The Business Ethics of Incarceration: The Moral Implications of Treating Prisons Like Businesses

Daniel J. D'Amico
Loyola University New Orleans

1. Introduction

Historically, punishment theory has attempted to resolve questions such as: What is a just penalty for crime? How severely should society punish criminals? And what are the nature and causes of criminal behavior? More recently, a subfield of punishment theory has focused upon the moral and practical implications of prison privatization—the use of privately owned and operated firms to produce, manage, and allocate the services of incarceration. Greatly debated by economists and moral theorists alike, prison privatization debates have both consequentialist and deontological components.[1]

Consequentialists at heart, most economists have characterized incarceration as a *public good*. The services of law and order (imprisonment being one key component) produce positive externalities to non-payers.[2] If an individual paid for the production of criminal law—say, hired a security officer to patrol his house—his neighbors would presumably be safer in person and property. The logic is similar for incarceration. If a victim were to pay for a criminal to be punished as a service,[3] non-payers would also

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[1] See Hugo Adam Bedau, "Punishment," *Stanford Encyclopedia of Philosophy*, accessed online at: http://plato.stanford.edu/entries/punishment/.

[2] See Tyler Cowen, "Law as a Public Good: The Economics of Anarchy," *Economics and Philosophy* 8 (1992), pp. 249-67.

[3] Under present institutional arrangements (government provision or government contracting-out of prison services), incarceration is costly. As of 2004, the United States spent over $60 billion on correctional services; see Lynn Bauer and Steven Owens, "Justice Expenditure and Employment in the United States, 2001," *Bulletin, NCJ 202792* (Washington, DC: United States Department of Justice, Bureau of Justice Statistics, May 2004). Were prisons completely privatized, some conclude that the

supposedly be better off. The law-breaker could not commit further crimes while he was in jail, which is the *incapacitation effect*.[4] And other potential criminals would be deterred from engaging in crime for fear that they would also be punished, which is the *deterrence effect*.[5] When third parties benefit from punishment services but are not made to pay for them, it is said that punishment is a *non-excludable* good. Non-excludable goods are often thus said to be *under-provided* by voluntary markets. David Friedman explains, "nobody pays and nobody gets, even though the good [in this case, additional units of incarceration services] is worth more than it would cost to produce."[6] Economists typically conclude that state subsidies *can* and *should* resolve the problems associated with sub-optimal output,[7] but recent contributions to the theory of public goods have explained that it does not necessarily follow that government provision will be more efficient than the presumably inefficient market.[8] This article takes seriously this recent development in the theory of

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costs of imprisonment would be *negative*; see Bruce L. Benson, "Customary Law with Private Means of Resolving Disputes and Dispensing Justice: A Description of a Modern System of Law and Order without State Coercion," *Journal of Libertarian Studies* 9, no. 2 (1990), pp. 25–42. That is, the revenue earned from the productivity of inmates would be greater than the overhead costs of operating prisons. Many libertarian philosophers support criminal-justice paradigms based upon *restitution* from criminals to victims as an alternative to retributive- or rehabilitation-punishment paradigms; see Randy Barnett, "Restitution: A New Paradigm of Criminal Justice," in *Assessing the Criminal: Restitution, Retribution, and the Legal Process,* ed. Randy Barnett and John Hagel (Cambridge: Ballinger Publishing Company, 1977).

[4] Steven Levitt and Daniel Kessler, "Using Sentence Enhancements to Distinguish between Deterrence and Incapacitation," *Journal of Law and Economics* 42 (1999), pp. 343-63.

[5] See Isaac Ehrlich, "The Deterrent Effect of Criminal Law Enforcement," *Journal of Legal Studies* 1, no. 1 (1972), pp. 259-76; Isaac Ehrlich, "The Deterrent Effect of Capital Punishment," *American Economic Review* 65, no. 3 (1975), pp. 397-417; and Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: Reply," *American Economic Review* 67, no. 3 (1977), pp. 452-58.

[6] David Friedman, *Hidden Order: The Economics of Everyday Life* (New York: HarperCollins, 1996), p. 278.

[7] See any standard microeconomics textbook, e.g., N. Gregory Mankiw, *Principles of Microeconomics*, 5th ed. (Mason, OH: South-Western Cengage Learning, 2008), pp. 226-30.

[8] This critique is relevant for public goods theory in general. See Tyler Cowen, *Public Goods and Market Failures: A Critical Examination* (New York: Transaction, 1991); David Schmidtz, *The Limits of Government: An Essay on the Public Goods Argument*

public goods and applies it specifically to the topic of incarceration in order to make progress in the debates concerning prison privatization.

The traditional moral analysis of incarceration arrives at a conclusion similar to the consequentialist analysis, namely, that prison services should not be left to the private market, but that these results are reached through a nearly opposite rationale. Criminal justice institutions are said to possess some unique metaphysical quality—they involve determining matters of justice and they require inhibiting the liberty of autonomous individuals.[9] In the hands of private actors these mechanisms of force can have a corrupting influence. It was not a concern for *under*-provision but *over*-provision which motivated the moral case against market involvement in punishment.[10]

These arguments supporting the view that the realm of criminal

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(Boulder, CO: Westview Press, 1991); and Randall Holcombe, "A Theory of the Theory of Public Goods," *Review of Austrian Economics* 10, no. 1 (1997), pp. 1-10. On the social provision of law specifically, see Bryan Caplan and Edward Stringham, "Market Provision of Law, Networks, and the Paradox of Cooperation," *Review of Austrian Economics* 16, no. 4 (2003), pp. 309-26; and David Friedman, "Law as a Private Good," *Economics and Philosophy* 10 (1994), pp. 319-27.

[9] Richard Harding, in his "Private Prisons," *Crime and Justice* 28 (2001), pp. 265-346, cites the following authors as representative of the view "that imprisonment is an intrinsic or core state function that by definition cannot legitimately be delegated in any of its aspects to a nonstate agency" (p. 266): H. Jung, "Introductory Report," in *Privatization of Crime Control: Collected Studies in Criminological Research*, vol. 27, ed. H. Jung (Strassbourg: Council of Europe, 1990); J. DiIulio, *No Escape* (New York: Basic Books, 1991); Nils Christie, *Crime Control as Industry: Towards GULAGS Western Style?* (London: Routledge, 1993); R. Sparks, "Can Prisons Be Legitimate? Penal Politics, Privatization, and the Timeliness of an Old Idea," in *Prisons in Context*, ed. R. King and M. Maguire (Oxford: Clarendon, 1994); and M. Ryan, "Prison Privatization in Europe," *Overcrowded Times* 7, no. 2 (1996), pp. 16-18.

