

THE PRIVATIZATION OF CALIFORNIA CORRECTIONAL FACILITIES: A POPULATION-BASED APPROACH

Kathryne Tafolla Young*

I. PRISON PRIVATIZATION IN THE CALIFORNIA CONTEXT

A. A FRAMEWORK FOR ASSESSING PRIVATIZATION

Most states' interest in privatizing segments of their prison system is fueled largely by a desire to cut costs.¹ After all, prisons are a vast expenditure. California spends \$8.75 billion annually on its Corrections Department (CDCR)—\$34,150 per inmate.² In the United States, state correctional expenditures rose 145%, in constant dollars, from 1986 to 2001.³ On average, prison expenses consume 77% of states' correctional budgets.⁴ Certainly, states have an incentive to cut prison costs where they can, and to this end, privatization holds intuitive appeal. After all, if a state hinges its willingness to contract with a private corporation upon the corporation's ability to offer a bid 5 to 10% lower than current state expenditures, it is difficult to see how the state would *not* save money. Indeed, some research suggests that privatization of state prisons, generally implemented through a company such as Corrections Corporation of America (CCA), has already saved some states considerable

* J.D. candidate, Stanford Law School; Ph.D. candidate in Sociology, Stanford University. For many helpful suggestions, and for prompting me to think about these issues, I am especially grateful to Joan Petersilia and Robert Weisberg. I also thank Mariano-Florentino Cuéllar and Marc Tafolla Young for useful comments and criticism, and Wendy Young and Randy Young for their encouragement.

1. *See, e.g.*, DAVID SHICHOR, PUNISHMENT FOR PROFIT 135 (1995) ("The major selling point of correctional privatization is the economic benefit that it can provide . . .").

2. CAL. DEP'T OF CORR. & REHAB., SECOND QUARTER 2006 FACTS AND FIGURES (2006), <http://www.cya.ca.gov/divisionsboards/AOAP/FactsFigures.html>. This figure includes all inmates in CDCR custody, including those in community correctional facilities. It does not include parolees.

3. BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, STATE PRISON EXPENDITURES, 2001, at 1 (2004), <http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf>.

4. *Id.*

expense.⁵

When examined more carefully, however, the numbers are less clear-cut. For one, some studies showing cost savings lack controls for factors likely to affect costs, such as inmate characteristics.⁶ Comparing a minimum-security private prison to a maximum-security public prison on the basis of cost is of limited use, as the latter requires more guards and different facilities. Second, categorizing costs can be problematic. Prison expenses are often understood in terms of “avoidable” costs (those that may be passed on to a private contractor) and “unavoidable” costs (those that fall to the state even after a contractor is paid). As Gaes and Camp, et al., point out, it is logistically difficult to parcel expenditures into these two types, and whether a cost is categorized as “avoidable” or “unavoidable” may drastically affect a study’s results.⁷ Third, and relatedly, some studies lack controls for variables such as inmate population size and geographic variation in cost of living.⁸ Such controls are crucial to reliability: if Massachusetts spends four times more on land to build a prison outside of Boston than California spends on land for a prison in the middle of the San Joaquin Valley, this difference will affect relative cost—even though, by many measures, the cost of purchasing land would be categorized as “unavoidable,” since it would probably not be passed on to a private contractor. Finally, even the best-intentioned researchers face assorted other complications. Indecipherable state bookkeeping, coupled with a wide variance among contracts, makes it difficult to compare institutions fairly.

Studies that take a more nuanced approach to cost calculation paint a murkier picture of privatization’s cost-effectiveness. For example, in 1999, Pratt and Maahs conducted a meta-analysis of twenty-four previous cost studies, and concluded that there was no significant effect of private versus public prison ownership with regard to cost.⁹ Many other estimates suggest that financial savings may be slim. As the Bureau of Justice Assistance concluded in 2001, researchers remain divided about how much—if any—cost can be

5. See *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1868 (2002); see also JAMES F. BLUMSTEIN & MARK A. COHEN, THE INTERRELATIONSHIP BETWEEN PUBLIC AND PRIVATE PRISONS: DOES THE EXISTENCE OF PRISONERS UNDER PRIVATE MANAGEMENT AFFECT THE RATE OF GROWTH IN EXPENDITURES ON PRISONERS UNDER PUBLIC MANAGEMENT? (2003), <http://www.apcto.org/logos/Study.pdf>.

6. See JAMES AUSTIN & GARRY COVENTRY, NAT’L COUNCIL ON CRIME & DELINQUENCY, EMERGING ISSUES ON PRIVATIZED PRISONS 24-25 (2001) (describing Sellers’ study, which compared three public and three private facilities, and concluding that the former operated at a lower cost per inmate and offered more programs to prisoners—but not controlling for factors such as inmate characteristics or how the designs of each facility differed).

7. For more on the “devilish” details of this division, see GERALD G. GAES ET AL., MEASURING PRISON PERFORMANCE 95-103 (2004).

8. See *id.* at 98.

9. *Id.* at 103.

saved through privatization;¹⁰ no reliable answer is readily available. Thus, this Note will not address the overall savings potential of privatization; rather, the limited discussion of fiscal efficiency presented here will center only upon very specific, self-contained (and thus more readily comparable) facets of prison services.

Proponents of facility-level privatization have also suggested that privatization may have a role in lowering recidivism rates. Lanza-Kaduce, Parker, and Thomas compared recidivism rates in two Florida facilities, one private and one public, and concluded that rates were lower among inmates who had been housed in the private facility.¹¹ It is exceedingly difficult to compare interstate recidivism rates,¹² but some research suggests that California's are the highest in the country, at 66%.¹³ Thus, although reducing recidivism is important to all states, it is a particularly crucial consideration for California.

However, like the fiscal benefits of privatization, the recidivism-reducing benefits of privatization are elusive.¹⁴ Few studies have compared recidivism rates of privately housed prisoners to those housed in public facilities, but the most comprehensive studies in this regard suggest the difference is negligible at best. A Florida study that used multiple measures of inmate exposure to private prisons, analyzed multiple groupings of inmates, and controlled for a range of recidivist behaviors, found "[n]o significant recidivism rate differences . . . between private and public prison inmates for adult males, adult females, or youthful offender males."¹⁵ Insofar as research has shown, there is little reason to believe that, absent other differences, recidivism rates will increase or decrease solely because an institution is private.

In examining what role privatization should serve in California criminal justice reform, this Note approaches privatization as a structural tool for

10. AUSTIN & COVENTRY, *supra* note 6, at 22.

11. Charles W. Thomas, *Correctional Privatization in America*, in CHANGING THE GUARD: PRIVATE PRISONS AND THE CONTROL OF CRIME 91 (Alexander Tabarrok ed., 2003) (citing Lon Lanza-Kaduce, Karen F. Parker & Charles W. Thomas, *A Comparative Recidivism Analysis of Releasees from Private and Public Prisons*, 45 CRIME AND DELINQUENCY 28-47 (1999)). Note that the study presents a design problem, as matched samples did not necessarily go to each facility. It is possible that milder offenders were sent to one or the other.

12. As Joan Petersilia has pointed out, two factors increase this number for California: the state's "blanket imposition of parole on all ex-prisoners, and California's unusual reliance on parole revocation as a quick-fix response to parolee problems." JOAN PETERSILIA, UNDERSTANDING CALIFORNIA CORRECTIONS 71 (2006), available at http://www.ucop.edu/cprc/documents/understand_ca_corrections.pdf.

13. See JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 144 (2003).

14. Again, this is true with respect only to the whole-facility, general-population variety of privatization typically undertaken by corporations such as CCA.

15. William D. Bales et al., *Recidivism of Public and Private State Prison Inmates in Florida*, 4 CRIMINOLOGY & PUB. POL'Y 1, 57 (2005).

systemic improvement, rather than simply a way to replicate existing structures more cheaply. But before making any policy suggestions, it is first necessary to identify the most significant aspects of the California criminal justice system upon which privatization, in any form, might bear.

B. SPECIAL IMPLICATIONS OF PRIVATIZATION IN CALIFORNIA

While cost may be the impetus for most prison privatization in the United States, the most dire circumstance facing California corrections is overcrowding. The CDCR reported an increase of more than 5% in the prison population last year.¹⁶ Of course, a population increase alone does not cause overcrowding, but the CDCR's bed space is extremely limited; California's prison system is currently operating at 200% of its capacity.¹⁷ Classrooms, gyms, and other programming space has been filled with beds—often stacked three high—and occasionally crowding has become so severe that prisoners have had to sleep outside.¹⁸ Alleviating this overcrowding is crucial.

Next, any privatization measure in California must be assessed with regard to its potential effect on the prison guards' union, the California Correctional Peace Officers Association (CCPOA). One of the most politically influential action groups in the State, the CCPOA, which numbers 33,350,¹⁹ has lobbied for victims' rights, pay raises for its members,²⁰ and other causes—generally with success.²¹ The political climate surrounding the CCPOA is heated, both from union supporters and from those who think the union has garnered too much power. One especially contentious factor involves allegations of prisoner neglect and abuse by guards.²² Another involves the guards' contract. By many analyses, California's prison guards are among the highest paid in the country,²³ with average salaries of around \$64,000.²⁴ With overtime, that salary can reach six figures. In fiscal year 2005-2006, over 900 workers added

16. CAL. DEP'T OF CORR. & REHAB., *supra* note 2.

17. *California Prison Overcrowding Vexes Politicians* (NPR radio broadcast July 11, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5548017>.

18. *Id.*; see also Ed Mendal, *Governor May Act on Crisis in Prisons*, SAN DIEGO UNION-TRIBUNE, Sept. 2, 2006, at A1.

19. PETERSILIA, *supra* note 12, at 17.

20. INST. OF GOVERNMENTAL STUDIES, UNIV. OF CAL., BERKELEY, CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION (2005), <http://www.igs.berkeley.edu/library/htCaliforniaPrisonUnion.htm>; see also Andy Furillo, *Contract Pits Guards vs. Governor*, SACRAMENTO BEE, June 12, 2005, at A1.

