

2015

Are Private Prisons to Blame for Mass Incarceration and Its Evils? Prison Conditions, Neoliberalism, and Public Choice

Hadar Aviram

UC Hastings College of the Law, aviramh@uchastings.edu

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship

Recommended Citation

Hadar Aviram, *Are Private Prisons to Blame for Mass Incarceration and Its Evils? Prison Conditions, Neoliberalism, and Public Choice*, 39 *Fordham Urban Law Journal* ____ (2015).

Available at: http://repository.uchastings.edu/faculty_scholarship/994

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marcus@uchastings.edu.

ARE PRIVATE PRISONS TO BLAME
FOR MASS INCARCERATION AND ITS EVILS?
PRISON CONDITIONS, NEOLIBERALISM, AND PUBLIC CHOICE

Hadar Aviram *

Abstract

One of the frequently criticized aspects of American mass incarceration is privatized incarceration, which is frequently considered worse by definition, than public incarceration, both for philosophical-ethical reasons and because its for-profit structure creates a disincentive to invest in improving prison conditions. Relying on literature about the neoliberal state and on insights from public choice economics, this Article sets out to challenge the distinction between public and private incarceration, making two main arguments: piecemeal privatization of functions, utilities and services within state prisons make them operate more like private facilities, and public actors respond to the cost/benefit pressures of the market just like private ones. The paper illustrates these arguments with several examples of correctional response to the conditions caused by the Great Recession, showing public and private actors alike adopting a cost-minimizing, financially prudent approach, sometimes at the expense of prison conditions and inmate human rights. The paper ends by suggesting that, in a neoliberal capitalist environment, prohibitions and litigation alone cannot improve prison conditions, and that policymakers need to consider proper market incentives regulating both private and public prisons.

* Professor of Law, Harry and Lillian Hastings Research Chair, UC Hastings College of the Law. I am grateful to Michael Munger, Barry Winegast and Todd Zywicki, who taught the George Mason Law and Economics Institute's workshop on public choice economics, and who probably strongly disagree with virtually all the political analysis and a substantive share of the normative recommendations of this paper. I am also grateful to Malcolm Feeley for his thought on prison privatization, to Amanda Leaf, Liz Pollack, and Rosie Reith for their excellent research assistance, and to Chuck Marcus for his outstanding library support.

Table of Contents

Introduction

- I. Mapping and Questioning the Traditional Arguments on Private Incarceration
 - A. The Ethical Argument
 - B. The Incentive Argument: For-Profit Incentives in the Neoliberal State Lead to Worsened Conditions
 - C. The Efficiency Argument: Public Choice and Its Critics

- II. Questioning the Public/Private Divide
 - A. Private Prisons' Share in Mass Incarceration
 - B. Even public Prisons Are Privatized

- III. Public Actors as Market Players
 - A. Public Incarceration Conditions and the Ugly Pig Contest
 - B. Profit-Seeking Aberrations and the Banality of Evil

Conclusion

ARE PRIVATE PRISONS TO BLAME
FOR MASS INCARCERATION AND ITS EVILS?
PRISON CONDITIONS, NEOLIBERALISM, AND PUBLIC CHOICE

They are telling this of Lord Beaverbrook and a visiting Yankee actress. In a game of hypothetical questions, Beaverbrook asked the lady: ‘Would you live with a stranger if he paid you one million pounds?’ She said she would. ‘And if he paid you five pounds?’ The irate lady fumed: ‘Five pounds. What do you think I am?’ Beaverbrook replied: ‘We’ve already established that. Now we are trying to determine the degree.’¹

INTRODUCTION

Anyone seeking a reason to rail against in the American correctional system will find plenty of easy targets. With approximately 2.2 million people behind bars²--1 in 100 American citizens,³ and more in certain states⁴--it is a frightening colossus of confinement and the world leader in incarceration rates.⁵ Vastly more people are under some form of correctional control—probation or parole—raising the number of people supervised by the criminal justice system to 6.7 million.⁶ Between 1980 and 2012, the total number of state and local prisoners in the United States rose from 501,886 to 2,228,400-- a

¹ O. O. McIntyre, “As O. O. McIntyre Sees It,” *The Muscatine Journal and News-Tribune* 3, January 2, 1937. The anecdote has also been attributed to Bernard Shaw, Winston Churchill, and several others.

² The Sentencing Project, “Incarceration,” 2014, <http://www.sentencingproject.org/template/page.cfm?id=107>.

³ The Pew Charitable Trusts, “U.S. Prison Population Drops for Third Year as States Adopt New Policy Strategies,” August 8, 2013, <http://www.pewtrusts.org/en/about/news-room/press-releases/2013/08/08/us-prison-population-drops-for-third-year-as-states-adopt-new-policy-strategies>.

⁴ *Ibid.*

⁵ The Sentencing Project, “Incarceration.”

⁶ The Pew Charitable Trusts, “One in 31 U.S. Adults are Behind Bars, on Parole or Probation,” 2014, <http://www.pewtrusts.org/en/about/news-room/press-releases/0001/01/01/one-in-31-us-adults-are-behind-bars-on-parole-or-probation>.

344% increase⁷—while the U.S. population grew in the same time only from 226.5 million to 313 million—a 38% increase.⁸ Shockingly, these numbers are not justified by the need to control crime, whose rates have been steadily declining since the 1980s.⁹ Scholars studying the connection found little causal connection between the increase in incarceration and the decrease in crime, attributing only 10% of the decline, at most, to incarceration. The conditions of incarceration, while diverse across the nation, are so appalling that many state prisons and county jails are under some form of federal court supervision.¹⁰ Most recently, the Supreme Court found the physical and mental health care in California prisons appalling—one inmate dying needlessly from iatrogenic causes every six days¹¹—indeed, so appalling that they could not be improved without considerable population reduction.¹² Eighty thousand inmates are housed under conditions of solitary confinement,¹³ in tiny cells

⁷ This calculation includes 319,598 prison and 182,288 jail inmates in 1980, and 1,483,900 prison and 744,500 jail inmates in 2012. Bureau of Justice Statistics, “Total U.S. Correctional Population Declined in 2012 for Fourth Year,” 2013, <http://www.bjs.gov/content/pub/press/cpus12pr.cfm>. During the same time, the federal prison population grew from 25,000 to 219,000 inmates. Nathan James, “The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options,” Congressional Research Service, 2014, 2, <http://fas.org/sgp/crs/misc/R42937.pdf>. Notably, however, the prison population began to decline in 2009, the year after the Great Recession, and has continued to steadily decline since then.

⁸ The Sentencing Project, “Trends in U.S. Corrections,” 2013, http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf. U.S. Census, “History: 1980 Fast Facts,” https://www.census.gov/history/www/through_the_decades/fast_facts/1980_new.html. The population currently is approximately 320 million: U.S. Census, “Population Clock,” 2014, <http://www.census.gov/popclock/>.

⁹ Franklin E. Zimring, *The Great American Crime Decline* (New York: Oxford University Press, 2008).

¹⁰ Malcolm Feeley and Edward Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons* (New York: Cambridge University Press, 2000).

¹¹ *Brown v. Plata* 131 U.S. 1910 (2011); Jonathan Simon, *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America* (New York: The New Press, 2014).

¹² *Brown v. Plata* 131 U.S. 1910.

¹³ Joseph Stromberg, “Research tells us that isolation is an ineffective rehabilitation strategy and leaves lasting psychological damage,”

with no outside stimulus,¹⁴ suffering abundant forms of neglect¹⁵ and deteriorating mental health.¹⁶ The United States is one of the only Western industrialized democracy in which the death penalty is alive and well, retained in 32 of its states.¹⁷ At least a quarter of the United States prison population consists of nonviolent drug offenders serving lengthy sentences,¹⁸ while the legacy of the War on Drugs continues to fuel horrifying violence domestically¹⁹ and in Mexico.²⁰

Smithsonian, February 19, 2014, <http://www.smithsonianmag.com/science-nature/science-solitary-confinement-180949793/?no-ist>.

¹⁴ Robert M. Ferrier, “An Atypical and Significant Hardship: The Supermax Confinement of Death Row Prisoners Based Purely on Status - A Plea for Procedural Due Process,” *Arizona Law Review* 46 (2004): 291-315, <http://www.arizonalawreview.org/pdf/46-2/46arizrev291.pdf>.

¹⁵ Terry A. Kupers, “What To Do With the Survivors? Coping With the Long-Term Effects of Isolated Confinement,” *Criminal Justice and Behavior* 35 (2008) 1005-1016; Josiah D. Rich, Sarah E. Wakeman, and Samuel L. Dickman, “Medicine and the Epidemic of Incarceration in the United States,” *New England Journal of Medicine* 364 (2011): 2081-2083.

¹⁶ Craig Haney, “A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons,” *Criminal Justice and Behavior* 35 (2008): 956-984, <https://www.aclu.org/prisoners-rights/stop-solitary-mental-health-resources>; Terry A. Kupers, MD, MSP, “How to Create Madness in Prison,” in *Humane Prisons*, ed. David Jones (Oxford: Radcliffe Publishing, 2006), <http://www.minutesbeforesix.com/MB6Files/2011/Kupers%20Humane%20Prisons.pdf>.

¹⁷ Max Fisher, “Map: Which Countries Use the Death Penalty?” *The Atlantic*, July 6, 2011, <http://www.theatlantic.com/international/archive/2011/07/map-which-countries-use-the-death-penalty/241490/>; Death Penalty Information Center, “States With and Without the Death Penalty, 2014,” <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>.

¹⁸ Justice Policy Institute, “Substance Abuse Treatment and Public Safety,” January 2008, 1, http://www.justicepolicy.org/images/upload/08_01_REP_DrugTx_AC-PS.pdf; Common Sense for Drug Policy, “Drug Offenders in the Correctional System,” 2014, http://www.drugwarfacts.org/cms/Prisons_and_Drugs#sthash.WHjtG9jD.dpuf; E. Ann Carson and Daniela Golinelli, “Prisoners in 2012: Trends in Admissions and Releases, 1991-2012” Department of Justice Bureau of Justice Statistics, December 2013, NCJ243920, Table 5, p. 3, and Appendix Table 10, p. 43. <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>.

¹⁹ Meredith May, “Many young black men in Oakland are killing and dying for respect,” *San Francisco Chronicle*, December 9, 2007, <http://www.sfgate.com/bayarea/article/Many-young-black-men-in-Oakland-are-killing-and-3299781.php>.

Much academic and popular literature on American incarceration frames its critique of this phenomenon in the context of what has come to be known as the prison industrial complex.²¹ Indeed, the term returns approximately 552,000 results in a Google search.²² Here are some definitions of the PIC provided by advocacy sites:

a term we use to describe the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social and political problems. . . [power over inmates] is also maintained by earning huge profits for private companies that deal with prisons and police forces; helping earn political gains for “tough on crime” politicians; increasing the influence of prison guard and police unions; and eliminating social and political dissent by oppressed communities that make demands for self-determination and reorganization of power in the US.²³

a set of bureaucratic, political, and economic interests that encourage increased spending on imprisonment, regardless of the actual need. The prison-industrial complex is not a conspiracy, guiding the nation's criminal-justice policy behind closed doors. It is a confluence of special interests that has given prison construction in the United States a seemingly unstoppable momentum. It is composed of politicians, both liberal and conservative, who have used the fear of crime to gain votes; impoverished rural areas where prisons have become a cornerstone of economic development; private companies that regard the roughly \$35 billion spent each year on corrections not as a burden on American taxpayers but as a lucrative market; and government officials whose fiefdoms have expanded along with the inmate population.²⁴

²⁰ Ioan Grillo, *El Narco* (New York: Bloomsbury Press, 2011).

