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## STATE PUNISHMENT AND PRIVATE PRISONS

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### ABSTRACT

*To date, the debate over private prisons has focused largely on the relative efficiency of private prisons as compared to their publicly-run counterparts, and has assumed that, if private contractors can run the prisons for less money than the state without a drop in quality, then*

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† Professor of Law, UCLA School of Law. I thank the many people who read earlier drafts of this Article and provided extremely helpful comments: Norm Abrams, Steve Bainbridge, David Dolinko, Victor Fleischer, Jody Freeman, Stephen Gardbaum, Steve Garvey, Carole Goldberg, Robert Goldstein, Mark Greenberg, Russell Korobkin, Maximo Langer, Gia Lee, Gillian Lester, Kirstie McClure, Steve Munzer, Sasha Natapoff, Bill Rubenstein, Andy Sabl, Seana Shiffrin, David Sklansky, Clyde Spillenger, Kirk Stark, Fred Tung, and Brian Walker. Thanks are also due to the UCLA Junior Group, to faculty colloquium participants at Loyola Law School, and to Michele Moody-Adams and participants in the Young Scholar Conference sponsored by Cornell University's Program on Ethics & Public Life, for helpful discussion. I owe a great debt of thanks to Linda Karr O'Connor and all the reference librarians at the UCLA School of Law, who were extremely helpful to me throughout this project. This research was supported by the UCLA Academic Senate, the Dean's Fund of the UCLA School of Law, and in its earliest stages by Dennis Thompson and the Harvard Center for Ethics and the Professions. Anders Christiansen, Scott Dewey, Matt Hanawalt, Paul Foust, Michael Meresak, Melanie Phillips, and Mikel-Meredith Weidman provided excellent research assistance. Ryan Bates and the editors of the *Duke Law Journal* were gracious and thoughtful editors. I am particularly thankful to Bill Rubenstein, Seana Shiffrin, and especially Jody Freeman for their kindness, support, and good counsel. I have been thinking about the normative implications of private prisons for some time, and several years ago I circulated a draft entitled "The Ethics of Private Prisons." Although the argument I develop here is wholly different from the argument made in that previous piece, I benefited greatly in my thinking on the issues from comments received from, and conversations had with, many people regarding that earlier draft. I gratefully acknowledge this generous assistance.

*states should be willing to privatize. This “comparative efficiency” approach, however, has two significant problems. First, it is concerned exclusively with efficiency, despite the fact that the privatization of prisons arguably implicates more urgent values. Second, it accepts the current state of public prisons as an unproblematic baseline, thus failing to consider the possibility that neither public prisons as presently constituted nor private prisons in the form currently on offer are adequate to satisfy society’s obligations to those it incarcerates. In this Article, Professor Dolovich examines the private prisons issue from a third perspective, that of liberal legitimacy. On this standard, if penal policies and practices are to be legitimate, they must be consistent with two basic principles: the humanity principle, which obliges the state to avoid imposing punishments that are gratuitously inhumane; and the parsimony principle, which obliges the state to avoid imposing punishments of incarceration that are gratuitously long. After sketching the foundation for this legitimacy standard, Professor Dolovich then applies it to the case of private prisons. Approaching the issue of private prisons from this perspective helps to reframe the debate in two ways, both long overdue. First, it allows for a direct focus on the structure and functioning of private prisons, without being derailed by premature demands for comparison with public-sector prisons. It thus becomes possible to assess directly the oft-heard claim that the profit incentive motivating prison contractors will distort the decisions made by private prison administrators and lead to abuses. Second, it makes it possible to see that the state’s use of private prisons is the logical extension of policies and practices that are already standard features of the penal system in general, thus throwing into sharper relief several problematic aspects of this system that are currently taken for granted. In this sense, the study of private prisons operates as a “miner’s canary,” warning that not just the structure of private prisons, but also that of American punishment practices more broadly, may need reconsideration.*

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## INTRODUCTION

During the 1980s and 1990s, the population of America’s prisons and jails soared to unprecedented levels.<sup>1</sup> Watching the cost of incarceration rise accordingly and finding themselves responsible for many more inmates than they were able to accommodate in existing facilities, state officials turned to the private sector for help. They were met by entrepreneurs offering a range of services designed to appeal to the overtaxed prison administrator, including everything from the siting and building of new prisons to the day-to-day management of whole inmate populations. By 2003, over 90,000

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1. See *infra* notes 56–60 and accompanying text.

inmates across the country were housed in prisons and jails run by for-profit prison-management companies.<sup>2</sup>

This emergence of privately run, for-profit prisons, or “private prisons,”<sup>3</sup> sparked a heated debate,<sup>4</sup> at the heart of which has been

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2. See PAIGE M. HARRISON & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN NO. NCJ 203947, PRISON AND JAIL INMATES AT MIDYEAR 2003, at 1 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf> (reporting that private prison facilities held 94,361 inmates at midyear 2003). In the late 1990s, the capacity of private prisons was reportedly as high as 120,000 beds. Clifford J. Rosky, *Force Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 903 (2004); Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 112, 112 n.2 (2001). But according to the United States Department of Justice Bureau of Justice Statistics, the number of inmates actually incarcerated in private facilities in 1999 was just shy of 70,000. See ALLEN J. BECK & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN NO. NCJ 185989, PRISON AND JAIL INMATES AT MIDYEAR 2000, at 1 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim00.pdf> (reporting that the number of private prison inmates at midyear 2000 was up 9.1 percent from the previous year, which would have put the actual number of inmates housed in private facilities in 1999 at 69,093). By midyear 2003, this number reached its apparent high of 94,361. HARRISON & KARBERG, *supra*. The figure of 120,000 thus appears exaggerated as an indicator of the actual market share of private prisons.

3. See RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY 2 (1997) (defining private prisons as “arrangements whereby adult prisoners are held in institutions which in a day-to-day sense are managed by private sector operators whose commercial objective is to make a profit from such activities”).

4. This debate, which continues today, has generated a voluminous literature. *E.g., id.*; CAPITALIST PUNISHMENT: PRISON PRIVATIZATION AND HUMAN RIGHTS (Andrew Coyle et al. eds., 2003); ADRIAN L. JAMES ET AL., PRIVATIZING PRISONS: RHETORIC AND REALITY (1997); CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS (1990); PRIVATE PRISONS AND THE PUBLIC INTEREST (Douglas C. McDonald ed., 1990); PRIVATIZATION AND THE PROVISION OF CORRECTIONAL SERVICES (G. Larry Mays et al. eds., 1996); PRIVATIZING CORRECTIONAL INSTITUTIONS (Gary W. Bowman et al. eds., 1993); MICK RYAN & TONY WARD, PRIVATIZATION AND THE PENAL SYSTEM: THE AMERICAN EXPERIENCE AND THE DEBATE IN BRITAIN (1989); MARTIN P. SELLERS, THE HISTORY AND POLITICS OF PRIVATE PRISONS: A COMPARATIVE ANALYSIS (1993); DAVID SHICHOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS (1995); Christine Bowditch & Ronald S. Everett, *Private Prisons: Problems Within the Solution*, 4 JUST. Q. 441 (1987); John J. DiIulio, Jr., *What's Wrong with Private Prisons*, 92 PUB. INT. 66 (1988); Sean McConville, *Aid from Industry? Private Corrections and Prison Crowding*, in AMERICA'S CORRECTIONAL CRISIS: PRISON POPULATIONS AND PUBLIC POLICY 221 (Stephen D. Gottfredson & Sean McConville eds., 1987); Douglas C. McDonald, *Public Imprisonment by Private Means*, 34 BRIT. J. CRIMINOLOGY 29 (1994) [hereinafter McDonald 1994]; Alida V. Merlo, *Ethical Issues and the Private Sector*, in CORRECTIONS: DILEMMAS AND DIRECTIONS 23 (Peter J. Benekos & Alida V. Merlo eds., 1992); David E. Pozen, *Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom*, 19 J.L. & POL. 253 (2003); Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813 (1987) [hereinafter Robbins 1987]; Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531 (1988) [hereinafter Robbins 1988]; Rosky, *supra* note 2; E.V. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889 (1987); Douglas W. Dunham, Note, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475 (1986); Brian B. Evans, Note, *Private Prisons*, 36 EMORY L.J. 253 (1987);

one basic question: should responsibility for offenders convicted by the state be delegated to private, for-profit contractors, or should incarceration continue to be administered exclusively by public institutions staffed by state employees? The private prisons issue has thus widely been viewed as a choice—even a competition—between alternative organizational forms.

For the most part, debate on this issue has focused on the relative efficiency of private prisons as compared to their publicly run counterparts and has assumed that, if private contractors can run the prisons for less money than the state without a drop in quality, then states should be willing to privatize.<sup>5</sup> There are, however, at least two significant problems with this “comparative efficiency” approach.<sup>6</sup> First, it is exclusively concerned with the value of efficiency. Such a focus may be appropriate in many contexts in which privatization is contemplated, but it is not so in the prison context. Incarceration is among the most severe and intrusive manifestations of power the state exercises against its own citizens. When the state incarcerates, it strips offenders of their liberty and dignity and consigns them for extended periods to conditions of severe regimentation and physical vulnerability. Before seeking to ensure efficient incarceration,

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James Theodore Gentry, Note, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 YALE L.J. 353 (1986).

5. See, e.g., Lisa Belkin, *Rise of Private Prisons: How Much of a Bargain?*, N.Y. TIMES, Mar. 27, 1989, at A14 (“I’m an old state bureaucrat. . . . I don’t have any philosophies. If they can do it cheaper than the state can, more power to them.” (quoting Bob Owens, internal auditor for the Texas Department of Corrections)); Nsong Xiong, *Private Prisons: A Question of Savings*, N.Y. TIMES, July 13, 1997 at C5 (“I think as long as it does not cost any more than it costs the state then we should consider privatization. . . . We should compare and explore the options out there that would save the taxpayers money.” (quoting Donald Campbell, commissioner of the Tennessee Department of Corrections)). The authors of a 1996 report by the United States General Accounting Office explain the divide as follows:

Proponents of privatization assert that the experiences of several states demonstrate that private contractors can operate prisons at less cost than the government, without reducing the levels or quality of service. In contrast, other observers say there is little or no valid evidence that privatization of corrections is a cost-effective alternative to publicly run facilities.

U.S. GEN. ACCOUNTING OFFICE, PRIVATE AND PUBLIC PRISONS: STUDIES COMPARING OPERATIONAL COSTS AND/OR QUALITY OF SERVICE 1 (1996).

6. “Comparative efficiency” is my own term. Certainly, not all participants in the private prisons debate explicitly adopt the perspective of comparative efficiency. See, e.g., sources cited *infra* note 9. But the assumptions of comparative efficiency direct and shape the discussion even among those who are not necessarily committed to this approach.

therefore, it must first be determined if the particular penal practice at issue is even legitimate.<sup>7</sup>

Second, in its drive to assess the relative performance of private prisons, comparative efficiency accepts the current state of public prison conditions as an unproblematic baseline. Comparative efficiency asks: how do private prisons compare with their public-sector counterparts? And in terms of conditions of confinement, this standard is satisfied when conditions in private prisons are shown to be as good as conditions in the public prisons they seek to replace. Whether the baseline set by public prisons is itself good enough to meet any justifiable objective standard is never considered. The conversation as defined by comparative efficiency is thus framed to sidestep, rather than directly engage, the fact that conditions in many prisons—public and private alike—fall far short of satisfying society's obligations to those it incarcerates.<sup>8</sup>

Not all participants in the private prisons debate take comparative efficiency to be the appropriate standard. For a small group of critics, what matters most is not the relative efficiency of private prisons but their perceived lack of legitimacy.<sup>9</sup> These critics

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7. True, some versions of comparative efficiency do seek to assess the relative quality and safety of private prisons, two aspects of incarceration that are arguably of central relevance to the legitimacy of prison sentences. But even in such versions, quality and safety tend to be viewed as mere components of an overall efficiency analysis that continues to view cost as the central issue.

8. In many American prisons and jails, inmates are plagued by, among other horrors, sexual violence, overcrowding, an ongoing threat of physical assault, seriously inadequate medical care, and extended sensory deprivation. See, e.g., Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 438–40 (2004) (discussing overcrowding in prisons); Wilbert Rideau, *The Sexual Jungle*, in LIFE SENTENCES 73, 74 (Wilbert Rideau & Ron Wikberg eds., 1992) (describing the sexual violence that “plagues” prisons); Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1525–29 (2004) (describing the imposition of extended sensory deprivation in supermax prisons); Wil S. Hylton, *Sick on the Inside: Correctional HMOs and the Coming Prison Plague*, HARPER'S MAG., Aug. 2003, at 43 (describing inadequate medical care in prisons); Adam Liptak, *Ex-Inmate's Suit Offers View into Sexual Slavery in Prisons*, N.Y. TIMES, Oct. 16, 2004, at A1 (recounting the story of a “homosexual inmate forced into sexual slavery” in a Texas prison).

9. See e.g., DiIulio, *supra* note 4, at 83 (“The central moral issues surrounding private prison . . . management have little to do with the profit motive of the privatizers and much to do with the propriety . . . of delegating the authority to administer criminal justice to nonpublic individuals and groups.”); Robbins 1987, *supra* note 4, at 828 (emphasizing the need to consider the public-interest and forfeiture-of-governmental-power concerns involved in privatizing prisons); White, *supra* note 2, at 112 (“[C]ritiques of the private prison tend to focus narrowly on the institution's practical, legal, or general normative failures . . . to the exclusion of any sustained focus on the private prison's implications for the changing relationship between state

share the view that incarceration is an inherently public function and thus that recourse to private prisons is inappropriate regardless of the relative efficiency of this penal form.<sup>10</sup>

By introducing into the debate a concern for the legitimacy of private prisons, this “inherent public function” approach makes a laudable attempt to shift the inquiry beyond the bounds of comparative efficiency and into the terrain of the more explicitly normative.<sup>11</sup> Yet this alternative framework also has its shortcomings. For one, its dismissal of the relevance of private prisons’ practical implications for the prisoners themselves seems both coldhearted and blind to the significance of the humanity of actual sentences served for the legitimacy of a given punishment.<sup>12</sup> Moreover, although its governing standard—legitimacy—is more appropriate for the prison context than efficiency, the inherent-public-function approach also accepts the status quo as an unproblematic baseline for analysis, and thus is ultimately trapped in the same unduly narrow frame as comparative efficiency. On both approaches, the only relevant

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and society and the way the law mediates the relationship.”); Michael Walzer, *At McPrison and Burglar King, It’s . . . Hold the Justice*, NEW REPUBLIC, Apr. 8, 1985, at 10 (emphasizing that “it is a moral and political—not economic—question”).

10. *But see* LOGAN, *supra* note 4, at 5, 49–61, 236–50 (“[A]ny potential problem with private prisons [is] at least matched by an identical or closely corresponding problem among prisons that are run by the government.”); Douglas C. McDonald, *When Government Fails: Going Private as a Last Resort*, in PRIVATE PRISONS AND THE PUBLIC INTEREST, *supra* note 4, at 184–88 (arguing that the authority to punish is not an exclusive right of the state, but ultimately resides in the people, and therefore may be transferred, and asserting that “[i]f conditions and treatment are acceptable, it should not matter that private individuals have been rewarded”).

11. Comparative efficiency, like many cost-benefit approaches, tends to present itself as value neutral, but it too is a normative view. Describing one’s aim as identifying the approach that minimizes costs and maximizes benefits is just another way of saying that actors should pursue the course of action that stands to generate the best possible consequences. And this, of course, is simply a paraphrase of the central organizing principle of consequentialism, the moral theory which teaches that “the rightness or wrongness of an action always depends on the consequences of the action, on its tendency to lead to intrinsically good or bad states of affairs.” BERNARD WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* 82–83 (2d ed. 1993).

12. The insistence of the inherent-public-function approach on the irrelevance of the practical consequences of prison privatization likely stems from the desire of these critics to escape the powerful force field of comparative efficiency, which operates to crowd out all considerations *except* practical consequences. Yet understandable though this resistance is, to the extent that it denies the moral relevance of actual conditions of confinement, it will necessarily operate with a conception of legitimacy that is only partially satisfying at best. It will, moreover, appear wholly insensitive to the needs and interests of the prisoners themselves and thus be vulnerable to charges of “intellectual indulgence” or “moral or ideological fundamentalism.” HARDING, *supra* note 3, at 23–24.



question is the comparative one—that of whether states should keep operating the prisons themselves or be willing to turn this task over to private, for-profit contractors. Neither approach, therefore, is able to consider the possibility that neither public prisons as presently constituted nor private prisons in the form currently on offer represents an acceptable choice.<sup>13</sup>

In this Article, I approach the private prisons issue from a third perspective, that of liberal legitimacy.<sup>14</sup> Liberal legitimacy offers what

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13. As noted above, *see supra* text accompanying note 8, comparative efficiency can be blind to the violence and other abuses in private prisons, deflecting any concerns in this regard with the incontrovertible observation that public prisons, too, are violent and abusive. But the inherent-public-function approach, in turn, can be blind to the violence and other abuses in *public* prisons, deflecting concerns in this regard with the more questionable assertion that the nature of actual punishments imposed is irrelevant to the legitimacy determination. Indeed, on the inherent-public-function approach, it seems as if, so long as the prisons retain their public aspect—so long, that is, as prison administrators and guards continue to draw their paychecks directly from the government—any punishment of incarceration is legitimate, however arbitrary or severe the sentence, and however appalling the conditions of confinement.

14. Thus far, little consideration has been given in the private prisons literature to the liberal perspective, although there are some notable exceptions. Michael Walzer, in a brief but influential article in *The New Republic*, puts his argument against private prisons—at the time of his writing, a brand-new phenomenon—in terms of citizens' political obligations in a liberal democracy, but he does no more than sketch his concerns. *See generally* Walzer, *supra* note 9. Andrew Rutherford, at the close of an account of private prisons in England, suggests that the state's use of private prisons raises "the fundamental normative issue of viewing punishment in a liberal democratic state as something that must be used with restraint." Andrew Rutherford, *British Penal Policy and the Idea of Prison Privatization*, in PRIVATE PRISONS AND THE PUBLIC INTEREST, *supra* note 4, at 42, 65. Here, however, Rutherford simply introduces the issue and does not explore it further. Ahmed White goes farther than anyone else in developing a critique of private prisons grounded both in a liberal theoretical framework and in the actual details of the structure and functioning of private prisons. *See generally* White, *supra* note 2. His approach is thus closest to my own. White, however, concentrates on issues of sovereignty and what he calls the "rule of law." *Id.* at 114. He objects to private prisons on the basis that, by contracting with private actors to run the prisons, the state blurs the lines of sovereign accountability, with troubling effects. *See id.* at 144 (explaining that his "arguments against the privatization of prisons focus on the sovereignty-restraining ambition of the rule of law and on the perversion of this ambition by the diffusion and extension of sovereignty"). In this claim, White may well be right, but I am concerned with a different set of liberal values. Moreover, I aim to provide a theoretical framework that captures the general objections underpinning what I view as the nascent liberal critique already present in the private prisons literature. White's concern with ensuring the accountability of the sovereign, although certainly warranted, does not in my view reflect either what is most troubling about the state's use of private prisons from a liberal perspective or the concerns motivating much of the resistance to private prisons one finds in the literature. Finally, in a recent article, Clifford Rosky brings to bear what he calls a "liberal theory of force" on the question of privatizing three governmental functions, each of which implicates the state's monopoly on force: the military, policing, and private prisons. *See* Rosky, *supra* note 2, at 973–1024 ("Through the lens of liberal thought, we consider carefully why and how liberal states must 'monopolize' force."). With respect to private prisons, Rosky ultimately finds

the private prisons debate has thus far lacked: an independent normative standard for assessing the legitimacy of penal policies and practices in a liberal democracy.<sup>15</sup> On this standard, if our penal policies and practices are to be legitimate, they must be consistent with two basic principles: the *humanity principle*, which obliges the state to avoid imposing punishments that are gratuitously inhumane;<sup>16</sup> and the *parsimony principle*, which obliges the state to avoid imposing punishments of incarceration that are gratuitously long.<sup>17</sup> In each case, gratuitous punishment is that which cannot be justified to all members of society under fair deliberative conditions.<sup>18</sup> In this Article, I sketch the foundation for this legitimacy standard. I then apply its conditions to the case of private prisons. Doing so reveals

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that the supply of the means of criminal punishment (i.e., prisons) may be privatized consistent with his liberal theory, so long as the demand for such punishment remains exclusively in public hands. *Id.* at 1024. In this way, Rosky distinguishes prisons from the military, the private supply of which, he argues, is foreclosed on his liberal theory. *Id.* at 1015. But while Rosky's article finds no like ground in his liberal theory of force for viewing private prisons as illegitimate, *id.* at 1021, this in no way goes to show that there are not other reasons, consistent with a broader liberal perspective than Rosky adopts, why one might object to their use. In this Article, I consider other such reasons.

15. By "liberal democracy," I mean a society committed to the baseline liberal democratic values of individual liberty, dignity, and bodily integrity; limited government; the primacy and sovereignty of the individual; and the entitlement of all citizens to equal concern and respect. See Dolovich, *supra* note 8, at 312–14.

16. As will be seen, on this model, inhumane punishment may be legitimately imposed only under extremely limited circumstances, which are likely to be met, if ever, in only a very small number of cases. See *infra* text accompanying notes 121–23. Thus, for purposes of the present discussion, which is concerned not with liminal cases but with mass incarceration, any conditions of inhumane punishment must be presumed to be gratuitous.

17. Elsewhere, I argue that, to satisfy the parsimony principle, punishments may only be as severe as necessary to appreciably deter offenses causing harm of equal or greater severity. Dolovich, *supra* note 8, at 378–404, 408–09. But it is not necessary to accept this particular view as to the limiting terms of the parsimony principle to agree that society should punish only so much as can be justified under fair deliberative conditions, and no more. The more general (and less controversial) version offered in the text is thus sufficient for present purposes.

18. In sketching this standard and its accompanying principles, I draw on earlier work in which I argue that, in a society committed to the baseline liberal democratic values, punishment policies are legitimate to the extent that they are consistent with principles of punishment all would accept as just and fair under conditions of strict impartiality. *Id.* at 313–14. As this formulation suggests, the approach I adopt is a self-consciously Rawlsian one. For further consideration of this approach, see generally Simone Chambers, *Democratizing Humility*, 7 BUFF. CRIM. L. REV. 465 (2004); Stephen P. Garvey, *Lifting the Veil on Punishment*, 7 BUFF. CRIM. L. REV. 443 (2004); Sharon Dolovich, *Idealism, Disproportionality, and Democracy: Reply to Chambers and Garvey*, 7 BUFF. CRIM. L. REV. 479 (2004).

the extent to which punishments served in private prisons fall short of society's obligations to those it incarcerates—and why they do so.<sup>19</sup>

Liberal legitimacy thus rejects the comparativist's impulse that has thus far defined the private prisons debate. The question here is not: how do private prisons compare with public prisons? It is instead: to what extent is the use of for-profit private prisons consistent with society's obligations to those it incarcerates?

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19. Although liberal legitimacy is distinct from the inherent-public-function approach, its operative legitimacy standard helps to flesh out the animating claim of those critics who argue that incarceration is inherently a public function and thus that private prisons are inherently illegitimate. The inherent-public-function approach is motivated by the idea that prison administration must be guided solely by public values. From this perspective, the worry is that private prison providers will be motivated, not by a commitment to the public interest, but by the desire to maximize their own financial gain—and that where this aim conflicts with the public interest, it will be contractors' own personal interests and not the public interest that will take precedence. This view, however, tends to leave unexplained the precise public values that would be ill served by this arrangement, leaving its concerns easily dismissed by the dominant comparative efficiency approach. For if, as comparative efficiency holds, efficiency is the highest public value, all that need be done to ensure that private contractors serve the public interest is to make it financially rewarding for them to run the prisons efficiently. Absent an alternative conception of the relevant public values, it is difficult for the inherent-public-function approach to explain why this response misses the point.

Liberal legitimacy, although not identical with the inherent-public-function approach, provides the substantive account of the public values missing from this latter approach, thereby helping to clarify the nature of its claim. For liberal legitimacy, the public interest lies in ensuring legitimate punishment, defined as punishments that satisfy the twin principles of humanity and parsimony. Or, to put it less formally, for liberal legitimacy, public values are realized when conditions of confinement are as humane as possible and criminal sentences are imposed only when, and to the extent that, they are absolutely necessary. These two concerns seem to me to be precisely those that, at bottom, motivate the inherent-public-function approach—that, when the prisons are run by people committed first and foremost to their own financial gain (1) any conflict between the well-being of inmates and the contractors' bottom line will be resolved against the inmates, thereby compromising the conditions of confinement; and (2) sentencing policy will be shaped, not on the basis of legitimate considerations bearing on the nature of criminal punishment, but instead on the basis of what serves the interests of parties who stand to benefit financially from increased incarceration. Viewed from the inherent-public-function perspective, either of these circumstances would raise appropriate skepticism about the justification for the punishment itself, and would thus reflect both an insufficient respect for, and a failure of responsibility toward, those society incarcerates.

The inherent-public-function objection is sometimes characterized as an “expressive” concern, the notion presumably being that even should there be no actual divergence between the decisions of a state official and those of a private prison provider, the delegation of power over the prisons to private actors “expresses” an inadequate commitment to the realization of public values. But if I am right that the conception of the public interest that informs this objection is in fact the one articulated by the theory of liberal legitimacy I advance in this Article, it is not the “expressive” effects of introducing private interests into prison administration (that is, what the policy “says”), but the actual normative conflict between the private interests of prison contractors and the public interest so understood, which raises questions for the inherent-public-function approach as to the appropriateness of private prisons.

Asking this latter question helps to reframe the debate in two ways, both long overdue. First, it allows for a direct focus on the structure and functioning of private prisons, and thus for the development of a rich understanding of how the private prison system actually works and precisely where it fails, without being derailed by premature demands for comparison with public-sector prisons.<sup>20</sup> Most notably, it allows for direct assessment of the claim that the profit incentive motivating prison contractors will distort the decisions made by private prison administrators and lead to abuses. This claim is often raised by opponents of private prisons. Yet it is rarely pursued in any sustained way, for whenever it is voiced, it is either dismissed outright as unsupported<sup>21</sup> or quickly deflected by reference to the admittedly incontrovertible fact that public prisons, too, are rife with abuse. By contrast, assessing private prisons against the standard of liberal legitimacy not only allows but *demand*s a thorough analysis of the concern that prison contractors' profit motive will lead to cutting corners in ways likely to harm inmates. It thus enables an understanding of the dangers posed by private prisons that is at once more comprehensive and more nuanced than is possible from within the comparativist frame.

Second, confronting the ways in which private prisons are at odds with society's obligations to those it incarcerates provides the basis for a far-reaching critique of several practices that currently inform prison administration more broadly. The possibility that studying

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20. This is not to say that comparison between public and private prisons is never in order. Certainly, policymakers facing the question of whether to privatize their prisons will rightly be interested in comparisons between public and private prisons. But before any such comparison can be undertaken, it is first necessary to understand the systems to be compared, and comparative efficiency as a framework for approaching the issue preempts rather than facilitates such an understanding. It is thus not comparison *per se* to which I am opposed, but rather premature comparison on inappropriate measures—which is precisely where comparative efficiency leads.

21. For example, contemplating the question of qualified immunity for private prison guards in *McKnight v. Rees*, 88 F.3d 417 (6th Cir. 1996), the Sixth Circuit expressed concern with the fact that “for-profit corporations—and indirectly the employees of those corporations—seek to realize what the name implies, a profit,” and that, “[a]ccordingly, private corporations running correctional facilities have a greater incentive to cut costs by infringing upon the constitutional rights of prisoners in order to ensure the profitability of the enterprise,” *id.* at 424 n.4. In his dissent in *Richardson v. McKnight*, 521 U.S. 399 (1997), in which the Supreme Court affirmed the Sixth Circuit’s decision in *McKnight v. Rees*, Justice Scalia dismissed this concern as “implausible,” and chided the panel for having “offered no evidence to support its bald assertion that private prison guards operate with different incentives than state prison guards, and g[iving] no hint as to how prison guards might possibly increase their employers’ profits by violating constitutional rights,” *id.* at 421 (Scalia, J., dissenting).

private prisons might afford a fresh perspective on society's penal practices in general has not been seriously considered by those engaged in the private prisons debate. In fact, a guiding premise of this debate has been that for-profit private prisons represent a radical departure from the way the public prison system otherwise operates. But this premise is false. Although private prisons do have some distinctive features, the differences between public and private prisons are mostly differences of degree. The use of private prisons is thus neither an isolated nor an aberrant approach to punishment, but is rather the logical extension of policies and practices that are already standard features of our prison system. Examining private prisons from the perspective of liberal legitimacy exposes this overlap, thereby throwing into sharper relief several problematic aspects of the penal system as a whole that are currently taken for granted. In this sense, the study of private prisons operates as a "miner's canary,"<sup>22</sup> warning that not just the structure of private prisons, but also that of American punishment practices more broadly, may need reconsideration.<sup>23</sup>

This Article proceeds as follows. Part I offers a brief account of the history and reemergence in the late twentieth century of private sector involvement in American corrections. Part II addresses the question of how to translate a commitment to the baseline liberal democratic values into the basis for public-policy critique. In doing so, it presents the framework of liberal legitimacy to be applied to private prisons. Part III considers the use of private prisons from the perspective of the humanity principle. In particular, it examines the incentives prison contractors face to reduce costs in ways likely to cause harm to inmates, and argues that existing mechanisms for checking contractors' tendencies in this direction are inadequate to the task. Drawing on this analysis, Part III identifies two practices of prison administration that threaten the health and safety of prisoners:

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22. See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 1 (2002) ("Miners often carried a canary into the mine . . . [because] the canary's more fragile respiratory system would cause it to collapse from noxious gases long before humans were affected. . . . The canary's distress signaled that it was time to get out of the mine because the air was becoming too poisonous to breathe.").

23. For-profit private prisons are thus worthy of study not only for their own sake, but also, as David Sklansky has put it in a related context, for "what [they] can teach us about what we thought we already knew." David A. Sklansky, *The Private Police*, 46 *UCLA L. REV.* 1165, 1171 (1999).

(1) the contracting out to for-profit entities for the provision of essential prison services to save states money on the cost of corrections, and (2) the delegation to prison officials of considerable power and discretion over prisons and prison conditions absent adequate accountability mechanisms. Although, as Part III shows, the dangers these practices create are heightened in private prisons—a fact that explains the elevated levels of violence in private prisons as compared with public prisons<sup>24</sup>—these practices are standard fare in public prisons as well. Part III thus concludes by identifying steps prison officials ought to take to curtail these practices or mitigate their harmful effects, even where the prisons themselves are run by public employees. Finally, Part IV examines private prisons from the perspective of the parsimony principle. In contrast to Part III, Part IV introduces a set of considerations that has not previously been addressed as such in the literature.<sup>25</sup> It is thus necessarily more speculative and suggestive than Part III. Still, Part IV does identify a further practice that threatens the legitimacy of punishment in general: political advocacy in the sentencing-policy arena by actors with a strong financial interest in increased incarceration rates and longer prison sentences. As Part IV suggests, this practice creates reason for concern whether the advocacy groups in question are private prison providers, correctional officers' unions, or voters in rural districts who view prison building as a possible source of economic development.

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24. See *infra* Part III.E.

25. Some of the issues on which I draw, in particular that of the possibility of abuse of discretion on the part of private prison guards in the internal prison disciplinary and parole processes, have been addressed before. See, e.g., Warren L. Ratliff, *The Due Process Failure of America's Prison Privatization States*, 21 SETON HALL LEGIS. J. 371, 373 (1997) (“[Most] statutes that authorize private prisons are constitutionally inadequate, because they allow private contractors to exercise inappropriate discretion concerning inmates’ liberties.”); Dunham, *supra* note 4, at 1475 (“[C]omprehensive safeguards are necessary to ensure the protection of inmates’ constitutional rights in private prisons.”); Gentry, *supra* note 4, at 363 (noting the “perverse incentives” that exist for private prisons to “create demand for [their] own product, . . . by fomenting violence among current inmates in order to scuttle parole chances [or] arbitrarily reducing good time”). But these previous discussions have largely been undertaken in the more conventional terms of system design (Gentry) or constitutional standards (Dunham, Ratliff), rather than from any explicit concern with the resulting legitimacy of the punishments imposed.

## I. THE EMERGENCE OF THE MODERN PRIVATE PRISON

A. *Historical Antecedents*

The involvement of private interests in American corrections began long before the current generation of private prison companies emerged—indeed, even before the existence of the prison as we know it. Before addressing the modern private prison, it is worth briefly considering some of this earlier history, which raises themes that will inform later analysis.

In colonial America, the meting out of criminal punishment was purely a local matter and could include any of a range of sanctions, among them fines, flogging, the stockade, banishment, and the gallows—but not imprisonment.<sup>26</sup> As in eighteenth-century England, jails were merely holding chambers for debtors or for those individuals awaiting trial or punishment.<sup>27</sup> Jailors paid for the running of the jails themselves and were reimbursed by the county according to a fee schedule.<sup>28</sup> They also routinely supplemented their income by taking bribes from prisoners in exchange for certain privileges and charging prisoners for meals and alcohol.<sup>29</sup> The less money spent on upkeep, the more money the jailor made; jails were thus generally overcrowded and extremely unsanitary.<sup>30</sup>

It was in the late eighteenth century that criminal punishment in America came to take the form of incarceration for a set period in a penal facility.<sup>31</sup> In the early penitentiaries, prison labor was introduced as part of rehabilitative programs,<sup>32</sup> but it quickly became

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26. David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, in *THE OXFORD HISTORY OF THE PRISON* 110, 112 (Norval Morris & David J. Rothman eds., 1995).

27. Randall McGowen, *The Well Ordered Prison: England, 1780–1865*, in *THE OXFORD HISTORY OF THE PRISON*, *supra* note 26, at 79, 80–81.

28. SHICHOR, *supra* note 4, at 25–26.

29. *Id.*; see also SELLERS, *supra* note 4, at 48–49. As Shichor describes, this system of private jailors making profits off their charges was the norm in England in the eighteenth century, when jailors sold inmates food and alcohol, charged family members for visiting privileges, and exacted fees from prisoners for every “service” rendered, including “putting people in irons, taking the irons off, ‘first locking up,’ providing copies of court papers, various privileges, and even being discharged.” SHICHOR, *supra* note 4, at 21–22.

