

THE THEORY AND PRACTICE OF PUNISHMENT: A THEORETICAL
CONSIDERATION OF AMERICAN PRIVATE PUNISHMENT

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THE THEORY AND PRACTICE OF PUNISHMENT: A THEORETICAL
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A Dissertation

Presented to

The Faculty of the Department

of Political Science

University of Houston

In Partial Fulfillment

Of the Requirements for the Degree of

Doctor of Philosophy

By

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ABSTRACT

Punishment has prolifically been a necessity in civil society and a duty of the state to create institutional stability, to model morality, and to ensure liberty. However, recent developments in United States policy have sparked a debate regarding the use of privatized punishment through independently owned and operated prisons. Since the 1980's, federal and state prison systems have contracted with private corporations to offset overcrowding and reduce state expenditures. This move has incited ample debate on the merits and ills of American private punishment. This literature has evaluative the performance of private prisons in arenas such as economic savings, recidivism, and prison conditions. This debate is valuable and offers insight into the outcomes of this punishment alternative, however, it lacks a theoretical foundation.

This dissertation inserts a theoretical consideration of private prisons into the prevailing discussion. First, this dissertation examines the imperative of state punishment through a survey of social contract theory. This initial discussion establishes the relevancy of theory within an American contract. Next, this dissertation selects three prevailing alternatives to punishment and outlines the goals and methods through an individual consideration of each justification. These alternatives are presented through Jeremy Bentham's consequentialism, Immanuel Kant's deontology, and John Locke's liberalism.

Throughout these theoretical discussions, this dissertation applies the deduced mechanisms of punishment to the American contract and ultimately finds a multitude of inconsistencies with punishment theory and the practice in the United States. Finally, this theoretical approach is returned to the empirical debate through a statistical description of American punishment. The theoretical deductions from this dissertation are bolstered

through these descriptive statistics and concludes that privatized institutions are opposed in practice and theory.

The work in this dissertation accomplishes two goals. First, this dissertation is a novel addition to an ongoing debate that is furthered through theoretical consideration.

Secondly, this dissertation has implications for policy decisions on a state and national level. Future work regarding private prisons can benefit from the conclusions presented here whether that work produces a more nuanced, academic understanding of private prisons or influences the policy decisions that affect prison punishment.

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Introduction

“But we who live in prison, and in whose lives there is no event but sorrow, have to measure time by throbs of pain, and the record of bitter moments. We have nothing else to think of.”

– Oscar Wilde, *De Profundis*

Every state uses punishment as a tool to facilitate social stability and justice.

However, punishment acts as more than a mere tool to demand obedience, but a state has an engrained duty to punish. Punishment is used for either utilitarian reasons to deter crime and reduce recidivism but is also chosen for deontological reasons to uphold justice and create uniform morality. These goals may act as singular choices or states may use a mix of these approaches. The state use of prison stems from a social contract that grants the legitimate authority to punish (Morris 1991). However, further considerations of punishment establish the morality of prison punishment (Koritansky 2011). This dissertation will consider the legitimacy and morality of American punishment within a privatized prison system that supplements the state’s endeavors. This exploration will be based in political theory which will create a new avenue of criticism for private punishment. Prevailing discussions consider the empirical outcomes of punishment. These insights are valuable but are lacking in political theory. This project will consider these insights in a theoretical framework and consider the legitimacy and morality of for-profit prisons.

This dissertation examines the relationship between privatization and the prison system. This project illustrates that a state’s theoretical objective for punishment is detracted from and challenged by private prisons in their legitimacy and morality. States retain a specific right to punish. Problems arise, however, when privatized prisons weaken the authority of the state to correct deficiencies. This holds individual contractors

as outside of the institutional right to punish which is a distinguished right of the state.¹ Additionally, states wish to impose a specific goal and method of punishment. The morality of punishment is compromised when individuals retain their own goals and methods of punishment.

The thesis of this dissertation asserts that regardless of how a state wishes to legally utilize punishment to fulfill a sovereign will, they cannot fulfill these goals within a privatized prison system as a for-profit system compromises the legitimacy and morality of state punishment. For-profit prisons contradict the prevailing theoretical necessity of punishment as a function of the state only as established in social contract theory. Subsequently, private systems violate the morality of punishment which are best articulated through three approaches: consequentialism, deontology, and liberal punishment. The debate regarding private prisons has been conducted along cultural, economic, and political standpoints. I am inserting a theoretical understanding of punishment to this debate and critiquing the private rationale that degrades the status of state harm.

The dissertation will proceed in the following manner: (1) the first chapter will present a survey of the history and literature surrounding the for-profit prison system in the United States. It will outline the arguments of both proponents and critics while assessing prescriptions to restructure the system.

(2) The second chapter then discusses the theory missing behind the debate and offers my contribution of theoretical understanding. This chapter will be the first delve

¹ For example, when state-controlled and state-managed collective prison labor restores the public good through trash collection or road repair, then its end is the restoration of a public utility. When the prison population labors to produce private goods that, at the point of sale, generate both operational revenue and profits for the board of directors of a private prison, punishment is linked directly to capital accumulation.

into theoretical discussion and will focus on contractarianism and the use of punishment in a social contract and consider if private prisons are legitimate endeavors.

(3) The third chapter will begin the examination of three predominant views of punishment: consequentialist, deontological, and liberal. The second chapter examines legitimacy, but the following chapters examines the morality of private prisons. Chapters 3 through 6 will examine each justification's approach to human motivators, the goals of punishment, and the methods of punishment. The third chapter, specifically, will engage with Jeremy Bentham's consequentialist punishment and will explain how private prisons are unable to produce the most cost-effective and consequentially sound means of punishment.

(4) The fourth chapter will utilize Immanuel Kant's deontology to display how contract prisons violate multiple categorical imperatives while attempting to profit from moral decay.

(5) The final theoretical chapter will examine John Locke's liberalism. Here, punishment will be examined on an individual level based on victimhood and display how restitution can only come through rehabilitation, a task that private prisons fail to accomplish.

(6) Finally, this dissertation is unique in that it combines theory with descriptive empirics. The sixth chapter will be an empirical analysis that connects the theoretical findings in this project back into concrete observations. Private prisons are fundamentally business endeavors. They do not wish to see prisoners rehabilitated and crime reduced. While these may be secondary concentrations, private prisons primarily wish to profit. This will be reasoned throughout my theoretical explanations. My last substantial chapter

will explore current prison data and apply my theory to the observations. I will once again return to the three arenas of study I outlined in my initial examination of the debate. The cultural implications, economic outcomes, and institutional independence of private prisons will be examined through survey data in the United States. These observed trends from the 1980's to the contemporary period will affirm if the theoretical assertions I have made still apply when critiquing the current empirical state of prisons.

Finally, I will conclude by discussing why the for-profit prison system is unfeasible regardless of the style of punishment chosen in a social contract. I will also examine the criticisms of punishment as an institution in the United States. There is a clear crisis of crime in contemporary America. Punishment therefore is also in crisis. I will suggest areas for further research and policy prescriptions to address this issue so prevalent in American dialogue. Private prisons are illegitimate punisher and subsequently compromise the morality of state punishment. This project shows that punishment is solely a public function. Policy formulation and future punishment endeavors must be aimed at creating the best public facilities. If the state's efforts are supported and refined, the American social contract will remain intact.

Chapter 1: The Debate

Prior to discussing theories pertinent to punishment, I first present a comprehensive examination of the contract prisons' history, legal basis, and subsequent debate to contextualize use of private prisons in the United States. This basic understanding will aid in the theoretical assertions made in subsequent chapters. The theoretical basis will be enriched by real world examples of contract prisons in the United States. I will present an outline of the prevalent arguments for and against privatized prisons. Many proponents attempt to abstractly explain the benefits of private prisons. Critics point to the empirically observed failures. These failures include lack of control in political and social culture, economic drawbacks for numerous sectors of society that do not directly benefit from prison revenue, and lack of uniform punishment for societal cohesion.

An account in Canada can provide context and parallels for the American discussion. From 2001 until 2006, Ontario housed Canada's only privatized prison which exemplified many of the issues that are still currently discussed in the American debate. This Ontarian prison was concurrently constructed and evaluated with a state-run prison. The unit, known as Central North Correctional Centre (CNCC), was run by Management and Training Corporations Canada (MTCC)². Ultimately, CNCC did not renew a contract with MTCC after an independent performance assessment from PricewaterhouseCoopers (PWC) revealed its inadequacy compared to its state-run counterpart.

PWC conducted an evaluation of the facility based on comparative evaluations of Central East Correctional Centre (CECC) under public management. The performance

² MTCC is the Canadian branch of the Utah based penal corporation Management and Training Corporations (MTC), a leading prison contractor with prisons in 8 states.

evaluation lists several areas where the public prison outperformed the private prison: “A comparison of the performance of CNCC versus CECC (excluding cost) indicates that CECC is rated higher than CNCC” (PricewaterhouseCoopers 2006). While CNCC was summarized to be the most cost-effective option for the state, the results according to other criteria were vastly different; the private facility underperformed in all other aspects except for cost effectiveness. CECC outranked CNCC in security, programing, recidivism, healthcare, and community impact. This natural experiment displays the contemporary, empirical shortcomings of punishment when the state relinquishes control. Much of the debate for private prisons stems from similar observations in which private prisons are not subjected to the scrutiny of the public eye and, when reviewed, have multiple deficiencies. While CNCC’s downfall is an example of inadequacy in the Canadian system, the American penal system’s history is rife with struggle over privatization, too.

Previous arguments against contract prisons have relied on history and empirical observation. This discussion has largely lacked a theoretical critique. While this dissertation will go on to engage with the theoretical underpinnings for punishment, these real-world observations serve to frame the theory presented in later chapters. Proponents creatively try to modify the system to change outcomes, but the results remain the same as seen in the CNCC: while trying to alleviate governmental pressure to rectify societal ill, private prisons never fully correct and even exacerbate criminal harm. The evidence of sustained criminality presented here will be discussed in further chapters as a reneging of the social contract and punishment theory.

The History

The tension between private and public endeavors is prevalent throughout the history of United States prisons and subsists in the contemporary discussion. By examining carceral history, this chapter provides a basis for the modern debate and explores the historical use of American prisons that shifted from shaming tactics, to incarceration. Labor, specifically, vacillated between public use for reform and private use for profit before the contemporary turn to fully privatized institutions.

American punishment did not begin with an overwhelming push towards mass incarceration and privatization. Initially, all punishment within colonies and new governments in the 17th Century were done by individuals and were entirely localized. Subsequently, abuse ran rampant due to a lack of regulation. Punishment was guided by “a curious mix of religion, English barbarity, and pragmatism” (Meskell 1999, 841). Public shaming was the most prominent form of punishment either through short, corporal acts, sustained humiliation, or public execution. The purpose of punishment was purely for deterrence and had no interest in rehabilitation as Calvinism interpreted sin as fixed and unchanging. The prevalence of capital punishment for many crimes, even on first offenses, was even more telling of early attitudes toward punishment. Reformation and rehabilitation was not a primary goal; instead the community was better protected by removing anti-social individuals. As the United States established itself after the Revolutionary War, the colonies, now states, saw a significant increase in population and punishment was reevaluated on local and federal levels. English writers such as John Howard conducted extensive research on British prisons and the abhorrent prisoner

conditions. Ten years after Howard's research, the study made its way into the American public in 1790 and began a legacy of prison reform.

Supplemented by the Enlightenment turn of thought on human morality standardized, legal punishment came to the forefront of early American punishment. Cesare Beccaria's work in *On Crimes and Punishment* and Charles de Montesquieu's work in *The Spirit of Laws* became seminal pieces of theory that shaped the American prison system, calling for reformation through secular morality. Beccaria and Montesquieu reasoned that human nature was not static as the Calvinist approach suggested, but rather could be changed through proper punishment. However, the prevailing punishment in Europe was excessively harsh and served to distance the criminal from reform.³ The reformation theory discussed the societal ills of capital punishment, the most prevalent punishment of the time. The deterrence effect of the death penalty was low, and the shock value of death failed to set an example. Moreover, the absurdity of preventing death by causing death brought to light the morality of both the prisoner and the punisher. Instead of capital punishment, new theory suggest that criminals should be subjected to a lesser type of slavery (i.e. confinement and punishment by means of incarceration). This new construct of punishment subverted the predominant notions of human suffering.

William Bradford, the second attorney general of the United States, followed in the theoretical tradition of Beccaria and Montesquieu. Bradford questioned the nature of highly retributivist punishment of: "The general principles upon which penal laws ought to be founded appear to be fully settled. Montesquieu and Beccaria led the way in the

³ Both the social contract tradition and the subsequent punishment justification of Montesquieu and Beccaria will be discussed further in the proceeding chapter.

discussion, and the philosophy of all Europe, roused by the boldness of their march, has since been deeply engaged on this interesting topic” (Bradford 1793 (1968), 126).

Bradford’s writing signified a shift away from colonial perceptions on punishment as the United States was founded. Bradford called for a reduction in the use of capital punishment on the federal level and sought to prevent crime in alternative forms rather than immediate capital punishment sentencing per colonial law. The introspection of the Enlightenment era exerted a considerable influence on penal code. The intrinsic value of the human came to light as an important aspect in punishment. Bradford’s work “An enquiry how far the punishment of death is necessary in Pennsylvania” cited legislators as overly harsh in their call for capital punishment. He found them too far removed from the cruelty of the action which was a violation of humanity and religion. Bradford’s writings and influence as Attorney General prompted drastic change. For instance, the Philadelphia Society, a group founded to make Bradford’s reform vision a reality, drafted a new criminal code in 1786 that utilized labor and used capital punishment for only treason and premeditated murder (Meskell 1999, 845). Rather than just punitively correct a criminal, there was a hope that the criminal might realign within society.

As Enlightenment punishment theory influenced Bradford, Bradford’s writing changed the penal system in the United States. Soon emerged the newest era of punishment that distanced itself from corporal punishment and instead began the modified slavery of criminals discussed in prison reform. This era began housing prisoners and subjecting them to hard labor and separate confinement, transitioning away from a dependence on corporal and capital punishment. Early American prisons were praised by observers such as Alexis de Tocqueville for their unique nature and originality

in the concept of punishment (Gottschalk 2014). The concept of separation and confinement was not historically novel, but Walnut Street Jail in Pennsylvania established the trend in 1790. The Walnut Street Jail utilized the reformation techniques from Bradford's Philadelphia Society and eventually was acquired as the first federal prison (Keve 1991). American prisons were hailed as inventive and offered a new form of punishment through long stints of incarceration over fleeting, public, shaming demonstrations. However, this approach had its own problems. The public, local jails failed to control prison behavior and turned to "private, cellular imprisonment" and hard labor (Meskell 1999, 845). However, with population increase and dilapidating buildings, prisons were under immense pressure to live up to original reformation ideals.