[10] Randy Barnett (in his "Pursuing Justice in a Free Society: Part Two—Crime Prevention and the Legal Order," *Criminal Justice Ethics* 5, no. 1 [1986], pp. 30-52) summarizes this perspective held by Hobbes and Locke: "When one seriously compares the potential responsiveness of each system [government versus market-based criminal justice], many readers may concede the point and offer the opposite objection: Competing jurisdictions would most likely be too responsive to their customers . . . creating serious social disruption" (ibid., p.40). See also Randy Barnett, "Pursuing Justice in a Free Society: Part One—Power vs. Liberty," *Criminal Justice Ethics* 4, no. 2 (1985), pp. 50-72. Robert Nozick explains the same position: "Men who judge in their own case will always give themselves the benefit of the doubt and assume that they are in the right. They will overestimate the amount of harm or damage they have suffered, and passions will lead them to attempt to punish others more than proportionately and to exact excessive compensation"; see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 11.

justice is the appropriate domain of the state and not the market are the dominant perspectives in the literature and in practice. At present, the vast majority of criminal justice institutions in the United States and nearly all developed countries are owned and operated by governments or under their authorities.

There are two major reasons to question the dominance of the state-only prison perspective. First, the long historical record of criminal justice institutions is a direct challenge to these accepted views.[11] Economic historian Bruce Benson points out that government's dominant role in criminal justice is a uniquely modern phenomenon.[12] For the majority of human history, criminal justice services were produced, funded, and managed functionally—dare one say, efficiently—by private means.[13] In various times and places, private entities creatively overcame the challenges of under-provision and non-excludability.[14] Incentivized by the competitive process of profit and

[11] Unrelated to criminal justice *per se*, Ronald Coase offers an empirical challenge through historical evidence to traditional public goods arguments; see Ronald Coase, "The Lighthouse in Economics," *Journal of Law and Economics* 17, no. 2 (1974), pp. 357–76. This publication has been subjected to historical criticism by E. Bertrand, "The Coasean Analysis of Lighthouse Financing: Myths and Realities," *Cambridge Journal of Economics* 30 (2006), pp. 389-402. However, William Barnett and Walter Block argue that the potential for privately operated public services such as lighthouses still holds; see their "Coase and Van Zandt on Lighthouses," *Public Finance Review* 35, no. 6 (2007), pp. 710-33; and their "Coase and Bertrand on Lighthouses," *Public Choice* (forthcoming).

[12] Bruce Benson, *The Enterprise of Law: Justice without the State* (San Francisco, CA: Pacific Research Institute for Public Policy, 1990).

[13] For historical examples of functioning private sector criminal justice services, see David Friedman, "Private Creation and Enforcement of Law: A Historical Case," *Journal of Legal Studies* (1979), pp. 399-415; and Terry Anderson and P. J. Hill, *The Not So Wild, Wild West: Property Rights on the Frontier* (New York: Stanford Economics and Finance, 2004). This list is not exhaustive.

[14] This includes prisons, and much else as well. For more on this, see Barnett and Block, "Coase and Van Zandt on Lighthouses"; Barnett and Block, "Coase and Bertrand on Lighthouses"; Walter Block, "Public Goods and Externalities: The Case of Roads," *The Journal of Libertarian Studies* 7, no. 1 (1983), pp. 1-34; Tyler Cowen, ed., *The Theory of Market Failure: A Critical Examination* (Fairfax, VA: George Mason University Press, 1988); Anthony De Jasay, *Social Contract, Free Ride: A Study of the Public Goods Problem* (New York: Oxford University Press, 1989); Holcombe, "A Theory of the Theory of Public Goods"; Hans-Hermann Hoppe, "Fallacies of the Public Goods Theory and the Production of Security," *The Journal of Libertarian Studies* 9, no. 1 (1989), pp. 27-46; Jeffrey Hummel, "National Goods vs. Public Goods: Defense, Disarmament, and Free Riders," *The Review of Austrian*

loss, private criminal justice systems have been seen to promote innovation and discovery.[15] While fascinating, such examples have had little influence upon real criminal justice policy today, neither in the United States nor abroad.

A second reason to doubt the state-only perspective of incarceration is that governmental dominance over criminal justice institutions has produced a wide variety of mixed results. Governments have not assured efficient, high-quality, or necessarily just outcomes. In contrast, it has been argued that quality improvements in government criminal justice institutions occur only insofar as they confront *hard budget constraints*.[16] Criminal justice scholar Michael Tonry explains that "[w]ithout resource constraints many politicians will argue for more imprisonment for every kind of offender as if

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Economics 4 (1990), pp. 88-122; David Osterfeld, "Anarchism and the Public Goods Issue: Law, Courts, and the Police," *The Journal of Libertarian Studies* 9, no. 1 (1989), pp. 47-68; E. C. Pasour, Jr., "The Free Rider as a Basis for Government Intervention," *The Journal of Libertarian Studies* 5, no. 4 (1981), pp. 453-64; Murray N. Rothbard, *The Logic of Action: Applications and Criticism from the Austrian School*, vol. 2 (Cheltenham, UK: Edward Elgar, 1997); Schmidtz, *The Limits of Government*; Larry Sechrest, "Privateering and National Defense: Naval Warfare for Private Profit," in *The Myth of National Defense: Essays on the Theory and History of Security Production*, ed. Hans-Hermann Hoppe (Auburn, AL: The Ludwig von Mises Institute, 2003), pp. 239-74; Larry Sechrest, "Public Goods and Private Solutions in Maritime History," *The Quarterly Journal of Austrian Economics* 7, no. 2 (2004), pp. 3-27; Larry Sechrest, "Private Provision of Public Goods: Theoretical Issues and Some Examples from Maritime History," *ICFAI Journal of Public Finance* 2, no. 3 (2004), pp. 45-73; and Larry Sechrest, "Privately Funded and Built U.S. Warships in the Quasi-War of 1797-1801," *The Independent Review* 12, no. 1 (2007), pp. 101-13. Rothbard's *reductio ad absurdum* of public goods is as follows: "A and B often benefit, it is held, if they can force C into doing something. . . . [A]ny argument proclaiming the right and goodness of, say, three neighbors, who yearn to form a string quartet, forcing a fourth neighbor at bayonet point to learn and play the viola, is hardly deserving of sober comment"; see Rothbard, *The Logic of Action*, p. 178.

[15] Bruce Benson, "Crime Control Through Private Enterprise," *The Independent Review* 2, no. 3 (1998), pp. 341-71.

[16] Janos Kornai developed the terms "hard" and "soft" budget constraints to explain the shortages and inefficiencies of production in the Soviet Union and other socialist countries; see Janos Kornai, "The Soft Budget Constraint," *Kyklos* 39, no. 1 (1986), pp. 3-30; and Janos Kornai, "The Concept of the Soft Budget Constraint Syndrome in Economic Theory," *Journal of Comparative Economics* 26, no. 1 (1998), pp. 11-17. Shortages do not imply that a given good or service is not being produced altogether, but they do signal that demand is exceeding supply and there is no movement in the direction of equilibrium.

imprisonment were a free good."[17] In fact, Tonry notes that legislative references to state budgets and fiscal constraints help explain the few successful cases of criminal sentencing reform. In desperate times there is little room to be concerned about public goods theory or moral legitimacy. Policy makers will implement what works, or that is, what they think will work, or what voters think will work.