30. SHICHOR, *supra* note 4, at 24–25.

31. *Id.* at 26; Rothman, *supra* note 26, at 114–15.

32. Alexis M. Durham, III, *The Future of Correctional Privatization: Lessons from the Past*, in *PRIVATIZING CORRECTIONAL INSTITUTIONS*, *supra* note 4, at 33, 35–36; Rothman, *supra* note 26, at 117.

the means through which state governments could recoup the costs to the state treasury of imprisoning criminals. Indeed, the history of nineteenth-century American prisons is a history of contracting between the state and private interests for the use of convict labor in efforts on both sides to achieve financial gain. These contracts took many forms. In some cases, as with New York's Auburn penitentiary, contractors would supply the raw material and collect the finished product at the end, with the work taking place at the prison.<sup>33</sup> In others, as in Louisiana, the state leased its entire penitentiary to a private contractor, who then assumed the cost of running the facility in exchange for the labor of its inmates.<sup>34</sup> The most common arrangements, however, involved the leasing of convict labor for work on plantations, on railroads, in mines, or in other labor-intensive industries.<sup>35</sup>

Although convict leasing was found throughout the nineteenth-century United States, it was most widely used in the Southern states after the Civil War. This development was in part a function of the serious financial straits of the former Confederate states in the postwar years; convict leasing offered a way both to defray the costs of incarceration and to rebuild the shattered Southern economy.<sup>36</sup> At the war's end, demand for convict labor was high, as those who had previously relied on slave labor found themselves in need of a pool of cheap workers. Both in response to this demand and as a way for white society to reassert its power over the newly emancipated black population,<sup>37</sup> the Southern states began to increase dramatically the sentences exacted against petty criminals, the vast majority of whom

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33. GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* 69 (Francis Lieber trans., S. Ill. Univ. Press 1964) (1833); SHICHOR, *supra* note 4, at 29. Beaumont and Tocqueville spoke highly of this method, noting in particular the efforts made by prison administrators to contract out different phases of production to different private parties, in order to contain the influence of each individual contractor. SHICHOR, *supra* note 4, at 33.

34. Durham, *supra* note 32, at 36. In the case of Louisiana, the contractor McHatton, Pratt, and Company paid nothing to the state beyond the cost of running the facility. *Id.* In Texas, after experimenting with convict leasing, the "state leased its entire penitentiary operation to private interests." *Id.* at 37 (quoting S.J. MARTIN & S. EKLAND-OLSON, *TEXAS PRISONS: THE WALL CAME TUMBLING DOWN* 6 (1987)). Texas resumed control over the penitentiary in 1875, after a legislative commission reported squalid living conditions, inadequate food and medical treatment, and brutal corporal punishment. *Id.* at 41.

35. DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 56–61 (1996).

36. SHICHOR, *supra* note 4, at 35.

37. OSHINSKY, *supra* note 35, at 37–40.



were former slaves. For example, in 1876, the Mississippi legislature passed a “major crime bill,” known as the “Pig Law,” which redefined the crime of grand larceny to include “the theft of a farm animal or any property valued at ten dollars or more.”<sup>38</sup> Violation of this law, which was “aimed directly” at the newly freed slaves, meant up to five years in state prison.<sup>39</sup> Moves like this one accompanied the legalization of convict leasing and ensured sufficient convicts to meet the demand.<sup>40</sup>

Convict leasing uniformly meant the severe abuse of leased convicts, thoroughly inadequate living conditions, and utter indifference as to whether they lived or died.<sup>41</sup> Because the prisons ensured a steady supply of convicts, from the contractors’ perspective one convict was as good as another.<sup>42</sup> Many contractors therefore routinely worked their charges literally to death.<sup>43</sup>

Historical accounts of inmate labor contracts in nineteenth-century America reveal that the practice was plagued by more than inmate abuse. In addition, state after state found itself being outmaneuvered and taken advantage of by the private parties with

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38. *Id.* at 40.

39. *Id.* As a consequence of this change, Oshinsky reports, the number of state convicts quadrupled in just three years, “from 272 in 1874 to 1,072 by 1877.” *Id.*

40. *See id.* at 31–42 (describing the simultaneous rise of convict leasing and the enactment of crime bills aimed primarily at imprisoning African Americans for extended periods of time).

41. In Tennessee, for example, an 1889 legislative commission investigating the treatment of convicts leased to the Tennessee Coal and Iron Company found the dwellings to be “‘rough board shanties unfit for the habitation of human beings’ and found that inmates were subjected to ‘cruel and inhuman whippings with a heavy strap on the[ir] naked backs . . . for failure to get out the tasks . . . and for nearly everything.’” Durham, *supra* note 32, at 42 (quoting PRISONS AND PRISONERS: HISTORICAL DOCUMENTS 107 (S. Chaneles ed., 1985)). In Kentucky, in 1882, leased convicts were “forced to work in waist-deep water in winter, some were killed in cave-ins, and beatings were the ‘mainstay of discipline.’” SHICHOR, *supra* note 4, at 42 (quoting Kentucky Corrections Cabinet, *Changing Faces, Common Walls: History of Corrections in Kentucky* 5 (1982)). And that same year in Alabama, the new warden of the state penitentiary described the inmates as “worn-out, battered men who lived like animals in disgusting quarters, where they ‘breathed and drank their bodily exhalation and excrement.’” OSHINSKY, *supra* note 35, at 78. This particular warden concluded that the system of convict leasing “is a disgrace to the State [and] a reproach to the civilization.” *Id.*

42. “Before the war we owned the negroes. If a man had a good nigger, he could afford to take care of him; if he was sick get a doctor. . . . But these convicts: we don’t own ‘em. One dies, get another.” *Id.* at 55 (quoting an unnamed Southern employer in 1883 on the practice of convict leasing).

43. In the years 1877–1879, the death rate of convicts leased to railroads was 16 percent in Mississippi, 25 percent in Arkansas, and 45 percent in South Carolina. SHICHOR, *supra* note 4, at 36. For a chilling state-by-state history of convict leasing in the post-Civil War South, see OSHINSKY, *supra* note 35, at 55–84.

whom the state had contracted for the labor of its convicts. In California, for example, the state tried in 1858 to rescind a contract for the labor of inmates at San Quentin when it became known that the contractor, John McCauley, had “blatant[ly] violat[ed]” the terms of the contract “to squeeze as much out of the arrangement as possible.”<sup>44</sup> McCauley had “ignored the physical needs of the convicts, ignored the orders sent down from Sacramento, ignored the suggestions of his own prison officers, ignored everything but his profit.”<sup>45</sup> McCauley fought the rescission in court and won, and the state, which had entered the contract in the first place to save money on the running of San Quentin, had to pay over \$200,000 to buy him out.<sup>46</sup>

The predominant theme of accounts of prison labor contracts gone awry is the state’s vulnerability to nonperformance by its contracting partner once the state had divested itself of responsibility for its prisoners. In Virginia,<sup>47</sup> Nebraska,<sup>48</sup> and Tennessee,<sup>49</sup> the story was the same: the state leased its convicts to private interests, discovered violations of the contract terms directed to increasing the profit of the contractor, and found itself unable to cancel the contract.

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44. Durham, *supra* note 32, at 44–45.

45. *Id.* at 45 (quoting K. LAMOTT, CHRONICLES OF SAN QUENTIN 52–53 (1961)).

46. *Id.* “What had initially been intended to be a cost-effective solution to California’s penal needs turned out to be an expensive debacle that resulted in severe abuses of inmates and widespread public embarrassment.” *Id.*; see also SHICHOR, *supra* note 4, at 39–41 (describing the California experience in detail). California’s experience was not atypical. In 1875, Louisiana filed a lawsuit against lessee Samuel James, who had for two years failed to make payments for his inmate labor. Despite the lawsuit, James continued both to withhold payments and to violate the state’s laws against working convicts outside the prison walls. Durham, *supra* note 32, at 44. In this case, James’s political connections—he was friends with the governor—delayed state action, and it was not until 1881 that he began to make good on the money owed. *Id.*; see also John J. DiIulio, Jr., *The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails*, in PRIVATE PRISONS AND THE PUBLIC INTEREST, *supra* note 4, at 155, 159. Kentucky had a similar experience: despite reports from the state’s investigation committee of inmate abuse, unsafe working conditions, and other contractual violations, the contractor’s political connections—he was “considered to be one of the most influential persons in the state”—kept the state from acting on the committee’s recommendations. SHICHOR, *supra* note 4, at 42.

47. See Durham, *supra* note 32, at 44 (“[T]he state’s reliance upon the private sector gave private companies the advantage in disputes over contractual issues.”).

48. See *id.* at 45 (“Despite these obvious violations [in penitentiary conditions], it took two years before the contract could be terminated, and even then the state was required to buy out the contract.”).

49. See W.J. Michael Cody & Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829, 834–38 (1987) (recounting the decline and eventual abolition of Tennessee’s convict leasing system).

The reasons for this incapacity varied from state to state and included the lessee's political connections (as in Louisiana and Kentucky),<sup>50</sup> the state's dependence on the contractor to provide for the prisoners' needs (as in New York, where in 1851 the wardens of Auburn penitentiary were forced to give significant concessions to the contractor running an on-site carpet shop or leave "idle more than 300 inmates" and risk the loss of necessary revenue),<sup>51</sup> and the risk that courts would side with the contractors (as in California), thus forcing the state to pay dearly to regain state control of its prisons. In each case, for these various reasons, once the contracts had been signed, the balance of power shifted to the contractors.

It would be a mistake to draw too many conclusions from this history for the current chapter of private sector involvement in prisons. The contemporary experience is governed by a set of norms, not in place a century ago, forbidding the economic exploitation and physical abuse of inmates.<sup>52</sup> Today, there is also a stricter standard of political accountability,<sup>53</sup> an extensive public bureaucracy with the capacity to regulate and administer complex institutions,<sup>54</sup> and the default expectation that the state bears the burden of financing the prison system.<sup>55</sup> But as will be seen, this history does introduce certain themes arising from private involvement in corrections that are still relevant today.

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50. See *supra* note 46.

51. Durham, *supra* note 32, at 43.

52. This is not to say that these norms are necessarily honored. On the systematic and persistent economic exploitation of prison labor in America since the Civil War, see generally Robert P. Weiss, "Repatriating" *Low-Wage Work: The Political Economy of Prison Labor Privatization in the Postindustrial United States*, 30 CRIMINOLOGY 253 (2001).

53. See, e.g., HARDING, *supra* note 3, at 27–31 (outlining strict tenets of accountability that "the state must require of private contractors and which citizens must require of the state").

54. See McConville, *supra* note 4, at 224–25 (arguing that the highly developed regulatory competency of the modern state has positive "implications for the safe and controlled revival of entrepreneurial imprisonment").

55. See, e.g., 18 U.S.C. § 4007 (2000) (establishing that "[t]he expenses attendant upon the confinement of persons arrested or committed under the laws of the United States, as well as upon the execution of any sentence of a court thereof respecting them, shall be paid out of the Treasury of the United States"); Cody & Bennett, *supra* note 49, at 846 (explaining that the "chief difference" between the modern move to privatize prisons in Tennessee and the state's "past practice of convict leasing" is "today's recognition that the State should bear the burden of funding the prison system"). *But see* Fox Butterfield, *Many Local Officials Now Make Inmates Pay Their Own Way*, N.Y. TIMES, Aug. 13, 2004, at A1 ("To help cover the costs of incarceration, corrections officers and politicians are more frequently billing inmates for their room and board, an idea popular with voters.").

*B. The Corrections Crisis of 1980s America*

The reemergence of private contractors in American corrections is traceable to the dramatic growth in incarceration nationwide over the past three decades. In 1985, there were over 740,000 people behind bars,<sup>56</sup> up from 226,000 ten years previously.<sup>57</sup> By 1990, this number had hit 1.1 million,<sup>58</sup> by 1995, it was almost 1.6 million,<sup>59</sup> and by 2003 it was over 2.1 million.<sup>60</sup> For legislators and prison officials around the country, this incarceration explosion created some vexing practical problems: Where to put all the convicted offenders? And how to pay the bills?

Initially, state officials nationwide responded to the first of these problems—finding room for all the bodies—by shipping convicted offenders to existing penal facilities and letting the wardens sort it out themselves. The limitations of this approach, however, were soon clear, as prisons and jails quickly came to be operating well over capacity. Eventually, the courts began issuing orders requiring government officials to relieve the overcrowding,<sup>61</sup> and it became

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56. HINDELANG CRIMINAL JUSTICE RESEARCH CTR., U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002, at 478 (2004), available at <http://www.albany.edu/sourcebook/pdf/sb2002/sb2002-section6.pdf>.

57. Steve Cettinger, *U.S. Prison Population Hits All-Time High*, CORRECTIONS MAG., Mar. 1976, at 10.

58. HINDELANG CRIMINAL JUSTICE RESEARCH CTR., *supra* note 56, at 478.

59. *Id.*

60. HARRISON & KARBERG, *supra* note 2, at 1. The incarceration rate in the United States thus went from 105 per 100,000 people in 1975, to 200 per 100,000 people in 1985, to an astonishing 714 per 100,000 people by 2003. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN NO. NCJ 205335, PRISONERS IN 2003, at 2 (2004) (incarceration rate in 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf>; PAIGE HARRISON, U.S. DEP'T OF JUSTICE, INCARCERATION RATES FOR PRISONERS UNDER STATE OR FEDERAL JURISDICTION, PER 100,000 RESIDENTS (2000) (incarceration rate in 1985); POPULATION ESTIMATES PROGRAM, U.S. CENSUS BUREAU, HISTORICAL NATIONAL POPULATION ESTIMATES: JULY 1, 1900, TO JULY 1, 1999, at 1 (2000) (incarceration rate in 1975), available at <http://www.census.gov/popest/archives/1990s/popclockest.txt>; Cettinger, *supra* note 57, at 10 (same).

61. See JOSEPH I. HALLINAN, GOING UP THE RIVER: TRAVELS IN A PRISON NATION 164 (2001) ("By 1984, . . . prisons in thirty-two states and the District of Columbia were under court orders or consent decrees . . . . That same year, more than seventeen thousand inmates were released from state prisons due to overcrowding."); Bowditch & Everett, *supra* note 4, at 442 ("In 1985, at least one correctional institution in each of 33 states was under court order to reduce overcrowding."). By 1989, the number of prisons under court order to relieve overcrowding was up to forty-three. Belkin, *supra* note 5, at A14. And this problem has not gone away. In 1998, thirty states were housing prisoners in jails and other facilities because of overcrowding. ALLEN J. BECK & CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS,

apparent that more prisons had to be built. But this solution, too, had its problems: building prisons is not cheap,<sup>62</sup> and the building process itself can be complicated and time consuming.<sup>63</sup> Jurisdictions urgently needing new prisons thus faced—and still face—serious obstacles to getting new facilities up and running.

Nor was the second practical problem caused by the rapidly increasing incarceration rate—how to foot the bill—fully contained in the cost of building new prisons or renovating old ones. Prisons also have operating expenses, and these costs, too, can be high.<sup>64</sup> Corrections officials have to be trained and their salaries and benefits paid; inmates' food, clothing, medical care, programming, security, and so on, must be provided for; overhead must be covered. In all, by the mid-1980s, many states were facing serious budgetary problems traceable to the increased cost of running their prison systems, and these problems have only grown in intensity as incarceration rates have continued their upward climb.

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U.S. DEP'T OF JUSTICE, BULLETIN NO. NCJ 175687, PRISONERS IN 1998, at 7 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p98.pdf>.

62. In 1985, a new high-capacity medium-security facility could cost upwards of \$140 million, the equivalent of more than \$240 million in 2003 dollars. See *Prototype Prison Late*, ENGINEERING NEWS-RECORD, Dec. 19, 1985, at 33 (reporting that the cost of the “3800-bed medium security [prison] at Vacaville[,] . . . the first new state prison built in California in 22 years[,]” was estimated to cost \$144.7 million, up from the original estimate of \$122.5 million); see also Gail S. Funke, *The Economics of Prison Crowding*, 478 ANNALS AM. ACAD. POL. & SOC. SCI. 86, 91–92 (1985) (estimating the total cost of a five-hundred-bed medium-security prison at \$41 million to \$44 million, not including site acquisition).

63. Typically, when a state or locality seeks to build a new jail or prison, it must ask the voters to approve a bond issue to finance the project. However, despite voter support for criminal justice policies that emphasize incarceration, voter approval for the financing of new facilities is frequently withheld. See Dana C. Joel, *The Privatization of Secure Adult Prisons*, in PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* note 4, at 51, 58 (“In the 1980s, an average of 60 percent of all local referenda for jail bonds was rejected.”); see also Richard Harding, *Private Prisons*, in 28 CRIME & JUSTICE 265, 270 (Michael Tonry ed., 2001) (“Prisons were not high on voters’ priority lists [in the 1980s and 1990s] and prison construction bond proposals were voted down.”). And even in cases when voter approval is secured, the process of seeing a publicly funded capital project to fruition can be a lengthy one, with many procedural steps not required when building projects are privately financed. See Herman B. Leonard, *Private Time: The Political Economy of Private Prison Finance*, in PRIVATE PRISONS AND THE PUBLIC INTEREST, *supra* note 4, at 66, 73 (explaining that this process can involve public budgetary hearings on the appropriation of funds, referenda on the bond issue itself, design competitions, and time to conform to statutory obligations accompanying the raising of new public buildings).

64. For example, in 1985, the estimated annual cost of running a five-hundred-bed medium-security facility was \$7 million per year, or some \$14,000 per prisoner. Funke, *supra* note 62, at 93. To give some idea of the total operating cost of American prisons at that time, in 1985, there were 742,579 people incarcerated in the country, HINDELANG CRIMINAL JUSTICE RESEARCH CTR., *supra* note 56, at 478, up from 225,903 in 1975, Cettinger, *supra* note 57, at 10.

### C. Enter the Private Sector

It was under these circumstances that the states turned to the private sector for help. The help offered took two forms. First, the private sector offered to assist states with the capital financing of prison construction, a version of private sector involvement known as “nominal privatization.”<sup>65</sup> Second, private firms offered to take over the day-to-day management of entire penal facilities, pledging to run the prisons at a lower cost than the state would otherwise pay. At the time these firms emerged, this latter form of privatization—“operational privatization”<sup>66</sup>—was not a new idea; in the late 1970s, the federal Immigration and Naturalization Service (INS) had begun contracting with private firms for the building and operation of holding facilities for illegal immigrants awaiting hearings or deportation.<sup>67</sup> What *was* new was the status of those to be housed in the privately managed facilities—adults convicted of crimes and sentenced to state custody as punishment.<sup>68</sup> Notwithstanding this

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65. Leonard, *supra* note 63, at 70–71. Nominal privatization locates the ownership of penal facilities in private hands. *Id.* at 69. Forms of nominal privatization range from prisons built “on spec” by private firms acting independently in the hope of winning government contracts to house prisoners, to “lease purchase” agreements, which may directly involve the relevant public agency in the building process although the financing comes entirely from the private sector. *Id.* at 68–69; see also Jan Elvin, *A Civil Liberties View of Private Prisons*, 65 PRISON J. 47, 48 (1985) (describing a 1983 E.F. Hutton brochure entitled “Innovative Alternatives to Traditional Jail Financing”). Building prisons on spec has become more widespread in recent years as local communities, seeking to foster economic development, have teamed up with private prison providers to build prisons as a means of attracting government contracts to house convicted offenders. See Sasha Abramsky, *Incarceration, Inc.: Private Prisons Thrive on Cheap Labor and the Hunger of Job-Starved Towns*, THE NATION, July 19, 2004, at 22, 24–25 (noting the trend of on-spec private prisons in small, sparsely populated Texas counties).

66. Leonard, *supra* note 63, at 69–70.

67. See McDonald 1994, *supra* note 4, at 30 (describing the INS’s early use of “contracting with private firms to detain illegal immigrants pending hearings or deportation”). By 1988, almost one-third of the 2,700 people then held by the INS were in privately run detention centers. *Id.*; see also James Austin & Garry Coventry, *Are We Better Off? Comparing Private and Public Prisons in the United States*, 11 CURRENT ISSUES IN CRIM. JUST. 177, 183 (1999) (describing the early privatization of juvenile detention centers).

68. Privately managed jails also house individuals charged with crimes and awaiting trial. Sarah Armstrong & David Moulton, *Policy Considerations in the Privatization of Local Detention Facilities*, in CONTRACTING OUT GOVERNMENT SERVICES 122, 127 (Paul Seidenstat ed., 1999); David Sedore, *Private Prisons Don’t Lock in Savings: There’s Little Evidence to Support the Decade-Old Notion that Letting Businesses like Wackenhut Build and Run Lock-Ups Is Saving Tax Dollars*, BROWARD DAILY BUS. REV., May 16, 1997, at A8 (explaining that the Florida “[l]egislature began its experiment with private prisons [in the 1980s], awarding CCA a contract to run the Bay Correctional Facility, a local jail in Panama City that houses prisoners awaiting trial”).

difference, the process of privatizing the prisons took the same form as with the previously privatized INS facilities: states deciding which facilities to privatize and issuing a request for proposals (RFP),<sup>69</sup> firms bidding for the contract, and the winning firm getting a set payment per inmate per day in exchange for assuming responsibility for running the facility and providing for inmates' needs. There are variations on this standard arrangement,<sup>70</sup> but the basic idea in each case is the same: "the state remains the ultimate paymaster and the opportunity for private profit is found only in the ability of the contractor to deliver the agreed services at a cost below the negotiated sum."<sup>71</sup>

The present Article focuses on this latter, operational form of privatization.<sup>72</sup> The state's motivation in relying on the private sector in this way is a simple one—to find a way to house the growing inmate population while keeping costs down.<sup>73</sup> And the prison-

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69. See HARDING, *supra* note 3, at 71–74 (outlining the primary stages in the establishment of a private prison). RFPs articulate the agency's specific requirements for the proposed institution. Private firms answer with proposals that include detailed descriptions of the facility they plan to build. Michael Keating Jr. advises that agencies should encourage collaboration between operations management and legal advisors at an early stage in an RFP's development to avoid the dilution of specified standards that would lead to "an equally murky contract." Michael Keating, Jr., *Public Over Private: Monitoring the Performance of Privately Operated Prisons and Jails*, in PRIVATE PRISONS AND THE PUBLIC INTEREST, *supra* note 4, at 130, 143.

70. In the case of operational privatization, the responsibility delegated to private correctional firms can range from day-to-day operation of a facility, to the increasingly common full-service "DCFM" contracts (for "design, construct, finance and manage") which blend nominal and operational forms of privatization, to intermediate variants. HARDING, *supra* note 3, at 12–13.

71. *Id.* at 2.

72. At the same time, issues relating to prison construction are not irrelevant to this analysis. In particular, as will be seen, decisions as to when and where to build prisons generate parsimony concerns much like those raised by operational privatization. See *infra* Part IV.

73. See HALLINAN, *supra* note 61, at 167 ("The success of private prisons . . . is driven by a single premise: They are cheaper than their public counterparts."); HARDING, *supra* note 63, at 310 (describing the origins of prison privatization in the United States as "less about doing a different job more innovatively than doing the same job less expensively"). Some private prison advocates also argue that privatization would lead through innovation to an increase in the quality and safety of prisons. See, e.g., McConville, *supra* note 4, at 240 ("[T]here seems every reason to believe that private correctional concerns would make an appreciable and welcome contribution to an easing of crowding problems."). As Harding puts it, however, "[t]he notion of improving prisons and correctional regimes was not overly prominent in U.S. debates about privatization. . . . [Privatization] might well improve prisons and conditions, but that was not the main point." HARDING, *supra* note 63, at 272.

management companies themselves are equally financially motivated—the aim was, and is, to make a profit.<sup>74</sup>

The first private entity formed to take advantage of this new business opportunity was Corrections Corporation of America (CCA), founded in Nashville in 1983.<sup>75</sup> CCA's founders had no experience in corrections, but from the start, the company's management personnel were drawn from the public sector, including former state corrections commissioners,<sup>76</sup> at least one former head of the federal Bureau of Prisons (BOP),<sup>77</sup> and any number of former state prison wardens and superintendents.<sup>78</sup> Wackenhut Corrections Corporation, the prison-management division of global security giant Wackenhut Security, Inc.,<sup>79</sup> entered the market soon after. Both CCA and Wackenhut were turning a profit by the late 1980s, and by the mid-1990s, they together controlled 75 percent of the American private prison market.<sup>80</sup>

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74. See, e.g., Robbins 1987, *supra* note 4, at 816 (“We’ll hopefully make a buck at it. I’m not going to kid any of you and say we are in this for humanitarian reasons.” (quoting the director of program development of Triad American Corporation, “a multimillion dollar Utah-based company that had been considering proposing a privately-run county jail in Missoula, Montana”)).

75. HALLINAN, *supra* note 61, at 164; see Alan Mobley & Gilbert Geis, *The Corrections Corporation of America aka the Prison Realty Trust, Inc.*, in *PRIVATIZATION IN CRIMINAL JUSTICE: PAST, PRESENT, AND FUTURE* 207, 209 (David Shichor & Michael J. Gilbert eds., 2001) (detailing the history of CCA’s founding). CCA “was financed in part by some of the same investors that had helped launch both the Hospital Corporation of America and Kentucky Fried Chicken.” Aric Press, *The Good, the Bad, and the Ugly: Private Prisons in the 1980s*, in *PRIVATE PRISONS AND THE PUBLIC INTEREST*, *supra* note 4, at 19, 19.

76. For example, CCA Executive Vice President T. Don Hutto was formerly corrections commissioner in both Arkansas and Virginia. J. Robert Lilly & Paul Knepper, *The Corrections-Commercial Complex*, 39 *CRIME & DELINQ.* 150, 159 (1993) (listing the many former public corrections officials subsequently employed by private prison companies).

77. Michael Quinlan, former CEO of CCA, was director of the Bureau of Prisons from 1987 to 1992. Mobley & Geis, *supra* note 75, at 207, 216.

78. See HALLINAN, *supra* note 61, at 173–74 (offering a list of “former [prison] wardens and superintendents who had jumped ship to work in the private sector,” and explaining that “[t]he ranks of big companies like [CCA] are peppered with them”). In this regard, CCA is hardly alone, as the roster of officers of any number of private prison-management companies will attest. See Lilly & Knepper, *supra* note 76, at 158–59 (listing the many former public corrections officials subsequently employed by private prison companies).

79. See Press, *supra* note 75, at 19 (“The new [private prison] industry attracted serious money men from, among others: a division of Bechtel, the giant defense contractor; [and] Wackenhut, the nation’s largest private security firm . . .”). In 2003, Wackenhut Corrections changed its name to “GEO Group.” *PR NEWSWIRE, The GEO Group, Inc. to Start Trading on the New York Stock Exchange Under New Name and New Ticker Symbol*, Jan. 20, 2004.

80. Xiong, *supra* note 5, at C5.



From the start, these companies faced a serious challenge, one that remains for any company trying to make money from running a prison. If the state is to reduce the cost of its prisons through contracting out to the private sector, the contract price must be less than the total cost the state would otherwise incur in operating the facility.<sup>81</sup> And if private providers are likewise to make money on the venture, they must spend less to run the prisons than the contract price provides. For such arrangements to be remunerative for both parties, therefore, private prisons must be run at a considerably lower cost than the state would otherwise incur. At the same time, contractors must not allow either the quality of conditions of confinement or inmate safety to drop below existing levels; even staunch advocates of private prisons have insisted that “concern with cost savings should not outweigh considerations of quality.”<sup>82</sup>

In practice, private prison providers have seemed little concerned with meeting this challenge. Instead, the anecdotal evidence suggests that contractors have prioritized economy above all

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81. Indeed, some states make such cost savings a condition of contracting, writing the requirement right into the statutes. The Tennessee statute, for example, provides that no contract bid may be accepted unless “[t]he cost of the private operation and the cost to the state to monitor the private operation, shall be at least five percent (5%) less than the state’s cost for essentially the same services.” TENN. CODE ANN. § 41-24-104(c)(2)(B) (2004); *see also* FLA. STAT. ANN. § 957.07(1) (West Supp. 2004) (“The Department of Management Services may not enter into a contract or series of contracts unless the department determines that the contract or series of contracts . . . will result in a cost savings of at least 7 percent over the public provision of a similar facility.”).

It can be difficult to calculate precisely the full cost to the state of running its prisons. The “true cost to government” is obscured by the fact that “several costs of operating prisons and jails are not borne by the correctional agency but by a number of different agencies or different government accounts.” DOUGLAS McDONALD ET AL., PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE 36 (1998). These hidden costs can include, among others, employee benefits, some inmate medical care, utilities, and “the true cost of insurance,” which “may be overlooked, as governments generally self-insure by paying for unpredictable costs when they are incurred, rather than spreading these costs over all years.” *Id.* At the same time, “[a] parallel problem exists with respect to identifying all costs to government for contracting,” because “[p]rivate firms may not always bear all the costs of imprisonment.” *Id.* Among those activities “sometimes necessary to support private facilities” that “were paid by government” include “inspection and licensing,” “personnel training,” some “high-cost and catastrophic” medical or dental care for inmates, inmate transportation, case management, “background checks for visitors and volunteers,” pardon and parole review, “accounting and banking of inmate funds,” “payment of inmate wages,” and emergency response. *Id.* at 36–37. These hidden costs create problems for the state, both in trying to fix an appropriate contract price and in trying to determine whether privatization indeed saves money. But private prison contractors do not face this same problem, for their opportunity for making money lies solely in their capacity to run the prison for less than the contract price.

82. LOGAN, *supra* note 4, at 120.

else, with disturbing results for the inmates themselves. Consider, for example, CCA's Youngstown, Ohio, facility. When the Youngstown facility opened in 1997, CCA filled the medium-security prison with prisoners from the overburdened Washington, D.C., prison system.<sup>83</sup> The incoming D.C. inmates included a number of violent inmates classified as "maximum-security, high-risk," which CCA "reclassified" as medium security to fill the beds without having to equip the facility to handle maximum-security inmates.<sup>84</sup> Over the next eighteen months, the Youngstown facility saw more than forty-four assaults and two fatal stabbings,<sup>85</sup> including one inmate who was stabbed to death when a shortage of beds in the administrative segregation unit (a prison's protective custody area) led prison officials to house the victim with two men who had been threatening his life.<sup>86</sup>

At CCA Youngstown, economizing also took other forms. Former employees of the prison, for example, reported receiving a "rundown" by their employers, "saying two slices of bread per inmate costs this much. If you can cut corners here, it would mean a possible raise for us."<sup>87</sup> At Youngstown, even the "toilet paper was rationed," to the point that "inmates were forced to go without it, using their bedsheets instead."<sup>88</sup>

Other incidents elsewhere suggest Youngstown is not unique for either its cost cutting or the troubling effects of such measures.<sup>89</sup> This

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83. *60 Minutes: Private Prisons Break Rules to Make a Profit* (CBS television broadcast May 2, 1999).

84. *Id.*; see also HALLINAN, *supra* note 61, at 180 (explaining that CCA Youngstown "was not supposed to accept maximum-security inmates," but that "when they arrived, CCA did not object," for doing so would have cost the company \$14,659 per day in lost revenue").

85. Cheryl W. Thompson, *Ohio Issues Restraining Order for Prison Firm; Control of Facility Cannot Be Changed*, WASH. POST, Nov. 19, 1998, at B4.

86. *All Things Considered* (NPR broadcast Mar. 27, 1998), available at 1998 WL 3644336.

87. Mark Tatge, *Employees Criticize Privately Run Facilities*, CLEVELAND PLAIN DEALER, Aug. 30, 1998, at 18A (quoting Daniel Eshenbaugh and Robert Oliver, former correctional officers at the CCA Youngstown facility).

88. *Id.*

89. In 1996, for example, minimally trained employees of a Capital Corrections Resources-run jail in Brazoria County, Texas, were captured on videotape "forcing prisoners to crawl, kicking them and encouraging dogs to bite them." *Prison Privatization Is No Panacea*, HARTFORD COURANT, Aug. 24, 1997, at C2. At the time of the beating, the jailers had "had only 40 hours of classroom training." Kim Bell, *Texas Jail Says Incident Was Overblown*, ST. LOUIS POST-DISPATCH, Aug. 26, 1997, at 1A. At a CCA-run INS facility in Houston, "inmates were contained in large dormitories, each containing between 50 and 60 beds with no privacy whatsoever; no lockers; [and] no screening around the toilets or showers, which were open to

is not surprising, for efforts by private prison providers to cut costs even at the expense of inmates is the entirely predictable result of the existing structure of private prison contracts. Indeed, as I show, there is good reason to think that, where both the state and the contractor seek financial advantage, the challenge private prison contractors face—of running the prisons for less money than the state would otherwise pay without also bringing about a drop in the quality of prison conditions—cannot be met. There is, moreover, a further concern to which the use of private prisons gives rise, that fostering the private prison industry could create a powerful constituency with a financial interest in longer prison sentences, and the political clout to push sentencing policy in this direction, regardless of whether such punishments are consistent with the demands of legitimate punishment. These two possibilities lie at the root of the liberal critique of private prisons. But before this critique can be pursued, more must be said about the foundation of the legitimacy standard on which it rests.

## II. A LIBERAL STANDARD OF LEGITIMATE PUNISHMENT

Legitimate punishment in liberal democracy has several components.<sup>90</sup> Of these, two in particular bear most centrally on the legitimacy of penal policies and practices: the humanity principle, which obliges the state to avoid imposing punishments that are gratuitously inhumane, and the parsimony principle, which obliges

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view by both male and female staff.” Ellen Simon, *Prisons for Profit: Who’s Minding the Rights of Inmates When Justice Goes to the Lowest Bidder?*, 19 HUM. RIGHTS 22, 24 (Spring 1992) (quoting a British Prison Officers’ report). Dunham recounts a list of practices traceable to private prison providers’ “excessive cost consciousness,” Dunham, *supra* note 4, at 1495, including the housing of “sixteen aliens for two days in a cell designed for only six persons,” *id.* (citing *Medina v. O’Neill*, 589 F. Supp. 1028, 1041 (S.D. Tex. 1984)), failing “to provide adequate meals, staffing, and sanitation,” *id.*, and “failing to attend to the medical needs of an indigent prisoner because, in part, the prisoner could not pay for his treatment,” *id.* (citing *Ancata v. Prison Health Servs.*, 769 F.2d 700, 704 (11th Cir. 1985)). See *infra* text accompanying notes 236–38 (describing conditions that led the INS to close its Elizabeth, New Jersey, facility run by Esmor Correctional Services and conditions at Louisiana’s Tallulah Correctional Center for Youth, run by Trans-American Corporation, which was finally closed in 2004); see also Kathleen Kenna, “*You Better Be Damn Careful*”: *Tour of US Prisons Suggests Ontario Should Think Twice About Private Jails*, TORONTO STAR, Nov. 28, 1999, at F1 (reporting that, in South Carolina, “[t]he state cancelled a contract with CCA after allegations of brutality at a young offender facility” in which “[o]ne teen was allegedly hog-tied more than 30 times by guards as punishment,” and “[o]thers were squeezed 18 to a one-person cell with no toilets, only cups”).