21. PETERSILIA, *supra* note 12, at 19.

22. Mark Martin, *Guards Union Corrupts Prisons, Report Finds*, S.F. CHRON., June 25, 2004, at A1.

23. PETERSILIA, *supra* note 12, at 21 (explaining that the earnings of correctional officers in California are 58% higher than the national average).

24. Mark Martin, *Dems Oppose Prison Guards' Pay Increase, 17 Senators Want Contract Renegotiated*, S.F. CHRON., May 19, 2004, at B3.

\$50,000 or more to their base salaries in overtime pay; over 1600 officers' total earnings topped \$110,000.²⁵ Their contract also limits the State's ability to reassign guards to tasks other than those delineated in their contracts,²⁶ and makes managerial reassignments difficult.²⁷ An independent review panel concluded that for the last five years, the CCPOA's contracts have created an "unfair and unworkable tilt toward union influence" in a way that "seriously undermine[s] the ability of management to direct and control the activities of existing correctional departments."²⁸ The weighty presence of the guards' union in California corrections, and in California politics generally, raises several issues that should be assessed in relation to privatization.

Additionally, since California's inmate population is one of the three largest in the country, the sheer number of inmates in CDCR facilities—approximately 170,000—translates into a large number of prisoners with special needs. Some of the biggest sub-groups include inmates over fifty years of age (more than 10% of the inmate population),²⁹ HIV-positive inmates (HIV is five times more common among inmates than among the general population;³⁰ 0.7% of California's combined state and federal prison population is HIV-positive³¹), and prisoners with mental illnesses (around 15% of the prison population³²). These populations alone total over 35,000 California inmates. Another large special needs group is illiterate or barely literate inmates. The average prisoner is thirty-six years old, but reads at a seventh grade level.³³ In considering how privatization might be used as a tool in the

25. Dan Morain, *OT Pushes Guards' Pay Past \$100,000*, L.A. TIMES, Dec. 23, 2006, at A1.

26. Interview with Jeanne Woodford, former Undersecretary, Cal. Dep't of Corr. & Rehab., at Stanford Law School in Stanford, California (Nov. 9, 2005); PETERSILIA, *supra* note 12, at 25. Woodford also served briefly as Acting Secretary before resigning in April of 2006.

27. PETERSILIA, *supra* note 12, at 25.

28. *Id.* (quoting CORR. INDEP. REVIEW PANEL, CAL. PERFORMANCE REVIEW, REFORMING CALIFORNIA'S YOUTH AND ADULT CORRECTIONAL SYSTEM (2004), <http://cpr.ca.gov/report/indrpt/corr>).

29. CAL. DEP'T OF CORR. & REHAB., PRISON CENSUS DATA AS OF DECEMBER 31, 2005, at 8 (2006), *available at* www.cdcr.ca.gov/ReportsResearch/offenderinfoservices/Annual/Census/CENSUSd0512.pdf.

30. CTR. FOR DISEASE CONTROL, ROUTINE HIV TESTING OF INMATES IN CORRECTIONAL FACILITIES (2003), http://www.cdc.gov/hiv/topics/prev_prog/AHP/resources/guidelines/Interim_RoutineTest.htm.

31. BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, HIV IN PRISONS, 2004, at 2 (2006), <http://www.ojp.usdoj.gov/bjs/pub/pdf/hivp04.pdf>.

32. PETERSILIA, *supra* note 13, at 37.

33. CAL. DEP'T OF CORR. & REHAB., *supra* note 2. Because this data is not disaggregated, it is impossible to draw definite conclusions from it. For example, it is conceivable that the least literate prisoners are also the youngest ones, or that some other subpopulation with very low literacy levels is bringing down the average.

California criminal justice system, it is useful to take stock of these populations and consider the ways in which privatization might help or hinder their treatment, as well as the financial implications of such changes.

C. GENERAL IMPLICATIONS OF PRIVATIZATION

On the national level, negative legal and moral assessments of privatization tend to be the crux of many opponents' arguments. The simplest moral and philosophical argument against privatization tends to take the form that states are fundamentally responsible for corrections and should not be permitted to contract away this responsibility. The legal argument against privatization is intertwined, but difficult to assess in the abstract. Some privatization opponents believe that private prisons provide less training and supervision of individual guards; they fear that this, in turn, leads to disregard of prisoners' constitutional rights. For now, it is simply worth noting that this concern is strongly implicated in any discussion of privatization.

A second reason opponents are wary of privatization is the possibility that the government and corporations have different motives. This, too, is often intertwined with moral and philosophical opposition. Whether a private corporation controls all or part of the services at a given facility, it functions as a for-profit enterprise that necessarily focuses on benefiting economically from the prison's administration. If it fails to turn a profit, it may cease to exist. Privatization opponents fear that corporations' concern with the bottom line risks cutting corners and sacrificing quality of services.³⁴ Privatization proponents, on the other hand, suggest that corporations' bottom-line interest forces them to be efficient, flexible, and innovative—concerns, proponents say, that the state does not share.³⁵ It is fruitful to consider the fundamental differences between a non-profit government institution and a for-profit private institution in assessing the ways in which their different characteristics might contribute most effectively to California's criminal justice system.

II. FOUR APPROACHES TO PRIVATIZATION: BENEFITS AND DRAWBACKS

A. MAJOR OPTIONS FOR PRIVATIZING CORRECTIONS IN CALIFORNIA

In assessing whether facility-level corrections privatization, in any form, would suit California's needs, it is essential to consider the benefits and drawbacks of various forms in which privatization could be implemented. At least four possible approaches are readily apparent. First, the State could forego

34. SHICHOR, *supra* note 1, at 166-85.

35. *See, e.g.*, Thomas, *supra* note 11, at 163-64.

privatization altogether, as about twenty other states have done.³⁶ After all, any shift to a new system will come with an administrative cost that is likely to create an initial financial burden, and invite scrutiny. Especially since the State's criminal justice system is already undergoing a number of other reforms,³⁷ the best approach may be to maintain the status quo. A second approach involves privatizing a certain *number* of facilities without regard to facility type. Some private facilities might be low-security, while others might be medium or even maximum security. This approach would likely offer the speediest implementation and could work to reduce overcrowding quickly, since it requires little initial research. Third, privatization efforts could be facility-focused, concentrating on privatizing a certain *type* or *category* of facility, most obviously those at a particular security level. A fourth approach would focus on offenders; the State would create private facilities designed to house certain categories of offenders with specific needs—for example, prisoners with AIDS, elderly prisoners, or prisoners with developmental disabilities.

Each approach raises questions of its own, foremost among which is staffing. In any private facility, the state might contract out for staff, provide its own staff, or use a combination of the two. Even the first approach—no facility privatization at all—could raise questions about staffing: what if some jobs in state facilities could be staffed with private employees? But while staffing concerns are crucial, they raise complications that cannot be satisfactorily addressed in a Note that focuses, as this one does, upon whole facilities. Thus, except where otherwise specified, “private” refers here, conventionally, to private facilities staffed with private employees, and “public” refers to institutions in which both facilities and staff are public.

B. OPTION ONE: NO PRIVATIZATION³⁸

In any form, privatization poses a myriad of controversies. Sidestepping these altogether is foremost among the benefits of eschewing privatization. Those who perceive prison management as a state responsibility would remain unruffled, any complications regarding “private” versus “state” actors under the Prison Litigation Reform Act would be dodged, and the state would avoid the onerous task of designing oversight measures.

Such benefits have practical and political significance, and the latter is especially important in California. For one, the CCPOA is politically powerful, and will likely oppose measures that threaten prison guards' job security, or

36. AUSTIN & COVENTRY, *supra* note 6, at 5.

37. *California Prisons Put New Focus on Rehabilitation* (NPR radio broadcast Jan. 19, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4458080>.

38. Most of the pros and cons of this approach are simply the inverse of the pros and cons of the next approach discussed. In order to avoid repetition, the benefits and drawbacks of each approach are only discussed at length in one section or the other.

even measures that would slow CCPOA expansion. The union's dissatisfaction with privatization could pose a political risk to any administration that tries to implement it. Additionally, since the current administration is engaged in efforts to increase the California criminal justice system's focus on rehabilitation—some of which have been met with accusations of evincing a “hug-a-thug” mentality³⁹—privatization may reinforce or create the negative perception that the State cannot handle its prisoners. This perception of helplessness may be exacerbated not only through reliance on private prisons in the first place, but also through any security breaches that occur at private prisons in future years. Nationally, incidents such as riots and assaults tend to receive a disproportionately high level of attention when they occur at private facilities.⁴⁰ Furthermore, because privatization has already been tried—albeit on a small scale—in California, and was subsequently abandoned, it may be regarded with especial suspicion. All of these factors suggest that one major benefit of keeping California's prisons public would be that, unlike privatization, it would not risk compromising the adoption of other, more urgent systemic reforms.

The most obvious drawback to keeping California's prison facilities uniformly public is that the approach does nothing to address overcrowding—a problem Jeanne Woodford, former Undersecretary of the CDCR, cites as one of the most serious problems in California's criminal justice system.⁴¹ According to Woodford, the State is in no financial position to construct new prisons, nor does it have immediate plans to do so.⁴² Governor Arnold Schwarzenegger has proposed building more state prisons and has been met with political opposition. Moreover, the Governor's interest in building additional prisons has been criticized by many who initially supported his reform efforts and fear that he has turned from rehabilitation-focused reform in search of a quick fix.⁴³ In January 2007, Governor Schwarzenegger indicated that he intends to keep advocating for the construction of new CDCR facilities.⁴⁴ From June 30, 2005

39. See Roderick Q. Hickman, Sec'y, Cal. Dep't of Corr. & Rehab., Secretary's Weekly Message for Sept. 30, 2005, <http://www.cdcr.ca.gov/AboutCDCR/secretaryMessage/2005/20050930.html>.

40. See, e.g., DOUGLAS McDONALD & CARL PATTEN, GOVERNMENTS' MANAGEMENT OF PRIVATE PRISONS xxii-xxiii (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/203968.pdf>.