Rising crime rates from the 1960s through the mid 1990s, and the "war-on-drugs" begun in the 1980s, led to a vast expansion of prison facilities and populations.[18] Earlier debates concerning the philosophy of punishment had concluded that the state was the rightful source of incarceration services, but they were resolved at times when state authorities could afford to expand. Financial conditions and public opinion have since changed. Growing crime, tighter budgets, and larger prison bureaucracies have forced decision-makers to entertain the prospect of efficiency gains via private prisons.[19] Today the modern punishment discussion must resolve more nuanced questions than previously: What is the appropriate role of the state in providing incarceration, and inversely what is the proper role of the market? In other words, should prisons be privatized; how and to what extent?

At first, it was thought that market incentives would result in a "race-to-the-bottom" in terms of prison quality standards.[20] As firms seek ways to

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[17] Michael Tonry, "The Politics and Processes of Sentencing Commissions," *Crime & Delinquency* 37 (1991), p. 324.

[18] See Jesper Ryberg, *The Ethics of Proportionate Punishment: A Critical Investigation* (Boston: Kluwer Publishers, 2004), pp. 3-5; P. L. Griset, *Determinate Sentencing* (New York: State University of New York Press, 1991); Barbara Hudson, *Justice Through Punishment* (Hong Kong: Macmillan Education, 1987); Andrew von Hirsch, K. A. Knapp, and Michael Tonry, *The Sentencing Commission and Its Guidelines* (Boston, MA: Northwestern University, 1987); Andrew von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993); Martin Wasik and Ken Pease, eds., *Sentencing Reform: Guidance or Guidelines*? (Manchester, UK: Manchester University Press, 1987); and Michael Tonry and Kathleen Hatlestad, *Sentencing Reform in Overcrowded Times* (Oxford: Oxford University Press, 1997). All of these authors describe the recent empirical trends of crime and punishment similarly, which place stress and tension upon the previously established and accepted moral punishment paradigms.

[19] See Glenn C. Loury, "Why Are So Many Americans in Prison? Race and the Transformation of Criminal Justice," *Boston Review* (July/August 2007), accessed online at: http://www.bostonreview.net.

[20] See Oliver Hart, Andrei Shleifer, and Robert Vishny, "The Proper Scope of Government: Theory and an Application to Prisons," *Quarterly Journal of Economics* (1997), pp. 1127-61. See also, Charles H. Logan, "The Propriety of Proprietary Prisons," *Federal Probation* 51 (1987), pp. 35-40; and Samuel Jan Brakel, "Prison

reduce costs, they may erroneously cut needed portions of the production function as well. For example, too few guards coupled with too many inmates can lead to excessive violence.[21] But the lower operating expenses of private prisons, even if only marginal, are empirically non-ambiguous. By harnessing the incentives of profit and competition, it has been shown that private prisons can hold operating expenses down while increasing the quality of operation.[22] Rather than a race to the bottom, quality controls can explicitly be defined in contracts. Thus when comparing public with private prisons on the specifically empirical margins of escape rates, physical health resources, mental health programs, counseling, the amount of recreational facilities, recidivism, and other proxy variables, the latter perform no worse and sometimes marginally better than the former.[23] However, such findings have not swayed the staunch moral opposition against private prisons.

At this point we should make clear an important distinction. Those institutions referred to as "private" prisons in popular discussions do not function completely within a free-enterprise system, but are rather *contracted-out* through government funding. They successfully avoid the majority of free-rider and public goods problems, but they are constrained in their decision-making by the fact that earlier production processes within the criminal justice system (police, courts, legislations, and criminal sentencing agencies) are still monopolized by state control.[24] From here on, this article

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Management, Private Enterprise Style: The Inmates' Evaluation," *New England Journal on Criminal and Civil Confinement* 14, no. 2 (1988), pp. 175-244.

[21] See Steven Levitt, "The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation," *The Quarterly Journal of Economics* 111, no. 2 (1996), pp. 319-51.

[22] See Lonn Lanza-Kaduce, Karen F. Parker, and Charles W. Thomas, "A Comparative Recidivism Analysis of Releases from Private and Public Prisons," *Crime and Delinquency* 45 (1999), pp. 28-47; and Harry P. Hatry, Paul J. Brounstein, and Robert B. Levinson, "Comparison of Privately and Publicly Operated Corrections Facilities in Kentucky and Massachusetts," in *Privatizing Correctional Institutions*, ed. G. Bowman, S. Hakim, and P. Seidenstat (New Brunswick, NJ: Transaction, 1993). pp. 193-212.

[23] Kenneth Avio, "The Economics of Prisons," in *Changing the Guard: Private Prisons and the Control of Crime,* ed. Alexander Tabarrok (Oakland, CA: Independent Institute, 2003), pp. 9-56.

[24] See Alexander Tabarrok, "Introduction," in *Changing the Guard: Private Prisons and the Control of Crime*, ed. Alexander Tabarrok (Oakland, CA: Independent Institute, 2003), pp. 1-9.

will refer to these arrangements as *contracted-out prisons* and reserve the term *private prisons* for incarceration services nested within a completely market-based criminal justice system.[25] Admittedly, this distinction is overly semantic for some of our purposes because the arguments currently pressed against contracted-out prisons attempt to take issue with the essentially "market-like" features of these contractual arrangements. Profits, incentives, and lack of democratic representation would presumably all be characteristics of actual private prisons as they are characteristics of currently contracted-out prisons. Thus our analysis informs both debates.

The consequentialist debate has been fought on predominantly empirical rather than theoretical grounds. Few speculative descriptions of purely free-market prison systems have been described, argued for, or compared across institutional lines. Instead, the current literature (as surveyed above) compares contracted-out prisons with government prisons on a variety of margins pertaining to technological efficiency. The general summary of this literature is that contracted-out prisons have a marginal lead over government prisons. On the other hand, when the normative debates compare contracted-out prisons against government prisons, their predominantly theoretical observations and arguments apply not only to contracted-out prisons, but to all and any application of markets to the criminal justice system. The conclusion from the current literature awards a marginal victory to contracted-out prisons on consequentialist grounds, but it awards a significant victory to governmental prisons over both contracted-out and private prisons on deontological grounds. In other words, opponents of applying markets to criminal justice may admit to the marginal technological gains achieved by contracted-out prisons, but they view these benefits as small and insignificant compared to the overwhelmingly negative moral

