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When choosing a Writing 101 class, *Land of the Free* immediately

grabbed my attention. Its premise was provocative – what’s beneath the surface of a culture that prides itself as the “land of the free”? Initially, we examined what it meant to be free and the ways in which governments take away liberty, as well as how the United States specifically has historically lived up to its promise of freedom. Towards the end of the semester, we began to examine the modern state of imprisonment in the United States – a system that punishes its citizens on a scale unparalleled by other countries, even those that are perceived as oppressive. America’s escalating reliance on imprisonment was an issue that had drawn my attention since I first encountered it in a high school debate. I began to wonder whether the privatization of punishment was a driving force behind the massive expansion of imprisonment, and whether privatization raised criminal justice concerns that conflict with the obligations that the government has to its prisoners. I began to explore the existing narratives and perspectives on private prisons, and, with Professor Whitt’s help, molded my essay into my own contribution on the issue.

Private Incarceration: Trading Freedom for Profit

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Writing 101: Land of the Free

Professor: Matt Whitt



Fueled first by Ronald Reagan’s war on drugs and then by the post-9/11 incarceration of non-citizens, the United States has had an imprisonment explosion over the past few decades. The U.S. currently imprisons roughly 716 people per 100,000¹. These numbers, drastically higher than the imprisonment rates of the next highest countries, make the U.S. – the supposed “land of the free”² – the world’s leader in incarceration. The U.S. incarceration rate is roughly 1.5 times that of Rwanda and Russia, 2.6 times that of Brazil, and a whopping 4.9 times that of Spain, the countries that rank second through fifth in terms of those with the most prisoners.³ The U.S. incarceration problem is being increasingly highlighted both in the academic world and the media. But what often gets overlooked in the debate about the incarceration epidemic is the role of private prisons. These prisons are for-profit private entities that are contracted out by the government. Since 1990, the number of privately run prisons in the United States has increased by 1600%, and private prisons are now a \$55 billion dollar industry.⁴ Both the federal and state governments justify this increase as a necessary cost-cutting measure, and there is evidence to suggest that private prisons do have a lower per capita cost than public prisons.⁵ However this lower per capita cost structure fails to translate into greater efficiency. Moreover, private prisons also cause affirmative harm that has far reaching implications for the criminal justice system for two reasons. One reason is that they go beyond the legitimate function of prisons in administering punishment by trying to influence the allocation of punishment, which is a function properly reserved for the state. Another reason is that they run afoul of traditional theories of punishment in the United States, most importantly with the predominant punishment theory of retributivism. Moreover, these negative effects cannot be cured with stricter regulation.

The privatization agenda was born out of the escalating cost concerns associated with America’s incarceration binge.⁶ Thus, as an initial matter, it is important to examine whether, leaving any potential negative effects of privatization aside, the hoped-for efficiencies of privatization have been achieved. It may be true that private prisons cost less per prisoner, on a dollar for dollar basis, to run than state run prisons. A number of cost comparison studies have shown that private prisons result in average savings of operational costs of about 10-15%.⁷ Some scholars, however, have questioned the accuracy of the data.⁸ Further, the industry

does not benefit from the increased efficiencies associated with free markets that have robust competition because the private prison industry is dominated by two large corporations (the Corrections Corporation of America and the GEO Group), which combined manage roughly 75% of the private prisons).⁹

Dominated by these two companies, the private prison industry in the U.S. is a duopolistic profit machine. According to Sheldon Richman of the Cato Institute (a libertarian think tank), “Rather than ceding a service to the competitive market, prison privatization constitutes merely the contracting-out of a government monopoly. Whatever efficiencies that may be realized through the competitive bidding for a monopoly government contract, the resulting service can hardly be considered ‘free market.’”¹⁰ Thus, any “savings” cannot be assumed to result from increased efficiencies that result from privatization. Instead, private prisons have more surreptitious ways of reducing costs. For example, it is well known that private prisons “cherry pick” the prisoners they serve, refusing to sign contracts that would place them in charge of the higher risk, higher cost inmates that government prisons are required to serve.¹¹ Thus, their perceived cost savings will reflect “artificial efficiencies” associated with serving an easier to manage prison population. More importantly, savings are often achieved through staff reductions or through salary and benefit savings from hiring a more inexperienced workforce. These staffing decisions often come on the backs of prisoners’ safety.

