the state. Some states with private prisons have statutorily dictated various contractual conditions. Tennessee, for example, mandates that prison management contracts be at least 5% below the cost of the same service provided by a public entity.²⁹ If California subjected prison privatization contracts to statutory mandates³⁰ then it is possible that the contract negotiation process, and the calculation of financial savings might be skewed by

²⁸ Department of Corrections: *It Needs to Better Ensure Against Conflicts of Interest and to Improve Its Inmate Population Projections*, 62 September 2005, available at <http://www.bsa.ca.gov/reports/summary.php?id=486>

²⁹ David Theroux, *California Prisons and Corrections: The Benefits from Privatization* (Testimony presented before the Little Hoover Commission, State of California State Capital Building, Sacramento, California) (Aug. 1998) citing *Tennessee Code Ann.* § 41-24-104 (4) (c) (1) available at <http://www.independent.org/newsroom/article.asp?id=472>; CA Penal Code 2910 (g).

³⁰ This seems likely in light of the State Civil Service Code.

the political motivations of both proponents and opponents of privatization. For example, if one political party's underlying political goal was to diminish size and power of the state government then that party might tend to approve of initiatives which shifted financial resources to private industry. That party might be willing to approve a prison privatization contract that neither saved the state money, nor improved prisoner services because their underlying goal of diminishing state power has been achieved.

An opposing party, one more closely aligned with the interests of the California Correctional Peace Officer's Association (CCPOA), that believes that the state is the proper actor to house prisoners, might see it as necessary to for any prison privatization contract to include many statutory and contractual provisions that shift many responsibilities back to the state and provide for extensive, and expensive, oversight procedures. Each party would then seek to calculate the cost of private prisons in a way that matches their motivations. The former party would simply look at the per diem expenses reported by the private prison service provider as a basis for declaring the private prison to be economically more efficient. The latter party would seek to include the expenses of the creation and oversight of the privatization contract as well as the expenses incurred by the state when performing the services the party fought to keep in the hands of the state. Additionally, depending on state law there are various functions relate to due process, such as discipline reviews that cannot be legally performed by a private entity. That means that the state must still dedicate resources to the completing those tasks.

B. Cautionary Note on Contracts:

Well-made and enforced contracts are the linchpin of prison privatization. The facial benefits of the prison privatization; cost efficiency, increased inmate programming, and specific programming outcomes are all elements that should be subject of contractual obligations under the agreement creating a private prison.

Therefore, the capacity of the state to negotiate, craft, and manage complex contracts will determine whether the benefits of prison privatization are realized. For example, in order to guarantee that the state realize an overall reduction in the cost of prisons, such contracts must account for the costs that are created by the oversight necessary to manage the contract itself. In prison privatization context such costs can be

fairly extensive because the contract oversight will have to account for multiple sites complying with complex programmatic requirements tied to standards-based performance guidelines.

Given the centrality of the state's capacity to the effectively handle the contracts necessary for prison privatization, its recent contract related difficulties in the obtaining necessary medical services for inmates from outside providers is troubling. A recent state audit of the Department of Corrections and Rehabilitation, initiated due to rapidly increasing medical costs, found several deficiencies related to the creation and maintenance of contract. The audit found that DCR staff accepted non-competitive bids from service providers by relying on a 30 year-old policy exemption of questionable applicability. The staff failed to follow basic procedural rules when contracting for non-emergency medical services and negotiated contractual terms that clearly violated additional department policies. In the course of their negotiations, they also failed to follow the “utilization management program,” a program it adopted to ensure inmates receive quality medical care.³¹ The audit concluded that as a result of these failures, “prisons are overpaying for some services, [and] incurring unnecessary costs for the State.”³²

The state auditor drafted a list of recommendations for the CDCH to implement in order to improve the quality of contracts negotiated by the department. Among the auditor’s recommendations were foundational basics such as: “[o]ffer[ing] its negotiation staff specialized training in effectively negotiating favorable rates,” “[e]nforc[ing] its requirements for justifying higher rates,” and “[e]stablish[ing] procedures to ensure that staff negotiating . . . contracts incorporate the use of costs and utilization data.”³³ Both the outcomes of the medical services contracts negotiations and the nature of the recommendations offered by the state auditor are significant concerns for the implementation of a policy reform that is so dependent on the competent formation of contracts.

