

Private Prisons: Ethical Considerations

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Submitted to the School of Liberal Studies and Continuing Education
in partial fulfillment of the requirements
for the degree of Bachelor of Arts in Liberal Studies

Purchase College
State University of New York

December, 2021

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Abstract

Background: Individualistic market-driven values have allowed the implementation of privately owned and operated for-profit correctional facilities into the American justice system.

Objective: This study aims to critically reflect on the practice by private contractors of owning and operating prisons for individual economic gain in the U.S.A.

Design and Methods: The study is designed to be analytic in its review of the practice. Literature relevant to the issue is compiled and examined from various philosophical perspectives. The main research questions are: *Is it ethical to profit from incarceration? What are the factors that have resulted in the phenomenon of for-profit prisons?*

Results: The study indicates that the economic benefits of this practice do not outweigh potential socioeconomic, political, and ethical consequences for society. Economic benefits to society are determined to be intangible or nonexistent.

Conclusion: Human rights based philosophies and formal moral reasoning provide strong arguments in opposition to this practice. Justification of profiteering is found insubstantial from lines of moral and economic rationale.

Keywords: *ethics, justice, markets, philosophy, prisons, privatization, mass incarceration, privatized prisons, human rights*

Chapter 1

Introduction

“Man is born free, and everywhere he is in chains.”

- Jean-Jacques Rousseau, *The Social Contract and Discourses*

Modern scholars regard mass incarceration as a significant social problem. It may come as a shock to some that America, “the land of the free,” has the highest incarceration rate in the world. (Schwartz & Nurge, 2004; Sliva & Samimi, 2018). Privately operated prisons, largely a U.S. phenomenon (Schwartz & Nurge, 2004), are likely a contributing factor. These companies, owned and operated by private and unelected individuals, have arisen as a means to house prisoners and alleviate the role of the government in the administration of punitive action. The questions to be answered are as follows:

- 1) Is it ethical to profit from incarceration?
- 2) What are the factors that have resulted in the phenomenon of for-profit prisons?

Based on many of the articles selected in this study for their examination of this specific issue, it can be concluded that these private facilities are recognized as a detriment to the incarcerated individual, the criminal justice system, and to society. Resulting from conducting a literature review, it's implied that these facilities are a symptom of a larger problem: lobby-driven and marketized political policies that enable and economically justify their existence (Schwartz & Nurge, 2004). Examination of the issue from human-rights based perspectives of ethics allows for a further critique of the practice.

From a standpoint of moral reasoning, it is my belief that the problems examined hereafter warrant our collective critical examination of justice's institution and its role in society.

Chapter 2

Literature Review

One of the great dilemmas of our time is characterized by a debate about whether or not privatized correctional facilities are ethical. The existence of incarceration as a punitive measure, when viewed from a critical lens, seems to carry with it some correlation to a plethora of other social problems. These range from drug abuse to an apparent inability to find a sense of belonging to a civil society; a society which cannot make up its mind about whether or not the incarceration of one of its members should be regarded as an opportunity by which an individual or a company ought to be able to exploit and profit from.

As the research subject I chose was quite broad, it was necessary to find a way to link the various topics. In conducting a review of the relevant literature pertaining to the research question, I was able to break the subject down into several categories: first, and probably most importantly, the subject of Western Philosophy. As the topic was being examined through the lens of a Western perspective, and much of the literature at hand was specific to privatization in the United States, I found that Western Philosophy was most applicable in examining the chosen social problem.

On the philosophical side of things, Sandel's *Justice: What's the Right Thing To Do?* (2010) provided much of the theory to answering the research question. The book was a thought provoking and engaging read which allowed me to reflect on various hard questions surrounding the issue. Sandel's accompanying compilation, *Justice: A Reader* (2007), was extremely useful: it contained important excerpts from various different philosophers, which were critical in examining differing perspectives regarding privatization as well as ethical aspects of the matter of prisons in general. This reader includes work from John Locke, John Rawls, Immanuel Kant,

and Aristotle, among others. One of the chapters in the book dealt exclusively with the question of “Markets and Morals” (Sandel 2007, p. 127). This examination of whether markets should determine the outcomes to society’s ethical conundrums was directly relevant to the main argument in favor of privatization: that privatized prisons are cheaper to run than publicly run facilities.