41. Woodford, *supra* note 26.

42. *Id.* But see Press Release, Office of the Governor, Gov. Schwarzenegger Unveils Comprehensive Prison Reform Proposal (Dec. 21, 2006), <http://gov.ca.gov/index.php?print-version/press-release/4972/> (suggesting that Governor Schwarzenegger may try again to allocate more funds for new prison facilities).

43. See Mike Zapler, *Clock Ticking on Overcrowding*, SAN JOSE MERCURY NEWS, Sept. 15, 2006, at 1A; NPR, *supra* note 17.

44. See Laura Kurtzman, *Schwarzenegger Wants to Build New Prisons, Schools, Dams*, ASSOCIATED PRESS WORLDSTREAM, Jan. 10, 2007.

to June 30, 2006, California's inmate population rose by 8382, or 5.1%.⁴⁵ By 2012, the institution population is projected to reach nearly 190,000.⁴⁶ If the growth rate remains stable, it will reach that number even sooner. Overcrowding in California prisons is further exacerbated by the sheer size of California's prison population in comparison to its facilities' capacity. Although California has roughly the same number of adult prisoners as Texas, California has half as many prisons in which to house them.⁴⁷

One of the main repercussions of overcrowding is insufficient physical space for programming, which Woodford views as a significant impediment to the development and implementation of new programs.⁴⁸ This effect highlights an overarching drawback of Option One; keeping prisons public may miss opportunities to fit the physical and organizational structure of California prisons with rehabilitative goals. In July 2005, California's correctional agency changed its name from the Department of Corrections to the Department of Corrections and Rehabilitation⁴⁹ and began assessing programmatic changes that would help meet this rehabilitative objective—for example, increasing the availability of work programs inside prisons, preparing offenders more appropriately for release, and making programmatic changes in women's prisons to more accurately reflect the needs and risk levels of female offenders.⁵⁰ This approach strives to address each prisoner individually, assessing his or her particular needs.⁵¹ It may be difficult to wedge this new correctional mission into an old correctional structure, especially one that only consists of thirty-three prison facilities.⁵²

45. CAL. DEP'T OF CORR. & REHAB., ADULT POPULATION PROJECTIONS, 2007-2012, at 3 (2006), www.cya.ca.gov/ReportsResearch/OffenderInfoServices/Projections/F06pub.pdf.

46. *Id.* at 23.

47. CAL. DEP'T OF CORR. & REHAB., *supra* note 2; Press Release, Office of Justice Programs, Dep't of Justice, The Nation's Prison Population Continues Its Slow Growth (Oct. 23, 2005), <http://www.ojp.usdoj.gov/bjs/pub/press/p04pr.htm>; Tex. Dep't of Crim. Justice, Unit Directory, <http://www.tdcj.state.tx.us/stat/unitdirectory/all.htm>. For both states, this number only includes prisons, and excludes camps, jails, and minimum-security community corrections facilities.

48. Woodford, *supra* note 26.

49. JAMES E. TILTON, CAL. DEP'T OF CORR. & REHAB., INMATE POPULATION, REHAB., & HOUS. MGMT. PLAN 8 (2006), *available at* www.cdc.state.ca.us/Communications/specialSession/inmatePopRehabHMP.pdf.

50. Woodford, *supra* note 26; *see also California Prisons Put New Focus on Rehabilitation*, *supra* note 37.

51. *See California Prisons Put New Focus on Rehabilitation*, *supra* note 37.

52. CAL. DEP'T OF CORR. & REHAB., *supra* note 2.

C. OPTION TWO: GENERALIZED PRIVATIZATION⁵³

A second potential privatization scheme would place California's most urgent penal need, reduction of overcrowding, over all other considerations. This approach would likely result in privatization of facilities at varying levels of security, as well as varying prisoner composition, and would likely involve partnerships with national corrections companies that have extensive experience operating private prisons. New facilities would be built and opened quickly, and prisoners from the most crowded facilities would be moved there immediately.

Flexibility and speed are the chief advantages of this approach. Rather than insisting upon a rigid scheme through which to implement privatization, under this "generalized" approach, a state houses inmates at a private facility whenever it becomes financially and politically feasible to do so. Such flexibility would be especially advantageous in California, since the State has recently undergone increases in prisoner population, and its prison system is undergoing reforms that may have unpredictable effects on the number of inmates it needs to house.⁵⁴ Because it is so tailored to population concerns, this relatively untargeted approach would almost certainly alleviate some of the State system's population burden, and is probably the approach most certain to reduce overcrowding. At the same time, if the prisoner population declined, California could simply cancel its private contracts.

Another potential advantage specific to California is that private employee contracts are likely to be more flexible than contracts negotiated by the CCPOA. Under the current CCPOA contract, a sizeable amount of managerial control rests with the union. For example, the contract controls which duties can be assigned to an individual guard⁵⁵ and whether a guard can be relocated from one facility to another.⁵⁶ As Petersilia has demonstrated, the "post and bid" staffing system that controls guard assignments means that corrections management often has discretion over only about a quarter of assignments.⁵⁷ Whether such restrictions are good or bad, they reduce California's ability to control aspects of corrections work, which could pose impediments to delivering new rehabilitative services to prisoners. Privatization could provide a "relief valve," since the State could incorporate a great deal of direct control

53. To varying degrees, the pros and cons of privatization discussed in this Part are generalizable to the next two approaches as well. They will be discussed in each of the next two Parts only to the extent that they differ from the benefits and drawbacks outlined here.

54. One proposed reform that seems especially likely to affect the prison population is a return to an indeterminate sentencing scheme. Other reforms, such as pre-release and reentry programs, may affect the prison population through changes in recidivism levels.

55. See Woodford, *supra* note 26.

56. PETERSILIA, *supra* note 12, at 25-27.

57. *Id.* For a thorough discussion of CCPOA contracts and their effects on California corrections more generally, see *id.* at 21-27.

into its agreements with private corporations. This control would allow the State to tailor its personnel as needed to align with reform goals.

An oft-cited but hard-to-measure potential benefit of Option Two is that competition between government facilities and private facilities may exert mutual pressure for improvement. Parallel private facilities, whether in schools, prisons, or other government programs, may offer “laboratories” for innovation and experimentation. As the argument goes, private facilities can quickly incorporate the latest research and technology. If these are effective, they can then be introduced at state facilities. While controlling for a variety of factors, one study found that in states with a mix of public prisons and private prisons, housing costs rise at a rate 8% lower than in states with public prisons alone—suggesting that the mere presence of private prisons may cause state prisons to become more efficient.⁵⁸ Yet, two caveats are important. First, the study was funded by CCA and the Association for Private Correctional and Treatment Organizations (APCTO). This may mean that it merits additional scrutiny, as the investigators had a clear stake in the outcome. Second, the study did not control for the type of facilities privatized. Suppose that a state privatizes only minimum-security prisons, leaving it free to concentrate on prisons with medium and high levels of security. State corrections may become more efficient simply because the corrections department has a narrower set of problems on which to focus—efficiency might result from specialization, not from competition. Another possible explanation is that it may be less expensive to house prisoners in uncrowded conditions than in crowded ones due to lower staffing needs and decreased collateral costs in areas such as health care; thus, states’ cost savings could be caused by alleviating crowded conditions—an effect ultimately attributable to privatization, but not to competition. Although the authors of the study address a few alternate explanations, they omit these two possibilities.⁵⁹

The drawbacks of this approach, like the benefits of privatizing nothing at all, are partly political. Option One would maintain current CDCR-CCPOA relations and avoid both “hug-a-thug” criticism and moral arguments against private imprisonment; this approach would do none of these. Additionally, it has other, less obvious potential problems. For one, since private prisons can only stay open as long as there are prisoners for them to house, their existence may create an incentive against reducing California’s prison population through changes to three-strikes laws or other criminal justice policies. Some private prison industries have been significant contributors to past political campaigns, and have the potential to become powerful political forces behind keeping

58. JAMES F. BLUMSTEIN & MARK A. COHEN, THE INTERRELATIONSHIP BETWEEN PUBLIC AND PRIVATE PRISONS: DOES THE EXISTENCE OF PRISONERS UNDER PRIVATE MANAGEMENT AFFECT THE RATE OF GROWTH IN EXPENDITURES ON PRISONERS UNDER PUBLIC MANAGEMENT? (2003), <http://www.apcto.org/logos/Study.pdf>.

59. *Id.* at 8-9.

prisons in operation.⁶⁰

Next, some critics of private prisons have suggested that private prison staff are not as well trained as staff in public prisons.⁶¹ There seems, however, scant evidence to support this proposition. Many states require private prison guards to go through the state guards' training as a condition of their contracts. In addition, some private prison companies provide staff training⁶² even beyond that required for state prison guards. And, certainly, training requirements can be written into a contract that a state signs with a private provider. Inequity is more likely to arise as a result of differences in compensation. On the whole, private prison staff are paid less than their public prison counterparts, resulting in less competitive positions. Studies suggest that lower labor costs in the private sector are due to lower rates of benefits as well.⁶³ Perhaps correspondingly, staff turnover rates tend to be higher among private prison employees than among employees of state prisons.⁶⁴ This translates into staff that may be well-trained, but have little *experience*—a difference that can compromise a facility's safety level. One empirical study concluded that privately operated prisons suffered from "much higher escape rates from secure institutions, and much higher random drug hit rates" than public prisons.⁶⁵ In the sample observed, these levels differed drastically from one private institution to the next. For example, a third of private facilities had random drug test hit rates of 0%, but a fifth had rates of 10% or more.⁶⁶ Federal Bureau of Prisons (BOP) facilities' rates were uniformly lower and more consistent. One facility out of sixty-eight had a drug test hit rate of more than 10%, and over half had a hit rate of 0%.⁶⁷ While the difference in these basic measures may be caused by other factors, and while a few similar studies have produced

60. See THE SENTENCING PROJECT, PRISON PRIVATIZATION AND THE USE OF INCARCERATION 4-5 (2004), available at <http://www.sentencingproject.org/pdfs/1053.pdf> ("[B]oth CCA and Wackenhut are major contributors to the American Legislative Exchange Council (ALEC), a Washington, D.C. based public policy organization that supports conservative legislators. . . . Under their Criminal Justice Task Force, ALEC has developed and helped to successfully implement in many states 'tough on crime' initiatives including 'Truth in Sentencing' and 'Three Strikes' laws.").

