

PRIVATE PRISONS, PUBLIC FUNCTIONS, AND THE MEANING OF PUNISHMENT

MARY SIGLER*

I. INTRODUCTION

For more than three decades, the prison population in the United States has steadily increased.¹ “For the first time in American history, more than one in every 100 adults is now confined in an American jail or prison.”² During the course of this rapid expansion, states and the federal government have come to rely increasingly on private prisons. In 2007, private detention facilities housed more than seven percent of incarcerated adults in federal and state prisons, up from three percent in 1999.³ At least thirty-five states and the District of Columbia now have private prisons; many more send inmates to private facilities.⁴ The Federal Bureau of Prisons pays private providers to house approximately eleven percent of federal inmates,⁵ and Immigration and Customs Enforcement houses about thirty-eight percent of its detainees in privately managed facilities.⁶

The primary impetus for the private-prison boom that began in the 1980s was the belief that for-profit corporations, subject to the rigors of

* Professor of Law, Arizona State University College of Law. I am grateful to Jeffrie Murphy, Antony Duff, and Richard Dagger for their thoughtful comments, and to participants in the 2009 *Markets and Responsibilities* workshop at Oxford University.

¹ Pew Center on the States, *One in 100: Behind bars in America 2008*, at 5.

² *Id.* at 3; In 1985, the figure was one in every 450 people. *Id.*

³ *Id.* at 6. The United Kingdom has also experienced a burgeoning prison population and increased reliance on private prisons. In England and Wales, private prisons account for eleven percent of the prison population. Robert Verkaik, *Private Prisons Performing Worse than State Run Jails*, INDEPENDENT, June 29, 2009.

⁴ Leonard C. Gilroy et al., *Reason Foundation Annual Privatization Report 2008*, at 106.

⁵ Federal Bureau of Prisons, at http://www.bop.gov/locations/weekly_report.jsp.

⁶ Gilroy, *supra* note _ at 106.. Immigration detainees are not “prisoners” in the legal sense, and their incarceration does not constitute punishment. See 28 U.S.C. 1915(h) (defining “prisoner” as “any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole probation, pretrial release, or diversionary program”). Although many of the same practical concerns about privatization apply in the context of immigration detention, see *infra* Part II, the argument about the meaning of punishment does not.

market competition, could deliver correctional services more efficiently than could the state. According to the private providers, cost savings come through lower payroll costs, consolidation of prisoner populations, and the siting of facilities in low-cost markets.⁷ Indeed, one recent study found that private prisons may reduce the cost of housing inmates by as much as fifteen percent; another found that between 1999 and 2004 states were able to save up to fifteen million dollars on their yearly corrections budgets by using privately managed prisons to house at least some of their inmate population.⁸ During the present economic crisis, many states are poised to increase their reliance on private prisons. In Oklahoma, for example, where approximately one quarter of the state's inmates are already housed in private facilities, legislators recently voted to expand contracts with private prison providers.⁹ Similar proposals are pending in California, Florida, and Arizona.¹⁰

Despite this enthusiasm for privatization, the cost-saving claim remains controversial. Some researchers have observed that private prison contractors typically siphon off the least costly inmates—those who are healthier and less violent than the incarcerated population as a whole.¹¹ More generally, simple cost comparisons that appear to favor private facilities are based on per diem rates that may not reflect the full cost of

⁷ Stephanie Chen, *Larger Inmate Population Is Boon to Private Prisons*, WALL ST. J., Nov. 19, 2008.

⁸ James Blumenstein, et al., *Do Government Agencies Respond to Market Pressures? Evidence from Private Prisons*, Health Policy Center, Vanderbilt Institute for Public Policy Studies (2007).

⁹ Michael McNutt, *Oklahoma House Fights Prospect of Terrorism Detainees*, OKLAHOMAN, May 23, 2009. The legislation also extracts various concessions from private prison providers, including reduced costs, cancellation options, and an increase in inmate services. *Id.*

¹⁰ Steven Harmon, *Schwarzenegger Hopes Budget Debacle Leads to Lasting Reform*, MERCURY NEWS, June 2, 2009; Steve Bousquet, *Florida Legislature Gives OK to Ship Inmates Out of State*, MIAMI HERALD, June 7, 2009; Luige del Puerto, *Arizona Senate Panel Passes FY10 Budget after 9-Hour Debate*, ARIZ. CAP. TIMES, May 22, 2009. In the United Kingdom, the "Government is committed to building five more private prisons to accommodate the growing prison population, which is predicted to rise to 96,000 by 2014." Verkaik, *supra* note 7.

¹¹ Kevin Pranis, *Cost-Saving or Cost-Shifting: The Fiscal Impact of Prison Privatization in Arizona* (2005), Private Corrections Institute Inc., at <http://www.nicic.org/Library/020388> ("Prisoners housed in private facilities were far less likely to be convicted of serious or violent offenses, or to have high medical and mental health needs, than prisoners housed in public facilities used to generate cost comparisons."); see also Pew, *supra* note 1 at 12 (noting that medical care is one of the most expensive items in corrections budgets; JOHN D. DONAHUE, *THE PRIVATIZATION DECISION* (1989) 158 (reporting on the tendency to send "the best in the bunch" to private facilities).

incarceration.¹² Others contend that whatever cost savings private prisons achieve, they come at the expense of inmate well-being—that private prison operators save money by skimping on personnel training and staffing, offering only minimal educational programming and vocational training, and housing inmates in cramped and unsafe quarters. Moreover, the profit motive is thought to create perverse incentives to extend inmate sentences and promote criminal justice policies that yield more and longer prison sentences regardless of whether they are in the public interest. Finally, critics decry the delegation of governmental functions to private actors and the threat it poses to democratic accountability and the rule of law.

While these important policy considerations may be reason enough to worry about the proliferation of private prisons, I argue that an even more fundamental consideration concerns the nature and justification of punishment in a liberal democratic polity. Punishment under law is a profound exercise of state power the meaning and justification of which depend on the social and political institutions that authorize it. In a liberal state—in the United States—punishment is inflicted for public wrongs in the name of the people themselves. Although it may be justified with reference to a plurality of public values, it is a predominantly retributive practice that constitutes and expresses society's moral condemnation of criminal conduct. Central to this conception of punishment is the relationship between punisher and punished, for it transforms otherwise socially objectionable conduct, such as the deprivation of liberty, into a just social practice. Punishment is thus meaningful not primarily as a means to an end; rather, punishment instantiates justice. The delegation of punishment through prison privatization attenuates the meaning of punishment in a liberal state and undermines the institution of criminal justice.

Or so I shall argue. I begin by examining the phenomenon of privatization in the liberal democratic context generally, considering a range of activities that, while publicly financed, are performed in whole or in part by private entities. This inquiry suggests a number of criteria for evaluating the wisdom of privatization in practical terms and the suitability of privatization more generally. In view of these considerations, I outline some of the practical issues raised by prison privatization, ranging from the potentially distorting effects of the profit motive to the challenge of effective oversight of contractor discretion and the implications for due process and the rule of law. This analysis highlights serious concerns about the trend toward penal privatization that ultimately rest on a set of empirical claims about its tendency to yield undesirable social and political consequences.

¹² Gerry Gaes, *Cost, Performance Studies Look at Prison Privatization* (2008), National Institute of Justice, at <http://www.ojp.usdoj.gov/nij/journals/259/prison-privatization.htm>.

The case that I construct against prison privatization is, by contrast, normative and conceptual. According to this approach, a judgment about prison privatization depends not (only) on its potential to produce bad consequences but on the meaning and justification of punishment itself. I undertake this analysis, first, by canvassing the traditional purposes of punishment, then developing a justificatory account that is predominantly retributive and broadly consonant with liberal-democratic values. This sets the stage for a discussion of the meaning of liberal-democratic punishment in the United States based on a conception of criminal justice as a type of moral dialogue between individuals and their community. On this view, the state is the legal embodiment of the political community, calling offenders to account for their wrongful conduct. Imprisonment, the primary mode of serious punishment in the United States, represents a grave form of censure that constitutes the normative community's moral condemnation of serious wrongdoing. Filtered through the medium of privatization, this communication is necessarily garbled. In our rush to privatization, we risk compromising the meaning and value of our punitive institutions and practices. If and when the latest economic crisis passes, we may find that it is too late to recover them.