The conversation on punishment turned from the Calvinistic approach of "sinner by birth" to optimism in rehabilitation from secular Enlightenment in the 17th and 18th Centuries. Only in the 19th Century and in the Jacksonian political era did more states begin to heavily utilize publicly funded prisons due to concerns of labor abuse in private prisons. The use of containment for offenders grew as social conditions became an underlying cause for deviant behavior: "If social ills were the cause of crime, the new reformers reasoned, then society should be able to cure criminals by separating them from corrupting influences and by inculcating in them healthy habits" (Meskell 1999, 852). Governmental punishment began to experiment with labor and solitary confinement, seeing which combination yielded the greatest reformation for the criminal. This experimental era began with the penitentiaries built in Auburn, New York and Pittsburgh, Pennsylvania. While receiving some governmental assistance, prison philosophies were radically different. Auburn's system was influenced by the private

business that contracted prisoner time leading to business profit over reform. Contrasted was Pittsburgh's Eastern Penitentiary which valued reform (prompted by government funding) over profit (spurred by private contractors). The Auburn system prevailed, historically:

The prison at Auburn cost \$584 per prisoner to construct while the Eastern Penitentiary cost \$1,023 per inmate. Additionally, Auburn-style prisons produced annual surpluses while the Eastern Penitentiary continually lost money. Legislatures found in the Auburn system a program that was cheap, could protect society, and might help fill their coffers. The eccentric Pennsylvania system could offer only vague statements about reformation that were not only unsubstantiated, but also philosophically disputed. (Meskell 1999, 839)

The next large wave of prison interpretation occurred during the Civil War period and rallied against forced labor. Instead, critics of the prison system focused on education, skills, and religiosity even against the backlash of Auburn-style prisons that did not support rehabilitative methods. Legislatures saw reform as a useless endeavor and "Contract prison labor became a serious political force in the 1830s" (Meskell 1999, 861). A lack of governmental assistance in reconstructing the Jacksonian era prisons left buildings dilapidated and distressed. Distinct sects of Northern and Southern style punishment produced varying punishment techniques. Northern prisons focused heavily on corporal punishment to control prisoners, but prison reformers lamented the use of iron shackles, straightjackets, and water torture (Rothman 2002). During this time, Northern prisons utilized a combination of public and private assistance: the state provided the housing and necessities while private entities provided the machinery and leased inmate time (Christianson 1998). The Southern prison infrastructure was distinct as it dealt with the effects of widespread poverty and struggled with racial divisions amongst prisoners. Freed slaves were no longer under the jurisdiction of private

ownership and now the public factor had a large influx of the black population that was subjected to significantly harsher labor conditions than their white counterparts (Thomas 2003). Private investors frequently physically abused prisoners to see if they were faking injuries to avoid manual labor. Punishment was utilized an advantage for the private sector, economically ravaged after the Civil War, rather than an advantage for societal reform. George Washington Cable, a reporter from New Orleans urged reform in Southern prisons which had particularly abhorrent conditions and labor demands. Prison reformers pressured for alternative forms of punishment that did not exploit the prisoner for work. They reasoned that reform was no longer the primary goal of punishment. Instead the public influence from governmental pressures was trying to remove the criminal from society rather than give credence to their moral reform

The Progressive era attempted to reconcile some of the issues with prisoner abuse but still utilized labor extensively for punishment. In 1891, Congress passed legislation to establish the first federal prisons creating a new prison system and alleviating state capacity (Keve 1991). Labor unions fighting for worker's rights changed the temperament of labor relations, lamenting the use of prisoner work as it disenfranchised labor opportunities for free workers evident by New Jersey abolishing contract labor in 1891 and other states following suit soon after (Sellers 1993). Eventually, the private aspect of contract labor reached a lull and privatization stagnated until the 1980's. Prisons slowly became strictly public with small and inconsequential uses of private industry only to supplement public reform. From the turn of the 20th Century until 1984, public and private prisons vied for control of prison labor, often conflating the profits as

desirable for prisoner reform. This combination allowed both the public and the private sectors to benefit from prison labor but for vastly distinct reasons.

Modern Privatization and the Legal Basis

The previous historical developments on punishment concentrate mostly on the individual's reformation and only preliminarily address society's role. Early American conflict on penal authority was mitigated by social reformers who represented a dissenting faction of public opinion. As punishment became more transparent in the 20th Century, public opinion took an interest in policing carceral policies. The most recent return to full privatization for adults occurred in the 1980's when public opinion began to stress legal justice through detention. This change in penal discourse was supplemented by economic upheaval in the 1970s such as New York City's financial crisis and tax relief reform in California (Sellers 1993). In 1984, CoreCivic (formerly the Corrections Corporation of America) began the first entirely privatized prison based in Tennessee, setting the trend for dependence on private punishment in the modern day (Antonuccio 2008). In the United States, CoreCivic is joined by two other companies: Management Training Corporation (MTC) and The Geo Group (Formerly Wackenhut Correction Corporation). These three companies create the strongest triumvirate of for-profit prison companies in the United States. As of 2015, 29 states utilize private prisons making up 5.3% of the prison population (Carson and Anderson 2016).

The prevalence of neoliberal ideology during the 1980's heavily contributed to the shift in punishment and produced the lasting success of these three companies. Neoliberalism, generally, is an ideology that is liberal for upper classes but authoritarian for lower classes. Loic Wacquant defines the ideology as a "transnational political project

aiming to remake the nexus of market, state, and citizenship from above...carried by a new global ruling class” and is characterized by four institutional logics: economic regulation; welfare state devolution; the cultural trope of individual responsibility; and an expensive, intrusive, and proactive penal apparatus (Wacquant 2009, 306-307)

Punishment historically trended towards reforming the prisoner to appease the morality of the punisher and reduce the burden on the state simultaneously; this was mostly done through state intervention as discussed in the previous section of this chapter. However, neoliberalism interrupted that trend and allowed states to delegate their duties.

Neoliberalism is defined as “privatizing failure and denigrating the role of government to solve problems” (Gottschalk 2015). It became increasingly popular in the 1980s and pushed the agenda for privatization from local levels to national levels and even reached towards international planes Combined with a fear of economic disappointment in the 1960’s and 1970’s, neoliberalism rose to prominence in the early 1980’s when private prisons reemerged in the United States. This change in ideology created a spectrum of services that could be privatized such as health care, schooling, utilities, transportation, etc. (Thomas 2003). It became instrumental in stricter legal punishment to quell political anxieties. The result shifted punishment rhetoric towards a carceral state with an unparalleled amount of punitive control.

Proponents for prison privatization point to the United States legal history and judicial precedent affirming privatization. Concerns arose regarding whether private prisons fall under the scope of the nondelegation doctrine in which the primary duties of government cannot be outsourced to other agencies. The Supreme Court has historically affirmed a loose interpretation of the implied powers clause, allowing Congress to

delegate such legislative authority to agency's that will govern in accordance with established law.⁴ While the implied powers clause has been criticized for allowing excessive interpretation in multiple facets that are too numerous to list here, precedence finds that the nondelegation doctrine seemingly does not interfere with prison privatization.

The relaxed restrictions on privatization through the federal 1979 Prison Industry Enhancement Act (allowing private firms to create contracts with prisons) and the Percy Amendment (allowing the sale of goods produced by inmate labor) indicate increased governmental support; this was motivated by a desire to reduce the pressure of overcrowded prisons after a cultural shift to neoliberalism (LeBaron 2008). These two pieces of legislation were originally intended as a rehabilitative measure. Having prisoners imitate working environments in the private sector was proposed to foster a desire to pursue private sector work and provide skills that prisoners could use when reintroduced into society. This would also mutually benefit the prisoner, with meager wages, and the prison benefactors who profited from the sale of prisoner produced goods. The use of prison labor was also advertised to alleviate economic concerns of the private and public sectors. Many of these jobs however resulted in further economic disarray for the public sector as prison jobs were being allocated at higher rates than free-world jobs “as demonstrated by the 2008 closure of Lufkin Industries’ trailer division in Lufkin, Texas and the loss of 150 free-world jobs in Austin, Texas due to prison industry programs” (Sloan 2010).

⁴ See *Mistretta v. United States*, *J. W. Hampton, Jr. & Co. v. United States*, *Schechter Poultry Corp. v. United States*, *Carter v. Carter Coal*

While this dissertation was in progress, the federal legislative use of private prisons was altered. The United States Department of Justice announced they would begin to phase out the federal use of private prisons. On August 18, 2016, Deputy Attorney General Sally Yates released a memorandum instructing that “as each private prison contract reaches the end of its term, the bureau should either decline to renew that contract or substantially reduce its scope.” This change was prompted by an analysis of inmate populations that showed an 800% increase in inmates from 1980 until 2013, but also revealed the first ever drop in population from 2013 to 2016. With an 11% decrease of population in recent years, Yates suggests that private prisons will no longer be needed to alleviate the pressure that federal, public prisons faced in past decades. While noticing the cultural shift calling for fewer private contracts, Yates was not remiss to the failings of the private system:

They simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department's Office of Inspector General, they do not maintain the same level of safety and security. The rehabilitative services that the Bureau provides, such as educational programs and job training, have proved difficult to replicate and outsource- and these services are essential to reducing recidivism and improving public safety.

Yates’ instructions, however, were short lived. Appointed under the Barack Obama administration, Yates stayed on as Acting Attorney General for the Donald Trump administration, On January 30th, 2017, Yates was dismissed from her position after issuing an instruction of noncompliance to the Justice Department for President Trump’s Executive Order 13769 entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." Yates was replaced by Attorney General Jeff Sessions who rescinded her memorandum on February 21, 2017. Sessions’ memorandum contained less

explanation than Yates' but stated that the previous memorandum "changed long standing policy and practice and impaired the Bureau's ability to meet the future needs of the federal correctional system."

Yates identified the three primary areas of argument for privatization: the cultural context, the economic benefits, and the lack of uniformity due to independent corporations.⁵ However, Sessions' actions to reverse procedure is indicative of where the United States lies on the issue of contract prisons. The debate is still occurring today and is now reinvigorated by recent events. This question does not just exist in the realm of federal, bureaucratic procedure. The publicity surrounding Yates' dismissal has made this issue part of the citizen's agenda. This project can contribute to that debate as it unfolds. The discussion in this dissertation may reveal the answers to questions that policy makers had never considered before. As this chapter progresses, I will outline what topics are currently being debated regarding private prisons. This discussion is empirical and based on real world observations, focusing on the effects of private prisons. Then I will examine how compromise between these two sides is inefficient. The institution either exists in its entirety or not at all. Ultimately, the current debate is anemic in understanding private prisons as it does not address the theoretical justification for private prisons under a social contract. However, these observations help to contextualize the theory that I discuss in proceeding chapters.

For and Against Privatizing for Profit

There are three arenas for the scholarly debate over privatization: the benefits and drawbacks for culture, for the economy, and for control of punishment itself. First,

⁵ The next section will outline the pros and cons of these arenas in privatization.

proponents of privatization find that private punishment satisfies the sentencing and carceral demands of the public and creates an efficient system. Additionally, private punishment allows for a more enriched economy through cost saving techniques and the sale of prison-produced goods to free society. Finally, defenders find the independence of private prisons allows for speedier and more efficient punishment that is not encumbered by bureaucratic procedure. Critics, however find that the cultural implications are corrupting: crime will be profitable and continue to disenfranchise minority groups. Moreover, the economic benefits of privatization are unfounded and ultimately hurt small businesses in the free world. The independence of the private prisons system is also undesirable as it reduces uniformity for punishment and marginalizes the democratic voice in punishment, leaving prisons unaccountable to the public.

The case for privatization will be addressed within culture, economic disposition, and the authority to punish. Proponents analyze that political culture and societal life is enriched in private prisons. Scholars argue that privatized prison systems offer many advantages for the state, the citizens, and the capital holder in a capitalist system as “The private prisons issue has thus widely been viewed as a choice- even a competition between alternative organizational forms” ultimately promoting the capitalist sentiment of creative competition and market growth (Dolovich 2005, 441). Privatization is pragmatically defended as an effort to increase economic benefits for the capital holder and eventually the economy at large that benefits from marketable goods produced by state-based, captive, and coerced labor. Privatized prisons are also defended ideologically for a reduction in state dependence prominent in libertarian-leaning theory; it alleviates pressures on the government and reduces possible shortcomings due to an increased

incarceration culture. The adherence to creative competition and incarceration culture supplement one other, making privatization a practical option (Gottschalk 2015, Savas 1987, Avio 2003).

First, the cultural argument rests on the infiltration of neoliberalism mentioned in the previous section. This shift suggested a cultural satisfaction of ideology when considering punishment. The state can reduce liability of harm to prisoners by outsourcing the job as suggested by neoliberal culture. This avoids overcrowding and inhumane prison conditions. Neoliberal culture has previously been attacked as inconsequential in the transition towards privatization (Western and Beckett 1999). However, social-science research has found that political culture does indeed impact punishment in substantial ways (Norrander 2000). More still, some studies show that public opinion supplemented by “fear and distrust [in] law and politics of punishment” has caused harsher punishment (Zimring and Johnson 2006, 266). Private prison systems were demanded by the public in the 1980’s to reduce overcrowding; prisons reached capacity as sentencing became harsher. Neoliberalism combined economic fears and carceral techniques to produce “a shift in the operational philosophy of corrections from rehabilitation to incapacitation. This resulted in a wave of determinate sentencing legislation that mandated longer sentences for offenders” (Kyle 2013, 2089). Subsequently, political culture demanded a solution to the shift in the understanding of the aims of punishment. This cultural shift legitimized private prisons, insinuating that the public prison system was ineffectual in deterring crime (Dolovich 2005). Moreover, the use of privatization legitimized the use of prison to deal with societal harm. Subsequently, neoliberal prominence shifted culture towards punishment over

rehabilitation and necessitated the use of private prisons to offset the efforts of state run facilities.

Second, proponents for privatization claim that contract prisons offer far-reaching economic benefits. Antonuccio (2008) states that private prisons are attractive to taxpayers: they are touted as money saving measures that ensure legal justice with less bureaucracy and better staffing methods. Proponents hold that private prisons allow economical improvements throughout society. The system also ensures manufacturing jobs to prisoners and has fused economic benefit for both contract beneficiaries and the United States economy (LeBaron 2008). The economic benefits are said to be far reaching when prisoners are subjected to work, through top down economic distribution (Andrews 2011). The economic benefit is viewed as “no more immoral than paying police officers to capture felons or paying physicians to save lives” especially since a cultural shift towards stronger incarceration efforts calls for “longer sentences to keep criminals off the streets” (Savas 1987, 187) and “creates conditions for the concentration and expansion of private capital” (Jinkings 2011, 12).

Third, the independence of corporate entities involved in punishment is also seen as beneficial to society as it allows independent entities to creatively discipline. Unhindered by governmental bureaucracy, private prisons can be built rapidly with new techniques and standards of “incarceration philosophies” that sidestep red tape (Antonuccio 2008). Privatized entities can encompass their own interpretation of punishment that diffuses the intent of the state. This might occur as supplemental to the state punishment which allows private prisons to circumvent the specificities from state prison systems. Capital holders utilize a rational choice strategy in conjunction with their

incarceration philosophies to maximize benefit of capital gain and transport prisoners between states to reduce housing costs based on cost of living. Private industry is hailed as more efficient than state bureaucracies because they use less staff and focus their capital investment. For example, while a private company can build in 9 months and operate in 12, a government facility might take up to 3 years to create a functioning facility (Kyle 2013). This means the goals of the state through punishment can be accomplished through creative means and reduces the burden on the state to achieve those goals (Thomas 2003).