90. See Dolovich, *supra* note 8, at 408–09, 411 (summarizing the five principles under which the punishment of criminals in a liberal democracy is legitimate).

the state to avoid imposing punishments of incarceration that are gratuitously long. In each case, gratuitous punishment is that which cannot be justified to all members of society under fair deliberative conditions.<sup>91</sup> These principles reflect familiar liberal ideals: that society owes particular obligations of respect and consideration toward fellow human beings, especially those rendered helpless, dependent, and vulnerable by actions society itself has undertaken, and that any violation of the liberty and dignity of citizens by the state demands compelling justification.

In what follows, I provide a foundation for these ideals in the theory of legitimate punishment in liberal democracy I have developed in greater detail elsewhere.<sup>92</sup> Doing so grounds the intuitions informing the liberal principles of humanity and parsimony, and thereby enriches our understanding of the obligations incurred when the state punishes convicted offenders.

#### A. *A Rawlsian Model of Legitimate Punishment*

State punishment represents a dilemma for liberal democratic societies.<sup>93</sup> For while punishment as a form of state power protects citizens from crime, it also represents the exercise of extremely oppressive force—at times even deadly force—by the state against its own citizens. A central challenge for any liberal theory is thus to establish the principles under which, in the name of criminal punishment, the state may legitimately burden, perhaps severely, the liberty, dignity, and bodily integrity of sovereign citizens.

How is the content of such principles to be determined? As I have elsewhere argued,<sup>94</sup> following Rawls, if the exercise of the state's power to punish in a liberal democracy is to be legitimate, it must be justifiable on terms that all those subject to this power would accept as just and fair under conditions of strict impartiality. Why conditions of strict impartiality? In a liberal democracy, all citizens are entitled to equal consideration and respect. All citizens, moreover, may be presumed to have an urgent interest in the greatest possible

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91. See *supra* note 18.

92. Those familiar with that previous work may prefer to skip this Part.

93. See discussion *supra* note 15.

94. See Dolovich, *supra* note 8, at 313–15 (developing a theory of legitimate punishment through application of a Rawlsian model of deliberation by parties in an original position, operating behind a veil of ignorance that has been suitably framed for a social context in which the problem of punishment is salient).

protection of what I have called their “security and integrity,” that is, security from assault on and interference with their physical and psychological integrity and well-being.<sup>95</sup> These goods are fundamental to the exercise of individual freedom and self-development. They are also at great risk of violation by both crime and punishment. All citizens thus have an important stake in the terms on which state punishment is imposed on criminal offenders. But if these terms were established absent conditions of strict impartiality, there would be a danger that those parties with the most power and influence would simply choose principles of punishment that would most protect the security and integrity of people like themselves and do little to protect the security and integrity of society’s most vulnerable members. Indeed, the most powerful citizens might even choose principles of punishment that put the urgent interests of the most vulnerable citizens at risk, if doing so would benefit themselves in any way. Of particular relevance to the present project, for example, they might impose punishment regimes that burden the security and integrity of the most vulnerable in order that they themselves could benefit financially.<sup>96</sup>

Applying Rawls’s model of the “original position” with its “veil of ignorance”<sup>97</sup> to the problem of punishment guards against this possibility. Behind the veil of ignorance, the parties selecting the principles of punishment know nothing of their own personal particulars or conception of the good. They can therefore only safeguard their own urgent interest in the greatest possible protection of their security and integrity if they choose principles that would also safeguard the like interest of all others. In this way, the strict impartiality of the modified Rawlsian model<sup>98</sup> ensures that parties

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95. *See id.* at 352–55.

96. The Mississippi legislature arguably did just this in passing its 1876 “Pig Law.” Oshinsky, *supra* note 35, at 40; *see also supra* notes 37–40 and accompanying text.

97. Behind the veil of ignorance, deliberating parties know nothing about the specifics of their own society or the particulars of their personal identity and social position. *See* JOHN RAWLS, A THEORY OF JUSTICE 137 (1971) (“Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage.”).

98. The model is modified for the particular problem of punishment. *See* Dolovich, *supra* note 8, at 350–52, where I argue that to apply Rawls’s model to the problem of punishment, its assumption of strict compliance by citizens in a well-ordered society must be replaced by the assumptions of a partially compliant society, in which (1) not all citizens may be relied on to act justly; (2) criminal justice institutions are flawed and untrustworthy and recognized as such; and (3) society’s background conditions are unjust and known to be so.

choosing principles of punishment will consider the various options from all possible social positions—including that of society’s least powerful and most vulnerable members. This standard of strict impartiality thus ensures equal consideration and respect for the liberty, dignity, and bodily integrity of all sovereign citizens.

*B. The Humanity and Parsimony Principles Derived*

The question then becomes: what constraints on the state’s criminal justice policies would emerge from the deliberative model just described? Elsewhere, I identify several such constraining conditions.<sup>99</sup> That analysis yields two principles, those of humanity and parsimony, which bear directly on the legitimacy of penal policies and practices. Space does not permit me here to provide full analytical support for this assertion, but brief consideration of the perspective of the deliberating parties in the original position should be sufficient to motivate the claim.<sup>100</sup>

Behind the veil, the parties know nothing of their own social position or personal particulars, but they do know that they will have some conception of the good that they will want to realize. They also know that they are choosing principles of punishment for a partially compliant society, that is, a society with some measure of crime, where innocent people are sometimes wrongfully convicted and punished, and in which social goods are unjustly distributed.<sup>101</sup> The parties will thus anticipate a threat to their security and integrity from both crime and punishment,<sup>102</sup> and they will seek principles that best protect these goods. How are they to do so? Behind the veil, the parties would reason according to the “leximin” variant of the “maximin” rule.<sup>103</sup> Maximin holds that under conditions of

99. See *id.* at 408–09, 411.

100. For further discussion on the theoretical grounding of these two conditions, see discussion *infra* Part III.A (on the humanity principle) and *infra* Part IV.A (on the parsimony principle).

101. For more on the conditions of partial compliance in the punishment context, see Dolovich, *supra* note 8, at 350–51.

102. For a response to the objection that parties in the original position will have no reason to fear punishment, see *infra* note 110.

103. See RAWLS, *supra* note 97, at 152–53 (“The maximin rule tells us to rank alternatives by their worst possible outcomes: we are to adopt the alternative the worst outcome of which is superior to the worst outcomes of the others.”). On the variant of maximin Rawls calls the “lexical difference principle”:

[I]n a basic structure with  $n$  relevant representatives, first maximize the welfare of the worst-off representative man; second, for equal welfare of the worst-off

uncertainty,<sup>104</sup> those wishing to maximize their prospects should assume that, once the veil is lifted, they will end up in the position of society's worst off.<sup>105</sup> Leximin then directs deliberators to select those principles that would guarantee the best possible result for the worst-off citizen who stands to be affected, and not to be "much concerned for what might be gained" by those who wind up in more fortunate positions.<sup>106</sup>

The parties will thus select those principles of punishment that provide the greatest possible protection for the security and integrity of the worst off. This means the parties would *not* agree to principles that could compromise the security and integrity of the worst off in order that other better-off members of society might satisfy their less urgent interest in accruing financial advantage—an interest that is less urgent because it is unconnected to the protection of anyone's security and integrity.<sup>107</sup> This stance can be understood as constituting a priority rule—call it "the priority of the most urgent interests"—to

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representative man, maximize the welfare of the second worst-off representative man, and so on until the last case which is, for equal welfare of all the preceding *n-1* representatives, maximize the welfare of the best-off representative man. We may think of this as the lexical difference principle.

*Id.* at 83. This principle has come to be known as "leximin." See Dolovich, *supra* note 8, at 382. For a more detailed discussion of the parties' need for leximin in the process of selecting the principles of punishment for a partially compliant society, see *id.* at 379–85.

104. Some readers may object that risk rather than uncertainty is the more appropriate description of the situation facing the parties behind the veil. For a justification of the position taken here, see Dolovich, *supra* note 8, at 342–46.

105. The "worst off" position here is judged on the basis of citizens' security and integrity. This is because, in considering the principles of punishment, the worst-off person who stands to be affected by the application of state punishment in any given case will be either the proposed target or the crime victim whose violation may thereby be prevented. In either circumstance, the most urgent concern facing the parties will be the greatest possible protection of their security and integrity.

106. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 98 (2001).

107. Protection of an individual's financial interests is not in all cases distinct from protecting his or her security and integrity. Consider, for example, "a crooked telemarketer who specializes in swindling elderly people out of their life savings." Personal communication with David Dolinko, UCLA School of Law (Aug. 17, 2004). The apprehension, conviction, and incarceration of this criminal could be said to be motivated in part by the desire, "[v]ia deterrence, . . . to enhance the financial security of elderly people who are vulnerable to swindlers." *Id.* But such cases are distinguishable from those that the parties in the original position would reject. What the parties would reject are principles that would compromise their own security and integrity to enhance another's financial position or otherwise to secure the financial interests of other persons where those interests are unconnected to preserving the security and integrity of those others. It is financial interest in this sense for which the parties would be unwilling to sacrifice their own more urgent interest in the protection of their security and integrity.

govern the selection of the principles of punishment.<sup>108</sup> Security and integrity are necessary preconditions for the exercise of all other basic liberties, prior even to material goods.<sup>109</sup> The parties, consistent with the priority of the most urgent interests, would therefore reject any principles authorizing punishment that would only enhance anyone's less urgent financial interests at the expense of the more urgent interest of the worst off in the protection of their security and integrity.

Both the humanity principle and the parsimony principle flow from this priority rule. Behind the veil, the parties cannot be confident that, once the veil is lifted and they enter society as citizens, they will not end up as either crime victims or targets of punishment.<sup>110</sup> They also know that incarceration represents a serious violation of the security and integrity of the target.<sup>111</sup> They will thus choose principles of punishment that impose incarceration only

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108. Cf. RAWLS, *supra* note 106, at 47 (“[T]his priority rule rules out exchanges (‘trade-offs,’ as economists say) between the basic rights and liberties covered by the first principle and the social and economic advantages regulated by the difference principle.”).

109. Without the protection of one's security and integrity, the provision of adequate material resources can mean little for the possibility of exercising even the basic liberties. For further elaboration of this argument, see Dolovich, *supra* note 8, at 352–56.

110. It might be objected that the veil of ignorance only obscures the parties' knowledge of morally arbitrary attributes, and that whether one is a target of state punishment is not morally arbitrary but instead the product of morally blameworthy conduct. However, the issue for the parties is not whether guilty offenders are to be held morally responsible for their actions (they are, *see id.* at 336–42), but whether, once the veil is lifted and the parties enter society as citizens, they could wind up as convicted offenders facing punishment. The parties would thus face a very practical question: whether, despite the conditions of partial compliance and their ignorance of the nature of their own (morally arbitrary) attributes, they could nevertheless be fully confident that they would always be in sufficient control over their (morally relevant) actions to guarantee that they would always be able to avoid any criminal actions for which they would be held fully responsible and punished, perhaps severely. And as I have elsewhere indicated, *id.* at 319, the answer to this question must be no, for three reasons. First, the danger of wrongful convictions in a partially compliant society means that even innocent people could find themselves facing criminal punishment once the veil is lifted. Second, although all citizens in a partially compliant society are stipulated to have the basic moral powers to the requisite minimum degree, the parties still know that they are human beings, with all the qualities of impulsiveness, bad judgment, proneness to error, and other limitations this status entails. And third and finally, an unjust distribution of goods in a partially compliant society means that citizens will differ dramatically in terms of both the pressures and temptations they face to offend against others, and the economic and moral resources with which they are equipped to resist such pressures and temptations. For these reasons, the parties cannot with confidence say in advance that they themselves will never end up as convicted offenders facing state punishment once the veil is lifted. For a more complete response to this objection, see *id.* at 317–20, 364–77.

111. *Id.* at 356–57.



when—and only to the extent that—doing so will maximize the security and integrity of the worst-off person who stands to be affected.<sup>112</sup> To the extent that a prison sentence would worsen the condition of the target vis-à-vis that person's security and integrity without improving anyone else's condition vis-à-vis *their* security and integrity, it would be viewed as merely gratuitous and thus beyond the scope of punishments the state may legitimately authorize.<sup>113</sup> Hence the parsimony principle, which prohibits gratuitously severe punishments.<sup>114</sup>

To this point, humane punishment has been assumed. The parsimony principle is thus concerned exclusively with length of sentence. But what of inhumane punishment? Under some extremely limited circumstances, imposing inhumane punishment may be consistent with maximizing the security and integrity of the least-well-off person who stands to be affected.<sup>115</sup> In the vast majority of cases, however, the imposition of any inhumane punishment would not satisfy these limited circumstances. And where it would not do so, it, too, would be merely gratuitous, and consequently illegitimate. Hence the humanity principle, which prohibits gratuitous inhumane punishment.

To identify the principles of legitimate punishment is no guarantee that the punishments actually imposed will in fact be legitimate. Many hurdles to effective implementation still exist.<sup>116</sup> Perhaps chief among them is ensuring that the political process that translates the principles into policies remains unaffected by illegitimate influences. Such legislative-stage processes are as vulnerable as deliberation over the basic principles themselves to being skewed toward serving the interests, urgent or otherwise, of the politically powerful at the expense of the urgent interests of more vulnerable citizens. Ideally, to guard against any such abuses, parties deliberating at the legislative stage as to how to implement the principles of legitimate punishment would do so as if behind a "modified veil." Such a veil would continue to screen out individuals' knowledge of their personal particulars while allowing full access to

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112. *Id.* at 385–94; *see also supra* notes 105–06 and accompanying text.

113. Dolovich, *supra* note 8, at 379–85.

114. Note that, in cases in which any incarceration at all would be unjustified, a sentence of even one day would be gratuitously severe and thus in violation of the parsimony principle.

115. *Id.* at 411–16; *see also infra* notes 121–23 and accompanying text.

116. Dolovich, *supra* note 8, at 419–28.

the facts about society that are necessary to crafting meaningful policy.<sup>117</sup>

In the real world, the legislative process falls somewhat short of this ideal. State officials, however, are still obliged to do what they can to secure the necessary conditions for legitimate punishment and to avoid taking steps likely to corrupt these conditions. This imperative may be thought of as an “integrity condition,” against which any criminal justice policy must be measured. Where legislators fail to satisfy this condition, the criminal justice system may come to lack integrity, a circumstance that could lead not only to illegitimate punishment but also to citizens’ widespread mistrust of the society’s criminal justice institutions. This danger, although certainly present where the issue is the humanity of conditions of confinement, is particularly salient in the parsimony context, where the issue is the severity of the sentences imposed. It is thus in the discussion of the parsimony principle that consideration of the integrity condition will most inform the analysis.<sup>118</sup>

### III. PRIVATE PRISONS AND THE HUMANITY PRINCIPLE

#### A. *Understanding the Humanity Principle*

The humanity principle, concerned with the conditions of confinement under which a given sentence is served, forbids

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117. On the modified veil and its purposes at the legislative stage, see RAWLS, *supra* note 97, at 200–01. The modified veil relevant at the legislative stage is to be distinguished from the modifications made to Rawls’s model of the well-ordered society, relevant at the initial stage at which the principles of punishment are determined. See Dolovich, *supra* note 8, at 351 (describing the modifications necessary to render Rawls’s model applicable to the problem of punishment).

118. In what follows, I consider the state’s use of private prisons in light of the principles of humanity and parsimony. In doing so, I directly consider the structure and functioning of private prisons, and the political context in which they operate. This approach may create the impression that my framework for analysis is not liberal at all, but is instead consequentialist. Concern with consequences, however, is not the exclusive province of consequentialists. True, the liberal perspective as I have sketched it here requires a determination whether the state’s use of private prisons is consistent with the requirements of humanity and parsimony, which are themselves abstract principles. But to make this determination, it must be established whether the use of this penal form is in fact humane, and whether it is in fact consistent with the obligation to avoid imposing punishments of unjustified severity. It is therefore necessary to consider the practical consequences of private prisons, both for the inmates themselves and for the processes that determine the sentences imposed. That this is so does not make this approach consequentialist, any more than the utilitarian commitment to the principle of the “greatest happiness for the greatest number” renders that moral theory deontological.

gratuitous inhumane punishment.<sup>119</sup> Inhumane punishments are those punishments imposed under conditions that degrade, humiliate, or otherwise seriously compromise essential aspects of the moral personhood of the target.<sup>120</sup> I take it as uncontroversial that punishments of this sort would include those that subject targets to nontrivial deprivations of the basic necessities of human life—adequate food, clothing, shelter, medical care, and so on—as well as those that pose an ongoing threat of physical or sexual assault.

Inhumane punishment may not always be incompatible with the demands of liberal legitimacy in a partially compliant society.<sup>121</sup> However, the circumstances under which such punishment might be legitimate are highly circumscribed, and at the very least would be subject to two main limiting conditions.<sup>122</sup> First, where the state's legitimate purposes can be achieved through either humane or inhumane forms of punishment, the state must impose only the former. And second, any inhumane punishment imposed must not be, in either duration or form, more severe than necessary to serve legitimate purposes. Each of these conditions is imposed for the same reason: any inhumane punishment beyond these points would be merely gratuitous and, therefore, illegitimate.<sup>123</sup>

The limiting conditions on inhumane punishment required by the liberal perspective understand “gratuitous” punishment through the lens of the priority of the most urgent interests. Put more formally, no punishment that compromises the essential aspects of the target's moral personhood may be imposed unless it can be reasonably certain and necessary to appreciably deter violations of the equally urgent interests of others who are as badly off as the incarcerated. It therefore follows that no inhumane punishment may be imposed in order to maximize the less urgent interests of anyone in their own financial gain, for any such inhumane punishment would necessarily be merely gratuitous.

How might this principle prohibiting gratuitous inhumane punishment be applied in the policy realm? For one thing, it would be an insufficient justification for inhumane treatment that money would

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119. See Dolovich, *supra* note 8, at 409–19 (elaborating and defending this principle).

120. For further discussion of this notion, see *id.* at 409–11.

121. See *id.* at 409–19. This is not to say that the imposition of such punishment would be affirmatively legitimate on this model—it is merely to say that it may not be clearly ruled out.

122. See *id.* at 417–18.

123. See *id.* at 411–12.

be thereby freed up that could be put towards improving the prospects of free citizens. Instead, inhumane punishment that could otherwise have been prevented through greater financial investment would be justified on this principle only if it can be shown *both* that the money saved thereby is necessary to improve the condition of the worst-off person in society with respect to their most urgent interests, and also that this expected improvement is not mere speculation or vaguely anticipated future benefit, but is reasonably certain to result if the necessary resources are shifted away from the prisons.<sup>124</sup> Where these twin conditions cannot be satisfied, the humanity principle obliges the state to spend the money necessary to prevent gratuitous inhumane punishment. The state is not required to spend more on inmates' upkeep than is necessary to satisfy the minimum standard of the humanity principle, although in some cases prudence or other considerations may counsel doing so. Luxury accommodations are not required. Where, however, the state is faced with a choice between protecting prisoners from inhumane conditions of confinement or funding some other appealing project, it is obliged to spend the money to protect its inmates unless the competing project equally implicates the most urgent interests of other citizens who are as badly off as the incarcerated.<sup>125</sup>

### *B. Framing the Issues*

In the private prisons debate, the dominant framework for assessing the desirability of private prisons is what I have termed comparative efficiency.<sup>126</sup> For this approach, the motivating question is how private prisons compare with their public-sector counterparts,

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124. This "reasonably certain to result" standard reflects the fact that the parties would not agree to principles that could compromise their most urgent interests on the basis of mere speculation or vague anticipated future benefits. For further discussion of this standard, see *id.* at 402–03.

125. States committed to honoring this fundamental obligation will at times face the difficult situation in which there are insufficient resources both to prevent the imposition of inhumane punishment and also to ensure the preservation of the conditions of moral personhood of other members of society who are as badly off as the inmates facing inhumane treatment. Presuming that the money saved on incarceration may be reasonably certain to satisfy the most urgent needs of other such citizens, such a case would indeed represent a dilemma. Either way, in seeking to satisfy the most urgent needs of society's worst off, the collectivity will fall short, and the humanity principle may well remain unsatisfied. However, in a society committed to imposing only legitimate punishment, this inadequacy would be recognized as such, and its remedy would be made a priority when sufficient funds became available.

126. See *supra* note 7.

and the central operating assumption is that if private contractors can run the prisons for less money than the state without the quality of prison conditions falling below existing levels, then the state should be willing to privatize.

It is important, however, not to let the impulse to comparative assessment distract from the main purpose. My goal in this Part is not to vindicate one form of penal management over another. It is instead to understand the structure and functioning of private prisons, in order to assess the extent to which the state's use of private prisons is consistent with the demands of the humanity principle. Only with this understanding will it be possible to see clearly the problems private prisons present, and to determine which of these problems are unique to private prisons and which represent tendencies found in the prison system as a whole.

This is not to suggest that comparison between public and private prisons is never in order. Ultimately, the humanity principle is concerned with the health, safety, and well-being of the incarcerated, and if these conditions turn out to be markedly better in one prison form than another, this difference ought to matter to those committed to legitimate punishment.<sup>127</sup> But it is crucial that such comparisons not be premature, that they not preempt a thoroughgoing analysis, and that they not be allowed to obscure the troubling structural problems that plague both public and private prisons as currently constituted. They must, moreover, be made on the basis of an appropriate measure: not cost, but legitimacy, understood here in terms of the humanity of conditions of confinement.

Any adequate analysis of the structure and functioning of private prisons requires an understanding of the motives of the two parties to the private prison contract. The private contractors' motives in both seeking and performing the contract are straightforward: to profit from the venture.<sup>128</sup> This very singularity of purpose is what is thought by many to make private prisons so appealing, for private prisons

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127. See Stephen P. Garvey, *Private Prisons: What to Do?* (Feb. 20, 2005) (unpublished manuscript on file with the author) (applying the Dolovich and DiIulio principles of punishment to an imagined legislative proposal to contract with a private firm to run some state prisons).

128. I use the term "profit" here in the broad sense of "gaining financial advantage." Particular private prison companies may have a range of strategic aims, from growing the company to paying handsome returns to shareholders. Whatever the business model, however, the contractors driving the move to private prisons over the past two decades in the United States (as well as in the United Kingdom, Australia, and New Zealand) are in it to make money in some fashion or other. *See supra* note 74.

seem to offer the state the possibility of harnessing the profit motive to serve public ends, whatever those ends may be.<sup>129</sup> As for the state, in the American context, the central aim is to save money on the cost of corrections.<sup>130</sup>

The remainder of this Part considers the implications for the humanity of conditions of confinement in a system in which both the prison contractor and the state are driven by economic interests. Section C explores the likely effects of this incentive system on the behavior of prison contractors, and Section D evaluates the efficacy of existing accountability mechanisms. Having explored the incentive structure and the regulatory landscape of private prisons, it will then be possible to make sense of one notable difference between public and private prisons: the elevated rates of violence in private prisons. This phenomenon is discussed in Section E, which argues that, so long as the state's use of private prisons is motivated by a desire to save money on the cost of corrections, private prisons are likely to be more violent and less humane even than state-run prisons.

This is not, however, to vindicate public prisons as currently constituted. Despite somewhat lower levels of violence, public prison conditions continue to be at odds in many respects with the demands of the humanity condition.<sup>131</sup> Section F, therefore, looks to public prisons themselves, and finds that several of the most disturbing features of private prisons are also present in the public context. It then identifies some lessons to be learned from the analysis of private

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129. See *supra* note 73. That the central motivating aim of government contractors is profit making is a basic assumption of the privatization literature and of the privatization movement itself. Indeed, in his important book on privatization, John Donahue uses the term “profit-seeker” as the place holder for the private, for-profit parties seeking government contracts. See JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 39 (1989) (distinguishing “two basic types of agents—profit-seekers and civil servants,” and explaining that “[t]he profit-seeker, in exchange for a *price*, agrees to deliver a *product*”).

130. See sources cited *supra* note 73 (explaining the centrality of cost savings to the appeal of private prisons for state officials). When surveyed, state agents identified cost as “only the fourth most important motivation” for their choice to privatize. Harding, *supra* note 63, at 267, 283; see also MCDONALD ET AL., *supra* note 81, at 16 (listing “reducing overcrowding,” “speed of acquiring additional beds,” and “gaining operational flexibility” as the top three objectives of state officials “for [c]ontracting with [p]rivate [c]orrectional [f]irms”). But as Harding puts it, this result “is not entirely reconcilable with the contemporaneous rhetoric and may represent a retrospective attempt to put a better public face on things.” Harding, *supra* note 63, at 267, 283; see also sources cited *supra* note 5 (quoting public officials for whom cost saving is the primary concern when considering prison privatization).

131. See, e.g., sources cited *supra* note 8 (noting the various dangers faced by prisoners as a result of conditions in public prisons).

prisons for the penal system in general—lessons that, if heeded, could render conditions in all our prisons more consistently humane.<sup>132</sup>

The first step in the analysis is to consider how private prisons might be expected to operate absent effective governmental regulation and oversight. The point here is not that no such regulation exists. But to move too hastily to asserting effective oversight short-circuits any possibility of fully understanding just what dangers are created by the state's use of private prisons. Before it is possible to achieve this understanding, it is necessary to clarify exactly how the "profit seeking" behavior of private contractors might affect the running of the prisons were it allowed to operate unchecked.

*C. A Thought Experiment: The Profit Motive Unconstrained*

To determine how for-profit private prisons might be expected to operate absent effective restraints on contractors' profit motive, consider the current structure of private prison agreements. Under the current system, the state agrees to pay a flat rate per inmate per day, and the contractor agrees to bear all the costs of running the prison. If the contractor is to make money, it must meet this contractual obligation for less than it earns from the state.

Private prison contracts thus contain a built-in incentive for the contractor to economize in two key respects. First, contractors will be tempted to reduce the amount spent on meeting inmates' needs. In a prison, every aspect of inmates' lives is dictated by the institution: when, what, and how much they eat; whether they get leisure time, adequate medical care, protection from harm, or access to rehabilitative or educational programming; the content and design of their beds and their cells; and when they shower and for how long. No detail of their lives remains unregulated. In a private prison, each of these aspects of inmates' lives offers the potential for increasing profit margins.<sup>133</sup> Absent effective checks, efforts on the part of private

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132. Much of the argument that follows is consistent with the insights of economists, corporate-law scholars, and others who have explored the issue of "agency costs" in the context of delegated power more generally. See, e.g., Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 *ACAD. MGMT. REV.* 57, 57-59 (1989) (collecting sources). What is new in the argument I offer is a sustained analysis of the agency-cost problem in the private prisons context and of the putative solutions to it, and an emphasis, not on financial costs, but on the human cost of such arrangements, which from the perspective of liberal legitimacy is paramount.

133. Beaumont and Tocqueville observed over a century ago the effects of such incentives, arguing that

prison administrators to cut operational costs could thus lead to decisions that deprive inmates of basic human needs, a hallmark of inhumane punishment.

Second, profit-seeking contractors will be tempted to cut the cost of labor. As one industry observer explains, because two-thirds or more “of a prison’s budget goes to staffing and training,” private providers “must reduce expenditures in these areas if they are going to make a profit.”<sup>134</sup> How might such cost cutting lead to inhumane conditions of confinement? The more effective correctional officers are at maintaining a secure prison environment, the safer the inmates will be from the threat of physical assault.<sup>135</sup> But guarding inmates requires constant interaction in a tense atmosphere with people who are bored, frustrated, resentful, and possibly dangerous.<sup>136</sup> To protect inmates from harm and to ensure their own personal safety, correctional officers require training, experience, good judgment, and presence of mind. But when such officers are overworked and undertrained, or work in prisons that are understaffed, they are at a disadvantage in such a volatile environment and will thus be less effective at maintaining safe and secure prison conditions. Money-saving strategies that include “hiring fewer staff members, paying

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when the same person contracts for the food, clothing, labor, and sanitary department of the convicts [the system is] equally injurious to the convict . . . because the contractor, who sees nothing but a money affair in such a bargain, speculates upon the victuals as he does on the labor. If he loses upon the clothing, he indemnifies himself upon the food, and if the labor is less productive than he calculated upon, he tries to balance his loss by spending less for the support of the convicts, with which he is equally charged. . . . The extent of his privileges, moreover, gives him an importance in the prison, which he ought not to have . . . .

BEAUMONT & TOCQUEVILLE, *supra* note 33, at 68. From this, the authors concluded that “it is therefore advisable to separate [the contractor] as much as possible from the penitentiary, and to counteract his influence, if it cannot be neutralized entirely.” *Id.*

134. Dunham, *supra* note 4, at 1498 n.158 (quoting Director of Jail Operations Richard Ford, Nat’l Sheriffs’ Ass’n); *see id.* (placing the proportion of a prison’s budget that goes into staffing and training at 80–90 percent); *see also* SHICHOR, *supra* note 4, at 149 (“[B]etween 60% to 80% of the correctional cost is labor-related.”); Kenna, *supra* note 89, at F1 (reporting that labor costs are “about 75 per cent of prison budgets”); Tatge, *supra* note 87, at 18A (“Staffing costs typically make up 60 percent to 70 percent of a prison’s operating costs.”).

135. The same is true of sexual assault, which is an ongoing threat in correctional facilities across the country. *See generally* HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001) (surveying the problem and making some policy recommendations); WOMEN’S RIGHTS PROJECT, HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996) (same).

136. *See* SHICHOR, *supra* note 4, at 194–97 (“The high turnover rate also may be a result of the pressures of the everyday work with a generally hostile and manipulative ‘clientele’ and monotonous routines that usually lead to a high staff burnout rate.”).



lower wages, and reducing staff training”<sup>137</sup> thus increase the threat to inmates of physical assault, a further hallmark of inhumane punishment.<sup>138</sup>

The foregoing account is likely to meet with two objections. First, some may object that it overlooks the potential of contractors to find innovative ways to reduce the cost of labor and other necessities so as to allow a comfortable profit margin without putting prisoners at risk.<sup>139</sup> However, the existence of alternative avenues for profit making does not mean that contractors would not also seek to increase profit further in the ways predicted, were they able to do so without detection or penalty.<sup>140</sup> There is, moreover, little evidence of cost-saving innovation in private-sector prisons.<sup>141</sup> Nor, given the nature of prison administration, is there much scope for such innovation in this arena consistent with the humanity principle.<sup>142</sup>

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137. Dunham, *supra* note 4, at 1498. *But cf.* Belkin, *supra* note 5 (quoting industry officials attributing savings to their freedom from government rules, for example those governing procurement); Fox Butterfield, *For Privately Run Prisons, New Evidence of Success*, N.Y. TIMES, Aug. 19, 1995, at A7 (quoting industry officials attributing savings to “reducing labor costs by making prisons a better place in which to work”).

138. As White puts it,

[m]uch of the supposed competitive advantage of private prisons derives from their ability to sidestep the civil service wages required with public prison guards. This dynamic encourages not only the employment of under-trained and disinterested employees but aggregate reductions in staffing—practices which in turn account in part for elevated levels of abuse, inmate-on-inmate violence, and so forth.

White, *supra* note 2, at 143.

139. According to Logan, for example, “CCA reports that it achieves savings in the key area of security personnel through efficient scheduling and facility design, and through strategic use of electronic surveillance systems. These management and capital investments have enabled CCA to reduce labor costs to about 60 percent of operating costs.” LOGAN, *supra* note 4, at 81.

140. Not all contractors, it might be argued, will value profit over satisfying the demands of the humanity principle. But given the incentive structure, it must be assumed that many will. For further discussion of this point, see *infra* note 159.

141. See GERALD G. GAES ET AL., U.S. BUREAU OF PRISONS, THE PERFORMANCE OF PRIVATELY OPERATED PRISONS: A REVIEW OF RESEARCH, in McDONALD ET AL., *supra* note 81, app. 1 at 1, 35 (“[D]espite the claims about cost savings and increased value, in reality there have been no empirical studies documenting innovations in the private sector in the use of labor or the purchasing of goods and services. . . . The private sector does not appear to argue that they run prisons in a dramatically different way based on different philosophies of managing inmates.”).

142. See, e.g., DiIulio, *supra* note 46, at 155, 171–72 (arguing that the belief that private prisons will be more innovative is flawed because “it is grounded in abject ignorance of the existing range of intersystem, intrasystem, and historical variations in correctional philosophies” and because it rests on questionable “theoretical assumptions about the relationship between given organizational conditions and organizational innovations”).

Unlike Adam Smith's butcher, brewer, or baker,<sup>143</sup> private prison administrators are not dealing with inert materials.<sup>144</sup> They are instead dealing in an extended and intimate way with human beings, whose treatment, if it is to be humane, requires constant attention and the careful exercise of discretion.<sup>145</sup> Running a prison is thus necessarily labor intensive and affords little scope for more than marginal cost-saving innovation consistent with the humanity principle.<sup>146</sup>

Second, some may object that the above account misunderstands the process of government contracting. Privately managed prisons, after all, exist only at the behest of the state. If the state wants to ensure a certain level of service provision, it need only specify its demands in the contract and hold the provider accountable.<sup>147</sup> To

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143. ADAM SMITH, *THE WEALTH OF NATIONS* 15 (Edwin Cannan ed., Modern Library 2000) (1776).

144. It is this quality of the task of running a prison that distinguishes this pursuit from the business of those worthies—the butcher, the brewer, and the baker—referred to in Smith's oft-cited explanation of self-interest as the engine of the market economy. *See id.* Smith noted that, in seeking our dinner, “[w]e address ourselves, not to the[] humanity [of these market providers] but to their self-love, and never talk to them of our own necessities but of their advantages.” *Id.* Given the vulnerability and dependence of prisoners on prison officials, however, if the conditions of confinement in prisons are to be humane, the strategy suggested by Smith in this passage will not do.