II. PRIVATIZATION

As a general matter, privatization is “the use of the private sector in the provision of a good or service, the components of which include financing, operations (supplying, production, delivery), and quality control.”¹³ Private actors involved in the provision of public goods or services may include corporations, interest groups, and nonprofit organizations. Their level of involvement varies widely, ranging from consulting and standard-setting to financing, constructing, and operating facilities designed to fulfill governmental responsibilities. For example, professional associations, such as the American Bar Association, often develop and enforce professional standards in a variety of settings; religious organizations offer alternatives to welfare and public education funded through voucher programs or tax credits; and for-profit corporations supply catering, medical, and waste management services to governmental entities on a contract basis, as well as building and managing hospitals, prisons, and military facilities to meet public-sector demand. At the far reaches of public-private partnership are such quasi-governmental entities as “Fannie Mae” and Freddie Mac,”¹⁴ the United States Postal Ser-

¹³ Kevin R. Kosar, *Privatization and the Federal Government: An Introduction*, Congressional Research Service Report for Congress, 3 (Dec. 28, 2006).

¹⁴ Fannie Mae and Freddie Mac are government-sponsored enterprises chartered by Congress. See <http://www.fanniemae.com/about/index.html>; http://www.freddie.com/corporate/company_profile/faqs/.

vice,¹⁵ and the American Red Cross.¹⁶ Although my current focus is primarily “contracting out”—agreements between governments and private providers to supply public goods and services¹⁷—I first briefly review the historical context out of which this particular form of privatization developed.

A. *Context and Case for Privatization*

As many commentators have observed, the traditional distinction between public and private realms is both powerfully intuitive and somewhat misleading.¹⁸ Historically, a number of what we have come to regard as public functions were performed through private initiative, including police and fire protection, tax collection, and education. In this setting, government relied on a variety of regulatory mechanisms, including tax policy and corporate law, to encourage private actors to pursue the public interest along with their own.¹⁹ With the expansion of the administrative state in the middle part of the twentieth century, people’s expectations of government, and thus the opportunity for contracting out, greatly increased.²⁰ In the modern era, public-private partnerships are more likely to involve direct financing, joint ventures, and market-style competition.²¹ Today, “[v]irtually any example of service provision or regulation reveals a deep interdependence among public and private actors in accomplishing the business of governance.”²²

Despite this interdependence, the distinction between public and private remains meaningful insofar as “[p]rivate firms and public agencies tend to have different capacities, cultures, and priorities...and respond to different incentives.”²³ Indeed, the fact that public and private providers may be animated by a different set of norms and goals gives rise to a range of concerns about the privatization of governmental responsibilities. Before turning to these issues, I first briefly outline the case for privatization and identify the major grounds for criticism. I then examine the phenomenon of prison privatization in particular, highlighting the specific challenges it presents.

¹⁵ The United States Postal service is a semi-independent federal agency. See <http://usgovinfo.about.com/od/consumerawareness/a/uspsabout.htm>.

¹⁶ The American Red Cross operates under a congressionally issued corporate charter. See <http://www.redcross.org/museum/history/charter.asp>.

¹⁷ Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U.L. REV. 543, 552 (2000).

¹⁸ See, e.g., Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003); Freeman, *supra* note 19 at 547.

¹⁹ Minow, *supra* note 20, at 1237.

²⁰ *Id.* at 1240, Donahue, *supra* note 13, at 4.

²¹ Minow at 1240-41.

²² Freeman, *supra* note 19, at 547.

²³ *Id.* at 550.

The basic case for privatization, particularly contracting out, turns on the greater efficiencies available through the operation of market mechanisms. Because governments function more or less as monopolies, they lack adequate incentives to pursue cost-saving innovations. Through the power of competition, however, private firms are motivated to deliver goods and services more cost-effectively—lest competitors underbid them—through stream-lined management and operations. Whereas governments must contend with entrenched bureaucracies and public employee unions, private entities have the flexibility to hire, fire, and adjust staffing and wage levels to respond to prevailing market conditions. In addition, the availability of private capital facilitates the timely design and implementation of new ventures.

Beyond the economic advantages associated with privatization, the competition it generates may lead to experimentation in the provision of social services and novel responses to persistent social problems.²⁴ At least some proponents of privatization also view it as a means to reduce the size and power of government and thereby promote greater individual liberty and choice.²⁵ The availability of vouchers or tax credits, for example, allows parents to choose educational options that reflect their values and traditions, while at the same time promoting pluralism and community.²⁶ Such “[g]roup affiliations can encourage virtues of participation, self-governance, and mutual aid...while allowing freedom from the controlling force of a powerful government.”²⁷

B. Potential Problems

Despite the considerable potential and expectations for privatization in the United States, the results to date reveal a mixed record.²⁸ Although one leading proponent of privatization contends that “the empirical question has long since been answered in its favor,” even he acknowledges that a number of practices have weakened the case for privatization and threaten its viability.²⁹ In particular, he notes the troubling use of campaign contributions to influence the awarding of contracts, the lack of transparent decision-making processes, and the use of anti-competitive tactics by private providers.³⁰ These concerns, and many others, high-

²⁴ Minow, *supra* note 20, at 1245.

²⁵ *Id.*

²⁶ *Id.* at 1244. Minow endorses “nontoxic pluralism,” which requires that individuals be permitted “to exit and participate in multiple groups or even none at all.” *Id.* at 1245.

²⁷ *Id.*

²⁸ For a discussion of the mixed results of privatization in various contexts, see John J. DiIulio, Jr., *Government by Proxy: A Faithful Overview*, 116 HARV. L. REV. 1271, 1273, 1282 (2003); Minow, *supra* note 20, at 1248-49.

²⁹ Robert W. Poole, Jr., *Privatization*, Library of Economics and Liberty, at <http://www.econlib.org/library/Enc/Privatization.html> (visited Aug. 16, 2009).

³⁰ *Id.*

light the challenges associated with privatization. In what follows, I take up these issues under four general headings—market failure, public accountability, legitimacy, and nonpublic motives.³¹

A market failure, as I use the term here, occurs when the ordinary operation of market mechanisms cannot be counted on to yield optimal outcomes. Thus, for example, if a government contracts with a private firm for the provision of an essential service that requires significant initial capital expenditures and expertise, the government is in a poor position to negotiate—or deny—contract extensions if it has become dependent on the private provider’s service. In a variety of contexts, including prison construction and management, the firm may be able to raise rates dramatically over the initial contract bid because the government cannot forgo the service—say, housing dangerous criminals—but lacks readily available alternatives. Additionally, private firms face the risk of business failure. A corporation may mismanage its operation to the point of bankruptcy, leaving government either to bail out the operation financially or scramble to identify alternative service providers, which may themselves extract a premium based on the government’s desperation for immediate supply. Other sources of market failure include the use of campaign contributions to influence the public officials who award government contracts³² and the inherent challenges of drafting suitable contracts that specify with adequate precision the terms and expectations of performance. In the absence of “solid and measurable performance standards,” it will be difficult to determine whether government is “getting the full measure of services it expects at the promised lower cost.”³³

The challenge of drafting sufficiently detailed contracts points to a further set of concerns relating to privatization—democratic accountability. Effective public oversight and control requires transparency in the contracting process as well as detailed public disclosure regarding contract terms and performance. Where the privatization process lacks mechanisms for specifying public goals and evaluating the quality of privately provided services, however, citizens cannot make informed judgments about the performance of the contract—or of their elected officials.³⁴ As one commentator notes, “Self-government will not retain meaning if major decisions about public resources and the shape of collective experiences occur without the knowledge and participation of the nation’s citizens.”³⁵ Finally, to the extent that the delegation of government functions to private actors diminishes legal liability, it weakens a

³¹ As will become clear, these are not so much discrete categories as they are convenient terms for overlapping clusters of value.

³² Contracts awarded on the basis of aggressive lobbying, rather than the competitiveness of the bid, are less likely to reflect prevailing market values.

³³ Poole, *supra* note 31.

³⁴ Minow, *supra* note _ at 1260.

³⁵ *Id.*

powerful mechanism for ensuring accountability in the exercise of public power.³⁶

The delegation of public functions to private actors also gives rise to concerns about political legitimacy. In the liberal-democratic context, legitimacy derives from the will of the people and the rule of law. Specifically, self-government entails a significant role for popular participation in the making and implementation of the rules and policies that bind us. In the context of privatization, however, the imprecision of drafting ensures that contracts will under-specify the terms and expectations of service, leaving extensive discretion to private actors facing unanticipated contingencies. Under these circumstances, the quality and character of public services will depend on the ad hoc judgments of private actors, who may or may not be motivated by public concern. Although the exercise of contractor discretion in some contexts—say, garbage collection—is likely to be unproblematic, in other cases, individual citizens—welfare recipients, school children, inmates—may be subject to arbitrary decision making and denied the protection of the rule of law. In a political environment where even inter-governmental delegation raises concerns, delegation to private actors is even more worrisome. For “[p]rivate actors exacerbate all of the concerns that make the exercise of [delegated] discretion so problematic.”³⁷

A final set of concerns stems from the nonpublic motivations characteristic of private actors. Although private firms and public entities alike rely on individual workers earning paychecks to carry out their activities, firms and their employees operate within the domain of competitive profit-seeking.³⁸ In this environment, “most private organizations may not develop the institutional norms of professionalism and public service that characterize many public bureaucracies.”³⁹ To say this is not, of

³⁶ The state action doctrine imposes constitutional obligations on private actors under certain conditions. See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 64 (1991); *West v. Atkins*, 487 U.S. 42 (1988). Despite its potential to hold private actors accountable for the exercise of public power, the applicability of the state action doctrine is quite narrow. Indeed, “[a]s a mechanism for disciplining private actors, the doctrine proves inept.” Freeman, *supra* note 19, at 579.