There was in Sandel’s work, however, what I would deem to be an antithetical acknowledgment to the libertarian school of thinking. Sandel did his part in examining both sides of the argument. Milton and Rose Friedman, popular economists of the 20th century, are referenced in the main book. Sandel also provided, in *Justice: A Reader*, an excerpt by the aforementioned figures to help garner an understanding of capitalistic libertarianism. This defense of the idea that the free market is infallible, and the ultimate indicator of a virtuous society, is essentially an antagonist for Sandel’s brand of philosophy to test its mettle against.

Timothy Besley, writing for the *Journal of Economic Literature*, cross examined Sandel’s idea that free markets sometimes degrade social values in his article “What’s the Good of the Market? An Essay on Michael Sandel’s ‘What Money Can’t Buy’” (2013). In this review and response to one of Sandel’s books, Besley outlined Sandel’s ideas about market forces. He cited some of Sandel’s examples, as well as others, and analyzed the idea from an economist’s point of view.

Another important resource for me in the course of the research was that of *The Social Contract & Discourses* (1762/1950), written by the philosopher Jean Jacques Rousseau (1712-1778). This treatise questioned the legitimacy of governmental power and the conditions by which it may operate.

Thomas Hobbes (1588-1679), in his book *The Leviathan* (1651/1988), explored the way in which societies are structured. Furthermore, he theorized about the political condition of mankind- that human beings grant power over themselves to a sovereign, be it a monarch or a broader, more representative government, in order to avoid the “brutish” state of nature (Hobbes, 1651/1988, p.65) and live in security.

The Reality of the Problem

The second part of my search for relevant literature consisted of finding articles that pertain specifically to the social problems of privatization and for-profit punishment. Upon reviewing literature written in various journals, one is left with the impression that the benefits of privatization as it occurs within the penal system are intangible at best, and it might be argued that the practice is malefic.

The most obvious of these articles was Martin Schwartz and Dana Nurge’s “Capitalist Punishment: Ethics and Private Prisons” (2004). In it, the authors issued a scathing critique of the privatization of the U.S penal system. They pointed out that private prisons go unmonitored and are notoriously unaccountable. They also exposed that the companies that run these private prisons heavily influence government policy due to lobbying. The article did a great job at comparing and contrasting the U.S system, where privatization of prisons is viewed as a moneymaker and prisoners as a commodity to be capitalized on, and the way this phenomenon is perceived in other countries- where privatization has also occurred, but its benefits questioned as perception and policy begins to shift.

“Policing and Punishment for Profit” (2019), by Chris Surprenant, writing for the Journal of Business Ethics, also delved into the moral nature of this phenomenon. Surprenant analyzed in his article the concept of fines and forfeitures from an ethics-based point of view, acknowledging

the fact that profiteering off of the justice system is not something that is unique to the privatization of prisons. He questioned the morality of earning a profit off of the punishment of crimes. He also analyzed the cost-effectiveness of private prisons, citing a Department of Justice Office of the Inspector General study which found in 2016 that “private prisons... offered no significant savings over public ones” (Surprenant, 2019, p. 124). While this study led to a policy directive to wind down the use of private institutions, this new directive was later reversed and corporations such as CoreCivic have subsequently had their contracts extended.

John A. Conley’s article on “Prison, Productions and Profit” (1980) focused mainly on one of the grittiest aspects of penal policy: the exploitation of prisoners to turn a profit. The article, albeit on the older side, was relevant because it provided an important history lesson on the rise of the 20th century industrial prison. Following the industrial revolution, some prisons turned to a model which required inmates to work manufacturing products to turn a profit which was used to offset upkeep costs. Conley’s article examined this practice in Oklahoma while analyzing its relationship to powerful business interests and governmental policy directives, leading the reader to draw conclusions about current political and social attitudes regarding not only the correctional facilities in the United States but also the individuals incarcerated within their walls. Ironically but perhaps unsurprisingly was the fact that the times when Oklahoma’s prisons were turning a profit, they subsequently received less funding from the government.