²¹ Henceforth, “PIC”.

²² Accessed Aug. 26, 2014.

²³ Critical Resistance, “What Is the PIC? What Is Abolition?” 2014, <http://criticalresistance.org/about/not-so-common-language/>.

²⁴ Eric Schlosser, “The Prison-Industrial Complex,” *The Atlantic*, December 1, 1998, <http://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/>.

an interweaving of private business and government interests. Its twofold purpose is profit and social control. Its public rationale is the fight against crime.²⁵

Eric Schlosser points out that “Private prisons are the most obvious, controversial, and fastest-growing segment of the PIC”²⁶ and, indeed, these broad definitions frequently mention private prison companies as the most salient example of the its harms. In an eponymous piece from 1998, Angela Davis writes:

Prison privatization is the most obvious instance of capital’s current movement toward the prison industry. While government-run prisons are often in gross violation of international human rights standards, private prisons are even less accountable. In March of this year, the Corrections Corporation of America (CCA), the largest U.S. private prison company, claimed 54,944 beds in 68 facilities under contract or development in the U.S., Puerto Rico, the United Kingdom, and Australia. Following the global trend of subjecting more women to public punishment, CCA recently opened a women’s prison outside Melbourne. The company recently identified California as its “new frontier.”²⁷

Indeed, critical prison literature commonly takes on private prison companies, assuming that private incarceration is, by definition, worse than public incarceration, both for philosophical-ethical reasons and because its for-profit structure creates a disincentive to invest in improving prison conditions. These concerns are reasonable and understandable. The concept of private enterprises designed to directly benefit from human confinement and misery is profoundly unethical and problematic. But while I share the critics’ concerns with private prisons, I think that focusing on private prison companies as

²⁵ Eve Goldberg and Linda Evans, “The Prison-Industrial Complex and the Global Economy,” *Global Research*, October 18, 2001, <http://globalresearch.ca/articles/EVA110AA.html>.

²⁶ Schlosser, “The Prison-Industrial Complex.”

²⁷ Angela Davis, “Masked Racism: Reflections on the Prison Industrial Complex,” *Colorlines*, September 10, 1998, http://colorlines.com/archives/1998/09/masked_racism_reflections_on_the_prison_industrial_complex.html.

the source—or even the salient representation—of all evil in American incarceration is misguided and myopic.

My concern with the critical movement’s focus on private incarceration does not stem from wide-eyed belief in an unregulated, free market’s ability to do well by doing good. Quite the contrary: an unregulated correctional market is a sure recipe for the indifference and cruelty we see in America’s prisons every day. However, the focus on private actors as the bogeymen of American incarceration belies a naïve understanding of neoliberal politics and a gross underestimation of the extent to which everyone—private and public actors alike—respond to market pressures and conduct their business, including correctional business, through a cost/benefit prism. As this Article argues, the profit incentives that brought private incarceration into existence, rather than private incarceration itself, are to blame for the PIC and its evils, and these evils cannot be remedied in full without carefully structuring incentives for correctional agencies and institutions that prioritize the goals we want to see manifested in the world, namely, recidivism reduction and humane confinement conditions.

The Article relies on two main bodies of literature from opposing political and economic perspectives: the progressive and radical literature on neoliberalism and the libertarian literature on public choice economics. The literature on neoliberalism describes the retreat of the state from its welfarist responsibilities and the emergence of a disturbingly unmitigated form of capitalism. Public choice literature exposes the ways in which public actors—legislatures, judges, politicians and other government agencies and individuals—conduct their affairs under the same microeconomic principles that have traditionally been used to analyze the behavior of private corporations and businesses. While public choice economists often write from a libertarian standpoint,²⁸ celebrating the retreat of the state and the power of the free market, one need not accept their ideological premises to see the realism in their analysis. That public actors, like private ones, seek to increase benefits and avoid costs and have no incentive to improve incarceration conditions does not mean that such incentives cannot, or should not, be created.

²⁸ Herbert Gintis, “Beyond Homo economicus: evidence from experimental economics,” *Ecological Economics* 35 (2000): 311–322, http://tbauler.pbworks.com/w/file/48548115/gintis_homo%2520economicus.pdf.

The Article proceeds in three parts. Part I presents the classic ethical and utilitarian arguments against prison privatization, relying on a recent, much-publicized decision of the Israeli High Court of Justice, which refused to allow the functioning of private prisons in Israel. It then proceeds to provide theoretical background on the two bodies of literature that guide my analysis: critiques of the neoliberal state and public choice economics.

Part II proceeds to question the premise that private prisons are to be blamed for a substantial part of the American incarceration crisis. As this part argues, focusing on private prisons gives them, at the same time, too much and too little weight. Too much—because the share of private prisons in the overall incarceration project is fairly small, and quantitative analysis fails to attribute prison growth to private prison growth; and too little—because focusing on private prison companies misses the fact that public correctional institutions are also, essentially, privatized, in terms of most of their internal functions.

Part III turns to public actors in the criminal justice system and sets out to demonstrate how, against a backdrop of neoliberal politics, they behave remarkably like private prison companies. This part highlights three aspects of the similarities: scandals emerging from individual actors' pursuit of profit at the expense of inmates, systemic neglect and abuse stemming from cost/benefit analysis, and the complicated relationship between public and private actors in the aftermath of the Great Recession. This last aspect shows states and private prison companies negotiating, wheeling and dealing, closing and repurposing prisoners, importing and exporting them across state lines, as techniques to cope with the impact of the Great Recession on the American correctional landscape.

The conclusions of this analysis are not all grim. It is possible to create conditions that incentivize prisons, both public and private, to improve incarceration conditions and to implement programs that promote rehabilitation, reentry, and recidivism reduction. The paper therefore ends by offering some suggestions as to the main characteristics of such an incentive system and explains why it would be superior to any effort to prohibitively regulate private prisons.

I. MAPPING AND QUESTIONING THE TRADITIONAL ARGUMENTS ON PRIVATE INCARCERATION

A. The Ethical Argument

In 2000, the Israeli High Court of Justice was petitioned to rule a new amendment to the Prison Ordinance unconstitutional.²⁹ The amendment in question allowed a private prison entrepreneur to operate a private prison in Israel. The petition, on behalf of civil rights organizations as well as potential inmates in the new prison,³⁰ presented various reasons for the amendment's unconstitutionality. While the petitioning civil rights organization focused on the ethical problem inherent in the privatization of punishment,³¹ the comments on behalf of the potential inmates pertained to the concerns that privatizing the industry will lead to a decrease in minimal prison conditions.³²

While Israel lacks a formal constitution, it has a series of “basic laws” of constitutional nature, adopted by a supermajority of lawmakers. One such law is Basic Law: Human Liberty and Dignity,³³ among whose tenets are the right to life and dignity,³⁴ personal freedom,³⁵

²⁹ Basic Law: Human Dignity and Liberty (Sefer Ha-Chukkim No. 1391 of the 20th Adar Bet, 5752, 1992) (Isr.), *translated at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm. No real constitution: “basic laws” but they have constitutional power, particularly Basic Law: Human Dignity and Liberty. As per the quasi-constitutional construct in this Basic Law, any violation of the rights provided in it, including Section 5, which disallows a “deprivation of restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise” unless it is made (1) by law (2) “befitting the values of the State of Israel”, (3) “enacted for a proper purpose”, and (4) “to an extent no greater than is required.”

³⁰ *Academic Center of Law and Business v. Minister of Finance* (2009) HCJ 2605/05 (Isr.), *translated at* http://www.privateci.org/private_pics/Israel_Ruling.pdf.

³¹ *Id.* at 36-37.

³² *Id.*

³³ Basic Law: Human Dignity and Liberty.

³⁴ *Id.* at section 2.

³⁵ *Id.* at section 5.

and privacy.³⁶ Any infringement upon these rights must be done “by law that befits the values of the State of Israel, for an appropriate purpose, and not greater than necessary”.³⁷ Accordingly, the Court set out to examine the purpose and the extent to which human rights are infringed by the law allowing prison privatization.

Despite the fact that petitioners invited the Court to examine not only ethical arguments, but also the actual impact privatization might have on incarceration conditions, the Court chose to focus on the former. Chief Justice Beinish argued that economic profit motives are not the ones that the law would deem an “appropriate purpose” of deprivation of rights,³⁸ and that any extent to which people’s freedom is restricted for this purpose is “greater than necessary.”³⁹ The concurring opinions also found that the law came up short of fulfilling the constitutional requirements. Justice Procaccia’s concurrence found that the purpose might be improving prison conditions by relieving prison overcrowding.⁴⁰ While this, deemed Justice Procaccia, was an “appropriate purpose”, it could be achieved via means other than prison privatization.⁴¹ Justice Naor’s concurring opinion also argued that the law is unequal in creating discrimination between public and private inmates,⁴² as well as problematic in allowing prison providers to profit from inmate labor.⁴³

The sole dissenter, Justice Levy, argued that without empirical data on the function and conditions of private prisons, determining its impact on individual rights and freedoms was impossible.⁴⁴

³⁶ *Id.* at section 7.

³⁷ *Id.* at section 8.

³⁸ *Academic Center of Law and Business v. Minister of Finance*, HCJ 2605/05 at 105.

³⁹ *Id.* at 58.

⁴⁰ *Id.* at 130-131.

⁴¹ *Id.* at 130-132.

⁴² *Id.* at 161-162.

⁴³ *Id.* at 163-166.

⁴⁴ *Id.* at 188-189.

The decision was widely lauded as progressive and revolutionary among journalists⁴⁵ and activists,⁴⁶ and several academics expressed philosophical critiques of private incarceration. Yoav Peled and Doron Navot⁴⁷, as well as Avihay Dorfman and Alon Harel,⁴⁸ have argued that some governmental decisions simply cannot be executed by private entities. Incarceration, as an expression of the public response to criminal behavior, is one such function, as it is an expression of the public will to punish, and as such could not be privatized.⁴⁹

Similar ethical critiques of incarceration are offered beyond the context of the Israeli decision. Michael Reisig and Travis Pratt⁵⁰ rely on Weber's state rationality theory to point out that, because criminal punishment is administered in response to violations of the laws of the state, it is inherently related to the state's power. They add that the pervasiveness of punishment in America makes the coercion involved in it even more closely tied to the state.⁵¹ This perspective stems directly from Enlightenment-era liberal theories of the state, none of which offered a basis for delegating what, by nature, is the state's response to a violation of its rules.⁵² Moreover, even from the perspective of libertarian philosophies, individuals do not have the

⁴⁵ Editorial: Canceling Prison Privatization: A Revolutionary Liberal Decision, Haaretz, Nov. 20, 2009, available at: <http://www.haaretz.co.il/news/law/1.1291075>

⁴⁶ Einat Gal and Na'ama Carmi, Crime and Punishment: Privatizing Prisons—Position Paper, Physicians for Human Rights, available at: <http://www.phr.org.il/uploaded/26%20novb04.doc.pdf>

⁴⁷ Yoav Peled and Doron Navot, "Private Incarceration - Towards a Philosophical Critique," *Constellations* 19 (2012): 216-234, <http://philpapers.org/rec/PELPI>.