However, the disadvantages of privation are plenty, claim critics. In a comparable manner, the cultural implications, economic benefits, and desired independence are questioned in the dissenters' camp. The opponents of privatization differ in their approach however. Firstly, the cultural implications show that privatization allows capital holder to benefit from increased crime and imprisonment; there are "implications of the potential to profit from incarceration and the resulting disincentive to curb the influx of new inmates" (Antonuccio 2008, 580). There is no incentive to curb imprisonment and reduce crime: "If these goals are realized, private prisons lose the primary source of their profits—the prisoners" (Antonuccio 2008, 589). The social problems that arise with this mindset can be observed through the increase of private prisons despite the decrease of crime rates in the United States from the 1970's to the beginning of the 21st Century; sentencing has become harsher regardless of this drop (Nicholson-Crotty and Meier 2003). The necessity of prison punishment is at ends with the level of crime committed. This business mindset of private prisons is exemplified by the public relations and advertising of the largest privatized prison company CoreCivic who originally utilized

the motto “If you build it, they will come” (Antonuccio 2008). CoreCivic has also globalized with facilities in the United States, Puerto Rico, the United Kingdom and Australia (Davis 2000). The private prison rationale of business growth is contradictory to societal rationale to reduce the use of punishment.

In addition, many interpret the growth of the prison industrial complex to be motivated by a desire to contain minority populations of color as 70% of all prisons come from this demographic: “To deliver up bodies destined for profitable punishment, the political economy of prisons relies on racialized assumptions of criminality...and on racist practices in arrest, conviction, and sentencing patterns” (Davis 2000). This sentiment is studied empirically in Nicholson-Crotty & Meier (2003) as the authors demonstrate black populations are incarcerated at higher percentages due to “poverty and disorganization of their communities (124).” The ability to disappear humans from society through incarceration, does not disappear societal problems; government programs addressing welfare and rehabilitation lose prominence and funding, intensifying societal problems. This in turn creates a cycle of crime, exacerbated by societal problems. This change is frequently accredited to neoliberalism “characterized by the reorganization of the US State towards capital accumulation” (LeBaron 2008, 60). By allowing neoliberalism to pervert the intent of punishment, societal problems, neoliberalism has also manifested itself as a racial factor, continuing a class separation that is deeply based on racial divisions (Gottschalk 2015). Exacerbating societal problems allows a steady workforce for private entities and this is especially targeted at racial minority in black and Hispanic communities.

Secondly, while proponents hold that the economic benefits provide overall societal benefit, critics find this economic expansion to interfere with the goal of punishment. The economic benefits of the private prison system are few. By utilizing prison labor, small firms face difficulty in competitive markets as they face higher costs of labor and benefits for workers. The assertions of trickle-down economics are not found in practice (LeBaron 2008). Supporters of the economic benefits range from prison staff and members of the community and assume the economic benefits are enough to maintain privatized prisons; those who stand to benefit from privatization hold it in high regard. However, local economies have seen very little benefit with the inclusion of privatized prisons (Gottschalk 2006). Critics also worry the economic problems that arise with privatization are exacerbated by globalization (LeBaron 2008). Private prison labor is intertwined with social concerns that labor laws are not regulated with the same scrutiny. Prison labor is glamorized to something mischievous and marketable as Davis (2000) notes the use of jeans marketed as “Prison Blues” that are “made on the inside to be worn on the outside.” There is no organized, union-type resistance and there are no benefits provided to employees. The question of the purpose of labor is also an issue within for-profit institutions. When inmates labor even in “chain gang” style, they are providing a societal good by providing the betterment of government structures. This is inherently connected to the sovereign’s betterment. When prisons labor to produce luxury goods like jeans or conduct cold calls to sell private goods, they are providing luxuries to society. The context of the labor is subverted when taken out of the public realm.

In the framework of meager regulations and glamorization, the cost cutting mechanisms make prison labor particularly enticing and the numbers reflect as much.

Without having to consent to strict regulations for free-world jobs, private prisons can see quicker returns on investment without pacifying labor or union groups. CoreCivic increased revenue by 58% (a total of \$462 million) in the span of 1 year and the GEO Group increased from \$138 million to \$210 million in the same period from 1996-1997 due to the use of non-union labor (Davis 2000). While the increase in revenue hints at cost effective measures, Andrews' (2011) conducts a case study of Acacia prison in Australia in which the accounting measures of the prison proved to lack cost effective measures. Confusion in effectiveness stems from misestimated figures and incorrectly understood costs and benefits. Private prisons are critiqued for shifting the economic benefit; rather than outwardly claim that private prisons benefit the capital holder, they are peddled as economically beneficial to the whole of the state without concrete evidence.

Additionally, cost cutting in certain places means an economic and social burden elsewhere; oftentimes, this is the prisoners and their families. Prisoners and their families are billed for “carceral costs” and charge for “room and board, collecting ‘processing fees’ at intake, charging for meals, and imposing a ‘co-payment’ for access to the infirmary, as well as supplemental charges for various other amenities” (LeBaron 2008, 78). This does away with other programs for education, sport, and general rehabilitation. A lack of social programs intensifies the societal problems and ensures repeat offenders; prisoners literally cannot afford to submit to their own rehabilitation. Punishment is distanced from the opportunity to reshape the prisoner; instead there is an opportunity to benefit from the prisoner parasitically. Many times, these carceral costs are shouldered by the families of prisoners, whom are overwhelmingly from low socioeconomic classes, or

by the prisoners themselves who labor for meager wages. The shift from rehabilitation to personal responsibility for cost highlights the prevailing notion that “capitalism, poverty, and unemployment are voluntary” (LeBaron 2008, 67). This challenges proponents’ claims that private prisons offer an alternative of services to prisoners that the public cannot provide (Savas 1987). It seems that private prisons are even less apt to provide these services to prisoners.

Variation in staffing requirements and independent penal code is also a concern. While proponents desire immediate staffing, critics argue that private staff is subjected to less scrutiny. This phenomenon has historically plagued the system harkening back to historical accounts of guards providing prisoners with luxury items for pay and therefore compromising the effectiveness of punishment. This leads to “incidents of prisoner abuse from allegedly inadequately trained staff” raising safety concerns from overcrowding and understaffing (Antonuccio 2008, 581). The tendency towards abuse negates claims that privatization alleviates governmental pressure and ensures humane prison conditions. Moreover, political concerns rest on whether governmental structure is unable to punish efficiently to appease the cultural push for incarceration. In turn, the effectiveness of the private prison system is questioned as private prisons do not report their forms of discipline with the same transparency as governmental prisons: “While government-run prisons are often in gross violation of international human rights standards, private prisons are even less accountable” (Davis 2000).

Critics also address the political implications of privatization when considering the independence contract prisons. While private corporations build prisons at will, public prisons depend on referendum and elected representative. Ultimately, this

circumvent the democratic process. Intensified by CoreCivic's adherence to policies of "If you build it, they will come," many private industries advance capital gains by bypassing democratic approval. Therefore, the right to punish according to the sovereign is distanced from public opinion. Instead, economic elites translate their economic power into political power and dictate how punishment should be utilized for economic benefit. Despite voter disapproval, the government can contract with the privatized entity because there is an already established facility. While this cuts costs, it also cuts out the voter: "Voters want to be empowered on every issue, but especially when the issue is whether to bring a prison—and all the social stigma and potential physical dangers that come with it—into the community. The legislature must take action to re-enfranchise voters." (Antonuccio 2008, 591).⁶

Dangers in the Middle of the Road

While proponents and critics stand on opposite sides of the road, at least one party has attempted to move towards compromise in the middle of the road. Critics firmly stand on their side, proclaiming the complete societal incompatibility of the prison industrial complex as a system. Proponents, however, extend an olive branch to critics, hoping to restructure the private system and reach compromise in the middle to privatize rehabilitative techniques and programs that do not require jail time. While the advance is admirable to please all parties, the reform of the private system is not only unlikely but irrational. Privatization proponents' respond with a call for restructuring the system away from punitive measures to appease the cultural argument from critics (Dolovich 2005,

⁶ The sovereign's significance of defining the societal and political climate is important in understanding the arguments demonizing the private prison system and ultimately must be examined in its inception. The importance of the voter in relation to a sovereign voice will be discussed in more detail in the preceding chapter as sovereignty establishes the penal code and enforces punishment to ensure societal benefit.

Kyle 2013). Rather than focus on the incarceration culture and techniques of punishment, private prisons ought to focus on rehabilitation (Kyle 2013, 2089). These prescriptions are honorable in their intent to reform private prisons to be aligned with production for prison owners, rehabilitation for the criminal, and safety for society, but they ignore the economic failures of the private system (apparent in the Australian study of Acacia prison) and do not address the concerns of critics based on the negative consequences of private independence in punishment (carceral costs, lack of programs, etc.)

At first blush, all sectors seem to benefit from a restructured private prison system with slightly shifted goals towards rehabilitation. However, these recommendations are diametrically opposed to the rationality of contracts and the necessary economic concerns of private prison beneficiaries. Businesses reasonably hope to see increasing return on an investment; the free market and space of creativity is established to allow the individual to flourish in their business endeavors. However, punishment is not a business endeavor. It is an integral function of the state and an important task to ensure citizens a peaceable existence. This sentiment proposed by Beccaria and Montesquieu has spanned centuries and maintains the authority to punish in present day. While authority to punish does not undermine the existence of private punishment in theory, the practice of private punishment combined with creativity in capitalism conflicts with the basis of punishment.

Prison delegation to private entities allows the individual to act as the government and violates the confines of nondelegation doctrine. While legally, the nondelegation doctrine does not prohibit private industry from contracting for punishment, the ability for private entities to take on the innate duties of the state allows the individual to become the state in some capacity. Even if the industry is reformed, it still faces the issue of

usurping the title of the state and siphoning legitimized power away from the establishment. The private entity becomes independently powerful outside of the sovereign.⁷

In addition, the very idea of housing prisoners in private conditions where prisons pay the brunt of their rehabilitative measures still undermines the idea of punishment provided by the state. Rehabilitating prisoners not only hurts contract owners, but the system of rehabilitation used by the prison industrial complex harms the prisoner. With a higher stress on rehabilitation, prisoners will face even more carceral costs to see their own rehabilitation. They will be forced to pay higher rates for more effective social programs placing the burden of rehabilitation on the prisoner rather than labeling rehabilitation a duty of the state, or in this case, the corrections corporation. Prisoners will soon be unable to afford their own rehabilitation and the use of a social program will be wasteful to the prison owner and eventually the prisoner who is unable to monetarily fund such programs.

Rehabilitation, as an ideal, is opposed to capitalist rationality in punishment. It is also a main component of the federal and nearly every state's correctional department. Nearly all mission or vision statements from state and federal governments include language that addresses rehabilitation, reintegration, positive behavioral change, reduced victimization, positive life changes, etc. This establishes that correctional departments in multiple facets of government aim to rehabilitate. Private prisons do not aim in this same way to rehabilitate. If business leaders invest in prison construction, they will see a diminishing return in the investment with a loss of labor force and contracts *per diem*.

⁷ The problematic implications of undermining the sovereign will be discussed in the proceeding chapter and will illuminate the relationship of sovereignty and the state.

While theoretically sound in promoting the benefit of society, the benefit of society and the benefit of contract prisons are at odds. Reform is impossible as the will of the individual corporation supersedes the sovereign will. The middle of the road proposal from proponents fails to address the true concerns of critics; the compromise cannot come to fruition.

Thus far, privatization cannot be cast in a redeeming light. The cultural, economic, and political implications of the system oppose rationality in punishment. Even reforming the system does not help the case. However, up until now, I have exclusively examined the real-world effects of the private prison system. To truly understand incompatibility, the for-profit prison system must be examined theoretically. Examining the theoretical foundations of punishment can aid in settling the debate on contract prisons. Theory examines more than just observations of the practice and delves into the basis of punishment, what punishment is for, and what justifies punishment, an approach that is remiss in the current debate. The empirical evidence through case studies shows private punishment as ineffectual. However, the next chapter will delve into the root of punishment. The very inception of private punishment gives more credence to the real-world understanding of privatization's failures. The theoretical foundation and the empirical evidence serve to supplement each other in uncovering how ineffective private punishment can be. The next chapter will explicate the importance of a social contract and how sovereignty punishes as a collective rather than a private individual.

Chapter 2: The Debate's Missing Theory

The contemporary debate surrounding for-profit prisons is based on concrete, observational terms that address the cultural, economic, and political issues of privatization. While these considerations are valuable in assessing the functions of the private prison complex, the debate has largely ignored the basis and aim of punishment theoretically. I wish to contribute to this debate by outlining the main, theoretical foundations of punishment, beginning with social contract theory, the punishment tradition that emerged, and more recent forms of contractarianism. The pros and cons of privatization from the previous chapter cannot be fully understood without a thorough examination of the practice of punishment. While the observations of the prison system are necessary, the theory of punishment is more telling than mere observations of the practice; it questions the institution of private punishment as an existing state mechanism. By returning to these texts on social contract theory, I aim to legitimize punishment as a state function and display private prisons' incompatibility with the theoretical basis for punishment.

First, I assess the theoretical justification to punish through social contract theory and then proceed to analyze the use of punishment in state-run institutions or privately contracted endeavors. State coercion in punishment is utilized to provide various definitions of benefit (Finkelstein 2010). The exact description of this benefit and the rationality of achieving this benefit vary across thinkers from deterrence to retribution. Uniting them, however, is the consensus to reduce harm. The cost of punishment, whether monetary or moral, is an acknowledged toll that is just as varied as the definition of rehabilitation. Societies must agree on proper punishment, incurring an initial cost of

consent. Moreover, there is a cost to house criminals in prisons and an additional cost for the allocation of goods and time. Most importantly, punishment involves inflicting some harm or loss of rights upon an individual which might be morally costly (and apprehensible), but societally necessary. The true dilemma of punishment arises when assessing who benefits from punishment despite the costs. This inquiry into punishment will explore how the societal benefit through punishment is more desirable than the profit of the individual.

I begin with a discussion of the widely-accepted founders of social contract theory. The theoretical traditions of Thomas Hobbes, John Locke, and Jean-Jacque Rousseau are the most prolific in establishing contractarianism. These theorists are the major alternatives in the history of social contract theory, forming the study with their respective works. The uniting feature from their works is a form of social contract that preserves equality and natural law while promoting self-preservation. Society shares a common goal of protection and appoints a sovereign to decide the limitations of punishment. The duty to punish is an integral duty of a sovereign; a sovereign that is unable to punish governs illegitimately.

The social contract tradition paved the way for subsequent punishment theory to evolve. Cesare Beccaria and Charles de Montesquieu wrote of a government's right to punish using the most effective means. As noted in the previous chapter, Beccaria and Montesquieu were influential in the American penal system by influencing the second Attorney General William Bradford. Melding these traditions prompted reform in the United States based on introspection of the human spirit as mutable rather than static. Beccaria and Montesquieu's theories reoriented the human spirit through secular

justifications to correct deficiencies in the state's method of punishment, solidify society's perception of harm, and analyze criminal motivation.