61. Pete Walker, *Pecos Prison Goes Private When Bond Default Threatens*, MIDLAND REPORTER-TELEGRAM, Jan. 25, 2004.

62. Corr. Corp. of Am., About CCA, <http://www.correctionscorp.com/aboutcca.html> (last visited Nov. 11, 2006).

63. SCOTT D. CAMP & GERALD G. GAES, FED. BUREAU OF PRISONS, GROWTH AND QUALITY OF U.S. PRIVATE PRISONS: EVIDENCE FROM A NATIONAL SURVEY 2 (2001), http://www.bop.gov/news/research_projects/published_reports/pub_vs_priv/orepres_note.pdf (citing D. R. Crants, III, *Private Prison Management: A Study in Economic Efficiency*, J. CONTEMP. CRIM. JUST. 7, 49-59 (1991)).

64. *Id.* at 11-12.

65. *Id.* at 9.

66. *Id.* at 13.

67. *Id.* at 12-13.

less conclusive results,⁶⁸ it also stands to reason that “[t]he ‘greener’ the workforce, the more likely there will be lapses in these fundamental security procedures.”⁶⁹ Staff with less experience may simply be less savvy and have a smaller reservoir of on-the-job knowledge from which to draw. At the same time, if private facilities tried to eliminate this difference by compensating employees with salaries and benefits packages identical to state employees’, much of the financial benefit the state enjoyed by using private companies might be eliminated. After all, the BOP has found that labor expenses represent between 60 and 80% of the cost of prison operations.⁷⁰

D. OPTION THREE: FACILITY-LEVEL PRIVATIZATION⁷¹

This approach involves privatizing facilities based on facility characteristics. The most obvious categorization is probably security level. Under this approach, the state would contract with private prisons to house prisoners who require a particular level of security. One synonym former Undersecretary Woodford has used for privatization, “community beds,” suggests this approach. In correctional parlance, “community beds” tends to mean local, community facilities⁷²—low-security correctional facilities that provide an alternative to state imprisonment. Indeed, although some privatization proponents reject the idea that privatized prisons tend to be low security,⁷³ data supports the conclusion that private prisons, on average, provide lower-security services than government facilities.⁷⁴

68. For example, when some of the same researchers (Camp, Gaes, & Saylor) studied “measurement properties of the two dimensions of prison quality, management effectiveness and safety” in private and BOP prisons, they found that BOP prisons were superior in terms of organizational commitment and certain safety measures, that private prisons “came out ahead in terms of the average level of commitment to the institution,” and that for most measures of management effectiveness and safety, inadequate information existed to draw any useful conclusions. SCOTT D. CAMP, GERALD G. GAES & WILLIAM G. SAYLOR, FED. BUREAU OF PRISONS, QUALITY OF PRISON OPERATIONS IN THE U.S. FEDERAL SECTOR: A COMPARISON WITH A PRIVATE PRISON 22, 31 (2002), http://www.bop.gov/news/research_projects/published_reports/cond_envir/oreprscott1.pdf (citing R. W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY (1997); A. L. JAMES ET AL., PRIVATIZING PRISONS: RHETORIC AND REALITY (1997)).

69. *Id.* at 16.

70. CAMP & GAES, *supra* note 63. Former Undersecretary Woodford has echoed this as well. Woodford, *supra* note 26; *see also* NPR, *supra* note 17, at 10.

71. Many of the pros and cons of this approach that have already been discussed with regard to the previous approach, apply similarly here, and will not be repeated in this Part.

72. *See, e.g.*, Dwight F. Blint, *Corrective Measures: Lawmakers Hear Testimony on Prison Reform Efforts*, HARTFORD COURANT, Sept. 25, 2003, at B1.

73. *See, e.g.*, Geoffrey F. Segal, Reason Foundation, Corporate Corrections? Frequently Asked Questions About Prison Privatization (Nov. 2002), http://www.reason.org/corrections/faq_private_prisons.shtml.

74. Relative public/private percentages for security level of facility break down as follows: public: 19.8% high, 40.6% medium, 35.8% low; private: 4.6% high, 49.2% medium, 44.2% low. These numbers are calculated from figures presented by the Bureau of

This approach is also similar to Oklahoma's initial strategy to relieve overcrowding. When overcrowding in the early 1990s became a serious problem in that state's prisons, Oklahoma initially provided for low-security inmates to be housed in "community beds." But as the prison population began to rise, even this absorption of low-security inmates was insufficient, and the State turned to private corporations to house medium-security prisoners.⁷⁵ For Oklahoma, the prison population boom caused its Option Three strategy to transform into an Option Two strategy nearly overnight.⁷⁶ California's initial foray into privatization, in the early 1990s, also reflected a facility-centered approach. Cities, counties, and private companies operated Community Corrections Facilities, which were originally designed to house parole violators, then quickly began absorbing new admissions.⁷⁷ Unfortunately, little empirical data is available regarding California's short-lived foray into privatization. Gaes, Camp, & Saylor note that in a private prison study by CDCR, data was collected at three of these facilities in 1994.⁷⁸ However, since subjects were not chosen randomly, the statistics are not very useful. The U.S. General Accounting Office also encountered problems studying these facilities in California and was unable to complete its analysis.⁷⁹

One obvious advantage of a facility-level approach is that minimum-security prisons house prisoners who are less likely to pose security risks. Thus, to the extent that privatization *does* give rise to disparities in staff experience between public and private facilities (possibly resulting in parallel compromises to facility safety and security), this approach would mitigate the problem. If security lapses occur in minimum-security facilities, they are less

Justice Assistance in 2001, and do not include county jails. AUSTIN & CONVENTRY, *supra* note 6, at 41.

75. Okla. Dep't of Corr., *The History of Private Prison Contracting in Oklahoma*, available at http://web.archive.org/web/20041111091656/http://www.doc.state.ok.us/Private+Prisons/PP_history.htm (last visited Nov. 11, 2006).

76. Note the parallels between Oklahoma's initial efforts and California's steps toward a "community beds" approach in California Penal Code Chapters 9.4 and 9.5. If Oklahoma's experience is indicative, California needs to be prepared for the possibility that if the prison population continues to rise, its "Option Three" approach may eventually become an "Option Two" approach. This is not a per se negative result, but it should not be an unanticipated one.

77. GERALD G. GAES, SCOTT D. CAMP & WILLIAM G. SAYLOR, FED. BUREAU OF PRISONS, *THE PERFORMANCE OF PRIVATELY OPERATED PRISONS: A REVIEW OF RESEARCH 5-6* (1998), http://www.bop.gov/news/research_projects/published_reports/pub_vs_priv/oreprpriv_cm2.pdf.

78. *Id.* at 6 (citing DALE K. SECHREST & DAVID SHICHOR, CAL. DEP'T OF CORR., *FINAL REPORT: EXPLORATORY STUDY OF CALIFORNIA'S COMMUNITY CORRECTIONAL FACILITIES* (1994)).

79. *Id.* (citing U.S. GEN. ACCOUNTING OFFICE, *PRIVATE PRISONS: REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON REGULATION, BUSINESS OPPORTUNITIES AND ENERGY, COMMITTEE ON SMALL BUSINESS, UNITED STATES HOUSE OF REPRESENTATIVES 31* (1991)).

likely to translate into full-scale riots or the escape of violent offenders. This lower risk of negative publicity also has an obvious political advantage.

Additionally, the public might simply feel more comfortable with this approach. While facility-level privatization would further rehabilitative aims by reducing overcrowding, it might avoid the common moral qualms, discussed above, that surround privatization. Because the beds would be “community” beds and would not house high-risk inmates, low-security private facilities could work in concert with jails, halfway houses, and parole boards, reducing prison overcrowding while adding another much-needed⁸⁰ option to the array of state-run services.

Although it would provide less flexibility than the previous option, a facility-centered approach would still help alleviate overcrowding and create additional programming space. However, if the State sends its least dangerous prisoners to private facilities, then California—in the midst of its rehabilitative efforts—may not have as much direct control over programming for the most treatable inmates. The political consequences could be severe; state rehabilitation efforts might begin to appear less effective than they actually are. Relatedly, the State’s ability to measure the effectiveness of new programs is likely to decrease as the use of “community beds” increases. If the least dangerous offenders are sent to private institutions and the security level of the average prisoner remains constant, then the average security level of each publicly housed prisoner will *increase*; on average, state prisoners will become a statistically more dangerous group. This may make it difficult to discern whether new programs have a positive effect on recidivism rates. Moreover, the higher rates of recidivism in the state system that might result from sending less serious offenders to private community beds could also undermine the California public’s faith in the rehabilitative efforts. Quite simply, the raw statistics may not end up looking favorable; numbers reported by the media, and by some research groups, may not control for offense type or previous incarceration. Justifiably or not, this may curb support for the CDCR’s efforts.

One final drawback to this option is that it may not be met with much favor among CCPOA members. The prison guards’ union has said repeatedly that it walks the “toughest beat in the state.”⁸¹ California corrections officers face dangerous conditions, high levels of stress, and an inmate-to-staff ratio well above the national average.⁸² Option Three may make the guards’ jobs more stressful and dangerous by handing off milder offenders to private facilities. For better or for worse, these changes could create obstacles to negotiating

80. See Woodford, *supra* note 26.

81. Ctr. on Juv. & Crim. Just., About the CCPOA, http://www.cjcj.org/cpp/growth_CCPOA.php (last visited Nov. 11, 2006) (Technically speaking, this claim may not be true. This source points out that truck drivers, construction workers, and farm workers have far more on-the-job fatalities than correctional officers. However, this statistic *only* considers fatalities. Certainly, physical assault, on-the-job psychological trauma, and other factors also contribute to an occupation’s “toughness.”).

82. See PETERSILIA, *supra* note 12, at 22-23.

contractual changes—particularly with regard to decreasing CCPOA control over managerial functions—by increasing the CCPOA’s political clout.