C. The Civil Service Act:

³¹ <http://www.bsa.ca.gov/reports/summary.php?id=432>

³² <http://www.bsa.ca.gov/reports/summary.php?id=432>

³³ <http://www.bsa.ca.gov/reports/summary.php?id=432>

The ability of the state to pursue some of the privatization options that will be presented will depend on compliance with the requirements of the State Civil Service Act. Nearly all state employees, with a few exceptions, are part of the State Civil Service.³⁴ State agencies are allowed to enter into personal service contract with private contractors in a fairly limited number of circumstances.

**i. Personal Services Contracts to Achieve a Cost Savings:
19130 (a)**

The state holds personal service contracts that the state enters to achieve a cost savings in particular disfavor. A state agency is, under the State Civil Service Act, forbidden from contracting with private contractors for work performed by state civil servants to “achieve cost savings” unless several conditions are met.³⁵ The state must demonstrate an actual savings under a cost comparison clearly delineated in the statute. The actual savings must be based on a comparison of the state and contractor’s estimate costs. The state’s estimate must include state overhead costs directly attributable to the service in question and the contractor’s estimate must include any cost associated with the contracted function that the state would continue to incur.³⁶ It seems clear then that the CDRC’s contracts for medical services failed to adequately compare the costs of the contractor’s services as mandated by the statute. Significantly, the law also specifies that private contracts, justified by economic efficiency, will only be approve if the contractor’s wages “do not significantly undercut state pay rates.”³⁷ In *California State Employees' Assn. v. State Personnel Bd.* the court struck down a contract for janitorial services between a state agency and a non-profit agency that operated a rehabilitation program for people with disabilities.³⁸ Under the contract, the organization’s disabled janitors received an hourly rate of the \$4.25 and the court ruled that the contracted wage significantly undercut the prevailing state wage of \$9.08.

³⁴ California Constitution, art. VII, § 4

³⁵ § 19130 (a).

³⁶ *Id.*

³⁷ § 19130 (a)(2).

³⁸ *California State Employees' Assn. v. State Personnel Bd.*, 48 Cal.Rptr.2d 754.

Additionally, contracts based solely on achieving a cost savings will not be approved unless they “do[] not cause the displacement of civil service employees.”³⁹ This particular clause is problematic because the privatization of the prison staff and services would necessarily cause the displacement of state civil employees. It seems clear that if the CDRC were to fire all the prison guards at San Quentin and then contract with a private company for the needed services with the purpose of “achieving a cost savings” that such a contract would not be allowed.

The two later restrictions are of particular relevance to any prison privatization scheme. According to a Department of Justice study, private prison contractors tend to generate the majority of their profits reducing the personnel costs by reducing the number of staff member, or paying the staff members substantially less in terms of salary, and benefits packages than is typically paid to public prison guards.⁴⁰ The wages reductions necessary to generate the majority of profits for private prisons would seem to be at odds with Section 19130.

A contract of this nature would also only be approved if had a minimal future economic risk for the state in the case of the contractor increasing rates.⁴¹ In the context of prisons this requirement could be problematic for two reasons. First, if the state is contracting out for services that require a high level of specialized training then the private contractor controls the supply of labor needed by the state. With prisons it is not possible to suspend operations until the state is able to train the staff, so the state might have to accept the increased rates offered by the contractor. In the meantime, the state would have to pay the increased rates while either attempting to find a new service provider, or training its own staff. The legislation that creates the state’s CCFs attempts to protect the state from such economic vulnerability with several provisions under section 6259 (a-c). For example, any contract used to establish a CCF is required to allow the state to purchase all or part of the equipment it uses to perform its services. It also protects the state by requiring these contracts “provide specifications for the vendor's

³⁹ § 19130 (a)(3)

⁴⁰ James Austin & Garry Coventry, *Emerging Issues on Privatized Prisons* 11 (Nat’l Council on Crime and Delinquency Feb. 2001), available at www.ncjrs.org/pdffiles1/bja/181249.pdf (last visited Oct. 4, 2005).

⁴¹ § 19130 (a)(9)

acquisition of sites, compliance with environmental requirements, preparation of plans and specifications for, and development and operation of, facilities . . . reasonably incidental to the development, operation, and potential future acquisition by the state pursuant to an option to purchase the facilities.” Therefore, if the contractor attempts to raise its rates then the state will be able to buy their facility. In the context of private prisons this is a significant improvement due to the pressures faced by the state in regards to inmate overpopulation.