Finally, the contemporary interpretation of these traditions has been Americanized. Notably, Americans John Rawls and James Buchanan shifted the focus of the social contract theory from passive consent to active agreement. These combined traditions of Enlightenment and contemporary contractarianism establish the right to punish within the American context but extend beyond the initial founding of the social contract. The Rawls and Buchanan interpretations reveal the American social contract is a solidified vision of the social contract conceived by Hobbes, Locke, and Rousseau. However, the practice of the American social contract has deviated from the original inception by privatization punishment. Rawls addresses the societal apprehensions of critics in a moral sense. Buchanan, conversely, looks at the economic costs and benefits. Their conclusions provide theoretical basis for critics' empirically observed condemnation and disavows private punishment in a social contract.

The Social Contract Tradition

Before contextualizing private punishment, I first provide a brief overview of punishment's role in the social contract by exploring Hobbes, Locke, and Rousseau. Hobbes' *The Leviathan* began the Enlightenment social contract theory tradition after publication in 1651. Notably, the Hobbesian social contract emerges out of human reason and fear of serious bodily harm. In the anarchical state of nature, life is famously encumbered by "continual fear, and danger of violent death; and the life of man [is] solitary, poor, nasty, brutish, and Short" (Hobbes 1996, 75). The only law known is natural law which directs man to preserve himself from violent death. The aversion to

harm prompts man to form a social contract for a peaceable society free of the uncertainty in the state of nature. To correct any deviations from this contract, a powerful Leviathan of a ruler is created to govern based on man's aversion to injury and harm.

The Hobbesian sovereign can only act given the consent of the people, so punishment executed by the Leviathan is executed based upon the consent of those who form the contract (Schrock 1991). Hobbes states that natural law allows for measured punishment that appropriately corrects behavior but is not retributivist in nature (Hobbes 1996, 89).⁸ The Leviathan punishes only to elicit some benefit, in this case easing the fear of harm. When a sovereign is no longer able to inflict punishment for the goal of peace, the contract is dissolved. Following this prescription, punishment is established as a fundamental function of the sovereign. Additionally, Hobbes' definition of punishment in cost and benefit terms is distinctly utilitarian and serves to benefit society (Norrie 1984).⁹

Hobbes' social contract theory envisioned an unsavory state of nature and a tacitly powerful sovereign, but the social contract tradition evolved to describe a softer state of nature through Locke's *Second Treatise of Government*. Published nearly 40 years after *The Leviathan*, Locke's state of nature is a tempered version of Hobbes' chaotic vision; the Lockean state of nature is one of total equality based on the universal ability to reason (Locke, *Second Treatise of Government* 1980).¹⁰ Man serves as his own individual sovereign creating a perfect state of freedom (Locke, *Second Treatise of Government*

⁸ "...we are forbidden to inflict punishment with any other designe, than for correction of the offender, or direction of others... to hurt without reason, tendeth to the introduction of Warre; which is against the Law of Nature; and is commonly stiled by the name of Cruelty."

⁹ This utilitarian concept was argued in depth by Jeremy Bentham whose contributions will be discussed at great length elsewhere in this project

¹⁰ This developed style of punishment will also be discussed in a later chapter that singularly focuses on the liberal justification of punishment.

1980, 8).¹¹ Hobbesian equality is based on the equal ability to harm. Conversely, Locke finds men are equal in autonomy. While equality in the state of nature can lead to chaos, it is also necessary to build social connections. Men create inequalities amongst one another by socially connecting and holding bias. However, the state of nature, with all its bias, is not an assumed state of war. Instead, natural law, combined with reason, guides men's interaction with one another and maintains a generally peaceable existence even without a sovereign.

Locke elevates the state of nature beyond Hobbes' chaotic interpretation, however, he concedes that there is still a possible state of war. Man's love for himself will lead him to create inconveniences of bias (Locke, *Second Treatise of Government* 1980, 12-13).¹² This metanoia to war is inescapable for the state of nature when individuals act as their own sovereign. Rather than Hobbesian utilitarian punishment, "Locke identifies two distinct grounds for punishment: the protection of society (including deterrence) and restitution (or 'reparation' as Locke sometimes says)" (Tuckness 2010). As Hobbes finds punishment is motivated fear, Lockean punishment is done in a retributivist manner, guided by man's ability to reason. With uncertain punishment in the state of nature, individuals will forgo their own sovereignty and will found a "civil government [that] is the proper remedy for the inconveniences of the state of nature," (Locke, *Second Treatise of Government* 1980, 12). The sovereign, therefore, translates natural law into the social contract and punishes accordingly.

¹¹ "A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another..."

¹² "self-love will make men partial to themselves and their friends: and on the other side, that ill nature, passion, and revenge will carry them too far in punishing others"

Rousseau is the final author who completes the trilogy of the social contract tradition in his works *Discourse of the Origin of Inequality* (1755) and *The Social Contract* (1762). There is a near 100-year gap between Hobbes and Locke's work compared to Rousseau's and this creates an apparent different approach amongst the theorists. While Locke builds upon Hobbes by mediating the harshness of the human spirit and the state of nature, Rousseau provides a positively rosy ideal of nascent communities. Famously Rousseau begins his first book by stating "Man is born free; and everywhere he is in chains" (Rousseau, *Discourse on the Origin and the Foundations of Inequality Among Men* 2014, 1). The compulsion to obey (remain "in chains") and command (place one "in chains") is not derivative of natural law. Instead placing one "in chains" is a product of civil society. The law of nature is divided into self-preservation and pity for fellow man making Rousseau's state of nature one of universal kinship (Rousseau 1998, preface).¹³ Rousseau claims that Hobbes and Locke were unable to truly capture the peaceful reality of the state of nature. The context of Hobbes' and Locke's writings perverted their interpretation of man's disposition; the civil man's traits were transplanted into the savage man. This love amongst men means that the state of war is an impossibility (Rousseau 1998, 519).¹⁴

Rather than attempt to self-preserve, man created a civil society of competition and inequality. The social contract was created to mediate the inequality of civil society by creating equal citizenship in a political state (Rousseau 2014, 10).¹⁵ Rousseau's

¹³ "our own welfare and preservation, and the other exciting a natural repugnance at seeing any other sensible being, and particularly any of our own species, suffer pain or death"

¹⁴ : "inequality, which may subsist between man and man in a state of nature, is almost imperceptible...it has very little influence"

¹⁵ "it is impossible for the body to wish to hurt all its members"

sovereign is intimately connected to the people as Rousseau assumes a general will that limits sovereign action. Obeying the general will constitutes a social identity: “whoever refuses to obey the general will shall be compelled to do so by the whole body...he will be forced to be free” (Rousseau 2014, 11).¹⁶ Since punishment is not necessary in the state of nature, Rousseau calls for parsimonious punishment from a sovereign specifically (Rousseau 2014, 23).¹⁷ Causing harm is abhorrent and the necessity of punishment, though vital to a healthy state, is a dismal prospect (Rousseau 1998, 639).¹⁸ While punishment for Hobbes is hesitantly given to the sovereign, and punishment for Locke is merely the sovereign implementing the original rights of man, Rousseau’s punishment is an unfortunate byproduct.

The sovereign plays differing roles of social identity in Hobbes, Locke, and Rousseau, but retains two uniting features. First, the sovereign is a direct governing authority granted to a state that is innately connected to the desires of a people based on consent. Secondly, all states must punish to maintain the social contract. This initial examination of early social contract theory aids in identifying problems that arise with private punishment. Outsourcing punishment is attractive to a state due to the perceived efficiency of the act; a state can fulfill the stipulations of a social contract with diminished burden and investment. However, multiple inconsistencies arise when considering this move. The first issue of private punishment is that it maintains the imbalance in the state of nature. For Hobbes, the fear of death is constant in this state; for

¹⁶ The universal morality that Rousseau imposes by forcing men to be free is a concept related to that of Immanuel Kant. His punishment theory is examined in later chapters along with others mentioned in this chapter, i.e. Jeremy Bentham and John Locke’s punishment

¹⁷ “A well-governed state has few punishments, not because there are many pardons, but because criminals are rare”

¹⁸ “Punishments had to be made more severe, as opportunities of offending became more frequent, and the dread of vengeance had to take the place of the rigour of the law”

Locke, the fear of harm; for Rousseau, the fear of war. Society must consent to an impartial judge entirely or this state of nature is preserved with several individual punishers. Entering a social contract forces the individual to forfeit his ability to punish and allows the sovereign to act in his place. A social contract places limitation on harmful action and regulates, uniformly, what is destructive to society. No individual retains the right to punish since this is a forfeited right when forming the contract. The state, empowered by original consent impartially punishes to preserve uniformity. When an individual or a group of individuals punish, they are susceptible to inconveniences. An individual in the state of nature obeys few laws but the state regulations in civil society. If a private prison punishes, they are empowered as individuals to punish in a manner outside of contractual terms.

An imbalance in punishment is precisely the reason to eliminate any entity that punishes independently of the sovereign. Private prisons remove themselves from the confines of the social contract and act as independent punishers who utilize their own methods and techniques to correct (Gottschalk 2015, Savas 1987, Avio 2003). When punishment is outsourced in privatization, the duty of punishment is delivered back to an individual. Society is then delved retroactively into a partial state of nature where a sovereign punisher is empowered to act given the consent of the people, while individual punishers simultaneously exist. This means the contract is invalidated since the original terms established a singular punishing body. Initially punishment as a state tool removes the uncertainty of the state of nature, but the uncertainty returns when a member of the contract must navigate multiple punishers. The original terms of the contract are outsourced to private prisons which is a regression of the original agreement: the

individual gave up their natural right to punish, yet witnesses individuals punishing (i.e. contracted prison entities punishing). The concentration of coercive power in privatization breaks the specifications in social contract of who can punish and to what degree. A new contract is formed between an individual and the state that exists within the social contract. This new contract negates portions of the social contract and instead maintains the inequality in the state of nature.

A second problem also arises when popular sovereignty is considered. In addition to the retrograding to the state of nature, the individual victim is removed from a sovereign's consideration of punishment. Originally, the right to act as a judge and executive was held by the individual in the state of nature and the social contract is still empowered to fulfill the individual punisher, but on a political level. The established state derives power from sovereignty and must appease the individuals who forsook their right to punish. Subsequently, natural law is the ultimate reference for punishment. Natural law empowered original savage man to punish, but when savage man became civil man, civil men created a state beholden to the only law they knew: natural law. Therefore, all decisions the sovereign makes are simply a reflection of the society itself. When punishment is privatized, a smaller group of individuals execute punishment and popular sovereignty is ignored. As the social contract is undermined and a partial state of nature emerges, then the individual who once constituted the social contract is disenfranchised from the contract he created. The very act of removing an individual or small group of individuals that determine punishment is in opposition to the duties of the sovereign. It exemplifies that individual private groups can alter the penal power of the state, ignores

the specific theoretical justification of punishment that the state holds, undermines accountability, and skews rehabilitative attempts (Lacey 2008).

While sentencing is still retained by popular sovereignty the act of physically causing a loss of right and bodily autonomy is outsourced to an entity that acts outside sovereignty. The sovereign, innately connected to the wishes of the people, dictates that punishment must be used to ensure security. The spirit of the people is minimized in a private prison system and the connection with the people is broken. The individual punisher was guaranteed proper punishment by a social contract. Private punishment dissolves this social contract and disenfranchises the individual's right to see just punishment. The private entity or individual has a greater say in the culture of punishment, removing the check of the public and limiting the guidance of popular sovereignty. Conversely, the ideal sovereign in a social contract is not free to act unchecked; it is limited in nature. The sovereign is beholden to the individual, but private punishment creates a punishment entity that is outside the social contract. By acting in this way, private firms can avoid the democratic process and disenfranchise popular sovereignty, building, staffing, and operating without the watchdog role of public scrutiny. For instance, private firms can build fully functioning facilities at will and propose a contract with a state after construction is complete. This offer is particularly to states since they will not have to wait for a facility to be built nor will they have to pay for such a facility. The issue, however, is that voter is kept from the decision. Prisons carry social stigma and can be potentially dangerous for a community (Antonuccio 2008). Subsequently, the use of popular sovereignty and consent is eliminated in contract punishment.

The third and final problem observed in the social contract is that private punishment undermines the existence of the sovereign as a complete and whole entity. The coercive use of force for correction is established as a duty of the individual as per natural law. However, as Hobbes and Locke voice, this duty is transferred to a sovereign who fulfills these tasks without human inconsistencies. By outsourcing punishment, the sovereign is removing this coercive power from its arsenal; it is admitting that it is not a sovereign at all. Often, the prevalence of neoliberal ideology is a key factor in this move to privatization. Recall that neoliberalism is “privatizing failure and denigrating the role of government to solve problems” (Gottschalk 2015, 11). If a sovereign is failing to punish adequately, then society has a larger problem than punishment gone awry. The social contract is revealed to be unfulfilled when a government must turn to privatization. The rise of neoliberal thought beginning in the 1980’s displays that the sovereign is struggling in the most basic of functions. Additionally, neoliberalism calls for harsh punishment; it aims to incarcerate the problem rather than solve the problem. Longer sentences were imposed as the ideology gained prevalence and created overcrowded prisons that has no choice but to private (Kyle 2013). A sovereign must punish as prescribed and appropriately handle the level of criminality in a society. The very underpinnings of the social contract are challenged when delegating punishment to an external source. When a sovereign hands over this coercive duty, it is handing over part of its legitimacy and duty for a contract. When the sovereign does not fulfill all the duties that society has bestowed, that sovereign is a pseudo-institution. Statute law from the state will not be binding if the sovereign does not have the coercive power to force compliance.

Outsourcing this to a separate entity chips away at validity and subsequently collapses the authority of the sovereign. When punishment is done by the state, it reveals a properly functioning social contract. If the state can no longer handle the task of punishing, the social contract is broken. Society cannot trust their sovereign to protect them and a dysfunctional state remains. With private punishment, an illegitimate sovereign hobbles along with its duties, unable to properly fulfill the original contract. The private prison industry fills these holes but does not actually fix the problem. The sovereign should be the sole punisher in a social contract as the inconvenience of an individual punisher undermines the sovereign's authority.

Social contract theory places the duty of punishment in the hands of an established sovereign. Civil society, as cemented by a contract, cannot incorporate contract punishment. Private punishment creates a partial state of nature, undermines popular sovereignty, and usurps the specified power of the sovereign. However, the right to punish differs from the intent of punishment. Subsequently, social contract theory gave a platform for punishment theory, specifically the tandem theories from Montesquieu and Beccaria. Punishment theory notes the foundation of a united people and attempts to articulate their goals through properly applied punishment. I have presented an argument against contract punishment based on the existence of a sovereign. Next, I will examine punishment as an execution rather than punishment as a duty.

