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

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# 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, privatized incarceration, is frequently considered worse, by definition, than public incarceration for both 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. This Article illustrates these arguments with several examples of correctional response to the conditions caused by the Great Recession, showing how public and private actors alike adopt a cost-minimizing, financially prudent approach, sometimes at the expense of prison conditions and inmate human rights. This Article ends by suggesting that, in a neoliberal capitalist environment, prohibitions and litigation alone cannot improve prison conditions,

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\* 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 University School of Law, Law and Economics Center'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.

and that policymakers need to consider proper market incentives regulating both private and public prisons.

### TABLE OF CONTENTS

Introduction .....	412
I. Mapping and Questioning the Traditional Arguments on Private Incarceration .....	418
A. The Ethical Argument.....	418
B. The Incentive Argument: For-Profit Incentives in the Neoliberal State Lead to Worsened Conditions.....	422
C. The Efficiency Argument: Public Choice and Its Critics.....	424
II. Questioning the Public/Private Divide .....	428
A. Private Prisons' Share in Mass Incarceration .....	428
B. Even Public Prisons Are Privatized .....	434
III. Public Actors as Market Players .....	439
A. Public Incarceration Conditions and the Ugly Pig Contest .....	439
B. Profit-Seeking Aberrations and the Banality of Evil.....	443
Conclusion.....	447

*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."<sup>1</sup>*

### INTRODUCTION

Anyone seeking a reason to rail against the American correctional system will find plenty of easy targets. With approximately 2.2 million people behind bars<sup>2</sup>—1 in 100 American citizens,<sup>3</sup> with more

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1. O. O. McIntyre, *As O. O. McIntyre Sees It*, MUSCATINE J. & NEWS-TRIBUNE, Jan. 2, 1937, at 3. The anecdote has also been attributed to Bernard Shaw, Winston Churchill, and several others.

2. *Incarceration*, SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited Oct. 22, 2014).

3. Press Release, Pub. Safety Performance Project, U.S. Prison Population Drops for Third Year as States Adopt New Policy Strategies (Aug. 8, 2013), *available*

in certain states<sup>4</sup>—the American system is a frightening colossus of confinement and the world leader in incarceration rates.<sup>5</sup> 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 7.3 million.<sup>6</sup> 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 344% increase<sup>7</sup>—while the U.S. population grew in the same time only from 226.5 million to 313 million—a 38% increase.<sup>8</sup> Shockingly, these numbers are not justified by the need to control crime. Rather, crime rates have declined since the 1980s.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> Most recently, the Supreme Court found the physical and mental health care in California prisons

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at <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. Press Release, Pub. Safety Performance Project, One in 31 U.S. Adults are Behind Bars, on Parole or Probation (Mar. 2, 2009), available at <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>.

5. *Incarceration*, *supra* note 2.

6. Press Release, Pub. Safety Performance Project, *supra* note 4.

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. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 2 (2013), [http://sentencingproject.org/doc/publications/inc\\_Trends\\_in\\_Corrections\\_Fact\\_sheet.pdf](http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf). During the same time, the federal prison population grew from 25,000 to 219,000 inmates. NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 2 (2014). Notably, however, the prison population began to decline in 2009, the year after the Great Recession, and it has continued to steadily decline since then. *Total U.S. Correctional Population Declined in 2012 for Fourth Year*, BUREAU JUST. STAT. (Dec. 19, 2013), <http://www.bjs.gov/content/pub/press/cpus12pr.cfm>.

8. *History: 1980 Fast Facts*, U.S. CENSUS BUREAU, [https://www.census.gov/history/www/through\\_the\\_decades/fast\\_facts/1980\\_new.html](https://www.census.gov/history/www/through_the_decades/fast_facts/1980_new.html) (last updated Aug. 7, 2014). The current population is approximately 319 million. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock/> (last visited Oct. 22, 2014).

9. FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 49 (2006).

10. See DON STEMEN, *RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME* 4 (2007), available at <http://www.thecommoninterest.org/docs/VeraNewDirections.pdf>.

11. MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 13, 39–40 (1998).

appalling—one inmate dying needlessly from iatrogenic causes every six days<sup>12</sup>—indeed, so appalling that they could not be improved without considerable population reduction.<sup>13</sup> Eighty thousand inmates are housed under conditions of solitary confinement,<sup>14</sup> in tiny cells with no outside stimulus,<sup>15</sup> suffering abundant forms of neglect<sup>16</sup> and deteriorating mental health.<sup>17</sup> The United States is one of the only Western industrialized democracies in which the death penalty is alive and well, retained in thirty-two of its states.<sup>18</sup> At least a quarter of the United States prison population consists of nonviolent drug offenders serving lengthy sentences,<sup>19</sup> while the legacy of the War on Drugs continues to fuel horrifying violence in the United States<sup>20</sup> and Mexico.<sup>21</sup>

12. *Brown v. Plata*, 131 S. Ct. 1910, 1927 (2011); JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 133–35 (2013).

13. *Brown*, 131 S. Ct. at 1922.

14. Joseph Stromberg, *The Science of Solitary Confinement: Research Tells Us that Isolation is an Ineffective Rehabilitation Strategy and Leaves Lasting Psychological Damage*, SMITHSONIAN.COM (Feb. 19, 2014), <http://www.smithsonianmag.com/science-nature/science-solitary-confinement-180949793/?no-ist>.

15. Robert M. Ferrier, Note, “*An Atypical and Significant Hardship*”: *The Supermax Confinement of Death Row Prisoners Based Purely on Status—A Plea for Procedural Due Process*, 46 ARIZ. L. REV. 291, 294–95 (2004).

16. Terry A. Kupers, *What to Do with the Survivors? Coping with the Long-Term Effects of Isolated Confinement*, 35 CRIM. JUST. BEHAV. 1005, 1009 (2008); Josiah D. Rich et al., *Medicine and the Epidemic of Incarceration in the United States*, 364 NEW ENG. J. MED. 2081, 2081 (2011).

17. Craig Haney, *A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons*, 35 CRIM. JUST. BEHAV. 956, 956 (2008); Terry A. Kupers, *How to Create Madness in Prison*, in HUMAN PRISONS 47 (David Jones ed., 2006).

18. Max Fisher, *Map: Which Countries Use the Death Penalty?*, ATLANTIC, July 6, 2011, <http://www.theatlantic.com/international/archive/2011/07/map-which-countries-use-the-death-penalty/241490/>; *States with and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Nov. 1, 2014).

19. See E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012, at 38 app. tbl.5, 43 app. tbl.10 (2013), available at <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>; NILA NATARAJAN ET AL., JUSTICE POLICY INST., SUBSTANCE ABUSE TREATMENT AND PUBLIC SAFETY 1 (2008), available at [http://www.justicepolicy.org/images/upload/08\\_01\\_REP\\_DrugTx\\_AC-PS.pdf](http://www.justicepolicy.org/images/upload/08_01_REP_DrugTx_AC-PS.pdf); *People Sentenced for Drug Offenses in the U.S. Correctional System*, DRUGWARFACTS.ORG, [http://www.drugwarfacts.org/cms/Prisons\\_and\\_Drugs#sthash.WHjtG9jD.dpuf](http://www.drugwarfacts.org/cms/Prisons_and_Drugs#sthash.WHjtG9jD.dpuf) (last visited Oct. 22, 2014).

