

ARE PRIVATE PRISONS TO BLAME FOR MASS INCARCERATION AND ITS EVILS? PRISON CONDITIONS, NEOLIBERALISM, AND PUBLIC CHOICE

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III. PUBLIC ACTORS AS MARKET PLAYERS

A. Public Incarceration Conditions and the Ugly Pig Contest

In a symposium titled *Capitalism, Government, and the Good Society*, political scientist and former North Carolina libertarian gubernatorial candidate Michael Munger used a unique simile to explain the choice between the state and private actors:

In North Carolina at the state fair, we have what in effect are beauty contests for pigs. So you might imagine in one of the categories at the state fair there is a Big Pretty Pig contest. And there aren't many entrants because there's big pigs, and there's pretty pigs, but there's not many big pretty pigs. So there's just two; we have the two entrants. The first one comes out and the judge goes, 'Oh, God, that's an ugly pig! Let's give the prize to the second one.' Well, he hasn't seen the second pig. Now it's true that the first pig is ugly. But why would you have a decision based on the fact that there's problems with one system, the other one must be better? But that's precisely what people who want to reject market solutions in some ways are advocating. So the world is imperfect, our knowledge is limited, that particular pig of market solutions is in many ways pretty ugly. The world is hard. The problem is that advocates of state intervention often want to award the prize to the invisible pig: the state. But when you actually take a look under bright lights, government failures are just as ugly, just as prevalent, and in some ways harder to control than market failures.¹

The comparison is hardly offensive, and possibly euphemistic, when used to examine incarceration conditions. The serious critiques leveled at private prison conditions are, of course, justified. Some recent incidents include the disturbing audit conducted in October 2012 at the CCA-owned Ohio Correctional facility, which found forty-seven violations of state prison standards,² most related to severe overcrowding of low-risk offenders under the supervision of inexperienced guards.³ Similarly, Otter Creek Correctional Center in Wheelwright, Kentucky, had its state funding pulled in August of 2012 after Hawaii removed all 168 female inmates it had housed at the facility due to allegations of sexual abuse by prison guards.⁴ In another egregious instance of private prisons run amok, GEO removed its presence entirely from Mississippi in April 2012, after Federal Judge Carlton Reeves wrote that GEO-run Walnut Grove Youth Correctional Facility had "allowed a cesspool of unconstitutional and inhuman acts and conditions to germinate, the sum of which places the offenders at substantial and ongoing risk," including routine sex between staff and underage inmates, "poorly-trained guards brutally beat youth and used excessive pepper

* Professor of Law, Harry and Lillian Hastings Research Chair, UC Hastings College of the Law. I am grateful to Michael Munger, Barry Winegast and Todd Zywicki, who taught the George Mason Law and Economics Institute's workshop on public choice economics, and who probably strongly disagree with virtually all the political analysis and a substantive share of the normative recommendations of this paper. I am also grateful to Malcolm Feeley for his thought on prison privatization, to Amanda Leaf, Liz Pollack, and Rosie Reith for their excellent research assistance, and to Chuck Marcus for his outstanding library support.

1. Michael Munger, *Capitalism, Government, and the Good Society*, ECON TALK (Sep. 4, 2013), http://www.econtalk.org/archives/2013/09/capitalism_gove.html.

2. Leigh Owens, *Private Prison In Violation of Ohio State Law*, HUFFINGTON POST October 10, 2012, *available at* http://www.huffingtonpost.com/2012/10/09/private-prison-violates-state-law_n_1951917.html.

3. MIKE BRICKNER, AM. CIVIL LIBERTIES UNION OF OHIO, PRISONS FOR PROFIT: A LOOK AT PRISON PRIVATIZATION 18 (April 14, 2011), *available at* http://www.acluohio.org/assets/issues/CriminalJustice/PrisonsForProfit2011_04.pdf.

4. Brett Barroquere, *Rural Ky. town readies for private prison closure*, ASSOCIATED PRESS (April 24, 2012), <http://www.foxnews.com/us/2012/04/24/rural-ky-town-readies-for-private-prison-closure/>.

spray,” and prison guards turned a blind eye to inmates possessing homemade knives that were used in “gang fights and inmate rapes.”⁵

But is this decidedly-very-ugly-pig that much uglier than its public counterpart? Here are only three examples from a state that holds all of its in-state inmates in public facilities.⁶ In 2011, the Supreme Court decided what might be the biggest inmate human rights case of our time, *Brown v. Plata*.⁷ The case exposed the abysmal quality of physical and mental healthcare provided in public California prisons. Justice Kennedy, writing the Opinion of the Court on behalf of five Justices, detailed numerous horrific instances of systemic indifference, resulting in inmates sitting in their own human waste for hours, injuries and chronic conditions becoming worse and worse through medical neglect and maltreatment, and unnecessary, iatrogenic deaths at a rate of an inmate every six days.⁸ It is particularly poignant that these practices were so horrifying that, years before the decision, the courts had taken the prison health care system out of the hands of the state and placed them in the hands of a federal receiver⁹ — but even that was not enough.¹⁰ Justice Kennedy grimly concludes:

To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison’s failure to provide sustenance for inmates ‘may actually produce physical ‘torture or a lingering death’ . . . Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society . . . [i]f the government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation.¹¹

Federal courts are currently in the process of hearing another lawsuit, *Ashker v. Brown*,¹² which addresses the practice of solitary confinement in California. In 2011 and 2013, inmates in California’s Pelican Bay and Corcoran institutions, as well as in other public correctional facilities, engaged in hunger strikes to protest against the conditions in the Security Housing Unit (SHU).¹³ These conditions included placement in small solitary cells for 23 hours a day with no human contact for an indefinite period of time — sometimes lasting decades¹⁴ — not for disciplinary violations, but for a suspicion of gang membership.¹⁵ The hunger strike ended only when Judge Thelton Henderson ordered that the inmates be force-fed.¹⁶

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

6. California houses approximately 9,000 inmates out-of-state in CCA facilities. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, PRISON FACILITIES, OUT OF STATE PRISON FACILITIES (2013), http://www.cdcr.ca.gov/Visitors/CA_Out_Of_State_Facilities.html (last visited October 23, 2014).

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

8. *Id.* For more on healthcare in California prisons, see Simon, *supra* note 12, at 133-54.

9. *External Audits and Reviews*, CALIFORNIA CORRECTIONAL HEALTH CARE SERVICES, <http://www.cphcs.ca.gov/> (last visited Oct. 23, 2014).

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

11. *Brown*, 131 S.Ct. at 1928.

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

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

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

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

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

In 2013, an exposé by the Center for Investigative Reporting uncovered a scandal of massive proportions: the sterilization of female inmates without proper state procedures.¹⁷ A subsequent 2014 California Auditor examination uncovered 144 cases of tubal ligations performed in inmates between 2006 and 2010, thirty-nine of which were performed without consent and a further twenty-seven in which the inmates' physicians did not sign the appropriate forms.¹⁸ Interviews with the inmates that had undergone the procedure reveal disturbing degrees of paternalism and pressure on the part of medical staff. "As soon as [the institution's OB-GYN] found out that I had five kids," recounted an inmate to the Sacramento Bee, "he suggested that I look into getting it done. The closer I got to my due date, the more he talked about it . . . He made me feel like a bad mother if I didn't do it."¹⁹

Many more examples of cruelty, laziness, and neglect in public prisons lead to the inevitable conclusion: incarceration conditions in the United States may differ across states and different types of institutions, but it is difficult to argue that private institutions, categorically, are worse than public ones. Both pigs are ugly. And as the next Subsection shows, criminal justice actors in the public sector are not at all immune from profit motivations when they engage in unconscionable behavior toward the people subjected to their control.

B. Profit-Seeking Aberrations and the Banality of Evil

In 2008, many conscientious Americans were shocked to discover that two Philadelphia judges—Mark Ciavarella, the former President Judge of the Luzerne County Court of Common Pleas, and Michael Conahan, a Senior Judge in the same county — were indicted and convicted for accepting money from a private juvenile facility provider, Robert Mericle, in return for sentencing thousands of juvenile defendants harshly so they would be sent to the provider's detention centers.²⁰ Mericle, a real-estate developer, was a staunch supporter of Ciavarella's election campaign,²¹ and Conahan struck a personal friendship with some organized crime leaders in Northeast Pennsylvania.²²

The defendants' association with Mericle started with their support, for cash of his juvenile facility venture in 2000-2001,²³ and continued with their furnishing Mericle's facilities with revenue-raising bodies.²⁴ Examples of their harsh sentencing for kickback included seven weeks detention for a thirteen-year-old's minor violent incidents with his mother's much-larger boyfriend,²⁵ months of house arrest in anticipation of a confinement sentence for an epileptic fourteen-year-old girl accused of defacing stop signs with the inscription "vote for Michael Jackson,"²⁶ a sixteen-year-old charged with "terroristic threats" for a prank and sentenced to an indefinite term at a privately-funded wilderness camp for girls,²⁷ and a fifteen-year-old who carelessly and mistakenly purchased a stolen motorbike sent to a term at a "boot camp" which led him to use drugs and exhibit signs of anxiety and depression, which brought him in and out of detention facilities for three years.²⁸ While many of these sentences directly lined the judges' pockets, some of them are more indirectly related to the kickbacks, and represent the indifference and cruelty that set in once they

17. See Corey G. Johnson, *Female Inmates Sterilized in California Prisons Without Approval*, SACRAMENTO BEE, July 7, 2013, available at <http://www.sacbee.com/2013/07/07/5549696/female-inmates-sterilized-in-california.html>.