⁴⁸ Avihay Dorfman and Alon Harel, "The Case Against Privatization," *Philosophy & Public Affairs* 41 (2013): 67-102, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103365.

⁴⁹ *Ibid.*, 72.

⁵⁰ Michael D. Reisig and Travis C. Pratt, "The Ethics of Correctional Privatization: A Critical Examination of the Delegation of Coercive Authority," *The Prison Journal* 80 (2000): 210-222.

⁵¹ *Ibid.*, 212.

⁵² *Ibid.*, 215.

right to harm each other; the necessity to do so has been delegated to the state.⁵³

Some ethical support for this position can be found in Norbert Elias' classical work *The Civilizing Process*.⁵⁴ Relying on an abundance of historical documentation, Elias argues that the formation of the Early Modern states was characterized by a sublimation of what gradually came to be regarded as base and violent urges. Blood lust was tamed; more refined table manners started to appear; and some bodily functions that were conducted in public were relegated to the private realm. Social historians relying on Elias' analysis, such as V.A.C. Gatrell,⁵⁵ Pieter Spierenburg⁵⁶ and Robert Nye,⁵⁷ have also associated the decline in disorganized violence between individuals to the increasing power of the state. Duels, for example, emerged to control and codify violence within acceptable boundaries of honor and regulation; gradually, as the state took over punishment, such forms of individual-on-individual recourse have disappeared. These socio-historical works are, in a way, an illustration of Thomas Hobbes' *Leviathan*.⁵⁸ the process by which people give their power of aggression to the emerging modern state.

In the American context, there are other issues that make privatization disturbing from an ethical perspective. As Michelle Alexander argues in *The New Jim Crow*,⁵⁹ there is a direct linkage between the

⁵³ Ibid., 217.

⁵⁴ Norbert Elias, *The Civilizing Process* (Oxford: Basil Blackwell, 1994).

⁵⁵ V.A.C. Gatrell, "The Decline of Theft and Violence in Victorian and Edwardian England" in *Crime and the Law: The Social History of Crime in Western Europe since 1500*, ed. V.A.C. Gatrell, Bruce Lenman and Geoffrey Parker (London: Europa Publications, 1980), 238-365.

⁵⁶ Pieter Spierenburg, "The Spectacle of Suffering," in *Men and Violence: Gender, Honor and Rituals in Modern Europe and America*, ed. Pieter Spierenburg (Columbus, OH: The Ohio State University Press, 1998), 103-127.

⁵⁷ Robert Nye, *Masculinity and Male Codes of Honor in Modern France* (New York: Oxford University Press, 1993).

⁵⁸ Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 1998).

⁵⁹ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2012).

abolition of slavery and the exclusion of inmates from the clause forbidding forced labor. Indeed, in the decades following the abolition of slavery, prison population, which during the civil war was largely white, gradually shifted to overrepresent inmates of color and subject them to forced work practices not dissimilar to antebellum practices. Moreover, during the nadir of race relations, private chain gangs proliferated, disturbingly resembling the private profit involved in slave labor a few decades earlier.⁶⁰ This disturbing heritage evokes considerable discomfort with the idea of profiting from human suffering which, in a different form, was a blight that still casts a dark shadow on race relations in the United States.

B. The Incentive Argument: For-Profit Incentives in the Neoliberal State Lead to Worsened Conditions

The second argument frequently made against prison privatization addresses the problematic incentives resulting from allowing incarceration for profit. This argument is deeply rooted in critical analysis of the neoliberal state.

The term “neoliberalism” was originally coined in 1938 to describe fairly moderate economic policies, consisting of a free market with competition but supported by a strong and impartial state.⁶¹ Even after the usage of the term declined in the 1960s, moderate Democrats such as Clinton and Gore used it to describe their political ideology as late as the 1980s.⁶² The current common usage of the term emerged in Chile, where it was used by left-wing oppositionists to describe the free market regime advocated by Pinochet and his hired economic advisors, who were Chicago-school libertarian economists.⁶³ Since

⁶⁰ Alex Lichtenstein, *Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South* (Brooklyn: Verso, 1996).

⁶¹ Philip Mirowski and Dieter Plehwe, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Cambridge, MA: Harvard University Press, 2009).

⁶² David Brooks, “The Vanishing Neoliberal,” *New York Times*, March 11, 2007, http://www.nytimes.com/2007/03/11/opinion/11brooks.html?_r=1&

⁶³ Taylor C. Boas and Jordan Gans-Morse, “Neoliberalism: From New Liberal Philosophy to Anti-Liberal Slogan,” *Studies in Comparative International Development* 44 (2009): 137-161, 149, <http://people.bu.edu/tboas/neoliberalism.pdf>.

then, “neoliberalism” is usually taken to mean broad support for a capitalist, free-market economy, and for a reduction in the regulatory power of the state. Neoliberalism usually advocates free competition and privatization, as well as the removal of external controls of the market such as tariffs, standards, and restrictions on capital flows and investment. With this ideology comes a call for a reduction in state expenditures on social services, such as health and education, and a shift in emphasis from communitarianism and interdependence to individual achievement and responsibility.⁶⁴ The assumption underlying neoliberal ideology is that, if the government and the legal system refrain from intervening in free market activities, the balance created by supply and demand leads to a healthy equilibrium that happens on its own, invoking the “invisible hand” of the market—a term coined in Adam Smith’s *The Wealth of Nations*.⁶⁵

Several commentators have observed that the state’s retreat from its welfare and social functions is often accompanied by greater oppression of the lower rungs of society, who are most likely to find themselves criminalized. In *Disciplining the Poor*,⁶⁶ Joe Soss, Richard Fording and Sanford Schram argue that current policies addressing poverty governance are the result of a combination of two ideologies: neoliberalism, consisting of a retreat from welfare reform and a lack of commitment to combat property, and paternalism, focused on infantilizing the poor and dictating their courses of action. Similarly, in *Punishing the Poor*,⁶⁷ Loïc Wacquant ties the increase in incarceration in the United States to the turn in American economics.

⁶⁴ Richard Robbins, *Global Problems and the Culture of Capitalism* (Columbus, OH: Allyn and Bacon, 1999), 100.

⁶⁵ Adam Smith, *Wealth of Nations*, ed. C. J. Bullock (New York: P.F. Collier & Son, 1909–14). Note that Smith is often mistakenly associated with an aggressive form of capitalism, when in fact he was very invested in the welfare state and its social functions: Jerry Z. Muller, *Adam Smith in His Time and Ours: Designing the Decent Society* (Princeton: Princeton University Press, 1996), 3.

⁶⁶ Joe Soss, Richard C. Fording and Sanford F. Schram, *Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race* (Chicago: University of Chicago Press, 2011).

⁶⁷ Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Durham, NC: Duke University Press, 2009).

According to Wacquant, punishment rates rose not because of fear of crime, but because of social insecurities brought about by the undermining of the class and race hierarchies. As a result, the state has created a link between “workfare” and “prisonfare”, penalizing property, expecting individual responsibility despite systemic class differences and differences in opportunities. Ironically, to Wacquant, the economic deregulation and retreat of the state from its welfarist function led to an increase in its punitive function, “managing” its poor through criminalization and incarceration, rather than providing them with opportunities for labor and mobilization.

These ideologies, argue privatization opponents, play out in a particularly destructive form in the context of prison privatization. First, they make private incarcerating companies complicit in overcrowding and mass incarceration. Private prison companies, it is argued, are compensated on a per-diem basis: the state pays the company a price per-inmate-per-bed-per-day. Since a certain number of inmates is necessary to make the operation profitable, contracts between states and private companies often specify the occupancy rate the state is obligated to supply. In that form, prison population and incarceration become a function not of crime rates and public safety, but of supply and demand and contractual obligation.

Moreover, unregulated private correctional institutions, whose primary motive is profit, are incentivized to seek it at all costs, and with a lack of a strong state regulatory power over their operations, are likely to skimp and save on costly goods, services, and programs. As a result, there are serious concerns that conditions in private prisons will be worse, since unregulated private enterprises will maximize their profit—and their bloated executive pay—at the expense of the inmates. The state finds private greed difficult to regulate, because citizens repeatedly vote down bond issues that fund prison expansion while at the same time demanding increases in incarceration.⁶⁸

⁶⁸ Donna Selman and Paul Leighton, *Punishment for Sale: Private Prisons, Big Business, and the Incarceration Binge* (Lanham, MD: Rowman and Littlefield, 2010), 43.

Finally, a business model tends to expand and encompass new fields; in search of new profit, private prison companies seek new markets, such as the undocumented detention market. As David Sklansky found,⁶⁹ “crimmigration”—the criminal management of immigration—has increased as a response to market conditions, and not merely as a response to concerns about terrorism.

C. The Efficiency Argument: Public Choice and Its Critics

A third set of arguments on privatization addresses the extent to which it is more profitable for the state, as a whole, to run its institutions by delegating them to private hands. These arguments come from public choice theory, which is best defined as the application of economic theory to the field of politics and government.⁷⁰ There is considerable diversity in public choice literature: some writings accept some premises of microeconomics without dispute, such as the assumptions of perfect rationality and perfect information, and some dispute them and bring empirical considerations into the analysis; some accept the premise that there is social consensus about the “common good” and some assume that there will be competing concepts of the “common good” among citizens and institutions.⁷¹

However, one characteristic quality of public choice literature is deep skepticism about the typical distinction between the private and public realms of law and of society.⁷² Public choice scholars analyze the legislative process, judicial decisionmaking, administrative regulation, and more, using the same cost-benefit tools traditionally

⁶⁹ David A. Sklansky, “Crime, Immigration and Ad Hoc Instrumentalism,” *New Criminal Law Review* 15.2 (2012), 157-223, 193-197.

⁷⁰ Dennis Mueller, “Public Choice: An Introduction,” in *The Encyclopedia of Public Choice*, Charles K. Rowley and Friedrich Schneider, eds., (New York: Springer, 2004), 32-48.

⁷¹ *Ibid.*, 36.

⁷² Daniel A. Farber, *Law and Public Choice: A Critical Introduction* (University of Chicago Press, 1991), 1.

relegated to the study of private markets. From this standpoint, public choice often critiques the state for undue interference in the operations of the market; it perceives “big government” intervention as undemocratic in the sense that it immunizes itself, and the industries it regulates, from being open to market considerations.⁷³ This is not merely a democratic critique: public choice economists believe in the positive contribution of market-driven competition to policy development.⁷⁴

In the specific context of prison privatization, public choice economists usually support private enterprises, arguing that a competitive marketplace in any field—including incarceration—motivates efficiency.⁷⁵ The sensitivity to market fluctuations means that private companies can be flexible in response to correctional needs.⁷⁶ As one proponent argues, competition begets creativity: “[A] contract to run a government program—say, a prison—only specifies a basic service, but the agent can invest in thinking up various innovations to the service. Some cut costs, some improve quality. Appropriate some of the net benefit by renegotiating the contract. Incentives are suboptimal, but at least better than those of public managers, who have a more precarious bargaining position.”⁷⁷

⁷³ Morgan, David R. Robert E. England, “The Two Faces of Privatization,” *Public Administrative Review* 48 (1988): 979-86; Vincent Ostrom, *The Intellectual Crisis in American Public Administration* (Tuscaloosa, AL: The University of Alabama Press, 1974).