E. OPTION FOUR: POPULATION-BASED PRIVATIZATION

This option entails the creation of a limited number of private facilities, each designed for a particular category of inmates. Possible candidates include elderly prisoners, HIV-positive prisoners, developmentally disabled prisoners, first-time offenders, drug offenders, sex offenders, or mentally ill prisoners. This is distinct from the previous approach. It would not merely involve developing private, *low*-security treatment facilities for prisoners with specific needs, but rather would cut across multiple levels of security. For example, a private, Level III facility might be opened to house inmates fifty years and older, or a private facility might be created for Level I and II drug offenders. Although security levels would obviously warrant consideration in deciding how to group inmates, the primary rationale for prisoner grouping in the new facilities would be individual offender characteristics.⁸³

Note that in a sense, Option Four skips a step—or perhaps takes an extra one: privatization is not a necessary prerequisite of a “population-based” approach. A state with entirely public facilities could house its inmates according to the same criteria suggested here. Indeed, halfway houses dedicated to drug or alcohol rehabilitation are a version of this. But California’s extremely limited amount of space in state prison facilities, coupled with the managerial restrictions written into CCPOA contracts, renders a comprehensive population-based approach virtually impossible to implement within the parameters of its existing CDCR facilities. For purposes of this Note, it is simply worth acknowledging that some of the advantages and disadvantages outlined in this Part would characterize any approach—public or private—that housed inmates chiefly according to their rehabilitative needs. Other aspects, especially financial savings and increased flexibility, arise from the combination of a population-based approach and private facilities.⁸⁴

One extremely attractive aspect of population-based privatization is its consistency with CDCR goals. As the Department works to become more rehabilitative and more population-based itself,⁸⁵ this privatization scheme would allow a concentrated focus on the needs and risks of particular offender

83. In the discussion that follows, these classifications are necessarily left a bit vague, as further research and writing is needed regarding the best way to group inmates. Regardless of which groupings are best, no housing arrangement should sacrifice security; further research may be useful in assessing which sub-groups of inmates could be housed together while maintaining safety in all facilities.

84. A worthwhile future project would look closely at potential sociological and psychological ramifications of the kinds of inmate groupings proposed here—without regard to the private or public status of the facility.

85. See TILTON, *supra* note 49.

groups. Clustering inmates with similar rehabilitative needs would allow more targeted, efficient implementation of programs and services. The private nature of the facility might also provide the flexibility necessary to try out, abandon, or change programs. Staff could be hired to perform a wide range of services, and the nature of these roles could be adjusted to fit programmatic needs—a flexibility that current CCPOA contracts do not permit. Like the previous two options, a population-based approach would reduce overcrowding by pulling prisoners from the general population and housing them in private facilities. However, unlike the previous two approaches, this one may leave the remaining population—the prisoners in CDCR facilities—more homogenous in its treatment needs. If so, the State could concentrate on a narrower range of rehabilitation and treatment programs. As in-prison reentry preparation programming expands, concentration of offender characteristics might become even more significant; facility-wide management, programs, and incentives could all be tailored to specific ends. For example, the State could tie pay to rehabilitative goals such as lower recidivism rates or higher literacy levels. The profit-driven nature of private industry—a drawback in some of the approaches discussed above—may be more effectively capitalized upon in Option Four.

Next, although it remains uncertain that privatization generally saves money, this approach may be an exception due to the specific nature of state employees' contracts. As former Undersecretary Woodford has stated, bringing private staff into public prisons may run the risk of conflicting with aspects of California's state civil service regulations, which constrain the State's ability to enter into private personal services contracts, and can place additional costs on the State for doing so.⁸⁶ Population-based privatization would allow the State to concentrate populations of prisoners where this occurs most frequently, allowing it to reduce the rate it paid providers, since these would not be in a public setting and would not duplicate existing state services. For example, suppose elderly prisoners account for 40% of the CDCR's medical bills and 10% of the CDCR's population. It might make sense to move elderly prisoners into a private facility, where they can receive the same services, but with trimmed bills by virtue of the facility's existence as a private institution. Concentrating the needs of the most expensive labor is likely to save more money than has been saved in previous attempts at privatization, which have merely reduced wages across the board. Of course, it would also be important to take into account whether any money saved by economies of scale in privatization would be sacrificed in this approach through the somewhat piecemeal outsourcing that might be required.

This approach also has the potential to minimize the conflict with the CCPOA that Options Two and Three would likely invite. Most importantly, if labor in the new private facilities is heavily non-guard—for example, if it consists largely of counseling and rehabilitation services—these new private

86. See CAL. GOV'T CODE § 19130 (West 2006); Woodford, *supra* note 26.

positions would not compete with services that CCPOA members now provide. As the contract stands, it seems unlikely that Option Four would threaten CCPOA jobs; the inmate population must drop by 6% or more—currently an unlikely prospect—for any California corrections officers to be laid off.⁸⁷ In contrast to the previous two approaches, population-based privatization would also allow the CDCR to minimize the number of employees who take on functions identical to those of state guards. Private employees might take on new functions, such as substance abuse counseling or job skills training, that are not the CCPOA's traditional domain. For these reasons, of the three options discussed in this Note that involve some amount of privatization, this approach seems the most strategic way to work *with* the CCPOA, rather than alienating it from reform efforts.

Two other political benefits—both quite speculative—may also result. First, the moral argument against privatization, whereby imprisonment is the exclusive domain of the state, may be diminished. A private prison focused on specific populations is, in many ways, more analogous to a private hospital or a private rehabilitation facility than to a private prison facility. Second, it is possible that while other states' privatization schemes have involved large national corporations such as CCA, a population-based approach to privatization could involve a wider breadth of industries, providing opportunities for partnerships between the CDCR and rehabilitation facilities, medical facilities, or other businesses. It would be especially advantageous, practically and politically, if these businesses were California-based.

As is evident from the discussion in the preceding few paragraphs, a primary drawback of this approach is the sheer unpredictability involved in its implementation. Because other states have not comprehensively attempted this form of privatization, it is difficult to anticipate pros and cons; unexpected snafus could arise at the implementation stage. For example, suppose a facility's purpose is to house prisoners who are HIV-positive. If this group's population in the prison system wanes—for example, due to advances in medical technology—then the facility could become obsolete if it were designed so specifically with this sub-group of prisoners in mind that it was inefficient to move a different group of prisoners there.⁸⁸

Certainly, targeted facilities themselves are not a new innovation. In order to trim costs, sixteen states have each opened at least one facility designated for elderly prisoners.⁸⁹ Also for the sake of cost and efficiency, psychiatric services are sometimes concentrated. California takes this approach already; for

87. See PETERSILIA, *supra* note 12, at 27.

88. Although, it is also possible that the state could then simply cancel or amend its contract with the private provider.

89. Ron Word, *Elderly Inmates Swell Florida Prisons, Fuel Rising Health Costs*, NAPLES DAILY NEWS, Feb. 29, 2004, available at http://www.cjcr.org/press/elderly_inmate.html.

example, California Medical Facility in Vacaville contains a psychiatric hospital for the care of male inmates with acute mental illnesses.⁹⁰ However, such specialization is limited and somewhat ad hoc, not imposed as part of any overarching plan to house and treat all inmates in accordance with their rehabilitative needs.

Compounding the many experimental and uncertain aspects of this approach are several *certain* obstacles. For one, it could be difficult to match prisoners to the new facilities. Suppose the State opens three private facilities: one which houses prisoners over the age of fifty, one which houses prisoners who are developmentally disabled, and one which houses prisoners who are addicted to drugs or alcohol. Where should a prisoner who falls into all three categories be housed? How should special needs be prioritized? What about an offender with a long rap sheet who has committed second-degree murder and is an alcoholic? Should he be housed in the same alcohol rehabilitation facility as an alcoholic who is in prison for first-time marijuana possession? Even though the two offenders share a similar rehabilitative need, it may not be safe or practical to house them together. What about offenders who switch categories? Once an inmate is no longer in need of rehabilitation for heroin use, but still has time left to serve, should he be moved to a state facility and housed with the general population, or would this undermine his potential for rehabilitation? These situations illustrate practical difficulties in deciding which prisoners would occupy which facilities. Moreover, security is critical, and housing arrangements would need to be implemented carefully, without sacrificing safety.

Record-keeping on individual inmates, already a laborious process, would become even more tedious, consume more state resources, and likely require additional research and expertise as new private facilities opened. Furthermore, measuring the effectiveness of facilities created under this approach would be crucial. More state resources would be needed for independent assessment of the new facilities. Relatedly, since parallel facilities would not exist in the state system, assessing the relative efficacy of public facilities versus private facilities would entail comparing apples and oranges. And as Gaes, Camp, and Saylor have detailed, when it comes to prisons, even comparing apples and apples is no easy task.⁹¹

III. RECOMMENDATION, JUSTIFICATION, AND IMPLEMENTATION

A. GENERAL RECOMMENDATION: POPULATION-BASED PRIVATIZATION

Of California's prison privatization options, population-based privatization

90. Cal. Dep't of Corr. & Rehab., California Medical Facility—Mission Statement, http://www.cya.ca.gov/Visitors/fac_prison_CMF.html (last visited Nov. 11, 2006).

91. See generally GAES, CAMP & SAYLOR, *supra* note 77.

is likely to offer the strongest synthesis of political⁹² and practical advantages in light of available evidence. It offers a way to optimize the strengths of private industry and use these strengths to further CDCR goals. The novelty of this approach makes it advisable to begin population-based privatization with a small number of inmate populations. Additionally, as will be discussed in detail in the next Part, attention to the legal and contractual intricacies of this program, as well as sensitivity to California's political situation, will be paramount in designing a successful plan for implementation.