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[25] Anarcho-capitalists apply privatization arguments to the minimum operations of the state—the provision of justice. This literature began in 1849 with Gustave de Molinari, "On the Production of Security," accessed online at: http://www.panarchy.org/molinari/security.html, and received new attention by Murray N. Rothbard, *For A New Liberty: The Libertarian Manifesto* (San Francisco, CA: Fox and Wilkes, 2002 [1973]); Murray N. Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998 [1982]); David Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism* (La Salle, IL: Open Court Publishing, 1989); and many more recent publications. On the provision of private police, see Patrick Tinsley, "Private Police: A Note," *Journal of Libertarian Studies* 14, no. 1 (1999), pp. 95-100; Rothbard, *For a New Liberty*, pp. 201-5 and 215-22; and Friedman, *Machinery of Freedom*, pp. 114-20. On the provision of private courts, see Benson, *The Enterprise of Law*, pp. 349-78; Rothbard, *For a New Liberty*, pp. 222-34; Friedman, *Machinery of Freedom*, pp. 114-20; and Edward Stringham, "Market Chosen Law," *Journal of Libertarian Studies* 14, no. 1 (1999), pp. 53-77. Very little has been done explicitly to describe the potential for purely free market prisons.

essence of running prisons and any other criminal justice services as if they were businesses. It is this staunch moral opposition which is isolated and specifically adressed in this paper. One must first try to understand what are the morally essential features of state-based incarceration services compared to market-based incarceration services, and then determine whether opponents of non-governmental prisons (who are against both contracted-out and private prisons) have calculated accurately the moral costs and benefits of each.

It has been argued that there is something inherently wrong with contracted-out incarceration.[26] Contracted-out prisons are said to "profit off of other people's misery." Prison activist Paul Wright explains, "at least in public prisons, when prisoners are raped due to inadequate staffing, [etc.] no one can say prison officials did so to line their own pockets and personally profit from the misery of others."[27] As best we can detect, activists against non-governmental prisons have attempted to pinpoint three characteristics of contracted-out and private prisons that they deem as essentially immoral: (1) *The existence of profits*. Judith Greene states that "the huge profits to be made by incarcerating an ever-growing segment of our population serve the system well. Profits oil the machinery, keep it humming, and speed its growth."[28] And according to Nils Christie, "[p]rison means money. Big money. Big in building, big in providing equipment. And big in running."[29] (2) *Bad incentives*. Closely related to profits, there is a concern that prison managers will seek their own interests at the expense of the social welfare: "Corporations with a stake in the expansion of private prisons invested $3.3 million in candidates for state office and state political parties in forty-four

[26] See Christie, *Crime Control as Industry*; and Jeffrey Reiman, *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice* (Boston, MA: Pearson, 1979), pp. 217-20. See also references in note 3 above. In addition, Charles Logan writes, "Organizations that have either opposed or called for a moratorium on private prisons include the American Federation of State, County, and Municipal Employees (AFSCME), the National Sheriffs' Association, the American Civil Liberties Union (ACLU), and the American Bar Association (ABA)"; see Charles H. Logan, *Private Prisons: Cons and Pros* (New York: Oxford University Press, 1990), p. 11.

[27] Paul Wright, "Introduction to Section 4: The Private Prison Industry," in *Prison Nation: The Warehousing of America's Poor*, ed. T. Herivel and P. Wright (New York: Routledge, 2003), p. 137.

[28] Judith Greene, "Banking on the Prison Boom," in *Prison Profiteers: Who Makes Money From Mass Incarceration*, ed. T. Herivel and P. Wright (New York: The New Press, 2006), p. 26.

[29] Christie, *Crime Control as Industry*, p. 98.

states over the 2002-04 election cycle."[30] In theory, these lobbying efforts can be an obstacle to lowering crime. (3) *Anti-democratic*. Lastly, they interpret private companies as anti-democratic insofar as they fail to be responsive to the public will.

Bruce Benson relies upon methodological individualism to criticize the moral case against private criminal justice services.[31] Individual people act; groups do not act, and society does not act. When one argues that the government must provide the services of incarceration, in real terms, she contends that a network of individuals—who happen to take on the role of government—must produce the services of incarceration. But individuals—be they private or governmental agents—can suffer from the same behavioral shortcomings as do buyers and sellers on the market. They do not have access to perfect information, nor are they motivated by perfectly benevolent incentives.

The incentives of private interest transcend the boundaries between markets and politics. Given different institutional arrangements, different expressions of these incentives emerge. It is only with reference to the systematic tendencies of different institutional arrangements and their predictably different outcomes that one can evaluate the net costs and benefits of government versus market or quasi-market prison services. Demonstrating the existence of profits, incentives, and a lack of direct responsiveness does not immediately imply a morally negative essence of non-governmental prisons, nor does it lend direct moral support for governmental prisons.

We do not directly answer the following question: Which institutional structure produces incarceration services better—governments or markets? This is mostly because we do not have sufficient answers to more particular questions: Better according to whom or to what criterion? How are the margins of quality prison services to be defined and communicated by the citizenry? How are they to be detected by institutional suppliers? How are good technological and logistical incarceration methods discovered and implemented? And lastly, how are such methods adopted and improved upon over time? We merely contend that the systematic tendencies of market processes to produce good outcomes, such as social cooperation through the division of labor, are under-recognized by anti-market prison activists. Inversely, the systematic tendencies of government to produce good outcomes through incarceration institutions are overstated within this literature.

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[30] Greene, "Banking on the Prison Boom," p. 4.

[31] Bruce Benson, "Do We Want the Production of Prison Services to Be More 'Efficient'?" in *Changing the Guard: Private Prisons and the Control of Crime*, ed. Alexander Tabarrok (Oakland, CA: Independent Institute, 2003), pp. 163-217.

The remainder of this article is organized as follows. Section 2 defines and explains privatization. It is a transition policy aimed to achieve social cooperation and economic prosperity. Section 3 is an explicit response to the morally charged phrase, “profiting off of other people's misery.” Such a phrase is meaningless when one recognizes that all for-profit businesses fulfill consumer preferences with regard to various forms of misery. States are not immune to the same accusation; they, too, profit from other people's misery. The parallel concepts of *capture* and *rent-seeking* used throughout public-choice economics recognize this inherent fact of government action.[32] Section 4 offers concluding remarks.

2. What Is Privatization?

Privatization is a free-market reform policy used to transfer production lines from the public sector into private hands. The rationale behind privatization is straightforward: Command and control economies failed to implement rational exchange, production, and distribution throughout society. Central planning repeatedly produced catastrophe. Without property rights, prices, profits, and losses, central-planners lack the incentives, information, innovation, and calculative abilities necessary to produce goods and services in proportionate qualities and quantities as they are demanded by society.[33] Without market prices to coordinate production, goods that are highly demanded are in short supply while goods that no one necessarily wants abound. Market processes are coordination devices; they dovetail the plans of otherwise unrelated and unfamiliar people with one another while avoiding conflict. On the other hand, market-based societies with high levels of economic freedom have experienced peace and prosperity at various times, around the world, and over time.[34]

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[32] See James Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor, MI: The University of Michigan Press, 1962); and Gordon Tullock, “The Welfare Costs of Tariffs, Monopolies, and Theft,” *Western Economic Journal* 5 (1967), pp. 224-32.