20. Meredith May, *Many Young Black Men in Oakland are Killing and Dying for Respect*, S.F. CHRON., Dec. 9, 2007, <http://www.sfgate.com/bayarea/article/Many-young-black-men-in-Oakland-are-killing-and-3299781.php>.

21. IOAN GRILLO, EL NARCO: INSIDE MEXICO’S CRIMINAL INSURGENCY 116 (2011).

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 (PIC). Indeed, the term returns approximately 555,000 results in a Google search.<sup>22</sup> 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.<sup>23</sup>
- [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.<sup>24</sup>
- “[A]n interweaving of private business and government interests. Its twofold purpose is profit and social control. Its public rationale is the fight against crime.”<sup>25</sup>

Eric Schlosser points out that “[p]rivate prisons are the most obvious, controversial, and fastest-growing segment of the PIC,”<sup>26</sup>

22. GOOGLE (search term “Prison Industrial Complex”), [https://www.google.com/?gws\\_rd=ssl#q=prison%20Industrial%20complex](https://www.google.com/?gws_rd=ssl#q=prison%20Industrial%20complex) (last visited Nov. 1, 2014).

23. *What Is the PIC? What Is Abolition?*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/not-so-common-language/> (last visited Oct. 22, 2014).

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

25. Eve Goldberg & Linda Evans, *The Prison-Industrial Complex and the Global Economy*, GLOBAL RES., (Oct. 18, 2001), [globalresearch.ca/articles/EVA110A.html](http://globalresearch.ca/articles/EVA110A.html).

26. Schlosser, *supra* note 24.

and indeed, these broad definitions frequently mention private prison companies as the most salient example of 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."<sup>27</sup>

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 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—responds to market pressures and conducts his or her business, including correctional business, through a cost/benefit prism. This Article argues that the profit incentives that brought private incarceration into existence, rather than private incarceration itself, are to blame for the PIC and its evils. Further, these evils cannot be remedied in full without carefully structuring incentives for

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27. Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998), [http://colorlines.com/archives/1998/09/masked\\_racism\\_reflections\\_on\\_the\\_prison\\_industrial\\_complex.html](http://colorlines.com/archives/1998/09/masked_racism_reflections_on_the_prison_industrial_complex.html).

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.<sup>28</sup> 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.<sup>29</sup> While public choice economists often write from a libertarian standpoint,<sup>30</sup> 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 that they have no incentive to improve incarceration conditions does not mean that such incentives cannot, or should not, be created.

This 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

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28. See generally JOE SOSS ET AL., *DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE* (2011); LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009).

29. For a comprehensive review of this perspective, see MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* (2009).

30. See Herbert Gintis, *Beyond Homo Economicus: Evidence from Experimental Economics*, 35 *ECOLOGICAL ECON. (SPECIAL ISSUE)* 311 (2000), available at [http://tbauler.pbworks.com/w/file/48548115/gintis\\_homo%2520economicus.pdf](http://tbauler.pbworks.com/w/file/48548115/gintis_homo%2520economicus.pdf).



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. This Article 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 2005, the Israeli High Court of Justice was petitioned to rule a new amendment to the Prison Ordinance unconstitutional.<sup>31</sup> The amendment in question allowed a private prison entrepreneur to

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31. HCJ 2605/05 Academic Ctr. of Law and Bus. v. Minister of Fin. (unpublished) [2009] (Isr.), *translated at* [http://www.privateci.org/private\\_pics/Israel\\_Ruling.pdf](http://www.privateci.org/private_pics/Israel_Ruling.pdf). Israel has no real constitution, instead “basic laws” that have constitutional power, particularly “Basic Law: Human Dignity and Liberty.” As per the quasi-constitutional construct in this Basic Law, Section 5 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.” Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 (Isr.), *translated at* [http://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm).

operate a private prison in Israel.<sup>32</sup> The petition, on behalf of civil rights organizations as well as potential inmates in the new prison, presented various reasons for the amendment's unconstitutionality.<sup>33</sup> While the petitioning civil rights organization focused on the ethical problem inherent in the privatization of punishment,<sup>34</sup> the comments on behalf of the potential inmates pertained to the concerns that privatizing the industry would lead to a decrease in minimal prison conditions.<sup>35</sup>

While Israel lacks a formal constitution, it has a series of "basic laws" of a constitutional nature, adopted by a supermajority of lawmakers. One such law is Basic Law: Human Liberty and Dignity,<sup>36</sup> which awards the rights to life and dignity,<sup>37</sup> personal freedom,<sup>38</sup> and privacy.<sup>39</sup> 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."<sup>40</sup> 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,<sup>41</sup> and that any extent to which people's freedom is restricted for this purpose is greater than necessary.<sup>42</sup> 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.<sup>43</sup> While Justice Procaccia deemed this an appropriate purpose, it could be achieved via means other than

32. *Id.*; see also Prison Ordinance (Amendment No. 28), 5764-2004, SH No. 1935 p. 348 (Isr.).

33. H CJ 2605/05 Academic Ctr. of Law and Bus. v. Minister of Fin. at 37.

34. *Id.* at 36-37.

35. *Id.*

36. Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 (Isr.).

37. *See id.* § 2.

38. *See id.* § 5.

39. *See id.* § 7.

40. *See id.* § 8.

41. *See* H CJ 2605/05 Academic Ctr. of Law and Bus. v. Minister of Fin. (unpublished), at 54, 69 [2009] (Isr.).

42. *See id.* at 57.

43. *See id.* at 130-31.

prison privatization.<sup>44</sup> Justice Naor's concurring opinion also argued that the law is unequal in creating discrimination between public and private inmates,<sup>45</sup> as well as problematic in allowing prison providers to profit from inmate labor.<sup>46</sup>

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.<sup>47</sup>

The decision was widely lauded as progressive and revolutionary among journalists<sup>48</sup> and activists,<sup>49</sup> and several academics expressed philosophical critiques of private incarceration. Yoav Peled and Doron Navot,<sup>50</sup> as well as Avihay Dorfman and Alon Harel,<sup>51</sup> 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.<sup>52</sup>

Similar ethical critiques of incarceration are offered beyond the context of the Israeli decision. Michael Reisig and Travis Pratt<sup>53</sup> 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.<sup>54</sup> 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

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44. *See id.* at 130–32.

45. *See id.* at 162.

46. *See id.* at 164.

47. *See id.* at 188.

48. *See generally* Prison Privatization Cancellation: Revolutionary Liberal Ruling, HAARETZ (Nov. 20, 2009), <http://www.haaretz.co.il/news/law/1.1291075>.

49. *See generally* Einat Gal & Na'ama Carmi, *Crime and Punishment: Privatizing Prisons—Position Paper*, PHYSICIANS FOR HUM. RTS., available at <http://www.phr.org.il/uploaded/26%20novb04.doc.pdf>.

50. *See generally* Yoav Peled & Doron Navot, *Private Incarceration—Towards a Philosophical Critique*, 19 CONSTELLATIONS 216 (2012), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8675.2012.00679.x/pdf>.

51. *See generally* Avihay Dorfman & Alon Harel, *The Case Against Privatization*, 41 PHIL. & PUB. AFF. 67 (2013), available at [http://law.huji.ac.il/upload/privatization\(1\).pdf](http://law.huji.ac.il/upload/privatization(1).pdf).

52. *See id.* at 72.