The potential economic benefit would also have to outweigh the public’s interest in having some functions performed by the state. The relevance of this requirement would depend on the primarily on the position being filled by a prison contractor. The public would probably hold little interest in having the state perform secretarial work at the CDRC, but that interest might be substantial if the position being filled was guarding youth offenders.

An exception to the above requirements that has been established by the court is related to the competency of the civil service. The court in *Riley* held that if the service needed by the state “could not be performed adequately or competently or satisfactorily under the civil service” then it was exempt from the Civil Service Act.⁴² Therefore, absent explicit legislative authorization for a new service, proponents of prison privatization may be able to argue that the aspect of the prison system that is being privatized has so abjectly failed in its legislated goals that private service providers are needed. However, the courts have held that if object of the contract is labor normally performed by the civil service then the burden of proof shifts to the state power seeking to contract with a private entity. In the case of California Prison, if the reason for the failure of the civil service is poor management that does not effectively utilize the resources it is allotted, or the after effects of a poorly negotiated prison guard contract that transfers too much managerial discretion away from prison management—then the court is unlikely to hold that the failure rests on the competency of the civil service. The major case upholding this exception to the Civil Service Act focused on the a structural problem within the Civil Service Act that prevented a civil servant from being able to effectively perform his duties. In, *Burum*, the Court allowed the state to contract with a

⁴² *State Compensation Insurance Fund v. Riley*, 9 cal 2d 126, 135.

private attorney to represent the state in a workman’s compensation case. The State determined that Civil Service attorneys would be irreparably prejudiced by his status as a civil servant and that this prejudice would result in financial harm to the state. Therefore, because the state needed a legal representative who would not be prejudiced by his status as a civil servant, the court found that state’s legal representation “could not be performed adequately or competently or satisfactorily under the civil service.” In this case, the CDRC would have to prove that the civil service could not adequately perform the services they were previously providing.⁴³

ii. Exceptions to 19130 (a).

There are ten exceptions to the personal service contract requirements under 19130 (a). Of these exceptions, only a one has any application to personal service contracts related to prison privatization. Under sections 19130 (b)(2) personal services contracts are allowed for “new state functions.”

a. New State Function:

An additional condition under which the state may contract with a private contractor is when “[t]he contract is for a new state function and the Legislature has specifically mandated or authorized the performance of the work by independent contractors.”⁴⁴ The success of this argument assumes requires positive legislative action in support of the privatization of prisons.

Assuming that the requisite political support can be mustered to pass legislation, then this approach to privatization is the one most likely to be successful. For example, California currently operates 12 Community Corrections Facilities (CCFs) that were created with statutory justification under Section 6250 of the California Penal Code. The legislative findings that accompanied the creation of the CCF’s makes clear that the legislature was intending to establish a new service as required by section 19130 (b)(2). In its official legislative findings, the legislature reports that state authorities are “lacking sufficient programs and strategies to intervene with substance abuse and other behaviors that contribute to criminality. Judges and parole authorities lack the options of community correctional facilities and programs with substance abuse intervention and

⁴³ *Burum v. State Compensation Ins. Fund*, 30 Cal.2d 575, 582 (citing *Riley*, 9 cal 2d at 135).

⁴⁴ Cal. Civ. § 19130 B(2); *California State Employees' Assn. v. Williams*, 7 Cal.App.3d 390.

treatment.”⁴⁵ Legislature also found that “[t]here does not presently exist a model for a state and local center” that meets the needs it established in the previous section. Having established an unfulfilled need at the state level, the court has recognized the civil service system “does not prohibit legislative experimentation in new forms to fit new functions.”⁴⁶ The state has clearly indicated that the establishment of the CCFs is the establishment of a “new state service” that had not previously existed and explicitly holds that “[i]t is [] the intent of the Legislature to provide for the establishment of substance abuse community correctional centers and programs.”⁴⁷

A legislative finding of the provision of a “new service” is subject to challenge in court. It is not enough that the legislature simply states that the state services are new; the services must, in fact, be new. The courts in *Department of Transportation v. Chavez* invalidated a personal services contract providing for the maintenance of roadside rest areas. In *Chavez*, the establishment and maintenance of the state’s rest area had been mandated for 20 years and the work performed by state workers for those years. Similarly, a personal services contract between the state and a private contractor for prison guards to replace those at San Quentin would likely fail because the work done by the prison guards has already been legislatively mandated and performed by state workers.