³⁷ Freeman, *supra* note 19, at 574. As Freeman notes, private actors are “one step further removed from direct accountability to the electorate” and “remain relatively insulated from the legislative, executive, and judicial oversight to which agencies must submit.” *Id.* For an argument that delegation of prison functions to private providers constitutes an unconstitutional delegation, see Joseph E. Field, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649 (1987).

³⁸ To the extent that they are not motivated by profit, it is unclear how the market discipline that makes privatization appealing could yield the desired consequences.

³⁹ Freeman, *supra* note 19, at 574. Freeman notes that private organizations may be motivated by ideology or group allegiance rather than profit. *Id.* For convenience, I will refer to these collectively as nonpublic motives. Also, private

course, to denigrate the profit motive—or to glorify public service—only to recognize that it is likely to generate a different set of workplace norms and values. In particular, because public employees are generally insulated from strict market discipline, their loyalty is to the government and its purposes; private employees' incentives are likely to be more directly linked to their firm's bottom line.⁴⁰ Moreover, just “the appearance of private motives in a public domain can undermine respect for government and even generate doubt about whether the government is sincerely pursuing public purposes.”⁴¹

C. *Private Prisons*

The private prison boom of the 1980s marked the beginning of only the latest chapter in a long history of private sector involvement in public corrections in the United States. Before the advent of punitive incarceration in the late eighteenth century, jails were run by for-profit providers paid by local governments to house debtors and suspects awaiting trial or capital punishment.⁴² The move to a government-run penitentiary system around 1790 was based on the idea that a term of imprisonment might facilitate the reform of wrongdoers, especially if they were occupied in productive labor.⁴³ Before long, private firms began contracting with prisons for the use of inmate labor, transforming prison workshops into sites of industrial production.⁴⁴ In this way, government was able to defray the cost of incarceration and perhaps turn a profit, while private industry gained access to cheap labor and greater profit margins. During the nineteenth century, a mix of leasing and contract arrangements proliferated, sending inmates to work for mines, railroads, and construction contractors; in some cases, private contractors assumed responsibility for all aspects of prison management in exchange for access to inmate labor.⁴⁵

The contemporary practice of contracting out to private corporations for total prison management is linked to significant public policy shifts in the 1970s. First, the rehabilitative ideal, which had dominated penal practices during much of the twentieth century, fell out of favor when it produced disparate and indeterminate criminal sentences while failing to

prison contractors, unlike private schools and private rehabilitation providers, are almost exclusively for-profit corporations.

⁴⁰ Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 518-19 (2005).

⁴¹ Minow, *supra* note 20, at 1234.

⁴² Dolovich, *supra* note 42, at 451.

⁴³ DAVID SHICHOR, PUNISHMENT FOR PROFIT 26 (1995). The move to public penitentiaries also reflected the developing Enlightenment view that criminal conduct constituted a transgression against the community. See, e.g., CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (1764); see also *infra*, Part IV.

⁴⁴ SHICHOR, *supra* note 45, at 28-29.

⁴⁵ *Id.* at 34-35.

reduce recidivism or deter crime. Soaring crime rates led to demands for tougher criminal justice policies to protect the public and provide criminal offenders their just deserts. At the same time, laissez faire economics, characterized by faith in the productive capacity of private property, suspicion of public regulation, and an aversion to “big government,” was on the rise in both the United Kingdom and the United States, championed by both Margaret Thatcher and Ronald Reagan. In the United States, the resulting criminal justice policies included a dramatic expansion in the number and type of offenses carrying a term of imprisonment and the imposition of significantly longer prison sentences on serious offenders. Facing burgeoning demand for prison beds, government turned to the private sector, which promised to supply comparable corrections services at greatly reduced costs.

Despite the ideological appeal, the primary impetus for the move to private prisons in the United States was and remains financial. As prison costs continued to rise throughout the last several decades, private corrections companies offered to house and manage inmates at substantially lower rates than the states were able to achieve themselves. In 2008, for example, California’s contract with GEO Group, Inc. cost the state \$40 per inmate per day, compared to \$118 per day—the average cost for the state to house inmates in its own facilities.⁴⁶ Although savings rates in other jurisdictions are less dramatic—ranging from two to fifteen percent—it still amounts to millions of dollars in savings annually.⁴⁷ According to the private providers, the key to private sector cost savings is cheaper private-sector labor. In California, for example, state corrections officers, covered by collective bargaining agreements, earn up to 35.00 per hour, while GEO employees, who are not unionized, earn between 10.00 and 16.00 per hour. In addition, private operators can shift and consolidate geographically disparate prisoner populations, concentrating inmates in facilities located in areas with low real estate, wage, and construction costs. Finally, because private firms must compete against industry rivals, as well as government itself, they have the necessary incentives to develop innovative corrections strategies and streamline their operations in order to win and retain government contracts.

Unfortunately, this upbeat picture of the public-private comparison obscures more than it clarifies. As an initial matter, the studies (and contracts) that reflect dramatically reduced per diem rates in private facilities are misleading even on their own terms.⁴⁸ Inmates with significant men-

⁴⁶ Andy Furillo, *Schwarzenegger Seeks \$67 Million Boost for Private Prison Operator*, SACBEE, Mar. 9, 2008. In 2008, GEO Group sought an increase to a per diem rate of \$60 per inmate, citing the need to raise the salaries of correctional officers. *Id.*

⁴⁷ Gaes, *supra* note 14 (citing studies reflecting cost savings of between two and fifteen percent).

⁴⁸ One leading researcher points out the methodological complexities associated with cost comparisons. See Gaes, *supra* note 14. In particular, while some

tal or physical health needs cost more to incarcerate than inmates without such problems. Similarly, both violent inmates and particularly vulnerable inmates require more restrictive—and more expensive—security measures to ensure the safety of inmates and prison staff.⁴⁹ Private contractors routinely decline to accept such inmates, an option unavailable to state-run facilities.⁵⁰ Moreover, contract per diem rates typically do not include the costs of programming and medical services that governments must pay for separately. More generally, the promised innovation and dramatically lower recidivism rates never materialized.⁵¹

Meanwhile, focusing on cost comparisons to the exclusion of other considerations means neglecting a range of important values at stake in the corrections context, implicitly accepting efficiency as the prime value of penal policy.⁵² In fact, several of the practical concerns raised by privatization generally—market failure, public accountability, democratic legitimacy, and nonpublic motives—apply with special force in the context of prison privatization.

The traditional market mechanisms for disciplining poor performance may not operate effectively in the private prison setting. As an initial matter, the “beneficiaries” of the contract—inmates—are not the purchasers of prison services. Thus, unlike the market for private education, for example, where families can research alternatives, make informed selections, and withdraw from unsatisfactory arrangements, inmates do not have a say in the decision whether to enter or terminate a private prison contract. Although the same is true when governments contract out for garbage collection—the beneficiaries of the contract are not a party to the contract—dissatisfied citizens are in a strong political position to demand improved service. Inmates, by contrast, are virtually powerless to effect change in the face of unsatisfactory prison conditions. Most lack the basic right to vote; and in any case, they constitute an unpopular minority without political influence or efficacy.

studies calculate costs based on actual governmental outlays for public facilities, others estimate the costs that would have been incurred for comparable inmate populations. These divergent approaches can yield dramatically different results. I. For example, a pair of contemporaneous studies—one privately funded, one done by the Board of Prisons—assessed the per diem costs of the same four facilities. The industry study found cost-savings of nearly 15%, while the BOP found savings of only 2%. *Id.*

⁴⁹ See Pew, *supra* note 1.

⁵⁰ Gaes, *supra* note 14; Donahue, *supra* note 13, at 158.

⁵¹ DONAHUE, *supra* note 13, at 162 (“[I]n general, incarcerating people is an enterprise with relatively little scope for resource-sparing technical progress.”); *id.* at 154 (noting boast of private corrections official regarding recidivism); Dolovich, *supra* note 42, at 476 (noting the lack of evidence of cost-saving innovation in private-sector prisons)..