The main empirical justification for rejecting Option One and adopting at least *some* form of privatization is the data regarding overcrowding in California prisons. Unless a major legal reform takes place soon, such as an overhaul of three strikes policy or a return to indeterminate sentencing, California's inmate population will continue to rise in proportion to the space available. Even the State's temporary, non-traditional bed space, such as bunks stacked in gyms and classrooms, will run out by June 2007.⁹³ In light of this projection, the status quo simply cannot be maintained. California's prisons are already debilitatingly overcrowded.⁹⁴ Short of releasing prisoners early or requiring counties to house more prisoners in local jails, new facilities are needed to alleviate overcrowding. Indeed, California's situation is so desperate that in October of 2006, Governor Schwarzenegger proclaimed prison overcrowding an "emergency" in order to allow the CDCR to contract with other states to temporarily house some of California's prisoners.⁹⁵

While population-based privatization is largely an unknown quantity, the empirical data analyzed in this Note suggests that Option Two, albeit the primary form of privatization among other states, is unconvincing in terms of cost savings and recidivism rates. The sheer dearth of reliable studies cataloguing either benefit from this kind of privatization is very telling. While other states may be pleased enough with a collateral reduction in overcrowding to be comfortable with unclear financial savings or no reduction in recidivism rates, the CDCR should not be satisfied with this benefit alone—in large part because its political situation is too precarious to justify undertaking a privatization scheme that lacks any benefit besides reducing overcrowding, and that does not take its rehabilitative goals into account.

For these reasons, Options Three and Four—facility-level privatization and population-based privatization—present the most viable avenues for California

92. One important set of political factors, and one beyond the scope of this Note, are the incentives that might affect legislators' enthusiasm for different proposals. Certainly, a full analysis of legislators' likely receptiveness to various options is crucial to a comprehensive understanding of the political factors in play.

93. See TILTON, *supra* note 49, at 1.

94. *Id.* at 4.

95. Press Release, Cal. Dep't of Corr. & Rehab., Governor Uses Executive Authority to Relieve Prison Overcrowding, Proclaims Emergency to Allow Inmate Transfer (Oct. 2006), <http://www.cya.ca.gov/Communications/press20061004.html>.

corrections. Neither is as likely to frustrate relations between the CDCR and CCPOA as is Option Two, but, as discussed above,⁹⁶ facility-based privatization may remove some of the government's leverage during contract negotiations. More importantly, a "community beds" approach—the version of Option Three discussed most frequently—may undermine the CDCR's efforts at rehabilitation. For one, it would place the most treatable offenders in private beds, leaving the State to test new ideas and programs on a group of offenders for whom these programs are less likely to be successful—simply because they are, on average, a group of more egregious and frequent offenders.⁹⁷ Since it is extremely difficult to control for inmate characteristics, and since many studies do not do this at all,⁹⁸ subsequent comparative studies between the new private facilities and the old state prisons might then lead to the (potentially) erroneous conclusion that state prisons' rehabilitation efforts lag behind those of private prisons. Even worse, Option Three might prevent the State from implementing newly developed rehabilitation programs for the inmates most likely to benefit from them.⁹⁹

Moreover, population-based privatization presents a rare opportunity to use the creation of facilities to further the rehabilitative goals of the CDCR. It allows new facilities to be tailored specifically to rehabilitative ends and target populations that research has demonstrated are responsive to rehabilitation, rather than forcing the State to shoehorn a set of rehabilitative efforts into a one-size-fits-all facility. As scholars have noted, the practices and policies that will reduce recidivism rates are not entirely a mystery. Research analyses by Gaes et al.,¹⁰⁰ Petersilia,¹⁰¹ and many others have established that much *is* known about rehabilitation and reducing recidivism rates, and that some policies, programs, and rehabilitative tactics clearly reduce recidivism rates in certain offender groups. Thus far, one of the main challenges has been how to use this evidence within existing corrections systems to make real, systematic changes in prison rehabilitation opportunities. Inmate-based privatization offers the chance to do this from the ground up. Consequently, of the approaches presented here, Option Four is the only one that would allow California to capitalize fully on the best available research.

96. See *supra* Part II.D.

97. Prior arrest record is a reliable predictor of whether a given inmate is likely to recidivate. See PETERSILIA, *supra* note 13, at 142.

98. See AUSTIN & COVENTRY, *supra* note 6, at 24-25.

99. The extent to which this is problematic would depend, in large part, on the level of state involvement in program implementation and staffing.

100. See *supra* note 77.

101. See *supra* note 13.

B. SPECIFIC IMPLEMENTATION RECOMMENDATIONS

To the author's knowledge, comprehensive population-based privatization has not been the subject of any research, nor have states attempted to use it as an overarching method of prison management. For this reason, additional research and analysis would be needed before implementation, especially regarding political strategy, legal concerns, and targeted inmate populations. Complete analyses of these areas, especially with regard to California contract law and financial management of prisons, are beyond the scope of this Note. But sufficient basis exists for some specific recommendations in each of these three areas.

First, the creation of population-based private facilities should begin with just two or three different prisoner populations. Careful population selection is important; an effective program could be declared an early failure if the first several years are not successful. Ideally, the first populations selected for these facilities would embody several of the following characteristics:

(1) *Potential for rehabilitation.* If the offender groups selected are unusually difficult to rehabilitate or have notoriously high rates of recidivism, it may be difficult to demonstrate success, even for a promising program.

(2) *Perceived potential for rehabilitation.* If the public lacks sympathy for an inmate population, or does not believe that members of that population can be rehabilitated, it may resent the expenditure of CDCR effort and resources there, even if the program is successful. Sex offenders, especially violent offenders, or those incarcerated for crimes against children fall into this category.¹⁰²

(3) *Staff and facility expenses.* Initial target populations should be those which already present (or whose treatment *would* present) an above-mean cost to the State. Though cutting costs is not the primary purpose of a population-based approach, privatizing expensive facilities may allow California to turn some of its largest expenses into avoidable costs.

(4) *Research expenses.* Inmate populations whose characteristics present especially evolving, or especially expensive, areas of research may be ideal. The CDCR's resources are limited, and it may be efficient to externalize these research costs to private companies, as well as to encourage research through the use of performance-based contracts.¹⁰³

(5) *Ease of measuring progress.* In assessing the efficacy of rehabilitation programs, it will be crucial to track different inmate groups' progress.

102. Additionally, no governor wants to be perceived as a "thug-hugger," and this perception can be diminished by concentrating on populations that the public is less likely to perceive as "thuggish." Once inmate-based private facilities establish a credible track record, the public may be more amenable to facilities designed for populations such as violent sex offenders.

103. See *infra* notes 125-129 and accompanying text.

Initial target populations whose rehabilitation involves attainable, quantifiable benchmarks are ideal. For example, illiterate prisoners' reading ability or acquisition of job skills could be tested at regular intervals. Additionally, new facilities should not *just* contain inmates with several years left to serve, lest a program's effect on recidivism become impossible to measure for many years.

(6) *Security levels.* The average security level of inmates in the target populations should be roughly equivalent to the average security level of California inmates overall. Setting the level too high may create security risks.¹⁰⁴ Setting it too low may expose the program to problems previously outlined regarding the "community beds" approach.¹⁰⁵

(7) *Inmates' counties of origin.* Target populations should be large enough that the average prisoner in a new facility need not be taken farther from his county of origin than the average prisoner in a regular state prison facility.¹⁰⁶ Increasing the distance from home would frustrate rehabilitation efforts by removing inmates even farther from pre-existing support networks.

(8) *CCPOA input.* Target inmate populations' care needs should be sufficiently different from those of the general population that duties of private staff do not merely replicate the duties outlined in the CCPOA guards' contract. The union's support for the new facilities, or at least a lack of fervent opposition from the union, would be helpful to the CDCR politically and practically. To the extent possible, the CCPOA should be involved in selecting target populations.

(9) *External support.* Ideally, inmate populations could be paired with non-profit and community organizations whose interests are commensurate with the populations themselves. A ready-made volunteer base could greatly facilitate programming. At the legislative stage, it may also be helpful if powerful non-profits are willing to back legislation regarding the population.

One population that seems a particularly ideal candidate is elderly inmates.¹⁰⁷ According to the CDCR's most recent inmate census, inmates over

104. See McDONALD & PATTEN, *supra* note 40, at xxii-xxiii.

105. See *supra* Part II.D. Although, even if the security level is low, this is still slightly better than a community beds approach alone, because it focuses on specific types of offenders. But it will nonetheless raise mean security level of inmates in public prisons.

106. Locating facilities even closer than this, especially for prisoners with children, would be ideal. As it stands in California, over half of female offenders are from Southern California, but the State's two largest women's prisons are in Chowchilla—a rural town in the San Joaquin Valley over 250 miles from Los Angeles. The sheer distance is the main reason for a lack of contact between incarcerated mothers and their children. See CHARLENE WEAR SIMMONS, CAL. RESEARCH BUREAU, CHILDREN OF INCARCERATED PARENTS (2000), available at www.library.ca.gov/crb/00/notes/v7n2.pdf; see also CAL. PENAL CODE § 6350 (West 2006).

107. Although fifty-five years of age is obviously far from "elderly" in the United States generally, a combination of factors causes prisoners to age much more rapidly than

fifty-five years old number more than 7500.¹⁰⁸ The proportion of older inmates in California will likely rise as the “Three Strikes” population ages; more than a quarter of California inmates are serving second-strike (excluding second-strike lifers) or third-strike sentences, and the number is expected to grow to more than 30,000 in the next decade and a half.¹⁰⁹ Older inmates tend to exhibit relatively few serious behavioral problems while in prison. The extra expenses involved in their housing stem not from guarding them, but from their health care,¹¹⁰ including medication and treatment for chronic ailments. Indeed, in terms of potential cost savings, elderly prisoners may be one of the most ideal inmate groups.