145. *See* Elaine M. Crawley, *Emotion and Performance: Prison Officers and the Presentation of Self in Prisons*, 6 PUNISHMENT & SOC'Y 411, 414 (2004) (explaining that relations between inmates and prison guards “are also emotionally charged because the degree of *intimacy* involved in working with prisoners is great”); *id.* at 415 (describing the prison as a quasi-domestic sphere).

146. As Donahue puts it, “in general, incarcerating people is an enterprise with relatively little scope for resource-sparing technical progress. . . . Prisoners must be sheltered, fed, cared for when sick, protected from each other, and prevented from escaping. These do not appear to be tasks that allow for radical innovation in technique.” DONAHUE, *supra* note 129, at 162–63. Where truly radical innovation suggests itself, it is certain to be *more* costly than current approaches, and thus would be inconsistent with the goal of cost savings. *See, e.g.,* Elaine Genders, *Privatisation and Innovation—Rhetoric and Reality: The Development of a Therapeutic Community Prison*, 42 HOWARD J. CRIM. JUST. 137, 154 (2003) (“The fiscal dimension of the value-for-money ideology seriously impedes the realisation of the opportunities for innovation [in prison management].”).

147. *See* Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 170–71 (2000) (“To some extent, objections to contracting out might be ameliorated by careful attention to contract design. Contracts could specify tasks more clearly, detail procedures more thoroughly, and clarify responsibilities.”). *But see id.* at 171 (acknowledging the “limit to technocratic solutions”). Even assuming such contractual completeness is possible, it could also work to the states' disadvantage. For instance, states could conceivably stipulate a minimum investment in the training and remuneration of the prison labor force. Doing so, however, would increase the cost of the contracts considerably, something cost-conscious state officials would wish to avoid.

achieve humane conditions of confinement, in other words, the contractual terms need only specify as much.

To some extent this is true. Where the standard of service to be provided can be specified in detail in advance, careful drafting can provide some protection from abuses.<sup>148</sup> But with respect to many key features of prison life that are crucial from the humanity perspective—the use of force, health care provision, inmate classification, discipline, and inmate safety, among others—it can be difficult to specify in advance precisely how they are to be provided.<sup>149</sup> To a significant extent, that is, private prison contracts are necessarily “incomplete,” meaning that the contractor’s obligations cannot be fully specified in the contract itself.<sup>150</sup>

The inevitable incompleteness of private prison contracts raises two difficulties for efforts to rely on careful drafting alone to check contractor abuses. First, the necessarily vague character of incomplete contracts makes violations difficult to demonstrate and thus difficult to police.<sup>151</sup> Second, because they are incomplete, prison contracts accord considerable discretion to contractors. This discretion comes in the form of what some economists call “residual control rights,” which carry “the authority to approve changes in procedure or innovations in uncontracted-for contingencies.”<sup>152</sup> From the standpoint of prison administration, this allocation makes sense. Consider, for example the use of force. Plainly, it is not possible to spell out in advance every contingency within a prison that will

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148. With respect to food service, for example, the American Correctional Association (ACA) “specifies the number of meals that must be served, caloric intake, time between meals, conditions for preparation and keeping of food, as well as palatability. It also refers to the standards of the American Dietetic Association on food quality.” Oliver Hart et al., *The Proper Scope of Government Theory and an Application to Prisons*, 112 Q. J. ECON. 1127, 1149 (1997). For more on ACA standards, see *infra* Part III.D.2.

149. See Freeman, *supra* note 147, at 171 (“No matter how careful the drafter, some tasks are difficult to specify in contractual terms (for example, delivering quality health care or providing a safe environment for prisoners).”).

150. See Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 730 (1992) (“Legal scholars use the term ‘incomplete contracting’ to refer to the contracts in which the obligations are not fully specified.”) cited in Russell Korobkin, *The Efficiency of Managed Care “Patient Protection” Laws: Incomplete Contracts, Bounded Rationality, and Market Failure*, 85 CORNELL L. REV. 1, 29 (1999); Hart et al., *supra* note 148, at 1128 (defining incomplete contracts as contracts in which “the quality of service the government wants often cannot be fully specified”).

151. See, e.g., Freeman, *supra* note 147, at 171 (“[Contractual] vagueness may impede meaningful monitoring.”).

152. Hart et al., *supra* note 148, at 1132.

require the use of force by correctional officers. Prison employees thus need discretion to use force when they think it warranted, for it is they who face an unpredictable environment and must make the hard judgments when potentially dangerous situations arise. Still, the extensive discretion necessarily lent by incomplete prison contracts to both line officers and prison administrators opens up space for these parties to use force against inmates in ways at odds with the demands of the humanity principle while still formally fulfilling the contract's terms.<sup>153</sup> Thus, even carefully drafted contracts cannot prevent many decisions by private contractors that might yield inhumane conditions of confinement.

There is, moreover, a further problem with relying on contract drafting alone to guard against possible contractor abuses. Even assuming the possibility of specifying contractual standards consistent with the humanity principle, the “hidden delivery” of prison services<sup>154</sup> means that contractual violations may well go undetected. Imagine, for example, a contractual provision capping the number of assaults on inmates that may occur annually in the facility.<sup>155</sup> To determine compliance with this provision, it is necessary for the state to have access to reliable data on such assaults. Yet private prison administrators are the ones who control access to this information, and they have a strong financial incentive to downplay the number of

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153. *See id.* at 1128. Or consider the provision of prisoners' medical care. As Russell Korobkin has shown in the context of managed healthcare, it is impossible to specify in advance the precise nature of a health plan's obligations to the consumer. *See* Korobkin, *supra* note 150, at 29 (explaining that doing so would be both impractical, because the “number of permutations” that might possibly arise and call for some medical treatment could not “reasonably” be itemized in advance, and “theoretically impossible because the fast pace of change in medical technology and knowledge” makes it hard to predict what treatment would be appropriate when the symptoms arise). In terms of the treatment to be provided, often the most that can be specified in advance is that the healthcare provider will provide all “medically necessary” or “reasonable and necessary” treatment. *Id.* at 30. Effective checks are therefore needed to ensure that contractors do not exercise their residual control rights in a way that saves money at the expense of providing necessary treatment for patients. *See, e.g., id.* at 74–84 (exploring judicial and legislative mechanisms for addressing this problem in the managed-care context in general). In the prison context, the hidden delivery of prison services, combined with the “low moral status of the prison population,” Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 631 (2000), means that prisoners are especially vulnerable to abuses of contractor discretion in the health care context. *See infra* text accompanying notes 294–97 (describing abuses of discretion on the part of Correctional Medical Services, a for-profit health care provider that presently holds contracts with prisons in over thirty states).

154. Gentry, *supra* note 4, at 356–57.

155. Such a provision might provide for financial penalties to be borne by the contractor for every assault in excess of the specified number.

assaults that actually occur, particularly if this number exceeds contractual specifications.<sup>156</sup> Thus, even assuming a contract that carefully delineated the maximum number of assaults, contractor control over the information necessary to effectively implement these contractual provisions could defeat this effort at regulation through contract.<sup>157</sup>

*D. Available Accountability Mechanisms and Their Limits*

The claim so far is this: absent effective checks, the desire for profit will lead private prison contractors to cut costs in ways that will create or exacerbate gratuitously inhumane conditions of confinement. This claim is not a radical one. To the contrary, it reflects a basic assumption at the heart of the private prisons literature, one made by advocates and opponents alike, that without effective accountability mechanisms, privatization will lead to considerable reductions in the quality of prison conditions.<sup>158</sup> The only difference here is that I have explicitly emphasized the costs of inadequate regulation in terms of the potentially inhumane treatment of inmates.<sup>159</sup>

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156. Possible motivations for downplaying the number of assaults also exist in the public system, a fact that reinforces the need for effective monitoring and oversight mechanisms in the public sphere as well as the private.

157. The state's relationship to private prison employees reflects a basic problem of agency theory, which arises when "(a) the desires or goals of the principals and agent conflict, and (b) it is difficult or expensive for the principal to verify what the agent is actually doing." See Eisenhardt, *supra* note 132, at 58.

158. See, e.g., Harding, *supra* note 63, at 340 (noting that private prisons "pose some serious political and humanitarian risks"); Pozen, *supra* note 4, at 282 (identifying riots and abuse of inmates as "indicative of the risks of contracting," because "with for-profit operators, a prison can quickly degenerate when its management is determined to save money by cutting corners and the government does not intervene," and arguing that the "greater risks" posed by private prisons "place an added onus on regulators"); Robbins 1988, *supra* note 4, at 796 (arguing that if privatization of prisons is to succeed "in the long run, it must be accomplished with *total accountability*").

159. One need not assume here that no private contractor has a conscience. In no business context are the consciences of providers exclusively relied on to ensure quality. Instead, the assumption is that incentives are required to get the results customers want and to deter contractors of any sort from acting solely in their own interests. See DONAHUE, *supra* note 129, at 170 ("[In the prison context,] if incarceration contracts are awarded on the basis of cost, and if it is possible to cut costs by lowering standards, then quality control becomes an urgent issue. . . . And without robust measures to guarantee the conditions of confinement, the businesspeople least constrained by scruples are likely to enjoy a competitive advantage in the imprisonment industry.").

Properly channeled, the profit-seeking motive of private contractors may well allow states to achieve desired goals in terms of prison conditions without also creating the danger of contractor abuses. But to achieve such desirable results, effective regulation is indispensable. In what follows, I consider the four regulatory mechanisms most commonly introduced as evidence that effective checks on private prisons exist—the courts, accreditation, monitoring, and competition—and in each case explain why, under current and foreseeable circumstances, they are inadequate to the task.

1. *The Courts.* Arguably, any dangers private prison inmates face could be neutralized through lawsuits brought by them or on their behalf. Not only might abused inmates thereby get a remedy,<sup>160</sup>

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160. State prisoners seeking to recover for violations of their constitutional rights must proceed in federal court under 42 U.S.C. § 1983, which provides a remedy for citizens who suffer “deprivation of any rights, privileges, or immunities secured by the Constitution and laws” at the hands of any public official acting “under color” of state law. 42 U.S.C. § 1983 (2000). This statutory provision is the primary vehicle through which the civil rights claims of prisoners held in state facilities get into federal court. Analogous claims against federal officials must be brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); see also *FDIC v. Meyer*, 510 U.S. 471, 484 (1994) (holding that *Bivens* actions can be brought only against federal officials and not against federal agencies). In neither case, however, may prisoners sue the states directly. See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989) (holding that states are not “persons” for § 1983 purposes and therefore cannot be sued under that statute).

In 2001, the Supreme Court held that a federal inmate could not bring a *Bivens* suit against the prison contractor managing the facility in which he was held. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 n.2 (2001). The Court has not yet addressed the question whether federal inmates may sue private prison officials in their individual capacity under *Bivens*, but in *Malesko*, the Court, per Chief Justice Rehnquist, made much of the fact that alternative remedies existed under which Malesko could have sought redress. See *id.* at 72 (“It was conceded at oral argument that alternative remedies are at least as great, and in many respects greater, than anything that could be had under *Bivens*.”). This emphasis, along with *Malesko*’s pointed cautions against extending the *Bivens* right of action to any new contexts, suggests that *Bivens* is unlikely to be extended any time soon to federal prisoners suing private prison officials in their individual capacity. See *id.* at 74 (“The caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades, forecloses such an extension here.”). Only one federal appeals court—the Tenth Circuit—has addressed this issue since *Malesko*. Taking its cue from the cautionary tone of the majority opinion, the court held that there is no private right of action for damages under *Bivens* against employees of a private prison for alleged constitutional deprivations when alternative state or federal causes of action for damages are available to the plaintiff. See *Peoples v. CCA Det. Ctrs.*, 422 F.3d 1090, 1108 (10th Cir. 2005). But see *Sarro v. Cornell Corr.*, 248 F. Supp. 2d 52, 64 (D.R.I. 2003) (holding that federal inmates held in privately run prisons may bring a *Bivens* action against individual guards employed by the private prison operator); *Peoples*, 422 F.3d at 1108–13 (Ebel, J., dissenting) (arguing persuasively that all of the following factors support the view that *Bivens* does create a cause of action against individual private prison guards: (1) Supreme Court

but the threat of lawsuits and the accompanying possibility of major financial liability could provide incentives for private prison providers not to cut corners in ways likely to harm inmates.<sup>161</sup> However, given the current state of the relevant law, the courts are not likely to provide a meaningful check on abuses in private prisons, notwithstanding the Supreme Court's ruling denying private prison guards qualified immunity from Section 1983 actions.<sup>162</sup>

Apart from a brief period in the late 1960s and early 1970s, judicial attitudes toward challenges to prison conditions have been marked by considerable deference to the judgment of prison officials.<sup>163</sup> As a consequence, the constitutional rights of inmates have been interpreted extremely narrowly.<sup>164</sup> For this reason, even instances of serious physical harm to inmates may not qualify for legal relief. Moreover, the mechanisms through which private prison providers might seek to save money could combine with the deferential standard of review under the Eighth Amendment to make it even less likely that private prison inmates could make out a successful constitutional claim.

Consider, for example, the use of force by prison officials against prisoners. For an inmate to have a viable Eighth Amendment claim against a prison official for use of excessive force, the inmate must show that the prison official acted "maliciously and sadistically," with the intention to cause harm.<sup>165</sup> So long as the prison official can make

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precedent, (2) the imperative of ensuring parallel remedies where possible for federal and state prisoners and for prisoners in public and private facilities, (3) the imperative of ensuring uniform rules to govern conduct toward all prisoners equally, and (4) the interest in deterring constitutional violations on the part of individual prison guards).

161. Private prison companies are required by statute to have insurance to cover the individual employees who are held liable for constitutional violations. *See* LOGAN, *supra* note 4, at 190–91 (detailing the high costs of insuring private prisons). Like any other purchaser of insurance, however, such companies have an interest in keeping the cost of premiums as low as possible and would thus seek to minimize any legal claims for which they are responsible.

162. *Richardson v. McKnight*, 521 U.S. 399, 401 (1997).

163. *See* David N. Wecht, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 818–20 (1987) (explaining that "in areas profoundly affecting the Fourteenth Amendment liberty interests and process rights of prison inmates, the courts have continued to accord broad deference to the judgment of prison personnel"); Weidman, *supra* note 8, at 1509–24 (examining the extent of the deference historically accorded prison officials in the federal courts).

164. *See, e.g.,* Wecht, *supra* note 163, at 820 (explaining that judicial deference to the judgment of prison officials has led the Supreme Court to hold that "staff members may isolate inmates, restrict their incoming mail, determine how many beds a cell will hold, prohibit contact visits, and limit eligibility for rehabilitation programs" (footnotes omitted)).

165. *Hudson v. McMillian*, 503 U.S. 1, 6–7 (1992).

a showing that “the use of force could plausibly have been thought necessary,” the prisoner’s claim will fail.<sup>166</sup> For example, even assuming that the corrections officers at a privately run jail in Brazoria, Texas, who “forc[ed] prisoners to crawl, kicking them and encouraging dogs to bite them,”<sup>167</sup> engaged in this abusive treatment because they were insufficiently trained in less-abusive inmate control techniques, the prisoners themselves could have no constitutional recourse so long as the guards could plausibly claim to have thought their actions necessary to “preserve internal order and discipline.”<sup>168</sup> Under these standards, private prison inmates suffering harm traceable to contractors’ inadequate investment in labor are even *less* likely to recover than public prison inmates: guards who are insufficiently trained may well resort to force more readily than guards with adequate training and experience, motivated in doing so not by a “malicious and sadistic” desire to cause harm, but by their own ignorance and fear.<sup>169</sup>

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166. *Id.* at 7 (quoting *Whitley v. Albers*, 475 U.S. 312, 321 (1986)).

167. *Prison Privatization Is No Panacea*, *supra* note 89, at C2.

168. *Hudson*, 503 U.S. at 6–7.

169. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that municipalities may be liable for the unconstitutional conduct of their employees when the constitutional violation is attributable to a municipal policy or custom. *Id.* at 690–91. One might thus seek to argue by analogy that where the use of force against prisoners by correctional officers is attributable to private prison administrators’ policy or custom of underinvesting in staff training, the prisoner ought in that case to recover. But the issue in *Monell* was that of when a municipality may be held liable under § 1983 for conduct itself adjudged to be unconstitutional. And the doctrinal problem sketched here is precisely that when prison guards believe—even mistakenly—that such force is necessary, there *is* no constitutional violation for which the prison contractor may be held liable. The subjective component of the Eighth Amendment standard for cases involving the use of force—that such force must be shown to have been applied *not* as a “good faith effort to maintain or restore discipline,” but rather “maliciously and sadistically for the very purpose of causing harm,” *Whitley*, 475 U.S. at 320–21—means that the fact of the violation itself turns on the state of mind of the prison official. The question of *why* the conduct occurred, which motivates the Court’s holding in *Monell*, thus has no relevance here.

True, there is some language in both *Hudson* and *Whitley* suggesting that prisoners subject to the poor judgment of badly trained guards could rebut the presumption that the judgment of corrections officials as to when force is necessary is always reasonable. For example, the Court states that:

[i]n determining whether the use of force was wanton and unnecessary, it may also be proper to evaluate the need for application of force, the relationship between that need and the amount of force used, the threat “reasonably perceived by the responsible officials,” and “any efforts made to temper the severity of a forceful response.”

*Hudson*, 503 U.S. at 7 (quoting *Whitley*, 475 U.S. at 321). A prisoner in the Brazoria facility might thus try to argue that the force used was far in excess of what was needed, and that



Or consider the Eighth Amendment standard for prisoners alleging inadequate medical care. In *Estelle v. Gamble*,<sup>170</sup> the Supreme Court held that for medical neglect of prisoners to rise to the level of an Eighth Amendment violation, prison officials must be shown to have acted with “deliberate indifference to serious medical needs.”<sup>171</sup> To satisfy this standard, prisoners must show that prison officials actually knew of the health risk and failed to take reasonable steps to address the problem.<sup>172</sup> It is not enough for the inmate to have told an official of pain or other physical distress; he or she must also show that the official actually “dr[e]w the inference” from these facts of “an excessive risk to inmate health or safety.”<sup>173</sup> Even under ordinary circumstances, it can be difficult for prisoners to make this showing. Add the profit motive to the picture, and the possibility of making out a claim of Eighth Amendment medical neglect becomes even more difficult. Prison operators wishing to save money on medical care might, for example, create a deliberately unwieldy process for prisoners wishing medical attention, as has apparently been the strategy of Correctional Medical Services (CMS), a for-profit prison medical services company operating in prisons and jails in twenty-seven states.<sup>174</sup> They might also hire medical staff of questionable competence, increasing the likelihood that conditions will go undiagnosed.<sup>175</sup> Or they might institute treatment protocols of

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adequately trained correctional officers would not reasonably have perceived a threat demanding the level of force used. But even assuming that the facts would support such an argument, it would likely be to no avail. For the Court in *Hudson* also reaffirmed that prison officials “should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” *Id.* at 6 (internal citations omitted) (quoting *Whitley*, 475 U.S. at 321–22); see also *Whitley*, 475 U.S. at 320 (underscoring that courts should be “hesitan[t] to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance”).

170. 429 U.S. 97 (1976).

171. *Id.* at 106.

172. *Farmer v. Brennan*, 511 U.S. 825, 844–45 (1994).

173. *Id.* at 837.

174. See Hylton, *supra* note 8, at 48–49 (detailing the lengthy procedure CMS requires its doctors to complete prior to providing services to inmates); see also Correctional Medical Services, <http://www.cmsstl.com/aboutus/overview.asp> (last visited Dec. 13, 2005); *infra* text accompanying notes 294–97.

175. See, e.g., Andrew Skolnick, *Prison Deaths Spotlight How Boards Handle Impaired, Disciplined Physicians*, 280 JAMA 1387, 1387 (1998) (detailing CMS’s hiring practices, which include hiring medical personnel whose licenses have been suspended or revoked by state medical boards, and explaining that some states allow the reinstatement of medical licenses restricting the holder to “practice in [a] penal institution[]”).

questionable efficacy that cost less than medically indicated methods. This last approach in particular might allow a defense that “reasonable” steps were taken even if they were ultimately ineffective.

Even assuming prisoners could demonstrate an Eighth Amendment violation, they must first get a hearing. Although no jurisdiction has ever warmly welcomed prisoner suits, the federal courts have traditionally been somewhat more receptive to prisoner claims than have state courts.<sup>176</sup> However, the passage of the Prison Litigation Reform Act of 1995 (PLRA),<sup>177</sup> intended by Congress “primarily to curtail claims brought by prisoners” under Section 1983,<sup>178</sup> places severe limits on inmates’ access to the federal courts. In many cases, these burdens effectively prevent inmates’ constitutional claims from being heard in this forum at all.<sup>179</sup> Not only does the PLRA explicitly limit the possible role federal courts might play in enforcing acceptable standards in penal facilities, but it also sends a strong message from Congress to the courts that they are to continue to give strong deference to prison administrators. These procedural hurdles, of course, also restrict court access for prisoners in publicly run facilities. But if the profit motive is a source of further potential abuse of prisoners in private facilities, these hurdles are that much

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176. See, e.g., Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You’re Out of Court—It May Be Effective, But Is It Constitutional?*, 70 TEMP. L. REV. 471, 512 (1997) (explaining that Congress originally created § 1983 “to ensure that victims of civil rights violations by persons acting under color of state law would have a federal forum to seek redress against those violations” and noting that “there still are significant reasons why some civil rights litigants are better served in federal court,” including the fact that “[m]any state judges are elected and therefore do not enjoy the general freedom from political pressures as do federal judges”); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1500 (2003) (noting the historical importance of federal courts in improving conditions in public prisons).

177. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134 §§ 801–810, 110 Stat. 1321-66 to 1321-77 (1996) (codified in scattered sections of 11, 18, 28, and 42 U.S.C.).

178. *Santana v. United States*, 98 F.3d 752, 755 (3d Cir. 1996).

179. Among other provisions, the PLRA requires that prisoners exhaust all administrative remedies before filing § 1983 actions in the courts, 42 U.S.C. § 1997e (2000), a requirement not imposed on nonprisoner § 1983 suits, *Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982). This requirement can tie up even valid claims for extended periods. The PLRA also pares back on *in forma pauperis* protections for prisoners, requiring inmates—most of whom are indigent—to pay “the full amount of the filing fee” for any lawsuit they file, on a fee schedule specified in the statute. 28 U.S.C. § 1915(b) (2000). And it creates a “three-strikes-and-you’re-out” rule that forever bars prisoners from filing § 1983 actions in federal court once they have filed three claims found by the courts to be “frivolous, malicious, or fail[ing] to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g) (2000).

more troubling when they prevent private prison inmates from gaining a hearing.

Private prison inmates do enjoy one doctrinal advantage over their counterparts in public prisons, an advantage that should, in theory at least, increase the likelihood that prisoners' claims against private prison officials will succeed when like claims against public prison officials would fail. Under *Richardson v. McKnight*,<sup>180</sup> private prison inmates filing Section 1983 actions need not overcome prison officials' claims of qualified immunity.<sup>181</sup> As a result, should private prison inmates be able to make a showing of unconstitutional treatment, private prison guards will be unable to escape liability on the grounds that the right they violated was not "clearly established" at the time of the violation.<sup>182</sup>

*Richardson*, however, is unlikely to make much difference to private prison inmates. These inmates only have a true doctrinal advantage over inmates in public prisons when the right they are asserting has not previously been "clearly established."<sup>183</sup> If, however, prisoners are to succeed in vindicating constitutional rights not already clearly established, judges must add to the set of prisoners' rights already recognized. And at present, there is little reason to expect federal judges to do so. Only during the late 1960s and 1970s did the Supreme Court seem willing to extend prisoners' constitutional protections.<sup>184</sup> And even during this period, the extent of this willingness was limited. The decades since, moreover, have seen a reinstatement of the "hands-off" attitude that predated that

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180. 521 U.S. 399 (1997).

181. *See id.* at 412 (denying qualified immunity to private prison guards). The defense of qualified immunity affords state officials immunity from individual liability in § 1983 suits if they can show that their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Federal officials can claim the same defense against *Bivens* suits.

182. *Harlow*, 457 U.S. at 818.

183. *Id.* Only in such cases could prison guards plausibly claim qualified immunity, and thus only in such cases would the *Richardson* Court's refusal to recognize this defense for private prison guards substantively change the result. If prisoners can demonstrate the violation of a right that *was* clearly established at the time of the violation, public prison officials' claims to qualified immunity would fail, making *Richardson*'s benefits to the prisoners superfluous. And if the prisoners bringing suit cannot demonstrate any violation of their rights, they cannot prevail in a § 1983 action regardless of *Richardson*.

184. *See, e.g.*, *Wolff v. McDonnell*, 418 U.S. 539, 579–80 (1974) (requiring procedural due process in prison disciplinary hearings); *Procunier v. Martinez*, 416 U.S. 396, 421–22 (1974) (protecting inmates' basic First Amendment rights); *Johnson v. Avery*, 393 U.S. 483, 489–90 (1969) (providing protections for prisoners' right of access to the courts).

brief period of expansion. This recent retrenchment has been marked by a series of decisions paring back the rights articulated during the period of reform<sup>185</sup> and creating new and substantial hurdles to the success of prisoners' constitutional claims.<sup>186</sup> And these conditions are unlikely to change while public attitudes to incarcerated offenders remain as they are. Thus, the denial to private prison guards of the defense of qualified immunity is unlikely to benefit sufficient numbers of inmate plaintiffs to act as a meaningful check on the excesses of private contractors.<sup>187</sup>

It might still be objected that, while courts are deferential to government officials, this deference is unlikely to extend to employees of for-profit prison-management companies. Private prison administrators and employees might thus not benefit from the culture of judicial deference to prison officials. This objection, however, misunderstands the role that judicial deference plays in prisoners' rights cases. Recovery is difficult for prisoners, not because courts routinely show deference to the individual prison officials

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185. See, e.g., *Lewis v. Casey*, 518 U.S. 343, 363 (1996) (narrowing the scope of prisoners' right of access to the courts); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (narrowing the scope of prisoners' First Amendment right to the free exercise of religion); *Turner v. Safley*, 482 U.S. 78, 99–100 (1987) (narrowing the scope of prisoners' First Amendment right of expression).

186. Most notable in this regard is *Turner*, which denies prisoners recovery for violation of their constitutional rights when the state can show that the policy or practice in question “is reasonably related to legitimate penological interests.” 482 U.S. at 89. In practice, this is an extremely deferential standard. For example, the first of the four factors that the Court identifies as going to the reasonableness of the regulation is the showing of a “valid, rational connection” between the policy and the “legitimate governmental interest put forward to justify it.” *Id.* To challenge a regulation on this basis, the plaintiffs must show that the “logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.” *Id.* at 89–90. The remaining three factors are equally deferential to the government. See *id.* at 89–91 (“[C]ourts should be particularly conscious of the ‘measure of judicial deference owed to corrections officials.’” (quoting *Pell v. Procunier*, 417 U.S. 817, 828 (1974))).

187. It is of course possible that the courts' current hostility to prisoners' rights could lead judges to reinterpret existing rights narrowly. Such a move might increase the chance that a court would find it not to have been clearly established that the challenged treatment was included in the existing right—as, for example, the Eleventh Circuit did in *Hope v. Pelzer*. See 240 F.3d 975, 977, 981–82 (11th Cir. 2002) (finding no clearly established precedent that defendants' conduct violated the Eighth Amendment, when correctional officers had handcuffed prisoner Larry Hope to a hitching post for seven hours in the hot sun without a shirt, little water, and no bathroom breaks), *rev'd*, 536 U.S. 730, 745–46 (2002). But even should some courts be motivated by such hostility, this disposition is unlikely to lead to favorable results in enough private prison inmates' cases to make a significant difference in how private prisons allocate resources.

against whom suit is brought, but because, in the crafting of applicable constitutional standards, courts defer to the position and expertise of prison officials in general.<sup>188</sup> Because the scope of prisoners' rights under prevailing constitutional doctrine will be the same whether prisoners are housed in public or private facilities, private prison employees defending prisoner suits will enjoy the benefits of judicial deference to prison officials, whatever individual judges in specific cases may feel about the for-profit character of private prisons.<sup>189</sup>

2. *Accreditation.* It is a standard requirement of state enabling statutes that private prison operators achieve and maintain official accreditation from the American Correctional Association (ACA),<sup>190</sup>

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188. See, e.g., Turner, 482 U.S. at 89 (establishing a deferential standard for review of prison regulations that “impinge[] on inmates’ constitutional rights,” because, in the Court’s view, “such a standard is necessary ‘if prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations’” (quoting *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 128 (1977))).

189. Assuming a private prison inmate overcomes all existing substantive and procedural hurdles and demonstrates a constitutional violation, he or she would at that point face a jury, which would decide on the extent of the recovery for the violation. The suggestion has been made that juries in such cases might be less sympathetic to defendants employed by private prison companies and would thus be more likely to award inmate plaintiffs a greater recovery than otherwise, an effect that would mean greater accountability in the private sector than the public sector. *Developments in the Law—The Law of Prisons: A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1838, 1880 (2002). However, even assuming the existence of such hostility, the possibility of disproportionately greater jury awards for plaintiffs who overcome the many hurdles that stand between them and a recovery is too speculative to have much regulative effect. Certainly, the example offered to support this proposition—the \$1.65 million settlement between CCA and the Youngstown prisoners who brought a class action against the company in the wake of a series of stabbings and other serious security breaches in the facility—is unpersuasive as evidence of this likely effect. See *supra* Part I.C (discussing the Youngstown affair in more detail). In the wake of the Youngstown affair, the citizens of the city felt deep outrage and bitterness toward CCA over the way it handled its Youngstown operations and its dealings with the city itself. See Kenna, *supra* note 89, at F1 (“[CCA] will be sorry that they . . . did this to Youngstown . . . .” (quoting Youngstown Mayor George McKelvey)); *id.* (“Youngstown feels it is a city deceived.”); *60 Minutes: Private Prisons Break Rules to Make a Profit*, *supra* note 83 (“I wouldn’t recommend CCA to any community. . . . I think they’ve failed miserably at doing the job that they claim they do best. The job that they do best is to make money, period.” (quoting State Senator Bob Hagen, who represents Youngstown, Ohio)). The size of the settlement, even if formed “in the shadow of expected recovery,” *A Tale of Two Systems*, *supra*, at 1880, may be best understood as an indication that CCA recognized the ill will the company itself had sown in the community and the bad faith it was widely believed to have demonstrated, and not, as has been asserted, “the well-known tendency of juries, rightly or wrongly, to be less sympathetic to large corporate defendants,” *id.*

190. Harding, *supra* note 63, at 315.

an independent “organization of correctional professionals dating to 1870.”<sup>191</sup> The ACA sets standards governing every aspect of penal life<sup>192</sup> and, on request, certifies the facilities that meet these standards to a satisfactory degree.<sup>193</sup> The requirement that private prisons receive ACA accreditation is certainly desirable; indeed, in this regard, the private sector, having been forced to satisfy ACA standards, is ahead of many public-sector facilities, 20 percent of which did not have such accreditation in 2001.<sup>194</sup>

Still, it would overestimate the effect of ACA accreditation to assume that this requirement sufficiently checks private-sector abuses. For one thing, ACA visits are highly structured, so that “certification [indicates] compliance with standards for only a brief period.”<sup>195</sup> Moreover, the standards are largely procedural in character, generally satisfied by a showing as to “what the written procedures of the institution lay down as operational processes, rather than observing whether those processes in fact are followed.”<sup>196</sup> Arguably, these problems could be resolved by an overhaul in the accreditation process, and such an overhaul would certainly be welcome. In its current form, however, the ACA is unlikely to undertake sufficient reform to ensure adequate protection against inmate abuses. For one thing, ACA officials are generally chosen from the ranks of experienced corrections officials.<sup>197</sup> As a result,

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191. Freeman, *supra* note 153, at 628.

192. *See id.* at 628 n.351 (“The [ACA] provides standards for ‘security and control, food service, sanitation and hygiene, medical and health care, inmate rights, work programs, educational programs, recreational activities, library services, records and personnel issues.’” (quoting MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* 163 (1998))).

193. Harding, *supra* note 63, at 316.

194. *See id.* at 317 (arguing that universal private sector compliance with ACA standards “marks a distinct step forward, at least symbolically, in the commitment of state agencies to improved standards”).

195. Keating, *supra* note 69, at 147.

196. Harding, *supra* note 63, at 316. As McDonald and colleagues put it,

For the most part, the prevailing professional standards [of the ACA] prescribe neither the goals that ought to be achieved nor the indicators that would let officials know if they are making progress toward those goals over time. Two facilities could conform equally to an ACA standard by having a written policy on a particular issue, yet they could have diametrically opposite practices and outcomes on that issue.

MCDONALD ET AL., *supra* note 81, at 49.

197. As the ACA itself explains:

The average [ACA] auditor has worked in corrections for more than 18 years and has experience operating and evaluating the type of programs being audited. . . . In order to be considered for a position as an ACA auditor, [an applicant] must have five years

personal and professional relationships between ACA overseers and prison management are not uncommon, creating a common sympathy and sense of purpose that tells against both more meaningful standards and more rigorous enforcement.<sup>198</sup> Moreover, the institutions being inspected “ha[ve] to pay for the whole procedure,” providing income on which the ACA is dependent for its survival.<sup>199</sup> For this reason, “a degree of capture is likely.”<sup>200</sup>

One could imagine a system of ACA accreditation that would serve as a meaningful check on declining prison conditions. Emphasis could be placed on ensuring conditions consistent with the humanity principle, prioritizing physical safety and the meeting of basic human needs.<sup>201</sup> To be successful, however, any such reform would need the backing of ACA membership and state officials alike. Moreover, more frequent and effective monitoring would be required, which is both expensive and itself susceptible to the problems of capture. These problems are not insurmountable ones. However, where the state’s aim in privatization is to save money, little progress may be expected toward effective ACA standards that satisfy the humanity principle.

3. *Monitoring.* As John Donahue has observed, “full, effective monitoring [of private prisons] is a tall order.”<sup>202</sup> Why is this so? In the prison context, the hidden delivery of the contracted-for services means that the contract is fulfilled away from the scrutiny of the buyers—in this case, the state.<sup>203</sup> Prisons are often large, sprawling

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of experience in corrections, three of which must be at the supervisory level, be a current ACA member, and be recommended by the director/CEO of [his or her] agency.