Additionally, the legislature included the goals of the CCFs in their findings. Significantly, nowhere in the description of the CCF’s goals does the legislature mention that the CCFs should produce a cost savings. It is unclear whether doing so would be sufficient to place contracts creating the CCFs under the greater demands of 19130 (a), which provides guidelines for personal services contracts created to effect cost savings. It seems unlikely that merely mentioning the desire for the CCFs to be opened with goal of economic efficiency would place the contracts under 19130 (a). Conversely, merely mentioning goals other than cost savings would not seem likely to insulate personal service contracts from 19130 (a). For example, if the legislature were to privatize the guards at San Quentin with the stated goal of lowering recidivism rates then it is likely that the contract with the private provider of prison guards will be subject to 19130 (a).

⁴⁵ Cal. Penal Code § 6240 (b).

⁴⁶ *California State Employees' Assn. v. Williams*, 86 cal rptr. 305, 312.

⁴⁷ Cal. Penal Code § 6240 (d).

The importance of the CCF's legislative goals is that economic efficiency is avoided altogether. It should be noted that under section 6250.5 (a) the Director of Corrections is only authorized to contract for a CCF "only if the cost per inmate of operating the facilities will be less than the cost per inmate of operating similar state facilities."⁴⁸ Even though economic efficiency is not a state goal of the CCF it is a requirement.

In addition to being for a new service, private personal service contracts must be also be specifically mandated by the legislature. Under California Penal Code section 6256 the Director of Corrections is mandated to establish contract for CCFs with public (i.e. non-profit) or private providers.⁴⁹

3. Approaches to prison privatization:

Each of the following proposals for prison privatization on the staff level necessarily focus on the state's civil service act because if a reform does not comply with the act then it will not be allowed. According to Jeannie Woodford, Undersecretary of the CDRC, the CCPOA's contract has terms so favorable to the guards that to pursue that further reform will require with a renegotiation of the guard's contract, or hiring private staff not covered under the contract.⁵⁰ Therefore, the proposals being made are focused on methods that prison administrators may be able to use help implement other possible prison reforms. Each proposal, to varying degrees, also considers the benefits and drawbacks of the proposed reform. Additionally, when relevant, a part of each analysis touches on the state's prior attempts to privatize similar.

A. Contracts:

One policy recommendation that works in conjunction with all others is that legislative should provide mandates that would improve the contracts under which the CDRC operates by improving the CDRC's contract negotiation capacity and mandating frequent third-party evaluations.

There is statutory precedent for bolstering the capacity of the CDRC to negotiate contracts. For example, state law attempted to supplement the CDRC's ability to the

⁴⁸ Cal. Penal Code § 6250.5 (a).

⁴⁹ Cal. Penal Code § 6256.

⁵⁰ See Generally Department of Corrections: *Issues Identified and Key Recommendation Made in Bureau of State Audit Reports* (Jan. 2005) available at <http://www.bsa.ca.gov/reports/list.php?agency=22>

negotiate contracts with Emergency healthcare providers in two ways. First, it placed restraints on the ability of the CDRC to contract for both medical and emergency medical services. Under 5023.5 (b) the CDRC is not allowed to reimburse a private entity for ambulance services at a rate greater than that established by Medicare. Second, it compelled the CDRC to find factual information to use its reimbursement procedures. Under 5023.5 (c) the CDRC is compelled to work with the State Department of Health Services to obtain information about the cost of hospital services. As was previously discussed, even with these restrictions in place the CDRC failed to negotiate a favorable rate for medical services. Until recently the California Medical Assistance Commission, which negotiates the medical contracts for the state's health care system, was charged with negotiating medical services contracts for the CDRC. The section was amended recently to mandate that the CMAC partner with and provide medical cost information to the CDRC. However, given the performance of the CDRC, it is recommended that legal restraints are placed on the CDRC when negotiating its contracts, and that the other state agencies are mandated to either help, or negotiate in the place of the CDRC when it is demonstrated that the other agency has a greater competence in such matter.

There is also statutory precedent for mandating oversight of state contract performance in a different state services context. In 1992 the state passed a law allowing for the development of a charter school system. A part of the state law allowing such a system was a mandate for several third-party evaluations of the efficacy of the charter school system.⁵¹ Such a mandate would be of particular importance to the CDRC because it would allow for a data driven evaluation of the efficacy of its reforms. Having detailed data would help ameliorate one the difficulties of prison privatization research, which is that each situation is so individualized that it is difficult to make a valid comparison from state-to-state, or prison-to-prison.