The Punishment Tradition

The social contract theory of Hobbes and Locke established the right to punish as an essential component of the state. Montesquieu, publishing in 1748, (prior to Rousseau's works) wrote his treatise *The Spirit of Laws* to engage with the actuality of

the social contract. He examines the components of a healthy state and posits that a properly checked government is best at serving its constituents. The influence from the social contract is seen in the conception of a limited government with checks and balances. Hobbes and Locke introduced the concept of a state beholden to their citizen. Montesquieu expanded upon this skeletal structure and concretely visualized a government that could serve the people over its own ends. Fear, for the contractarians, creates of a contract to avoid uncertainty in bodily preservation yet Montesquieu disavows its use (Montesquieu 2011, VI:2).¹⁹ Using fear means using the harshest form of punishment to dissuade criminality. Contractarianism prescribes scaled punishment that is dictated by natural law, so the sentence is scaled to the severity of the crime. Montesquieu concurs with this point. Severe punishment (where the criminal's spirit is disregarded) is fit for despotism. Overcorrection gradually lessens the impact of punishment until a despotic state has reached a limit of severity and ultimately becomes ineffective. Montesquieu uses natural law for this justification; the natural attributes of shame sufficiently deter.

Montesquieu preserves the people by protecting their safety through reform. Rehabilitation can protect society rather than provide vengeance to those harmed (Montesquieu 2011, VI:13). Reform respects the criminal as a consenter to the social contract that must be handled methodically. This important examination is more than a moral compass for appropriate punishment. Montesquieu, in Enlightenment fashion, secularly proclaims why punishment should preserve the dignity of the criminal by

¹⁹ "...in moderate governments, where the life of the meanest subject is deemed precious, no man is stripped of his honour or property until after a long inquiry; and no man is bereft of life till his very country has attacked him — an attack that is never made without leaving him all possible means of making his defence."

eliminating excessive punishment, like torture, and regulating uniform punishment apt for cultural norms. With no moral attachment, Montesquieu finds reform pleasing to society and the ethical soul.

In 1764, Beccaria published *On Crimes and Punishment* building upon Montesquieu's "foundation" with his own "superstructure" (Beccaria 1819, II).²⁰ Good law, says Beccaria, reduces the need to punish. With this assertion, Rousseau's influence comes to light due to Beccaria publishing later than Montesquieu.²¹ Rousseau's state required minimal punishment, a take that Beccaria continues. Laws are established to secure man from the perpetual war that is inevitable in the state of nature. Beccaria takes a Hobbesian approach to the state of nature where mankind continuously returns to war. However, Beccaria also establishes a Lockean sense of equality: any excessive domination of man over another is tyrannical (Beccaria 1819, VII).²² Such subjugation is an abuse of natural law and ignores what is in the "hearts of men" for the true authority of punish. State laws ought to punish without over correcting so that punishment may prompt reform, like Montesquieu's prescriptions. Reform will benefit society as a conglomerate. Importantly, benefits will "increase in proportion to the number of people and the opposition of private interests" (Beccaria 1819, VI). Punishment theory, using contractarianism as a basis, solidifies the core of punishment: society's benefit takes precedence over private interests.

²⁰ "Every punishment which does not arise from absolute necessity, says the great Montesquieu, is tyrannical"

²¹ When first published, *On Crimes and Punishment* was derisively portrayed by the "Parisian *Gazette littéraire de l'Europe* as a simple restatement of Rousseau's *Social Contract* and attacked in Italy as the work of a 'socialista'" (Harcourt 2013, 3).

²² "The relations between man and man are relations of equality"

Unpacking the social benefit farther, torture and other forms of pain that cause harm prior to proving guilt is abhorrent to natural law and concepts of equality (Beccaria 1819, XII).²³ Proper judgment corrects these acts. Ultimately, it is not the severity of punishment that deters, but rather the certainty that punishment is imminent. While previously seen as a restating of Rousseau ideals, *On Crimes and Punishment*, firmly negates the use of the death penalty and opts for reform. Not only does reform respect individual rights and dignity, but the population benefits from perceiving punishment as imminently harmful. Man wishes to avoid harm, as established in social contract tradition, so the use of punishment should be enough deterrence without causing abhorrence to the laws of nature through excess.

The lineage of punishment theory begins to solidify within the social contract. The social contract requires a sovereign to be representative of the people and limited by the people. It is maintained through coercive punishment. Punishment theory defines how this sovereign state acts and the purpose of punishment in a contract. Montesquieu and Beccaria draw upon the obligations of the sovereign in a contract to define punishment theory which I also find to be incompatible with contract punishment. While my previous examination found inconsistency with privatization based on the instatement of a social contract, this section will examine how private punishment violates the practice of punishment due to a lack of parsimony.

Private prisons are originally intended to alleviate the pressure on the government by implementing punishment that is equal to the efficacy of public punishment. Therefore, the private punishment must be equal to the sovereign in task and use. When a

²³ “The end of punishment, therefore, is no other than to prevent the criminal from doing further injury to society, and to prevent others from committing the like offence”

sovereign is unable to punish efficiently, proponents of private punishment defend contract punishment as mechanism to assuage the inadequacies of the state. I mentioned previously that if a state inadequately deals with criminality, it is not a legitimate sovereign, however, this is not the only problematic theoretical observation. I formerly defined neoliberalism as having four distinct parts of economic regulation, welfare state devolution, a cultural shift towards individual responsibility, and a proactive penal apparatus (Wacquant 2009). These combined variables create a new prison complex that has implications for private prisons and for the greater concept of punishment. The push for privatization and for harsh punishment combined to create a recipe for incarceration culture beginning in the 1980's after economic upheaval of previous decades. As neoliberalism rose to prominence, the lower echelons of socioeconomic status were increasingly upheld to harsh standards of codified law and sentencing. Subsequently, neoliberalism gave the illusion that criminality was increasing, and the state was unable to mediate its effects. A private firm, conceived out of neoliberal politics, emerged to assist in multiple areas such as health care, schooling, utilities, and transportation. Neoliberal politics simultaneously effected sentencing procedures and labeled specific demographics as criminal. Ultimately, these twin dynamics secured individual profit for a firm that playacts as a sovereign that lacks consent. Neoliberal politics consequently alters the health of a society with excessive punishment.

As the former chapter notes, the escalation in private prison facilities (such as CoreCivic, Management and Training Corporation, and the GEO Group) and their subsequent increase in profit margins point out that punishment is a lucrative business. Neoliberalism's harsh sentencing procedures lack parsimonious punishment and attacks

the problem of crime retroactively rather than reactively. The ideology does not attempt to identify societal ills and resorts to punishing the problem rather than rectifying the root criminality. Neoliberalism politics pushes for prison time and longer sentences rather than probation and reintegration (Kyle 2013). Studies have observed discrepancies in recidivism rates in Florida (Bales, et al. 2003), Oklahoma (Spivak and Sharp 2008), Minnesota (Duwe and Clark 2013), and Mississippi (Mukherjee 2016) based on time spent in private or public facilities and private prisons have greater rates of recidivism comparably. When a prisoner is not rehabilitated, they recidivate and escalate a cycle of punishment that offers no relief to society but guarantees a profit to private contractors. Ideally, punishment should decrease as it becomes more effective in correction criminality. Private prisons operate under opposite assumptions. They lose profit by losing *per diem* contracts when the flow of prisoners is minimized. The state can adequately handle punishment and private prisons become less enticing. The theory provided by Montesquieu and Beccaria contradict the observations of the private prison industry. Punishment theory urges a state to parsimoniously punish at the lowest threshold, but contract prisons are not contracted to deal with meager populations. Subsequently, private prisons do not operate under the theoretical observations of the punishment theorists.

While the amount of punishment is troubling, the intensity of punishment observed also indicates problems with privatization. The prior chapter of this dissertation mentioned private prisons' rising profit margins are concurrent with the rise of neoliberalism. Neoliberalism unwittingly promotes the use of quick punishment without examining proper application; it promotes an iron fist with harsh consequences which

tend to rush the process of sentencing and punishment (Kyle 2013). Again, this contradicts the prescriptions of Montesquieu and Beccaria. Punishment should be parsimonious to be effective and should occur with a system that analyzes the unique context of the crime. This appropriately balances cost and benefit and punishes due to similar harm committed. Neoliberal punishment promises the harshest of punishment to deter but loses the balance of harshness necessary. Montesquieu and Beccaria disparage capital punishment because society is numbed to harm and punishment no longer has the desired effect. Private punishment's lack of rehabilitative services exacerbates harsh punishment. With criminals having to pay for their carceral costs of medical bills and reform programs, criminality is maintained and the harm to society multiplies. The duty of punishment, so important to the legitimacy of the sovereign, is never fulfilled when prisoners are forced to serve long and severe sentences. The dignity of the prisoner is lost when they are subjected to these practices. The equality of an individual is preserved in Montesquieu and Beccaria's theory; one is still an equal member of the social contract despite criminality. The criminal must be processed evenly and consistently so that punishment is effective.

The foundations of social contract theory defined the ideas of punishment of Montesquieu and Beccaria. Both fields of political theory have proven to be incompatible with private punishment, however these traditions are dated. A contemporary interpretation helps determine if the accusations against privatization are still relevant. I will examine if the prescriptions from contractarians and punishment theorists are still pertinent in the existing social contract. Even more important is finding theorists who

root themselves in American tradition. Their national identity serves to translate the social contract in the present-day United States

The Existing Social Contract and Punishment

Early social contract theory focused on consent of a people. However, more recent social contract theory looks towards institutional stability through agreement rather than consent. The stability of a social contract is more telling than the original action of consent. While consent displays an initial agreement to protection via the sovereign, institutional stability shows a functioning agreement that self-enforces over time. The difference between the concepts is that agreement uses self-interested reasoning for individual benefit and instills a distinct sense of moral obligation once placed in a social contract. Agreement is orchestrated with self-awareness and contextualizes the societal placement of the individual. Consent, conversely, carries no moral justification or self-reflection. It only serves to protect one's self without any consideration of societal obligations once in a contract. This chapter began with modern contractarianism from European Enlightenment but will now shift to determine the social contract's relevancy in contemporary America. Enlightenment social contract theory may be perceived as antiquated and inapplicable to present-day. If contemporary theorists still find private punishment incompatible, then the practice may still be condemned.

Two contemporary influences on social contract theory are examined here: John Rawls' justice based social contract theory and James Buchanan's subjectivist social contract theory. Rawls' social contract theory creates an overlapping consensus on societal cooperation (Hill 1995). Buchanan's subjectivist social contract theory uses uniformity to maintain peaceable relations (Hill 1995). Contrasting these contemporary

theories with the established theories of Hobbes, Locke, and Rousseau will create a lineage of the social contract. Originally, punishment was accepted to prevent a return to the state of nature (a retroactive approach); the new interpretations of the social contract focus on stability of institutions (a proactive approach). Popular sovereignty, the driving force of the contemporary contract, is the greatest threat to the private prison industry; society agrees on the stability of institutions for punishment and criminal law but does not agree to a contract between one private industry and the state.

Rawls introduces the concept of justice as fairness. Previous conceptions of the social contract use utilitarian justice, but Rawls finds speaks to various interpretations of justice that contribute to overlapping consent and social cooperation. Rawls does not analyze human motivations like Hobbes, Locke, and Rousseau, but he does offer justice as the basis for all human action. Rawlsian motivations of truth and justice are chosen independently through a veil of ignorance. The just concept is conceived with no outward influence and unites men in agreement on these terms. Although man wishes to cooperate, there are inconveniences (as Locke theorizes), which limit this collaboration. However, even with differences in concepts of justice, all agree on underlying principles that reinforce social cooperation and provide fairness and equal stature under law (Rawls 1971, 5).²⁴ This differs from a Rousseauian sovereign that forces one to be free and conform to the general will as Rawls sovereign does not force compliance. In the pursuit of overlapping consensus, a state must utilize rational laws and provide an unbiased judiciary to mitigate breaches of law like Montesquieu and Beccaria's theories. Here,

24 "Those who hold different conceptions of justice can, then, still agree that institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life."

Lockean style impartiality avoids the inconveniences of man acting as his own judge. Similarly, Rawls promotes fairness to achieve justice through equal citizenship and opportunity.

When punishing, previous social contract theory established criminality under utilitarian means: because criminal acts harm society, they must be punished accordingly. However, Rawls rejects the utilitarian justification. Social cooperation is threatened by lawbreaking, compromising the status of justice as fairness. Subsequently, criminal law must follow natural law to limit harm and is not done for some overarching morality (Rawls 1971, 314).²⁵ Rawls channels Lockean theory and asserts that life, liberty, and property are equal guarantees in the contract and any violation of this agreement allows the state to intervene against the constitutional agreement through punishment that is defined as “not simply a scheme of taxes and burdens designed to put a price on certain forms of conduct and in this way to guide men’s conduct for mutual advantages” (Rawls 1971, 277). Importantly, Rawls lays out the intent of punishment to correct moral deficiencies, but states what punishment should not do: provide benefit for individuals. An individual benefitting from anti-social behavior means one is benefitting from injustice which is an immoral action.

Contrasting Rawls’ moral approach, economist James Buchanan offers a modern social contract that provides uniform rules of engagement. Buchanan uses a Hobbesian analysis of man’s motivations; man rationally looks for his own benefit in the most efficient way and so Buchanan’s social contract begins in economic terms. Rawls posits

²⁵ “The purpose of criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end.”

that fairness should be socially acknowledged (a Lockean concept), but Buchanan holds that peaceable existence is to be maintained (a Hobbesian concept). Peaceful interaction emerges from agreements in economic exchange and property rights, but a state of nature lacks a force that polices economic infractions. State institutions emerge to enforce peaceful economic exchange and create uniformity in behavior beyond trade and industry. Buchanan's consensus of the people replicates Rousseau's sovereign, but in the negative. While the Rousseauian sovereign forces others to be free, Buchanan's consensus of the people allows one to be free without interference.

When behavioral norms are broken, punishment must be subjective, enforced, and cost-efficient. Buchanan echoes Montesquieu's assertions on plurality: differing cultures will require different interpretations of punishment. He repeats the command to "live and let live," by codifying law in such a manner (Buchanan 1975, 21).²⁶ While there is a cost of obeying law (i.e. forsaking a level of personal freedom), a legal structure provides benefit to the entirety of society through individual freedoms (Buchanan 1975, 111).²⁷ While law abiding is a public good, there is a cost of enforcement. Additionally, popular sovereignty dictates punished based upon the threat of punishment. An individual might be unwilling to make punishment particularly harsh because he might be subject to this punishment or punished as an innocent victim due to error. The attributes of punishment culminate in the necessity of reform: "punishment institutions are chosen only for the purpose of preventing or deterring violations" (Buchanan 1975, 134). While a member of society witnesses punishment being given out for violations, he faces the dilemma that he

²⁶ "Mutual agreement, backed up if necessary by effective enforcement, is a necessary condition for social interchange."

²⁷ "It is not difficult to see that a legal structure confers benefits on all members of the community in most cases, benefits that stem from the order that is introduced"

might be subjected to such punishment and would hope that his benefit is realized from such an action. Subsequently, a rational individual wishes to see punishment reform the criminal lest he also be subjected to punishment (Buchanan 1975, 134).²⁸ Buchanan finalizes his views on punishment by considering how a state may contract an external agent outside of agreed institutions to offset the cost of punishment. While this might balance costs and benefits and make punishment more effective for the time being, this raises his ultimate question for external punishment: “how is this external agent to be controlled?” (Buchanan 1975, 146). How, asks Buchanan, can this agent remain under the jurisdiction of the state when it is given the powers of a state?