53. *See generally* Michael D. Reisig & Travis C. Pratt, *The Ethics of Correctional Privatization: A Critical Examination of the Delegation of Coercive Authority*, 80 PRISON J. 210, 212 (2000).

54. *See id.* at 212.

state's response to a violation of its rules.<sup>55</sup> Moreover, even from the perspective of libertarian philosophies, individuals do not have the right to harm each other; the necessity to do so has been delegated to the state.<sup>56</sup>

Some ethical support for this position can be found in Norbert Elias' classical work *The Civilizing Process*.<sup>57</sup> 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,<sup>58</sup> Pieter Spierenburg,<sup>59</sup> and Robert Nye,<sup>60</sup> 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 disappeared. These socio-historical works are, in a way, an illustration of Thomas Hobbes' *Leviathan*<sup>61</sup>: 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*,<sup>62</sup> there is a direct linkage between the abolition of slavery and the exclusion of inmates from the clause forbidding forced labor. Indeed, in the decades following the abolition of slavery, the prison population, which during the civil war was largely white, gradually shifted to over-represent inmates of color and subject them to forced work practices not dissimilar to

55. *See id.* at 215.

56. *See id.* at 217.

57. *See generally* NORBERT ELIAS, *THE CIVILIZING PROCESS: SOCIOGENETIC AND PSYCHOGENETIC INVESTIGATIONS* (Edmund Jephcott trans., 2000).

58. *See generally* 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*, at 238, 239 (V.A.C. Gatrell et al. eds., 1980).

59. *See generally* Pieter Spierenburg, *Knife Fighting and Popular Codes of Honor in Early Modern Amsterdam*, in *MEN AND VIOLENCE: GENDER, HONOR, AND RITUALS IN MODERN EUROPE AND AMERICA* 103, 119 (Pieter Spierenburg ed., 1998).

60. *See generally* ROBERT NYE, *MASCULINITY AND MALE CODES OF HONOR IN MODERN FRANCE* 39–41 (Judith Brown & Guido Ruggiero eds., 1993).

61. THOMAS HOBBS, *LEVIATHAN* (Michael Oakshott ed., 1962).

62. *See* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 31 (2012).

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.<sup>63</sup> 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.<sup>64</sup> Even after the usage of the term declined in the 1960s, moderate Democrats such as President Clinton and Vice President Gore used it to describe their political ideology as late as the 1990s.<sup>65</sup> 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 President Pinochet and his hired economic advisors, who were Chicago-school libertarian economists.<sup>66</sup> Since then, “neoliberalism” has usually been 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 for 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

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63. See ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* 15 (1996).

64. See PHILIP MIROWSKI & DIETER PLEHWE, *THE ROAD FROM MONT PÈLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE* 13–15 (Philip Mirowski & Dieter Plehwe eds., 2009).

65. See David Brooks, *The Vanishing Neoliberal*, N.Y. TIMES, Mar. 11, 2007, [http://www.nytimes.com/2007/03/11/opinion/11brooks.html?\\_r=1&amp;](http://www.nytimes.com/2007/03/11/opinion/11brooks.html?_r=1&amp;)

66. See Taylor C. Boas & Jordan Gans-Morse, *Neoliberalism: From New Liberal Philosophy to Anti-Liberal Slogan*, 44 *STUD. COMP. INT’L DEV.* 137, 149, 152 (2009), available at <http://people.bu.edu/tboas/neoliberalism.pdf>.

individual achievement and responsibility.<sup>67</sup> 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*.<sup>68</sup>

Several commentators have observed that the state’s retreat from its welfare and social functions is often accompanied by greater oppression of members of the lower rungs of society, who are most likely to find themselves criminalized. In *Disciplining the Poor*,<sup>69</sup> 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*,<sup>70</sup> Loïc Wacquant ties the increase in incarceration in the United States to the turn in American economics. 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 and 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.<sup>71</sup>

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. One argument is that private prison companies are compensated on a per-diem basis: i.e. the state

67. See generally RICHARD H. ROBBINS, *GLOBAL PROBLEMS AND THE CULTURE OF CAPITALISM* 100, 101, 135 (1999).

68. See ADAM SMITH, *WEALTH OF NATIONS*, at book IV, ch. 2 (C. J. Bullock ed., 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. See JERRY Z. MULLER, *ADAM SMITH IN HIS TIME AND OURS: DESIGNING THE DECENT SOCIETY* 86 (1996).

69. See SOSS ET AL., *supra* note 28.

70. WACQUANT, *supra* note 28, at xviii.

71. *Id.*

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 motives are 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.<sup>72</sup>

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, “cimmigration”—the criminal management of immigration—has increased as a response to market conditions, and not merely as a response to concerns about terrorism.<sup>73</sup> In summary, some critics of privatization point out its evils as embedded in the overall structure of neoliberalism.

### 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.<sup>74</sup> 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

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72. See DONNA SELMAN & PAUL LEIGHTON, PUNISHMENT FOR SALE: PRIVATE PRISONS, BIG BUSINESS, AND THE INCARCERATION BINGE 43 (2010).

73. See David A. Sklansky, *Crime, Immigration and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 193–94 (2012).

74. See Dennis Mueller, *Public Choice: An Introduction*, in ENCYCLOPEDIA OF PUBLIC CHOICE 32 (Charles K. Rowley & Friedrich Schneider eds., 2004).

perfect information, 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.<sup>75</sup>

However, one characteristic of public choice literature is deep skepticism about the typical distinction between the private and public realms of law and of society.<sup>76</sup> Public choice scholars analyze the legislative process, judicial decision-making, administrative regulation, and more using the same cost-benefit tools traditionally 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.<sup>77</sup> This is not merely a democratic critique; public choice economists believe in the positive contribution of market-driven competition to policy development.<sup>78</sup>

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.<sup>79</sup> The sensitivity to market fluctuations means that private companies can be flexible in response to correctional needs.<sup>80</sup> As one proponent argues, competition begets creativity:

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75. *Id.* at 37.

76. DANIEL A. FARBER, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 1 (1991).

77. VINCENT OSTROM, *THE INTELLECTUAL CRISIS IN AMERICAN PUBLIC ADMINISTRATION* 6–8 (1974); David R. Morgan & Robert E. England, *The Two Faces of Privatization*, 48 *PUB. ADMIN. REV.* 979 (1988).

78. KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 1–8 (2d ed. 1963); DAVID B. BOBROW & JOHN S. DRYZEK, *POLICY ANALYSIS BY DESIGN* 122–23 (1987); AMARTYA K. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 1–2 (1970).

79. CHARLES H. LOGAN, *PRIVATE PRISONS: CONS AND PROS* 76–118 (1990). This perspective echoes arguments made by the private prison industries themselves. See Don T. Hutto, *Corrections Partnership: The Public and Private Sectors Work Together*, *CORRECTIONS TODAY*, Oct. 1988, at 20–22; Charles H. Logan, *The Propriety of Proprietary Prisons*, 51 *FED. PROBATION* 35 (1987) [hereinafter Logan, *Proprietary Prisons*]; Stephen Steelman & Kenneth Harms, *Construction Management Firms—Saving Time and Money*, *CORRECTIONS TODAY*, Apr. 1986, at 64–66.

80. WILLIAM A. DONOHUE, *THE POLITICS OF THE AMERICAN CIVIL LIBERTIES UNION* 269–71 (1985); Logan, *Proprietary Prisons*, *supra* note 79; Joan Mullen, *Corrections and the Private Sector*, *NAT’L INST. J.*, June 1984, at 1–13 (1985).