American Correctional Association: Standards and Accreditation, <http://www.aca.org/standards/becomeauditor.asp> (last visited Nov. 16, 2005).

198. See Lilly & Knepper, *supra* note 76, at 161 (“Reliance on ACA standards by government agencies and private contractors promotes a close working relationship between the ACA, government agencies, and private companies.”).

199. Harding, *supra* note 63, at 316.

200. *Id.*

201. Such standards might also reflect other societal concerns that go beyond the demands of the humanity principle, like rehabilitation or the reduction of recidivism.

202. DONAHUE, *supra* note 129, at 171.

203. Gentry, *supra* note 4, at 356–57. Of course, the state is in turn contracting on behalf of the public. However, as Freeman points out:

The ultimate beneficiaries of the incarceration function, whether taxpayers, prisoners, or both, face considerable obstacles to meaningful oversight. The typical taxpayer encounters few opportunities or incentives to monitor conditions in prisons . . . [and]

institutions, housing anywhere from several hundred to several thousand inmates. At any time in a given facility, therefore, scores and perhaps hundreds of employees are operating in a volatile environment, shielded from public view.

The call for monitoring is the usual response when concern is expressed regarding the possibility of abuses by private prison contractors. Yet, available data reveal good reason to doubt the efficacy of the monitoring regimes in place to oversee contractual compliance. The most comprehensive survey on the question was conducted in December 1997.<sup>204</sup> This survey found that, of the twenty-eight state and federal government agencies then in the midst of “active contracts with privately operated [penal] facilities . . . twenty reported using monitors in addition to contract administrators,” suggesting that fully eight agencies used no monitoring at all.<sup>205</sup> The twenty agencies that reported using on-site monitoring provided survey information for ninety-one separate contracts. Of these, forty-six—slightly over half—reported having monitors on-site on a daily basis.<sup>206</sup> The remainder had monitors on-site weekly (five), monthly (sixteen), quarterly (ten), “on an ‘as needed’ basis or on an annual or semi-annual basis” (nine), with three contracts conducting all their monitoring off-site.<sup>207</sup>

What should be made of this data? Given the enormity of the task of overseeing contractual performance under circumstances of “hidden delivery”<sup>208</sup> in crowded and bustling institutions,<sup>209</sup> it seems

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the relative invisibility and low moral status of the prison population makes prisoners especially vulnerable . . . .

Freeman, *supra* note 153, at 631–32. As a result, the state must protect the interests of both taxpayers and prisoners.

204. MCDONALD ET AL., *supra* note 81, at 50. More recent data would be welcome, but to my knowledge none exist. In any case, nothing in the literature indicates that monitoring regimes have changed significantly since the collection of the data discussed here.

205. *Id.*

206. *Id.* at 51 tbl.4.1.

207. *Id.* These numbers cover eighty-nine contracts, suggesting an absence of usable information regarding the remaining two. For our purposes, though, this minor discrepancy is of no moment, because the main point is the apparent inadequacy of *all* the monitoring systems reported.

208. Gentry, *supra* note 4, at 356.

209. It would be impossible for state monitors to oversee all activity everywhere in a given prison. But an effective oversight system would allow state monitors full access to all parts of the facility, in numbers sufficient to ensure an accurate picture of contractual performance as a whole. Certainly, any such system must be designed with care, so as not to disrupt the functioning of the prison or compromise the ability of prison officials to maintain safe and



plain that systems under which monitors make only occasional on-site visits are inadequate to the task—even assuming, as the data suggest, multiple monitors per visit.<sup>210</sup> As the authors of the study themselves note, “[w]here monitoring is so limited, it is unlikely that contracting agencies are able to provide more than a cursory assessment of the contractor’s performance.”<sup>211</sup> Certainly, those contracts that provide for full-time on-site monitors are an improvement over those that allow for only occasional visits: the average permanent on-site monitor spends an average of 7.25 hours per day, working five days a week, in the monitored facility.<sup>212</sup> But still, given the scope of prison contracts and the range and extent of the interactions and activities within any given prison, it seems unlikely that comprehensive and meaningful oversight can be achieved by a single monitor spending an average of thirty-six hours a week on-site.

It is theoretically possible that a comprehensive system of contractual oversight could check the temptation of contractors to cut costs in ways likely to harm inmates, if the contractors actually believed that the decisions made by their employees would be observed and recorded by monitors committed to enforcing the terms of the contract. But this possibility provides little comfort if—as the data suggest—no such comprehensive system actually exists.

Why are existing monitoring systems so inadequate? The answer is at least in part financial. Monitoring is necessarily labor intensive and therefore expensive, requiring an investment that states—which turned to privatization to *save* money—are not eager to make.<sup>213</sup>

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orderly conditions. At the same time, monitoring cannot be so minimal and restrained that its deterrent and enforcement effects are lost. The task, moreover, is made more difficult by the ongoing nature of a prison contract, which means that monitoring is never finished. Instead, it is a process, requiring constant attention and vigilance. Effective oversight of a prison is thus necessarily a labor-intensive endeavor.

210. For example, the sixteen contracts reporting monthly visits reported an average of nineteen hours per visit and a “total monitoring time . . . per contract” of 18.6 percent. MCDONALD ET AL., *supra* note 81, at 51 tbl.4.1. These data suggest monthly visits conducted by teams of three.

211. *Id.* at 56.

212. *See id.* at 51 tbl.4.1 (explaining that the time reported by full-time monitors assumed a forty-hour work week).

213. It might be thought that states achieving a measure of cost savings through privatization would be willing to invest some portion of that savings in monitoring, because by doing so they would still come out ahead. But this notion overlooks the fact that states seeking to reduce the cost of running their prisons are doing so to have funds available for other budgetary items and would thus be unenthusiastic about spending any savings on the prisons themselves. Moreover, the use of private prisons does not always yield the promised cost

States may try to pass the cost of monitoring onto the contractor, but such efforts are ill-advised. Unless the contract specifies the amount contractors must spend in this regard, contractors' interest in cutting costs—not to mention their interest in reducing the effectiveness of monitors in exposing contractual violations—will likely lead to an investment too small to serve the purpose.<sup>214</sup> And were the contract to stipulate the expenditure of an amount sufficient to ensure effective monitoring, it could well erase the possibility of any profit margin for the contractor. Private prison providers already operate on extremely narrow profit margins,<sup>215</sup> so if the state is to have any contracting partner at all, imposing such stipulations would also necessarily drive up the contract price for the state. There is no way around it: if monitoring is to be effective, the state must bear the cost.

Even assuming adequate financial investment on the part of the state, however, there remains a further obstacle to the effective monitoring of private prisons: the risk of “agency capture.”<sup>216</sup> Agency capture occurs when “regulators come to be more concerned to serve the interests of the industry with which they are in regular contact

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savings. See McDONALD ET AL., 1998, *supra* note 81, at iv–v (describing the mixed results on studies of cost savings). Further, any investment in monitoring must be made up front, before any possible savings would be realized. Because private prison contracts allow for a set rate per inmate per day, the state cannot say in advance how much it will pay on a given contract; this amount depends on the number of offenders that ultimately come through the system. It is true that, given a contract price below what the state would otherwise spend, state officials could assume that, however many inmates the private prison turns out to house, the state will end up saving money. But with the contract price a shifting target, officials are even less likely to want to commit money up front for monitoring, given that at the outset they cannot even say with any certainty what their ultimate expenditure on incarceration will be. State officials negotiating the contracts would thus perceive the cost of monitoring, not in terms of possible future savings, but as among the expenses of privatization, and cost-conscious officials in this position would be loath to invest more in monitoring than the bare minimum, whether or not the designated amount were sufficient to ensure an effective system of oversight.

214. Of course, given the inadequacy of the mechanisms currently in place for enforcing contractual performance by prison contractors, this result could equally be true even were the contracts to specify a minimum required investment in monitoring.

215. See HALLINAN, *supra* note 61, at 177–78 (“The [private] prison business is intensely competitive. Winning bids for prison contracts are often separated by pennies per day. Those pennies mean the difference between a profitable prison and a money-loser.”); Sam Howe Verhovek, *Operators Are Not Worried by Ruling*, N.Y. TIMES, June 24, 1997, at B10 (“Even a small increase in their costs could be enough to eliminate the price advantage that many companies can now offer . . . , which is almost uniformly the factor that leads governments to privatize.”).

216. See HARDING, *supra* note 3, at 33–34 (citing MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955)).

than the more remote and abstract public interest.”<sup>217</sup> The worry here is that monitors will become too closely aligned with the facility being monitored, leading them to overlook or miss altogether evidence of abuse.

Although relations between state-employed monitors and private prison management are likely to be closest when monitoring is carried out by a full-time on-site inspector, opportunities will exist for a rapport to develop between inspectors and contractors, whether the monitor is permanent or makes only periodic inspections. These actors, generally drawn from the same pool of corrections professionals,<sup>218</sup> all share a common interest, knowledge base, professional community, and perhaps most importantly, a sense of the difficult challenges involved in running a prison and a concomitant sympathy with the perspective of prison administrators. Such a rapport can orient the monitor toward the interests of the contractor, making it less likely that contractual performance will be challenged. Equally significantly, the “revolving door” between state agencies and private providers<sup>219</sup> can “create [a] subtle conflict of interest,” as monitors who might at some point seek to move from public to private employment try to avoid alienating potential future employers in the course of performing their current responsibilities.<sup>220</sup>

Effective monitoring thus appears to have two key requirements: sufficient financial investment, and a commitment to overcoming the risk of agency capture. Even still, the scope of activity within the prison and the hidden delivery of prison services may limit the likely

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217. *Id.* at 33 (quoting P. GRABOSKY & J. BRAITHWAITE, *OF MANNERS GENTLE: ENFORCEMENT STRATEGIES OF AUSTRALIA BUSINESS REGULATORY AGENCIES* 198 (1986) (internal quotation marks omitted)).

218. According to Dennis Cunningham of the Oklahoma Department of Corrections, the qualifications of private prison monitors “include but are not limited to”:

- A. Broad base of experience in corrections
- B. Operated at a high level administrative position prior to assignment
- C. College degree or equivalent
- D. Oklahoma private prison monitors average 19 years of experience each. Prior experience ranges from Warden to Unit Manager.

Dennis Cunningham, Okla. Dep’t of Corr., *Cross Continental Cross Cultural Cooperation*, at 9, <http://www.doc.state.ok.us/Private%20Prisons/Cross%20Continental%20Cross%20Cultural%20Cooperation%208-13-03.pdf> (last visited Feb. 23, 2006).

219. LOGAN, *supra* note 4, at 219.

220. Gentry, *supra* note 4, at 360 n.38. The risk of capture appears present whatever the particular monitoring regime. Richard Harding studied monitoring in a range of jurisdictions pursuing a variety of approaches, and found evidence of capture in all of them. HARDING, *supra* note 3, at 38–47.

effectiveness of any monitoring scheme. Notice, moreover, that there is a tension between these requirements, in that the more time monitors spend on-site, the greater the risk of agency capture. Although this tension need not undermine the possibility of effective monitoring, it does further indicate the limits of monitoring as a possible check on contractor excesses.

4. *Competition and the Threat of Replacement.* Even assuming a contract could be drafted with sufficient specificity to reflect the desired results and even if an effective system of monitoring were in place, prison contractors need not fear exposure of noncompliance absent a credible threat of replacement. Plainly, the states need to house their prisoners somewhere. Contractors know this, and know too that states face great obstacles to finding suitable alternative accommodations for their prisoners. They will therefore understand that, notwithstanding threats to this effect, contractual noncompliance need not necessarily mean a loss of the contract.<sup>221</sup>

As Donahue points out, “[p]erfect competition—many alternative suppliers, ease of entry and exit, full information, and so on—is out of the question here.”<sup>222</sup> But is the field of competition good enough to ensure a meaningful threat of replacement in the event of nonperformance? At least three characteristics of the private prison “market” raise questions as to the likely efficacy of such a threat in ensuring ongoing quality of service.<sup>223</sup> First, as Justice Scalia points out in his dissent in *Richardson v. McKnight*, the only buyers in this market are public officials, spending “other people’s money.”<sup>224</sup> Consequently, factors other than quality of service are liable to

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221. Even under such circumstances, the contracts might still impose monetary sanctions for violations, which private prison operators would wish to avoid and which could thus be expected to have some disciplinary effects. But if the state is dependent on the private prison provider to house its prisoners, the contractor will have considerable leverage that could be used to keep any such sanctions to a minimum. As Gentry puts it, “If the state cannot return to a competitive market to rebid the contract, sanctions for misfeasance will be inadequate to halt these abuses, even if the abuses are detected. The state will be constrained not to penalize the firm heavily enough to drive it from business.” Gentry, *supra* note 4, at 358 (footnotes omitted).

222. DONAHUE, *supra* note 129, at 165.

223. This argument regarding market failures in the private prison context draws on that offered in my case comment on *Richardson v. McKnight*, 521 U.S. 399 (1997). See Case Comment, *Qualified Immunity—Privatized Governmental Functions: Richardson v. McKnight*, 117 S. Ct. 2100 (1997), 111 HARV. L. REV. 390, 396–98 (1997) (discussing market failures in the private prison industry).

224. *Richardson*, 521 U.S. at 418–19 (Scalia, J., dissenting).

influence the judgment of whether to cancel or renew a contract—for example, politicians’ need to secure future campaign contributions or the business or personal connections between politicians, corrections officials, and firm management.<sup>225</sup> Second, there is a relatively small number of viable industry participants with the experience, resources, and infrastructure necessary to make a bid. For this reason, although a number of smaller companies have sought to break into the market, the industry continues to be dominated by a very few major players.<sup>226</sup> The limited pool of competitors can undermine the force of threatened replacement even in the event of inadequate performance on the part of the contractor.<sup>227</sup> Third, the dependence of the government on the initial provider is compounded by the obstacles to the state’s resuming the operation of a privatized facility: it would face high start-up costs,<sup>228</sup> especially if the current facility were owned by the contractor,<sup>229</sup> and possible litigation arising out of the termination of the contract. In rescinding a private prison contract, the state is therefore likely to wind up spending more on corrections than it had before privatizing. It may thus “be cheaper for the state to

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225. As Steven Donziger explains, because private prisons are “funded entirely by government, firms like CCA need to ally themselves with politicians to sustain their growth.” Steven Donziger, *The Prison-Industrial Complex: What’s Really Driving the Rush to Lock ‘Em Up*, WASH. POST, Mar. 17, 1996, at C3. In Tennessee, for example, an investigation into the Nashville-based CCA following the announcement of a bill to privatize all twenty-one of the state’s prisons revealed “a small but impressive network of political contacts, a history of generous campaign contributions by CCA executives, and business ties among [CCA owner Tom] Beasley and top state officials.” Richard Locker, *Personal, Political, Business Ties Bind CCA*, STATE, MEMPHIS COM. APPEAL, May 25, 1997, at B3. Richard Locker reports that “[a]t least five state officials” are business partners with CCA owner Beasley in an unrelated business venture.” *Id.*; see also Simon, *supra* note 89, at 25 (providing examples of state officials being “intertwined” with CCA).

226. Together, CCA and Wackenhut control 70 percent of the American market. PHILIP MATTERA ET AL., CORRECTIONS CORPORATION OF AMERICA: A CRITICAL LOOK AT ITS FIRST TWENTY YEARS 2 (Grassroots Leadership 2003); *Your World with Neil Cavuto* (Fox News television broadcast May 10, 2004) (reporting that CCA runs sixty-five facilities and has custody of 62,000 inmates).

227. See SHICHOR, *supra* note 4, at 126. Clifford Rosky, among others, has argued that this particular problem could be resolved by making the private prison market more competitive. See Rosky, *supra* note 2, at 960–61. But even assuming such a change could be orchestrated, states will still be reluctant to bear the cost of replacement in the event of nonperformance.

228. For example, Nevada expected to incur some \$12 million in additional operating costs in the first two years following decisions in 2003 and 2004 by state legislators to return to public control two private facilities that had been operating in the state. See discussion *infra* note 245.

229. See Gentry, *supra* note 4, at 357. As Gentry notes, “[T]he firm’s market power can drive the state from the marketplace just as it can private competitors.” *Id.* at 358 n.28.

accept some contractor abuses than to remedy them by resuming state operation.<sup>230</sup>

Available evidence confirms that, absent both political pressure to replace abusive or otherwise ill-performing contractors and a willingness to bear the financial cost of such replacement, the state is unlikely to act on the threat of rescission. It is not that state agencies never replace contractors in the event of noncompliance;<sup>231</sup> states experimenting with privatization have rescinded a number of private prison contracts after contractor abuses came to light.<sup>232</sup> But what seems to be required for such cancellation are conditions sufficiently objectionable to trigger a public outcry, an effect that generally occurs under limited circumstances: either the inmates experiencing abusive conditions are housed by private prisons out of state, or the exposed conditions are extremely egregious.

As to the former, at least six states have cancelled contracts “involving the shipment of [their own] prisoners to private prisons in another state”<sup>233</sup> following allegations of “vendor violations.”<sup>234</sup>

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230. *Id.* That states’ dependence on private contractors deepens the longer state correctional facilities have been in private hands may explain the fear among skeptics of prison privatization that contractors will engage in “low-balling.” The term refers to the practice of deliberately bidding low for a contract, and then raising the prices charged to the captive purchaser later on. Michael Janus, *Bars on the Iron Triangle: Public Policy Issues in the Privatization of Corrections*, in *PRIVATIZING CORRECTIONAL INSTITUTIONS*, *supra* note 4, at 75, 78.

231. Indeed, on comparing the private prisons landscape in the United States with that in Australia and the United Kingdom, Richard Harding found that “United States authorities have been more willing than their peers in other countries to cancel contracts.” Harding, *supra* note 63, at 323.

232. *See id.*; *see also* MCDONALD ET AL., *supra* note 81, at 53. States have also cancelled contracts when their prison populations dropped sufficiently to allow all inmates to be housed in state facilities. Peter Slevin, *Prison Firms Seek Inmates and Profits*, WASH. POST, Feb. 18, 2001, at A3. Here, however, what is of interest is only those cancellations made as a result of contractor noncompliance.

233. Harding, *supra* note 63, at 323.

234. *See* MCDONALD ET AL., *supra* note 81, at 53 (listing states that have terminated contracts with out-of-state private prison providers on the basis of “vendor violations,” including Colorado, Montana, North Carolina, Oklahoma and Utah); *see also* Scott Charton, *Missouri Suit Says Jail Abuse Covered Up*, AUSTIN AMERICAN-STATESMAN, Aug. 26, 1997, at B3 (noting that the Brazoria facility and two other Texas jails from which Missouri withdrew its inmates “were managed by . . . Capital Correctional Resources, Inc.”); Matthew Schofield, *Fortune Takes a Downward Turn: Inmate Exit Threatens a Town’s Livelihood*, KAN. CITY STAR, Aug. 24, 1997, at A1. It bears noting that each one of the out-of-state contract terminations described by McDonald and colleagues, as well as Missouri’s termination of its out-of-state private prison contracts following the Brazoria incident, involved private facilities located in Texas. *See* MCDONALD ET AL., *supra* note 81, at 53; Schofield, *supra*.

Among them was Missouri, which pulled eight hundred of its prisoners from three Texas jails managed by Capital Correctional Resources, Inc. (CCR), after a leaked videotape showed Missouri inmates in CCR's Brazoria facility "forced to crawl on the floor, shocked with electric prods, [and] bitten by police dogs."<sup>235</sup>

As to the latter, in 1995, for example, the INS cancelled its contract with Esmor Correctional Services for the operation of its Elizabeth, New Jersey, facility after it came to light that Esmor's practices included the "cutting [of] financial corners" on food, so that at some Esmor facilities "there were often only 30 meals to feed 100 inmates, because Esmor did not want to pay for more."<sup>236</sup> Detainees were also denied such essentials as clean underwear and sanitary napkins, and Esmor even charged them "for lost eating utensils, clothing and drinking cups."<sup>237</sup> Investigations into the New Jersey facility also revealed that guards who were ill-trained, overworked, and outnumbered had routinely abused inmates physically, "shackled them during visits [and] placed them in punishment cells for little documented reason . . . [as] part of a systematic methodology designed by some Esmor guards as a means to control the general detainee population."<sup>238</sup>

To take one further example, in 2004, in the wake of extensive reports of abuse, the state of Louisiana closed its Tallulah Correctional Center for Youth. Tallulah had been operated by Trans-American Corporation, a company run by a local businessman whose father was "an influential state senator."<sup>239</sup> At the Tallulah facility, inmates had "regularly appear[ed] at the infirmary with black eyes,

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The greater number of cancelled contracts with out-of-state contractors has several possible explanations. For one thing, in such cases, the regulatory power of the host state is at a minimum. (Harding calls this situation one of "regulatory impotence." Harding, *supra* note 63, at 280.) There also appears to be greater political will to protect "home" inmates when the provider is an outsider, and out-of-state contractors may also have fewer political contacts that they might work to their advantage when allegations of abuse surface.

235. Schofield, *supra* note 234, at A1; *see also* Charton, *supra* note 234, at B3.

236. John Sullivan & Matthew Purdy, *Parlaying the Detentions Business into Profit*, N.Y. TIMES, July 23, 1995, at A1 ("Whoever got there first got the food." (quoting Richard Moore, a "former operations manager for Esmor's two halfway houses in New York"))).

237. *Id.* ("Money, money, money. That's all that was important to them." (quoting Carl Frick, "a veteran jail warden who was the first administrator [of the] Elizabeth, [New Jersey, facility]"))).

238. *Id.* (quoting the investigators' report).

239. Fox Butterfield, *Profits at a Juvenile Prison Come with a Chilling Cost*, N.Y. TIMES, Aug. 19, 1995, at A1.

broken noses or jaws or perforated eardrums from beating by the poorly paid, poorly trained guards or from fights with other boys.”<sup>240</sup> One inmate suffered regular beatings from guards, and after fifteen months, a judge ordered that he be released so he could receive medical attention. By this time “his eardrum had been perforated in a beating by a guard, he had large scars on his arms, legs and face, and his nose had been broken so badly that he [spoke] in a wheeze.”<sup>241</sup> Trans-American “scrimped on money for education and mental health treatment . . . to earn a profit,” and meals at the facility were “so meager that many boys los[t] weight [and c]lothing [was] so scarce that boys [fought] over shirts and shoes.”<sup>242</sup>

The willingness of state agencies to cancel contracts under these limited circumstances suggests that the threat of replacement may serve to check at least some contractor excesses, particularly when the private prison is located in another state. But taken as a whole, the evidence suggests not a readiness to rescind contracts when there is evidence of widespread abuse but reluctance on the part of states to do so even in the face of long-term concerns with prison conditions. Wisconsin, for example, waited five years after allegations first surfaced of physical and sexual abuse of Wisconsin prisoners in a CCA-run prison in Tennessee before announcing its intention to cancel its contract and bring its prisoners home, although the allegations had been confirmed by a team of Wisconsin state investigators shortly after being raised.<sup>243</sup> And Louisiana’s Tallulah Correctional Center for Youth, which the state finally closed in 2004, had by that time seen allegations of severe abuse of prisoners for a full decade.<sup>244</sup>

To make the threat of replacement meaningful, legislators must commit to bearing the cost when the evidence of abuse suggests the need to do so.<sup>245</sup> Yet, where the state’s priority is saving money, this

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240. *Id.*

241. *Id.*

242. *Id.*

243. Richard P. Jones, *State to Probe Alleged Abuse of Inmates in Tennessee*, MILWAUKEE J. SENTINEL, Oct. 3, 1998, at 1; Patrick Marley, *State Cutting Ranks of Inmates Held Elsewhere*, MILWAUKEE J. SENTINEL, Mar. 30, 2004, at 3B.

244. See Butterfield, *supra* note 239, at A1 (reporting on the brutal conditions at Tallulah as recounted by prison officials and inmates).

245. For instance, in Nevada, the legislature voted to take over the CCA-run Southern Nevada Women’s Correctional Facility in North Las Vegas after legislators visiting the prison saw evidence of inadequate programming and below-standard medical care. Prior to these visits,



willingness is unlikely to be forthcoming absent extreme circumstances and a public outcry. As a consequence, the threat of replacement cannot be expected to deter any but the most extreme abuses.

*E. Private Prisons: Problems and Prospects*

The foregoing survey suggests that, although existing oversight and accountability mechanisms are not wholly ineffectual, they fall far short of providing adequate safeguards against prisoner abuse. Ideally, private prisons would allow states to harness “[the] willingness and ability [of the private sector] to innovate in pursuit of profits”<sup>246</sup> within a regulatory structure that effectively checked any efforts by contractors to save money in ways likely to put inmates at risk. But this is not the regime currently in place.

Instead, absent the restraining power of effective regulatory and oversight mechanisms, private prison contractors have acted largely as earlier predicted.<sup>247</sup> That is, they have sought to increase their margins by considerably reducing their labor costs, systematically cutting salaries and benefits to employees, and underinvesting in training.<sup>248</sup> They have done so, moreover, without fear of either contravening statutory civil service protections or meeting collective

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nearly half the inmates had signed a petition complaining of “poor food and medical care, staffers who aren’t properly trained, inadequate grievance procedures and missing personal items” and used the petition to pressure the state to take over running the facility. *Female Nevada Inmates Petition for State Takeover of Prison*, Associated Press Newswires, Apr. 12, 2004, available at Westlaw, 4/12/04 APWIREs 19:20:05; see Ed Vogel, *Board OKs State’s Takeover of Prison*, LAS VEGAS REV.-J., June 17, 2004, at B4. The decision of the Nevada legislature to take over the women’s prison came just a year after it decided to do the same with a privately run juvenile facility when allegations of abuse led to the withdrawal of the contractor. This dual takeover was expected to cost the state an extra \$1 million a year for the women’s prison and up to \$10 million over the first two years for the youth facility. See *id.*; *Legislative Panel Votes for State to Operate Youth Prison*, Associated Press Newswires, May 9, 2003, available at Westlaw, 5/9/03 APWIREs 15:24:00.

246. Pozen, *supra* note 4, at 283.

247. See *supra* Part III.C.

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Private prison companies lure state-employed guards by offering short term bonuses and pay raises. They do not dwell on the fact that, unlike the unionized state prison guards—whose union, AFSCME, has negotiated a generous, and guaranteed, pension package over the years—private guards receive a benefits package that in the long run is virtually worthless. For a few thousand dollars in ready cash, the newly hired private guards give up the possibility of a lifelong guaranteed retirement income.

Sasha Abramsky, *Incarceration, Inc.: Private Prisons Thrive on Cheap Labor and the Hunger of Job-Starved Towns*, THE NATION, July 19, 2004, at 22.

resistance from their workers. Not only are the employees of private prisons not state employees, a fact that allows their employers to set contract terms with minimal restrictions,<sup>249</sup> but private prison employees are also not generally union members. As employees of private companies, guards in private facilities are not eligible for membership in the American Federation of State, County, and Municipal Employees (AFSCME), which has so effectively represented publicly employed correctional officers nationwide.<sup>250</sup> Nor have private prison guards tended to form their own unions, as “private correctional companies make every effort not to employ unionized workers and not to let their workforce join any union.”<sup>251</sup>

Nor have predicted innovations in prison management through privatization come to pass.<sup>252</sup> Instead, the private prisons of today function very much like public prisons, only with a cheaper labor force.<sup>253</sup> Private prisons thus generally exhibit all the particularized characteristics that make public prisons dangerous places: the considerable discretion and power conferred on guards;<sup>254</sup> the fear on all sides; the simultaneous monotony and high pressure of the prison environment;<sup>255</sup> inmates’ possible proclivity to violence; and the

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249. See *Richardson v. McKnight*, 521 U.S. 399, 411 (1997) (noting that privatization “frees the private prison-management firm from many civil service law restraints” and that such firms “can operate like other private firms; [they] need not operate like a typical government department”).

250. The other powerful correctional officers’ union is the California Correctional and Peace Officers’ Association (CCPOA). CCPOA, however, represents only correctional officers in California, which as of now has no private prisons. And given the strong opposition of the organization to prison privatization, it is unclear whether it would open its ranks to private prison guards should the state ever privatize some of its prisons. See Daniel B. Wood, *Private Prisons, Public Doubts*, CHRISTIAN SCIENCE MONITOR, July 21, 1998, at 1 (explaining that private prisons are “vehemently opposed by [CCPOA]”).

251. SHICHOR, *supra* note 4, at 198.

252. For discussion as to why not, see *supra* notes 140–46 and accompanying text.

253. As McDonald and colleagues found in their comprehensive survey of private prisons, when contracting agencies have privatized penal facilities, “the contract procurement and monitoring procedures appear to be designed to obtain a facility that is a close equivalent to the public facility, differing mainly in the legal status of the operator (i.e., private rather than government).” MCDONALD ET AL., *supra* note 81, at 56. And, they conclude, “with some notable exceptions, . . . the agencies are getting what they ask for.” *Id.*

254. See Gentry, *supra* note 4, at 354 n.7 (suggesting that “the greatest unwarranted burden on prisoners may be the arbitrary implementation of rules and exercise of authority by guards”).

255. See Crawley, *supra* note 145, at 417–18 (“Anxiety [on the part of prison officers] arises from the unpredictability of prison life; although much of prison life is mundane and routine, the officer is always conscious that a prisoner *may* assault him, that a prisoner *may* try to escape, that a prisoner *may* try to take him hostage, etc.”).

relative social and economic disempowerment of prison guards, who do a difficult job in a tense and dangerous environment and for whom power over prisoners constitutes both a rare perquisite and an outlet for frustration.<sup>256</sup> But in addition, private prison employees are likely to be less qualified (because less well remunerated) and less well trained than their public-sector counterparts.<sup>257</sup>

Given this situation, it seems likely that private prisons as currently constituted would turn out to be more violent places than their state-run counterparts. And in fact, although much of the available data is inconclusive regarding the overall quality of conditions in private prisons as compared with public facilities,<sup>258</sup> meaningful data do exist showing elevated levels of physical violence in private prisons.<sup>259</sup>

For example, in 1997, researchers at the U.S. Department of Justice Bureau of Justice Assistance (BJA) surveyed private prison operators and received responses pertaining to sixty-five of the eighty private correctional facilities then in operation in the country.<sup>260</sup> They then compared this information to comprehensive data on public prisons nationwide. Comparing the number of “major incidents,” including “assaults, riots, fires and other disturbances” in the public prisons over twelve months with those occurring in private facilities

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256. See, e.g., Ted Conover, *Guarding Sing Sing*, NEW YORKER, Apr. 3, 2000, at 55, 58; Bruce Porter, *Terror on an Eight-Hour Shift*, N.Y. TIMES MAG., Nov. 26, 1995, at 42.

257. This is not to say that public prison guards are always well trained. Hallinan, for example, reports that “[b]y 1994, Texas guards received only 120 hours of classroom instruction before entering a prison[.] . . . one of the shortest training periods in the nation.” In 1994, moreover, “one-third of the guards in Texas had less than a year’s experience.” HALLINAN, *supra* note 61, at 89.

258. See MCDONALD ET AL., *supra* note 81, at 55 (“[A]ll of the existing evaluations are flawed in fundamental ways, and there is little information that is widely applicable to various commitment settings. Accordingly . . . it is not possible to make any general statements about the ability of private contractors to ensure quality correctional services in comparison to public prison management.” (summarizing the findings of GAES ET AL., *supra* note 141)).

259. Some may take the drawing of this comparison to be inconsistent with my earlier eschewal of the comparative efficiency approach. But the argument against comparative efficiency is not an argument against any and all comparison between public and private. It is an argument against premature comparison derailing efforts to understand how private prisons actually work, and against the exclusive focus on efficiency at the expense of the arguably more urgent legitimacy concerns. The comparison of violence levels offered here avoids both these pitfalls, having come after a detailed analysis of the actual structure and functioning of private prisons themselves, and placing the relative humanity of conditions of confinement, and not their relative efficiency, at center stage.

260. See JAMES AUSTIN & GARY COVENTRY, U.S. DEP’T OF JUSTICE, EMERGING ISSUES ON PRIVATIZED PRISONS 39–40 (2001); see also Austin & Coventry, *supra* note 67, at 190.

over the same period,<sup>261</sup> the survey found a greater number of such incidents per one thousand inmates in the private prisons: 45.3 per 1,000 inmates in public prisons, as compared with 50.5 in private facilities.<sup>262</sup> When inmate assaults were taken alone, the disparity was even more marked: 25.4 per 1,000 inmates in publicly run facilities, as compared with 35.1 in private prisons.<sup>263</sup>

These data, moreover, do not account for the greater proportion of maximum-security inmates in publicly run facilities—19.8 percent as compared with only 4.6 percent in private facilities.<sup>264</sup> Maximum-security prisoners are so classified because they are considered a much greater security risk and are thus likely to be more violent than prisoners with lower security classifications.<sup>265</sup> One should thus expect public prisons, which house a higher proportion of maximum-security inmates, to be more violent than private ones. That private prisons are more violent than public ones despite the lower security classification of private prison inmates suggests that particular violence-fostering forces are at work in private prisons that are not present in public prisons, or at least not present to the same degree. This hypothesis is reinforced by the picture that emerges once the data are adjusted to compare only “the medium and minimum security public facilities with the same type of private facilities.”<sup>266</sup> Here, the difference is even more pronounced, with 29.6 “major incidents” per 1,000 inmates at public prisons, as compared with 48.0

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261. See Austin & Coventry, *supra* note 67, at 190, 196.

262. See *id.* at 196 tbl.9.

263. See *id.*

264. See *id.* at 191 tbl.5.

265. In Montana, for example, inmates labeled “predatory” are automatically classified as maximum security. The prison disciplinary infractions that earn an inmate the label “predatory” include “homicide; assault; inciting a riot/rioting; hostage taking; setting a fire; . . . sexual assault; assault with intent to transmit a communicable disease; threats of bodily harm; and fighting.” PATRICIA L. HARDYMAN ET AL., U.S. DEP’T OF JUSTICE, REVALIDATING EXTERNAL PRISON CLASSIFICATION SYSTEMS 10–11 (2002), available at <http://www.nicic.org/pubs/2002/017382.pdf>. In Virginia, prisoners classified as Level 6, the highest available security classification, are those prisoners who satisfy this description: “[d]isruptive, assaultive, severe behavior problems, predatory-type behavior, and/or escape risk.” *Id.* at 65 (Exhibit A.4). And in Delaware, prisoners who earn seventeen points or more according to Department of Corrections guidelines are automatically placed in maximum-security facilities, see *id.* at 88–89 (Exhibit A.14); on this scale, among other allocations, prisoners receive seven points for a “[p]redatory/assaultive institutional misconduct report,” as well as seven points for a conviction of the “highest severity,” *id.* These parameters are representative of those used across the country. See *id.* at 59–107 (detailing the classification schemes of ten states).