Rawls and Buchanan establish the modern interpretation of the social contract as agreement. While Rawls comes from a moral, Lockean concept of justice as fairness, Buchanan establishes his theory in Hobbesian terms of protection from uncertainty and harm. For Rawls, punishment aims to restore fairness which means individual benefit is condemned. Buchanan reaches a similar conclusion coming from a utilitarian standpoint. Any external agent skews cost/benefit ratios for society and does not provide uniform rules of engagement. This discussion shows that the contemporary social contract theory is still at odds with privatization. Private prisons innately cannot be written into the contemporary, American social contract as they violate overlapping consensus and stable cost/benefit relations.

²⁸ “He observes persons being coerced and harmed by the rules, after violations have occurred. The damage that the violation itself represents has been done; no punishment will restore the status quo ante. At this stage, the individual member of the inclusive community, which includes the person who has violated law as well as those who are damaged by the law violation, may be strongly tempted to modify or to change the rules that he may have indicated to be preferred in his planning or constitutional frame of reference.”

First, Rawls' fairness imperative in punishment cannot be combined with private prison systems due to a lack of uniform morality in private punishment. Justice ensures fairness based on perceived equal and social stature for universal morality. The private prison system operates outside the boundaries of sovereignty and therefore undermines uniformity in carceral techniques because overlapping consensus is eliminated from technique selection. These independent punishment philosophies led to prisoner abuse and safety concerns from undertrained personal and understaffed facilities (Antonuccio 2008, Davis 2000). The reform instilled in the prisoner does not organically emerge from universal morality. Moreover, overlapping consent does not act as a watchdog for private prisons since contract prisons intentionally remove themselves from the public sphere. Instead, an individual or a small group acting as an entity makes the decision on how punishment should be applied through variations in incarceration culture (Antonuccio 2008). This allows them to posit their private identity and contract prisons are free to choose combinations of labor, rehabilitation, and confinement that are not scrutinized by public opinion. Overlapping consensus is removed from policing the effectiveness of these techniques and this ultimately may undermine the state's attempts at rehabilitation (Lacey 2008). The missing piece of public opinion or consented punishment circumvents the social contract and asks private prisons to instill their own sense of justice. The criminal then is punished outside the social contract by the private considerations of an individual punisher. Moreover, the variation in punishment stems from a variation in the concept of justice. Multiple parties interpret justice varyingly without the larger consent of society and punishment becomes unfair.

Following Rawls' argument of justice as fairness comes the conclusion that injustice is unfairness. Injustice is the highest affront to law based on overlapping consensus so activity that promotes such injustice is societal unacceptable. If an individual profits from deviant behavior, he profits from injustice. Ideally, punishment cannot be used to profit, but to rehabilitate (i.e. reinstate justice). Profiting from unfairness cannot exist in a society that abides by an overlapping consensus and shared sense of justice. The societal agreement incorporates natural equality by enforcing fairness under law and views the society as a conglomerate of consenting individuals. If an individual morality is deviant from this conglomerate, it must be reconfigured. No single morality can stand in contrast with the concept of fairness and rehabilitation is imperative. However, as mentioned previously, private prisons are unwilling to rehabilitate at the same levels of state prisons. Rehabilitation is anti-rational in a private prison complex. Contract prisons do not have high incentives to rehabilitate as it guarantees a loss in capital. If criminality is controlled through punishment, then the state should eventually have the means to punish in public prisons and eventually phase out contracts with private firms.²⁹ The concept of justice as fairness is weakened when considered in a private aspect because uniformity in the public sphere is compromised and rehabilitation (the avenue to reinstate uniform morality) is not utilized. A private entity that is not beholden to public scrutiny can decide what justice is, even if it deviates from popular sovereignty. The overlapping consensus further decays because the contract prison is self-interested; the contractors want to preserve their gain and not preserve fairness, so they do not rehabilitate. Therefore, there is no justice in punishing privately.

²⁹ This issue was presented as one of the societal concerns of private prison critics mentioned in the previous chapter.

Secondly, Rawls uses moral justification for punishment, but Buchanan examines punishment through economic terms. Economic exchange is rooted in mutual agreement to specific rules of engagement; a sovereign is legitimized to guarantee such exchange. Buchanan's economic approach might seemingly be supportive of private punishment endeavors as it attempts to maximize cost efficiency. However, private prisons may offer economic savings on face value but create costs elsewhere, fail to provide cost savings at all, or even have entirely incorrect calculations of cost savings that portray private facilities as more cost effective than they really are. Local economies have seen a decrease in jobs for free world laborers (Sloan 2010), Australian prisons have shown lax accounting standards that incorrectly portray cost savings (Andrews 2011). Prisoners and their families are billed for housing, processing fees, meals, and healthcare all to offset the cost saving techniques of the private prison and shifting the cost of punishment onto families (LeBaron 2008, 78). Private prisons also have been found to have negligible cost savings in multiple studies (Pratt and Maahs 1999, Perrone and & Pratt 2003, Lundahl, et al. 2009). This evidence indicates that private prisons subvert the cost/benefit analysis. There is seemingly no consistent evidence that private prisons consistently provide economic benefit. This indicates the rules of engagement and exchange in the social contract are suboptimal and are not representative of a contract.

Buchanan's economic assertions undermine the cost and benefits of monetary value, but this criticism can also be extended to consider the benefit of punishment on the individual prisoner. A sovereign is instated to facilitate economic transition; one basic function of this sovereign is to provide safety through punishment if someone deviates from the rules of engagement. Therefore, if an entity profits from social deviancy, they

are profiting from deviations to the rules of engagement. This entirely eviscerates the reasoning to have this economically based sovereign. In fact, private punishment can exacerbate this uncertainty as they do not aim to rehabilitate as state prisons do. Ultimately, no individual can profit when criminality is prevalent because there is uncertainty in the social contract. Subsequently, a safe society ultimately protects economic agreements. Private prisons fail to stress rehabilitation force prisoners to carceral costs for their own rehabilitation (LeBaron 2008). Rationally, they do not implement rehabilitative methods because it undermines future, individual profit and if they do take rehabilitative steps, it is only to a threshold that guarantees a future contract for satisfactory work (Mukherjee 2016). While Buchanan praises the concept of utilitarianism in punishment, contracting externally is not utilitarian in its ends. The cost of controlling an external agent exceeds the benefit of offsetting governmental pressure. Critics of private prisons point to the economic shortcomings of private prisons. Buchanan theoretically roots these accusations. Combining Buchanan's theory with the empirical evidence presented by critics reveals that private prisons do not punish efficiently or fulfill utilitarian terms for either monetary inputs or rehabilitative outputs.

Punishment is an act that must be done by the established state and this is exemplified in contemporary interpretations of the social contract. For Rawls, justice is not fulfilled in a private context because there are various interpretation of justice and profiting from injustice is an unjust act. Additionally, Buchanan's theory cannot be put into a private scheme as private punishment does not practically fulfill the promises of economic benefit and compromises the stability of future economic interactions. These

considerations display that contracted prison work cannot be configured in the American context.

Conclusions

Punishment is integral to the social contract. It stabilizes a society, preserves individual rights, and maintains a sovereign. Many critics in the prevalent, empirically-based debate are concerned that private prisons profit from criminality and therefore promote criminality by reducing rehabilitative techniques. This in turn creates a fragile society plagued with harm. The social contract attempts to assuage the likelihood of harm by leaving a state of nature. This Enlightenment proposal is still relevant in the American context. Rawls asserts that individuals may be treated unfairly when subjected to criminal harm. Criminal harm offends Buchanan's adage of "live and let live." The social contract, from Enlightenment to contemporary conceptions needs rehabilitation. Private prisons violate this prescription with a lack of rehabilitative programs and strict enforcement of carceral costs that create an illegitimate sovereign created without consent or agreement. Privatized systems detract from the initial intent of the contract: the established concept of state punishment has been perverted by delegating the job to private firms. This undermines the legitimacy of the state in a more substantial way. Punishment is so integral to the functions of a state that removing this singular building block loosens other foundational securities of an established state. The state is unable to protect its people. Without control over corporeal safety and moral preservation, a sovereign does not uphold the social contract. When a state uses private punishment, the sovereign reveals

its illegitimacy and creates another sovereign that is removed from those who instated the original contract.

The subsequent chapters will build upon these prescriptions of social contract theory and punishment for rehabilitation. The social contract and punishment theory shows punishment as a necessary component for societal stability. However, punishment has expanded beyond Montesquieu and Beccaria's preliminary understand. The discussion conducted in this chapter regarded the sovereign's right to punish. As this dissertation continues, I will examine the choices a sovereign makes regarding the principle of punishment as there are multiple choices presented. The examination in the following three chapters will address the choice of punishment and the incompatibility of the private prison complex with all three prevailing views of punishment as defined by Bedau & Kelly (2015). These three methods of punishment are most commonly conceptualized and constitute highly recognizable theories of punishment. Two basic versions of punishment, consequentialism and deontology, are prominent. Often these traditions are cited as the general approaches to societal punishment in the aspects of restitution and justice. Consequentialism promises restitution in punishment, so discipline is given based on actions taken. Deontology promises justice through reform to correct immorality. Consequentialism and deontology treat restitution and justice as separate goals, but liberalism combines these two approaches. The liberal view of punishment mediates the human tendencies for retribution and acknowledges the injustice done to an individual (Bedau and Kelly 2015).

Each of these punishment principles will have its own chapter of examination and will be paired with the theorist best exemplifying the method. Consequentialism, deontology, and liberalism will be observed through the theories of Jeremy Bentham, Immanuel Kant, and John Locke, respectively. While this chapter provided sovereign's justification for punishment within the social contract, the sovereign is presented with a choice in punishment. The triumvirate of subsequent chapters speaks to this choice and analyzes the goals and methods of various punishment choices. Subsequently, these choices will be pitted against private punishment. While private punishment has been condemned for use in a social contract, there are further incompatibilities. I will display that, regardless of a sovereign's choice in the punishment principle, contract punishment undermines the intent of a punishing sovereign and remains contentious in a social contract.

Chapter 3: Bentham and Consequentialism

So far, this project has traced the modern debate regarding privatized prison and noted the lack of theoretical backing behind empirical observations. While these observations are valuable in the argument against private prisons, they do not begin at the root of the problem. The cultural issues, misleading economic benefits, and lack of government control are consequences of the greater theoretical rationalizations for strictly state-run prisons. Because the modern argument against privatization ignores theoretical roots, I explored the conception of criminal law and punishment through Enlightenment-era social contract theory; punishment theory; and modern, American contractarianism.

My previous examination of these theories shows that privatization is incompatible with legislative punishment as it undermines the legitimacy of the sovereign as a punisher. The empirically based debate attacks the effects of privatization while my theoretically based argument addresses the legitimacy of privatization. The ability to legally harm has been proven to be the sole responsibility of the sovereign. I have established how privatization stabilizes an illegitimate and weak sovereign, but now this dissertation will turn to the justification of punishment that a state may choose. While I have established that there is an authority that punishes, there are still goals and purposes of punishment that may be explored. A state must punish, but how does it punish and for what ultimate, moral reason? These questions go beyond the writings of Montesquieu and Beccaria; they address the purpose of punishment in a social contract and provide the purpose of discipline with a specific goal in mind. Previous work done condemning private punishment does not explore the basic assumptions about the principle for punishment. I have established the authority to punish through social contract theory, but

what is the purpose served through legislated harm? Do private prisons adhere to these purposes? I address these questions by exploring all major justifications for punishment. This examination reveals that neither the authority nor the purpose of punishment can justify a privatized system.

The previous chapter concluded by mentioning the three justifications that I will proceed to examine: consequentialism, deontology, and liberalism. Consequentialism and deontology are two dominant forms of punishment, considered complementary approaches for deterrence and restitution. The simple dichotomy they present is the precise reason why they are so prolific. They act as two halves to a single whole: prevention punishment versus retributivist punishment. Subsequently, I will first discuss Jeremy Bentham's consequentialist deterrence strategies in the preceding sections of this chapter. I will examine Bentham in conjunction with his utilitarian views: consequentialism is often paired with utilitarianism to achieve a rational and efficient reduction in injury. The chapters following the considerations on Bentham will discuss deontology and liberalism, respectively and will also explore their compatibility with private punishment. Ultimately, the forms of punishment listed here have varying rationale to punish; punishment may be for prevention, retribution, or individual preservation. However, none of these justifications can incorporate a system of private punishment.

Rational Consequences in Utility

The Panopticon, a structure championed by Bentham, concretely exemplifies his utilitarian approach to punishment. Bentham describes a circular building with partitioned cells climbing upward. In the center, an inspector's lodge rises in a tower-like

structure allowing a full view of the cells. The inspector easily observes every prisoner (Bentham proposes 288 persons) with minimal effort. The prisoners are unaware of whether they the inspector is watching, and they act compliantly to avoid the consequence of punishment. Subsequently, even when the inspector is engaged in other activity, prisoners behave under the mere threat of being observed. The very structure of the penal institution promotes efficiency based on possible consequences: “the persons to be inspected should always feel themselves as if under inspection, at least as standing a great chance of being so, yet it not by any means the *only* one” (Bentham, *The Panopticon and Other Prison Writings* 1995, letter V). While the inspector cannot physically observe every prisoner, the likelihood of a prisoner being observed means that order will remain even when the inspector is occupied elsewhere. This proposed structure would allow more prisoners to be housed, lower mortality rates, and a more efficient staff even with fewer inspectors. This ideal that Bentham envisioned, described down to cell dimensions and light sources, is indicative of Bentham’s utilitarian and consequentialist approach: punishment should be done to the least degree for the maximized benefit and should punish in consequence to mischief committed. The consequence should have an appropriate level of harm that is ultimately wholly beneficial to the community. Thus, punishment (an action of the state) should maximize society’s benefit rather over the individual’s benefit. The ultimate social benefit is deterrence, as seen in the Panopticon’s inspector. The inspector’s gaze deters any mischief from prisoners who fear the consequence of punishment. On a larger scale, this deterrence prevents social harm through reform and rehabilitation.

The efficiency of punishment in the Panopticon illustrates Bentham's utilitarianism. In his work *An Introduction to the Principles of Morals and Legislation*, Bentham begins by defining motivators of human reason that constitute a utilitarian approach. After Bentham establishes this concept, utilitarianism is applied to punishment. This section will follow Bentham's structure and first discuss utilitarianism within the context of punishment. First, Bentham establishes that pleasure is the greatest human motivator and pain is dutifully avoided; man reacts to the situation around him to achieve pleasure. The corporeal experience of pain and pleasure is so prolific that is the basis of all human action, including legislation (Draper 2002, 2).³⁰ The individual experience of pain and pleasure can be aggregated to guide the proposals of legislators. While original social contract theorists like Hobbes, Locke, and Rousseau provided some forms of fear, self-preservation and rationality of equality, Bentham claims baser emotions of somatic fulfilment motivate man and criminal law (Bentham 2016, I:1).³¹ Utility is the foundation of any action in a rational entity as man or institution. Therefore, criminal law and punishment should indulge the motivators of pain and pleasure, seeking the correct balance of both.