⁵² Cf. LEO KATZ, *BAD ACTS AND GUILTY MINDS* 25 (1987) (characterizing as “price worship” the tendency to assign greater importance to quantitative over qualitative assessments of value).

Even governments may not be well positioned to respond to non-compliance by private prison contractors. Public officials dissatisfied with a contractor's performance—or rate increases—cannot realistically cancel the contract before finding alternative placements for hundreds of inmates. The high start-up costs for prison operations ensure that a relatively small number of players will (and do) dominate the market, giving them considerable leverage when negotiating with governments desperate to place inmates.⁵³ Although a handful of states have canceled contracts for noncompliance, they appear reluctant to rescind promptly even in cases of extreme inmate abuse.⁵⁴

A further source of concern arising from the private prison market is the role of lobbyists. Apart from the usual worries about the use of campaign contributions to curry favor with elected officials or the potential for self-dealing, prison industry lobbyists may play an even more pernicious role—developing and promoting criminal justice policies solely to advance their financial interests. The most widely reported example is the American Legislative Council, a Washington-based policy organization heavily funded by the two leading private prison firms, which successfully promoted such get-tough sentencing laws as “three strikes” and “truth in sentencing.”⁵⁵ These and similar policies contributed substantially to increased demand for private prison beds—and to the need for contracting out. Indeed, private firms, as rational actors subject to market pressures, have every incentive to pursue such a strategy. As one commentator cautions, “we should...be wary that private-corrections corporations may initiate advertising campaigns to make the public feel more fearful of crime than it already is, in order to fill the prisons and jails.”⁵⁶

The challenges of contract drafting also create special problems in the private prison context. As many commentators have noted, the “incarceration function...proves difficult to specify.”⁵⁷ As a result, contract terms are likely to be imprecise, providing an insufficient basis for gauging contractor performance. This problem is exacerbated in the prison

⁵³ DONAHUE, *supra* note 13, at 165 (noting the factors contributing to the small number of private corrections firms and the difficulty for states of attempting to switch companies); *see also* Pranis, *supra* note 13 (describing the situation in Louisiana during the mid-1990s when the state was prevented from canceling a private prison contract for noncompliance when it learned that doing so would adversely affect its bond rating).

⁵⁴ Dolovich, *supra* note 42, at 498-99 (describing instances of inmate abuse and the time lag before contract cancellation).

⁵⁵ *Id.* at 526-27 (citing various sources).

⁵⁶ Ira P. Robbins, *Privatization of Corrections*, 40 VAND. L. REV. 813, 827-28 (1987).

⁵⁷ Freeman, *supra* note 19 at 632; *see also* DONAHUE, *supra* note 13, at 166 (“Attempts to exhaustively spell out contingencies and assign rights and duties for each conceivable case will be awkward and burdensome, and will almost surely fail to cover everything.”).

setting, where the quality of performance—from the provision of medical care to the use of force—can mean for inmates the difference between life and death. Moreover, these activities take place behind closed doors in service of beneficiaries who lack meaningful recourse in cases of poor performance. In these circumstances, officials can be confident about neither the value of the contract nor the well being of inmates. These obstacles to public accountability suggest the challenges to effective oversight in precisely those circumstances that call for special vigilance.

A related set of issues is the threat to legitimacy resulting from inevitably vague contract terms. To the extent that the parameters for the use of force, inmate discipline, and administrative classification are underspecified, private corrections employees exercise considerable discretion on a daily basis. While these decisions can have a profound effect on the length and conditions of confinement, they result from “uncontracted-for contingencies” that cannot be settled in advance.⁵⁸ Instead, private corrections employees—less well paid, less well trained, and less experienced than their public sector counterparts⁵⁹—will be left to make critical decisions, without reference to standards of due process or the rule of law.⁶⁰

Finally, the profit motive that fuels prison privatization exerts a constant pull in the direction of cost cutting. As various commentators have observed, contractors can attempt to save costs by reducing the amount spent on meeting inmates’ needs—food, housing, security, medical care—and by keeping wages low.⁶¹ Because the delivery of these services is hidden from meaningful scrutiny, the temptation to cut corners is likely to be overwhelming.⁶² At the same time, private prisons offer sub-

⁵⁸ Dolovich, *supra* note 42, at 478-79.

⁵⁹ See, e.g., Furillo, *supra* note 48 (noting inferior training and generally lower levels of education of private corrections employees); DONAHUE, *supra* note 13, at 164 (presenting “suggestive” data to illustrate that private corrections employees are likely to be generally younger, less experienced, less well educated, and less well trained).

⁶⁰ Some critics note that these decision makers also have a financial interest in longer prison terms. See, e.g., Dolovich, *supra* note 42, at 518-19 (noting 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”); Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111 (2001) (noting the potential for private prisons to “sustain their occupancy rates and therefore their revenues...by manipulating inmates’ terms of incarceration”).

⁶¹ See, e.g., DONAHUE, *supra* note 13, at 170; Dolovich, *supra* note 42, at 474-75.

⁶² This is not to suggest that all—or any—private prison contractors are indifferent to public values or inmate well-being. As Donahue notes, most firms probably enter the industry with good intentions. But the structure of the enterprise—the quest for profits and the pressure of competition—create strong incen-

stantially lower wages than public facilities and spend considerably less on training and retention. Predictably, they draw younger workers with less education and experience and have significantly higher turnover rates.⁶³ In this environment, employees are less likely to develop the commitment to public values and shared norms of professionalism that contribute to rule compliance and promotion of the common good.⁶⁴ As one observer lamented, “the private sector is more interested in doing well than doing good.”⁶⁵

III. JUSTIFYING PUNISHMENT

Criminal punishment, in general terms, is the authorized imposition of deprivations—liberty, property, or other goods to which one has a right—or the imposition of special burdens because one has been found guilty of a criminal violation.⁶⁶ In the absence of criminal wrongdoing, the sort of treatment that we call punishment—taking life, liberty, or property—would itself represent a grave injustice. For this reason, we must be able to provide a justification, or some combination of justifications, that makes such otherwise prohibited treatment permissible or even obligatory.

The range of acceptable justifications—even the need for such a justification—depends on the social and political institutions that authorize criminal punishment. “Thus the color and texture of any possible justification for punishment will depend upon more general political and moral theory, consistent with the responsibilities for legal protection afforded by a just society.”⁶⁷ In the Anglo-American tradition, legitimate punishment reflects such basic liberal-democratic values as liberty, equality, and rule of law. Historically, the justification for punishment has shifted among the traditional accounts according to changes in the prevailing social and political norms. The ascendancy of the liberal commitment to autonomy and individual rights seems to have secured the place of such retributive values as culpability and desert, while discrediting utilitarian

tives to cut costs come what may. “And without robust measures to guarantee conditions of confinement”—about which he is skeptical—“the businesspeople least constrained by scruples are likely to enjoy a competitive advantage in the imprisonment industry.” DONAHUE, *supra* note 13, at 170.

⁶³ DONAHUE, *supra* note 13, at 164.

⁶⁴ See generally LAURA DICKINSON, *OUTSOURCING WAR AND PEACE* (forthcoming 2010) (comparing operational norms among public and private military personnel in Iraq).

⁶⁵ Robbins, *supra* note 58, at 816.

⁶⁶ See Hugo Adam Bedau, *Punishment*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, at <http://plato.stanford.edu/> (last visited June 5, 2009).

⁶⁷ *Id.*

approaches to the extent that they lack side constraints that would confine punishment to the blameworthy.⁶⁸

A. *Traditional Justifications*

The traditional scheme of classification divides the justifications for punishment in Anglo-American criminal law into two broad categories, utilitarian and retributive. Utilitarian⁶⁹ justifications—principally incapacitation,⁷⁰ deterrence,⁷¹ and rehabilitation⁷²—are defended in terms of the positive consequences they are believed to bring about. In the case of deterrence, for example, its viability as a justification for punishment is measured in terms of its efficacy in achieving the goal of crime prevention by means of the threat of punishment. From the utilitarian perspective, punishment is justified in terms of its effectiveness in preventing crime while at the same time generating the least possible amount of human suffering. Proportionality is thus defined in terms of the relevant utilitarian goals, prescribing exactly that amount of punishment necessary to achieve those goals; any suffering above that amount is excessive and unjustifiable.

Retributivism, by contrast, is centrally concerned with the imposition of punishment in proportion to an offender's moral desert.⁷³ On this

⁶⁸ See, e.g., John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 11-12 (1968).

⁶⁹ Utilitarianism is the most prominent form of consequentialism, the view that actions should be evaluated in terms of their consequences. For the utilitarian, the consequence to be maximized is happiness—or utility.