⁷⁴ Kenneth J. Arrow, *Social Choice and Individual Values*, 2nd ed. (Hoboken, NJ: John Wiley & Sons, 1963). David B. Bobrow and John S. Dryzek, *Policy Analysis by Design* (Pittsburgh, PA: University of Pittsburgh Press, 1987); Amartya K. Sen, *Collective Choice and Social Welfare* (San Francisco: Holden-Day, 1970).

⁷⁵ Charles H. Logan, *Private Prisons: Cons and Pros* (New York: Oxford University Press, 1990). This perspective echoes arguments made by the private prison industries themselves: Don T. Hutto, “Corrections Partnership: The Public and Private Sectors Work Together,” *Corrections Today* 50 (1988): 20-22; Charles H. Logan, “The Propriety of Proprietary Prisons,” *Federal Probation* 51 (1987): 35-40; Stephen Steelman and Kenneth Harms, “Construction Management Firms—Saving Time and Money,” *Corrections Today* 48 (1986): 64-66.

⁷⁶ William A. Donohue, *The Politics of the American Civil Liberties Union* (New Brunswick, NJ: Transaction, 1985); Logan, “Proprietary Prisons;” Joan Mullen, . “Corrections and the Private Sector,” *The Prison Journal* 65 (1985): 1-13.

⁷⁷ Alexander Volokh, “Privatization and Competition Policy,” in *Competition and*

Moreover, at least in the 1980s, the increase in demand for incarceration simply could not be matched solely by the public sector;⁷⁸ population reduction orders can only provide a temporary relief for overcrowding, and more institutions are needed in the long run.⁷⁹ The funding structure for private institutions, primarily via lease-revenue bonds, meant that they could be built fairly quickly, without being clogged in budgetary bureaucracy difficulties.⁸⁰ Finally, the different nature of private prison firms and public sector correctional employee unions means different abilities and incentives to lobby for greater incarceration.⁸¹ Privatization, by nature, fragments the market, which means private firms may have less power and incentive to lobby for more incarceration.⁸² By contrast, in places where correctional employee unions have been allowed to gain considerable political power, they have been powerful players in the state correctional policies.⁸³

But not everyone agrees that prison privatization is necessarily more efficient than public incarceration. Some critics of the libertarian position argue that any savings on private institutions will necessarily

the State, ed. D. Daniel Sokol, Thomas Cheng, and Ioannis Lianos (Palo Alto, CA: Stanford University Press, 2014): 15-32, 19.

⁷⁸ Colson Charles, "Alternatives to Reduce Prison Crowding," *Journal of State Government* 62.2 (1989): 59-94.

⁷⁹ James M.A. Pitts, O. Hayden Griffin, and W. Wesley Johnson, "Contemporary Prison Overcrowding: Short-Term Fixes to a Perpetual Problem," *Contemporary Justice Review* 17.1 (2014): 124-139.

⁸⁰ Dana C., Joel, "Containing Costs Through Privatization. 149-170 in *How Privatization Can Solve America's Infrastructure Crisis*, ed. E. Hudgins and U. Utt (Washington, DC: The Heritage Foundation. 1992), 149-170; Patrick T. Kinkade and Matthew C. Leone, 1992, "Issues and Answers: Prison Administrators' Responses to Controversies Surrounding Privatization," *The Prison Journal* 72 (1992): 57-76; Dennis J. Palumbo, "Privatization and Corrections Policy," *Policy Studies Review* 15 (1986): 598-605.

⁸¹ Volokh, "Privatization and Competition Policy," 21.

⁸² Volokh, "Privatization and Competition Policy," 25.

⁸³ A classic example is the California Correctional and Peace officer's Union (CCPOA): Joshua Page, *The Toughest Beat: Politics, Power, and the Prison Officers Union in California* (New York: Oxford University Press, 2011).

be only for the short term, because the per-diem compensation scheme requires that prison occupancy be maintained.⁸⁴ Moreover, some questions are raised regarding the ability of a private industry to employ the kind of economy of scale that would yield significant savings.⁸⁵

This raises the question whether, indeed, private prisons are more efficient than public ones. There are several important considerations that make such efficiency comparisons difficult. First, private prison critics argue that the private prison companies tend to omit some of their costs, such as salaries, from the operational costs of the facilities. And second, any comparative analysis has to take into account that private prisons are typically newer, and as such have to incur less maintenance costs than older institutions.⁸⁶ Nonetheless, there are a few dozen studies comparing private and public institutions—enough to obtain a general picture.

In a 1999 study,⁸⁷ Travis Pratt and Jeff Maahs conducted a meta-analysis that encompassed 33 such evaluations of private and public

⁸⁴ Patrick Anderson, Charles R. Davoli and Laura Moriarty, “Private Corrections: Feast or Fiasco?” *The Prison Journal* 65 (1985): 32-41; Jeffrey R. Henig, “Privatization and Decentralization: Should Governments Shrink?” *Public Policy and Federalism* 12 (1985): 26-53; David Shichor, *Punishment for Profit: Private Prisons/Public Concerns* (Thousand Oaks, CA: Sage, 1995).

⁸⁵ Gary W. Bowman, Simon Hakim, Paul Seidenstadt, 1993. “Introduction,” in *Privatizing Correctional Institutions*, ed. Gary W. Bowman, Simon Hakim, Paul Seidenstadt (New Brunswick, NJ: Transaction, 1993), 1-12; Dale K. Sechrest and David Shichor, “Comparing Public and Private Correctional Facilities in California: An Exploratory Study,” in *Privatization and the Provision of Correctional Services: Context and Consequences*, ed. G.L. Mays and T. Gray (Cincinnati, OH: Anderson, 1996), 133-151.

⁸⁶ Harry P. Hatry, Paul J. Brownstein, and Robert B. Levinson, “Comparison of Privately and Publicly Operated Correction Facilities in Kentucky and Massachusetts,” in Bowman, Hakim, and Seidenstadt, *Privatizing Correctional Institutions*, 193-212. For an example of such a difficult comparison see LeAnn Beaty, “Privatization in the Last Frontier,” *The CASE Journal* 6 (2010): 1-20, http://www.caseweb.org/journal_sub/TheCASEJournalVolume6Issue2Case5.pdf.

⁸⁷ Travis C. Pratt and Jeff Maahs, “Are Private Prisons More Cost-Effective than Public Prisons? A Meta-Analysis of Evaluation Research Studies,” *Crime &*

facilities from 24 independent studies of adult male prisons.⁸⁸ In comparing the efficiency of these institutions, they controlled for differences in institutional characteristics across independent studies, such as the size of the facility (economy of scale), the security level, and the age of the facility.⁸⁹ The dependent variable was the effect-size estimate: the daily per-diem cost of operating the facility.⁹⁰ The study found that ownership of the institution, in itself, was an insignificant predictor of the standardized measure of inmate cost per day. Other institutional characteristics much more significant: the inmate population size and the age of the institution, and the security level of the facility.⁹¹ In general, for maximum security institutions, private institutions did better, whereas in minimum and medium security institutions, private facilities fared slightly better. 367 A newer meta-analysis by Brad Lundahl, et al.,⁹² also found no significant difference in costs and savings between private and public institutions. Lundahl, et al. also found that the competitive market did not create any improvements in terms of quality of confinement, which did not considerably between private and public prisons; public prisons fared slightly better in terms of the skill trainings they offered to inmates and had slightly fewer inmate grievances.

Our next step will be to challenge the classic arguments against privatization in light of public choice and neoliberal skepticism of the public/private divide.

II. QUESTIONING THE PUBLIC/PRIVATE DIVIDE

Delinquency 45 (1999): 358-371,
<http://cad.sagepub.com/content/45/3/358.full.pdf+html>.

⁸⁸ Ibid., 363.

⁸⁹ Ibid., 362.

⁹⁰ Ibid., 364.

⁹¹ Ibid., 365. It is important to keep in mind that public prisons differ rather dramatically along a spectrum of institutional ages and quality of incarceration. John J. DiIulio, *No Escape: The Future of American Corrections* (New York: Basic Books, 1991).

⁹² Brad W. Lundahl, Chelsea Kunz, Cyndi Brownell, Norma Harris and Russ Van Vleet, Prison Privatization: "A Meta-analysis of Cost and Quality of Confinement Indicators," *Research on Social Work Practice* 19 (2009): 383, <http://www.epsu.org/IMG/pdf/luhndahl-prisons-.pdf>.

A. Private Prisons' Share in Mass Incarceration

The political and scholarly energy invested in debating the merits and shortcomings of private incarceration beg the question whether private prisons are the cause of the massive increase in incarceration since the late 1970s. Progressive advocacy materials tend to highlight the power and growth of private prison companies like the Corrections Corporation of America (CCA) and the GEO Group. Commenting on the Rutherford Institute website, John Whitehead highlights the bottom line as a “\$70 billion gold mine”, and mentions CCA’s recent proposal to prison officials in 48 states to buy and manage public prisons at a substantial cost savings to the states—provided that these prisons contain at least 1,000 beds and states maintain a 90% occupancy rate in the privately run prisons for at least 20 years.⁹³

Similarly, the ACLU report on mass incarceration bemoans its increase “exponential growth”,⁹⁴ pointing out that “as mass incarceration led to disastrous effects for the nation as a whole, one special interest group—the private prison industry—emerged as a clear winner. A massive transfer of taxpayer dollars to the private prison industry accompanied the unprecedented increase in incarceration and the rapid ascent of for-profit imprisonment.”⁹⁵

“Accompanied,” however, does not necessarily equal “caused”, but in many publications this distinction remains blurry. This is particularly the case in writings examining the connection between racial stratification and the prison industrial complex,⁹⁶ as well as in a report

⁹³ John W. Whitehead, “Jailing Americans for Profit: The Rise of the Prison Industrial Complex,” The Rutherford Institute, April 10, 2012, https://www.rutherford.org/publications_resources/john_whiteheads_com%20mentary/jailing_americans_for_profit_the_rise_of_the_prison_industrial_complex

⁹⁴ ACLU, “Banking on Bondage: Private Prisons and Mass Incarceration,” November 2, 2011, https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf, 10.

⁹⁵ *Ibid.*, 12.

⁹⁶ Michelle Alexander, *The New Jim Crow*

by the Progressive Labor Party, which accuses the prison industry of being “an imitation of Nazi Germany with respect to forced slave labor and concentration camps.”⁹⁷ A causal explanation can, of course, be provided. Joel Dyer’s *The Perpetual Prison Machine*⁹⁸ argues that the increase in prison population is a function of three components: the consolidation of large media corporations that sensationalize crime and violence content, the increasing use of public opinion polling by politicians who wish to pander to “popular” views about crime, and the collaboration between the state and private corporations, who allow governments to expand incarceration without the initial expenditure for construction. As Julia Sadbury argues, “the mutually profitable relationship between private corporations and public criminal justice systems enables politicians to mask the enormous cost of their tough-on-crime policies by sidestepping the usual process of asking the electorate to vote for ‘prison bonds’ to raise funds to build publicly operated prisons. Instead, they can simply reallocate revenue funds from welfare, health or education into contracts with privately run-for-profit prisons. Since the 1980s, the private sector has allowed prison building to continue, even where public coffers have been exhausted by the prison construction boom. It has been rewarded with cheap land, tax breaks and discounts in sewage and utilities charges, making prison companies a major beneficiary of corporate welfare. These three components constitute the ‘political and economic chain reaction’ that we have come to know as the prison industrial complex: a symbiotic and profitable relationship between politicians, corporations, the media and state correctional institutions that generates the racialized use of incarceration as a response to social problems rooted in the globalization of capital.”⁹⁹

⁹⁷ Vicky Pelaez, “The Prison Industry in the United States: Big Business or a New Form of Slavery?” *Global Research*, March 31, 2014, <http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289>.