The individual experience in pain and pleasure poses a challenge in Bentham's theory. The concept of the individual for Bentham is important, but he subverts this importance later and begins to focus solely on society's greatest happiness. The happiness of the community is the final goal of any action and the community does not exist without the individual. Bentham concedes this point, but, later in his work, insists

³⁰ "Individual human motivation is given prominence throughout the process of re-affirming the value of legal systems"

³¹ "The *principle of utility* recognises this subjection, and assumes it for the foundation of [government], the object of which is to rear the fabric of felicity by the hands of reason and of law."

that the sum of the greatest amount of happiness is the main objective. The extensive discussion on legislation proposals focuses on the individual but these examples amalgamate to create overarching legislation guidelines.³² Originally, Bentham understands the individual's place in society and recognizes that the community is nothing without its body of individuals. However, as utility is considered on a larger scale, the legislative relationship with the societal benefit takes precedence.

Utility faces opposition from two principles, which are ultimately inferior to the utilitarian approach. First, Bentham mentions asceticism, which he defines as one who approves of pleasure deprivation and disapproves of pleasure seeking. Bentham rejects morality as a human motivator and instead focuses on corporeal stimuli for his theory. The second opposing principle is the corresponding concepts of sympathy and antipathy. These emotions lead to inconsistent Similar to Locke's social contract theory; both require an impartial judge in the sovereign to mitigate inconveniencies and bias. The internal synthesis for morality and sympathy and antipathy create disharmony amongst citizens: "Each [party] becomes in the other's eyes an enemy, and if laws permit, a criminal" (Bentham 2016, II: 16). These inconsistent principles are dependent on emotional appeal instead of corporeal satisfaction. They tend towards severe punishment stemming from prejudice and create various interpretations of punishment that do not stand, unchanged, against the progression of time. Utilitarianism, however, is the remedy to these inconveniencies (Bentham 2016, II:10).³³

³² When I discuss John Locke's punishment theory, the debate of individual versus community will return.

³³ "The principle of utility is capable of being consistently pursued; and it is but tautology to say, that the more consistently it is pursued, the better it must ever be for human-kind."

After introducing his concept of utility and its importance in achieving pleasure and pain, Bentham spends time dissecting the type of pleasures and pains, how man may incorrectly measure his own pleasure and pain, and the general human motives that he observes. One important debate arises in Bentham's analysis of personal utilitarian choices: utilitarian consequentialism is a flexible guide for the inconveniences of crime. The individual creates a value system of corporeal stimuli (i.e. personal pain and pleasure) based on intensity, duration, certainty or uncertainty, propinquity or remoteness, fecundity, and purity (Bentham 2016, IV:7). These guides however are not strictly consistent rules of behavior and aim to approach an ideal rather than achieve an ideal (Bentham 2016, IV:15).³⁴ It is rational to expect man to avoid pain, but utility achieved universally can be partially detrimental rather than wholly beneficial so there may be variations in the methods of efficiency (Burns 2005). Utility should guide towards the greatest happiness for the greatest number of people and should correct itself once a method becomes inefficient.

Bentham's analysis of utilitarianism as a guide will help unpack some of his claims in punishment that contradict the principle of utilitarianism. He upholds certain conclusions for private punishment institutions that are contrasted with the empirical observations in "The Debate" regarding efficiency. I ground these empirical observations in theory. Firstly, Bentham takes utility as the guiding theory behind every decision. As I mentioned previously, utility does not come to final, un-revisable conclusions; it can be altered as cost and benefit analyses are updated. In describing the Panopticon, Bentham

³⁴ "It is not to expect that this process should be strictly pursued previously to every moral judgment, or to every legislative or judicial operation. It may however, be always kept in view: and as near as the process actually pursued on these occasions approaches to it, so near will such process approach to the character of an exact one."

asserts that contracting punishment is an appropriate method to maximize benefit; privatizing is acceptable if it provides profit (Bentham 1995, letter IX).³⁵ However, my earlier chapter, “The Debate,” contradicts Bentham’s conclusion in contract punishment. Building upon Bentham’s own prescriptions, contract punishment does not offer maximized benefit and is incompatible with Bentham’s theory. Subsequently, consequentialism and utilitarianism must condemn private punishment due to incorrect cost/benefit assumptions economically and societally. These flawed ratio assumptions stem from both policy makers and private contractors revealing the incompatibility of consequentialism and private punishment.

First, legislators incorrectly assign cost and benefit by using contract punishment. Insight into Australia’s Acacia prison (Andrews 2011) reveals that frequent over- and under-estimations on accounting documentation has made private prisons seemingly more cost effective. In reality “investigations into accounting numbers used within policy debates show a number of technical deficiencies that are overlooked in favour of the policy ideal” (Andrews 2011, 1). Further, independent case studies from PricewaterhouseCoopers revealed that similarly constructed, Canadian prisons had varying levels of effectiveness. Central North Correctional Centre (a privately-run prison) and Central East Correctional Centre (a state-run prison) revealed the superiority of the public prison in every aspect except cost efficiency (PricewaterhouseCoopers 2006). This observation in Canada has been observed in the United States where cost efficiency is simply not recognized (Pratt and Maahs 1999, Perrone and Pratt 2003, Lundahl, et al. 2009, Bayer and Pozen 2005). Moreover, the monetary cost of housing a prisoner is

³⁵ “I would do the whole by contract. I would farm out the profits, the no-profits, or if you please the losses, to him who, being in other respects unexceptionable, offered the best terms established.”

supplemented by the cost of reoffending. Recidivism is greater in private prisons over public prisons (Spivak and Sharp 2008) indicating that the cost of exceeds simply monetary cost. Rehabilitation, the benefit derived from punishment, is not realized making the cost of housing a prisoner null.

Bentham's assertion that utility is a guideline rather than a fixed rule applies aptly to the American context. Utility seeks maximized benefit which allows it to be flexible when considering cost and benefit. Similarly, while seemingly helpful for maximized utility, the cost incurred in contracting is detrimental. Utility allows an individual to deviate from the perceived benefit when the actual benefit is less subsequently allowing states to deviate from the inefficient private prison system. There is no added benefit that the government cannot already provide or can provide in a better capacity when outsourcing punishment. Therefore, state run prisons prove to be more cost efficient. The imbalance of cost and benefit challenges utilitarianism: the theory of cost-efficient, private prisons does not hold up against observed consequences profiled in my chapter "The Debate." Comparing fact versus theory connects with Bentham's discussion regarding the individual's analysis of personal pain and pleasure. I mentioned earlier that the individual can incorrectly assess their personal cost and benefit. I also mentioned that the community's general pain and pleasure can be derived from the conglomerate of the individual summation of pain and pleasure. If a large group of individuals incorrectly assume their cost and benefit, their pain and pleasure, then the universally applied legislation is built upon skewed assumptions. This is one possible insight into the contradiction of contract punishment that does not provide societal benefit.

A second critique from utilitarianism is levied against contractors whose cost/benefit ratio is greater and holds more weight than that cost/benefit ratio of the community. Rather than assume the community is acting against its best interest, instead, the community might be eliminated entirely from the cost/benefit analysis. Bentham's utilitarianism denies individual cost-benefit analysis as irrelevant. Assuming the community is rational and has correctly analyzed the benefit, society would desire state-run prisons for its own protection. However, the individual contractor or entity representing the contractor might be the only preference considered in the decision to privatize. It is rational, cost-efficient, and monetarily beneficial for the individual contractor to involve itself in private punishments. However, the community suffers at-large since the community's preferences are ignored and the individual's preference take precedence in punishment. Again, Bentham's utilitarian is the greatest happiness for the largest amount of people. While the contractor benefits, the community suffers. Therefore, Bentham's prescriptions for the conglomerate of individuals to recognize community cost/benefit is not utilized. An individual supersedes the community and opposes utilitarian prescriptions in privatization.

Thirdly, this assertion is also related to improper analysis for cost/benefit. Originally, the blame is placed on the community. My second critique shifts blame for inefficiency on contractors. However, this scope of this blame can be extended to a third realm. While the contractor is selfishly invested in benefit, it is legislators that implement the use of private prisons. Therefore, legislators also are part of the incorrect benefit analysis. Legislators ignore the importance of preserving the community's greatest pleasure. Legislators are not directly benefitting from contract punishment in the same

way as the contractor. This insinuates that their cost/benefit analysis is flawed in the same way a consenting community's analysis would be: both sectors ignore the harm that is eventually caused to themselves. Contractors, on the other hand, are selfishly utilizing their cost/benefit analysis.

Finally, I previously pointed to the importance of uniformity in utilitarianism. The emotionally dictated perceptions of asceticism and sympathy and antipathy produce inconsistent outcomes of treatment and behavior. Punishment cannot be implemented on a whim without impartial, level-headed assessment. This allows the punisher to punish in accordance with the crime and subsequently bring about reform of the criminal. However, private prisons compromise uniformity. When punishment is taken out of the hands of the state, there is room for error in consistency. Subsequently, uniformity is at risk and utilitarianism is unachievable.

I established in the previous chapter that social contract theory and punishment theory aim to protect the community at large. This concept is compatible with Bentham's utilitarianism that asks for maximized pleasure over pain or benefit over cost. Subsequently, the use of private punishment is at odds with Bentham's concepts of utilitarian punishment. A further analysis in punishment will speak directly to these claims in the subsequent section. However, here I have demonstrated that contract prisons, as proposed by Bentham and proponents of privatization, is incompatible with Bentham's basis in utilitarianism. Now that I have established the utilitarian basis of Bentham's theory, I can specifically address consequentialist punishment theory in the utilitarian style.

Consequentialist Punishment

After establishing utilitarianism, Bentham situates consequentialist punishment as a part of utilitarian theory. Consequentialism is specifically promoted through legality (Bentham 1995, VII:1).³⁶ Note that Bentham has shifted his scope of governmental duty. While originally the individual is at the forefront of pleasure fulfillment as a component of society, this is only in the abstract. When concretely involving government and legislation, the individual is not the focus; instead, society's greatest happiness guides legislative punishment. This statement aids in connecting consequentialism with the social contract theory. The use of society's happiness over the individual's (possibly biased) happiness indicates that Bentham's use of punishment is compatible with social contract theory. Therefore, Bentham's theory of punishment is within the confines of a social contract society. The sovereign's legitimacy to punish (in this case, consequentially punish) is dictated by those who consent to the contract. Bentham's punishment theory is discussed in two spheres. First, he states the goals and accomplishments of consequentialist punishment. Second, Bentham then lists the specific methods of punishment. This chapter will cover both the goals and methods and will then analyze them in conjunction with private prisons.

The Effectual Goals of Consequentialist Punishment

Bentham begins by discussing the consequences of actions that justify legal discipline. The goal of consequentialism is to achieve a peaceful society through utilitarian deterrence in codified law. Harm is based on the consequences of actions, in the material sense. For example, a citizen robbing another citizen has consequences. The

³⁶ "The business of government is to promote the happiness of the society, by punishing and rewarding."

criminal citizen has caused harm to the victim for an individual benefit. Additionally, the benefit that the criminal receive from this action outweighs the cost of robbery. However, this citizen faces legal consequences which inflict another cost on the criminal, should he be caught. The state then commits harm against the criminal through imprisonment. This harm also leads to consequences. The difference between the state's harm and the criminal's harm is the state's harm leads to universally beneficial consequences. The criminal is corrected, and society no longer suffers the burden of harmful citizens. Subsequently, generalized harm can bring either pleasure or pain, but legislative harm must ultimately bring pleasure to society.

The intention of an action, based on rationality, changes the type of consequence and punishment incurred. In Bentham's lengthy division of actions, circumstances play a role in interpreting consequences based on harm caused. The circumstances of a crime decide if harm was purposeful or not and might validate some examples of justifiable murder or other consequentially beneficial harm. Contextualizing criminal harm helps reach true convictions and subsequently dictate what harm (if any) should be given to a subject in question. If the intent of an action decides the appropriate consequences of punishment, punishment must establish its goals based on the context of the harm committed (Bentham 2016, X:33). Actions producing painful consequences, therefore, must be punished to show what behavior is tolerated in a society. Moreover, the consequences of an action in punishment directly influence the criminal; they associate deviant behavior with pain. This connection aids in the goal of deterrence.

Punishment is divided into multiple arenas based on harm. Harm may be committed against individuals, a substantial portion of a community, self-inflicted

actions, public offenses for all a community, or a combination of harm against many people and self. This conceptualization of harm acts as an acknowledgement of the social contract. By dividing harm into different arenas, all areas of the social contract are honored: the individual and the community are protected by the state. Unpunished crimes, such as robbery, tend to flourish and the moral declination against these crimes is lessened with every subsequent crime or mischief (Bentham 2016, XII:10).³⁷ Instating a consequentialist form of punishment deters crime due to the rational “recognition of individual circumstances and sensibilities” in pain and pleasure (Draper 2002, 2). The influence of example shows that inflicting pain and subsequently receiving pain is anti-rational. Bentham concedes that using mischief to harm another is undesirable, however, the consequences of the action must be considered. The consequences help to achieve the goal of a peaceful society. Punishing one who has committed harmful mischief “tends to restrain them from committing such acts...it is of a beneficial nature” (Bentham 2016, XII:8). Even though harm is universally mischief, the pleasure of legally infliction pain as a punishment gives the proper cost/benefit ratio. The goal of consequentialism, subsequently, is to reduce crime through associated punishment once intent has been established.

In previous chapters, Bentham makes great distinction between acts and the type of harm caused. Essentially, the consequences and intent of any action should aim to achieve the most amount of good. This begins the discussion on the state’s role in punishment. Firstly, Bentham finds that goals of punishment must bring happiness to the

³⁷ “Accordingly, where robberies are frequent, and unpunished, robberies are committed without shame”

entire community (Bentham 2016, XII:1).³⁸ This differs slightly from his original prescription to recognize the individual. Granted, the sum of the individual desires constitutes the community, but criminal legislation must appease the community rather than the individual. Some punishment ought not to be implemented, as it is irrational against utilitarianism and the benefit of the community. These cases are those that are groundless, inefficacious, unprofitable, or needless. Most importantly, Bentham lists unprofitability as an attribute that is undesirable in punishment. The concept of profiting from harm is naturally a major consideration for the private penal system.

If deterrence is the first goal of consequentialist punishment, then privatized prisons are unable to fulfill this prescription. Recall in the chapter “The Debate” where I introduced the concept of rationality. If individuals have preferences to maximize pain and pleasure, then individuals who profit from private punishment have a preference of monopolizing and controlling punishment to receive the greatest benefit. Consequently, their individual goal is to profit from crime. The individual preferences are not harmful just in existence. However, once these preferences interfere with governmental duties, the preferences cause harm to society. As I established in the chapter “The Debate’s Missing Theory,” private contractors take on a duty of the state when punishing. Bentham insists that the state act for the greatest happiness for the greatest number of people. However, the number of contractors is not the majority of society. Legislated harm must act consequentially to afford maximized pleasure. Legislation allowing private punishment profits the small number of contractors. Thusly, private punishment is considered unprofitable according to Bentham’s own standards.