Anne Bonds, in “Profit from Punishment” (2006) wrote briefly about how rural areas in the American Northwest are more subject to having private prisons built in their locales, how this is framed as a financial “opportunity” (Bonds, 2006, p. 174), especially in the context of the modern industrialized economy, and how convicts from an ethnic minority who are subsequently released from incarceration may have problems integrating, or “settling out” (Bonds, 2006, p.

176), into the communities into which they are released based on discrimination and racially motivated biases.

Shannon M. Sliva and Ceema Samimi, in “Social Work and Prison Labor: A Restorative Model” (2018), provided necessary context and history of southern prisoners in the post civil war era. They wrote about policy guidelines given by the U.N regarding modern prison labor, one of which states that “the interest of prisoners and their vocational training must not be subordinated to the purpose of making a financial profit from an industry in the institution” (Sliva & Samimi, 2018). They also provided an analysis of the “labor landscape” (Sliva & Samimi, 2018, p. 155) in modern correctional facilities, and point out that there is a correlation between the profits of CCA (now CoreCivic) and incarceration rates.

The article offered a “restorative model” (Sliva & Samimi, 2018 p. 157) based on certain principles, and outlined the role of the profession of social work in reforming the current model of corrections.

Katharine Gammon (2018) provided a counterpoint to some arguments in opposition to privatization. In “Pondering Privatization,” an article published in *Nature Medicine*, she described contextually the ways in which the Department of Veterans’ Affairs has begun to embrace a hybrid model. I think there is a necessary juxtaposition between the idea of privatizing prisons and the privatization of other institutions. There was a positive spin in the article when it came to the idea of privatization of health care and biomedical research. There may perhaps be a greater ethical soundness for a company deciding to profit off of people’s need for health care, or the development of biomedical research, than for a company relying on an individual’s crimes and subsequent incarceration. One might argue, from a Kantian point of view, that turning a profit is never the stuff of moral worth. That being said, if it is more convenient and

cost-effective, and the act itself is not found to be immoral by conventions of reason, then it could be perhaps considered to be a sum benefit.

Finally I must also mention for its relevance a dissertation which dealt directly with the “theory of punishment.” Danielle Mascarenhas’ doctoral thesis “*The Theory and Practice of Punishment: A Theoretical Consideration of American Private Punishment*” (2018) explores the nature of privatized punishment and provides further philosophical evaluation, this time specifically on the nature of punishment from the lenses of social contract theory, consequentialism, deontology, and liberalism. This work is notably useful- punishment, like everything else, needs to be examined critically. This is especially true because of the tendency of existing power structures to present punishment as a deterrent and an alternative to higher crime rates- thereby rationalizing punishment as a force for good.

Chapter 4

Results

For-profit prisons are a result of social, economic and political forces that justify and reinforce their existence. These facilities exist at the crossroads of political policy, economic demand, and cultural stigmatization of offenders: the modern prison industrial complex, a perversion of justice.

Incarceration is commonly presented as a means to achieving three things: the deterrence of future crime, retribution or revenge against an offender, and restitution or restoration to a victim. Historically, persons incarcerated have been stripped of their rights to liberty and property, and presumably also the pursuit of happiness. Suspects of a crime are afforded protections by the United States Constitution- the eighth amendment asserts that an individual shall not be subject to excessive bail, nor cruel and unusual punishments. However, once convicted, these individuals lose a great deal of their rights. For example, the thirteenth amendment to the constitution protects us from subjection to slavery or involuntary servitude, but reserves it as a punishment for individuals convicted of a crime.

Of these three aforementioned goals of penal policy, deterrence and restitution are perhaps the most obviously beneficial. However, it stands to reason that deterrence cannot be had without some sort of negative consequence for the offender. Deterrence obviously requires that potential offenders understand that they may be punished according to their actions.

To this effect justice is typically regarded as being impartial. Ideally, law has an element of objectivity in its execution- the outcome should have an aspect of fairness to it. From an egalitarian standpoint, similar crimes ought to beget similar consequences. John Rawls explored this concept at length and developed a theory which holds that a just society would require

impartiality- he explains this through the use of a literary device known as the “veil of ignorance.” (Rawls,1971, p 219). The subjects of justice would have to determine its principles without knowing their role and status in the society (Sandel, 2010). Rawls’ works lay an important foundation for social justice theory, however, not all individuals subscribe to this particular school of thought.