The most tragic example of the ramifications associated with attempting to rely on privatization arose out of the mismanagement of medium risk prisoners who were transferred to a Youngstown, Ohio, CCA facility with staff that was ill equipped to handle them, resulting in two deaths, 47 assaults and 6 escapes all within the first 14 months of the prison’s opening.¹² Another private company, Wackenhut Correction Corporation (now GEO), was responsible for two facilities in New Mexico that collectively experienced nine stabbings and five murders within their first year of operation¹³ (to which the company responded that “New Mexico has a rough prison population”).¹⁴ There is also a great deal of anecdotal evidence that private prisons embark on other cost cutting measures that are not reflective of private market efficiencies. For example, there are stories of private facilities where prisoners have no toilet paper and are forced to eat raw meat and food that is infested with insects.¹⁵ All of these “savings” are achieved despite the fact that the compensation for the most senior executives of the largest private prison corporations is much higher, well into seven figures, than that of their public counterparts.¹⁶ While it is possible that these atrocities might also occur in a public prison, private prisons exist to earn a profit. Like any for-profit corporation, private prisons strive to make as much money as possible in connection with their products and services. Further, those who run the company strive to maximize their own compensation, which is often dependent on revenue and profit targets and, in the case of public companies, the company’s stock performance. Simply put, the incentives that exist in the private arena provide motivations that do not exist in the public domain.

Private prisons, however, do not produce any true efficiencies; worse yet,



the undeniable profit motives of private prisons negatively impact the criminal justice system. Private prisons go beyond the legitimate function of prisons in administering punishment by trying to influence the allocation of punishment, interfering with basic theories of punishment, especially recidivism. The *allocation* of punishment – the deprivation of an individual’s freedom for committing a crime – has traditionally been viewed as a non-delegable state function, whereas the administration of punishment, or simply carrying out the government’s mandate, can be delegated to prisons, including private prisons. Reserving the allocation of punishment to the government is fundamental to a democracy because an individual’s liberty interest to be free from incarceration without due process is grounded in the constitution. An individual’s rights in this regard are rooted both in Article 1 of the Constitution, which has been interpreted to place limits on Congress’ ability to delegate its duties to other branches of government and to private parties, and in the due process clauses of the fifth and fourteenth amendments to the Constitution, the purpose of which is to protect individuals from arbitrary exercises of power.¹⁷ Indeed, “protection of the individual from the arbitrary and capricious exercise of power, by an official body or a private party acting under delegated authority, is an essential element of free government.”¹⁸ Thus, in order to maintain the legitimacy of our criminal justice systems and, indeed, our democracy, many have argued that the deprivation of liberty must remain entirely the responsibility of the democratically-elected government.¹⁹

While proponents of privatization argue that private prisons simply administer punishment,²⁰ the financial incentives created by the private prison structure distort the distinctions between allocation and administration. Moreover, the distorted profit-motivated incentives of private prisons are incompatible with multiple theories of punishment in the United States. Justice Scalia has argued that “punishment ... is now acknowledged to be an inherently retributive practice.”²¹ And it is widely accepted that deterrence is the “primary alternative to retributivism.”²² Retributivists punish out of a sense of moral responsibility,²³ and argue that “criminals *deserve* punishment *in proportion* to their crime;”²⁴ while proponents of the deterrence theory of punishment claim that “punishment should make crime less frequent.”²⁵ The displacement of these basic state functions within a distorted profit motivated system interrupts either goal of punishment.

At the most basic level, the distinction between allocation and administration of punishment is blurred *any* time a prison employee has power over an inmate, whether in a public or private prison. Both public and private prison officials routinely determine disciplinary actions within the prison walls, such as whether someone will be placed in solitary confinement or will lose free time or other privileges.