The main downside of beginning with elderly prisoners is that they already tend to be less likely to reoffend than the average inmate; “perceived potential for rehabilitation” and “ease of measuring progress” (factors (2) and (5) above) may not be strong. Additionally, without proper oversight, private prisons’ profit motive may not work to the benefit of the inmates. Unlike staff and care costs, few research costs for this population are externalizable, since its treatment involves a wide range of medical needs. Private companies might have a motive to care for these prisoners as cheaply—but not as effectively—as possible. As a result, extra oversight might be advisable, and this would create an additional expense for the CDCR. Nonetheless, these considerations may be overridden by the pre-existence of a legislative framework providing for the private care of elderly prisoners. California Penal Code Section 6267, passed in 2003, allows for privately-contracted care of elderly inmates in order to “lessen[] the burden on the prison medical care system.”¹¹¹ Section 6267 refers specifically to inmates in need of “long-term” care, which “means personal or supportive care services provided to people of all ages with physical or mental disabilities who need assistance with activities of daily living including bathing, eating, dressing, toileting, transferring, and ambulation.”¹¹² This definition allows quite a bit of flexibility, and may already provide a strong infrastructure for private, population-based care facilities—even those that are not strictly nursing facilities. Consequently, these facilities could be opened quickly. And certainly, it is within the letter of the statute to open facilities targeted to smaller sub-groups. For example, prisoners with severe enough developmental disabilities would fall within the parameters of “mental

the rest of the American population. See Stephanie Pfeffer, *One Strike Against the Elderly: Growing Old in Prison*, MEDILL NEWS SERV., Aug. 2002, available at <http://docket.medill.northwestern.edu/archives/000121.php>.

108. James Sterngold, *Hard Time: California Bracing for a Flood of Elderly Inmates*, S.F. CHRON., Dec. 25, 2005, at A21.

109. *Id.*

110. Patricia S. Corwin, *Senioritis: Why Elderly Federal Inmates Are Literally Dying to Get Out of Prison*, 17 J. CONTEMP. HEALTH L. & POL’Y 687, 688 (2001).

111. CAL. PENAL CODE § 6267 (West 2006).

112. *Id.*

disabilities who need assistance with activities of daily living.” Counseling, psychological, and medical services for this category of prisoner will naturally be different in kind from the general needs of elderly prisoners, or other subpopulations that fall within the definition. Additionally, although the statute instructs the CDCR to “provide for the security of the facility,” it establishes no constraints regarding facilities’ security level¹¹³—thus leaving open the possibility of multi-level facilities concentrating on a particular group of prisoners.¹¹⁴

One obvious challenge this population might raise is shifting categorizations. That is, certain inmates may acquire enough life skills that they no longer fall within Section 6267. At this point, it may become illegal to house them in private facilities—yet it may also be counterproductive to their rehabilitation to return them to the general population. The line between a “skilled nursing facility” and a “regular” private prison is not entirely clear, and further legislation would help ensure that private facilities effectively house and rehabilitate developmentally disabled prisoners without conflicting with California’s Civil Service Reform Act.¹¹⁵

Regardless of which populations are selected, the CDCR must be careful not to become entirely dependent on private facilities for provision of these prisoners’ needs. Otherwise, California’s correctional system could evolve such that California is no longer equipped to take care of certain prisoner populations. For instance, suppose that ten years after this approach is implemented, 90% of inmates over age fifty are housed in private facilities that are equipped with copious medical staff who specialize in geriatrics, counselors equipped to treat depression (an ailment common among older prisoners¹¹⁶), and facilities optimal for older inmates. At this point, if the State became dissatisfied with its contract with a private corporation, or if the corporation went belly-up, the State would be faced with an influx of inmates with special needs that it has become unaccustomed to accommodating.¹¹⁷ For this reason, the State would do well to keep its contracts flexible, and to exercise caution before entering into long-term agreements.¹¹⁸

113. *Id.*

114. Of course, as mentioned above, any housing arrangements that would threaten security should be avoided.

115. Cal. Gov. Code § 19130(a) (setting forth restrictions on the state’s ability to hire private contractors). The population of inmates with developmental disabilities offers other advantages, too, including measurability and the opportunity to externalize research costs.

116. See, e.g., Jason S. Ornduff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 *ELDER L.J.* 173, 182 (1996); Susan Lundstrom, *Dying to Get Out: A Study on the Necessity, Importance, and Effectiveness of Prison Early Release Programs for Elderly Inmates Suffering From HIV Disease and Other Terminal-Centered Illnesses*, 9 *BYU J. OF PUB. L.* 155, 168 (1994).

117. Additionally, to the extent that this benefit exists at all—which is far from certain—a lack of overlap in services offered by the state and by private industry also might diminish potential positive effects of competition.

118. For example, Section 6250.5(c), which authorizes the establishment of

Neither elderly inmates nor developmentally disabled inmates encompass all of the criteria, although they each fulfill several and are certainly among the groups that should be seriously considered for housing in separate private facilities. Other strong candidates for population-based privatization may include prisoners with AIDS, prisoners with depression or severe emotional disturbances, and prisoners addicted to drugs or alcohol.

Next, although many aspects of the State's contracts with private facilities are intricate prison management and prison finance issues, and thus beyond the scope of this Note, empirical data and legal analysis strongly support a handful of recommendations about the State's contracting behavior with private providers of correctional facilities.

California law already provides for some specialized treatment facilities in addition to those discussed above. Any contract for new services should take these into consideration. For example, the California Penal Code provides for the existence of Substance Abuse Community Correctional Detention Centers. Though these facilities are not private—ownership and operation of these facilities occurs at the county level¹¹⁹—they otherwise exist as a hybrid of Options Three and Four; the security for these facilities is low, and they serve an inmate population suffering from drug and alcohol addiction. These facilities are commensurate with the population-based treatment this Note recommends. Not only do they have a specific rehabilitative mission, but they have the additional advantage of a community base. Indeed, successful facilities may even act as a model for population-based private facilities.

Sections 6250 and 6250.5 of the California Penal Code provide for the creation of a more generalized version of Community Correctional Centers. To the extent that they help reduce recidivism rates, these centers have the potential to be useful. But there may be more efficient, effective ways to accomplish the same goals. First, unlike Substance Abuse Community Correctional Detention Centers, Community Correctional Centers may be private, provided the contracted work costs the State less than it currently spends per inmate.¹²⁰ Although the law requires facilities to be “therapeutic,” focusing on preparing prisoners for reintegration into mainstream society, Section 6250.5, which delineates programmatic requirements for these facilities, does not indicate that they need to cater to any particular inmate groups. Substance treatment is “emphasize[d],” and skills such as computer competency, reading, and family skills must be provided as well.¹²¹ Certainly,

community correctional centers, and drug and alcohol treatment programs within these centers, allows the state to enter into twenty-year contracts. CAL. PENAL CODE § 6250.5(c) (West 2006). The shifting nature of the criminal justice system, sentencing practices, and fluctuations in prisoner populations renders such an extended commitment inadvisable.

119. *Id.* § 6242.

120. *Id.* § 6250.5(a).

121. *Id.* § 6250.5(b).

any program aimed at reducing recidivism rates is admirable—and pre-release programs may be effective. Still, the inclusion of a broad cross-section of inmate groups exposes this approach to many of the criticisms outlined in the discussion of Option Three, especially those arising from the minimum-security nature of the facilities.¹²² Additionally, the Penal Code requires cost-saving contracts, but not *performance*-based contracts.¹²³ Thus, unless a contract specifies otherwise, directors of private Community Correctional Centers will have a financial incentive to make their services cheaper, but not better. Furthermore, although Section 6250.5 provides for a “therapeutic community,” and suggests that the efficacy of programs should be evaluated regularly, the only type of oversight upon which the contract is contingent is financial: “an annual audit and cost comparison evaluation.”¹²⁴ Performance-based contracts would ensure that private profit motives are focused on inmates’ rehabilitative needs. Either as a modification to Section 6250 or Section 6250.5, or in any new legislation providing for the creation of private facilities, California should capitalize on private companies’ natural profit motive and competitive edge through contracts that give companies financial incentives for achieving particular goals.

Performance-based contracts generally take one of two forms. First, a state may hinge the continuance of a company’s contract on the company’s achievement of an institutional standard, such as American Correctional Association accreditation. This is the most common type of performance-oriented contract; “[i]n general, state and federal governments demand in their contracts that privately operated facilities perform like their public sector counterparts.”¹²⁵ Additionally, studies suggest that two-thirds of private

122. Another type of community facility, Community Correctional Reentry Facilities, are open to virtually identical criticism, and take a similarly untargeted approach to divvying inmates among facilities. Additionally, these facilities have severe restrictions as to which inmates may be housed there; for example, inmates must request a transfer, have fewer than 120 days left to serve, and the CDCR must determine that the inmate will “benefit” from the transfer. *See id.* §§ 6258-6258.1. The restrictions exclude from these facilities inmates serving a sentence for *any* violent felony. *Id.* § 6258.1(b). As a result, the prisoners about whom the state should be most concerned will not have the benefit of transitioning back to outside life in a reentry facility.

123. *See* CAL. PENAL CODE § 6250.5(a) (West 2006).

124. *Id.* § 6250.5(e). Nor is the research methodology of these audits set out in any detail. An “independent” auditor is required—a good first step—but Section 6250.5(e) merely says that he or she will undertake a “cost comparison.” Since identical facilities are not operated by the state, it is not altogether clear what the costs of the new facilities will be compared *to*. Presumably, Section 6250.5(e) is referring to the cost that the state would have otherwise spent on that group of inmates. However, such a comparison is unlikely to be tidy. After all, merely placing lower-security prisoners together will likely reduce costs—and even more so if CCPOA guards are not used in the facilities. Thus, any cost savings an auditor may find might simply be due to the fact that the state does not have to pay CCPOA guards to staff the Community Correctional Centers, not due to the success of the Centers themselves.