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

19. Johnson, *supra* note 175.

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

21. *Id.* at 32.

22. *Id.* at 33.

23. *Id.* at 44-45.

24. *Id.* at 47.

25. *Id.* at 1-4.

26. *Id.* at 5-6.

27. *Id.* at 7-9.

28. *Id.* at 10-12.

got used to commodifying human life. The Juvenile Law Center found that hundreds of defendants were tried without receiving proper counsel.²⁹

Clearly, a serious culprit in this scandal is Robert Mericle, the juvenile facility provider, who paid the judges kickbacks. One possible reading of this story is as an indictment against such institutions. But in an environment in which public officials are not greedy, corrupt, and profit-seeking, a for-profit attempt to corrupt judges would not result in such horrific results. William Ecenbager provides background that includes a lengthy history of political corruption,³⁰ the judicial election system in thirty-nine states — including Pennsylvania³¹ — and the “tough love” change in the American approach to juvenile justice.³² In his account of the scandal, Ecenbager shows that pressures were exerted by the judges over the entire juvenile system in Pennsylvania, bullying lawyers and therapeutic personnel to collaborate with their schemes, sometimes openly stating that these policies were necessary because there were “bills to pay.”³³

Scandalous human rights crimes perpetrated for profit do not even require the partnership of a private actor; sometimes, a legislative lacuna suffices. A 1939 Alabama law allowed the state’s sixty-seven sheriffs to pocket any leftover money they managed to save from the state’s allowance for feeding inmates in local institutions.³⁴ In 2009, then-sheriff of Morgan County, Greg Bartlett, was charged and convicted for having pocketed \$212,000 from the prison’s food budget, while the inmates were provided with inadequate food on \$1.75 a day.³⁵ His defense attorney argued that “everything he [had] done [was] by the rules, including the feeding allowance.”³⁶ After Bartlett’s release from jail, he agreed to spend the food money solely on food and not keep any funds for his personal use.³⁷ Currently, Sheriff Mike Rainey, who is calling on the legislature to end the current system and allow county commissions to oversee the funds, has reportedly been donating most of his potential earnings, to charity to the tune of \$10,000.³⁸

One would hope that Rainey’s public stance be the norm, rather than notable and unusual honesty, and that Bartlett’s deeds be exposed for the travesty they are. However, Bartlett was defended in his trial by the Alabama Sheriffs Association, who stressed in their defense that he had not broken any laws, but merely exploited an existing system.³⁹ And when local advocacy groups sought to find out how common this profiteering-on-food scheme was, the Director of the Alabama Sheriffs Association sent each sheriff a letter advising them to ignore the open records law.⁴⁰ Sarah Geraghty and Melanie Velez provide other examples of such enrichment: In South Georgia, Clinch County court officials had charged state court misdemeanants \$10-15 in illegal fees, which were pocketed by court personnel.⁴¹ Interpreting these incidents as endemic to the Southern system does not obscure the fact that they consisted of exploiting an opaque system riddled with antiquated law to obtain personal profit.

29. *Id.* at 154.

30. *Id.* at 17-25.

31. *Id.* at 30-31.

32. *Id.* at 38-40.

33. *Id.* at 49-50.

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

35. Adam Nossiter, *As His Inmates Grew Thinner, a Sheriff’s Wallet Grew Fatter*, N.Y. TIMES, Jan. 8, 2009, available at http://www.nytimes.com/2009/01/09/us/09sheriff.html?_r=0.

36. *Id.*

37. See *Maynor v. Morgan County*, No. 01-0851, NE (N.D. Ala. Sept. 25, 2001). For journalistic commentaries, see Shelly Haskins, *Sheriff Greg Bartlett to Speak On Jail Food Issue*, AL.COM BLOG (Jan. 9, 2009), http://blog.al.com/breaking/2009/01/sheriff_greg_bartlett_to_speak.html.

38. See Adam Peck, *In Alabama Prisons, The Less Sheriffs Spend On Food For Inmates, The More They Earn*, THINK PROGRESS, June 25, 2013, <http://thinkprogress.org/justice/2012/06/25/506089/in-alabama-prisons-the-less-sheriffs-spend-on-food-for-inmates-the-more-they-earn/>.