B. Privatization of Prison Guards:

One possibility concerning prison guards was to keep state ownership of a prison facility, remove the current prison guards from the civil service, and introduce private

⁵¹ In 1997 SRI, International studied the demographic characteristics of charter schools; in 2003 RAND Corp released a study detailing the academic achievement levels of charter schools; this year RAND is expected to release a study that focuses on a subset of charter schools it found to be problematic in its 2003 study.

companies that could recruit and train private guards. This is not recommend for two major reasons. First, there is no research that evaluates the performance of private guards in public facilities, but that is irrelevant because it would not be allowed under the state civil service act.

Turning prison guard responsibilities over to private companies would clearly displace civil service workers. Additionally, even if a court found that such a contract did not violate 19130 (a) then it would also not be allowed if the private provider generated profits by paying less than the state's prevailing wage. In order to generate a profit, private prison providers would have to either cut the number of guards on duty, or cut the wages and benefits for guards. Both options have negative consequences, but under the Civil Service Act, the personal services contract will not be allowed if the pay rate, or benefits paid to the private guards are not within a reasonable range to the state's prevailing wage. Therefore, the private provider's ability to generate profits will be severely limited since the state's prevailing wage is that of the prison guards union. Therefore, the only real option for left for the private provider to generate profits is to reduce the number of staff members.

The main drawback to reducing staff coverage is that violence may increase as a result. For example, according to the Prison Policy Initiative, 49% more prisoner-to-prisoner violence was reported in private prisons than public prisons and 54% more prisoner-to-staff violence occurred in private prisons than public prisons.⁵² Lending significance to these figures is the fact that the majority of private prisons in the United States deal with the lower threat prisoners than the general system.

Additionally, there might be external consequences to allowing the whole scale privatization of prison guards. One claim made by proponent of prison privatization is that the services provided to the state by private contractors are equal to those provided by state employees. If it is stipulated that the services will in fact be equal, then the taxpayers will clearly benefit by the paying less for an equal service. However, the financial benefit to taxpayers should be weighed against any external costs incurred as a result of the privatization of prison guard jobs.

⁵² Peter Wagner, *The Prison Index: Taking the Pulse of the Crime Control Industry.*, (Prison Policy Initiative, 2003) available at <http://www.prisonpolicy.org/prisonindex/privateprisons.shtml>

One policy concern that does not seem to be addressed in the research is related to the quality of jobs offered by the private providers. According to Marc Duff, a senior policy and research director at Taxpayer's Inc., private prison guards are often offered salaries that are competitive to those paid to public guards, but the benefits are much lower. According to Mr. Duff's estimates, private prison guards receive benefits that are worth approximately 10% of their salary. A survey of public prison guards in Wisconsin found that the guards received benefits worth up to 44% of their salary.⁵³ Mr. Duff, as a researcher at Taxpayer's Inc., makes clear his belief that this situation is unacceptable, but his means that private prison jobs will not be able to provide the same benefits, not only to the guards, but to their families. According to a study of private prisons from 1998-1997, the turnover rate for private prison guards was approximately three times that of public prison guards.⁵⁴ Another study, published 2 years ago, roughly replicated the findings. It found that the turnover rate at private prisons was 40.9% among private correctional officers, but the turnover rate among public correctional officers was 15.4%. Both figures indicate that the quality of a job found within private prisons is substandard.⁵⁵ Hypothetically, the public is getting the same prison guard services at a 5% overall savings with the balance of the financial benefits being paid to a private company while an entire class of jobs in the state is significantly diminished in quality. The situation might be viewed as a transfer of wealth from the state employees to the private service providers.

An additional reason not to embark on a wide scale privatization of prison guards is the political risk it will entail. The CCPOA is one of the strongest political entities in the state and they will view an effort to privatize any guard position as an attack on their political capital. If the union becomes too opposed to privatization too quickly then the implementation of any privatization strategy will face political hurdles that may be difficult to overcome.

i. Specialized CCF Version #1

⁵³ Marc C. Duff, *Corrections Privatization Generates Savings and Better Services*, 24 (Taxpayer Inc., Winter 2003).