[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.<sup>81</sup>

Moreover, at least in the 1980s, the increase in demand for incarceration simply could not be matched solely by the public sector.<sup>82</sup> Population reduction orders could only provide a temporary relief for overcrowding, and more institutions would be needed in the long run.<sup>83</sup> 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.<sup>84</sup> Finally, the different nature of private prison firms and public sector correctional employee unions meant different abilities and incentives to lobby for greater incarceration.<sup>85</sup> Privatization, by nature, fragments the market, which means private firms may have less power and incentive to lobby for more incarceration.<sup>86</sup> 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.<sup>87</sup>

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 be only for the short term because the per-diem compensation scheme requires that prison occupancy be maintained, thus keeping population—and the costs of its incarceration—up, in

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81. Alexander Volokh, *Privatization and Competition Policy*, in COMPETITION AND THE STATE 15, 19 (Thomas K. Cheng et al. eds., 2014).

82. See Colson Charles, *Alternatives to Reduce Prison Crowding*, 62 J. ST. GOV'T, no. 2, 1989, at 59–94 (1989).

83. See generally James M.A. Pitts et al., *Contemporary Prison Overcrowding: Short-Term Fixes to a Perpetual Problem*, 17 CONTEMP. JUST. REV. 124 (2014).

84. Dana C. Joel, *Containing Costs Through Privatization*, in HOW PRIVATIZATION CAN SOLVE AMERICA'S INFRASTRUCTURE CRISIS 149-70 (Edward L. Hudgins and Ronald D. Utt eds., 1992); Patrick T. Kinkade & Matthew C. Leone, *Issues and Answers: Prison Administrators' Responses to Controversies Surrounding Privatization*, 72 PRISON J. 57 (1992); Dennis J. Palumbo, *Privatization and Corrections Policy*, 5 POL'Y STUD. REV. 598 (1986).

85. See Volokh, *supra* note 81, at 21.

86. *Id.* at 25.

87. A classic example is the California Correctional and Peace Officers Union (CCPOA). See JOSHUA PAGE, *THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA* 44–80 (2011).

order to comply with contractual obligations.<sup>88</sup> 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.<sup>89</sup>

This raises the question of whether 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 that wish to present an impressive bottom line tend to omit some of their costs, such as salaries, from the operational costs of the facilities.<sup>90</sup> 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.<sup>91</sup> Nonetheless, there are a few dozen studies comparing private and public institutions—enough to obtain a general picture.

In a 1999 study,<sup>92</sup> Travis Pratt and Jeff Maahs conducted a meta-analysis that encompassed thirty-three such evaluations of private and public facilities from twenty-four independent studies of adult male prisons.<sup>93</sup> 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.<sup>94</sup> The dependent variable was the effect-size estimate: the daily per-diem cost of

88. Patrick Anderson et al., *Private Corrections: Feast or Fiasco?*, PRISON J., Oct. 1985, at 32–41; Jeffrey R. Henig, *Privatization and Decentralization: Should Governments Shrink?*, 12 PUB. POL'Y FEDERALISM 26–53 (1985); DAVID SHICHOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS 9–18 (1995).

89. Gary W. Bowman et al., *Introduction to PRIVATIZING CORRECTIONAL INSTITUTIONS* 1–12 (Gary Bowman et al. eds., 1993); Dale K. Sechrest & David Shichor, *Comparing Public and Private Correctional Facilities in California: An Exploratory Study*, in PRIVATIZATION AND THE PROVISION OF CORRECTIONAL SERVICES: CONTEXT AND CONSEQUENCES 133 (G.L. Mays & T. Gray eds., 1996).

90. GERALD G. GAES, THE CURRENT STATUS OF PRISON PRIVATIZATION RESEARCH ON AMERICAN PRISONS (2012), available at [http://works.bepress.com/gerald\\_gaes/1](http://works.bepress.com/gerald_gaes/1).

91. H. Hatry et al., *A Comparison of Privately and Publicly Operated Corrections Facilities in Kentucky and Massachusetts*, in PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* note 89, at 193–212. For an example of such a difficult comparison see LeAnn Beaty, *Privatization in the Last Frontier*, 6 CASE J., Spring 2010, at 1, available at [http://www.caseweb.org/journal\\_sub/TheCASEJournalVolume6Issue2Case5.pdf](http://www.caseweb.org/journal_sub/TheCASEJournalVolume6Issue2Case5.pdf).

92. Travis C. Pratt & Jeff Maahs, *Are Private Prisons More Cost-Effective than Public Prisons? A Meta-Analysis of Evaluation Research Studies*, 45 CRIME & DELINQUENCY 358 (1999).

93. *Id.* at 363.

94. *Id.* at 362.

operating the facility.<sup>95</sup> The study found that ownership of the institution, on its own, was an insignificant predictor of the standardized measure of inmate cost per day.<sup>96</sup> Other institutional characteristics were much more significant: the inmate population size, the age of the institution, and the security level of the facility.<sup>97</sup> In general, in terms of per diem costs for maximum-security institutions, private institutions did better, while public facilities fared better in studies of minimum- and medium-security institutions.<sup>98</sup> A newer meta-analysis by Brad Lundahl, Chelsea Kunz, Cyndi Brownell, Normal Harris, and Russ Van Vleet, also found no significant difference in costs and savings between private and public institutions.<sup>99</sup> The analysis also found that the competitive market did not create any improvements in terms of quality of confinement, which did not differ 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.<sup>100</sup>

The next Part of this Article will 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

### A. Private Prisons' Share in Mass Incarceration

The political and scholarly energy invested in debating the merits and shortcomings of private incarceration begs the question of 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 forty-eight

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95. *Id.* at 364.

96. *Id.* at 364–365.

97. *Id.* at 365. It is important to keep in mind that public prisons differ rather dramatically along a spectrum of institutional ages and quality of incarceration. *See, e.g.*, JOHN J. DI IULIO, NO ESCAPE: THE FUTURE OF AMERICAN CORRECTIONS 182–85 (1991).

98. Pratt & Maahs, *supra* note 92, at 366–67.

99. Brad W. Lundahl et al., *Prison Privatization: A Meta-analysis of Cost and Quality of Confinement Indicators*, 19 RES. SOC. WORK PRAC. 383 (2009), available at <http://www.epsu.org/IMG/pdf/luhdahl-prisons-.pdf>.

100. *Id.*

states to buy and manage public prisons at a substantial cost savings to the states—provided that these prisons contain at least 1000 beds, and states maintain a ninety percent occupancy rate in the privately run prisons for at least twenty years.<sup>101</sup>

Similarly, the ACLU report on mass incarceration bemoans its “exponential growth,”<sup>102</sup> pointing out that:

[A]s 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.<sup>103</sup>

“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,<sup>104</sup> as well as in a report 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.”<sup>105</sup> A causal explanation can, of course, be provided. Joel Dyer’s *The Perpetual Prison Machine*<sup>106</sup> 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:

[T]he 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

101. John W. Whitehead, *Jailing Americans for Profit: The Rise of the Prison Industrial Complex*, RUTHERFORD INST. (Apr. 10, 2012), [https://www.rutherford.org/publications\\_resources/john\\_whiteheads\\_com%20mentary/jailing\\_americans\\_for\\_profit\\_the\\_rise\\_of\\_the\\_prison\\_industrial\\_complex](https://www.rutherford.org/publications_resources/john_whiteheads_com%20mentary/jailing_americans_for_profit_the_rise_of_the_prison_industrial_complex).