266. Austin & Coventry, *supra* note 67, at 197.

in the private facilities.<sup>267</sup> For inmate assaults taken alone, with the adjustment for security classification, public prisons had 20.2 assaults per 1,000 inmates, as compared with 33.5 in private facilities.<sup>268</sup>

The data on staff assaults likewise changed notably once the classification levels were taken into account. Private prisons did slightly better than public prisons on this measure when the full complement of publicly held maximum-security inmates was included: per 1,000 inmates, there were 12.7 assaults on staff in private prisons as compared with 13.8 in public prisons during the twelve-month period studied.<sup>269</sup> However, when the data were recalculated to include only medium- and minimum-security inmates, researchers found 8.2 such assaults per 1,000 inmates in public facilities, as compared with 12.2 in private prisons.<sup>270</sup>

Other studies have also found elevated violence levels in private prisons as compared with public ones. For example, according to Judith Greene, a New York-based expert on private prisons, a comparative study of “serious incidents” in public and private facilities in Oklahoma over a three-year period found that “private prisons recorded more than twice as many incidents as public ones.”<sup>271</sup> Similar findings were also made in an earlier study commissioned by the Tennessee Department of Corrections (TDOC).<sup>272</sup> The TDOC study compared two public prisons and one prison run by CCA. Although the study authors claimed to have found no significant differences among the prisons in terms of quality,<sup>273</sup> the empirical data on which this conclusion was based tell a different story. In particular, over the fifteen months studied, “the private prison reported significantly more (214) injuries to prisoners and staff, compared to 21 and 51 for the two state prisons respectively,” and “[t]he private prisons also reported 30 incidents of the use of force [against inmates by guards], compared with 4 and 6 respectively for the state prisons.”<sup>274</sup> As with the BJA study above, inmate characteristics were

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267. *See id.* at 196 tbl.9.

268. *See id.*

269. *See id.*

270. *See id.*

271. Slevin, *supra* note 232.

272. *See* GAES ET AL., *supra* note 141, at 9.

273. *Id.*

274. Hart et al., *supra* note 148, at 1151 (quoting Tennessee Department of Corrections report). It is unclear how the three Tennessee prisons that were the focus of this study compared in terms of population size. But the three facilities selected for the study were chosen

not consistent across the three Tennessee facilities, with each facility housing “quite different types of inmates in terms of the socio-demographic characteristics reported, age and race, criminal history and custody classification.”<sup>275</sup> That this is so, however, only strengthens the point, for prisoners assigned to the care of private prison providers tend to be the “cream of the crop,” those thought to be less inclined to violence or other forms of troublemaking.<sup>276</sup> One should thus have expected *fewer* incidents of injuries and use of force in Tennessee’s private prison, rather than the other way around.

Certainly, nothing in the foregoing discussion goes to show that the state’s use of private prisons could never satisfy the humanity principle. What it *does* show is that, when the state looks to privatization to save money on the cost of corrections, there is reason to expect conditions of confinement to fall below even that level of quality and safety that can be reasonably expected of those charged with the difficult task of running the prisons. When the state’s aim is saving money, it will be unwilling to undertake measures that will substantially raise the cost of privatization, even when doing so could arguably ensure more meaningful protections for vulnerable inmates. So the state will invest minimally in monitoring contractual compliance, placing perhaps one full-time monitor at each site, despite the arguable need for a full-time team of monitors if the effort is to be at all effective. When money is the state’s primary concern, it will hesitate to rescind contracts even when evidence of abuse is considerable, fearing the costs such a move would entail. It will also forbear from specifying contractual terms requiring private contractors to provide minimum levels of staffing and training for private prison guards and stipulating the salaries and benefits to be paid to them. Doing so would only increase the cost of contracting to the state and would, moreover, greatly tie the hands of contractors, for whom cutting labor costs is the central available means to keep expenses down.

It is possible that the hazards private prisons pose under these circumstances might be mitigated considerably were society

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for purposes of direct comparison between public and private prison management, and they “were all based on the same general architectural design.” GAES ET AL., *supra* note 141, at 7. These factors suggest that the populations of the three facilities were at least roughly comparable in size.

275. GAES ET AL., *supra* note 141, at 9.

276. DiIulio, *supra* note 46, at 166–67.

committed to satisfying the demands of the humanity principle and willing to pay the cost of effective regulatory tools. Still, even assuming such a commitment, obstacles would remain to eliminating gratuitously inhumane treatment in private prisons. Contracts would still be incomplete and would continue to accord residual control rights to private prison administrators and guards, thus allowing scope for abuses.<sup>277</sup> Even assuming a public commitment to adequate oversight, many aspects of prison life would inevitably still go unobserved. And though one might contemplate a change in the public sentiment regarding the cost of corrections, contractors themselves will still be motivated by the desire for profit. This means that even under the altered circumstances contemplated, the contractors' interests would remain at odds with those of the humanity principle, continuing to place a burden of particularly rigorous oversight on the state.<sup>278</sup>

*F. Public Prisons: A Satisfactory Alternative?*

To judge private prisons from the perspective of the humanity principle, it is not enough to consider merely the *idea* of private prisons. Instead, it is necessary to examine prison contracting as a practice, within the regulatory context in which private prisons actually operate. Conducting this contextual analysis has made plain that, at least as currently structured, private prisons pose an appreciable danger to the possibility of legitimate punishment.

Yet public prisons, too, will invariably fall short when measured against the ideal the humanity principle represents.<sup>279</sup> Given conditions in publicly run prisons and jails, it would be absurd to suggest otherwise. The question then becomes, of what relevance is the sorry state of many public prisons to the present discussion?

Were comparative efficiency the operative framework here, drawing attention to existing conditions in public prisons would serve as a rejoinder: yes, conditions in private prisons are at odds with the demands of the humanity principle, but so are conditions in public prisons—the implication being that, given the shortcomings of public

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277. Indeed, it is this reason alone that leads economists Hart, Schleifer, and Vishny to caution against the use of private prisons. Hart et al., *supra* note 148, at 1150–52.

278. See, e.g., Pozen, *supra* note 4, at 282 (suggesting that the profit motive of private contractors creates risks that “place an added onus on regulators”).

279. See *supra* note 8 (noting the various dangers faced by prisoners as a result of conditions in public prisons).

prisons, private prisons may still be preferable. But liberal legitimacy rejects the “either/or” approach of comparative efficiency. It aims not to champion the least bad alternative, but instead to understand how and why existing prisons and jails, public *and* private, fall so far short of the ideal. For liberal legitimacy, therefore, the current state of public prisons represents not a rejoinder to the foregoing critique of private prisons, but rather an occasion for asking whether the insights gleaned from that critique help also to explain failings in the public system.

That there is much to learn about public prisons from a study of private prisons only makes sense. Although the privatization of corrections is generally treated in the private prisons literature as a radical departure from prevailing penal practices, prison privatization represents neither an isolated nor an aberrant approach to punishment. It is instead the logical extension of practices that are standard fare in the prison system as a whole. Of these practices, two in particular bear emphasizing: (1) the widespread use of private contractors to provide key prison services at a cheaper cost than the state would otherwise pay, and (2) the delegation to correctional officers of considerable discretion—and thus, considerable power—over vulnerable and dependent prisoners absent mechanisms adequate to check possible abuses.

The foregoing discussion suggests that the risk that private prisons will be unsafe and inhumane stems directly from these two practices. Yet both of these practices are also standard components of state-run prisons across the country. As to the first, virtually every corrections facility in the country contracts out to for-profit providers for at least some necessary services, including everything from food services to medical, dental, and psychiatric treatment to rehabilitative and educational programming, garbage collection, and even inmate classification.<sup>280</sup> The state’s primary motivation for such contracting is its potential to cut the cost of corrections to the state; for the majority of contractors, as in the case of private prison providers, the aim is to

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280. See Joel, *supra* note 63, at 51, 51. All prisons—public as well as private—contract out a range of necessary services to private for-profit contractors to save money on the cost of corrections. The alternative to private prisons is thus not wholly “public” prisons, but rather prisons in which state-employed prison administrators contract out discrete services to for-profit providers who, in their spheres, are subject to the same pressures and temptations as private prison providers.



make as large a profit as possible.<sup>281</sup> And although perhaps some services—say, garbage collection—can be carried out without having an impact on prison conditions, most others directly affect the well-being of prisoners.<sup>282</sup>

And as to the second, in terms of correctional officers' discretion in dealing with prisoners, there is little if anything to distinguish public from private. Prison officials in public and private prisons alike have direct control over all aspects of prisoners' day-to-day lives,<sup>283</sup> the circumstances of which are well hidden from public view. Furthermore, the mechanisms in place to check potential abuse in the public prisons are either identical to those that apply in the private context, or else, despite differences, are just as likely to be inadequate.

With respect to the courts, aside from the narrow *Richardson* exception,<sup>284</sup> the legal standards previously canvassed, both substantive and procedural,<sup>285</sup> apply equally to public and private prisons.<sup>286</sup> The same holds for the certification standards of the ACA, which does not distinguish between public and private prisons when assessing facilities for accreditation purposes, and thus judges each on

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281. Unlike the private prison context itself, in the context of contracting out for discrete services, some of the players are nonprofits, who seek not economic rewards but to fulfill some other aim. The precise interests of nonprofit prison contractors vary depending on the nature of the contractor. For example, Prison Fellowship Ministries operates a program called the InnerChange Freedom Initiative (IFI), which runs "Biblically-based, Christ-centered 24-hour a day" prison residential programs in Iowa, Kansas, Minnesota, and Texas. IFI - About - IFI Program, <http://www.ifiprison.org/channelroot/home/aboutprogram.htm> (last visited Dec. 13, 2005); IFI - States, <http://www.ifiprison.org/channelroot/home/states.htm> (last visited Dec. 13, 2005). Prisoners who participate in IFI programs live together in a separate area of the prison, and their days are orchestrated exclusively by InnerChange. See IFI - About - IFI Program, <http://www.ifiprison.org/channelroot/home/aboutprogram.htm> (last visited Dec. 13, 2005) ("The state continues to provide food, clothing, shelter and security to the inmates while IFI staff provides the intensive program."). According to the program's website, its mission "is to create and maintain a prison environment that fosters respect for God's law and rights of others, and to encourage the spiritual and moral regeneration of prisoners." *Id.*

282. Arguably, of course, even garbage collection can directly affect the quality of conditions of confinement if it is not carried out regularly enough or under sufficiently sanitary conditions.

283. See *supra* note 133 and accompanying text.

284. See *Richardson v. McKnight*, 521 U.S. 399 (1997) (holding that privately employed prison guards are not entitled to qualified immunity in § 1983 actions). But see *supra* notes 183–87 and accompanying text for an argument that the denial of qualified immunity to private prison guards is unlikely to yield much tangible benefit to prisoners held in private facilities.

285. The PLRA, which restricts prisoners' access to the courts, applies to all inmates, whether they are held in public or private facilities.

286. See *supra* Part III.D.1.

the same basis. As for the threat of service-provider replacement in cases of poor performance and ongoing monitoring of internal prison affairs, although the structuring regimes differ in each case, these mechanisms appear no more effective at constraining abuses in the public sphere than in the private.

With regard to competition and the threat of replacement, because the state has a monopoly over prison administration, there is no possibility that a dysfunctional public prison will be taken over or replaced by an alternate provider. And as to monitoring, although many states provide by statute or administrative regulation for regular inspection and oversight of corrections facilities, the stipulated requirements tend to be minimal. In California, for example, the Office of the Inspector General (CA OIG) is required by statute to audit each prison within a year of a new warden's appointment, and all facilities once every four years.<sup>287</sup> Although available reports suggest that the CA OIG does a thorough job and provides detailed and useful findings,<sup>288</sup> the infrequency of the audits suggests that this oversight scheme can have only limited effect. At the same time, even where monitoring requirements seem on paper to be relatively stringent, they do not necessarily translate in practice into effective means for identifying and checking possible abuses. In Tennessee, for example, the Commissioner or Deputy Commissioner of Corrections is required to visit each state prison once a month "to determine whether the laws, rules and regulations are duly

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287. See CAL. PENAL CODE § 6126 (a)(2) (West 2005). This provision went into effect on July 1, 2005, and its requirements are to be "fully met" by July 1, 2009. *Id.* Prior to the amendment, the CA OIG was under no specific obligation to conduct regular investigations or audits of any facilities; instead, the CA OIG was simply given the discretion to "initiate an investigation or an audit on his or her own accord." *Id.* (text of section operative until July 1, 2005).

288. For example, the CA OIG's 2003 audit of conditions in California State Prison Solano in Vacaville, California, identified problems that included "deficiencies in tracking inmate tuberculosis status, improper assignment of sentence reduction credits, ineffective monitoring of the length of time inmates spend in administrative segregation, unsafe modification to administrative segregation unit buildings, and inappropriate housing for inmates taking psychotropic and anticonvulsant medications." CAL. OFFICE OF THE INSPECTOR GENERAL, MANAGEMENT REVIEW AUDIT, CALIFORNIA STATE PRISON, SOLANO at 3 (2003), available at <http://www.oig.ca.gov/reports/pdf/csps0303.pdf>. In addition, the audit "revealed several issues outside the direct control of the warden that require the attention of the Department of Corrections. Those issues include[d] budgetary restrictions that conflict with departmental mandates relating to inmate dental care and deficiencies in procedures for conducting inmate death reviews." *Id.*

observed . . . and the convicts properly governed.”<sup>289</sup> Yet my efforts to turn up records confirming these monthly inspections were unavailing, and the commissioner’s own annual review suggests that inspections are conducted not monthly but annually.<sup>290</sup> And even these annual inspections seem unlikely to affect the quality of conditions of confinement, given the emphasis the commissioner places on the “cost efficient” character of this monitoring scheme;<sup>291</sup> as has already been seen, an emphasis on cost savings in the context of monitoring tends to detract from, rather than enhance, the success of the effort.<sup>292</sup>

Thus, public prisons, too, contract with for-profit providers for the provision of essential prison services as a cost-saving measure. And in public prisons, too, correctional officers enjoy considerable power over prisoners absent effective oversight mechanisms. It should thus be unsurprising that, in terms of day-to-day structure and functioning, private prisons operate pretty much like public prisons—and that the conditions in each are far from safe or humane.<sup>293</sup>

What lessons, if any, does the foregoing analysis of private prisons offer for those wishing to increase the humanity of prison conditions generally? For one thing, it suggests that prison officials should be wary of contracting out prison services, even on a smaller scale, to any entities that promise to reduce the cost of providing essential prison services in exchange for the chance to make a profit for themselves. This caution extends not just to contracts for running

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289. TENN. CODE ANN. § 41-1-1-6 (2005).

290. TENN. DEP’T OF CORR., FISCAL YEAR 2003–2004, ANNUAL REPORT, at 19 (2004) (section entitled “Annual Inspections”).

291. *Id.* This particular emphasis, together with the fact that, collectively, the Tennessee prisons were reportedly 95 percent “in compliance with policy mandates for FY2003-04” suggests an inspection regime of relatively limited efficacy in terms of identifying problems and constraining abuses. *Id.* at 20.

292. *See supra* Part III.D.3.

293. This fact may help to resolve a puzzle presented by the emergence of private prisons—why a policy innovation that struck so many outsiders as inappropriate and even deeply disturbing was so readily adopted as a good idea by corrections professionals across the country. The explanation may be that once prison officials came to view as appropriate the contracting out to for-profit parties of key prison services in order to save money on the cost of corrections, and came to see nothing problematic about according broad discretion over inmates to prison guards notwithstanding the questionable efficacy of existing accountability mechanisms, private prisons themselves did not seem so dramatic a move. At that point, it may have seemed perfectly reasonable to delegate responsibility for whole inmate populations to for-profit contractors and to rely on the regulatory mechanisms canvassed in this Article to check potential abuses

whole prisons, but also to the contracting out of discrete prison services like food service, medical, dental and psychiatric care, rehabilitative programming, and inmate classification. As has just been seen, absent effective checks, one can expect for-profit contractors to cut costs even at the expense of inmates. Creating disincentives to this behavior is therefore crucial. But ensuring meaningful oversight and accountability costs money, and any time the states contract out to reduce their prison budgets, state officials are going to be reluctant to spend what it takes to ensure prisoners' ongoing security and well-being. This set of dynamics means that contracting out even discrete prison services to for-profit contractors when the state's goal is cost cutting is a recipe for seriously compromised conditions of confinement.

Experiences with prison health-management companies bear out this caution. To take just one example, in 2003 alone, CMS took in over \$500 million contracting with prisons in thirty states to provide medical care for inmates. Although the company is extremely secretive,<sup>294</sup> investigations into company practices have revealed a litany of stories of inmates who died or suffered serious long-term disability because of treatment delayed or denied,<sup>295</sup> of staff—doctors and nurses—being hired despite their having been suspended from the practice of medicine or otherwise disciplined by the medical boards issuing their licenses,<sup>296</sup> and of policies deliberately designed to minimize the amount of medical care ultimately provided to prisoners in need of treatment.<sup>297</sup>

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294. See Hylton, *supra* note 8, at 43.

295. See, e.g., William Allen & Kim Bell, *Death, Neglect, and the Bottom Line*, ST. LOUIS POST-DISPATCH, Sept. 27, 1998, at G1 (giving examples of numerous inmates who died or became seriously ill as a result of inadequate medical care provided by CMS).

296. See Skolnick, *supra* note 175, at 1387 (detailing CMS's employment practices, which include hiring medical personnel whose licenses have been suspended or revoked by state medical boards, and explaining that some states allow the reinstatement of medical licenses restricting the holder to "practice in a penal institution").

297. One former CMS employee, who worked for CMS for five years as a supervising nurse, recounted a host of such policies, including those made to reduce the number of doctors' visits:

Appointments were made for weeks or months down the road, knowing that the inmate would not be there anymore. Or we would make appointments for days that we knew the inmate was going to be in court. They don't keep the trial dates in the medical file, but you just call the booking desk up front and ask them when the trial date is. Then you make their next appointment for that date. We were told to tell them, there was a canned phrase, "Don't worry, you have an appointment. We just can't tell you when it is because of security reasons." So you would be consoling someone, knowing full well that they weren't going to get to see anybody. You just put them right back at the bottom of the list again.

And contracting out is not the only practice that bears scrutiny for the reasons just explored. It is also necessary to scrutinize carefully any independent efforts on the part of state officials to make publicly run prisons financially self-sustaining or to run them at a profit.<sup>298</sup> Meeting inmates' needs and ensuring their safety is expensive and requires a certain minimum investment. Yet state corrections officials, too, face pressures to reduce the cost of running the prisons. Depending on the approach adopted to achieve this end, these efforts could well pose a risk of serious harm to inmates.<sup>299</sup>

The foregoing analysis of private prisons also indicates that dangers may exist whenever individuals with their own motives and interests are given wide discretion over the lives of inmates. Given the power wielded by all correctional officers, public or private, all prisons could benefit from more intense efforts to monitor meaningfully and to enforce standards of confinement consistent with

Hylton, *supra* note 8, at 53.

298. *But cf.* JAMES ET AL., *supra* note 4, at 154 (“[W]hilst it might be argued that there is an important distinction between the pursuit of profit and the pursuit of economy, any difference in the impact of the cash nexus in terms of [prison] regime management is . . . difficult to discern.”).

299. Consider, for example, the landmark case of *Hutto v. Finney*, 437 U.S. 678 (1978), in which the Supreme Court affirmed the characterization of the Arkansas prison system “as ‘a dark and evil world completely alien to the free world,’” *id.* at 681 (citation omitted).

[At] Cummins Farm, the institution at the center of [the] litigation, [inmates were required] to work in the fields 10 hours a day, six days a week, . . . in all sorts of weather, so long as the temperature was above freezing, sometimes in unsuitably light clothing and without shoes. [They] slept together in large, 100-man barracks, . . . [allowing] “creepers[.]” . . . [to] stalk[] their sleeping enemies. In one 18-month period, there were 17 stabbings, all but 1 occurring in the barracks. Homosexual rape was so common and uncontrolled that some potential victims dared not sleep . . . [Disciplinary infractions brought c]onfinement in punitive isolation . . . for an indeterminate period of time. An average of 4, and sometimes as many as 10 or 11, prisoners were crowded into windowless 8'x10' cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell.

*Id.* at 681 n.3, 682 (citations omitted). In this case, the Court found that Arkansas' prison administrators “evidently tried to operate their prisons at a profit.” *Id.* at 681 n.3. The Arkansas Corrections Commissioner at the time the case was brought was T. Don Hutto, who subsequently joined CCA as an executive vice president. Lilly & Knepper, *supra* note 76, at 159.

Or consider the effects of efforts by the Texas Department of Criminal Justice (TDCJ) in 1994 to keep spending down by serving inmates “Vitapro[, a] powdered soybean substitute for meat.” HALLINAN, *supra* note 61, at 175. Vitapro came “in two flavors, chicken and beef, and was supposed to be cheaper than both.” *Id.* The TDCJ contracted with the manufacturer of Vitapro to buy its product on the understanding that it could sell any extra to other state prison systems, an arrangement that promised the TDCJ four million dollars a year and led Andy Collins, then TDCJ director, to “order[] the prison’s food supervisor to water down” the powder so as to preserve a large amount for resale, leading to a “food” that was “barely tolerable.” *Id.*

the demands of the humanity principle.<sup>300</sup> All prisons, for example, ought to be required to secure ACA accreditation,<sup>301</sup> although ideally these standards would be made more rigorous than they currently are. There ought to be benchmark standards of quality and humanity that apply to all prisons, set by state departments of corrections themselves—or if this arrangement would create too great a conflict of interest, then by an independent body.<sup>302</sup> This body could also be charged with monitoring compliance in a regular and ongoing way. In the public sector, too, such an arrangement would carry a risk of agency capture, but absent the lure of a high-paying job with the entity being monitored, monitors overseeing the performance of state-run prisons might at least be somewhat less vulnerable in this regard.<sup>303</sup> And efforts should be made to render the courts a more

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300. Publicly employed prison guards, who enjoy civil service protections and are far more likely to be unionized, receive higher salaries, better benefits, and more training, and are less likely to be short staffed than private prison guards. They are thus better equipped to maintain a prison environment in which inmates are less susceptible to violence than the prisoners are in private prisons. But if for this reason conditions in public prisons may be somewhat less at odds with the demands of the humanity principle, they nonetheless continue to fall well short of fully satisfying those demands, notwithstanding that conditions in private prisons may be still worse.

301. As of 2001, fewer than 80 percent of public prisons met this requirement, whereas 100 percent of private prisons had or would soon have ACA accreditation. Harding, *supra* note 63, at 316–17.

302. Charles Logan has gone further than anyone in developing systematic standards for measuring the quality of prison conditions. See Charles H. Logan, *Well Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 J. CRIM. L. & CRIMINOLOGY 577, 581 (1992) (introducing criteria with which to measure prison quality). His framework measures “eight dimensions of prison quality—security, safety, order, care, activity, justice, conditions, and management.” *Id.* These dimensions are consistent with the “mission of a prison . . . to keep prisoners—to keep them in, keep them safe, keep them in line, keep them healthy, and keep them busy—and to do it with fairness, without undue suffering and as efficiently as possible.” *Id.* at 580 (citing CHARLES H. LOGAN, *WELL KEPT: COMPARING QUALITY OF CONFINEMENT IN A PUBLIC AND PRIVATE PRISON* 5–11 (Nat’l Inst. of Justice 1991)).

303. Possible strategies for addressing the risk of agency capture might include salary increases for monitors to counter any temptation to curry favor with the monitored entity in the hope of securing a higher paying job; frequent rotations by state-employed monitors through the various facilities to prevent the possibility of a shift in loyalty; and the establishment of independent oversight bodies, perhaps along the lines of Her Majesty’s Inspectorate of Prisons (HM Inspectorate) in the United Kingdom. HM Inspectorate is an independent oversight agency “which reports on conditions for and treatment of those in prison, young offender institutions and immigration removal centres.” HM Inspectorate of Prisons, <http://inspectorates.homeoffice.gov.uk/hmiprison/about-us/> (last visited Dec. 13, 2005). The chief inspector “is appointed by the Home Secretary, from outside the Prison Service, for a term of five years,” and “reports directly to the Home Secretary.” *Id.* The auditors include “healthcare inspectors, drugs inspectors,” and other professionals otherwise unconnected to the Prison Service. HM Inspectorate of Prisons - Frequently Asked Questions, <http://inspectorates.homeoffice.gov.uk/hmiprison/about-us/faqs/> (last visited Dec. 13, 2005).

meaningful channel for ensuring the accountability of prison administrators. Such efforts might include clarifying (and even strengthening) via statutory enactments the particular duty of care that state officials owe inmates, providing inmates seeking to enforce these standards with more meaningful rights of access to the courts, and establishing liability rules more likely than prevailing Eighth Amendment standards to yield humane conditions of confinement. Such changes to prevailing legal standards would benefit inmates in any prison, public as well as private.

As these proposals indicate, viewed from the liberal perspective, there is a great benefit in shifting the focus of the private prison debate from efficiency to the humanity of conditions of confinement. Doing so allows us to transcend the inadequate baseline of current prison conditions and to consider how the system as a whole, public prisons as well as private, might better measure up against society's obligations to those it incarcerates.

These proposals do leave unaddressed one accountability mechanism favored by private prison advocates, that of competition and the threat of replacement. The absence of these forces in the public context, a product of the state's monopolistic status as the sole prison provider, is one reason some advocates of private prisons offer for their preference for privatization. On this view, the fear of losing one's contract to a competitor is supposed to exert a disciplining force not available in the public context. Yet the foregoing discussion suggests that this threat is far less effective at curbing abuses than is often believed. It also suggests the danger of relying on this threat to ensure adequate conditions of confinement; even if a given prison contractor is replaced, there is no guarantee that the replacement will do the job any better. Indeed, there is reason to think they will not do so, given that the same regulatory structure that failed to constrain the previous provider will still govern. Moreover, having replaced a provider once, the state will not be eager to do so again. The lesson here applies equally to public prisons as to private ones. If the penal system is failing, changing the logo on the letterhead or the nameplates on the doors will not solve existing problems. When the system is failing, the system itself requires serious reconsideration.

## IV. PRIVATE PRISONS AND THE PARSIMONY PRINCIPLE

A. *Understanding the Parsimony Principle*

As conceived of here, the parsimony principle speaks not to conditions of confinement, but to the length of prison sentences. This principle obliges the state to avoid imposing sentences that are gratuitously long. I have argued elsewhere that this constraint requires that punishments be no more severe than necessary to appreciably deter offenses causing harm of equal or greater severity.<sup>304</sup> But one need not accept this particular interpretation of the parsimony principle to agree with the more general point that to be legitimate, punishment can be of no greater severity than can be justified to all under fair deliberative conditions.<sup>305</sup>

This more general version of the principle is all that is required to motivate the analysis of private prisons from the parsimony perspective. Whatever one's view of the justification for punishment that would be accepted under fair deliberative conditions, any view satisfying this requirement would recognize the burden that punishment places on the urgent interests of the targets<sup>306</sup> and would thus authorize the state to punish convicted offenders only when interests of equal or greater urgency would thereby be served.<sup>307</sup> I therefore take it as uncontroversial that, whatever one's particular view as to the justification for punishment that would be accepted under fair deliberative conditions, all would reject the idea that

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304. The basis for this position is that when a punishment of incarceration would worsen the conditions of the target vis-à-vis his or her most urgent interests without effecting a like benefit for anyone else, that punishment would be viewed from behind the veil of ignorance as merely gratuitous and thus illegitimate. See Dolovich, *supra* note 8, at 385–403 (analyzing the principles of punishment that parties would adopt under “conditions of partial compliance”).

305. I have in mind here the conditions modeled by Rawls's idea of the original position with its veil of ignorance, suitably modified for conditions of partial compliance. See Dolovich, *supra* note 8, at 350–78 (applying the principles of partial compliance to the Rawlsian framework); see also *supra* Part II.B.

306. This assumption stems from the impartiality constraints imposed on deliberating parties. Parties uncertain whether they will wind up targets of punishment once the veil is lifted would consider the issue as if they themselves might suffer punishment; they would thus necessarily be aware of the burdens such punishments would impose. For a response to the objection that the parties behind the veil would not be uncertain on this point, see *supra* note 110.

307. See *supra* Part II.B (discussing the deliberative process of the parties behind the veil, which for purposes of determining the principles of punishment would be guided by leximin).



punishments of incarceration might be imposed on some members of society in order that others might benefit financially.<sup>308</sup>

From the parsimony perspective, any such punishments would be considered gratuitous, and therefore illegitimate. Yet the privatization of prisons seems to raise this very concern—that the delegation of responsibility for prison administration to private, for-profit contractors could result in punishments imposed so that some members of society might increase their net worth. To this extent, the state's use of private prisons would violate the parsimony principle.

Efforts to ensure that prison sentences satisfy the parsimony principle face obstacles not present in the humanity context. With very few exceptions, violations of the humanity principle can be verified against existing prison conditions.<sup>309</sup> People may disagree as to whether particular conditions are inhumane, but the ultimate judgment will turn on the nature of the conditions themselves. To identify violations of the parsimony principle, in contrast, it is not enough to look to the sentences themselves, for there are no qualitative differences between legitimate punishments and gratuitous ones. All are measured by incarceration for a term of years, and what for one offender will constitute gratuitous punishment will be legitimate when applied to another. In the parsimony context, it is the reason why a particular sentence was authorized that matters. The determination as to whether a particular punishment is illegitimate is thus necessarily far more speculative in the parsimony context than in the humanity context. Moreover, it is the process of fixing sentences rather than the particular sentences themselves that is the primary focus of scrutiny.

The parsimony principle requires at the very least that punishments not be imposed on some members of society in order that others might benefit financially. It is thus crucial that the process of shaping sentencing policy and fixing particular sentences be

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308. Or at least this is so where the financial benefit is unconnected to the protection of anyone's most urgent interest in their security and integrity, or to any interests as urgent as those of the punished burdened by the punishment itself. *See supra* note 107.

309. The exceptions would arise in those rare circumstances under which inhumane punishment was not automatically ruled out as illegitimate; in those cases, one would require more information before judging conditions gratuitously inhumane. *See supra* notes 121–23 and accompanying text (noting that inhumane punishment may not always be incompatible with the demands of liberal legitimacy in a partially compliant society, but that the circumstances under which such punishment might be legitimate are highly circumscribed).

untainted by illegitimate influences.<sup>310</sup> In practice, of course, this process will inevitably fall short of this ideal. As a consequence, even legislators committed to realizing the parsimony principle cannot be confident that either the sentencing policies they authorize or the punishments imposed pursuant to those policies will satisfy this standard. Such legislators thus have an added burden. Not only are they obliged to do all they can to ensure the conditions necessary if criminal punishment is to be legitimate, but they must also avoid taking steps likely to corrupt these conditions. This “integrity condition” is designed to ensure that the process of crafting sentencing policies is as isolated as possible from any illegitimate influences.<sup>311</sup> When this condition remains unsatisfied, the criminal justice system itself may come to lack integrity, a circumstance that could lead to the imposition of illegitimate punishments. It could also, moreover, lead to citizens’ mistrust of the judgments and actions of government institutions. Citizens may be expected to respect the authority of the state only when they trust that state power is exercised for legitimate reasons justifiable to all. When the process of setting criminal penalties is perceived to lack integrity, citizens would reasonably lack confidence that punishments imposed on convicted offenders were consistent with such reasons. Satisfying the integrity condition in the parsimony context is thus important for two reasons: it increases the likelihood of legitimate punishment, and it secures public trust in the process.

In what follows, I consider the possible parsimony concerns raised by the state’s use of private prisons. In contrast to Part III, the present discussion introduces considerations that have not previously been addressed in any systematic way in the private prisons literature. It is thus necessarily more speculative and suggestive than Part III. As with the discussion in Part III, consideration of the state’s use of private prisons from the perspective of the parsimony principle suggests a critique, not only of the state’s use of private prisons, but of

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310. It is for this reason that parties deliberating at the legislative stage as to the shape of sentencing policy ought to approach the task as if from behind a “modified veil,” which screens out any knowledge of the parties’ personal particulars. *See supra* note 117.

311. The integrity condition may thus be understood as prophylaxis, preventing actions that might risk the imposition of illegitimate punishment. In so doing, it also helps to preserve the public trust, which would be compromised by any widespread skepticism as to the legitimacy of punishment. The integrity condition arguably also applies in the humanity context. But for the reasons noted here, it is particularly salient in the context of the parsimony principle. *See also supra* discussion accompanying note 118.

the penal system as a whole. In this case, however, it is not merely particular practices, but the whole process of policymaking in the criminal justice context that the analysis of private prisons calls into question.

*B. Influencing Time Served from the Inside: "I'm the Supreme Court"*<sup>312</sup>

The length of the sentence a convicted offender officially receives is established by the sentencing judge within the terms set by the legislature. However, in those jurisdictions that have retained parole and indeterminate sentencing,<sup>313</sup> the precise amount of time a convicted offender actually serves is determined by judgments regarding the inmate's behavior made by prison officials over the course of his or her confinement. Such judgments in turn influence decisions regarding the classification, discipline, and ultimate release date of the inmate. For this reason, those prison officials with direct day-to-day contact with inmates are in a position of considerable power over the length of the sentence individual inmates will ultimately serve.

In private prisons, it is the employees who exercise this power. From the perspective of the parsimony principle, the concern with this arrangement arises from the possibility that private prison operators, whose profitability depends on maintaining a high occupancy rate, could encourage their employees in subtle and not-so-subtle ways to make judgments regarding individual inmates' behavior so as to prolong the amount of prison time that inmates serve, regardless of whether such extensions are consistent with the demands of legitimate punishment.<sup>314</sup> True, at least in some states,

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312. Robbins 1987, *supra* note 4, at 816 (quoting Martin Tolchin, *Jails Run by Private Company Force It to Face Question of Accountability*, N.Y. TIMES, Feb. 19, 1985, at A15 (statement of CCA employee John S. Robinson)).