[33] See Friedrich A. Hayek, “Economics and Knowledge,” *Economica* 4 (February 1937), pp. 33-54; Friedrich A. Hayek, “The Use of Knowledge in Society,” *American Economic Review* 35, no. 4 (1945), pp. 519-30; Don Lavoie, *National Economic Planning: What Is Left?* (Cambridge, MA: Ballinger Publishing Company, 1985); Ludwig von Mises, “Die Wirtchaftsrechnung im socialistischen Gemeinwesen,” *Archiv fur Sozialwissenschaften und Sozialpolitik* 47 (1920), pp. 86-121; and Ludwig von Mises, *Socialism* (Indianapolis, IN: Liberty Fund, 1981 [1951]).

[34] See James Gwartney, Robert Lawson, and Walter Block, *Economic Freedom of the World, 1975-1995* (Vancouver: The Fraser Institute, 1996); and James Gwartney and Robert Lawson, *Economic Freedom of the World, Annual Report* (Vancouver: Fraser Institute, 2008).

The socialist calculation debate was framed as a comparative research agenda until the actual collapse of the Soviet Union. Then, policy makers and reformers were in loose agreement as to the productive merits of market-based societies over central planning. (Though the agreement was loose, it was significantly more so than in previous years; agreement was thus sufficient to implement social change.) The field of transition economics arose to investigate the question: How do we move from here to there? Privatization is one specific form of transition policy. The argument for privatization begins with the realization and admission that many of the goods and services that the centrally planned administration used to produce were in fact crucially important. Food and clothing production in the Soviet Union may have been terribly inefficient and of poor quality, but that does not change the fact that food and clothing are vitally important to human survival. Privatization simply takes production lines that were previously owned, funded, and managed by the state and gives them over to private firms and/or individual owners. As the market process unfolds, some of these will likely expand and others contract.[35]

Once owned and operated in the private sector, producers rely on prices to harness the dispersed, tacit, and sometimes incomplete knowledge of consumers' tastes and preferences.[36] As consumers want more of a good or service they bid up prices, and vice versa if they demand less. Investors and producers allocate their capital assets to those items with the highest profit potential. They are sometimes consciously, but more often unconsciously, guided to make what society wants by responding to their own self-interest and profit motives. It is the rearrangment of incentives away from inefficiency and decline and toward innovation and competitiveness that matters most. Thus Peter Boettke argues in favor of freely giving away state-operated industries and assets in post-Soviet countries.[37] Either they stay in business as

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[35] One must be careful to resist the notion that a privatization has failed, judged only by the fact that the firm constructed out of the government entity goes under. For example, say that a Soviet steel mill is spun off into a business firm, whereupon it promptly goes bankrupt. A failure of privatization? Not necessarily. Capital has successfully been turned over to the private sector, which is all the privatization process can accomplish. That the company later disappears from the scene (perhaps its equipment sold off to others) means, merely, that it could survive only while protected by subsidy; it was not able to satisfy customers.

[36] See Hayek, "The Use of Knowledge in Society."

[37] See Peter Boettke, *Why Perestroika Failed: The Politics and Economics of Socialist Transformation* (New York: Routledge, 1993); and Peter Boettke, "An 'Austrian' Economists Perspective on Transitional Political Economy," *Ama-gi: The Journal of the Hayek Society at the London School of Economics* 6, no. 2 (2004), pp. 12-14.

a sign of efficient operations, go under as a sign of failure, or sell off the factory to more responsive business people. In any case, improvements are not guaranteed but seem to hold more potential than previous arrangements.

In practice, privatizations have had various results and therefore mixed reviews.[38] Clarifying the terms of debate in a transition analysis is very important. If transitions are a matter of moving from here to there, then an effective and efficient transition is often determined by one's presuppositions as to what is so bad about here, so good about there, and the degree of patience that one is willing to afford in making the transition.[39] Thus some examples of privatization have been judged negatively only because they did not succeed, based on the expectations of some, in degree or speed. Such debates have resulted in a particular heuristic called the J-curve. The immediate effects of radical policy changes are often disorienting, especially to the lowest economic classes of society. As state-operated industries adjust to the new competitive climate, consumer prices and unemployment rates increase. Thus transition policies are better when they are implemented quickly with minimal opportunities for political reconfigurations and adjustments. Many of the successful transition cases have been cases of *shock therapy*—where significant crises allowed for wide-scale and pervasive institutional reforms to be implemented quickly, thoroughly, and credibly.

The general conclusion of several transition cases and attempts supports the theoretical insights of privatization: Privatization harnesses incentives and information toward peace and prosperity and away from scarcities, conflicts, and strife.[40] Short-term downturns are consequential and perhaps necessary steps to converging upon new trajectories of progress and prosperity, hence the J-like shape of J-curve graphics. One could even say that this theoretical lens helps to make sense out of the privatization literature and debates to date. The short-term results of privatization reforms were thought to be and have been empirically estimated to be negative races to the bottom. Cost-cutting was closely related to corner-cutting. When the agents within the

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[38] See Jeffrey Sachs and Andrew Warner, "Economic Reform and the Process of Global Integration," *Brookings Papers on Economic Activity* 1 (1995); and Jeffrey Sachs and Andrew Warner, "How to Catch Up with the Industrial World: Achieving Rapid Growth in Europe's Transition Economies," *Transition* 7, nos. 9-10 (1996).

[39] See Boettke, "An 'Austrian' Economists Perspective on Transitional Political Economy."

[40] See Boettke, *Why Perestroika Failed*; and Timothy J. Yaeger, *Institutions, Transition Economies, and Economic Development* (Boulder, CO: Westview Press, 1998).

model are guards and inmates and their social behaviors range from isolated fights to full-out riots, the real short-term effects can be violent and unsavory, difficult to endure without modifying public policy. But in the longer run it seems that states have gotten what they contracted for. For-profit prison firms have learned and adopted logistic strategies for marginal improvements.

Converting America's prison system from public to private control is slightly more complicated, but not fundamentally different from other such cases. Incarceration and other criminal justice services are likely crucial to human civilization and a prosperous economy, but the production of criminal justice services in general and incarceration services in particular is marred by moral stigma in ways that the production processes of menial consumer goods are not. There are good reasons to presume that organizing incarceration (and perhaps the entire criminal justice system) by markets rather than politics will carry technological efficiency gains. But are such marginal efficiency gains a sufficient reason to support market-based prisons in the face of the deontological shortcomings raised by theorists such as Christie and Paul? It seems obvious that the answer to this question depends upon the magnitude that one awards such deontological claims, but are these deontological concerns sound and valid?