102. AM. CIVIL LIBERTIES UNION, *BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION* 5 (2011), available at [https://www.aclu.org/files/assets/bankingonbondage\\_20111102.pdf](https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf).

103. *Id.* at 12.

104. See generally ALEXANDER, *supra* note 62.

105. Vicky Pelaez, *The Prison Industry in the United States: Big Business or a New Form of Slavery?*, GLOBAL RES. (Mar. 31, 2014), <http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289>.

106. JOEL DYER, *THE PERPETUAL PRISONER MACHINE: HOW AMERICA PROFITS FROM CRIME* 3 (2000).

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.<sup>107</sup>

There are very good reasons to be concerned about the effects of punitive policies on 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,<sup>108</sup> nor would it dilute the horrors of the “old Jim Crow” by drawing blanket comparisons between the two regimes.<sup>109</sup> Still, this popularized form of blaming 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,<sup>110</sup> 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

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107. Julia Sudbury, *Celling Black Bodies: Black Women in the Global Prison Industrial Complex*, 70 FEMINIST REV. 57, 61 (2002), available at <http://jthomasniu.org/class/687/Readings/women-global.pdf>.

108. See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 15–16 (2006).

109. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 61 (2012).

110. See JEREMY TRAVIS ET AL., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 126 (2014), available at [http://www.nap.edu/catalog.php?record\\_id=18613](http://www.nap.edu/catalog.php?record_id=18613).

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 generally have an insignificant, or sometimes negative, impact on the economic development of the rural communities where they are located.<sup>111</sup>

In his critique of the NRC report,<sup>112</sup> John Pfaff mentions that it cites numerous popular sources, with Ruth Gilmore's *Golden Gulag*<sup>113</sup> and Heather Ann Thompson's *Why Mass Incarceration Matters*<sup>114</sup> as its only academic sources.<sup>115</sup> The evils of private incarceration and the pervasive incentives notwithstanding, it is important, according to Pfaff, to keep in mind the share of private incarceration in the overall correctional market. As of 2010, only 8% of prisoners were housed in private prisons, about 7% in state systems, and about 16% in the federal system.<sup>116</sup> Of the thirty states that contracted out, the median percentage of inmates in private prisons was about 10%, and no state's percentage exceeded 45%.<sup>117</sup> The outcome is a concentrated, but not monopolistic, prison industry.<sup>118</sup>

Elsewhere,<sup>119</sup> 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,

111. *Id.* at 164.

112. John Pfaff, *The Flawed NRC Report: The "Prison-Industrial Complex" Part 1: Private Prisons*, PRAWFSBLAWG (June 16, 2014), <http://prawfsblawg.blogs.com/prawfsblawg/2014/06/the-flawed-nrc-report-the-prison-industrial-complex-part-1-private-prisons.html>.

113. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007).

114. Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703 (2010).

115. TRAVIS ET AL., *supra* note 110, at 358–418.

116. Pfaff, *supra* note 112.

117. CARSON & GOLINELLI, *supra* note 19, at 9 tbl.7.

118. Volokh, *supra* note 81, at 24.

119. See generally John F. Pfaff, *The Micro and Macro Reasons of Prison Growth*, 28 GA. ST. U. L. REV. 1239 (2012) (describing Pfaff's general thesis and some of his empirical analysis).

it cannot in itself be accountable for even that percentage of the incarceration market. While the industry has, according to a Justice Policy Institute report,<sup>120</sup> donated over \$6 million to state races in the last five election cycles, Pfaff argues that, based on the Institute's same source, these donations need to be considered in the larger context of state lobbying and spending. He argues the funds provided by private companies 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.<sup>121</sup>

While Pfaff's analysis ignores the fact that private prison companies may choose to spend specifically on bills that push mass incarceration,<sup>122</sup> 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 Bureau of Justice Statistics 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.<sup>123</sup> He finds no connection between percent of private inmates and prison growth.<sup>124</sup>

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120. PAUL ASHTON & AMANDA PETERUTI, JUSTICE POLICY INST., GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES 211 (June 22, 2011), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming\\_the\\_system.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf)

121. Pfaff, *supra* note 112.

122. *See, e.g.*, Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

123. Pfaff, *supra* note 112.

124. *Id.*





## B. Even Public Prisons Are Privatized

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.<sup>128</sup>

In her critique of the Israeli decision,<sup>129</sup> 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.<sup>130</sup>

Similarly, Malcolm Feeley has criticized the decision based on empirical work conducted in Australian private institutions.<sup>131</sup> Feeley argues that the condemnation of privatization as an expression of modernity is ahistorical and ignores multiple, accepted historical examples of private criminal justice.<sup>132</sup> 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,<sup>133</sup> rather than the disaggregated group of different actors and sectors.<sup>134</sup>

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

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128. HCJ 2605/05 Academic Ctr. of Law and Bus. v. Minister of Fin. (unpublished), at 72 [2009] (Isr.).

129. Hila Shamir, *The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State*, 15 THEORETICAL INQUIRIES L. 1 (2014).

130. *See id.* at 4.

131. *See generally* Malcolm M. Feeley, *The Unconvincing Case Against Private Prisons*, 89 IND. L.J. 1401 (2014).

132. *Id.* at 1412–13.

133. *Id.* at 1415–16.

134. *Id.* 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. *Id.* at 1423–24.

correctional services.<sup>135</sup> Of course, private prison industries are commonplace in public prisons as well as in private ones, and benefit extensively from the competitiveness of prison labor.<sup>136</sup> But many other services within prisons, from food<sup>137</sup> to rehabilitative programs,<sup>138</sup> 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.<sup>139</sup> While prisons have never excelled at providing health care to inmates, after the Attica revolt, the provision of health care to inmates came to be viewed as an Eighth Amendment right.<sup>140</sup> Since then, however, the overall neoliberal perspective on the role of the state has changed dramatically, and its retreat from welfare responsibility on the outside has clearly changed on the inside as well. This has included a transformation in the perception of the inmate, from being ward of the state to a consumer of services.<sup>141</sup> As a result, public and private prisons have narrowed their healthcare offerings to “bare life” sustenance.<sup>142</sup> 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.<sup>143</sup> 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,<sup>144</sup> which led to noncompliance with the Centers

135. See Norman R. Cox, Jr. & William E. Osteroff, *The Public-Private Partnership: A Challenge and an Opportunity for Corrections*, in PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* note 89, at 113.

136. BARBARA J. AUERBACH ET AL., WORK IN AMERICAN PRISONS: THE PRIVATE SECTOR GETS INVOLVED 113–29 (1988); WARREN I. CIKINS & JAMES R. SEVICK, CONSTRUCTING CORRECTIONAL FACILITIES: IS THERE A ROLE FOR THE PRIVATE SECTOR? (1987).

137. Warren I. Cikins, *Privatization of the American Prison System: An Idea Whose Time Has Come*, 2 NOTRE DAME J.L. ETHICS & PUB. POL’Y 445, 451 (1986).