Prison officials are often also responsible for decisions relating to prisoner status, such as whether prisoners are eligible for parole or work release.²⁶ These actions affect the allocation of punishment, not just its administration. Entrusting private prisons with these actions may have significant negative consequences for prisoners. For example, private prisons, motivated by profit considerations, are incentivized to encourage longer prison stays and therefore have implicit motives to increase the length of an individual’s prison term, which may in turn color the disciplinary actions to which the prisoner is subject. Certainly, any profit-motivated decision to lengthen a prison term cannot be consistent with a retributivist theory of punishment. The prisoner is not getting what he “deserves” (under the retributivist theory) if his freedom is curtailed for a longer time because a private corporation seeks to make more money from his incarceration. Likewise, under the retributivist theory, a private prison does not have a moral responsibility to its prisoners. Indeed, its profit motives explicitly conflict with any moral responsibility. For these reasons, even delegation of the most basic disciplinary functions to a private for-profit entity is arguably unjust.

Perhaps even more troubling is the impact of the perverse incentives that privatization generates on recidivism rates. If private prisons produce more future criminals, then it is clear that they are impacting the allocation, not just the administration, of punishment, because it is the prison system itself that is contributing to the repeated incarceration. While private prisons are likely to rely on favorable recidivism rates as evidence of their superior efficiency over public facilities, they have every incentive to encourage repeat offenders so that they can make profits from repeated imprisonments. If private prisons produce more repeat offenders, this outcome is inconsistent with the deterrent theory of punishment. On the contrary, imprisonment will not deter future crime because there are other forces at work that are conflicting with this goal.

The data on recidivism demonstrates the ineffectiveness of private prisons to deter future crime. There have been several studies that have found that recidivism rates were lower at private institutions than public ones. However, one study conducted in the late 1990s was criticized for, among other things, not properly matching up the private and public prisons that formed the basis of comparison.²⁷ Selmen and Leighton revealed that another study in 1999 that claimed private prisons had improved recidivism rates was primarily funded by the private prison industry.²⁸ Yet, another study, conducted for the National Criminal Justice Reference Service in 2003, found no significant reduction in recidivism rates.²⁹ Another 2008 study of inmates in private and public medium security prisons in Oklahoma conducted by Spivak and Sharp reached a similar conclusion.³⁰ The results are not surprising: private prisons are not incentivized

to ensure that prisoners don't recidivate.

The profit motive to create a steady stream of prisoners also leads private companies to advocate for stricter laws with longer sentences; their attempt to influence criminal justice policy to enhance profits clearly distorts criminal justice policy. The private prison industry makes no secret of this goal. In a recent 10-K filing with the Securities and Exchange Commission, CCA acknowledged that it could be hurt by the "relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices, or through the decriminalization of certain activities."³¹ In response, the industry retains lobbyists to influence criminal justice laws.³² For example, in 2004 Congress passed legislation that authorized the Immigration and Customs Enforcement Division to increase the number of beds in detention facilities that it paid private companies to run. In that year alone, CCA spent \$3 million on lobbying efforts.³³ Over a ten year period, the industry was estimated to have spent over \$45 million in lobbying efforts.³⁴

These attempts to influence policy to maintain the viability and increase the profitability of private prison industry break down any walls between the administration and allocation of punishment. In essence, these attempts to influence stricter criminal justice laws by definition mean that private prisons are attempting to not only *administer* but also *allocate* punishment. Additionally, it is difficult to reconcile lobbying efforts with either the retributive or deterrence theory of punishment. Stricter laws created as a result of private interest lobbying cannot satisfy a deterrence theory because the goal of such efforts is not to create laws that will deter people from committing a crime, but rather to fill an empty prison cell, thus interfering with the principle of proportionality. Laws created as a result of lobbying efforts at the behest of private companies who stand to gain from increased imprisonment rates cannot be consistent with the retributive theory either. The policy of proportionality underlying this theory, which is supposed to reflect society's moral judgment about deservedness of punishment for particular crimes, cannot be advanced when that policy is infected with the profit motives of private industry.