Marketized Justice

One argument in favor of these privately operated facilities defends their existence by using the reasoning of the free-market: in a market economy, competition between different entities creates an incentive to provide efficiency. If a company operates inefficiently, without doing a good job for a good price, then the company will not survive, because other better companies will arise.

The most common market-logic argument in favor of privately operated correctional facilities is based on the notion that they are more cost effective, thereby alleviating some of the burden on the taxpayer. In addition, another argument in favor of the construction of these facilities is that they are used as a means to reinvigorate the rural economies where they are built. They provide construction jobs at first, and thereafter house inmates who are counted as residents, warranting grants of additional federal and state funding. While this may have some financial benefit for stagnant local economies, there are socioeconomic consequences to be considered when transplanting non-indigenous prisoners to these rural areas.

“Initial fieldwork in rural Idaho reveals a particular racial politics surrounding migrant farmwork and the growing Latino population ‘settling out’ in particular communities.” (Bonds, 2006, p. 176).

The cost savings argument is not adequately defended by the statistics so far. In 2016 the U.S Department of Justice Officer of the Inspector General conducted a study which revealed

that in reality private facilities offered no significant savings over that of publicly operated ones (Suprenant 2019). Furthermore, several of the measured parameters led to the conclusion that the private facilities were less secure for the incarcerated individuals. However, despite these findings, the Department of Justice remains indecisive about reducing its reliance on privately-owned correctional facilities (Surprenant, 2019).

The choice to utilize private enterprises to house inmates is not the only means by which the government is culpable- it was legislative action that created the conditions necessary for it. Lobbying by profit-driven organizations such as the American Legislative Exchange Council have resulted in the implementation of disastrous policies (Sliva & Samimi, 2018). Mandatory minimum sentences, three strike laws and a war-on-drugs started in the 80's have created the perfect storm for overcrowding of prisons (Mascarenhas, 2018; Schwartz & Nurge, 2004; Surprenant, 2019), creating a need for the construction of more facilities. To this effect, companies such as CoreCivic have been able to capitalize on the demand- building prisons first and reaping government contracts later. These neoliberal "tough-on-crime" legislative policies have created an ethical dilemma- the incentive to incarcerate (Mascarenhas, 2018, p. 144).

To delve further into the ways by which the retributive and restitutive goals of the U.S. penal system are achieved requires looking at the justice system's role in the exploitation of prisoners for economic gain: imprisonment of a segment of the population has a side effect which has historically been advantageous to the interests of the powerful. During the 20th century, for example, Oklahoma state policy saw an expanded utilization of prisoners in an effort to industrialize the economy (Conley, 1980). It comes as no surprise that labor is a daily routine for incarcerated individuals, and those who ultimately benefit the most from this arrangement are those best able to exploit it. The work of prisoners is currently utilized by corporations such as

Boeing, McDonalds, Microsoft, and Walmart (Sliva & Samimi, 2018). These companies incentivize incarceration merely by utilizing this form of labor and successfully profiting from it. By making use of prison labor, they create an example- a business model- for other for-profit entities to observe and mimic.

However, the ethical failings of business interests are not solely to blame. The U.S. government is not wholly without responsibility in maintaining the social imbalances created through reaping the rewards of prison labor. The United States Congress, in passing the Justice System Improvement Act of 1979, effectualized the Prison Industry Enhancement Certification Program to standardize the way in which prison labor be utilized for the sake of interstate commerce (Sliva & Samimi, 2018). The wording of this policy indicates that inmate participation must be voluntary, and that the companies utilizing this form of employment are supposed to pay a prevailing local wage. However, the loose enforcement of these rules often means that inmates receive less (Sliva & Samimi, 2018).

The conclusions drawn from these articles, field studies and reports imply that the use of privatized prisons results in economic benefits which are intangible at best, and at worst have negative socioeconomic implications which are not initially considered.