⁷⁰ Incapacitation involves disabling an offender from engaging in further criminal conduct. The most obvious forms of incapacitation are imprisonment and execution; in both cases, offenders are physically prevented from offending again. See, e.g., Jeremy Bentham, *Panopticon Versus New South Wales*, in 4 THE WORKS OF JEREMY BENTHAM 183 (John Browning ed., Russell & Russell, Inc. 1962) (1838) (“This contrivance [incapacitation] was as firmly laid down in school-logic as could be wished. Mischievously or otherwise, for a body to act in a place, it must be there.”).

⁷¹ Deterrence may be either “general” or “specific.” General deterrence is the “prevention of similar offenses on the part of individuals at large, viz. by the repulsive influence exercised on the minds of bystanders by the apprehension of similar suffering in case of similar delinquency.” Specific deterrence is “prevention of similar offenses on the part of the particular individual punished in each instance, viz. by curing him of the will to do like in the future.” See *id.* at 174.

⁷² Rehabilitation involves the attempt to reform a wrongdoer, either in Bentham's sense—by “curing” the offender of the impulse to engage in wrongdoing—or by otherwise reforming an “offender's character, habits, or behavior patterns so as to diminish his criminal propensities.” ANDREW VON HIRSCH, DOING JUSTICE 11 n.* (1976).

⁷³ See MICHAEL S. MOORE, PLACING BLAME 105 (1997).

view, punishment of the deserving is intrinsically good; its justification does not depend on any further positive consequences that punishment might be expected to produce. In Kant's classic formulation: "The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it..."⁷⁴ Although a retributivist will welcome the positive consequences that punishment may incidentally yield—crime prevention or character reformation, for example—such consequences are not part of the *justification* for punishment.⁷⁵ Thus, a "retributivist punishes because, and only because, the offender deserves it."⁷⁶

A further set of approaches to the justification of punishment—expressive or communicative accounts—do not fit neatly into either the utilitarian or retributive categories, for they typically reflect elements of both.⁷⁷ In general terms, they conceptualize punishment as a form of communication that expresses society's moral condemnation of criminal wrongdoing. In Joel Feinberg's influential formulation, "punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part of the punishing authority himself or of those in whose name the punishment is inflicted."⁷⁸ While Feinberg's account highlights community condemnation as an "essential ingredient" in legal punishment, it suggests that some alternative mechanism could also serve as an appropriate

⁷⁴ IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* *331 (J. Ladd trans. 1965) (1780).

⁷⁵ See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 374 (1996) ("These further consequences are not to be dismissed simply; but we shall see them as an especially desirable and valuable bonus, not as part of a necessary condition for justly imposed punishment.").

⁷⁶ Michael S. Moore, *The Moral Worth of Retribution*, [hereinafter *Moral Worth*] in *PUNISHMENT AND REHABILITATION* 94 (Jeffrie G. Murphy ed., 1995). Some conceptions of retributivism do not regard desert as the controlling value. See generally Herbert Morris, *Persons and Punishment*, 4 *MONIST* 52 (1968) (defending a conception of retributive punishment based on the mutual assumption of benefits and burdens); Jean Hampton, *The Retributive Idea*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 111 (1988). Although these conceptions represent an important contribution to the literature, they do not reflect the prevailing view. See Bedau, *supra* note 68.

⁷⁷ For variations of the expressive theory, see NOZICK, *supra* note 77, at 370; ANTONY DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* (2001); Hampton, *supra* note 78, 130; Joel Feinberg, *The Expressive Function of Punishment*, in *DOING & DESERVING* 95 (1970).

⁷⁸ Feinberg, *supra* note 79, at 98.

vehicle for expression of this message.⁷⁹ Feinberg's expressivism thus has a decidedly utilitarian cast.⁸⁰

Contemporary communicative⁸¹ accounts are more explicitly retributive, reflecting the prevailing orientation of Anglo-American criminal law.⁸² Indeed, "[p]unishment in its very conception is now acknowledged to be an inherently retributive practice, whatever may be the further role of retribution as a (or the) justification or goal of punishment."⁸³ For communicative accounts this means, first, that punishment must be understood "not as a contingently efficient means towards a further and independently identifiable end."⁸⁴ Rather, punishment itself constitutes the condemnatory communication; censure is internal to the practice.⁸⁵ Second, the retributive orientation requires that "the relationship between past crime and present punishment [is] central to the meaning and justification of punishment."⁸⁶ In these ways, the communicative account reflects the plural values that underlie Anglo-American criminal punishment, including its essentially retributive character.⁸⁷

⁷⁹ *Id.* at 105 (concluding that a state might have other ways of expressing various messages, "but when it speaks by punishing, its message is loud and sure to get across").

⁸⁰ Michael Moore has emphasized the distinction between utilitarian and retributive conceptions of punishment, designating traditional expressivist accounts utilitarian. See Moore, *Moral Worth*, *supra* note 78, at 96. See also DUFF, *supra* note 79, at 27, 206 n.29 (distinguishing retributivist from utilitarian versions of expressive purposes in punishment).

⁸¹ Following Antony Duff, I will use the term communicative to describe approaches that view punishment as a kind of dialogue between the community and some or all of its members. Although expressivist accounts also typically contemplate a recipient for the messages expressed, they do not require it. DUFF, *supra* note 79, at 79; see also Dan Markel, *Retributive Damages: A Theory of Punitive Damages and Intermediate Sanction*, 94 CORNELL L. REV. 239, 261-62 (2009).

⁸² See The American Law Institute, Model Penal Code: Sentencing, Tentative Draft No. 1, Part I. General Provisions (April 9, 2007) (proposing revisions to MPC's punitive purposes to emphasize blameworthiness and retribution); Bedau, *supra* note 68.

⁸³ Bedau, *supra* note 68.

⁸⁴ Antony Duff, *Expression, Penance and Reform*, in PUNISHMENT AND REHABILITATION, *supra* note 78, at 169, 170.

⁸⁵ NOZICK, *supra* note 77, at 374 ("The wrongdoer has become disconnected from correct values, and the purpose of punishment is to (re)connect him. It is not that this connection is a desired further effect of punishment: the act of retributive punishment itself effects this connection."); Markel, *supra* note 83, at 260 (noting that "the good achieved by punishment is bound up in the faithful practice of retributive punishment itself, so that the practice of punishment has an intrinsic value that makes the practice and its limits both internally intelligible and attractive").

⁸⁶ DUFF, *supra* note 86, at 170; see also NOZICK, *supra* note 77, at 369; Markel, *supra* note 83, at 260.

⁸⁷ Bedau, *supra* note 68.

B. *Justifying Private Prisons*

With the basic approaches to justification in hand, we can begin to see how they bear on the question of prison privatization. Before developing the retributive account of communicative punishment that I believe militates against prison privatization, I briefly sketch the relationship between the traditional justifications in general terms and the suitability of prison privatization. This suggests that private prisons are most compatible with utilitarian approaches to punishment, especially rehabilitation and incapacitation.⁸⁸ Notably, the rehabilitative ideal that took hold in the late eighteenth century facilitated the move to prison industrial operations involving the private sector. Similarly, the abandonment of that ideal, and the shift toward incapacitation, coincides with the rise of the modern private corrections industry. At the same time, the retributive turn in penal philosophy may itself have been instrumental in the privatization boom, though based on a misapprehension of retributive values.

1. Rehabilitation

Despite the abandonment of the rehabilitative ideal in the 1970s, there was never a complete rejection of the idea that punishment might effect a change of heart, mind, or habit in criminal wrongdoers. To be sure, the most ambitious models of rehabilitation—from the Quaker vision of reforming souls to the psychiatric goal of curing the disease of crime—seem neither appealing nor realistic in contemporary liberal terms. Whereas the eighteenth-century penitentiary model presupposed a set of shared religious commitments that can neither be taken for granted nor coercively enforced in a liberal society, the psychiatric conception of crime denies wrongdoers their status as responsible moral agents worthy of the rights that liberalism secures.⁸⁹ More modest rehabilitative goals, however, constrained by liberal-democratic principles, reflect our best understanding of the correlation between drug addiction, poverty, and mental illness on the one hand, and criminal misconduct on the other. Effective rehabilitation programs that target these correlates of crime are thus good for offenders, who are exposed to constructive options, and good for the society that experiences a reduction in crime.

The value of rehabilitative services, then, consists primarily in their effectiveness. The point is to provide programming—drug counseling, vocational training, or therapeutic techniques—that yields positive con-

⁸⁸ Indeed, Bentham's utilitarian conception of punishment was based on the idea of contracting out. See DONAHUE, *supra* note 13, at 171.

⁸⁹ Morris, *supra* note 78, at 83 (noting that "we display a lack of respect for the moral status of individuals, that is, a lack of respect for the reasoning and choices of individuals" if we treat acts of intentional wrongdoing as symptoms of disease).

sequences in the lives of offenders and their community. Rehabilitation is thus an instrumental good, valuable to the extent that it produces the desired results.