There are two main problems with Christie's, Wright's, and others'[41] perspective. First, their imputed moral case against markets rests upon an inaccurate understanding of how markets function. Market processes are characterized by profits and private incentives, but markets also possess an ability to harness these phenomena toward social harmony and a representative system of production and distribution. It is the explicit presence of profits and incentives and their interaction within competitive markets that align self-interest to the satisfaction of others' preferences. Second, in pointing out the existence of profits and incentives within markets and subsequently preferring governmental production processes, such commentators have failed to explain how governments systematically avoid the supposed moral dilemmas imputed to such qualities.

3. "Profiting Off of Other People's Misery"

Profit is the positive difference between costs and revenues. One subtracts all of the costs of operating a business from all of the money gathered by sales (price per unit times quantity sold), and the remainder is

[41] Admittedly, Christie and Wright are less academics and more activists, but their general portrayal of market processes runs parallel to many prominent theorists within the field. See, e.g., sociologist David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago, IL: University of Chicago Press, 2001), p. 204, who fails to recognize that goods and services can increase in quality and decline in price when produced in competitive markets.

profit. The expectation of earning a profit is the motivating force behind upfront investment costs. Individuals act, expend resources, and employ means so as to achieve ends. The value an individual gains from the ends he achieves in excess of the value that he imputed to the costs he endured, is another form of profit. In this sense, individuals act rationally insofar as they only partake in those behaviors in which their ends produce value in excess of costs. Given several opportunities to make a profit, an individual chooses the lowest cost and maximal benefit course of action—she strives to maximize her profits. Profit is not necessarily pecuniary, nor does it have to relate to money at all. Profit can be psychological, spiritual, moral, reputation-based, or in the forms of authority and power.

When firms compete with one another within a free-enterprise system, they bid down each other's profits over time. Holding other things constant or assuming that transaction costs are zero, all profits are eliminated. If a capital owner recognizes that other owners of similar resources are earning profits by making sales, then she too can earn profits by making sales at or below the current market price. Thus prices in competitive markets are bid down, and all firms price at the market-clearing rate.[42] With profits defined on the one hand, and an understanding of the competitive market process on the other, it becomes easy to recognize the essential, original, or "genetically causal" source of lasting and sustainable profit levels for individual firms.[43] Those businesses that continuously provide value, as perceived by their customers, in excess of the prices that they charge will stand the test of time. Value-producing firms are profitable and succeed while inefficient alternatives go bankrupt. Entrepreneurship stands out as the driving force of the market.[44] A profitable company is one which possesses the best foresight into the changing and contextual tastes of consumers. Over time, the market is characterized by higher quality goods and services at lower prices.

To say that a company profits off of the misery of others is a tautology. Consumers purchase goods and services when they perceive that the value of that good or service is greater than its costs, including the opportunity costs of forgone alternatives, which is to say that consumers are rational in a similar fashion as are suppliers and firms within the market. When a consumer buys a good or service, presumably she experiences some

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[42] See any standard microeconomics textbook, e.g., Mankiw, *Principles of Microeconomics*.

[43] See Mario Rizzo, "The Genetic-Causal Tradition and Modern Economic Theory," *Kyklos* 49, no. 3 (1996), pp. 273-317.

[44] See Israel Kirzner, *Competition and Entrepreneurship* (Chicago, IL: University of Chicago Press, 1973).

need or desire, some "felt uneasiness" or "misery" which she presumes will be abated by possessing the good in question. Trade is said to be *mutually beneficial* when it is voluntary. If a consumer did not prefer a good she purchased to the value of wealth she gave up, then she would not have voluntarily engaged in the exchange. Trade is a choice where options of lesser value (misery) are given up for options of greater value (alleviation). In this sense, a private prison company profits off of the misery of their consumers (victims) in no distinctive way (other than perhaps a degree of magnitude) compared to a restaurant that profits off of the misery (hunger) of its customers.

We argue that the assumption to treat political actors as rationally self-interested is valid and necessary in order to assess accurately the institutional tendencies of both governmental prison systems and contracted-out prison systems. Financial profits are the guiding motive for investments, expenses, purchases, and sales in the marketplace. But non-pecuniary sources of value instigate rational behaviors in non-market realms as well. Happiness, desire, love, or vengeance can serve as profit-like motives for noncommercial behaviors. Noncommercial behaviors, when understood from an accurate frame of reference, are also characterized by rationality: individuals attempt to maximize benefits while minimizing costs.[45]

Public Choice economics, begun by James Buchanan and Gordon Tullock, seeks to understand political actions and political decision-making as guided and motivated by behavioral characteristics similar to market processes.[46] Individuals within the political sphere are well-explained when they are held to act rationally. They maximize their personal interests to be re-elected, seek political authority, and maximize political revenues while minimizing costs; they seek rents, hence the term *rent-seeking*.[47] Such assumptions have been helpful in explaining political history and courses of events in a variety of applied-topic fields.[48]

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[45] See Gary Becker, *The Economic Approach to Human Behavior* (Chicago, IL: University of Chicago Press, 1976); and Israel Kirzner, "Rational Action and Economic Theory," *Journal of Political Economy* 70, no. 4 (1962), pp. 380-85.

[46] See Buchanan and Tullock, *The Calculus of Consent*.

[47] See Anne Krueger, "The Political Economy of Rent-Seeking Society," *American Economic Review* 64, no. 3 (1974), pp. 291-303; and Gordon Tullock, *The Politics of Bureaucracy* (Lanham, MD: University Press of America, 1965), pp. 120-220.

[48] Some recent examples include, but are not limited to, the following: Eric Helland and Alexander Tabarrok, *Judge and Jury: American Tort Law on Trial* (Oakland, CA: The Independent Institute 2006), who have shown that the number of civil case rulings and their size of awards are correlated with rational political motivations; and Peter Leeson and Russell Sobel, "Weathering Corruption," *Journal of Law and Economics*

At this point our distinction between contracted-out prisons and private prisons is more important because the customer bases of the two institutions are different from one another. Understanding how a completely private prison would operate requires a bit of creative imagination. For example, conceptualize a world where individuals and/or victims of crime are required explicitly to enlist punishment and/or incarceration as paid-for services on the market. In such a case, consumers' preferences—revealed by their expressed willingness to pay—would shape the qualities and quantities of prison services. How insecure and how pained by the occurrences of crime that victims perceived themselves to be, would determine their degree of unease when entering the market. Lastly, their perceived benefits and value, obtained by investing in incarceration or other punishment services, would determine their demand for such services.

On the other hand, contracted-out prisons attempt to satisfy the preferences of government officials, central planners, and individuals in state bureaucracies as their bases of customers. If we take seriously the presumption that both providers of prison services and their political customers are motivated by rational private interests to maximize benefits and minimize costs, then we recognize that such institutions can and likely do take on a different structural form from their market-based counterparts. Contracted-out prisons would be operationally and technologically efficient only insofar as the amount of prison contractors within the industry was plural and relatively competitive.[49] Contracted firms maximize profits by minimizing costs of operation; they under-bid each other to compete for fixed amounts of state-budgets. Contracted-out prisons represent the tastes and preferences of society for punishment and incarceration only insofar as political processes are accurate in detecting, perceiving, designing, and enforcing those preferences within contractual arrangements.