⁵⁴ Judith Greene, *Prison Privatization: Recent Developments in the United States*, (May 2000)

⁵⁵ Peter Wagner, *The Prison Index: Taking the Pulse of the Crime Control Industry.*, (Prison Policy Initiative, 2003) available at <http://www.prisonpolicy.org/prisonindex/privateprisons.shtml>

There is a way to approach the privatization of prison guards, but it is highly case specific. There are clearly segments of the prison population that pose a greater escape risk, or a greater potential for violence and therefore require more supervision by highly trained prison guards than other segments of the prison population. It stands to reason that the centrality and importance of prison guards fluctuate with the levels of the supervision required by the inmate population in a given facility. For example, in a facility like San Quentin, which houses some of California's most dangerous inmates, the level of inmate supervision required is extremely high and therefore the centrality of prison guards to the function of the facility is also extremely high. Conversely, a facility housing only elderly and infirmed inmates has fairly low supervision needs. Because need for guards is relatively low, the contribution of qualified guards to the proper function of such a facility is minimal.

One possible method of privatizing prison guards is to identify these low supervision needs inmate populations and create new service facilities designed for them.⁵⁶

The proposed structure for facilities designed for specialized inmate populations is modeled roughly on the state's CCFs in that they are small and have diverse missions. These specialized CCFs, directed at privatizing prison guard services, would follow one of two possible models. The specialized CCF would be private facilities, staffed by private employees and private prison guards, and serving inmate populations requiring relatively little supervision. Since this approach would be a continuation of the approach used to develop the 12 existing CCFs it would also require specific legislative action to create a "new state service." If the CCF was not a "new state service" then the facility would have to be staffed by state prison guards and could not contribute to privatizing guard services.

There is some evidence that some California politicians are contemplating this approach. Last winter assemblymen Tim Liu introduced AB658 to the California Assembly. It was expressly directed non-violent women offenders in correctional facilities and reads in part:

⁵⁶ For more information on identifying groups for consideration please see Kathryn Tafolla Young's paper on the issue.

(a) The Department of Corrections shall develop a pilot program that creates expanded incarceration options for nonviolent women offenders. Those options may include, but are not limited to, community correctional facilities that house women inmates closer to their families, re-entry facilities to support the transition from prison to the community, and facilities designed to address the needs of parole violators who are appropriate for less restrictive sanctions. The Legislature intends that this pilot program be operated within existing resources of the department.

Significantly, in section (a)'s demonstrative list of options for increasing the incarceration options, Assemblyman Liu included "community correctional facilities." This bill is clearly attempting to justify the creation of a "new state service" for women. It is not clear whether such a justification, based solely on a declarative statement, would pass under judicial scrutiny based. As discussed previously, any attempt to privatize prison will be recognized by the CCPOA and resisted. This bill, as well as its supporters, are attacked on the CCPOA's website as being "in bed with the Privateers."⁵⁷ Despite the opposition of the CCPOA, specialized forms of CCFs may have a political advantage over other methods of privatization. AB 658 is expressly directed at the needs of women in prison. Because of its focus, the bill can be framed as addressing a women's issue to increase support from various political groups. The California National Organization of Women contributed an "argument in support" to the assembly bill and the California National Association of Women formally registered its support.⁵⁸ Prisoners are an easy group for voters and interest groups to oppose, but rhetorically it is much more difficult to register a group's opposition to a bill aimed at a specific population such as women. Additionally, the prisoner populations at which CCFs would be directed may be more sympathetic to voters. Pushing for reforms in juvenile justice, or supporting a bill that separates elderly inmates from younger, stronger offenders might be more politically palatable than simply supporting inmates.

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http://www.ccpoa.org/default.php?inc=homenews/news_list&pagemode=view&news_id=151

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http://www.aroundthecapitol.com/billtrack/analysis.html?file=ab_658_cfa_20050411_101514_asm_comm.html

Although AB 568 was passed in the State Assembly, it was introduced the State Senate as SB617 and while there it has undergone significant revision. Perhaps the most significant revision is that “community correctional facility” no longer appears anywhere in its language.⁵⁹ However, the bill now calls for the creation of a committee that is charged with “evaluat[ing] the need for gender specific programs to meet the needs of the majority of [] women” and provides a non-exhaustive list of specific areas of concern that includes pregnancies, domestic abuse history, and mothers of dependent children.⁶⁰

The reason for amending the bill to exclude “community corrections facility” is unclear. It is possible that it is a result of political pressure from the CCPOA. It is also possible that the committee is being formed to explore whether there does exist a legitimate need for gender specific prison reform and what role “new state services” might have in that reform. If the committee does find a legitimate need for a specific population then their fact-finding can provide the legislative basis needed for to establish additional specialized CCFs.