The case for privatization in the development and delivery of rehabilitative services is easy to make out. A combination of religious organizations, other non-profits, and for-profit firms competing to provide rehabilitation services is likely to offer a range of cost-effective alternatives. Whether governments adopt the programs offered by a particular group or whether offenders are permitted to choose their own programs, the instrumental nature of the services provides the means to gauge their success. That is, we can determine the effectiveness of a drug program by assessing the rate at which it succeeds, relative to other approaches, in helping offenders end their drug dependency; vocational programs by their ability to impart the knowledge and skills for a trade or profession; counseling services to the extent that they equip offenders to cope with the stresses and temptations of everyday life. Moreover, unlike the incarceration function itself, which provides little room for innovation or alternative philosophies,⁹⁰ rehabilitative programming is ideally suited to creativity and experimentation.⁹¹ Finally, to the extent that privatized rehabilitation services engage offenders in religious or other civic groups, they promote the values of pluralism and community.⁹²

2. “Retribution” and Incapacitation

When the psychiatric conception of rehabilitation gave way to retribution and incapacitation as the dominant penal values in the 1970s, the stage was set for the emergence of the private prison. But whereas the instrumentalist goal of incapacitation may be well suited to privatization,⁹³ the retributive—or “just deserts” philosophy—is not. Unfortunately, the form of retribution that took root during this period was not always true to such fundamental retributive values as proportionality and humanity.⁹⁴ Instead, perhaps as a reaction to the perceived laxity of the era that preceded it, the just deserts philosophy too often amounted to nothing more than a get-tough approach to criminal justice, producing mandatory minimum sentences, repeat-offender provisions, and generally longer prison terms across the board. Even more troubling was the cultivation of a social and political environment in which officials who ex-

⁹⁰ DONAHUE, *supra* note 13, at 162-63; Dolovich, *supra* note 42, at 501.

⁹¹ See, e.g., Minow, *supra* note 20, at 1236, 1245.

⁹² *Id.* at 1244.

⁹³ That is, if incapacitation is the goal of punishment, then private prisons may be just as successful in disabling dangerous offenders as public facilities are.

⁹⁴ See KANT, *supra* note 76, at *332 (arguing for proportionality between crime and punishment); *id.* at *333 (insisting that punishment “must be kept free from any maltreatment that would make an abomination of the humanity residing in the person suffering it”).

pressed skepticism about these policies were branded “soft on crime” and turned out of office.⁹⁵

To the extent that retribution degenerates into a form of vengeance, indifferent to considerations of culpability and desert, it is compatible with penal privatization. Under these circumstances, private prisons may have a role to play in delivering cost-effective punishment that provides a more or less humane environment for housing criminal offenders. But absent a concern for proportionality and humanity, punishment ceases to be recognizably retributive.

Despite this bleak scenario, there is of course no necessary connection between various utilitarian justifications for punishment and the worst excesses of prison privatization.⁹⁶ But by focusing on instrumental goals in evaluating prison privatization, we neglect the essentially retributive character of our punitive institutions and practices. Fleshing out the meaning of punishment in the liberal-democratic context provides a firmer foundation for assessing private prisons.

IV. THE MEANING OF PUNISHMENT

To flesh something out is to add detail to an existing structure—to put meat on the bones.⁹⁷ Fleshing out the meaning of punishment, as I undertake it here, involves identifying the basic framework of liberal-democratic punishment in the Anglo-American tradition, then filling it out with some conceptual detail and defining its normative contours. The resulting account of punishment will be recognizably our own, though it will not reflect the prevailing approach to punishment in the United States, the United Kingdom, or anywhere else. My aim is thus to suggest “an ideal conception of what punishment ought to be, in whose light we

⁹⁵ MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* 15 (2004).

⁹⁶ For an especially thoughtful articulation of an instrumentalist conception designed to ensure humanity in punishment, see Dolovich, *supra* note 42.. Although Dolovich’s argument against prison privatization is ultimately contingent on empirical claims about the relative performance of public and private actors, she makes a compelling normative case for resisting privatization. See also DONAHUE, *supra* note 13, at 156 (“If a private prison treats inmates humanely, protects them from indignity and assault, endeavors to aid their rehabilitation, and charges the community a fair price, would the fact that its shareholders anticipated a return on their investment make that prison inferior to one in which public employees neglect, humiliate, and abuse prisoners while needlessly straining the public purse?”).

⁹⁷ See CAMBRIDGE DICTIONARY OF AMERICAN IDIOMS (last visited July 5, 2009). The origin of the expression is “based on the idea of adding flesh to a picture that shows only the bones of a creature.” *Id.*

can evaluate (and no doubt find seriously wanting) our existing practices.”⁹⁸

I begin by outlining the familiar principles of the liberal-democratic tradition that structure the institutions of criminal punishment, then draw on various retributive and communicative theories to sketch a conception of punishment that reflects the most compelling features of that tradition.⁹⁹ Finally, I consider the implications of the retributive-communicative account for prison privatization, concluding that private prisons are largely inconsistent with the meaning of punishment in a liberal-democratic polity—that the proliferation of private prisons moves us further away from the highest ideals of the Anglo-American tradition.

A. *The Liberal-Democratic Political Tradition*

The commitment to liberal-democracy sets the parameters for legitimate punishment in the Anglo-American tradition. In its classic formulation, the liberal-democratic polity arises from a state of nature into which individuals are born free and equal.¹⁰⁰ Endowed with rationality and a bundle of natural rights, individuals come to recognize the advantages of mutual cooperation and consent to form themselves into political communities that secure their rights and coordinate their activities through the mechanisms of self-government and the rule of law.

One need not—should not—accept the state of nature as a historical phenomenon to appreciate the liberal-democratic values it showcases. In particular, because individuals are free and equal rights-bearers, a status inherent in their humanity, they can neither be legitimately deprived of their rights without their consent nor compelled to sacrifice their own interests for the good of others. The commitment to self-government provides individuals a say in establishing and enforcing the laws that bind them, while the rule of law constrains arbitrary and unreasonable manifestations of collective power. Contemporary conceptions of liberalism introduce autonomy and pluralism that provide individuals the authority and resources for determining the course of their lives according to their own conceptions of meaning and value. Finally, part and parcel of Anglo-American liberalism is a set of commitments—citizenship, community, and civic responsibility—traditionally denominated republican.¹⁰¹

⁹⁸ DUFF, *supra* note 79, at xv (describing the interplay between theory and practice in developing a normative account of criminal punishment).

⁹⁹ See especially DUFF, *supra* note 79; NOZICK, *supra* note 77.

¹⁰⁰ See, e.g., THOMAS HOBBS, *LEVIATHAN* 117 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 323-25 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

¹⁰¹ This way of putting things is actually somewhat controversial. Historians of political thought are divided on the precise sources of American constitutional values. On one view, republican values predominated among the founders and

This distinctive blend of liberal and republican values yields a social and political environment that reflects neither extreme individualism nor radical communitarianism, but a more or less stable balance between individual and community interests that is constantly being negotiated and renewed. At our worst, the obsession with individual rights vitiates any sense of common purpose; at our best, political participation is deliberative, reshaping individual preferences in light of community norms and values. Indeed, “[c]riminal law is ... one area in which Americans have conceded to the state an almost unqualified right to act in the name of the polity, and hence one of the few places in which one can discern an American conception of political community that is not a mere collage of individual preferences.”¹⁰²

Nothing in this brief account of liberal-democratic values obviously disqualifies any of the traditional justifications for punishment. Utilitarian purposes—incapacitation, deterrence, and rehabilitation—honor the basic liberal commitment to public order by securing the rights of individuals against criminal transgression. Retributivism respects the human capacity for choice that the commitment to individual rights presupposes. Yet the familiar weaknesses of these approaches quickly surface. Because utilitarianism conceives of the public good in the aggregate, it fails to take seriously the distinction between persons and is formally indifferent regarding the allocation of benefits and burdens.¹⁰³ Absent side-constraints, it countenances the deliberate infliction of punishment on the innocent¹⁰⁴ and accommodates modes and methods of treatment that fail to accord with our basic sense of justice and proportionality. Moreover, because utilitarianism operates primarily through fear and manipulation

provide the raw material for a hoped-for “republican revival.” See, e.g., JGA POCOCK, *THE MACHIAVELLIAN MOMENT* (1975); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); GORDON S. WOOD, *THE CONFEDERATION AND THE CONSTITUTION* (1979). Richard Sinopoli, among others, argues, however, that the values identified as republican are in fact classically liberal and traceable to Locke himself. RICHARD C. SINOPOLI, *THE FOUNDATIONS OF AMERICAN CITIZENSHIP* (1992). On this view, Lockean liberalism is less individualistic than popularly supposed, and American republicanism is more rhetorical than actual. For my purposes, the exact source of the values is less significant than their central place in the Anglo-American political tradition.