⁹⁸ Joel Dyer, *The Perpetual Prisoner Machine* (New York: Basic Books, 2000).

⁹⁹ Julia Sadbury, “Celling Black Bodies: Black Women in the Global Prison Industrial Complex,” *Feminist Review* 70 (2002): 57-74, <http://jthomasniu.org/class/687/Readings/women-global.pdf>.

There are very good reasons to be concerned about the effects of punitive policies of communities of color, though a nuanced approach to the racialized aspects of prison would not ignore the spread of incarceration of white inmates in the heartland,¹⁰⁰ nor would it cheapen dilute the horrors of the “old Jim Crow” by drawing blanket comparisons between the two regimes.¹⁰¹ Still, this popularized form of accusing private prison companies in part for the ills of the prison system is so common that it has been adopted, unquestioningly, by the National Research Council (NRC) in its recently published report on the reasons for mass incarceration,¹⁰² assuming that readers will accept it as given:

By the mid-1990s, the new economic interests—including private prison companies, prison guards’ unions, and the suppliers of everything from bonds for new prison construction to Taser stun guns—were playing an important role in maintaining and sustaining the incarceration increase. The influence of economic interests that profit from high rates of incarceration grew at all levels of government, due in part to a “revolving door” that emerged between the corrections industry and the public sector. Another factor was the establishment of powerful, effective, and well-funded lobbying groups to represent the interests of the growing corrections sector. The private prison industry and other companies that benefit from large prison populations have expended substantial effort and resources in lobbying for more punitive laws and for fewer restrictions on the use of prison labor and private prisons . . . Many legislators and other public officials, especially in economically struggling rural areas, became strong advocates of prison and jail construction in the 1990s, seeing it as an important engine for economic development. The evidence suggests, however, that prisons

¹⁰⁰ Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006).

¹⁰¹ James Forman, Jr., “Racial Critiques of Mass Incarceration: Beyond the New Jim Crow,” *New York University Law Review* 87 (2012): 101-146,

http://racism.org/index.php?option=com_content&view=article&id=1119:racial-critiques2012&catid=137&Itemid=155&showall=1&limitstart=

¹⁰² Jeremy Travis, Bruce Western, and Steve Redburn, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Washington, DC: The National Academies Press, 2014),
http://www.nap.edu/catalog.php?record_id=18613.

generally have an insignificant, or sometimes negative, impact on the economic development of the rural communities where they are located.¹⁰³

The report cites numerous popular sources, with Ruth Gilmore's *Golden Gulag*¹⁰⁴ and Heather Ann Thompson's *Why Mass Incarceration Matters*¹⁰⁵ as its only refereed academic sources. The evils of private incarceration and the pervasive incentives notwithstanding, it is important to keep in mind the share of private incarceration in the overall correctional market. As of 2010, only 8 percent of prisoners were housed in a private prison, about 7 percent in state systems, and about 16 percent in the federal system. Of the 30 states that contracted out, the median percentage of inmates in private prisons was about 10 percent, and no state's percentage exceeded 45 percent.¹⁰⁶ The outcome is a concentrated, but not monopolistic, prison industry.¹⁰⁷

In his critique of the NRC report,¹⁰⁸ John Pfaff points out more problems with the theory that privatization was a main contributor to mass incarceration. Not only does the private prison industry house relatively low rates of inmates, it cannot in itself be accountable for even that percentage of the incarceration market. While, according to a Justice Policy Institute report¹⁰⁹, the industry has donated over \$6

¹⁰³ Ibid., 24.

¹⁰⁴ Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007).

¹⁰⁵ Heather Ann Thompson, "Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History," *The Journal of American History* 97 (2010): 703-58.

¹⁰⁶ E. Ann Carson and Daniela Golinelli, "Prisoners in 2012 Trends in Admissions and Releases, 1991-2012," *Bureau of Justice Statistics Bulletin*, December 2013, Appendix Table 7, <http://www.bjs.gov/index.cfm?ty=pbse&sid=40>.

¹⁰⁷ Volokh, "Privatization and Competition Policy."

¹⁰⁸ For Pfaff's general thesis and some of his empirical analysis see generally John Pfaff, "The Micro and Macro Reasons of Prison Growth," *Georgia State University Law Review* 28 (2012): 1239-1274.

¹⁰⁹ Paul Ashton, "Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies," Justice Policy Institute,

million to state races in the last five election cycles, Pfaff argues, based on the Institute's same source, that these donations need to be considered in the larger context of state lobbying and spending. The funds provided by private companies, says Pfaff, are vastly outnumbered by the donations of public and non-profit lobbyists such as the educational lobby, and total political spending ran \$14.5 billion, a much vaster sum than the private prison lobby's contribution to political races.¹¹⁰

While Pfaff's analysis ignores the fact that private prison companies may choose to spend specifically on bills that push mass incarceration,¹¹¹ his conclusions about the percentage of private institutions among all U.S. incarceration should give pause to popular proponents of the prison industrial complex theories. Using BJS data, Pfaff charts the state's rate of incarceration growth between 2000 and 2008 as a function of the percent of each state's prisoners that are held in private facilities.¹¹² He finds no connection between percent of private inmates and prison growth.

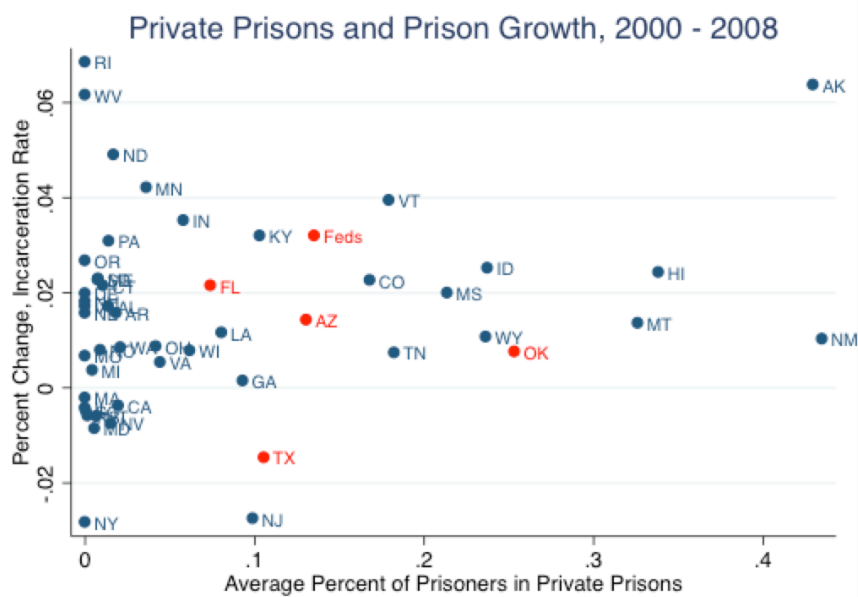
Fig. 1. Private Prisons and Prison Growth, 2000-2008

June 22, 2011,
http://www.justicepolicy.org/research/2614?utm_source=%2fGamingTheSystem&utm_medium=web&utm_campaign=redirect.

¹¹⁰ Pfaff, "Micro and Macro Reasons."

¹¹¹ Support Our Law Enforcement And Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. (Az 2010).

¹¹² John Pfaff, "The Flawed NRC Report: The 'Prison Industrial Complex' Part 1: Private Prisons," Prawfs Blawg, June 16, 2014, available at: <http://prawfsblawg.blogs.com/prawfsblawg/2014/06/the-flawed-nrc-report-the-prison-industrial-complex-part-1-private-prisons.html#more>.



Pfaff’s chart raises a few difficult questions, however. The data depicts prison growth in privatized institutions, but ignores the fact that many of the inmates housed in Arizona, Oklahoma, Florida and Texas are out-of-state inmates imported to those states, and it is unclear whether his prison growth data attributes the numbers of those prisoners to their state of origin or to the incarcerating state. This is particularly notable in states like Hawaii, which incarcerates close to 30% of its inmates on the mainland, in private facilities.¹¹³

Despite these shortcomings and difficulties, Pfaff’s conclusion that it is inaccurate to blame mass incarceration on the privatization of prisons seems fairly sound. However, the conventional PIC explanations are not only too cruel to privatization; they are too kind to it, in that they focus on CCA and GEO as the be-all, end-all of incarceration. Privatization mentality is much more pervasive and intrusive, to the point that it is no longer easy, or sensible, to draw firm distinctions between private and public prisons.

B. Even Public Prisons are Privatized

¹¹³ Gregg K. Kakesako, “State moves closer to reopening Hawaii island prison,” *Honolulu Star Advisor*, July 9, 2013, <http://www.staradvertiser.com/news/breaking/214816621.html?id=214816621>.

The aforementioned decision by the Israeli High Court of Justice was very adamant in its ethical condemnation of private prisons. However, it explicitly noted that the unconstitutionality of the amendment does not rule out any privatization of prison services within a public prison, such as construction, laundry, feeding, and other services.¹¹⁴

In her critique of the Israeli decision,¹¹⁵ Hila Shamir argues that the opinion represents an antiquated and unsophisticated perception of the market, which unduly distinguishes between the state and the market, creating an unhealthy dichotomy between public and private actors.¹¹⁶

Similarly, Malcolm Feeley has criticized the decision based on empirical work conducted in Australian private institutions.¹¹⁷ Feeley argues that the condemnation of privatization as an expression of modernity is ahistorical and ignores multiple, and accepted, historical examples of private criminal justice.¹¹⁸ Moreover, while Shamir argues that the concept of the state as separate from the market is unsophisticated, Feeley argues that the concept of the state itself is flawed – the decision perceives the state as a Leviathan,¹¹⁹ rather than the disaggregated group of different actors and sectors.¹²⁰

¹¹⁴ *Academic Center of Law and Business v. Minister of Finance*, H CJ 2605/05 at 72.

¹¹⁵ Hila Shamir, “The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State,” *Theoretical Inquiries in Law* 15.1 (2014): 1-26.

¹¹⁶ Shamir, 2.

¹¹⁷ Malcolm M. Feeley, “The Unconvincing Case Against Private Prisons,” *Indiana Law Journal* 89 (2014): 1401-1436, <http://ilj.law.indiana.edu/articles/9-Feeley.pdf>.

¹¹⁸ *Ibid.*, 1413-1414.

¹¹⁹ *Ibid.*, 1415-1416

¹²⁰ *Ibid.*, 1418-1419. Feeley also provides several examples of prison privatization success in Australia and the ways in which private industries modernized an antiquated and cruel Victorian infrastructure, in effect contributing to better conditions for inmates: Feeley, 1423-1424.