C. Privatization of Prison Non-Guard Services:

The second approach to the privatization of prison services would be to target the non-security services provided by the CDRC. These services would include service contracts, programming and prison management services.

i. Centers without Facilities:

The director of corrections is already authorized under statute to contract with private service providers to fulfill the service contract needs of the state. Additionally, such contracts are allowed under section 19130 (b) and are therefore not subject to the restrictions under section (a) of the same code. The only recommendation in regards to this segment of prison services is to the aggressively expand the number and quality of

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http://www.aroundthecapitol.com/billtrack/text.html?file=sb_617_bill_20050504_amended_sen.html

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http://www.aroundthecapitol.com/billtrack/text.html?file=sb_617_bill_20050504_amended_sen.html

contracts since, as in all areas of prison privatization, the quality and costs saving achieved by the state are not inherent in the nature of privatization, but in the quality and enforcement of the contracts enforcing such privatization.

For the other two types of privatization there are two vehicles for instituting such change. The first vehicle would be for the state legislature to specifically mandate the privatization of specific services. There are services that seem to have followed this model. For example, the director of corrections is mandated to contract with a private non-profit provider for prisoner visitation services. The legislature first establishes the state's need. Under section 6350 (a) and (b) the state finds that prisoner visitation helps decrease both recidivism and in prison violence. Having established a state need, the legislature continues in section (c) by finding that "[t]he location of prisons and lack of services to assist visitors impedes visitors," thus establishing an unfulfilled state need. The statute further authorizes the private non-profit agency to establish "visitor centers" outside the security perimeter and to work with the CDRC, the community, volunteers, and others to encourage visitation to inmates

One recommendation that would improve the model under which the visitor centers are created is to implement performance standards. Under the current system the visitor centers are required to submit a report detailing its impact on prisoner visitation, efforts to network with the community, and barriers it faced. Such a report is important because it makes the agency responsible for tracking such data; however there is no actual consequences attached to the data being produced. The state would be better served if such contracts mandated that contract renewal is dependent on the service provider being able to demonstrate measurable, verifiable yearly progress in fulfilling its mission. One of the problems with the law is that progress is not imperative and the service provider has no incentive to improve their performance. The prison administrations do not have an incentive to demand improved performance. With a highly demanding job, prison administrators under the law as it exists only have to ensure that the program exists and that they receive a report each year. If those two conditions are met then presumably the contract can be renewed regardless of actual improvement by the agency. The law, as currently structured, disincentives the prison administrator from pressing the issue of services improvement. He can legally accept the status quo

from a service provider who is not making any improvement, or he can voluntarily create more work for himself by not renewing the contract and searching out a new “visitor center” provider who will be more productive. Given the limited resources of the prison administrator, it is not a wise policy to rely on him to insist on improved service performance. By mandating objective, specific performance review then the administrator has no choice but to comply with the law and require performance. Changing the law privatizing prison visitation services provides both parties—the service provider, and the prison administration—the proper incentives to perform.

It is unclear whether the legislature could privatize the staff inside of the prisons by setting up “centers” within the prison walls. The visitor centers authorized by section 6351 is a privatized new state service because the legislature found that the service was needed and not being provided. The law authorizing the “visitor centers” specifically states that they are to provide services including assistance with transportation, childcare, emergency clothing, information about visitation regulations, and referral for available social services.⁶¹ The law specifies that these “visitor centers” must also maintain a reception room outside of the secure perimeter. While this means that there is a physical separation between the prison and the reception room, most of the services offered by the visitor centers are not dependent on a separate facility. Under section 6356, the legislature specifies that the creation of the “visitor centers” is not intended to “limit the department in developing additional programs or making all reasonable efforts to promote visits to prisoners.”⁶² The legislature is authorizing a private provider to perform services that overlap with the past and future efforts of the state in the same endeavor. This is significant because one basis for challenge an action that privatizes a state service is to allege that it is contracting out work that either could have been, or has been done by the civil service. In this case, the legislature is instructing to civil service to continue doing the work that that has been contracted out to the private non-profit.