138. Francis T. Cullen, *The Privatization of Treatment: Prison Reform in the 1980s*, 50 FED. PROBATION 8 (1986).

139. Wil S. Hylton, *Sick on the Inside: Correctional HMOs and the Coming Prison Plague*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 179 (Tara Herivel & Paul Wright ed., 2013).

140. *Id.* at 182.

141. HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT (forthcoming 2015).

142. SIMON, *supra* note 12, at 71.

143. Hylton, *supra* note 139, at 182.

144. *Id.* at 185.

for Disease Control's protocols for treating the epidemic.<sup>145</sup> Private health care providers fiercely fight journalists who expose instances of medical neglect in prisons.<sup>146</sup> Paul von Zielbauer's journalistic investigation into Prison Health Services, a private prison provider, exposed the problematic nature of private health care in local jails.<sup>147</sup> 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,<sup>148</sup> prompting scathing reports by the New York State Commission of Correction.<sup>149</sup> It should probably be noted that inmates tend to be in worse health than the general population, are more dependent on alcohol and drugs, and are thus particularly vulnerable to faulty medical care.<sup>150</sup>

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.<sup>151</sup> 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.<sup>152</sup> Guerrero is suing the nurse and Correctional Healthcare Management, the private firm, for medical malpractice.<sup>153</sup>

Another industry within prison privatization that has been the subject of abundant criticism is the phone company. Telephone conversations from prisons include a variety of hidden charges, including exorbitant connection fees and per-minute charges, which invariably fall upon the shoulders of family and friends who are in contact with inmates. This is a particularly important issue given how essential telephone services are to inmates for staying in contact with

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145. *Id.* at 187.

146. *Id.* at 200.

147. Paul von Zielbauer, *Private Health Care in Jails Can Be a Death Sentence*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION, *supra* note 139, at 204.

148. *Id.* at 204.

149. *Id.* at 206.

150. See AVIRAM, *supra* note 141; SIMON, *supra* note 12, at 97; Zielbauer, *supra* note 147, at 209.

151. Shelby Lin Erdman & 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/>.

152. Alyssa Johnston, *Lawsuit: Inmate in Solitary Confinement Says Jail Ignored Birth, Leading to Baby's Death*, INDEP. MAIL (May 23, 2014), <http://www.independentmail.com/news/lawsuit-inmate-solitary-confinement-says-jail-igno>.

153. *Id.*

their families and to the system overall, given the importance of family contact and visitation and their proven impact on recidivism reduction.<sup>154</sup> Supportive families of inmates cite the difficulties of visitation and telephone calls as a hindrance and as a financial and emotional hardship.<sup>155</sup> 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.<sup>156</sup> Given these issues, and particularly the logistical and financial difficulties in visitations, especially in remotely located prisons,<sup>157</sup> it should be a priority for public and private prisons alike to make phone calls accessible.

A less visible private function is that of transportation companies, which are private businesses that serve public and private prisons.<sup>158</sup> The biggest private transportation service is Transcor, which is owned by CCA.<sup>159</sup> These transportation services have yielded several serious problems, including dangerous driving,<sup>160</sup> improper security leading to

154. William D. Bales & Daniel P. Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?*, 45 J. RES. CRIME DELINQ. 287, 312 (2008), available at <http://jrc.sagepub.com/content/early/2008/06/04/0022427808317574.short>; Joseph P. Ryan & Huilan Yang, *Family Contact and Recidivism: A Longitudinal Study of Adjudicated Delinquents in Residential Care*, 29 SOC. WORK RES. 31 (2005), available at <http://swr.oxfordjournals.org/content/29/1/31.short>; Ryan Shanahan & Sandra Villalobos Agudelo, *The Family and Recidivism*, AMERICANJAILS, Sept./Oct. 2012, at 17–24, available at <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 et al., *Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships*, 21 J. CONTEMP. CRIM. JUST. 314 (2005), available at <http://ccj.sagepub.com/content/21/4/314.short>.

155. See MEGAN COMFORT, DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF THE PRISON 21–64 (2008); NANCY G. LA VIGNE ET AL., URBAN INST. JUSTICE POLICY CTR., BROKEN BONDS: UNDERSTANDING AND ADDRESSING THE NEEDS OF CHILDREN WITH INCARCERATED PARENTS 4–5 (2008), available at [http://www.urban.org/UploadedPDF/411616\\_incarcerated\\_parents.pdf](http://www.urban.org/UploadedPDF/411616_incarcerated_parents.pdf).

156. DREW KUKOROWSKI, PRISON POLICY INITIATIVE, PRICE TO CALL HOME: STATE-SANCTIONED MONOPOLIZATION IN THE PRISON PHONE INDUSTRY 4 (2012), available at [http://www.prisonpolicy.org/phones/price\\_to\\_call\\_home.pdf](http://www.prisonpolicy.org/phones/price_to_call_home.pdf); Ben Iddings, Comment, *The Big Disconnect: Will Anyone Answer the Call to Lower Excessive Prisoner Telephone Rates?*, 8 N.C. J.L. & TECH. 159, 189, 191 (2006).

157. CHESA BOUDIN ET AL., PRISON VISITATION POLICIES: A FIFTY STATE SURVEY 24 (2012), available at [http://www.law.yale.edu/documents/pdf/Liman/Prison\\_Visitation\\_Policies\\_A\\_Fifty\\_State\\_Survey.pdf](http://www.law.yale.edu/documents/pdf/Liman/Prison_Visitation_Policies_A_Fifty_State_Survey.pdf).

158. Alex Friedmann, *For Profit Transportation Companies: Taking Prisoners and the Public for a Ride*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION, *supra* note 139, at 265.

159. *Id.* at 266.

160. *Id.* at 268.

escapes,<sup>161</sup> and even inmates being burned alive in a defective bus.<sup>162</sup> Also notable are more than a few instances of sexual and physical assault of inmates in the hands of private transportation employees.<sup>163</sup>

While public prison guards lobby hard to differentiate themselves from private corporate correction employees, there is an increasing market for training of public prison guards, including riot preparation,<sup>164</sup> with the addition of tourist attractions and exhibit halls.<sup>165</sup> These, in part, support industries of weapons designed to quell riots and ease arrests, such as tasers.<sup>166</sup>

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 is 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.<sup>167</sup>

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 Part

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161. *Id.* at 270.

162. *Id.* at 272.

163. *Id.*

164. Jennifer Gonnerman, *The Riot Academy: Guards Stage Mock Prison Riots to Test the Latest High-Tech Gear*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION, *supra* note 139, at 228.

165. *Id.* at 232.

166. Anne-Marie Cusac, *Shocked and Stunned: The Growing Use of Tasers*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION, *supra* note 139, at 250.

167. Pfaff, *supra* note 119.

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 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.<sup>168</sup>

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

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168. Michael Munger, *Capitalism, Government, and the Good Society*, ECON TALK (Sept. 4, 2013), [http://www.econtalk.org/archives/2013/09/capitalism\\_gove.html](http://www.econtalk.org/archives/2013/09/capitalism_gove.html).

forty-seven violations of state prison standards,<sup>169</sup> most related to severe overcrowding of low-risk offenders under the supervision of inexperienced guards.<sup>170</sup> 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.<sup>171</sup> 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.”<sup>172</sup> Among other appalling conditions, prison staff routinely had sex with 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.”<sup>173</sup>

But is this decidedly-very-ugly-pig that much uglier than its public counterpart? In a 2005 article, Sharon Dolovich concludes that a one-to-one comparison of conditions in public and private prisons alike raises serious concerns about both types of institutions.<sup>174</sup> Here are three more recent examples from a state that holds all of its in-state inmates in public facilities.<sup>175</sup> In 2011, the Supreme Court decided what might be the biggest inmate human rights case of our time, *Brown v. Plata*.<sup>176</sup> The case exposed the abysmal quality of physical

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169. Leigh Owens, *Private Prison in Violation of Ohio State Law*, HUFFINGTON POST (Oct. 10, 2012), [http://www.huffingtonpost.com/2012/10/09/private-prison-violates-state-law\\_n\\_1951917.html](http://www.huffingtonpost.com/2012/10/09/private-prison-violates-state-law_n_1951917.html).