These critiques of the private prison condemnation arguably fit the American correctional market better than its Israeli and Australian equivalents. Admittedly, the share of private prison companies in owning and running prisons is much smaller than the popular literature suggests. But to focus on this small percentage is to ignore a vast spectrum of privatized, for-profit incarceration services that have been privatized in public prisons. It is probably more sensible to perceive privatization not as an either/or option, but rather as a continuum of private-sphere involvement in the provision of correctional services.¹²¹ Of course, private prison industries, some of them within walls, are commonplace in public prisons as well as in private ones, and benefit extensively from the competitiveness of prison labor.¹²² But many other services within prisons, from food¹²³ to rehabilitative programs,¹²⁴ have been privatized. The examples that follow illustrate the extent to which private services have permeated public institutions.

Perhaps the phenomenon that has received the most negative attention recently is the privatization of health services.¹²⁵ While prisons have never excelled at providing health care to inmates, after the Attica revolt provision of health care to inmates came to be viewed as an

¹²¹ Norman R. Cox and William E. Osteroff, "The Public-Private Partnership: A Challenge and an Opportunity for Corrections," in Bowman, et al., *Privatizing Correctional Institutions*, 113-129; Claus Offe, *Contradictions of the Welfare State* (Cambridge, MA: MIT Press, 1984).

¹²² Warren I. Cikins and James R. Sevick, *Constructing Correctional Facilities: Is There a Role for the Private Sector?* (Washington, D.C.: Brookings Institute, 1987; Barbara J. Auerbach, George E. Sexton, Franklin C. Farrow, Robert H. Lawson, "Work In American Prisons: The Private Sector Gets Involved," U.S. Department of Justice, 1988.

¹²³ Warren I. Cikins, "Privatization of the American Prison System: An Idea Whose Time Has Come?" *Notre Dame Journal of Law, Ethics and Public Policy* 2 (1986): 445-464.

¹²⁴ Francis T. Cullen, "The Privatization of Treatment: Prison Reform in the 1980s," *Federal Probation* 50.1 (1986): 8-16.

¹²⁵ Wil S. Hylton, "Sick on the Inside: Correctional HMOs and the Coming Prison Plague," in *Prison Profiteers: Who Makes Money from Mass Incarceration*, ed. Tara Herivel and Paul Wright (New York: The New Press, 2013), 179-203.

Eighth Amendment right.¹²⁶ However, since then, the overall neoliberal perspective on the role of the state has changed dramatically, and its retreat from welfare responsibility on the outside is clear on the inside as well. This has included a transformation in the perception of the inmate, from ward of the state to a consumer of services.¹²⁷ As an outcome, public and private prisons have narrowed their healthcare offerings to “bare life” sustenance.¹²⁸ One effect of the privatization of prison health care has been muddled accountability for medical negligence, and as Wil Hylton has noted, many practitioners working for private companies reportedly have had their licenses revoked in other states.¹²⁹ Hylton’s investigation of the prison’s approach to hepatitis revealed a strong motivation to save money at the expense of providing inmates with hepatitis treatment,¹³⁰ which led to noncompliance with the Centers for Disease Control’s protocols for treating the epidemic.¹³¹ Private health care providers fiercely fight journalists who expose instances of medical neglect in prisons.¹³² Paul von Zielbauer’s journalistic investigation into Prison Health Services, a private prison provider, exposes the problematic nature of private health care in local jails.¹³³ Zielbauer recounts horrifying examples of neglectful healthcare, which show that the hope of efficient care is shattered by scant and unqualified medical staff and unpunished employee misconduct,¹³⁴ prompting scathing reports by the New York State Commission of Correction.¹³⁵ It should probably be noted that inmates, who tend to be in worse health than

¹²⁶ Ibid., 180.

¹²⁷ Hadar Aviram, *Cheap on Crime: Recession-Era Politics and the Transformation of American Punishment* (Oakland, CA: University of California Press, forthcoming 2015), chapter 7.

¹²⁸ Simon, *Mass Incarceration on Trial*.

¹²⁹ Hylton, “Sick on the Inside,” 182.

¹³⁰ Ibid., 185.

¹³¹ Ibid., 187.

¹³² Ibid., 200.

¹³³ Paul von Zielbauer, “Private Health Care in Jails Can Be a Death Sentence,” in Herivel and Wright, *Prison Profiteers*, 204-227.

¹³⁴ Ibid., 204.

¹³⁵ Ibid., 206.

the general population and more dependent on alcohol and drugs, are particularly vulnerable to faulty medical care.¹³⁶

One recent example of medical misconduct occurred when Nicole Guerrero, a pregnant inmate in a public prison in Wichita County, Texas, called for help when her water broke in solitary confinement. A nurse working with a private prison provider, who was later found to have had an expired license, did not heed Guerrero's plea for medical assistance, and the baby died shortly after its birth. Guerrero is suing the nurse and Correctional Healthcare Management, the private firm, for medical malpractice.¹³⁷

Another industry that has been the subject of abundant criticism is the phone company. This is a particularly important issue given how essential telephone services are to inmates for staying in contact with their families, and to the system overall given the importance of family contact and visitation and its proven impact of recidivism reduction.¹³⁸ Supportive families of inmates cite the difficulties of visitation and telephone calls as a hindrance and hardship, financially and emotionally.¹³⁹ Given these issues, and particularly the logistical

¹³⁶ Ibid., 209; Simon, *Mass Incarceration on Trial*; Aviram, *Cheap on Crime*.

¹³⁷ Shelby Lin Erdman and Carma Hassan, "Texas woman claims she gave birth alone in jail, baby died," CNN, May 24, 2014, <http://www.cnn.com/2014/05/23/us/texas-jail-baby-death/>.

¹³⁸ William D. Bales and Daniel P. Mears, "Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?" *Journal of Research in Crime and Delinquency* 45 (2008): 3287-3321, <http://jrc.sagepub.com/content/early/2008/06/04/0022427808317574.short>; Joseph P. Ryan, "Family Contact and Recidivism: A Longitudinal Study of Adjudicated Delinquents in Residential Care," *Social Work Research* 29 (2005): 31-39, <http://swr.oxfordjournals.org/content/29/1/31.short>; Ryan Shanahan and Sandra Villalobos Agudelo, "The Family and Recidivism," *AMERICANJails* (September 2012): 17-24; <http://www.vera.org/files/the-family-and-recidivism.pdf>. It is important, however, to mention that in-prison contact can be problematic for recidivism if relationships are already poor. Nancy G. La Vigne, Rebecca L. Naser, Lisa E. Brooks, Jennifer L. Castro, "Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships," *Journal of Contemporary Criminal Justice* 21 (2005): 4314-4335, <http://ccj.sagepub.com/content/21/4/314.short>.

¹³⁹ Nancy G. La Vigne, Elizabeth Davies, and Diana Brazzell, "Broken Bonds: Understanding and Addressing the Needs of Children with Incarcerated Parents," Urban Institute Justice Policy Center (2008),

and financial difficulties in visitations, especially in remotely located prisons,¹⁴⁰ it should be a priority for public and private prisons alike to make phone calls accessible. Nonetheless, there have been multiple litigation efforts surrounding the excessive fares charged by private phone companies contracting with public prisons, as well as efforts to regulate such fares.¹⁴¹

A less visible private function is that of transportation companies, which are a private business that serves public and private prisons.¹⁴² The biggest private transportation service is Transcor, which is owned by CCA.¹⁴³ These transportation services have yielded several serious problems, including dangerous driving,¹⁴⁴ improper security leading to escapes,¹⁴⁵ and even inmates being burned alive in a defective bus.¹⁴⁶ Also notable are more than a few instances of sexual and physical assault of inmates in the hands of private transportation employees.¹⁴⁷

While public prison guards lobby hard to differentiate themselves from private corporate correction employees, there is an increasing

http://www.urban.org/UploadedPDF/411616_incarcerated_parents.pdf.
Also, Megan Comfort, *Doing Time Together: Love and Family in the Shadow of the Prison* (University of Chicago Press, 2008).

¹⁴⁰ Chesa Boudin, Trevor Stutz & Aaron Littman, “Prison Visitation Policies: A Fifty State Survey,” Yale University Law School, February 14, 2014, http://www.law.yale.edu/documents/pdf/Liman/Prison_Visitati_on_Policies_A_Fifty_State_Survey.pdf.

¹⁴¹ Drew Kukorowski, M.A., J.D., “Price To Call Home: State-Sanctioned Monopolization In The Prison Phone Industry,” Prison Policy Initiative, 2012, http://www.prisonpolicy.org/phones/price_to_call_home.pdf; Ben Iddings, “The Big Disconnect: Will Anyone Answer the Call to Lower Excessive Prisoner Telephone Rates?” *North Carolina Journal of Law and Technology* 8 (2006): 159.

¹⁴² Alex Friedmann, “For Profit Transportation Companies: Taking Prisoners and the Public for a Ride,” in Herivel and Wright, *Prison Profiteers*, 265-284.

¹⁴³ *Ibid.*, 266.

¹⁴⁴ *Ibid.*, 268.

¹⁴⁵ *Ibid.*, 269.

¹⁴⁶ *Ibid.*, 271.

¹⁴⁷ *Ibid.*, 272.

market for training of public prison guards, including riot preparation,¹⁴⁸ with the addition of tourist attractions and exhibit halls.¹⁴⁹ These, in part, support industries of weapons designed to quell riots and ease arrests, such as tasers.¹⁵⁰

The conclusion to be drawn from these findings is that the public perception of the prison industrial complex is both too grim and too rosy. Contrary to some of the PIC critical literature, the share of fully private institutions in the market is narrow, their impact on policymaking considerably smaller than perceived, and their contribution to mass incarceration, while not negligible, fails to explain the growth of the U.S. prison population or its oppression in any meaningful way. However, expanding one's perspective beyond the particular companies that run entire institutions exposes a spectrum of privatized operations in public prisons that are also driven by profit motivations. Therefore, any ethical or utilitarian ailment that can be leveled against private prison companies can also be leveled against public institutions, which are increasingly private in name only. Moreover, accusing private companies of profiteering from the prison crisis – which is true, but a convenient scapegoat – is taking the heat off the real culprits: states, and particularly state prosecutors, who are the ones driving the prison crisis in the first place with untoward punitive charging policies.¹⁵¹

But even this critique does not fully address the scope of the problem. The distinction between the public and private sector is not only futile because of the increased privatization within public institutions, but also because it assumes that private actors are motivated by different incentives than public ones. The next chapter relies on public choice insights to argue that, in fact, public actors consider cost/benefit factors just as frequently as private ones, both as individuals and on the institutional level. And as the incarceration shifts following the

¹⁴⁸ Jennifer Gonnerman, “The Riot Academy: Guards Stage Mock Prison Riots to Test the Latest High-Tech Gear,” in Herivel and Wright, *Prison Profiteers*, 228-234.

¹⁴⁹ *Ibid.*, 231.

¹⁵⁰ Anne-Marie Cusac, “Shocked and Stunned: The Growing Use of Tasers,” in Herivel and Wright, *Prison Profiteers*, 250-264.

¹⁵¹ Pfaff, “Macro and Micro Reasons.”

Great Recession of 2008 have revealed, private and public actors are negotiating, wheeling and dealing in remarkably similar ways, in mutual response to market pressures to decrease incarceration.