Unless the physical separation between the “visiting centers” and the prison facility is dispositive as to whether the “visiting centers” are an allowable creation of a “new state service” then it might be possible to for the state to create “centers” of various

⁶¹ Cal. Penal code §6352 (a-f).

⁶² Cal. Penal code §6356.

types inside the prison. For example, the state legislature could officially find that: increasing the literacy of the prisoners at San Quentin is necessary to lower the recidivism rate, and that such services are lacking at San Quentin. Having officially established an unfulfilled state need, the legislature might be able to create a “literacy center” housed within San Quentin. These proposed “literacy centers” would be housed in state facilities and the prisoners in the “literacy center” would be guarded by CCPOA members, but the actual instructors and management of the learning center would be private contractors, such as Sylvan Learning Center. These contractors would then be subjected to performance review contracts in that they would either have to meet certain standards, such as raising the mean literacy of each class, or they could receive bonuses for various levels of performance. One of the primary benefits of this approach is that the staff of such a center is not covered under the protections of the state civil service. Because of that the state would have more flexibility to contract with a variety of the providers, subject them to performance review, and fire those who do not produce the literacy gains desired by the state. Additionally, if private enterprise is introduced the larger prison population then it has been exposed to a larger market for these services than had previously been available. It is then possible that such providers will engage in political lobbying to help keep their programs in the corrections system. This effect was certainly seen in California’s attempt at whole facility prison privatization in the late 1990’s.⁶³

ii. Specialized CCF Version #2

The second type of staff privatization is to use the CCF primarily to privatize non-guard prison services. Under this second version of the CCF model, the facility would be privately owned, and the employees would be private, but the guarded by state prison guards. The benefit of this diversified approach is that it provides a better allocation of the strengths of the CCPOA and the strengths of private prison guards. In smaller facilities, with fewer inmates who need less supervision the private prison guards will be less central to the proper function of such a facility. Because the guards are, relatively

⁶³ Brigitte Sarabi and Edwin Bender, *The Prison Payoff: The Role of Politics and Private Prisons in the Incarceration Boom*. (Nov. 2000) (Western Prison Project) available at www.westernstatescenter.org/archive/ppayoff.pdf.

speaking, less important to the proper function of the facility the effects of any short-coming that is endemic to private prison guards will be minimized. This also allows for the highly trained and experienced state prison guards to be placed in the facilities with prisoners that most need their expertise.⁶⁴

This model assumes that an inmate who requires a high level of security can also benefit from the therapy, or other services that a CCF focused on a specific population can provide. For example, is a CCF was dedicate to treating illiterate non-English speaking inmates then it stands to reason that violent offenders falling into this category would also benefit from the treatment at this facility. Allowing CCPOA guards to staff the facility would allow for the greater security needs of the diverse inmate population.

There is also statutory precedent for this approach. Under section 6267 of the penal code, the director of corrections is allowed to contract out to a private facility to provide for the care of inmates in need of long-term medical attention, or a skilled nursing home.⁶⁵ This means that the legislature has approved private facilities that are guarded by state prison guards. It should be noted that facility created by section 6267 would be a prime candidate for the type of CCF discussed earlier because inmates in need of long term medical care and especially inmates in need of a skilled nursing home would can be presumed to be a low security need inmate.

An additional benefit of this system is that because it requires the use of CCPOA employee it does not threaten the CCPOA. Therefore, it might not be met with the same kind of resistance as the other models of privatization.

Conclusion:

The anticipated benefits of the privatization prison staff and services are focused on a couple of areas.

Privatizing a portion of the prison guard and using that portion to guard segments of the inmate population that require less security, private service providers can enter the system and help provide a wider range of services which are more narrowly tailored to the needs of specific inmate populations. Additionally, the privatization of some prison

⁶⁴ For a discussion of the possible political and social effects of only allowing CCF's to serve low and medium risk inmates see Kathryn Young's paper.

⁶⁵ Cal. Penal Code § 6267.

guard positions will diminish the bargaining position of the CCPOA by lowering their membership. The downside to this is that any movement towards privatization will raise the ire of a very strong political opponent.

The privatization of prison services will allow the prison administration greater leeway in hiring and firing service providers based on performance. By negotiation performance based contracts and legislatively mandating that contract renewal is contingent on meeting established measurable goals, service providers will be given a strong incentive to perform and meet their goals.

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