313. As of 2002, eighteen states had abolished parole. This number does not include Colorado or Connecticut, each of which, having abolished parole, have since reinstated it. See ASS'N OF PAROLING AUTHS. INT'L, PAROLE BOARD SURVEY 2002, available at <http://www.apaintl.org/Pub-ParoleBoardSurvey2002.html> (last visited Dec. 6, 2004) (surveying parole policies of U.S. states).

314. Some anecdotal evidence suggests that private prison administrators already encourage decisionmaking on the part of employees that inures to the financial advantage of the prison-management company. Guards at CCA's Youngstown facility, for example, were given a "rundown [by their employer,] 'saying two slices of bread . . . costs this much. If you can cut corners here, it would mean a possible raise for us.'" Tatge, *supra* note 87, at 18A (quoting former CCA employee Robert Oliver).

legislators have sought to mitigate the danger of such manipulation by reserving to state officials the final authority over determinations bearing on length of sentence, including changes to inmate classification and any decisions relating to inmate release dates, parole decisions, work release, and reduction of good-time credit.<sup>315</sup> However, even under such arrangements, private prison employees still wield considerable influence over the administrative proceedings that affect individual inmates' length of confinement: as one CCA employee, charged with reviewing disciplinary cases, put it, "I'm the Supreme Court."<sup>316</sup> The formal reservation of these powers to the state may thus be insufficient to counteract the dangers such influence represents for the legitimacy of criminal punishment in terms of parsimony.

Take, for example, the disciplinary context. Discipline in prisons is kept by guards, who have authority to "write up"—that is, to issue disciplinary tickets (D-tickets) to—inmates caught violating prison regulations. Following the receipt of a D-ticket, the inmate will be called to a hearing (D-hearing), at which time evidence may be entered and testimony heard and after which the hearing officer will issue the verdict and pronounce sentence.<sup>317</sup> Depending on the infraction, penalties may include revocation of good-time credits<sup>318</sup> and thus the extension of the inmate's term of incarceration.<sup>319</sup>

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315. See, e.g., *Richardson v. McKnight*, 521 U.S. 399, 411–12 (1997) (noting Tennessee's reservation to the state of "important discretionary tasks—those related to prison discipline, to parole, and to good time" (citing TENN. CODE ANN. § 41-24-110 (1990))). According to Ratliff, "[e]leven states . . . bar private operators from '[g]ranted, denying or revoking inmates' good-time credits, . . . eleven states prohibit private contractors from calculating prisoners' release dates[, and] . . . nine states bar contractors from making furlough decisions.'" Ratliff, *supra* note 25, at 412 (citation omitted). "[H]owever, only six states currently prohibit private contractors from making parole recommendations[, and] . . . only seven states have enacted any restraints on private contractors' ability to make disciplinary judgments." *Id.* at 413, 415–16.

316. Robbins 1987, *supra* note 4, at 816 (quoting Martin Tolchin, *Jails Run by Private Company Force It to Face Question of Accountability*, N.Y. TIMES, Feb. 19, 1985, at A15 (statement of CCA employee John S. Robinson)).

317. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 548 n.8 (1974) (quoting in full the regulations describing the disciplinary process in the Nebraska prison system, as established in the Nebraska Treatment and Corrections Act, as amended, NEB. REV. STAT. § 83-1,107 (Cum. Supp. 1972)).

318. In jurisdictions with "truth in sentencing" statutes, which require convicted inmates to serve some specified component of their sentence (usually 85 percent) before the possibility of release, the amount of good-time credit an inmate can earn is statutorily capped. PAUL M. DITTON & DORIS JAMES WILSON, TRUTH IN SENTENCING IN STATE PRISONS: STATE SENTENCING LAW CHANGES LINKED TO INCREASING TIME SERVED IN STATE PRISONS (1999),

Because inmates have no right of counsel at D-hearings,<sup>320</sup> it is generally their word against that of the guard who wrote up the infraction. Under such circumstances, even in the public sector, the inmate is at a considerable disadvantage: given the solidarity among corrections officers, which can frequently devolve into a mentality of “us” against “them,”<sup>321</sup> the hearing officer’s sympathies tend to lie with the disciplining officer. When the facility is run by a private, for-profit corporation, the worry is that the process will be skewed even more strongly against the inmate. The guard writing up the infraction, and in many cases the hearing officer as well, will be employed by a corporation with a direct financial stake—indeed, a paramount interest—in maintaining a high occupancy rate.<sup>322</sup> This arrangement raises the concern that official testimony and judgments rendered at D-hearings will not reflect the treatment that the inmates deserve or that is consistent with the state’s interest in imposing only legitimate punishments, but will instead reflect the financial interests of the company running the prison.<sup>323</sup>

The same can be said for parole decisions. In the decision of any parole board, the inmate’s disciplinary record while in prison carries great weight. Indeed, in many cases, prison officials are “called upon to provide parole boards with testimony [and] parole

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available at <http://www.ojp.usdoj.gov/bjs/pub/press/tssp.pr> (last visited Dec. 6, 2004). By the end of 1998, forty states had adopted such statutes. *Id.*

319. Other possible sentences range from denial of privileges to time in solitary confinement (“the hole”). LYNN S. BRANHAM & MICHAEL S. HAMDEN, *CASES AND MATERIALS ON THE LAW OF SENTENCING & CORRECTIONS* 583 (7th ed. 2005).

320. However, inmates are entitled to some limited procedural due process rights at such hearings. *Wolff*, 418 U.S. at 558.

321. *See, e.g.*, Conover, *supra* note 256, *passim* (illustrating the oppositional interplay between guards and inmates); Crawley, *supra* note 145, at 420 (explaining that most prison guards feel the need to be “emotionally detached” from prisoners).

322. *See* Ratliff, *supra* note 25, at 373, 393 (“Private prison contractors . . . have a financial interest in maximizing their inmate populations, because their compensation is directly tied to the number of prisoners they house each day. . . . Because each prisoner release entails a revenue loss, private operators have a financial bias toward minimizing releases and maximizing sentences.”).

323. Although this possibility might be constrained to some degree in cases in which the hearing officer is required by statute to be a state employee, the animating worry remains. Even in such cases, the same tendency of prison officials to be sympathetic to one another’s reports will likely incline the state-employed hearing officer to take the side of the private prison employee over the inmate. From the perspective of the parsimony principle, therefore, notwithstanding the participation in the process of a state-employed corrections official, the situation still creates the possibility of illegitimate influence and thus remains troubling.

recommendations.”<sup>324</sup> Again, the worry is that private contractors’ financial interest in the outcome of parole proceedings “may impair private officials’ objectivity” in a way that yields parole denials for otherwise qualified inmates.<sup>325</sup>

Little study has been made of this aspect of private prison life, and as a result little definitive proof exists of widespread abuses of discretion of the type just postulated.<sup>326</sup> Given the demands of the integrity condition, however, to raise a salient parsimony concern it is not necessary to have definitive empirical proof that the feared abuses have in fact taken place. It is enough that the policies in question create an appreciable risk that illegitimate interests will affect the nature and scope of punishments imposed by the state.

Here, the Supreme Court’s due process jurisprudence provides an apt analogy.<sup>327</sup> The Court has held that it violates due process to subject the “liberty or property [of any defendant] to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.”<sup>328</sup> In *Connally v. Georgia*,<sup>329</sup> for example, the Court held that the issuance of a search warrant by a justice of the peace violated due process when the justice was paid a fee of five dollars only when he issued the warrant sought, and received no compensation if the warrant request was denied.<sup>330</sup> Such a situation, the Court found, “offers ‘a possible temptation to the average man as a judge . . . [that] might lead him not to hold the balance nice, clear and true between the State and the accused.’”<sup>331</sup> Indeed, the Court has gone still further and required “that judges avoid even the *appearance* of financial

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324. Dunham, *supra* note 4, at 1489.

325. *Id.* at 1490.

326. One study does exist which bears out the hypothesis that, in the private prison context, the financial interests of the company running the prison will influence judgments made in the context of prison discipline and classification. See Paul Moyle, *Separating the Allocation of Punishment from Its Administration: Theoretical and Empirical Observations*, 11 CURRENT ISSUES CRIM. JUST. 153, 166–170 (1999) (offering evidence from a CCA-run prison in Queensland, Australia, which suggests that “the commercial interest of CCA influenced a decision to [discipline] an inmate” and affected “classification” decisions). This study, however, is a very small one, and although the findings are suggestive, they are hardly conclusive.

327. I am grateful to Robert Goldstein for suggesting this analogy.

328. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (quoted in Ratliff, *supra* note 25, at 385).

329. 429 U.S. 245 (1977)

330. *Id.* at 246, 251. In this way, the Court found that the “financial welfare [of the justice was] enhanced by positive action and [was] not enhanced by negative action.” *Id.* at 250.

331. *Id.* at 250 (quoting *Ward v. Village of Monroe*, 409 U.S. 57, 60 (1972)).

bias.”<sup>332</sup> As the Court explained, “to perform its high function in the best way, ‘justice must satisfy the appearance of justice.’”<sup>333</sup> These cases are plainly concerned with the substantive fairness of the outcome, the worry being that the decisionmaker will not be truly impartial and will thus reach a questionable result. But they are also concerned with the integrity of the system itself, and with ensuring that those subject to punishments can trust in the impartiality of the decisionmaker and thus in the legitimacy of the verdict. For where the judge is known to have a vested interest in the outcome, the subjects of punishment are unlikely to trust and respect the judgment issued.

This same set of concerns applies to the private prison context. True, private prison guards’ financial incentive to maintain high occupancy rates is not as stark as the justice of the peace’s financial incentive in *Connally*, because private prison employees, unlike the justice of the peace, receive a salary regardless of any role they might play in disciplinary or parole hearings. But the interest of their employers in this regard is still substantial; depending on the contract price, a single parole denial or revocation of good-time credit could be worth as much as \$10,000 to \$20,000 or more per year,<sup>334</sup> a notable sum in an industry where contractors work on extremely narrow profit margins.<sup>335</sup> The guards, who are hired to work in the interest of their employers and whose job security is dependent on the financial success of the operation, surely know that this is so.<sup>336</sup> Under such circumstances, it would come as no surprise if illegitimate decisions were in fact rendered by private prison employees, or if prison inmates, along with their families, friends, and communities, were

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332. Ratliff, *supra* note 25, at 386 (emphasis added).

333. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955) (internal citation omitted)).

334. *Cf.* Ratliff, *supra* note 25, at 414 (arguing that “due process would not tolerate a system in which public officials received twenty-thousand dollar bonuses each time they denied an inmate’s parole or reduced an inmate’s good-time credits”).

335. *See supra* note 215.

336. The incentives facing private prison guards are arguably like those faced by the defendant mayor in *Ward v. Village of Monroeville*, who, although having no personal financial stake in the outcome of cases before him, had an interest in maintaining the income of the city of which he was mayor, “[a] major part of [which was] derived from the fines, forfeitures, costs, and fees imposed by him in his mayor’s court.” 409 U.S. at 58. In *Ward*, such conditions were enough for the Court to find any judgment rendered by the mayor to be suspect when it resulted in fines accruing to the municipal treasury. *Id.* at 60–62. The point was not that the fine could be known conclusively to be illegitimate, imposed solely for the pecuniary benefit of the city, but that the temptation that existed to impose illegitimate fines was enough to make the integrity of any such judgment suspect. *Id.* at 60.

skeptical of the impartiality of the decisionmakers and thus unable to trust the legitimacy of judgments affecting the length of their incarceration.<sup>337</sup>

In public prisons, too, the impartiality of corrections officials can be infected by illegitimate motives, by a distaste for particular inmates, or by sheer delight in exercising power. All such motives could—and likely do—lead public correctional officers to issue D-tickets, to revoke good-time credits, or to testify at parole hearings in ways at odds with the parsimony principle, even absent the financial interest of private prison providers. However, this likelihood does not vindicate private prisons. Rather, recognizing the particular danger the profit motive creates in the context of private prison discipline and parole prompts consideration of other, less obvious ways that dispositions in prison disciplinary and parole hearings may be illegitimately skewed.

*C. Influencing Incarceration Rates from the Outside: “The Most Powerful Lobby You’ve Never Heard Of”<sup>338</sup>*

The private prison industry, to increase the demand for its services, exerts whatever pressure it can to encourage state legislators to privatize state prisons.<sup>339</sup> This effort does not necessarily suggest a parsimony concern, for the fact of privatization alone need not affect

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337. Logan suggests that the economic interest of private prison operators in being widely known as trustworthy would “restrain an ideological interest and . . . force [the contractor] to focus more on the concerns of the general public.” LOGAN, *supra* note 4, at 153. This notion, however, assumes that there are sufficient mechanisms in place to identify any questionable decisions by private prison employees and to translate any concern with overreaching into economic costs for the contractor. As I have shown, however, the limited efficacy of existing oversight and accountability mechanisms makes it unlikely that economic incentives will operate on private prison contractors in ways likely to constrain the sorts of abuses anticipated. *See supra* Part III.D.

338. Nick Penniman, *Outing ALEC: The Most Powerful Lobby You’ve Never Heard Of*, AM. PROSPECT, July 1, 2002, at 12.

339. Strategies to influence penal policy in the direction of privatization have included both aggressive lobbying, McDonald 1994, *supra* note 4, at 43, and the targeting of campaign donations to key legislative players, *see* BRIGITTE SARABI & ERWIN BENDER, *THE PRISON PAYOFF: THE ROLE OF POLITICS AND PRIVATE PRISONS IN THE INCARCERATION BOOM* 8 (2000). In 1998, for example, the private prison industry collectively contributed more than \$540,000 to political campaigns in twenty-five states, just \$44,000 shy of the total contribution given to state campaigns by the National Rifle Association. *See id.* “[W]hile the figure [of \$540,000] appears small relative to federal elections,” Sarabi and Bender explain that “[i]n states, when campaign budgets still average \$5000 for state representatives and \$20,000 for state senators, contributions of \$250, \$500, and \$1000 are still meaningful.” *Id.*



the number of individuals who are actually incarcerated or the length of prison sentences.<sup>340</sup> But what if the private prison industry were exerting political pressure on state legislators not only to encourage a shift to privatization, but also to generate harsher sentencing regimes? This would create the possibility that the state's sentencing policies, and thus the sentences imposed pursuant to them, are inconsistent with the priority of the most urgent interests and instead serve the financial interests of the private prison industry and the politicians who accept campaign contributions from industry members.<sup>341</sup> By creating an industry capable of, and with an interest in, corrupting the legislative conditions for legitimate punishment, the state's use of private prisons would be directly at odds with the demands of the parsimony principle.

Given the financial interest of private prison providers in increased incarceration rates, it would not be unexpected if the industry did seek to influence legislation in this direction. Interestingly, however, although the industry is adept at lobbying legislators and targeting campaign contributions to promote its privatization agenda, there is little evidence of any such efforts in support of harsher criminal sentencing schemes. Some commentators, noting this fact, have argued that the private prison industry has no need to push for stiffer sentences. They suggest that by the time the industry emerged in the mid-to-late 1980s, the prisons were filling up so quickly as a result of other, unrelated forces that prison contractors

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340. There is, however, one sense in which the privatization of prisons might well have this effect. The work of Malcolm Feeley suggests that resources made available for the imposition of punishment tend to get used, and thus that penal innovations that expand the state's capacity to incarcerate will tend to mean the imposition of more punishment regardless of legitimate need. See Malcolm M. Feeley, *The Privatization of Punishment in Historical Perspective*, in *PRIVATIZATION AND ITS ALTERNATIVES* 199, 203-05 (William T. Gormley, Jr. ed., 1991) ("[T]he most significant consequence of privatization historically has been the generation of new and expanded sanctions and forms of control."). This effect in turn suggests the possibility that, to the extent that privatizing prisons expands the number of prison cells available for occupancy by convicted offenders, the incarceration rate will expand accordingly to fill these cells, regardless of whether filling them is consistent with the demands of legitimate punishment. If Feeley is right in this regard, it might be argued that, to the extent that private prisons expand the possible scope of incarceration beyond the demand for legitimate punishment, their use, for this reason alone, is at odds with the parsimony principle. See, e.g., Richard Sparks, *Can Prisons Be Legitimate? Penal Politics, Privatization, and the Timeliness of an Old Idea*, 34 *BRIT. J. CRIMINOLOGY* 14, 25 (1994) (asserting that the state's use of private prisons is "extremely unlikely, for reasons of economic and political logic, to reduce the overall dimensions of [the criminal justice] system").

341. On the campaign contributions of private prison providers to state legislators, see *supra* note 339.

have not needed to undertake any deliberate efforts to ensure continued demand for their services.<sup>342</sup>

However, even if demand for prison space is currently sufficient to ensure the financial position of private prison operators, there is no guarantee that the same will be true in the future. Here, the analogy of the U.S. defense industry, suggested by J. Robert Lilly and Matthew Deflem, may be instructive.<sup>343</sup> After the Cold War, military contractors in the United States suffered a decline in the demand for their services. In response, explain Lilly and Deflem, members of this group “successfully lobbied for governmental concessions and support in the form of changes in the guidelines for selling arms to foreign customers.”<sup>344</sup> Previously, military contractors only received U.S. government approval for foreign arms sales when the sales were found by state officials to “support[] American foreign policy goals and strengthen[] regional alliances.”<sup>345</sup> However, after successful lobbying by the industry hoping to expand its markets in a period of declining American investment in defense, the guidelines for such sales were amended, and they now “require that the U.S. government also consider their benefits to the nation’s military contractors.”<sup>346</sup>

In other words, it was not until economic opportunities for defense contractors began to shrink that the industry began pressuring legislators to generate policies consistent with its corporate interests. This experience suggests that even if private prison providers have had no need as yet to pressure state legislators to shape sentencing policies consistent with their financial interests,<sup>347</sup> these conditions are subject to change. Ultimately, the worry is that, as in the case of the defense industry, the power, wealth, and political connections of the corrections industry may mean that “concerns for

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342. See, e.g., HARDING, *supra* note 3, at 94 (“In the USA there have been exponential increases in imprisonment rates and numbers for the last 15 years. Yet it is really only since the mid-to-late 1980s that privatization has become a visible aspect of the adult imprisonment scene.”); McDonald 1994, *supra* note 4, at 43 (“There is no evidence that private firms have had any influence over the key decisions that have created the booming prisoner populations.”).

343. J. Robert Lilly & Matthew Deflem, *Profit and Penalty: An Analysis of the Corrections-Commercial Complex*, 42 CRIME & DELINQ. 3, 12 (1996); see also Lilly & Knepper, *supra* note 76, at 151 (arguing that “corrections policy is fashioned within a *corrections-commercial complex* akin to the military-industrial complex that operates in the defense industry”).

344. Lilly & Deflem, *supra* note 343, at 12.

345. *Id.*

346. *Id.*

347. This would not mean that they have not in fact done so. For reason to think that at least some industry players have done just this, see *infra* discussion accompanying notes 358–63.

profit, efficiency, competition, and money may radically alter the . . . normative goals [of the corrections domain].”<sup>348</sup>

The defense industry analogy suggests that a lack of evidence as to present efforts to unduly influence sentencing policy does not necessarily mean that the parsimony concern is misplaced in the context of private prisons. It is, moreover, not so clear that the private prison industry has not yet taken steps to promote the adoption of statutes likely to increase the size of the prison population. Although industry members have taken little overt action in this direction, at least two private prison firms—industry leaders CCA and Wackenhut—have for some time been “private sector members” of a little-known organization called the American Legislative Exchange Council (ALEC). ALEC is an unusual organization. It takes no public credit for its legislative successes, instead preferring to maintain a low profile.<sup>349</sup> Its main function is the drafting of model legislation, which its legislator-members take back to their home jurisdictions and do their best to turn into law. In 2000 alone, over 3,100 bills based on ALEC’s model legislation were introduced into legislatures by its members, with 450 such bills signed into law.<sup>350</sup> This success is a function of the sheer number of legislators from around the country who are members of ALEC—2,400, almost a third of all state and federal legislators nationwide.<sup>351</sup>

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348. *See id.* at 14 (“As the economic system intrudes even further into matters of law, justice, and punishment, the picture that may emerge may be one of the ‘business of law and order’ being run by ‘merchants in justice and punishment’ whose only interest lies in the law of the free market (profit).”). When they speak of the corrections-commercial complex, Lilly and Deflem are not talking solely of private prisons, but of the entire range of players whose ongoing financial health depends on continued expansion of the prison system, including those businesses that supply corrections agencies with the goods and services they need to run the prisons. *See infra* note 373 and accompanying text. If these predictions are right, they suggest that one should be troubled by the full range of ways that private interests stand to profit from increased incarceration—and the possibility that the combined effort of these businesses will place an upward pressure on criminal sentencing in ways that violate the parsimony principle.

349. *See* Alan Greenblatt, *What Makes ALEC Smart?*, GOVERNING MAG., Oct. 2003, at 30, 30 (“You don’t hear too much about this right-leaning state pressure group. Maybe that’s why it wins so often.”); Penniman, *supra* note 338, at 12 (“Never heard of the American Legislative Exchange Council? That’s just the way ALEC likes it.”).

350. Karen Olsson, *Ghostwriting the Law: A Little-Known Corporate Lobby Is Drafting Business-Friendly Bills for State Legislators Across the Country*, MOTHER JONES, Sept.–Oct. 2002, at 17, 17.

351. Greenblatt, *supra* note 349, at 30; AM. LEGISLATIVE EXCH. COUNCIL, 2002 ANNUAL REPORT 3 (2003). A large number of these members, moreover, wield considerable power at the state level: among its members, ALEC counts 125 floor leaders, thirty-two Speakers of the House, twenty-two Senate presidents or presidents pro tempore, and eight sitting governors.

With minimum annual dues of \$5,000, corporations and trade associations can also become ALEC members.<sup>352</sup> Upon further payment of “applicable Task Force Dues” (ranging from \$1,500 to \$5,000 annually), private-sector members can join the task force of their choice<sup>353</sup> and participate in drafting the model legislation that public-sector members will introduce to their respective legislatures.

According to ALEC itself, the criminal justice task force has been among the organization’s most successful working groups.<sup>354</sup> Its successes have included the passage in forty states of ALEC-sponsored “truth in sentencing” statutes, mandating that convicted offenders serve at least 85 percent of their sentences before being eligible for parole,<sup>355</sup> and the passage in at least eleven states of three-strikes laws, which impose mandatory minimum sentences of anywhere from twenty-five years to life for offenders convicted of a third serious offense.<sup>356</sup> Although ALEC takes care to obscure the

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ALEC’s alumni list is also extremely impressive, featuring more than eighty members of Congress, including Speaker of the House J. Dennis Hastert (R-IL), former House Majority Leader Tom DeLay (R-TX), and Assistant Senate Majority Leader Don Nickles (R-OK), Penniman, *supra* note 338, at 12, as well as former Wisconsin Governor and former Health and Human Services Secretary Tommy Thompson (awarded ALEC’s Thomas Jefferson Freedom Award in 1991) and White House Chief of Staff Andrew Card, AM. LEGISLATIVE EXCH. COUNCIL, *supra*, at 10, 18.

352. DEFENDERS OF WILDLIFE & NAT’L RES. DEF. COUNCIL, CORPORATE AMERICA’S TROJAN HORSE IN THE STATES: THE UNTOLD STORY BEHIND THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL 20–21 (2002), available at <http://alecwatch.org/11223344.pdf>. Each public-sector member of ALEC pays \$50 for a two-year membership. *Id.* at 5. The bulk of ALEC’s \$6 million annual budget, Penniman, *supra* note 338, at 12, which “pays for 30 staffers in prime Washington office space,” *id.*, comes from “private sector members,” the corporations and trade associations that pay between \$5,000 (“Membership”) and \$50,000 (“Jefferson Club”) annually to be affiliated with ALEC, DEFENDERS OF WILDLIFE & NAT’L RES. DEF. COUNCIL, *supra*, at 20–21.

353. DEFENDERS OF WILDLIFE & NAT’L RES. DEF. COUNCIL, *supra* note 352, at 20–21. ALEC has twelve such task forces, covering a range of issues from natural resources to tax and fiscal policy to education. ALEC National Task Forces, <http://www.alec.org/task-forces> (last visited Nov. 12, 2005).

354. See *Weekend Edition: American Legislative Exchange Council* (NPR broadcast Apr. 13, 2002), available at LEXIS, News Library, National Public Radio File (“By ALEC’s own admission in its 1995 model legislation scorecard, [ALEC’s criminal justice task force was] very successful.” (quoting Edwin Bender of the National Institute on Money in State Politics)).

355. Olsson, *supra* note 350, at 18. By foreclosing the possibility of parole until the inmate has served 85 percent of the sentence imposed, truth-in-sentencing creates mandatory minimum sentences, thereby extending the amount of time offenders ultimately serve. Joanna M. Shepard, *Police, Prosecutors, Criminals, and Determinate Sentencing: The Truth About Truth-in-Sentencing Laws*, 45 J.L. & ECON. 509, 509 (2002).

356. ALEC’s three-strikes push postdated passage of the first such legislation, passed in Washington state in 1993, and in California in 1994. See SARABI & BENDER, *supra* note 339, at

role played by corporations standing to benefit from its legislative initiatives,<sup>357</sup> it is known that bo(h)0.4(a 2( A nd) Wackenu)-5.3( bCorrec7.9(N)-5.3( )-5.

pressure on incarceration rates. Moreover, it reveals that, should these leading members of the private prison industry see a financial benefit to themselves in promoting harsher sentencing regimes, there are channels through which they might effectively further these interests—channels that are conveniently out of public view. Given the distaste with which the public might well react to the notion of private prison contractors lobbying for stiffer criminal penalties—a move that would suggest a cynical willingness to lock more people up for longer periods so that CCA and its fellow industry members might profit financially—their involvement in ALEC may signal, not a lack of interest in promoting such legislation, but a recognition that such efforts might best be undertaken behind closed doors.

The link between CCA, Wackenhut, and ALEC's criminal justice initiatives provides no concrete evidence of undue influence over sentencing policy on the part of private prison providers. It nonetheless effectively illustrates the tension between the state's use of private prisons and the demands of the parsimony principle's integrity condition. At the heart of this condition is the imperative that the state do all it can to secure the conditions of legitimate punishment and to avoid taking steps likely to corrode these conditions. Yet the state, through the use of private prisons, not only allows but facilitates the growth of an industry with a "direct, personal, substantial, pecuniary interest" in increased incarceration rates regardless of the demands of legitimate punishment,<sup>362</sup> with no particular commitment to ensuring legitimate punishment, and with direct access to powerful legislators through both public and back channels. Viewed in this light, it is hard not to see the state's support of the private prison industry as inviting the possibility that this constituency will exercise undue influence on sentencing policies. Under these circumstances, especially given the extent of the campaign donations given by the private prison industry to key legislative players, citizens may well wonder about the legitimacy of sentencing policies and the punishments imposed pursuant to them.<sup>363</sup>

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362. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

363. An editorial cartoon by artist Matt Wuerker suggests that this suspicion already exists. It shows a prison in the form of a cash register, bearing the legend "Private Prisons Inc 'Time is Money!'" In the background, dump trucks full of prisoners drop their loads onto a conveyer belt leading into the prison. In the foreground, Uncle Sam hands over bags of money to men who are wearing suits and big smiles, and carrying a briefcase marked with a dollar sign. News Art, Prisons and Sentencing, <http://www.newsart.com/zz/zz16.htm> (last visited Nov. 12, 2005). A

And this suspicion is likely to be strongest in communities most vulnerable to state punishment of any sort—those communities that themselves enjoy little political access or influence.

*D. CCA & CCPOA: “Protecting the Public Interest”?*<sup>364</sup>

There is thus a tension between the existence of a successful and influential private prisons industry and the demands of the parsimony principle. But private prisons are by no means unique in the threat they pose to the legitimacy of particular punishments and to citizens’ trust in the institutions of the criminal justice system. This threat exists whenever sentencing policy is influenced by interest groups with a strong financial interest in increased incarceration and longer prison sentences. And were private prison providers to seek to wield such influence themselves, they would enter a politicized arena in which several other interest groups *already* work to shape criminal justice policies in ways consistent with the financial interests of their members.<sup>365</sup>

Perhaps the most notable example in this regard is the California Correctional and Peace Officers’ Association (CCPOA). This organization, one of the most powerful lobby groups in California,<sup>366</sup> represents all of California’s correctional officers and consistently supports state legislation providing for enhanced sentencing, seemingly regardless of the legitimacy of the punishments thereby

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slightly different version of this cartoon graces the cover of *THE CELLING OF AMERICA: AN INSIDE LOOK AT THE U.S. PRISON INDUSTRY* (Daniel Burton-Rose et al. eds., 1998).

364. LOGAN, *supra* note 4, at 159.

365. *See id.* at 152–59 (“The private sector will not bring politics and lobbies to a field where none now exists. Corrections is already a political arena.”).

366. *See* Dan Morain & Jenifer Warren, *Battle Looms over Prison Spending in State Budget*, L.A. TIMES, Jan. 22, 2003, at A1 (“The 26,000-member prison guards union . . . is among the biggest campaign donors in California, giving \$3.4 million to [California Governor Gray] Davis directly and indirectly since his first run for governor in 1998, including more than \$1 million last year alone.”); *see also* JOE DOMANICK, *CRUEL JUSTICE: THREE STRIKES AND THE POLITICS OF CRIME IN AMERICA’S GOLDEN STATE* 113 (2004) (“[By 1990, c]andidates for governor were stumbling all over themselves to get Novey’s endorsement and some serious campaign money. They had come to understand that a nod from him could mean the difference between victory and defeat.”). One reporter wrote that “when [Don] Novey[, the president of CCPOA,] calls, California governors and lawmakers carve out time in their schedules. When he fights legislation, odds are it’s dead. When he blesses a politician with campaign cash, others invest in the candidate too.” Jenifer Warren, *When He Speaks, They Listen*, L.A. TIMES, Aug. 21, 2000, at A1 (quoted in Kerri Strunk, *Majoritarianism Unchecked* 14 (2003) (unpublished manuscript, on file with the author)).

imposed.<sup>367</sup> The existence of CCPOA and other criminal-justice interest groups, however, does not vindicate the state's use of private prisons, as some commentators appear to believe.<sup>368</sup> Any time criminal justice policy is influenced by parties hoping to further their financial interests through increased incarceration regardless of the demands of legitimate punishment, it is cause for concern. The fact that the private prison industry is not the only group motivated in this direction suggests not that there is no problem with private prisons,

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367. Among CCPOA's notable successes was the 1994 passage of California's three-strikes provision. CCPOA donated a total of \$101,000 to the three-strikes ballot initiative campaign, an amount eclipsed only by the NRA's contribution of \$130,000. DOMANICK, *supra* note 366, at 115, 130. As Joe Domanick puts it in recounting the story of the measure's passage, with its donation, CCPOA became one of the campaign's "financial angels early on, when it counted most." *Id.* at 115. The three-strikes law was a key victory for CCPOA because the enhanced sentences for which it provides assured increased job security for CCPOA's members. These enhanced sentences include among others a twenty-five-year mandatory minimum sentence for a third "strike" (i.e., felony conviction), no matter how minor. *See, e.g.*, *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding a mandatory sentence of fifty years to life imposed pursuant to the California three-strikes law for two third-strike counts of petty theft with a prior, imposed when the defendant stole a total of nine videotapes from K-Mart stores); *Ewing v. California*, 538 U.S. 11 (2003) (upholding a mandatory sentence of twenty-five years to life for a third-strike grand theft conviction, imposed when the defendant stole three golf clubs from a pro shop). Yet, the punishments this law authorizes seem in many cases impossible to square with the parsimony principle, which requires that punishment not be imposed beyond the point necessary to protect the security and integrity of the least well-off citizens judged on this measure.

CCPOA has had other such victories. For example, in 1999, the California legislature approved a bill to establish a \$1 million pilot program that would provide alternative sentencing for some nonviolent parole offenders. Judith Tannenbaum, *Prisons a Growth Industry*, S.F. CHRON., Sept. 27, 1999, at A25. Because the state spends so much to reincarcerate members of this group, the bill would have meant significant savings—an estimated \$600 million per year—for state taxpayers. *Id.* CCPOA, however, opposed it. The union presumably expressed this opposition to Governor Gray Davis, for despite the widespread bipartisan support the measure enjoyed, Governor Davis—who had received \$2.3 million in contributions from CCPOA during his recent election campaign—vetoed it. *Id.*; *see also* Strunk, *supra* note 366, at 14.

368. *See, e.g.*, PAUL GUPPY, WASH. POLICY CTR., PRIVATE PRISONS AND THE PUBLIC INTEREST: IMPROVING QUALITY AND REDUCING COST THROUGH COMPETITION 15 (2003), available at <http://www.washingtonpolicy.org/ConOutPrivatization/PBGuppyPrisonsPublicInterest.html> (last visited Nov. 12, 2005) ("Government programs are equally subject to undue influence from, for example, powerful public-sector unions that have a direct interest in preserving state monopolies."); *cf.* Savas, *supra* note 4, at 898 ("Some opponents of privatization . . . claim that private prison firms will be inclined to lobby for more and longer prison sentences . . . . If this argument was sound, however, prison officials, guards, and their unions presumably would act in the same manner for the same reasons.").



but that the problem is more widespread than previously recognized.<sup>369</sup>

As private prison advocate Charles Logan sees it, introducing the private prisons industry into the political mix better serves “the public interest” by forcing competing interest groups—correctional officers’ unions, state agencies, etc.—to press their claims in the most vociferous way possible. This process, Logan claims, allows policymakers and citizens to “sort[] out the [public interest] from among competing definitions and claims.”<sup>370</sup> My own view is somewhat different. To satisfy the parsimony principle, the state is obliged to avoid taking steps likely to corrupt the conditions of legitimate punishment. Yet the presence of any powerful interest group with a financial stake in increased incarceration creates the danger of such a corrupting influence. Granted, this sort of political pressure is routinely brought to bear by interest groups of all kinds hoping to influence all manner of legislation. But whatever one might think of this system more generally, it is out of place when the issue is criminal punishment.