170. MIKE BRICKNER, AM. CIVIL LIBERTIES UNION OF OHIO, PRISONS FOR PROFIT: A LOOK AT PRISON PRIVATIZATION 18 (2011), available at [http://www.acluohio.org/assets/issues/CriminalJustice/PrisonsForProfit2011\\_04.pdf](http://www.acluohio.org/assets/issues/CriminalJustice/PrisonsForProfit2011_04.pdf).

171. Brett Barroquere, *Rural Ky. Town Readies for Private Prison Closure*, FOX NEWS (Apr. 24, 2012), <http://www.foxnews.com/us/2012/04/24/rural-ky-town-readies-for-private-prison-closure/>.

172. *Depriest v. Epps*, No. 3:10-cv-00663-CWR-FKB (S.D. Miss. Mar. 26, 2012), available at <https://www.aclu.org/files/assets/order.pdf>.

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

174. Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 506 (2005).

175. California houses approximately 9000 inmates out-of-state in CCA facilities. *Prison Facilities*, CAL. DEPT CORRECTIONS & REHABILITATION, [http://www.cdcr.ca.gov/Visitors/CA\\_Out\\_Of\\_State\\_Facilities.html](http://www.cdcr.ca.gov/Visitors/CA_Out_Of_State_Facilities.html) (last visited Oct. 23, 2014).

176. *Brown v. Plata*, 131 S. Ct. 1910 (2011).

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.<sup>177</sup> 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 it in the hands of a federal receiver<sup>178</sup>—but even that was not enough.<sup>179</sup> Justice Kennedy grimly concluded:

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. If the government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation.<sup>180</sup>

Federal courts are currently in the process of hearing another lawsuit, *Ashker v. Brown*,<sup>181</sup> 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).<sup>182</sup> These conditions included placement in small solitary cells for twenty-three hours a day

177. *Id.* For more on healthcare in California prisons, see SIMON, *supra* note 12, at 133–54.

178. CAL. CORRECTIONAL HEALTH CARE SERVICES, <http://www.cphcs.ca.gov/> (last visited Oct. 23, 2014).

179. MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, PROVIDING CONSTITUTIONAL AND COST-EFFECTIVE INMATE MEDICAL CARE 11–15 (2012), *available at* <http://www.lao.ca.gov/reports/2012/crim/inmate-medical-care/inmate-medical-care-041912.pdf>.

180. *Brown*, 131 S. Ct. at 1928 (citations omitted).

181. *Ashker v. Brown*, No. C 09-5796 CW, 2013 WL 1701702, at \*1 (N.D. Cal. Apr. 18, 2013).

182. *Sept. 6th Event: Anniversary of Suspension of Historic 2013 Hunger Strike*, PRISONER HUNGER STRIKE SOLIDARITY (Aug. 17, 2014), <http://prisonerhungerstrikesolidarity.wordpress.com/2014/08/17/sept-6th-event-anniversary-of-suspension-of-historic-2013-hunger-strike/>.



with no human contact for an indefinite period of time—sometimes lasting decades<sup>183</sup>—not for disciplinary violations, but for a suspicion of gang membership.<sup>184</sup> The hunger strike ended only when Judge Thelton Henderson ordered that the inmates be force-fed.<sup>185</sup>

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.<sup>186</sup> A subsequent 2014 California Auditor examination uncovered 144 cases of tubal ligations performed in inmates between 2006 and 2010, thirty-nine of which were performed without consent and a further twenty-seven in which the inmates' physicians did not sign the appropriate forms.<sup>187</sup> Interviews with the inmates that had undergone the procedure reveal disturbing degrees of paternalism and pressure on the part of medical staff. "As soon as [the institution's OB-GYN] found out that I had five kids," recounted 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."<sup>188</sup>

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 Subsection 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.

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183. For a full account of the conditions in the SHU and the hunger strike that resulted, see Benjamin Wallace-Wells, *The Plot from Solitary*, N.Y. MAG. (Feb. 26, 2014), <http://nymag.com/news/features/solitary-secure-housing-units-2014-2/>.

184. See Keramet A. Reiter, *Parole, Snitch, or Die: California's Supermax Prisons and Prisoners, 1997–2007*, 14 PUNISHMENT & SOC'Y 530, 542 (2012).

185. See *California Hunger Strike: Judge Approves Force-Feeding of Prisoners*, GUARDIAN (Aug. 20, 2013), <http://www.theguardian.com/world/2013/aug/20/california-hunger-strike-force-feeding>.

186. See Corey G. Johnson, *Female Inmates Sterilized in California Prisons Without Approval*, SACRAMENTO BEE, July 7, 2013, <http://www.sacbee.com/news/local/health-and-medicine/article2578036.html>.

187. CAL. STATE AUDITOR, STERILIZATION OF FEMALE INMATES 19 (2014), available at <http://www.auditor.ca.gov/pdfs/reports/2013-120.pdf>.

188. Johnson, *supra* note 186.

### 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 convicted 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 provider’s detention centers.<sup>189</sup> Mericle, a real-estate developer, was a staunch supporter of Ciavarella’s election campaign,<sup>190</sup> and Conahan struck a personal friendship with some organized crime leaders in Northeast Pennsylvania.<sup>191</sup>

The defendants’ association with Mericle started with their support of cash for his juvenile facility venture in 2000–2001,<sup>192</sup> and continued with their furnishing of Mericle’s facilities with revenue-raising bodies.<sup>193</sup> 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,<sup>194</sup> months of house arrest in anticipation of a confinement sentence for an epileptic fourteen-year-old girl accused of defacing stop signs with the inscription “vote for Michael Jackson,”<sup>195</sup> a sixteen-year-old charged with “terroristic threats” for a prank and sentenced to an indefinite term at a privately-funded wilderness camp for girls,<sup>196</sup> 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.<sup>197</sup> While many of these sentences directly lined the judges’ pockets, some of them are more indirectly related to the kickbacks, and represent the indifference and cruelty that set in once they got used to commodifying human life.

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189. *See generally* WILLIAM ECENBARGER, *KIDS FOR CASH: TWO JUDGES, THOUSANDS OF CHILDREN, AND A \$2.6 MILLION KICKBACK SCHEME* (2012) (providing an engaging overview of the case).

190. *Id.* at 32.

191. *Id.* at 33.

192. *Id.* at 44–45.

193. *Id.* at 47.

194. *Id.* at 1–4.

195. *Id.* at 5–6.

196. *Id.* at 7–9.

197. *Id.* at 10–12.