125. MCDONALD & PATTEN, *supra* note 40, at 18.

correctional contracts require “compliance with conditions established in consent decrees or other court-mandated standards,” which has the dual benefit of safeguarding inmate rights and shielding the state from lawsuits.¹²⁶

On the other hand, performance-oriented contracts *could* focus not just on compliance with procedural requirements, but also on substantive goals.¹²⁷ For example, a facility that housed developmentally disabled offenders could be charged with bringing a certain percentage of its prisoners up to a particular level of life skill competency within a certain time period. The State could monitor progress itself or provide by law that an independent auditor or research institute measure the efficacy of the private facility. This approach would allow the State to place first priority on its rehabilitative efforts.¹²⁸ It would also put private companies’ profit motive to work for the State. The more successful the facility’s treatment, the more financial rewards the company would reap. This gives a private company an incentive not just to cut costs, but to design facilities, architecturally and programmatically, to best teach and reinforce desired skills. Moreover, all of the research costs associated with this design, with the exception of oversight, would be externalized. Once tested in private facilities, successful strategies could be incorporated into the state system—and for a reduced cost, once a private facility has already tested an innovative correctional approach. Finally, performance-based contracts provide visible benchmarks of improvement, which could be integral to winning and keeping public support for the CDCR’s rehabilitative efforts and fostering a norm of outcome-oriented accountability.¹²⁹

Legislation authorizing the construction of private correctional facilities is likely to be broad. Thus, the CDCR should be mindful of the need to introduce criteria beyond the vague outline that new penal code provisions are likely to specify. For example, although legislation sometimes designates a specific facility location, as was true for Folsom prison, specific sites may not be listed in legislation that provides for multiple facilities. In this case, private contractors would have an incentive to find the cheapest land possible; the CDCR, however, should think carefully about where it allows new facilities to be placed. Many of California’s prisons now fall within the Central Valley, or

126. *Id.*

127. *Id.* at ix.

128. As McDonald and Patten point out, this approach requires specificity of goals, as well as a great deal of oversight, and has not been extensively tested in the correctional context. *Id.* The contract between the Federal Bureau of Prisons and the Wackenhut Corrections Corporation at the Taft Correctional Institution is one exception, but the effectiveness of this type of contract has not been studied seriously. *Id.*

129. As a simple online search can reveal, a veritable cottage industry exists in evaluating and managing performance-based contracts. Thus, before entering into any of these contractual relationships, it is imperative that the state consult attorneys with expertise in drafting effective and efficient performance-based contracts. Oversight of such contracts is crucial.

other remote locations where the land is cheap and the population is relatively sparse. To the extent possible, the CDCR should avoid contracts that would place new, population-based facilities in similar locations. Rather, the ideal locations for these facilities are probably within about forty five miles of a fairly large city—and ideally a city that is large enough, and whose political tendencies are left-leaning enough, that its residents are unlikely to muster NIMBYism resistance. More importantly, a location near a city would offer the facility a large group of local residents—counselors, administrators, and researchers—upon which to draw for staffing. A large city would also offer diverse special-interest and non-profit groups that might provide a large, stable volunteer base interested in working with that particular group of offenders.¹³⁰ Members of a law student organization or a prisoners' literacy group are more likely to drive thirty minutes from their homes than to venture the several hours' trip to Susanville, Chowchilla, or Coalinga. Placing a facility too far from a large city also reduces the facility's visibility, and the CDCR's rehabilitative efforts need to be part of the public's consciousness. Any contracts CDCR signs with private facilities must take geographic location into account.

One additional contractual consideration is the shape of a remedial damages lawsuit in a private prison. If a private company did not indemnify its guards against liability, a plaintiff inmate might sue an effectively judgment-proof defendant guard and be unable to obtain a remedy.¹³¹ For this reason, private prisons that contract with the CDCR should indemnify their staff members in order to protect inmates' ability to obtain relief for violations of their constitutional guarantees. Even so, as Gillian Metzger points out, "simply extending the constitutional norms applicable to government actors to cover the government's private partners is also constitutionally problematic . . . [and] simply transfers regulatory authority to the courts . . ." ¹³² Adverse lawsuits may make other prospective private partners gun-shy to sign correctional contracts with the State. Very careful contracting with private entities would increase California's ability to preemptively police constitutional violations committed by private entities, as well as its ability to create effective oversight mechanisms. This step is crucial. Without it, courts will likely end up acting as decision-makers in place of the State—a result that, as Metzger writes, may inhibit California's "freedom to target the policy concerns and opportunities that privatization presents."¹³³ If its level of confidence in private facilities was

130. A city should also provide a population large enough that small or random fluctuations in the crime rate will not be unjustifiably blamed on newly released inmates.

131. See *Richardson v. McKnight*, 521 U.S. 399 (1997).

132. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377 (2003). This article offers a thorough analysis of the constitutional issues that arise when private companies contract to provide services traditionally performed by the government.

133. *Id.* See also Press Release, Am. Civil Liberties Union, Abuses by Private Prison Guards Are Not Exempt From Legal Scrutiny, Supreme Court Rules (June 23, 1997), available at <http://www.aclu.org/scotus/1996/22977prs19970623.html>.

sufficiently high, the State itself could indemnify these private facilities. This strategy, however, is probably too risky to be advisable. A better approach (in addition to anticipating constitutional concerns in the contracts themselves) may be to simply use CCPOA guards for the most security-intense positions. This appears to create no conflict with the guards' current contract, as long as functions not delineated in the contract are performed by private staff members.

Finally, California's precarious political situation with regard to criminal justice allows a few political recommendations regarding implementation. Most obviously, the CCPOA should be offered a seat at the table in determining which inmate populations to choose as initial program targets. Seeking the union's assistance would not only demonstrate the CDCR's good will toward the CCPOA, but allow the CDCR to use the union's expertise in assessing the characteristics of various inmate populations. Including the union in the process might also be helpful in determining what functions CCPOA members might best serve in the new facilities.

Involving the CCPOA might also help lay the groundwork for upcoming contract negotiations between the State and the union. As former Undersecretary Woodford has stated, the most problematic aspect of the guards' contracts has been their rigidity.¹³⁴ Union guards' duties are narrowly construed, making it difficult for California to implement programming that requires guards to perform duties that are different from their current assignments.¹³⁵ Private prisons might create an incentive for the CCPOA to increase its flexibility regarding guards' jobs, because a willingness to take on a variety of duties could fuel additional CCPOA growth by making guards even more valuable to the CDCR. This would likely affect the next round of contract negotiations between the CDCR and CCPOA. In turn, any increased flexibility would facilitate programming by allowing the CDCR to make organizational changes in response to inmates' rehabilitative needs.

In all of its interactions with the CCPOA regarding implementation of population-based privatization, the CDCR would need to make its long-term goals for its relationship with the union extremely clear. The approach would not *reduce* the number of prison guards through termination or attrition. Rather, the CCPOA would stay the same size, or simply continue to grow more slowly.¹³⁶ The CDCR's positions regarding the CCPOA, as well as any positive outcomes of CDCR-CCPOA collaboration, should be emphasized in press releases as well. Much fervor has been drummed up in the past few years about the tension between the State and the union, both in mainstream media and in

134. Woodford, *supra* note 26.

135. *Id.*

136. A similar need to "reassert[] managerial control" provided much of the impetus for prison privatization in Australia and Great Britain. See CAMP ET AL., *supra* note 68, at 27-28 (citing R. W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY (1997); A. L. JAMES ET AL., PRIVATIZING PRISONS: RHETORIC AND REALITY (1997)).

lesser-known, even cultish, online media.¹³⁷ The union is a strong political force, and every effort should be made to improve relations between the CCPOA and CDCR. In implementing a population-based approach, the CDCR would need to make it clear that the guards' union is an invaluable part of California corrections, and ensure that any dearth of CCPOA participation in population-based privatization was a choice made by the union, not by the State.

Additionally, the CDCR should make every effort to use California companies and California staff in its new programs, rather than simply bringing in a company such as CCA. One reason for this is the CCPOA's close alignment with other strong California unions, such as the California Teachers Association. In order to win public support, population-based privatization must generate, not eliminate, living-wage jobs for Californians. Contracting with in-state private companies would help advance this perception, in addition to creating more, and stronger, connections between the CDCR and California businesses.

C. PROJECTED IMPACT OF POPULATION-BASED PRIVATIZATION

As Joan Petersilia has pointed out, "In matters of prison policy, liberals who want more programs are being pitted against conservatives who want more cells [T]he honest answer is that we need both."¹³⁸ Population-based privatization recognizes that these are not mutually exclusive, and offers the CDCR an opportunity to work toward both goals.

The most certain short-term benefit is a reduction in overcrowding, temporarily alleviating the CDCR's most pressing rehabilitative concern. Additionally, recidivism rates will likely drop for the inmate populations upon which privatization efforts are focused—although certainly, this will depend on the soundness of the programs implemented for each target population. Additionally, the inmate population in the state system will become slightly more homogeneous, which may make it easier to develop useful programs for those inmate groups.

In the long term, population-based privatization is likely to save money. However, as this Note has suggested, the program will probably require some initial expenditures, particularly associated with administrative, monitoring, and legal costs. In time, the savings of the program will almost certainly surpass these expenditures, particularly because fewer inmates will

137. For a particularly colorful example, see Paco Villa Home Page, <http://www.pacovilla.com> (last visited Jan. 31, 2007). This website, purportedly maintained by CCPOA guards whose identity the site does not reveal, evinces great hostility between the CCPOA and the CDCR, and even uses unflattering nicknames to reference CDCR personnel.

138. PETERSILIA, *supra* note 13, at 246.

recidivate.¹³⁹ Still, it should not be assumed that cost savings will be immediate, nor—in light of empirical evidence—that they will be enormous. Additionally, depending on the CCPOA's response to population-based privatization, union guards may eventually become more amenable to participating in CDCR programming, which could lead to a more amicable long-term partnership between the CDCR and the CCPOA.

Ideally, population-based privatization would also have a long-term benefit to Californians' perception of the criminal justice system as a whole. Defining and housing inmates according to their rehabilitative needs, rather than simply conceptualizing them in terms of their offenses, may create a greater public awareness that prisons do not need to be warehouses. If recidivism rates improve and citizens see a corresponding decrease in crime, they may begin to realize that not only do most prisoners return to their communities, but that given the right tools, many can reintegrate to become productive, conscientious Californians.

139. After all, the average yearly cost to house an inmate in a California state prison is about the same as a year's tuition at Stanford University. CAL. DEP'T OF CORR. AND REHAB., *supra* note 2; Stanford Undergraduate Admission, 2006-2007 Student Budget, <http://www.stanford.edu/dept/uga/applying/extras/12b5budget.html> (last visited Jan. 31, 2007).