Several key concepts throughout the public-choice tradition expose sources of unresponsiveness in the political processes. Voters are said to be *rationally ignorant,* that is, unwilling to invest time and energy to inform themselves of the full content and consequences of political issues.[50] Political

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51, no. 4 (2008), pp. 667-81, who have similarly shown that federal aid funding after natural disasters flow faster and fuller to states who actively lobby and support current political authorities.

[49] There are only a small handful of companies within this industry today and since its development in the late 1970s. They include, but are not necessarily limited to, Corrections Corporation of America (CCA), the GEO Group (formerly Wackenhut Securities), Cornell Companies, and Community Education Centers.

[50] See Anthony Downs, *An Economic Theory of Democracy* (New York: Harper, 1957).

processes and voting elections can induce *political business cycles,* where appointed decision-makers exploit the value of resources during their tenure only to impose costs on later regimes.[51] Politicians appeal to *median voters* where they support the lowest common denominator of public policy, perhaps in conflict with costs and consequences.[52] Elections contain *voting paradoxes*, when the number of platforms and candidates lead to deterministic outcomes as a principle of mathematics rather than social preferences.[53] Voters also fail to update their false perceptions of political phenomena because they bear a disproportionately small portion of the costs compared to the benefits—they are "rationally irrational."[54]

In addition, a purely governmental prison system without private corporate providers would be similar to a contracted-out institution, except that they would lack the incentive for operational efficiency motivated by competing agencies. Similar competition may come from other sovereign governments attracting citizens with superior public services.[55] Finally, one would expect the flaws of political processes explained within the Public Choice literature listed above to be exaggerated when political processes were used as decision-making criteria for the sum total of all prison operations.

How do these concepts operate specifically within the criminal justice system and the practices of incarceration? Benson explains that the incentive structures produced and insulated by government bureaucracy have impeded rather than facilitated the efficient production of security in person and property.[56] Robert Higgs argues that the war on drugs is fueled by

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[51] See Michal Kalecki, "An Essay on the Theory of the Business Cycle," in *Collected Works of Michal Kalecki*, ed. J. Osiatynski, vol. 1 (New York: Oxford University Press, 1990 [1933]), pp. 65–81; and Patrick Minford and David Peel, "The Political Theory of the Business Cycle," *European Economic Review* 17, no. 2 (1982), pp. 253-70.

[52] See Roger Congleton, "The Median Voter Model," in *The Encyclopedia of Public Choice*, ed. C. K. Rowley and F. Schneider (The Netherlands: Kluwer Academic Press, 2002).

[53] See Kenneth Arrow, "Alternative Approaches to the Theory of Choice in Risk-Taking Situations," *Econometrica* 19, no. 4 (1951), pp. 404-37.

[54] See Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies* (Princeton, NJ: Princeton University Press, 2008).

[55] See Charles Tiebout, "A Pure Theory of Local Expenditures," *The Journal of Political Economy* 64, no. 5 (1956), pp. 416-26.

[56] See Benson, "Crime Control Through Private Enterprise."

political interests.[57] Russell Sobel, Matt Ryan, and Joshua Hall show a correlation between criminal case decisions and political cycles.[58] Specifically on the topic of incarceration, Kenneth Avio summarizes research by Peter Nardulli and Fred Giertz: "Citizens of the local government derive benefits (protection and retribution) from longer sentences, which happen to be specified by local authorities. . . . The tendency to prison overcrowding in the federal part of the system and to underbuilding in the local part follows directly."[59] And Daniel D'Amico describes the process of calculating criminal sentencing lengths to suffer from knowledge problems, rent-seeking, capture, and political interests.[60] Public servants in the prison industry respond to incentives; they act according to subjectively determined profit motives. The expression of these private interests within the political/public sphere have led to outcomes that conflict with many commentators' perceptions of social welfare.

What systematic tendencies are at play in a purely private prison system? A variety of case studies have recently emerged that offer a partial vision of private criminal law enforcement and incarceration without governmental control. First, David Friedman researched ancient Iceland's privately operated legal system, where punitive sentences were apparently held in proportionate check by social norms and a price system of restitution.[61] Similarly, classicists Danielle Allen and Virginia Hunter posit that criminal punishments and the practices of incarceration pre-dated formal

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[57] See Robert Higgs, "Lock 'Em Up!" in Robert Higgs, *Against Leviathan: Government Power and a Free Society* (Oakland, CA: The Independent Institute, 2004), pp. 95-100.

[58] See Russell Sobel, Matt Ryan, and Joshua Hall, "Electoral Pressures and the Legal System: Friends or Foes?" in *Law Without Romance: Public Choice and the U.S. Legal System*, ed. E. Lopez (Oakland, CA: The Independent Institute, forthcoming).

[59] Avio, "The Economics of Prisons," p. 16, summarizing Peter F. Nardulli, "The Misalignment of Penal Responsibilities and State Prison Crises: Costs, Consequences, and Corrective Actions," *University of Illinois Law Review* 2 (1984), pp. 365-87; and J. Fred Giertz and Peter F. Nardulli, "Prison Overcrowding," *Public Choice* 46 (1985), pp. 71-78.

[60] See Daniel J. D'Amico, "The Imprisoner's Dilemma: The Political Economy of Proportionate Punishment," Ph.D. Dissertation (George Mason University 2008).

[61] See Friedman, "Private Creation and Enforcement of Law."

governance in ancient Greece.[62] Stephen Schafer surveys a variety of similar restitution-based criminal justice systems.[63] Historian David Rothman argues that many of the ends currently sought by America's incarceration institutions were traditionally accomplished by private individuals and organizations during the colonial periods of American history; most of them avoided the bureaucratic inefficiencies that plague their modern counterparts.[64] Most recently, scholars are investigating the rational decisions and economic implications of organized crime with surprising results. There appears to be much order among thieves, even in calculating and doling out punishments amid thieving social groups. Diego Gambetta, Maerk Kaminski, Sudhir Venkatesh, and Peter Leeson all expose a structure similar to retaliatory and punitive processes in stateless contexts.[65] It is the explicit presence of profits, losses, and incentives that interact in order to constrain punishment levels, avoid escalating violence, and maintain social order. Informal social norms and emergent institutional rules in various contexts can maintain a link between the preferences of society, on the one hand, and the functionally constrained level of law enforcements/punishments, on the other.

These case studies are not presented as viable alternatives to the current political provision of criminal law. They are merely presented in order to expose how punishments and criminal incarceration procedures operate

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[62] See, respectively, Danielle Allen, "Imprisonment in Classical Athens," *The Classical Quarterly* 47, no. 1 (1997), pp. 121-35; Danielle Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens* (Princeton, NJ: Princeton University Press, 2000); and Virginia Hunter, "The Prison of Athens: A Comparative Perspective," *Phoenix* 51 (1997), pp. 296-326.