Furthermore, even if this practice was beneficial for a majority of society, such a viewpoint is based solely on the economic and social utility provided by the prisoner, failing to take into account the prisoner's humanity. Further analysis of this practice requires examination of this practice from a critical lens. Several philosophical modes such as social contract theory may help to determine whether or not the existence of these privately operated facilities can be justified using moral reasoning.

The Social Contract

The 17th century enlightenment philosopher Thomas Hobbes thought that human beings exist in a state of nature but surrender some of their rights in order to live harmoniously among themselves. Hobbes pioneered this idea, referring to the sovereign, or government, as a great “Leviathan.” (Hobbes, 1651/1988 p. 1). He theorized that human beings come together under an unwritten social contract by which they all implicitly agree to abide, with this being the sole basis for government. The sovereign, which human beings consent to and permit to exist merely by the act of living in a civil society, has a duty to maintain the order of this social contract (Mascarenhas, 2018). This is the rationale for a government’s ability to punish those who violate certain social norms- commonly referred to as laws.

This duty to punish undermines any justification of a government to outsource punishment to private entities. By outsourcing punishment, a government indicates that it is not fully capable of fulfilling its duty to maintain the order of the social contract. Furthermore, in order to have a right or duty to punish, the private institution would have to be part of the initial social contract (Mascarenhas, 2018). Hobbes’ social contract leaves little room for market forces to determine justice.

Morality as Justice: The Categorical Imperative

Immanuel Kant developed his own reason-based philosophy of ethics which relied on a test in order to determine whether an act possessed or was absent moral worth (Sandel, 2010). Kant developed this viewpoint because he believed that all people are rational beings worthy of respect. He believed that deep down, all people are reasonable and will act logically or reasonably; this warrants that we treat them with respect.

Kant's maxim test is as follows: "Act only on that maxim by which you can at the same time will that it should become a universal law." (Kant, 1785/2007, p 176). In other words, only do things according to a principle which you would universalize as a law. For example, if you wouldn't want littering to be a universal law (a societal norm), you should thus refrain from littering. This is maybe too obvious of an example, and in a way is more a reactive approach to morality, focusing on what we shouldn't do rather than what we should. "Be the change you wish to see in the world" is a contemporaneous cultural quote sometimes attributed to Mahatma Gandhi which I believe is more effective at conceptualizing Kant's maxim.

The test exists to align an individual's actions with the categorical imperative, otherwise called by Kant the supreme principle of morality. Kant contrasted this principle, the categorical imperative, with other motives, which he called hypothetical imperatives. Kant elaborates on this in an example: Suppose a calculating shopkeeper has an opportunity to shortchange a customer. The shopkeeper knows he can get away with it, but opts not to because others might discover the act and it could hurt the business in the long run. In Kant's eyes, such a shopkeeper calculates the act based upon a hypothetical imperative (others might find out) and not the categorical imperative (moral reasoning.) The act, according to Kant, lacks moral worth.

This example can be applied to the companies who operate private prisons. The companies' intent matters. According to the tenets in Kant's theory, if the companies operate solely because they know there is a profit to be made, then the existence of these companies lacks moral worth. If the companies open because they know they can provide a better means and end for the persons incarcerated, and the profit comes secondary in the motive, then, according to Kant, perhaps there is some worth in that.

Kant, however, posited another example utilizing the same shopkeeper. In this instance, the shopkeeper might decide not to shortchange a customer simply because it is wrong to do so. In Kant's eyes, the motive is the most important factor in determining the morality of an act (Sandel, 2010).

Making the assumption that the privatization of prisons is done for unethical reasons, and companies are just looking to make money off of the justice system's current ability and tendency to produce vast numbers of convicts to be capitalized upon and exploited- what is the verdict of Kantian ethics? And what if anything can be done about it?

I think, according to Kant's maxim test, this kind of exploitation of human beings by one another could eventually lead to the eradication of society. Human beings are fully capable of exploiting one another in the Hobbsian state of nature, and therefore society, social contracts, and law have no utility if exploitation is deemed as morally permissible. With the existence of an incentive to incarcerate other people, it's entirely too easy to imagine a dystopian future where incarceration is the norm and privatized prisons are everywhere.