¹⁰² John J. DiIulio, Jr., *What’s Wrong with Private Prisons* 92 *PUB. INT.* 66, 81 (1988).

¹⁰³ See JOHN RAWLS, *A THEORY OF JUSTICE* 26 (1971) (“[T]here is no reason in principle why the greater gains of some should not compensate for the lesser losses of others; or more importantly, why the violation of liberty of a few might not be made right by the greater good shared by many.”); see also Jeremy Bentham, *Panopticon*, in *THE PANOPTICON WRITINGS* 48-50 (Miran Bozovic ed. 1995) (1791) (advocating that contracts “would make him [the private provider] pay so much for every one that died, without troubling whether any care of his could have kept the man alive”).

¹⁰⁴ And the converse as well—forgoing punishment of the guilty in cases where utilitarian values are not implicated.

rather than appeals to shared values, it fails to address individuals as citizens or as members of a normative community.¹⁰⁵

For its part, retributivism, without more, seems less like a justification for punishment than an article of faith. Despite the powerful intuitions that underwrite it, its historical and conceptual affinity with revenge should give us pause. The concept of desert at the heart of retributivism is similarly intuitive but also deeply mysterious, while the commitment to proportionality cannot provide or even suggest a scale of deserved punishment.¹⁰⁶

Although neither the utilitarian nor retributive justifications provide a complete, or completely satisfying, account of criminal punishment, only the retributive approach is ultimately consistent with the liberal-democratic values of the Anglo-American tradition. For retributive punishment is premised on the liberal individual with the distinctive set of attributes and capacities that determine our moral status. As free and rational agents, we are held accountable for our choices, including acts of criminal wrongdoing; to refrain from punishing for such acts would be to fail to treat wrongdoers as responsible moral agents.¹⁰⁷ Moreover, because our rights are inviolable and cannot be subordinated to the interests of others, the deliberate punishment of the innocent is ruled out of bounds regardless of whatever social benefit it might produce. Finally, the social condemnation that inheres in retributive punishment presupposes a community of value as well as a responsible moral agent. In the absence of either, punishment lacks moral authority and retributive meaning.

B. Retributive Communication

In the modern liberal-democracy, acts of criminal wrongdoing are not only offenses against particular victims, but offenses against the community as well.¹⁰⁸ While the most serious forms of law violation—

¹⁰⁵ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 28 (1823) (characterizing criminal punishment as a form of “terror”).

¹⁰⁶ As Michael Moore notes, a commitment to retributivism does not entail a commitment to any particular metric for gauging desert. Moore, *supra* note 78, at 94-95. For despite Kant’s commitment to *lex talionis*, see KANT, *supra* note 76, at *332, retributivism entails a commitment only to proportionality in punishment.

¹⁰⁷ Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 741 (“Moral responsibility signifies our belief that human worth comes from our choices.”).

¹⁰⁸ This is among the developments associated with the shift from a state of nature, in which individuals possess the executive authority to punish wrongdoing, to civil society, where the executive power transfers to the state. See LOCKE, *supra* note 105, at 325 “Where-ever therefore any number of Men are so united into one Society, as to quit every one of his Executive Power of the Law of Na-

assault, robbery, and murder, for example—most dramatically affect direct and identifiable victims, law violation in all its forms constitutes a transgression against the political community as a whole, a subversion of its norms and values. Because it is a liberal-democratic polity, moreover, its laws will reflect the self-determination of its members. For “[t]he voice of the law is (or aspires to be) the voice of the community addressing itself, the voice of all the citizens addressing one another and themselves.”¹⁰⁹ Legal punishment represents the community’s formal response to criminal attacks, a “special social convention that signifies moral condemnation.”¹¹⁰

On the communicative conception, criminal justice represents a kind of “moral dialogue”¹¹¹ between citizens and the state as the legal embodiment of the political community.¹¹² “The distinctive meaning of criminal wrongdoing is its denial of some important value, such as the victim’s moral worth.”¹¹³ Against the backdrop of the community’s norms and conventions, the social meaning of criminal conduct is objective, conveying disrespect for victims and contempt for community values regardless of the offender’s subjective motive or intent.¹¹⁴ Likewise, criminal punishment draws its meaning from the values of the community and its conventional forms of condemnatory expression. These reflect “deeply rooted public understandings” of particular modes of punishment that signify the gravity of criminal misconduct.¹¹⁵

C. *The Meaning of Prison*

Punishment, then, is and effects a form of community censure that takes its meaning from the community’s values and conventions. The Anglo-American criminal law contemplates a wide array of punitive

ture, and to resign is to the publick, there and there only is a *Political, or Civil Society*.”); see also BECCARIA, *supra* note 45, at 15.

¹⁰⁹ DUFF, *supra* note 79, at 60; see also Michael Walzer, *Hold the Justice*, NEW REP., Apr. 8, 1985, at 11 (“Criminals are fellow citizens; when we punish them we presume upon the fellowship.”).

¹¹⁰ Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 Chi. L. Rev. 591, 593 (1996).

¹¹¹ Pillsbury, *supra* note 112, at 744.

¹¹² The doctrines of excuse in the criminal law tend to reflect the presupposition of a responsible moral agent as the addressee of the criminal law. See, e.g., MOORE, *supra* note 75, at 404 (“The presupposition is that any being who is held responsible must be sufficiently rational and autonomous to be a rational agent.”).

¹¹³ Kahan, *supra* note 116, at 597-98; see also Hampton, *supra* note 78, at 124; Pillsbury, *supra* note 112, at 721.

¹¹⁴ See Kahan, *supra* note 116, at 597-98.

¹¹⁵ *Id.* at 593.

practices, ranging from fines to capital punishment, each with a more or less distinctive social meaning. Because “certain forms of hard treatment have become the conventional symbols of public reprobation,”¹¹⁶ it is not enough to attend to the severity of punishment; we must also consider the mode of punishment as well. This accounts for why punishing a brutal rapist with a monetary fine would offend our sense of justice. The problem is not (only) that the punishment is too lenient, it is rather the wrong kind of punishment;¹¹⁷ it is insufficiently expressive of public condemnation, trivializing the seriousness of the offense and denigrating the worth of the victim.¹¹⁸

In the Anglo-American tradition, “[i]t is...imprisonment in a penitentiary, which now renders a crime infamous.”¹¹⁹ Because it entails the extreme curtailment of individual liberty and physical exclusion from the political community, it expresses condemnation in the clearest possible terms. In the liberal-democratic context, the loss of freedom and community “is our society’s most potent symbol of moral condemnation.”¹²⁰ It signifies “that the offender has, by his crime, made the maintenance of normal community with him impossible.”¹²¹

At its best, a term of imprisonment represents an extreme form of censure that “dramatically and unequivocally” expresses social condemnation for acts and agents of serious wrongdoing.¹²² In the conventional parlance of the Anglo-American criminal law, it addresses offenders as responsible moral agents whose wrongful choices provoke the community’s punitive response. However, what is heard “depends not just on the content of what is said, but on the context in which it is said, and the accent in which it is spoken.”¹²³ Effective communication thus depends on the identity of the speaker as well as the identity of the listener, lest “some offenders hear ... its voice, not as the voice of a community to which they belong and are treated as belonging, but as the voice of an alien and oppressive power.”¹²⁴ It must be “us against us” rather than “us against them.”¹²⁵

But perhaps, one might argue, the moral dialogue ends at the moment of conviction and sentencing. At that point, the community has articulated its values through the legislative process, affirmed its commitments through the mechanisms of enforcement and prosecution, and

¹¹⁶ FEINBERG, *supra* note 79, at 100.

¹¹⁷ DUFF, *supra* note 79, at 146.

¹¹⁸ Kahan, *supra* note 116, at 620-22.

¹¹⁹ FEINBERG, *supra* note 79, at 111 (quoting Brandeis).

¹²⁰ Kahan, *supra* note 116, at 621.

¹²¹ DUFF, *supra* note 79, at 149.

¹²² Kahan, *supra* note 116, at 592.

¹²³ DUFF, *supra* note 79, at 192.

¹²⁴ *Id.* at 193; *see also* Pillsbury, *supra* note 112, at 752 (“We punish offenders not because they stand outside of society, not because they are alien enemies, but because they are fundamentally like the rest of us.”).