[63] See Stephen Schafer, *Compensation and Restitution to Victims of Crime* (Montclair, NJ: Patterson and Smith, 1970).

[64] See David Rothman, *Discovery of the Asylum: Social Order and Disorder in the New Republic*, rev. ed. (New York: Aldine Transaction Publishers, 2002).

[65] See Diego Gambetta, *The Sicilian Mafia: The Business of Private Protection* (Cambridge, MA: Harvard University Press, 1993); Maerk M. Kaminski, *Games Prisoners Play: The Tragicomic Worlds of Polish Prison* (Princeton, NJ: Princeton University Press, 2004); Sudhir Venkatesh, *Off the Books: The Underground Economy of the Urban Poor* (Cambridge, MA: Harvard University Press, 2006); Peter Leeson, "An-arrgh-chy: The Law and Economics of Pirate Organization," *Journal of Political Economy* 115, no. 6 (2007), pp. 1049-94; Peter Leeson, *The Invisible Hook: The Hidden Economics of Pirates* (Princeton, NJ: Princeton University Press, 2009); Peter Leeson, "The Calculus of Piratical Consent: The Myth of the Myth of Social Contract," *Public Choice* (forthcoming); and Peter Leeson "The Invisible Hook: The Law and Economics of Pirate Tolerance," *New York University Journal of Law and Liberty* (forthcoming).

without the oversight of government and are more directly infused with the qualities of profits and private interests. Here in these cases, one notices that profits and private incentives interact to constrain and check power rather than exaggerate it. When comparing the institutions of state-only prisons with contracted-out prisons and purely private prisons, one recognizes that profits and private interests operate in all three contexts; it is the way they operate that makes all the difference. Whereas several commentators have derided private prison firms as unchecked by public oversight, our analysis casts the same accusation against the state, and perhaps in greater magnitude.

4. Conclusion

This article has produced neither a consequentialist nor a deontological case in support of current prison privatization, nor one for a fully free-market criminal justice system, though such arguments have been presented by others.[66] Instead, we offer a comment on the current moral component of the modern private-prison debate. While several theorists have concluded that public prisons are morally preferable to contracted-out prisons because of the unsavory tendencies for private firms to “profit off of other people's misery,” we contend that the latter may be true but the former does not necessarily follow therefrom.

While discussing Logan as a supporter of prison-privatization, Christie asks, “Why is it that what is so clear to Logan is so utterly unclear to me?”[67] The answer to Christie is revealed in part by explaining that his perception of human rationality is short-sighted. Individuals act rationally insofar as they are purposeful. They choose means to pursue their subjectively valued ends; this holds true for politicians as well as businessmen. Christie erroneously upholds government agents as behaviorally distinct: “The civil servant represents more than himself, she or he represents the community, that is me. The servant of the state is thus under greater responsibility and control than those who only serve the private firm.”[68] His description of the incentives and motivations behind government representatives suffers from a *nirvana fallacy*. We can only make accurate comparisons between the market setting and the governmental alternative when we use realistic models for both.

First, the ethical focus of private-prison debates should be re-aligned

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[66] See Barnett, “Pursuing Justice in a Free Society: Part One”; Barnett, “Pursuing Justice in a Free Society: Part Two”; Rothbard, *The Ethics of Liberty*; and Morris Tannehill and Linda Tannehill, *The Market for Liberty* (Lansing, MI: Tannehill, 1970).

[67] Christie, *Crime Control as Industry*, p. 100, discussing Logan, *Private Prisons*.

[68] Christie, *Crime Control as Industry*, p. 102.

with Feeley's topical question: "[T]o what extent does privatization expand and transform the state's capacity to punish?"[69] Second, one must recognize such effects in both the short and long run. And lastly, one must take account of how various institutional structures—purely state, contracted-out, and purely private—may each bear their own unique influences to "expand" or "transform" the fundamental practices of punishment in society.

Many commentators have attempted to identify the moral dilemma of private prisons by attacking the profit motive, but we have presented theory and alluded to evidence gathered elsewhere which suggests that the profit motive transcends the boundary between public and private incarceration. Thus if one is confident in her net assessment that modern punishment institutions suffer a significant degree of immorality, then she must look elsewhere beyond the profit motive for a culprit. Such issues have caused moral philosopher David Boonin to conclude that it is the punishment paradigm itself which is morally flawed.[70] As Buchanan writes, "good economics is better than no economics . . . [but] applied within a bad or misguided conception of legal process need not promote the structural, procedural changes that may be urgently required."[71] It may not be the existence of profits and incentives which sully the moral legitimacy of private incarceration practices, but rather, that profits exaggerate the negative moral qualities of the presumed institutional environment already set in place by legislative fiat.

The field of comparative institutional analysis began during the socialist-calculation debates. Within those debates and in its several subsequent applications, comparative analyses have continuously shown consequentialist support for market processes over political decision-making. For example, Friedrich Hayek's closing insights of the socialist-calculation debate describe markets as dynamic and adaptive systems.[72] Entrepreneurs are continuously inclined to search for and discover innovative profit opportunities. Such incentives are explicitly disrupted when politics replaces markets in certain decision nodes. Thus the costs and unintended

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[69] Malcolm M. Feeley, "The Privatization of Prisons in Historical Perspective," *Criminal Justice Research Bulletin* 6, no. 2 (1991), p. 109.

[70] See David Boonin, *The Problem of Punishment* (Cambridge: Cambridge University Press, 2008).

[71] James Buchanan, "Good Economics, Bad Law," *Virginia Law Review* 60, no. 3 (1974), p. 484.

[72] See Friedrich A. Hayek, "Socialist Calculation: The Competitive 'Solution'," *Economica* 7, no. 26 (1940), pp. 125-49.

consequences of central planning are inherently shortsighted. Christie's presumption that government agents are more attuned to societal preferences than are market agents is a natural conclusion, but it is drawn from a biased and incomplete understanding of social structures. If similar institutional characteristics held for the task of providing incarceration services, they would set a radically different stage for deontological conclusions to begin from.

Take Wright's pointed concern which opened our discussion: "[A]t least in public prisons, when prisoners are raped due to inadequate staffing, [etc.] no one can say prison officials did so to line their own pockets and personally profit from the misery of others."[73] Could we not say, instead, that at least in private prisons, when prisoners are raped due to inadequate staffing, etc., no one can say that improvement will never occur so long as the citizenry remains apathetic. At least he will have endured his suffering in a context where his offenders systematically suffer losses and their competitors are systematically rewarded. At least he suffered in a system that appeared to be enjoying a trend of innovation and improvement over time.[74]

[73] Wright, "Introduction to Section 4," p. 137.

[74] We would like to thank Walter Block, who provided helpful comments and criticisms throughout the writing process.