39. *Id.*

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

41. *Id.*

Least it seem that these are extreme, idiosyncratic examples of cruelty and corruption, let us turn to much more ordinary profit-seeking mechanisms of exploitation. On May 15, 2014, the California legislature approved AB 1876, a bill designed to put an end to any prevailing practice among county correctional officers to profiteer from contracts with phone companies. The new bill “prohibits a contract to provide telephone services to any person detained or sentenced to a jail or juvenile facility from including any commission or other payment, ..., to the entity operating the jail or juvenile facility.”⁴²

The bill was designed to address a county loophole in phone contract regulation in local facilities. In 2007, California passed a law phasing in reductions in the cost of prison phone calls, but left the county jail market open to abuse and exploitation.⁴³ For example, in Contra Costa County, phone call rates amounted to triple what the state had put in place for state-owned facilities, and the commissions paid by the operator to the county were fifty-three percent.⁴⁴ The money was reportedly directed to an “inmate welfare” fund, some of which was used for worthwhile programming, but, as commented in the Contra Costa Times, obtaining it via a profit-seeking kickback was a function of corrupt management.⁴⁵ Similarly, the 2007 law pertaining to state prisons did not cover interstate-calling costs, making those prohibitively expensive and contact with out-of-state family virtually impossible for low-income families.⁴⁶ Similar schemes that make phone calls prohibitively expensive, for prison authority profit, are the subject of civil rights campaigns in Virginia⁴⁷ and in the federal system.⁴⁸

These individuals and institutions were clearly operating with the intention to profit from their misdeeds. That they were public officials, or public institutions, did not make them immune to greed or more sensitive to human suffering than their private counterparts. Indeed, much more mundane examples of “wheeling and dealing” demonstrate that, when public and private actors are faced with a shift in the profitability or sustainability of incarceration, they transform their behavior and adapt to the changing market conditions in surprisingly similar ways.

This phenomenon can be illustrated by examining the changes in incarceration policies and practices following the Great Recession of 2008.⁴⁹ When incarceration became less sustainable and states began to feel the pressure to reduce their prison populations, private prison companies offered their public clients “discounts” on the required occupancy rates in their institutions,⁵⁰ while at the same time “diversifying their incarceration portfolio” by entering the undocumented immigrant detention market and advocating for anti-immigration legislation.⁵¹ Responding to the same pressures, states turned to prison closures.⁵² States who

42. Assemb. B. 1876, 2013-2014, Reg. Sess. (Cal. 2014), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1876.

43. S.B. 81, 2007-2008 (Cal. 2007), http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0051-0100/sb_81_bill_20070824_chaptered.html.

44. Tracy Rosenberg, *County Allows Outrageous Charges for Inmate Calls*, CONTRA COSTA TIMES, Feb. 23, 2013, available at http://www.contracostatimes.com/ci_22640254/tracy-rosenberg-county- allows-outrageous-charges-inmate-calls.

45. *Id.*

46. Tracy Rosenberg, *A Tale of Two Prisoners*, HUFFINGTON POST, Jan. 8, 2014, available at http://www.huffingtonpost.com/tracy-rosenberg/a-tale-of-two- prisoners_b_4552343.html.

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

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

49. See Aviram, *supra* note 132; Hadar Aviram, *The Inmate Export Business and Other Financial Adventures: Correctional Policies for Times of Austerity*, 11 HASTINGS RACE & POVERTY L.J. 111, 115-133 (2014) [hereinafter *The Inmate Export Business*].

50. AVIRAM, *supra* note 132; see *The Inmate Export Business*, *supra* note 207, at 122.

51. AVIRAM, *supra* note 132; see *The Inmate Export Business*, *supra* note 207, at 125-26.

52. See *The Inmate Export Business*, *supra* note 207, at 138-44; Nicole D. Porter, *On the Chopping Block 2013: State Prison Closures*, THE SENTENCING PROJECT 2 (2013), http://sentencingproject.org/doc/publications/inc_On%20the%20Chopping%20Block%202013.pdf.

managed to reduce their population tried to sell their unused correctional space to other states.⁵³ States made decisions about housing inmates in-state, or out-of-state, based on cost-benefit considerations.⁵⁴

Public and private actors alike, we can conclude, negotiate with each other, and with other actors, in order to respond to economic pressure. Private prison companies are changing their contracts with state and local governments to account for lesser occupancy, and states buy and sell prison space from each other. Not only are these two “pigs” so ugly that they defy comparison, they are both motivated by profit and cost-benefit analysis, like the neoliberal subjects they are.

53. See, e.g., Kathryn Lynch-Morin, *The Fate of Standish Max is Still Uncertain*, MLIVE (July 21, 2009), http://www.mlive.com/news/bay-city/index.ssf/2009/07/the_fate_of_standish_max_is_st.html.

54. See, e.g., STATE OF HAWAII ATTORNEY GENERAL *Hawaii's Imprisonment Policy and the Performance of Parolees Who Were Incarcerated In-State and on the Mainland*, (January 2011), <http://ag.hawaii.gov/cpja/files/2013/01/AH-UH-Mainland-Prison-Study-2011.pdf>.