¹²⁵ Pillsbury, *supra* note 112, at 752.

communicated censure to the offender directly through the trial process by pronouncing guilt and imposing a fitting sentence. What, if anything, remains to be said? What possible significance could attach to the identity of the jailer?¹²⁶

The first problem with this way of putting things is that it misplaces the burden of justification. The enterprise of criminal justice, according to the retributive-communicative account, is not a series of discrete processes that can be neatly distinguished and parceled out for delivery. Rather, criminal justice encompasses the full range of decisions and actions that define, enforce, and affirm the community's standards of criminal behavior through a process of ongoing dialogue. In light of this, we should expect the state, as the legal embodiment of the political community, to assume responsibility for all aspects of criminal justice—to take our part in the dialogue. Carving out one or more of these activities for private delivery thus requires justification in terms of the relevant legal, moral, and political values. So instead of asking opponents of privatization why the enterprise of community censure extends beyond the moment of conviction and sentencing, we should ask proponents of privatization why they believe *that* is the critical moment when the dialogue ends. What is it about punishment, imprisonment in particular, that distinguishes it from the other aspects of criminal justice? Why is the identity of the jailer insignificant?

One way to make the case that it does not matter who owns and operates a prison—so long as inmates are treated fairly and humanely—would be to draw a sharp distinction between the responsibilities of prison personnel and those of legislators, prosecutors, and judges. On this view, prison employees, whether public or private, are charged with implementing the decisions of various public officials—housing inmates for more or less determinate periods of time while maintaining a generally humane environment calculated to protect inmates and respect their rights. As such, punishment is akin to a ministerial function, involving the execution of policies and decisions made elsewhere by others. Although legislators, prosecutors, and judges (or juries) exercise considerable discretion in reaching their judgments, prison personnel, on this conception, do not. Thus, a prison employee acts “in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his or own judgment upon the propriety of acts being done.”¹²⁷

This argument is unavailing because it is based on a misconception of prison operations. Prison personnel, ranging from top administrators to line officers, in fact exercise considerable discretion in virtually every

¹²⁶ For purposes of this inquiry, I assume sufficient oversight to ensure fair and humane treatment. That is, I want to rule out as an answer to this question the set of practical concerns about monitoring the conditions of confinement and ensuring due process in private prisons.

¹²⁷ 636 AM. JUR. 2d *Public Officers and Employees* § 234 (2009).

aspect of their work. Although legislative and judicial mandates set the parameters of fair and humane treatment, it is not possible to anticipate every situation that is likely to arise or to specify appropriate responses in advance.¹²⁸ As a result, prison personnel are necessarily afforded substantial discretion to establish and implement prison policy and to address the day-to-day contingencies that they encounter in the prison environment. For their part, administrators must develop policies regarding the provision of medical care, standards for administrative classification, and the procedures for inmate discipline.¹²⁹ Corrections officers who interact directly with inmates must not only implement these policies in a variety of settings, they must also make on-the-spot judgments about inmates and their behavior—determining whether they require medical attention, represent a danger to themselves or others, or merit disciplinary action, administrative segregation, or even the use of force.¹³⁰ Moreover, these decisions are not confined to the margins of the prison experience; they arise on a daily basis and will dramatically affect the length and character of a criminal sentence.

Since prison personnel exercise considerable discretion, their role is not relevantly distinguishable from other actors in the criminal justice process whose decisions we recognize as our own.¹³¹ By privatizing punishment, however, we terminate the dialogue between offenders and their community in just the same way as if we privatized prosecutors and criminal courts. “Although some historical traditions permitted prosecutions initiated by private parties, contemporary U.S. practice consolidates prosecutorial power in the government, with the symbolic message that the government stands in for the community and private victims.”¹³² Indeed, even proponents of prison privatization balk at the idea of privatizing criminal courts.¹³³ Our reasons for rejecting privatization of these aspects of criminal justice should lead us to resist prison privatization as well.

Moreover, despite the conventional meaning of prison in the Anglo-American tradition, the message of punishment it constitutes can easily be scrambled. Prison privatization interposes a filter between the community and the offenders whom it calls to account. In particular, by transforming the institutions of punishment into commodities—fungible objects of economic exchange—privatization alters the character of punishment, reducing the punitive enterprise to a question of price point and logistics. It becomes a puzzle to be solved rather than a dialogue to be

¹²⁸ Dolovich, *supra* note 42, at 478-79.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Thomas W. Pogge, *How Should Human Rights Be Conceived?*, in *THE PHILOSOPHY OF HUMAN RIGHTS* 187, 194 (Patrick Hayden ed., 2001).

¹³² Minow, *supra* note 20, at 1234.

¹³³ See, e.g., Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force*, 36 *CONN. L. REV.* 879, 977 n.334 (2004).

opened or renewed. For in the same way that the “law and the courts speak and act in the name of the political community,”¹³⁴ our conventions establish that our prisons do so as well.¹³⁵ “That message ought to be conveyed by the offended community of law-abiding citizens, through its public agents, to the incarcerated individual.”¹³⁶ As we distance ourselves from the condemnatory practice, however, we attenuate its message of censure, alienating offenders and ourselves from the meaning and value that constitute the liberal-democratic community.¹³⁷

Skeptics of the “social meaning” argument against prison privatization observe that the cultural context that confers meaning is by no means fixed. Indeed, perhaps “there are already some legislators, judges, administrators, and entrepreneurs”—we might add citizens and criminal offenders—“who actually and honestly do not believe that ‘private’ imprisonment is significantly different from ‘public’ imprisonment in cultural terms.”¹³⁸ To the extent that this is the case, it suggests how far we have strayed from the normative path of liberal-democratic meaning. In fact, we can recall or envision changes in meaning regarding a number of culturally significant phenomena, such as marriage, parenthood, and rape. But presumably it is not a matter of indifference to us what course these changes take—whether rape is or is not regarded as a serious violation of the self, whether marriage and family are limited to heterosexual couples or extended to homosexuals, polygamists, or other non-traditional arrangements. In each instance, the challenge is to make a case for meaning in terms of our liberal-democratic values and to promote or resist cultural change on that basis.

In the case of criminal punishment, the contemporary focus on incapacitation, combined with an “us v. them” mentality toward criminal offenders, represents an impoverished conception of the liberal-democratic community and charts a course in the wrong direction. It fails to take seriously both the capacity of persons to make and remake themselves and the number and variety of obstacles, affecting some more than others, in the way of making socially responsible choices. By contrast, the communicative conception of punishment is predicated on precisely those features of the human condition—on our potential and our limitations—that ground our liberal-democratic commitments. There is thus nothing “mysterious” about the idea that it matters who inflicts punishment.¹³⁹ For punishment engages fellow citizens in one of the most serious and definitive enterprises of a liberal-democratic community—

¹³⁴ DUFF, *supra* note 79, at 186.

¹³⁵ See FEINBERG, *supra* note 79, at 111; Kahan, *supra* note 116, at 591.

¹³⁶ DiIulio, *supra* note 107, at 79.

¹³⁷ This conceptual claim is distinct from, but related to, the empirical claim that prison privatization causes us to be less concerned about the fate of inmates. See, e.g., Walzer, *supra* note 114, at 12.

¹³⁸ Rosky, *supra* note 137, at 968.

¹³⁹ *Id.*

holding ourselves and one another responsible for our actions—and the voice of the community is clearest when it speaks for itself.

V. CONCLUSION

The case against private prisons may be overdetermined. In the prevailing liberal-democratic context, their mixed record of performance, along with the seemingly intractable practical problems they present, casts serious doubt on the value of private prisons. But the budgetary realities that hit home during the present economic crisis heighten the appeal of prison privatization. The burgeoning prison population in the United States, resulting from a variety of dubious criminal justice policies, does not seem likely to decrease any time soon. In this environment, private prisons may act as a kind of escape valve that relieves the pressure we might otherwise feel to critically examine our policies and practices.

According to at least one commentator, however, advancing the claim that the management and operation of prisons is an inherently public function means implicitly accepting public prisons in their current form as the baseline for evaluating the private alternative.¹⁴⁰ In this way, one risks being “coldhearted and blind” about the fate of actual inmates consigned to the deplorable conditions that prevail in our public prisons and jails.¹⁴¹ This sort of complacency would indeed suggest a kind of moral obtuseness that we are right to be on our guard against. My own hope is that by focusing on the meaning of punishment in the Anglo-American tradition, it may be possible to put our practices into fresh perspective, forcing us to confront the chain of events—the criminal justice policies, the millions imprisoned, the overcrowded and indecent conditions—that led us astray. Punishment, especially imprisonment, is a serious matter, and we almost certainly punish too much—not in the utilitarian sense, but in terms of what our values are and what wrongdoers deserve. They deserve to be taken seriously as moral agents in the way that retributive punishment entails, and they deserve the full force of our censure when their choices flout the values that constitute the liberal-democratic community of which we take them to be a part.

¹⁴⁰ Dolovich, *supra* note 42, at 443.

¹⁴¹ *Id.*