In the case of punishment, the state is taking the extraordinary step of heavily burdening the security and integrity of individual citizens. Imposing such a burden is not beyond the scope of the state’s legitimate power. But if the exercise of this power is to be legitimate, it must be consistent with the priority of the most urgent interests.<sup>371</sup> And if the criminal justice system is to earn citizens’ trust, the process for setting the terms of state punishment must be driven by a good-faith effort by all parties to craft policies consistent with the demands of legitimate punishment. However, where it is known that the process and state officials themselves are open to the influence of parties standing to benefit financially from increased incarceration, not only may the punishments flowing from particular criminal justice policies prove illegitimate, but citizens are also likely—rightly—to view them as such.

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369. Thus here too, applying the standards of liberal legitimacy to the case of private prisons reveals aspects of the criminal justice system more generally which are widely taken for granted but which may also be at odds with the principles of legitimate punishment.

370. LOGAN, *supra* note 4, at 159.

371. The fact that a particular role played by a private party in the legislative process may raise no constitutional objections is thus insufficient to justify that party’s involvement or render legitimate the resulting policy. On the view adopted here, any such involvement must also raise no parsimony concerns of the sort described.

The private prison industry and the correctional officers' unions are not the only entities with a financial interest in increased incarceration rates. As Lilly and Knepper have shown, "there are many more companies profiting from the routine, low-profile world of providing prison services," among them private companies who provide prisons with services including "food service design and management, consulting and personnel management, architecture and facilities design, vocational assessment, medical services, drug detection, and transportation. . . . And that is not all."<sup>372</sup> There are also those companies that supply prisons and jails with equipment, selling them, among other things, "protective vests for guards, closed-circuit television systems, mechanical and electronic locks, perimeter security and motion detection systems, fencing, flame-retardant bedding, furniture, foot[wear], lighting, and linen along with shatter-proof plastic panels, tamper-proof fasteners, and clog-proof waste disposal systems."<sup>373</sup> As this account suggests, prisons are big business. There is thus a wide range of private interests in a position to profit from an increase in the number of people incarcerated, and potentially a large number of interest groups with the desire, and perhaps the financial wherewithal, to seek to influence sentencing policies in ways consistent with their financial interests.<sup>374</sup>

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372. Lilly & Knepper, *supra* note 76, at 154–55. For more on one such company, Correctional Medical Services, see *supra* notes 294–97 and accompanying text.

373. Lilly & Knepper, *supra* note 76, at 155.

374. It might be thought that taking the discussion in this direction extends the parsimony principle too broadly. The concern of the parsimony principle is that public officials not take steps likely to corrupt the conditions of legitimate punishment. With the use of private prisons, state officials themselves foster the growth of the industry, which increases in size and power the more prisons are privatized. As it grows, the industry may be expected to have greater influence over the shape of sentencing policies in the ways suggested above. Thus, it might be thought, state officials bear particular responsibility for the growth of private prisons as a powerful interest group, in contrast to prison guards' unions or purveyors of necessary prison services, the growth and strength of which might be thought an inevitable by-product of incarceration rather than a direct effect of state action. This distinction may make sense as a practical matter—state officials could perhaps more easily limit their use of private prisons than they could constrain the power of prison guard unions. If, however, the concern is with state actors fostering a potentially corrupting influence on sentencing policy by parties with a financial stake in increased incarceration, it is hard to find grounds for distinguishing between the state's use of private prisons and policies facilitating the growth of union power or decisions taken to contract out the provision of goods and services for public prisons. See Joel, *supra* note 63, at 51, 56 (explaining that virtually every state department of corrections accepts bids for private contracts to provide at least some services to its prisons, including food services, medical, dental, and psychiatric treatment, rehabilitative programs, educational programs, garbage collection, inmate classification, and even data management). Regardless whether the concern is decisions of state

Widening the lens to include this range of parties with a financial interest in incarceration may seem to extend the parsimony concern too far, perhaps thereby negating its critical bite. Am I saying that no one in contemporary society should be able to make money from operating prisons? If so, what about correctional officers, who work for salaries and benefits? And how would prisons receive the goods and services that are incontestably necessary if they are to run at all? The point here is not that, for punishment to be legitimate, no one can benefit financially from corrections; as the questions just posed indicate, such a requirement would be a practical impossibility. That this is so, however, does not require averting one's eyes from the potential dangers created when people or entities with a strong financial interest in increased incarceration are also positioned to influence the nature or extent of punishments imposed. Where such circumstances exist, it is essential to call attention to them and be explicit about the threat they represent. Society must also do all it can to protect the process of crafting sentencing policies from any undue influence.

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officials that affirmatively create and sustain a constituency that then comes to exert influence over the criminal justice process (as in the case of private prisons), or whether it is instead the state's failure to curb an emerging interest group that comes to wield such power (as in the case of CCPOA), in either case the potential for compromising the conditions of legitimate punishment is traceable to official policies that in themselves are questionable from the perspective of the parsimony principle.

The case of California and the CCPOA reveals the way in which the state's failure to constrain the power of an interest group might come to influence the nature and extent of punishments in a way inconsistent with the demands of legitimate punishment. A commission struck by Governor Schwarzenegger to examine the state of California corrections found that many of the pathologies in the state's prisons, including the intimidation of whistleblowers and excessive delays in internal investigation and discipline of corrections officers accused of abuse, are traceable in part to CCPOA's power to protect its members from discipline. *See* CORR. INDEP. REVIEW PANEL, REFORMING CORRECTIONS 27–29 (2004), available at <http://cpr.ca.gov/report/indrpt/corr/pdf/introto6.pdf> (describing such problems with employee investigations and discipline). This power, the commission found, has contributed to an institutional culture in the prisons characterized by the routine cover-up of wrongdoing and prisoner abuse and harassment of whistleblowers. *See id.* at 19–20 (noting that the DOC is described as “one that punishes employees who try to do right and protecting those who do wrong”). In the wake of the commission's report, Senate Bill 1731 was introduced in the legislature to try to constrain this power; had it passed, the bill would have “remov[ed] a major barrier to investigations of guard misconduct”: a clause in the labor contract that “requires investigators to turn over information about a probe—including the accuser's name—before internal affairs interviews are conducted.” Jenifer Warren, *Major Prison Reform Eludes Lawmakers*, L.A. TIMES, Aug. 31, 2004, at B1. But this effort failed, thanks to strong lobbying efforts on the part of CCPOA itself. *See id.* (“Killing the bill was a top priority of the [CCPOA], which represents the guards.”).

Admittedly, short of generating an explicit and widespread commitment among legislators and their constituents to satisfying the conditions of legitimate punishment, a total abatement of the sort of undue influence over sentencing policy described here is unlikely. Absent that commitment, the interest-group model of politics that reigns in the criminal justice context will not likely be widely condemned or even questioned. Campaign finance reforms designed to constrain illegitimate influence would certainly be welcome,<sup>375</sup> as would tighter conflict-of-interest rules, for example, those prohibiting legislators or their spouses from owning stock in companies that stand to gain significant economic benefits from increased incarceration.<sup>376</sup> But any such efforts are likely to be limited in their effects, for several reasons. First, even absent overt lobbying and obvious conflicts of interest, there is reason to expect a sympathy of perspective and priorities between policymakers and at least some private interests. This is particularly so in the private prison industry, where the “revolving door” between government and private corrections firms means that private prison executives will often have a considerable range of contacts in the government of the state whose prison markets they seek to access.<sup>377</sup> Second, effective lobby groups will still be able to find mechanisms to promote their financial interests in ways less obvious—and thus less open to regulation and less susceptible to critique—than direct lobbying of legislators.<sup>378</sup> And

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375. See, e.g., GUPPY, *supra* note 368, at 14 (“The most obvious check [to the “corruption” of the legislative process by the prison industry] is campaign finance law, which requires public disclosure of donations that may influence policymaking.”); see also Rosky, *supra* note 2, at 955 (“[T]he industrial influence argument is not an argument against the privatization of punishment . . . . If we curb the problem of corporate campaign finance, then we curb the problem of industrial influence.”).

376. See HALLINAN, *supra* note 61, at 168 (“Among the early investors in CCA was Honey Alexander, wife of Lamar Alexander, who was then governor of Tennessee. In 1984, Mrs. Alexander invested \$8,900 in CCA. Five years later, she walked away with \$142,000.”).

377. As Lilly and Knepper note, “[t]he heads of private prison firms are often former government officials or corrections administrators who have left public service for private interest.” Lilly & Knepper, *supra* note 76, at 158. Examples abound. Before his appointment as executive vice president of CCA, for example, T. Don Hutto was commissioner of corrections in Arkansas and Virginia. *Id.* at 159. (Hutto also became president of the ACA shortly after his appointment to CCA.) CCA vice president and former CEO J. Michael Quinlan was former head of the Federal Bureau of Prisons. Maurice Sigler, former chair of the Federal Parole Commission, held a seat on the CCA board of directors. *Id.* And the “list goes on.” *Id.*

378. The legislative strategy of CCPOA effectively illustrates this point. Perhaps recognizing that the sight of prison guards vociferously advocating for tougher sentences for criminal offenders might invite charges of cynical self-interest, former CCPOA president Don Novey invested heavily in supporting victims’ rights organizations, sponsoring the yearly Crime

third, these methods will do little or nothing to prevent the kind of access and influence enjoyed by private-sector members of organizations like ALEC. Yet even granting that campaign finance reform efforts are likely to fall short, society remains obligated to recognize the broader legitimacy problem posed by the possibility of private influence over the legislative process and to do what it can to ameliorate it.

*E. Prison Building as Economic Development: "Recession-Proof Jobs"*<sup>379</sup>

There is a further reason why the concerns raised by the parsimony principle cannot be fully addressed through initiatives targeted at constraining the undue influence of identifiable interest groups over the legislative process: the tendency to look to prisons—and prisoners—as a revenue source is not restricted to interest groups like these. In addition to the groups already discussed, communities across the country, led by public officials at all levels, have come to view prison building as the means to bring in jobs and grow local economies. As a result, voters and their political representatives now regard incarceration as a means to promote their own financial interests. Thus these groups, too, may well have an incentive to support policies likely to increase the prison population regardless of the implications for legitimate punishment.

Take, for example, the case of Wise County, Virginia. In the late 1990s, with much fanfare, the state of Virginia opened two state-of-

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Victims' March on the Capitol and providing office space, lobbying staff, computers, and annual funding to at least two victims' rights organizations in the state, Crime Victims United (CVU) and the Doris Tate Crime Victims Bureau (CVB). See DOMANICK, *supra* note 366, at 112; Strunk, *supra* note 366, at 16; see also CCPOA—About Us, [http://www.ccpoanet.org/mem\\_svcs/default.php?inc=mission](http://www.ccpoanet.org/mem_svcs/default.php?inc=mission) (last visited Feb. 7, 2006) ("[The Member Services] division of Logistics works with responsible individuals coordinating special events, such as . . . the Annual Victims March on the Capitol."). CVU in particular is supported almost entirely by CCPOA and is, some have alleged, "its creature." DOMANICK, *supra* note 366, at 112. Both CVU and CVB are committed wholeheartedly to the goal of sentence enhancement. This goal is shared by CCPOA, which seeks job security for its members and a growing membership for itself. Yet by supporting CVU and CVB, CCPOA is able to further its own interests via an interest group that is much more palatable both to lawmakers and the public, allowing the union to "wrap[] [itself] in this flag of altruism and concern for public safety which masks their self interest." Strunk, *supra* note 366, at 17 (quoting Vincent Schiraldi, executive director of the Center on Juvenile and Criminal Justice, [www.cjcf.org/cpp](http://www.cjcf.org/cpp)).

379. Tom Gibb, *Private Prison Back on Track for Philipsberg*, PITTSBURGH POST-GAZETTE, Dec. 16, 2002, at A11 (quoting John Woznisk, Pennsylvania state senator (internal quotations omitted)).

the-art supermax prisons, Wallens Ridge and Red Onion, in Wise County.<sup>380</sup> To do so was a serious investment; Wallens Ridge alone cost the state \$77.5 million, an average of \$110,085 per cell.<sup>381</sup>

The supermax prison is a recent innovation in incarceration. As the term “supermax” suggests, the purpose of these prisons is generally to house what prison administrators refer to as “the worst of the worst”—those inmates who are too violent or unruly to be kept under control even in the relatively restrictive conditions of conventional maximum security.<sup>382</sup> Originally, the intended purpose of Virginia’s new supermax facilities was to house this subset of prisoners. Although “never precisely defined,” the worst of the worst was understood by the state’s director of prisons to “include[] two categories of inmates: those who had been ‘disruptive’ at other prisons (those who had attacked other inmates or guards) and those who had been sentenced to terms of life or ‘near life’—typically, eighty years or more.”<sup>383</sup> As it happened, however, between Wallens Ridge and Red Onion, the Virginia Department of Corrections (DOC) had more supermax cells than qualified prisoners.<sup>384</sup> In response, the DOC “quietly expanded the eligibility” for supermax classification.<sup>385</sup> By the time both prisons were opened, they were accepting inmates sentenced to as few as five years, who had harmed no one and had never been disruptive.<sup>386</sup>

380. HALLINAN, *supra* note 61, at 204–18.

381. *Id.* at 204. Supermax cells generally house one prisoner (and thus one bed) only. By way of comparison, the average capital investment for each maximum-security bed in Virginia is \$66,400. THE 2002 CORRECTIONS YEARBOOK: ADULT CORRECTIONS 86 (Camille Graham Camp ed., 2003).

382. Weidman, *supra* note 8, at 1526 (quoting *Madrid v. Gomez*, 889 F. Supp. 1146, 1155 (N.D. Cal. 1995) (internal quotations omitted)).

383. HALLINAN, *supra* note 61, at 204–05.

384. *See id.* (“[T]here weren’t enough of these inmates to go around.”).

385. *Id.*

386. *Id.* As Hallinan explains it,

[B]y the time Wallens Ridge opened, in April 1999, “the worst of the worst” had come to be a meaningless phrase. It included those who had been disruptive and those who had not, those who had committed horrible crimes and those who had harmed no one, those who would be loose in a few years and those who would never be free.

*Id.* Human Rights Watch (HRW) has expressed concern about the Virginia DOC’s classification policy for its supermax prisons. As a press release issued by HRW put it: “No prisoners should be subjected to more restrictive conditions than is [sic] reasonably necessary for safe and secure confinement. Yet in Virginia, inmates who do not pose serious security or safety risks and who have not engaged in assaultive or dangerous behavior while incarcerated

Incarceration in supermax represents a qualitatively different and more severe punishment than even incarceration in a conventional maximum-security prison. Inmates housed in such prisons are severely restricted in their movements and actions. They are generally locked down in their cells twenty-three hours a day, with one hour given to (solitary) physical activity in an outdoor “concrete exercise ‘yard’ that is simply a larger version of their own cell, minus the toilet and roof.”<sup>387</sup> There is neither programming nor inmate interaction, and possession of personal items is extremely limited.<sup>388</sup> Why would the state of Virginia extend its control in this way over inmates whose behavior did not warrant it? The reason is economic development. In 1995, Wise County had seen the closing of the Westmoreland Coal Company, then the biggest employer in the area, and the building of the prisons was intended to bring business and jobs to the area. As Governor James Gilmore said at the opening of Wallens Ridge, the prison “is an economic boon for this town and this county and this region . . . [a] win-win for everyone.”<sup>389</sup> A prison operating at less than full capacity, however, means less of an economic boon than otherwise possible: fewer jobs for local residents, fewer visitors to the area, less business for area merchants, and even fewer mouths to feed inside the prison walls. Hence the expanded supermax eligibility.

Wise County is just one example of a community looking to prisons—and the imposition of punishment they represent—for

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are being assigned to supermax facilities.” Human Rights Watch, Red Onion: Virginia’s First Supermax Prison, <http://www.hrw.org/about/initiatives/onion.htm> (last visited Nov. 12, 2005).

The Supreme Court recently held, in a case out of Ohio, that prisoners have a protected liberty interest in avoiding transfer to supermax. *See* *Wilkinson v. Austin*, 125 S. Ct. 2384, 2394–95 (2005) (finding that “assignment to OSP [Ohio’s supermax facility] imposes an atypical and significant hardship under any plausible baseline”). Prisoners are thus entitled to some procedural protections before they may be transferred from general population to supermax. *See id.* at 2390–91, 2395–97 (upholding Ohio’s “New Policy,” which among other procedures accords inmates forty-eight-hours’ notice, in writing, “summarizing the conduct or offense triggering the [classification] review,” and multiple layers of review of any decision to reassign the inmate to supermax). It is possible that such protections may prove to have some limiting effect on the circumstances under which Virginia transfers its prisoners to supermax.

387. HALLINAN, *supra* note 61, at 208.

388. *See id.* (noting that many inmates “live and eat alone” and are allowed just “a ‘reasonable amount’ of personal effects”); *see also* Weidman, *supra* note 8, at 1525–28 (“[M]ost supermax prisons rely on solitary confinement. . . . [S]upermax inmates are rarely offered any educational, religious, or legal programming.”).

389. HALLINAN, *supra* note 61, at 206.

economic development purposes. But such examples abound.<sup>390</sup> Throughout the United States, communities in rural areas in particular have come to look to prison building as the way to boost their economies, provide jobs, and increase tax revenues,<sup>391</sup> and even to increase the local population registered by the national census, thereby increasing the state and federal subsidies for which the community is eligible.<sup>392</sup> In the 1990s, an estimated 245 prisons were built in “212 of the nation’s 2,290 rural counties, many in Great Plains towns of Colorado, Oklahoma and Texas that had been stripped of family farms and upended by the collapse of the 1980s oil boom.”<sup>393</sup> These communities see prison building as a safe, “clean” form of economic development,<sup>394</sup> and they also see it as “recession-proof”;<sup>395</sup> as one city manager commented, “Nothing’s going to stop crime.”<sup>396</sup> State legislators appear to share this view, and routinely vie to locate

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390. See, e.g., John Reid Blackwell, *Lost Contract Guts Snack Suppliers*, RICHMOND TIMES DISPATCH (Va.), July 19, 2003, at A1 (reporting that Virginia’s privatization of prison commissaries cost Wayne Sanders, a snack supplier to prison commissaries for twelve years, 90 percent of his business when private, out-of-state companies were hired to manage them); Ronald Fraser, *Prisons Have Become a Growth Industry in New York*, BUFFALO NEWS, Nov. 21, 2004, at H2 (reporting that in New York, “more towns [are] becom[ing] economically dependent on state prisons”); David Unze, *Oak Ridge Corrections Facility*, ST. CLOUD TIMES (Minn.), Nov. 17, 2004, at 1A (reporting that the Oak Ridge Corrections Facility was reopening under private management and that its 1999 closing had cost the local economy approximately \$5 million annually and 100 jobs).

391. As one observer explained, “More than a Wal-Mart or a meat-packing plant, state, federal and private prisons, typically housing 1,000 inmates and providing 300 jobs, can put a town on a solid economic footing.” Peter T. Kilborn, *Rural Towns Turn to Prisons to Reignite Their Economies*, N.Y. TIMES, Aug. 1, 2001, at A1 (citing Calvin L. Beale, senior demographer at the Economic Research Service of the United States Department of Agriculture). Moreover, “[a]s communities become more and more familiar with the benefits that prisons bring, they are also becoming increasingly adept at maximizing their windfall through collecting taxes and healthy public service fees.” *Id.*

392. See Robert Whiteside, *Sprawling for Prisoners*, HARPER’S MAG., Feb. 2002, at 88, 88. Among the municipalities adopting this technique is Florence, Arizona, which since 1982 “has repeatedly expanded its borders to include prisons being built beyond them, inflating its census count and thereby its state and federal funding.” *Id.* Meanwhile, “five new prisons have opened or expanded within town limits.” *Id.* There is a further benefit of increasing the official population in this way, that of “influence[ing] the drawing of congressional and state districts,” a move that usually benefits Republicans at the expense of Democrats because “most prisoners are minorities from urban, Democratic areas and reside in typically white, rural, Republican enclaves.” *Id.*; see also *infra* notes 402–03 and accompanying text.

393. Kilborn, *supra* note 391 (citing Calvin L. Beale, senior demographer at the Economic Research Service of the United States Department of Agriculture).

394. Abramsky, *supra* note 65, at 25.

395. Kilborn, *supra* note 391 (quoting Jack McKennon, city manager of Sayre, Oklahoma).

396. *Id.*



new prisons in their districts to provide an economic boon for constituents.<sup>397</sup>

The phenomenon of what one observer has called “prison construction advocacy”<sup>398</sup> does not necessarily mean that the punishments served in the prisons built under these circumstances are illegitimate. Viewed from the perspective of the parsimony principle, however, the worry is that maintaining a high incarceration rate will become fused in the minds of voters—and, even more troubling, in the minds of their political representatives—with the possibility of economic prosperity, potentially corrupting the process of determining appropriate criminal punishments with concerns that are plainly illegitimate. Interestingly, in many cases, prison building has not provided the economic security and employment opportunities for residents that communities often expect.<sup>399</sup> But the federal and state financing a county receives is based on census data, which includes the inmate population of local prisons.<sup>400</sup> Having a prison in

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397. Fox Butterfield, *Study Tracks Boom in Prison and Notes Impact on Counties*, N.Y. TIMES, Apr. 30, 2004, at A19. In some cases, desperate communities have teamed up with private prison-management companies to help them bring prisoners to local prisons. Abramsky, *supra* note 65, at 24. In 2003, for example, Wackenhut Corrections agreed to take over three prison facilities built on spec by the town of Pecos. Pecos, a “dying oil town . . . in the remote West Texas county of Reeves,” has since the late 1980s issued a total of \$90 million in bonds to build three separate prisons, the most recent of which was completed in the spring of 2003. *Id.* The town has been servicing the debt at a rate of \$500,000 per month. Although Pecos had successfully contracted with the federal Bureau of Prisons for inmates to fill two of its prisons, local officials were unable to fill the third prison. Enter Wackenhut, which “agreed to take over the three facilities on a ten-year contract, and to use its out-of-state contracts to bring in prisoners to fill the [third prison]” in exchange for a monthly fee of \$330,000. *Id.* at 24–25. The county itself pays “the salaries of all the guards, the medical expenses of prisoners, all programming costs, food expenses and utilities.” *Id.* at 25.

398. Butterfield, *supra* note 397, at A19 (quoting Jeremy Travis, a senior fellow at the Urban Institute).

399. In Delano, California, for example, the building of North Kern State Prison was supposed to bring a “river of jobs, sales tax revenue and other economic goodies,” but in 2002, “a pall of economic gloom . . . still envelop[ed] the] town.” Matthew Heller, *Delano's Grand Illusion*, L.A. TIMES MAG., Sept. 1, 2002, at 8. And an Urban Institute report published in 2004 found “no clear evidence that building prisons in poor rural areas had a significant economic impact.” Butterfield, *supra* note 397, at A19. The report cited one Sentencing Project study of “25 years of employment and per capita income data from rural counties in New York, which found ‘no significant difference or discernible patterns of economic trends’ between counties that were home to a prison and counties that did not have one.” *Id.*

400. See Eric Lotke & Peter Wagner, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From*, 24 PACE L. REV. 587, 601 (2004) (“Larger places typically have greater needs and receive a corresponding share of government resources. . . . One measure of size for determining resource distribution is the official U.S. census population.”); see also Editorial, *Phantom Constituents in the Census*,

the district can thus bring a community a considerable amount of extra money, whether or not the employment rate is positively affected.<sup>401</sup> And even in cases where building a prison brings fewer economic benefits than might have been hoped, once the prison is built and filled, citizens still have a strong financial incentive to see incarceration levels maintained.

Again, I know of no empirical evidence confirming that the allure of economic benefits directly inclines voters or their representatives to push for “tough-on-crime” initiatives. From the perspective of the parsimony principle, however, it is enough that the incentives to do so exist, promoted by the very legislators charged with the task of defining the terms of legitimate punishment for convicted offenders. Such incentives create the real possibility that illegitimate interests will affect the nature and extent of punishments ultimately imposed. They also give citizens—especially those citizens most likely to be subject to criminal punishment—reason to mistrust the process, grounding the suspicion that criminal punishments are imposed not for legitimate reasons but instead to sustain the economies of voters in rural communities and the reelection prospects of their political representatives.

If this concern seems far fetched, consider the racial dynamics that arise from treating prisons as engines of rural economic development. The communities that have benefited from this strategy are overwhelmingly “white, rural, Republican enclaves.”<sup>402</sup> The prisoners shipped in to populate the new prisons, in contrast, are overwhelmingly “minorities from urban, Democratic areas.”<sup>403</sup> Many of these prisoners, moreover, are serving time for nonviolent

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N.Y. TIMES, Sept. 26, 2005, at A16 (“A longstanding quirk in census rules counts incarcerated people as ‘residents’ of the prisons where most are held for only a short time, instead of counting them in the towns and cities where they actually live.”).

401. For example, Ina, Illinois, population 455, is home to the Big Muddy River Correctional Center, inmate population 1,900. As a result, Ina receives federal and state tax revenues that would ordinarily be reserved for towns with four times its population. Big Muddy River thus provides a “permanent windfall for [the] town.” David Heinzmann, *Towns Put Dreams in Prison: Rural Areas See the Potential for Economic Gains*, CHI. TRIB., Mar. 20, 2001, at 1. The mayor of Ina, Andy Hutchins, has exulted over his situation. As he views it, “This little town of 450 people is getting the tax money of a town of 2,700. . . . And those people in that prison can’t vote me out of office.” *Id.*

402. Whiteside, *supra* note 392, at 88.

403. *Id.*

offenses.<sup>404</sup> Under these circumstances, it is not unreasonable to think that, when prisoners are viewed by local whites as the key to prosperity, those same prisoners—not to mention their families, friends, and communities—would come to view their incarceration as more about jobs and revenue for rural communities than about satisfying the demands of legitimate punishment.

*F. Private Prisons as Miner's Canary*

Considering the state's use of private prisons through the lens of the parsimony principle reveals a possible threat to the legitimacy of punishment whenever parties with a financial interest in increased incarceration are in a position to exert influence over the nature and extent of criminal sentencing. If this concern is real, it suggests an independent reason for the state not to privatize its prisons: even granting that similar concerns exist elsewhere in the criminal justice system, the state ought not to foster yet another potentially influential industry that could seek to compromise further the possibility of

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404. As many as half the incarcerated offenders in the United States serving sentences of over one year were convicted of nonviolent offenses. This category includes property, drug, and public-order offenses. In state prisons in 2001, just over half the inmates—614,200 people—were serving time for nonviolent offenses. See PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN NO. NCJ 195189, PRISONERS IN 2001, at 12–13 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p01.pdf> (“[A]n estimated 589,100 inmates in State prison . . . were held for violent offenses. . . . In addition, 238,500 inmates were held for property offenses, 251,100 for drug offenses, and 124,600 for public-order offenses.”). Moreover, in 1996, roughly three-quarters of jail inmates were in custody for nonviolent offenses. See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT NO. NCJ 164620, PROFILE OF JAIL INMATES 1996, at 1 (1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji96.pdf> (“About 26% were being held for a violent offense; 27% for a property offense; 22% for a drug offense; and 24% for a public order offense.”). In federal prisons in 2000, the comparable figure was 90 percent, up from roughly 83 percent in 1990. See HARRISON & BECK, *supra*, at 14 (“[Between 1990 and 2000,] the percentage of violent Federal inmates declined from 17% to 10%.”). Some calculate that America has over one million prisoners convicted of nonviolent offenses. JOHN IRWIN ET AL., JUSTICE POLICY INST., AMERICA'S ONE MILLION NONVIOLENT PRISONERS 2 (1999), available at <http://www.justicepolicy.org/downloads/onemillionnonviolentoffenders.pdf>. To put this calculation in some perspective, it suggests that the number of nonviolent offenders incarcerated in the United States is larger than the combined populations of Wyoming and Alaska. Compare JUSTICE POLICY INST., THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM 3 (2000), available at <http://www.justicepolicy.org/downloads/punishingdecade.pdf> (“By the end of [2000], JPI estimates there will be 1,169,118 non-violent offenders in American jails and prisons.”), with Wyoming QuickFacts from the US Census Bureau, <http://quickfacts.census.gov/qfd/states/56000.html> (last visited Nov. 14, 2005) (estimating the population of Wyoming in 2004 to be 506,529), and Alaska QuickFacts from the US Census Bureau, <http://quickfacts.census.gov/qfd/states/02000.html> (last visited Nov. 14, 2005) (estimating the population of Alaska in 2004 to be 655,435).

legitimate punishment to promote that industry's own financial interests. This is especially so given the likely limitations of available mechanisms for constraining any undue influence by private parties on criminal justice policies.

But exploring this concern in the context of private prisons has revealed a problem that extends well beyond this context, arguably reaching the core of our majoritarian system. That this is so vindicates the assertion, made above, that considering private prisons from the perspective of liberal legitimacy provides a lens through which to see in a new light practices in the criminal justice system that may have been too readily taken for granted. At the same time, however, the apparent extent of the problem may seem to undercut the value of the exercise; having revealed so deep a problem, I can offer no easy remedy.

The difficulty is that, absent widespread commitment to ensuring that criminal punishment satisfies the demands of the parsimony principle, there will be no broad sympathy for the view that society needs to exclude illegitimate considerations like the financial advantage of voters from the process of establishing sentencing policies. This means that to address the problem properly, there can be no half measures. So long as one continues to assume that criminal justice policy is appropriately shaped through an interest group model of politics, where all parties with a stake in the outcome vie for policies friendly to their own interests, looking to prisons for economic prosperity will seem entirely unobjectionable. Indeed, on the interest-group model of politics, it seems exactly right. The only adequate remedy is broad acceptance of the idea that the parties charged with determining the nature and extent of criminal punishment have an obligation to make such determinations in isolation from any possible knowledge of their own personal interests—or those of their constituents.

Broad acceptance of this approach, however, is a tall order; it would, as Simone Chambers recently noted, require that legitimate punishment come “to be understood democratically, not just philosophically.”<sup>405</sup> Certainly, any such process of “public opinion formation” will not happen overnight.<sup>406</sup> But the first step is to make explicit the potential conflict between legitimate punishment and

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405. Chambers, *supra* note 18, at 477.

406. *Id.*

conceiving of incarceration as a source of financial gain. Having done so, it will then be possible to challenge state officials to act in ways that minimize this conflict as much as possible, and to do all they can to rise above this impulse themselves.

In the private prisons literature, it has largely been assumed that prisons are no different from any other government function to be privatized. Private prisons have thus been treated as an issue of privatization and not one of criminal justice policy. The foregoing analysis, however, makes plain what is lost with this move: it makes it impossible to see that the state's use of private prisons reflects a larger trend toward viewing incarceration in economic terms and regarding prison inmates as the economic units of a financial plan. If anything, private prisons appear to be the logical extension of this vision, which already informs myriad aspects of this country's criminal justice system, including the practice of prison administrators contracting out the provision of basic services to cut the cost of corrections; underinvestment in mechanisms for accountability and oversight; and the tendency of private prison providers, correctional officers, and the voters themselves to look to increased incarceration as the means to their financial well-being.

From the perspective of liberal legitimacy, there is a serious cost to the widespread adoption of this economic view:<sup>407</sup> society becomes less likely to see those it punishes as human beings and more likely to lose a sense of the severity of the burdens punishment imposes. Indeed, from the perspective of liberal legitimacy, the most troubling thing about private prisons may be what they reveal of this country's collective failure of respect and responsibility toward those it incarcerates.

## CONCLUSION

The debate over private prisons has largely been framed as a choice between alternative management structures judged on the basis of their relative efficiency. But framing the issue in terms of

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407. By my use of the term "economic," I do not mean to suggest that economists do not care about the quality of prison conditions. *See generally* Hart et al., *supra* note 148 (arguing that the incomplete character of private prison contracts creates a risk of prisoner abuses that may tell against the appropriateness of privatization in this context). I am merely trying to characterize a particular view, pervasive in policy circles and in the political culture more broadly, that reduces incarceration to its component parts and conceives of the prison environment, inmates included, in economic terms.

comparative efficiency is the wrong way to think about private prisons, for at least two reasons. First, this approach leads to an undue focus on the value of efficiency, when what should be of most concern in the incarceration context is whether the penal practices at issue are in fact legitimate. Second, comparative efficiency uncritically accepts the current state of prison conditions as the appropriate baseline for analysis, judging private prisons to be good enough when conditions of confinement within them meet the standard set by public prisons, thus providing no opening for challenging this (low) baseline as unacceptable.

Focusing on the comparative question, that of whether the management structure of prisons should be public or private, is to lose sight of the bigger picture. The real question is why *all* prisons, public and private alike, fall so far short of satisfying society's obligations to those it incarcerates. Exploring the state's use of private prisons from the perspective of liberal legitimacy has helped to answer this question by making plain what is wrong with private prisons in the form currently on offer, and, in so doing, exposing as problematic several practices operating within the penal system as a whole which tend to be taken for granted and thus no longer questioned. The foregoing analysis has, for example, exposed the danger of delegating to prison officials extensive discretion and power over a largely vulnerable and dependent prison population in the absence of adequate accountability mechanisms—and demonstrated that this danger is particularly acute when those officials are motivated by private purposes at odds with the possibility of humane punishment. It has revealed the threat posed to humane conditions of confinement when state officials seek to save money by contracting with for-profit entities for the provision of crucial prison services. And it has indicated the corrosive effect, both on the possibility of legitimate punishment and on citizens' trust in the criminal justice system itself, of the unquestioned idea that sentencing policy is appropriately influenced by advocacy groups with a financial interest in increased incarceration. The examination of private prisons from the perspective of liberal legitimacy suggests that a meaningful commitment to the possibility of legitimate punishment requires that all these practices be curtailed, or, at the very least, engaged in warily, not only in the private prisons context, but in the context of the penal system in general.

As noted in the opening pages of this Article, a recurring theme among opponents of private prisons is that incarceration is an

inherently public function, one that cannot be legitimately delegated to private actors. But, as the foregoing discussion has revealed, the fact that punishments of incarceration are served in prisons administered by state employees is no guarantee of their legitimacy. To the contrary, public prisons too can be sites of unchecked discretion exercised by individuals with their own personal interests and agendas, whether those individuals are state-employed corrections officials or private contractors engaged by public prison officials to provide discrete prison services as a way to save states money. And the punishments served in public prisons are as likely as punishments served in private prisons to be shaped by the efforts of political actors seeking to further their own financial interests.

Still, there is arguably something to the view that punishment, if it is to be legitimate, should be a wholly public function, untainted by private motives and interests. But if so, it is not just the use of private prisons, but the current approach to criminal punishment in general—shot through as it is with scope for furthering private purposes at the expense of convicted offenders—that sorely needs to be rethought.