Democratic Libertarianism

Suppose for the sake of further analysis that the government conducts a study on the ethics of government contracts, concluding that privately negotiating with companies to fulfill the needs of the justice system is inherently unethical. Regulation might be introduced to prohibit the forming of contracts between private contractors and the government. If we believe that Kant's brand of ethics is convincing, then we must once again take into account his categorical imperative. If this regulation were introduced in order to dissuade individuals from undertaking this kind of business venture, society would find itself existing with the right outcome (an

absence of people exploiting each other via privatized prisons) for the wrong reason (regulation.) The right outcome for the right reason would be that individuals themselves decided not to profit off of such a circumstance, and the reason in such an ideal world, according to Kant, would be the categorical imperative.

In a way, libertarianism, the philosophy of those who champion free markets (Sandel, 2010), unwittingly lends itself to this argument when synthesized with social contract theory. This approach challenges the government's authority to contract with entities aside from its citizens- corporations, for example. Libertarianist ideals hold that people should be able to freely enter contracts of their choosing. However, in the event that the contract devised between prison companies and the government lacks the consent of *all* the people represented by the government, such a contract may be considered at least partially non consensual and even perhaps a form of coercion by the private contractor, who relies on a superior bargaining position- the need of the government. The democratic and perhaps unconventional libertarian making this case might argue that those who do not favor the privatization of prisons, who disagree and do not want such a contract, have their rights violated simply due to the existence of said contract between their representative government and a private entity.

Conclusions

The argument in favor of privatized correctional facilities is one born merely of economic logic and devoid of moral reasoning. There are strong and compelling arguments to be made against this practice when viewed from a variety of human-rights centric philosophies. Moral reasoning leads us to the conclusion that the privatization of penal policy is questionable at best and likely a detrimental practice which cheapens our concept of justice. The creation of an

incentive to incarcerate for economic gain simultaneously violates the dignity of human beings and perpetuates the most useless aspect of punishment- revenge- by stigmatizing prisoners in order to justify the practice.

Chapter 5

Discussion

The main voices in favor of privately operated correctional institutions rest their claim on the notion that they are more cheaply and efficiently run. The OIG report determined that there are no significant cost savings thus far (Surprenant, 2019), and examination from different philosophical viewpoints question the moral reasoning, or lack thereof, for its justification.

We now must begin to question the circumstances by which an individual may profit from incarceration, whether those circumstances are justified, and whether or not they may be eliminated or reformed. Is it morally permissible that one individual may exploit another simply due to the fact that the latter is convicted of a crime? Does such a phenomenon have a place in a society which values egalitarian principles such as fairness in the law? Perhaps from a point of view predominantly based on free market principles, but as indicated in the previous chapter, there are a great variety of ways in which this dilemma may be analyzed.

In my opinion, an individual is only justified in profiting from a crime insofar as they were a victim of the specified crime. The only profit that should be had is one that makes the victim as whole as possible. Any other possible benefit should be focused on rehabilitating the offender or deterring future crimes to the benefit of society. Whether or not for-profit prisons can even begin to achieve these kinds of goals is another question entirely- however, I think that because there is a profit incentive for individuals and shareholders, further philosophical analysis is required. For example, assuming that the profit allocated to individuals and shareholders results from the fact that they are somehow socially victimized by the crime, under what circumstances are they, the shareholders, the sole victims of the crime, and not the rest of

society? By what right does a certain segment of the population, but not all, profit from the attempted execution of justice arising from a criminal act?

Prison, in general, may be an unsatisfactory way to achieve recompense- ultimately, those who go to prison are required to be housed, fed, and guarded. All of this is paid for by the same citizens who may have been the original victims of the crime committed. What, then, is the greater offense: the law violated by the action of an individual, or the levying of the tax which redistributes wealth to the imprisoned offender?

While it is important that, for the sake of the taxpayer, the institution of retributive justice is as efficient as possible without sacrificing our ethics, I believe that institutions ought to be uniform and consistent in their administration of punitive action, as to preserve equality under the law for its own sake.

In conclusion, it is my opinion that a shift in our collective cultural perspective is necessary for the preservation of virtue within justice- one requiring that we engage with these hard questions, examine our own motives, and begin to reflect on what kind of community we want to live in, acting accordingly.

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