III. PUBLIC ACTORS AS MARKET PLAYERS

A. Public Incarceration Conditions and the Ugly Pig Contest

In a symposium titled *Capitalism, Government, and the Good Society*, political scientist and former North Carolina libertarian gubernatorial candidate Michael Munger used a unique simile to explain the choice between the state and private actors:

In North Carolina at the state fair, we have what in effect are beauty contests for pigs. So you might imagine in one of the categories at the state fair there is a Big Pretty Pig contest. And there aren't many entrants because there's big pigs, and there's pretty pigs, but there's not many big pretty pigs. So there's just two; we have the two entrants. The first one comes out and the judge goes, 'Oh, God, that's an ugly pig! Let's give the prize to the second one.' Well, he hasn't seen the second pig. Now it's true that the first pig is ugly. But why would you have a decision based on the fact that there's problems with one system, the other one must be better? But that's precisely what people who want to reject market solutions in some ways are advocating. So the world is imperfect, our knowledge is limited, that particular pig of market solutions is in many ways pretty ugly. The world is hard. The problem is that advocates of state intervention often want to award the prize to the invisible pig: the state. But when you actually take a look under bright lights, government failures are just as ugly, just as prevalent, and in some ways harder to control than market failures.¹⁵²

The comparison is hardly offensive, and possibly euphemistic, when used to examine incarceration conditions. The serious critiques leveled at private prison conditions are, of course, justified. Some recent incidents include the disturbing audit conducted in October 2012 at the CCA-owned Ohio Correctional facility, which found 47

¹⁵² Michael Munger, "Capitalism, Government, and the Good Society" EconTalk, Sep. 4, 2013, http://www.econtalk.org/archives/2013/09/capitalism_gove.html.

violations of state prison standards,¹⁵³ most related to severe overcrowding of low-risk offenders under the supervision of inexperienced guards.¹⁵⁴ Similarly, Otter Creek Correctional Center in Wheelwright, Kentucky, had its state funding pulled in August of 2012 after Hawaii removed all 168 female inmates it had housed at the facility due to allegations of sexual abuse by prison guards.¹⁵⁵ In another egregious instance of private prisons run amok, GEO removed its presence entirely from Mississippi in April 2012, after Federal Judge Carlton Reeves wrote that GEO-run Walnut Grove Youth Correctional Facility had “allowed a cesspool of unconstitutional and inhuman acts and conditions to germinate, the sum of which places the offenders at substantial and ongoing risk,” including routine sex between staff and underage inmates, “poorly-trained guards brutally beat youth and used excessive pepper spray,” and prison guards turned a blind eye to inmates possessing homemade knives that were used in “gang fights and inmate rapes.”¹⁵⁶

But is this decidedly-very-ugly-pig that much uglier than its public counterpart? Here are only three examples from a state that holds all of its in-state inmates in public facilities.¹⁵⁷ In 2011, the Supreme Court decided what might be the biggest inmate human rights case of

¹⁵³ Leigh Owens, “Private Prison In Violation of Ohio State Law,” Huffington Post, October 10, 2012, http://www.huffingtonpost.com/2012/10/09/private-prison-violates-state-law_n_1951917.htm.

¹⁵⁴ Mike Brickner, “Prisons for Profit: A Look at Prison Privatization,” ACLUOhio.org, April 14, 2011, http://www.acluohio.org/assets/issues/CriminalJustice/PrisonsForProfit2011_04.pdf.

¹⁵⁵ Brett Barroquere, “Rural Ky. town readies for private prison closure,” Associated Press, April 24, 2012, <http://www.foxnews.com/us/2012/04/24/rural-ky-town-readies-for-private-prison-closure/>. Other aspects of Hawaii’s choice to house its inmates out of states are discussed below.

¹⁵⁶ John Burnett, “Miss. Prison Operator Out; Facility Called a ‘Cesspool,’” NPR, April 24, 2012, <http://www.npr.org/2012/04/24/151276620/firm-leaves-miss-after-its-prison-is-called-cesspool>.

¹⁵⁷ California houses approximately 9,000 inmates out-of-state in CCA facilities. California Department of Corrections and Rehabilitation, “Prison Facilities, Out of State Prison Facilities,” 2013, http://www.cdcr.ca.gov/Visitors/CA_Out_Of_State_Facilities.html.

our time, *Brown v. Plata*.¹⁵⁸ The case exposed the abysmal quality of physical and mental healthcare provided in public California prisons. Justice Kennedy, writing the Opinion of the Court on behalf of five Justices, detailed numerous horrific instances of systemic indifference, resulting in inmates sitting in their own human waste for hours, injuries and chronic conditions becoming worse and worse through medical neglect and maltreatment, and unnecessary, iatrogenic deaths at a rate of an inmate every six days.¹⁵⁹ It is particularly poignant that these practices were so horrifying that, years before the decision, the courts had taken the prison health care system out of the hands of the state and placed them in the hands of a federal receiver¹⁶⁰—but even that was not enough.¹⁶¹ Justice Kennedy grimly concludes:

To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates 'may actually produce physical 'torture or a lingering death'. . . Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society. . . [i]f the government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation.¹⁶²

¹⁵⁸ *Brown v. Plata* 131 U.S. 1910.

¹⁵⁹ For more on healthcare in California prisons, see Jonathan Simon, *Mass Incarceration on Trial*.

¹⁶⁰ California Correctional Health Care Services, 2014, <http://www.cphcs.ca.gov/>.

¹⁶¹ Mac Taylor, "Providing Constitutional and Cost-Effective Inmate Medical Care," Legislative Analyst's Office, April 19, 2012, <http://www.lao.ca.gov/reports/2012/crim/inmate-medical-care/inmate-medical-care-041912.pdf>.

¹⁶² *Brown v. Plata* 131 U.S. 1910.

Federal courts are currently in the process of hearing another lawsuit, *Ashker v. Brown*,¹⁶³ which addresses the practice of solitary confinement in California. In 2011 and 2013, inmates in California's Pelican Bay and Corcoran institutions, as well as in other public correctional facilities, engaged in hunger strikes to protest against the conditions in the Security Housing Unit (SHU).¹⁶⁴ These conditions included placement in small solitary cells for 23 hours a day with no human contact for an indefinite period of time—sometimes lasting decades¹⁶⁵—not for disciplinary violations, but for a suspicion of gang membership.¹⁶⁶ The hunger strike ended only when Judge Thelton Henderson ordered that the inmates be force-fed.¹⁶⁷

In 2013, an exposé by the Center for Investigative Reporting uncovered a scandal of massive proportions: the sterilization of female inmates without proper state procedures. A subsequent 2014 California Auditor examination uncovered 144 cases of tubal ligations performed in inmates between 2006 and 2010, 39 of which were performed without consent and a further 27 in which the inmates' physicians did not sign the appropriate forms. Interviews with the inmates that had undergone the procedure reveal disturbing degrees of paternalism and pressure on the part of medical staff.¹⁶⁸ "As soon as [the institution's OB-GYN] found out that I had five kids", recounted

¹⁶³ *Ashker v. Brown*, No. C 09-5796 CW (N.D. Cal. Apr. 18, 2013).

¹⁶⁴ Prisoner Hunger Strike Solidarity, "Sept. 6th Event: Anniversary Suspension of Historic 2013 Hunger Strike," August 17, 2014, <http://prisonerhungerstrikesolidarity.wordpress.com/>.

¹⁶⁵ For a full account of the conditions in the SHU and the hunger strike that resulted, see Benjamin Wallace-Wells, "The Plot From Solitary," *New York Magazine*, February 26, 2014, <http://nymag.com/news/features/solitary-secure-housing-units-2014-2/>.

¹⁶⁶ Keramet Reiter, "Parole, Snitch, or Die: California's Supermax Prisons and Prisoners, 1997–2007," *Punishment & Society* 14 (2012): 530-563.

¹⁶⁷ *The Guardian*, "California hunger strike: judge approves force-feeding of prisoners," August 20, 2013, <http://www.theguardian.com/world/2013/aug/20/california-hunger-strike-force-feeding>.

¹⁶⁸ Corey G. Johnson, "Female inmates sterilized in California prisons without approval," *Sacramento Bee*, July 7, 2013, <http://www.sacbee.com/2013/07/07/5549696/female-inmates-sterilized-in-california.html>.

an inmate to the Sacramento Bee, “he suggested that I look into getting it done. The closer I got to my due date, the more he talked about it. . . He made me feel like a bad mother if I didn't do it.”

Many more examples of cruelty, laziness and neglect in public prisons lead to the inevitable conclusion: incarceration conditions in the United States may differ across states and different types of institutions, but it is difficult to argue that private institutions, categorically, are worse than public ones. Both pigs are ugly. And as the next chapter shows, criminal justice actors in the public sector are not at all immune from profit motivations when they engage in unconscionable behavior toward the people subjected to their control.

B. Profit-Seeking Aberrations and the Banality of Evil

In 2008, many conscientious Americans were shocked to discover that two Philadelphia judges—Mark Ciavarella, the former President Judge of the Luzerne County Court of Common Pleas, and Michael Conahan, a Senior Judge in the same county—were indicted and convicting for accepting money from a private juvenile facility provider, Robert Mericle, in return for sentencing thousands of juvenile defendants harshly so they would be sent to the detention centers.¹⁶⁹ Mericle, a real-estate developer, was a staunch supporter of Ciavarella’s election campaign;¹⁷⁰ Conahan struck a personal friendship with some organized crime leaders in Northeast Pennsylvania.¹⁷¹

The defendants’ association with Mericle started with their support, for cash of his juvenile facility venture in 2000-2001¹⁷², and continued with their furnishing Mericle’s facilities with revenue-raising bodies. Examples of their harsh sentencing for kickback included seven weeks’ detention for a thirteen-year-old’s minor violent incidents with his mother’s much-larger boyfriend,¹⁷³ months

¹⁶⁹ For an engaging overview of the case, see William Ecenbarger, *Kids for Cash: Two Judges, Thousands of Children, and a \$2.6 Million Kickback Scheme* (New York: New Press, 2012).

¹⁷⁰ *Ibid.*, 30.

¹⁷¹ *Ibid.*, 33.

¹⁷² *Ibid.*, 43.

¹⁷³ Ecenbarger, *Kids for Cash*.

of house arrest for an epileptic fourteen-year-old girl accused of defacing stop signs with the inscription “vote for Michael Jackson”,¹⁷⁴ a sixteen-year-old charged with “terroristic threats” for a prank and sentenced to an indefinite term at a wilderness camp for girls,¹⁷⁵ and a fifteen-year-old who carelessly and mistakenly purchased a stolen motorbike sent to a term at a “boot camp” which led him to use drugs and exhibit signs of anxiety and depression, which brought him in and out of detention facilities for three years.¹⁷⁶ The Juvenile Law center found that hundreds of defendants were tried without receiving proper counsel.

Clearly, a serious culprit in this scandal is Robert Mericle, the juvenile facility provider, who paid the judges in kickbacks, and one possible reading of this story is as an indictment against such institutions. But in an environment in which public officials are not greedy, corrupt, and profit-seeking, a for-profit attempt to corrupt judges would not result in such horrific results. William Ecenbager provides background that includes a lengthy history of political corruption,¹⁷⁷ the judicial election system in 39 states including Pennsylvania,¹⁷⁸ and the “tough love” change in the American approach to juvenile justice.¹⁷⁹ In his account of the scandal, Ecenbager shows that pressures were exerted by the judges over the entire juvenile system in Pennsylvania, bullying lawyers and therapeutic personnel to collaborate with their schemes, sometimes openly stating that these policies were necessary because there were “bills to pay.”¹⁸⁰

Scandalous human rights crimes perpetrated for profit do not even require the partnership of a private actor; sometimes, a legislative lacuna suffices. A 1939 Alabama law allowed the state’s 67 sheriffs to pocket any leftover money they managed to save from the state’s

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid., 23.