Perhaps most perniciously, the private prison industry's profit incentives cause it to target specific segments of the population that are likely to enhance its bottom line.³⁵ The war on drugs marked the beginning of the incarceration boom and it is well documented that the drug wars resulted in an increase in incarceration rates for African American men.³⁶ Because African American men became the "mainstay of for-profit imprisonment,"³⁷ private prisons have advocated for laws, such as stricter sentencing rules for drug offenses, which disproportionately affect African American males.³⁸ After the drug wars slowed down, the post 9/11 crackdown on immigrants provided a new potential source of revenue for the private prison industry. Indeed, the CEO for Cornell Corrections, a private prison company, expressed enthusiasm about the new business created by the crackdown on illegal aliens that followed the attacks,³⁹ and the private prison industry lobbied for stricter criminal justice laws pertaining to non-citizens.⁴⁰

Motivated by profit, the lobbying efforts of private prisons are rationally targeted at producing the most prisoners at the cheapest cost. Thus, it makes sense to lobby for tougher laws that target those individuals with the fewest resources to combat



charges leveled against them. Privatization creates incentives for penal enforcement against poor or disenfranchised individuals. As Selman and Leighton explain:

Companies are ready to follow the money and push for more privatization by identifying social problems that will ... promote ... privatization ... The industry has broadened its market to include what it refers to as “specialized” populations: the mentally ill, drug addicts, youth offenders, probationers...⁴¹

This presents a fundamental problem. By allowing private prisons to exert this influence, “the state may merely be opening up a new way for large enterprises to profit from the misfortunes and powerlessness of certain individuals.”⁴² A system that encourages discrimination cannot be consistent with retributivism – a person’s race should not mean that he or she deserves punishment any more than someone of another race.

Many commentators have maintained that privatization is not inherently problematic, and some advocate for increased regulatory oversight to mitigate the problems that have been associated with private prisons.⁴³ Harding, for example, argues that private prisons in the United Kingdom have more accountability for their actions because disciplinary issues in private prisons are regulated by government officials who work at the prison.⁴⁴ In the United States, in contrast, the disciplinary rules, but not the way they are enforced, are regulated by public officials.⁴⁵ More effective regulation, Harding argues, will increase accountability and avoid the problem of discipline bleeding over from administration into allocation of punishment.⁴⁶ While increased regulation can improve accountability, it is unlikely, however, to be a complete panacea for the defects that lie within the privatized system for two reasons. First, and most importantly, increased regulatory oversight cannot solve all of the distorted incentives that lead private prisons

to lobby for stricter criminal justice laws. Private prison companies have a duty to their shareholders to maximize profits by increasing incarceration rates. While they might not completely ignore moral imperatives, because doing so may eventually affect their profits, they do not have an affirmative legal obligation to advocate for socially just laws that will redress existing imbalances in criminal justice policy or to ensure that the laws that they advocate are consistent with legitimate punishment objectives.⁴⁷ Because a for-profit corporation’s objective is to maximize profit, its motivations are not naturally aligned with the public policy objectives to redress imbalances in the prison system. Second, on a more practical level, the drive toward privatization itself arose from the desire to save money.⁴⁸ Thus, increased regulatory oversight will necessarily negate the goals of the cost savings initiatives that led to privatization in the first place.

Private prisons can, and often do blur the line between “public good and private interest,”⁴⁹ and once punishment leaves the public domain, “it loses its moral legitimacy.”⁵⁰ While the foundation of our democracy rests on the availability of justice and liberty for all, these underpinnings frequently do not apply to private companies. If private prisons go too far over the line in their prioritization of profit objectives over individual liberty interests, there is a good chance that they will not survive. However, leaving aside obvious abuses that would cause a corporate shutdown, there is much room for more subtle abuses that negatively affect an individual’s liberty interests. Particularly because the individuals affected by privatization are “human beings ... rendered helpless, dependent, and vulnerable by action society itself has undertaken,”⁵¹ the profit motive underlying the private prison structure is difficult to reconcile with the basic principles of liberty that underlie our democracy. Thus, while private prisons have addressed governmental short-term budget shortfalls, these for-profit structures have considerable negative implications for prisoners’ freedom and conflict both morally and legally with legitimate goals of punishment.

Endnotes:

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23. *Ibid.*, 18.

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26. Harding, *Private Prisons and Public Accountability*, 89.
27. Sasha Volokh, "Are Private Prisons Better or Worse than Public Prisons?" *Washington Post*, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/25/are-private-prisons-better-or-worse-than-public-prisons>.
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