The Juvenile Law Center found that hundreds of defendants were tried without receiving proper counsel.<sup>198</sup>

Clearly, a serious culprit in this scandal is Robert Mericle, the juvenile facility provider, who paid the judges' kickbacks. 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,<sup>199</sup> the judicial election system in thirty-nine states—including Pennsylvania<sup>200</sup>—and the “tough love” change in the American approach to juvenile justice.<sup>201</sup> 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.”<sup>202</sup>

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 sixty-seven sheriffs to pocket any leftover money they managed to save from the state's allowance for feeding inmates in local institutions.<sup>203</sup> 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.<sup>204</sup> His defense attorney argued that “everything he [had] done [was] by the rules, including the feeding allowance.”<sup>205</sup> 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.<sup>206</sup> Currently, Sheriff Mike Rainey, who is calling on the legislature to end the

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198. *Id.* at 154.

199. *Id.* at 17–25.

200. *Id.* at 30–31.

201. *Id.* at 38–40.

202. *Id.* at 49–50.

203. See ALA. CONST. amend. XLIV; ALA. CODE § 36-22-17 (1975).

204. Adam Nossiter, *As His Inmates Grew Thinner, a Sheriff's Wallet Grew Fatter*, N.Y. TIMES, Jan. 8, 2009, [http://www.nytimes.com/2009/01/09/us/09\\_sheriff.html](http://www.nytimes.com/2009/01/09/us/09_sheriff.html).

205. *Id.*

206. See *Maynor v. Morgan County*, 147 F. Supp. 2d 1185 (N.D. Ala. 2001). For journalistic commentaries, see Shelly Haskins, *Sheriff Greg Bartlett to Speak on Jail Food Issue*, AL.COM BLOG (Jan. 9, 2009, 1:23 PM), [http://blog.al.com/breaking/2009/01/sheriff\\_greg\\_bartlett\\_to\\_speak.html](http://blog.al.com/breaking/2009/01/sheriff_greg_bartlett_to_speak.html).

current system and allow county commissions to oversee the funds, has reportedly been donating most of his potential earnings to charity, to the tune of \$10,000.<sup>207</sup>

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. However, Bartlett was defended in his trial by the Alabama Sheriffs' Association, who stressed in his defense that he had not broken any laws, but merely exploited an existing system.<sup>208</sup> 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.<sup>209</sup>

Sarah Geraghty and Melanie Velez provide other examples of such enrichment: In South Georgia, Clinch County court officials had charged state court misdemeanants \$10–15 in illegal fees, which were pocketed by court personnel.<sup>210</sup> 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 any 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.”<sup>211</sup>

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 it left the

207. See 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/>.

208. *Id.*

209. See Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 464–65 (2011).

210. *Id.*

211. Assemb. B. 1876, 2013–2014 Reg. Sess. (Cal. 2014), available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB1876](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1876).

county jail market open to abuse and exploitation.<sup>212</sup> For example, in Contra Costa County, phone call rates amounted to triple what the state had put in place for state-owned facilities, and the commissions paid by the operator to the county were fifty-three percent.<sup>213</sup> 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 a function of corrupt management.<sup>214</sup> 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.<sup>215</sup> Similar schemes that make phone calls prohibitively expensive, for prison authority profit, are the subject of civil rights campaigns in Virginia<sup>216</sup> and in the federal system.<sup>217</sup>

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.<sup>218</sup> When incarceration became less sustainable and states began to feel the pressure to reduce their prison populations, private prison

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212. S.B. 81, 2007–2008 (Cal. 2007), [http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb\\_0051-0100/sb\\_81\\_bill\\_20070824\\_chaptered.html](http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0051-0100/sb_81_bill_20070824_chaptered.html).

213. Tracy Rosenberg, *County Allows Outrageous Charges for Inmate Calls*, CONTRA COSTA TIMES, Feb. 23, 2013, [http://www.contracostatimes.com/ci\\_22640254/tracy-rosenberg-county-allows-outrageous-charges-inmate-calls](http://www.contracostatimes.com/ci_22640254/tracy-rosenberg-county-allows-outrageous-charges-inmate-calls).

214. *Id.*

215. Tracy Rosenberg, *A Tale of Two Prisoners*, HUFFINGTON POST (Jan. 8, 2014), [http://www.huffingtonpost.com/tracy-rosenberg/a-tale-of-two-prisoners\\_b\\_4552343.html](http://www.huffingtonpost.com/tracy-rosenberg/a-tale-of-two-prisoners_b_4552343.html).

216. See, e.g., *Campaign for Prison Phone Justice*, NATION INSIDE, <http://nationinside.org/campaign/prison-phone-justice/> (last visited Nov. 2, 2014).

217. Justin Moyer, *After Almost a Decade, FCC Has Yet to Rule on High Cost of Prison Phone Calls*, WASH. POST, Dec. 2, 2012, [http://www.washingtonpost.com/opinions/after-almost-a-decade-fcc-has-yet-to-rule-on-high-cost-of-prison-phone-calls/2012/12/02/b11ea164-2daf-11e2-9ac2-1c61452669c3\\_story.html](http://www.washingtonpost.com/opinions/after-almost-a-decade-fcc-has-yet-to-rule-on-high-cost-of-prison-phone-calls/2012/12/02/b11ea164-2daf-11e2-9ac2-1c61452669c3_story.html).

218. See AVIRAM, *supra* note 141; Hadar Aviram, *The Inmate Export Business and Other Financial Adventures: Correctional Policies for Times of Austerity*, 11 HASTINGS RACE & POVERTY L.J. 111, 115–33 (2014).

companies offered their public clients “discounts” on the required occupancy rates in their institutions,<sup>219</sup> while at the same time “diversifying their incarceration portfolio” by entering the undocumented immigrant detention market and advocating for anti-immigration legislation.<sup>220</sup> Responding to the same pressures, states turned to prison closures.<sup>221</sup> States that managed to reduce their population tried to sell their unused correctional space to other states.<sup>222</sup> States made decisions about housing inmates in state, or out-of-state based on cost-benefit considerations.<sup>223</sup>

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 equally as atrocious and neglectful, and they respond to the same market pressure as their private counterparts.

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219. AVIRAM, *supra* note 141; *see* Aviram, *supra* note 218, at 122.

220. AVIRAM, *supra* note 141; *see* Aviram, *supra* note 218, at 125–26.

221. *See* NICOLE D. PORTER, THE SENTENCING PROJECT, ON THE CHOPPING BLOCK 2013: STATE PRISON CLOSURES 2 (2013), *available at* [http://sentencingproject.org/doc/publications/inc\\_On%20the%20Chopping%20Block%202013.pdf](http://sentencingproject.org/doc/publications/inc_On%20the%20Chopping%20Block%202013.pdf); Aviram, *supra* note 218, at 138–44.

222. *See, e.g.*, 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](http://www.mlive.com/news/bay-city/index.ssf/2009/07/the_fate_of_standish_max_is_st.html).

223. *See, e.g.*, DAVID T. JOHNSON ET AL., HAWAII’S IMPRISONMENT POLICY AND THE PERFORMANCE OF PAROLEES WHO WERE INCARCERATED IN-STATE AND ON THE MAINLAND (2011), *available at* <http://ag.hawaii.gov/cpja/files/2013/01/AH-UH-Mainland-Prison-Study-2011.pdf>.

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 acknowledge reality; fighting private incarceration companies 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 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 us push everyone in the correctional

business, whether they wear badges or business suits, to do well by doing good.