¹⁷⁸ Ibid., 30.

¹⁷⁹ Ibid., 39.

¹⁸⁰ Ibid., 49.

allowance for feeding inmates in local institutions. In 2009, then-sheriff of Morgan County, Greg Bartlett, was charged and convicted for having pocketed \$212,000 from the prison's food budget, while the inmates were provided with inadequate food on \$1.75 a day.¹⁸¹ His defense attorney argued that "everything he [had] done [was] by the rules, including the feeding allowance."¹⁸² After Bartlett's release from jail, he agreed to spend the food money solely on food and not keep any funds for his personal use.¹⁸³ Currently, Sheriff Mike Rainey, who is calling on the legislature to end the current system and allow county commissions to oversee the funds, has reportedly been donating most of his potential earnings, to the tune of \$10,000, to charity.¹⁸⁴

One would hope that Rainey's public stance be the norm, rather than notable and unusual honesty, and that Bartlett's deeds be exposed for the travesty they are, but Bartlett was defended in his trial by the Alabama Sheriffs Association, who stressed in their defense that he had not broken any laws—just exploited an existing system.¹⁸⁵ And when local advocacy groups sought to find out how common this profiteering-on-food scheme was, the Director of the Alabama Sheriffs Association sent each sheriff a letter advising them to ignore the open records law.¹⁸⁶ Geraghty and Velez provide other examples

¹⁸¹ Adam Nossiter, "As His Inmates Grew Thinner, a Sheriff's Wallet Grew Fatter," *New York Times*, January 8, 2009, http://www.nytimes.com/2009/01/09/us/09sheriff.html?_r=0.

¹⁸² *Ibid.*

¹⁸³ Consent Order, *Maynor v. Morgan County*, No. 01-0851, NE (N.D. Ala. Sept. 25, 2001.) For journalistic commentaries, see Nossiter, "Sheriff's Wallet Grew Fatter;" Shelly Haskins, "Sheriff Greg Bartlett to speak on jail food issue," AL.com blog, January 9, 2009, http://blog.al.com/breaking/2009/01/sheriff_greg_bartlett_to_speak.html.

¹⁸⁴ Adam Peck, "In Alabama Prisons, The Less Sheriffs Spend On Food For Inmates, The More They Earn," Think Progress, June 25, 2013, <http://thinkprogress.org/justice/2012/06/25/506089/in-alabama-prisons- the-less-sheriffs-spend-on-food-for-inmates-the-more-they-earn/>.

¹⁸⁵ *Ibid.*

¹⁸⁶ Sarah Geraghty and Melanie Velez, "Bringing Transparency and Accountability to Criminal Justice Institutions in the South," *Stanford Law and Policy Review* 22 (2011): 455-488, 465.

of such enrichment: In South Georgia, Clinch County court officials had charged state court misdemeanants \$10-15 illegal fees, which were pocketed by court personnel.¹⁸⁷ Interpreting these incidents as endemic to the Southern system does not obscure the fact that they consisted of exploiting an opaque system riddled with antiquated law to obtain personal profit.

Lest it seem that these are extreme, idiosyncratic examples of cruelty and corruption, let us turn to much more ordinary profit-seeking mechanisms of exploitation. On May 15, 2014, the California legislature approved AB 1876, a bill designed to put an end to a prevailing practice among county correctional officers to profiteer from contracts with phone companies. The new bill “prohibits a contract to provide telephone services to any person detained or sentenced to a jail or juvenile facility from including any commission or other payment to the entity operating the jail or juvenile facility.”¹⁸⁸

The bill was designed to address a county loophole in phone contract regulation in local facilities. In 2007, California passed a law phasing in reductions in the cost of prison phone calls, but left the county jail market open to abuse and exploitation.¹⁸⁹ So, in Contra Costa County, phone call rates were triple what the state had put in place for state-owned facilities, and the commissions paid by the operator to the county were 53 percent. The money was reportedly directed to an “inmate welfare” fund, some of which was used for worthwhile programming, but as commented in the *Contra Costa Times*, obtaining it via a profit-seeking kickback was absurdly corrupt

¹⁸⁷ Alison Palmer & Andy Peters, “Ex-Judge Blitch Pleads Not Guilty after Months of Being Listed as Un-Indicted Co-Conspirator,” *Fulton County Daily Report*, July 21, 2008, <http://www.law.com/jsp/article.jsp?id=1202423121013&slreturn=1&hbxlog in=1/>.

¹⁸⁸ A.B. 1876, 1st Reg. Sess. (Ca 2014), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1876.

¹⁸⁹ Tracy Rosenberg, “County allows outrageous charges for inmate calls,” *Contra Costa Times*, February 23, 2013, http://www.contracostatimes.com/ci_22640254/tracy-rosenberg-county- allows-outrageous-charges-inmate-calls.

management.¹⁹⁰ Similarly, the 2007 law pertaining to state prisons did not cover interstate-calling costs, making those prohibitively expensive and contact with out-of-state family virtually impossible for low-income families.¹⁹¹ Similar schemes that make phone calls prohibitively expensive, for prison authority profit, are being protested in Virginia¹⁹² and Washington.

These individuals and institutions were clearly operating with the intention to profit from their misdeeds. That they were public officials, or public institutions, did not make them immune to greed or more sensitive to human suffering than their private counterparts. Indeed, much more mundane examples of wheeling and dealing demonstrate that, when public and private actors are faced with a shift in the profitability or sustainability of incarceration, they transform their behavior and adapt to the changing market conditions in surprisingly similar ways.

This phenomenon can be illustrated by examining the changes in incarceration policies and practices following the Great Recession of 2008.¹⁹³ When incarceration became less sustainable and states began to feel the pressure to reduce their prison populations, private prison companies offered their public clients “discounts” on the required occupancy rates in their institutions,¹⁹⁴ while at the same time “diversifying their incarceration portfolio” by entering the undocumented immigrant detention market and advocating for anti-immigration legislation.¹⁹⁵ Responding to the same pressures, states

¹⁹⁰ Ibid.

¹⁹¹ Tracy Rosenberg, “A Tale of Two Prisoners,” Huffington Post, January 8, 2014, http://www.huffingtonpost.com/tracy-rosenberg/a-tale-of-two-prisoners_b_4552343.html.

¹⁹² Nation Inside, Campaign for Prison Phone Justice, 2014, <http://nationinside.org/campaign/prison-phone-justice/posts/time-sensitive-virginia-prison-phone-justice/>

¹⁹³ Aviram, *Cheap on Crime*; Hadar Aviram, “The Inmate Export Business and Other Financial Adventures: Correctional Policies for Times of Austerity,” *Hastings Race and Poverty Law Journal* 11 (2014): 111-155.

¹⁹⁴ Aviram, *Cheap on Crime*; Aviram, “The Inmate Export Business.”

¹⁹⁵ Aviram, *Cheap on Crime*.

recurred to prison closures.¹⁹⁶ States who managed to reduce their population tried to sell their unused correctional space to other states.¹⁹⁷ States made decisions about housing inmates in-state, or out-of-state, based on cost-benefit considerations.¹⁹⁸

Public and private actors alike, we can conclude, negotiate with each other, and with other actors, in order to respond to economic pressure. Private prison companies are changing their contracts with state and local governments to account for lesser occupancy, and states buy and sell prison space from each other. Not only are these two “pigs” so ugly that they defy comparison, they are both motivated by profit and cost-benefit analysis, like the neoliberal subjects they are.

CONCLUSION

This Article’s journey into the inner workings of private and public correctional agencies leads to the inescapable conclusion that PIC critics who focus on private prison companies are missing the mark. By focusing specifically on private incarceration, they reinforce the traditional public/private divide, ignoring the realities of a fragmented market as well as a fragmented state. Public institutions have privatized so many of their internal functions that they can hardly be differentiated from private ones. Public actors behave in ways as atrocious and neglectful, and they respond to the same market pressure, as their private counterparts.

A sober public choice perspective on incarceration (albeit one that does not necessarily subscribe to the political preferences of public choice) requires that critical prison literature abandon fantasy and

¹⁹⁶ Aviram, “The Inmate Export Business;” Nicole D. Porter, “On the Chopping Block 2013: State Prison Closures,” The Sentencing Project, http://sentencingproject.org/doc/publications/inc_On%20the%20Chopping%20Block%202013.pdf.

¹⁹⁷ Kathryn Lynch-Morin, “The fate of Standish Max is still uncertain,” MLive, July 21, 2009, http://www.mlive.com/news/bay-city/index.ssf/2009/07/the_fate_of_standish_max_is_st.html.

¹⁹⁸ David Johnson, Janet Davidson, and Paul Perrone, “Hawaii’s Imprisonment Policy and the Performance of Parolees Who Were Incarcerated In-State and on the Mainland,” State of Hawaii Attorney General, January 2011, <http://ag.hawaii.gov/cpja/files/2013/01/AH-UH-Mainland-Prison-Study-2011.pdf>.

acknowledge reality: fighting private incarceration companies, in themselves, is not only futile, but also misses the mark. The problem is not the institutions themselves, but rather the fact that they cannot escape the neoliberal economy in which context they operate.

Calling attention to the horrifying, inhumane consequences of these market pressures is important, but so is designing solutions that might work. Since the capitalist makeup of the state, and its contribution to the PIC, cannot be dismantled by raising consciousness to humanitarian concerns, the regulation correctional behavior must be altered so that it provides incentives to improve prison conditions.

One such alteration might be shifting the compensation basis for all correctional institutions—private and public alike—from a per-diem basis to a recidivism-reduction basis. In other words, inmate recidivism will be measured for each correctional institution, regardless of its management, and these institutions will be compensated and budgeted according to their accomplishments in recidivism reduction. Such a system would prompt prison administrations to adopt rehabilitation programs proven to work and to seek reentry schemes for their inmates that will improve their lives overall and reduce the chance that they will return to prison. It will also sever the link between better business and a larger number of inmates, and eliminate the incentive for lobbying for “tough on crime” propositions by public and private actors alike.

In crafting this system, care must be taken to avoid a situation in which unsuccessful prisons simply close and all inmates are shuttled to successful prisons, making the latter, over time, overcrowded and unsuccessful. This incentive structure must be accompanied by a plan to heal troubled prisons, which should include resources for implementing proven vocational and educational training programs. Everyone should be offered an opportunity to succeed in recidivism reduction. Care must also be taken to foresee efforts to “game” the new system by admitting solely inmates who have better rehabilitative chances, by requiring that facilities accept inmates in their relevant security level on a random allocation basis.

If, in light of such alterations in the compensation scheme, private prison companies decide that their business is no longer profitable, their exit from the field will not be mourned. But if, indeed, private

entrepreneurs respond better to financial initiatives than to accusations and limitations, let's push everyone in the correctional business, whether they wear badges or business suits, to do well by doing good.