³⁸ “The general object which all laws have...is to augment the total happiness of the community...in other words, to exclude mischief.”

However, one could argue that private punishment provides a benefit to society by deterring crime. This argument contradicts the rationality of pleasure and pain. The utilitarian rationality of the contractor cannot reconcile with diminishing returns. Correcting behavior for rehabilitation misconstrues the cost/benefit ratio for the individual contractor. The cost of building, housing, hiring, training, etc. is not compensated as criminality reduces. Private entities that correct criminal behavior see fewer criminals and therefore fewer benefits from the cost. Rehabilitating the criminal consequentially punishes as legally dictated but does not strive to consequentially rehabilitate. Evidence of this can be seen in “The Debate.” Carceral costs for health, education, trade programs, etc. put the burden of rehabilitation on the prisoner (LeBaron 2008). If the prisoner can pay the cost of his own rehabilitation, then there are multiple benefits: society is at less risk for harm, the contractor makes excess money, and the criminal can strive for pleasurable activities in future endeavors. However, this cost was never a factor in the original inception of punishment. The cost for these benefits has been debunked as incompatible with an established sovereign. It is the duty of the sovereign to rehabilitate criminals; it is not the duty of the criminal to rehabilitate himself. Subsequently, the private entity does not act in the interest of the sovereign that seeks rehabilitation. Instead, the private contractor(s) invoke consequences of personal benefit rather than societal benefit.

The Methods to Incur Beneficial Consequence

After establishing the goals of punishment in utilitarian terms, Bentham then looks to the methods of punishment. First, under the utilitarian principle, man will choose to do the least amount of mischief for the largest payoff; criminality still adheres to

cost/benefit payoffs of pain and pleasure. Secondly, legislation correcting crime must be ultimately popular. The method for punishment must be pleasing to society with gives legitimacy to the state for punishment. Finally, the method of punishment must be synthesized by the criminal in a constructive manner. If the criminal is unable to connect the punishment with the crime, then the harm of punishment is wasteful. Subsequently, the methods of punishment should be parsimonious, popular, and produced as a consequence of criminal harm.

Bentham discusses the ultimate purpose of punishment in four parts in Chapter XIV. The goals of punishment have a two-fold function: to prevent mischief from occurring and reduce mischief to the greatest degree. While the first outcome specifies the goal of punishment, the latter articulates the methods of punishment. Bentham uses the method of proportionality in the same manner of Cesare Beccaria and Charles de Montesquieu. Criminals will use the least amount of mischief to achieve their goal. Subsequently, punishment should follow this same guideline. Additionally, parsimony of harm is also translated into parsimony of cost; harm should be at the most cost-efficient rate. The highest consideration for consequentialism is the consequences of acts. This works based on the mischief caused and the reactive harm done by legislation to correct the mischief. Although harm is immoral, the harm of punishment is unavoidable and justified due to the achieved societal good: overall reduction of harm in society (Wood 2010). Parsimonious punishment can achieve this consequence far better than excessive harm without excess cost (Bentham 2016, XV:12).³⁹ To ensure that the might of the state is persuasive enough to prevent crime, the punishment must be severe enough to

³⁹ “punishment, it is still to be remembered, is in itself an expense: it is in itself an evil.”

rehabilitate, but not so severe as to overcorrect. Parsimony achieves greater good for society with “an increase in public safety achieved through general deterrence and individual reformation of convicted offenders” (H. Bedau 2004, 9). Bentham’s model assumes rationality in all areas: the criminal rationally reduces cost for his benefit, so the consequences must be rationally calculated to punish the most effectively for the least cost.

My first criticism of private punishment regards the lack of parsimony. The basis behind this method of punishment is largely utilitarian. Punishment in a parsimonious fashion achieves the greatest benefit with the least cost. Bentham himself holds that utilitarianism can be flexible to achieve the greatest happiness, but the goal of societal happiness is undermined in private punishment. Contract punishment can exist within a social contract due to two errors: miscalculated cost/benefit ratio for society or focus on an individual’s cost/benefit analysis that handicaps society. In the former, society is unable to calculate the cost it receives from private punishment. In the latter, the greatest happiness is shifted away from a conglomerate interpretation of society, and instead uplifts individual happiness of those who receive benefit from private punishment. This may result from the three different realms of society incorrectly assess their long-term benefit, contractor’s singular benefit gaining more prominence than society’s, or legislator’s ignoring the greatest number of happiness. Harm is to be minimized in the realm of criminal harm and criminal punishment. I mentioned in earlier chapters how neoliberalism allows privatization to take up governmental duties for profit, but ultimately props up a failing sovereign who cannot fulfill its duties. Subsequently, neoliberalism espouses that private investments in government help to garner capital

(Gottschalk 2015). The issue of miscalculation lies in this claim. Capital accumulation is not a universal endeavor. Rationally, it is selfish to maximize personal cost/benefit. By reconstructing this idea as beneficial to society, neoliberalism has been able to subvert the necessary act of punishing. In turn, society consents to private punishment without assessing the genuine cost society incurs. Neoliberalism can operate under the guise of popular sovereignty while effectively harming society for individual benefit.

My second critique addresses punishment against popular sovereignty which can be quantified as the popularity of the method of punishment. Here, utilitarian consequentialism skirts around the concept of popular sovereignty promoted through social contract theory. Bentham subsequently prescribes legislation as a guide to ensure utility is achieved and punishment is served (de Champs 2011). The purpose of Bentham's work is to inform legislators on the correct way to punish so naturally so the concept of legislation is a significant consideration. If legislators, as representatives, wish to gain re-election, then their actions as representatives must coincide with the public opinion. While Bentham never explicitly acknowledges the idea of popular sovereignty, his guidance towards popular legislation serves the same purpose. Consequentialism is therefore appropriately situated within a social contract society. The sovereign has no legitimacy to act without the consent of the people. Legislators ensure popularity of legal punishment and avoid unpopularity which is interpreted as frugality. The prejudices of the people are also mentioned by Bentham as it is done in traditional contractarianism: "Every nation is liable to have its prejudices and its caprices which it is the business of the legislator to look out for, to study, and to cure" (Bentham 2016, XV:22). The social contract theory influence here is evident; harm in punishment is dictated by the people,

but a sovereign prevents partiality in judgement. Consequentialist punishment again can levy criticism against private contractors regarding the general approval of punishment techniques. Legislative popularity, a substitute for popular sovereignty, speaks to the issues mentioned in the previous chapter, “The Debate’s Missing Theory.” I mentioned earlier how Bentham’s consequentialism can be contextualized within a social contract society as the state protects society as a whole, rather than the individual. Subsequently, the rules of popular sovereignty still apply here as an entire population constitutes the subjects of a state.

Bentham uses the conglomerate of individual desires to dictate law. Similarly, this Rousseauian spirit of the people judges the appropriateness of legal measures. Recall the criticism charged against private punishment when assessing the social contract. Popular sovereignty dictates punishment and gives legitimacy to the sovereign’s right to punishment. When popular sovereignty is eliminated, the people are disenfranchised from the punishment process. Punishment is the duty of the sovereign to eliminate bias from the individual who acts as judge and executive. Reverting from this prescription means that the social contract is no longer intact; the sovereign is illegitimate. Then, the social contract is dissolved and the state of nature, with no uniform sovereign, returns. These condemnations from social contract theory are applicable to Bentham’s theory. Consequentialism seeks out legislative outcomes that provide safety for society. The motivators of pain and pleasure act in the same way of social contract theory’s aversion to harm and quest for self-preservation. If the context of these theories creates similar societies, then scrutiny of private prisons stems from similar arenas. Legislation must have popular approval to protect society from harm (self-preservation for social contract

theory, aversion to pain and desire for pleasure for utilitarian consequentialism). Without these results, the sovereign serves only individuals or small groups of individuals contradicting Bentham's prescription for the greatest happiness of the greatest number.

My final criticism addresses the situation where criminals feel disconnected from the punishment they receive. In Chapter XV, Bentham lists multiple properties of punishment that should be considered by legislators. One of the concepts that Bentham unwraps is the connection of punishment and crime. There should be variability, equability, commensurability, and characteristicness to punish. Bentham insists that the punishment has some connection for the criminal similar to the punishment theory of Montesquieu and Beccaria. Not only must punishment relate to the crime for the criminal, but they must be frugal and painful with purpose. Similarly, the punishment theory of Montesquieu and Beccaria call for an even hand in punishment; it cannot be needlessly cruel so that a populace becomes jaded to the consequences of punishment. In addition, Bentham names some lesser properties of punishment. Connecting with his earlier prescriptions of a crime being connected to the punishment, the punishment must serve to reform. Most importantly, efficiently using punishment limits unwanted consequences from reoccurring within society. Other properties include a slight restitution to the victim, popularity (previous mentioned in this section), and remissibility should one be found innocent. The summarized major claims for consequentialist punishment are as follows: "that punishment reduces crime, and hence the resulting harms...that punishment functions to rehabilitate offenders... that punishment (or some forms of punishment) can serve to make restitution to victims...that it can strengthen social values" (Wood 2010, 455). Importantly, the ability to rehabilitate is the mechanism

that offers the best cost/benefit ratio. Legally pain inflicted rectifies illegally inflicted pain on the individual to give society an ultimate pleasure of bodily safety.

Again, Bentham's consequentialist theory is incompatible with privately contracted prison as the criminal is disconnected from the punishment. In "The Debate's Missing Theory," I discussed the rationality of the contractor; the contractor wishes to profit from punishment while rehabilitation is not a primary goal. This is especially relevant as rehabilitation limits future profitability. Subsequently, rehabilitation through punishment is not a focus of the private contractor. This, in turn, means that the punishment is not set to correct the criminal, but to simply put the criminal in a safe space until legality allows them to recommit upon release. This is a contradiction of Bentham's views on harm. Universally, harm is seen as a negative outcome for utilitarian consequentialism. Criminal harm brings consequences of punishment that hope to rehabilitate. If criminal harm is met with legal harm that does not correct behavior, then the consequences of this second stage of harm are in vain. The criminal is needlessly harmed costing the state and providing no benefit to society. Subsequently, the criminal is disconnected from the punishment when legal harm does not seek to rehabilitate.

Bentham insists that the criminal connect their actions with the consequences of their punishment. While private contractors may punish with an even hand of justice that is neither too harsh nor too lenient, the end goal of this punishment presents issue. The punishment might be apt, but if it does not limit the chances of a criminal re-offending, then it is a futile effort. This wasted use of resources is of the greatest affront to Bentham's theory. Consequences that produce no benefit are anti-rational. The lack of rehabilitative efforts from private prisons to maintain financial influx produces less than

desirable consequences. The state, however, has vested interest in rehabilitation. This state's legitimacy is only established within the consent of the people. The aversion to pain necessitates that the people will consent to rehabilitative punishment. However, this is compromised when punishment occurs outside of popular sovereignty. Individual monopolization of punishment disconnects the criminal and needlessly incurs the cost of punishment without the benefit of a secured society.

Conclusions

Bentham's punishment theory of consequentialism rectifies harm through consequential actions of legal harm. Rooted in utilitarianism, the consequences must be effective and cost-efficient. Legal measures protect society in a manner consistent with popular sovereignty by balancing pain and pleasure. The unwavering use of corporeal pain and pleasure help create uniformity in a society rather than moral obligations of individuals dictating the benefits of others. The utilitarian basis for Bentham displays weaknesses in the private approach to punishment. If the state allows a singular individual to punish, then the state eliminates the conglomerate of desires (i.e. popular sovereignty) that is necessary to guide legislation. The burden of incorrectly measured pain and pleasure can rest in society, the contractor, and legislators. Rationally, private punishment causes more pain than pleasure due to criminals reoffending after private punishment fails to rehabilitate.

Additionally, this basis of utilitarianism means that reactively punishing to induce corrective consequences must maximize benefit while minimizing cost. This responsive form of punishment does not merely serve to punish an action. It also looks proactively to reform the criminal from recidivating. This punishment is connected intimately with the

criminals' interpretation of pain and pleasure. However, privately punishing under consequentialism reveals incompatibility. The cost of privately punishing does not provide valuable outcomes as the prisoner is not aptly rehabilitated. Instead the criminal is responsible for his or her own rehabilitation which is a burden not placed on those within a social contract. This duty is fulfilled by the state. Moreover, popular sovereignty is minimized in the process of punishment, which disenfranchises society and nullifies the social contract. Subsequently, the criminal is free to re-offend and create greater cost to society.

The consequences and outcomes of actions is of the utmost importance to Bentham's theory. The consequences of crime require punishment as rectification. Moreover, the consequences of legal harm require a benefit given to society. When these legal consequences are unable to be fulfilled, punishment becomes harm with no benefit. This affront to Bentham's theory is wasteful. Efforts to preserve pleasure and exclude pain are in vain; pain remains. I conclude here by stating that consequentialist punishment is unable to support private punishment. Even Bentham's own visions of a Panopticon with contracted entities show conflicts. The efficiency of the Panopticon exemplifies Bentham's theory to correct behavior with consequences and minimal cost, but the cost that occurs within private punishment is too great to be ignored. Subsequently, this first example of the punishment theory triumvirate is at odds with privatization. The next chapter will shift towards deontological punishment and will proceed to discredit the use of private punishment in another justification

Chapter 4: Kant and Deontology

The preceding chapter showed that consequentialism must reject contract punishment because it ultimately leads to bad consequences. In this chapter, I will ask if deontology, the complement of consequentialist punishment, will also reject private punishment on moral grounds. Previously, this dissertation stated that consequentialism and deontology constitute the most visible forms of simplified punishment (Gabbay 2005). They fall into two distinct categories of deterrence and retribution, respectively. I now explore deontological punishment through Immanuel Kant's metaphysics and categorical imperative which create uniform justice by universalizing morality. Kant wrote a series of critiques with supplemental material to explain his position on morality and the human condition. Subsequently, I will first examine his *Critique of Pure Reason* and the supplement of *Prolegomena to any Future Metaphysics*. These works explain Kant's understanding of metaphysics and human motivations in the abstract. The human experience is perceived through an imperfect physical existence. Kant looks to explain this muddled experience and establish real, universal truth.

Next, I will apply Kant's metaphysics to universal morality and the goals of punishment which I derive from the *Critique of Practical Reason* and the *Groundwork for the Metaphysic of Morals*. Despite limitations of human perception, every action or object contains an essence that creates rational morality. All action can be rationally deduced to uphold or undermine morality. Building on Kant's metaphysical examination of the abstract, I assess how human perception translates into concrete human action and rationality. By rationally judging actions, an individual can question the motives of an action. Consequentialism, from the previous chapter, examined outcomes of actions; this

chapter will shift the scope to the intention of an action. For deontology, we should assess the moral value of an action based on its aim, not consequences, including punishment.

Finally, this chapter discusses the methods of deontological punishment regarding legislated harm. Bentham's consequentialism proactively attempts to stop harm, Kant's deontology attempts to reactively punish deviations from moral code. The deontological approach to morality uses state punishment as a retributive response to compromised universal morality. Deduced truths must be upheld in society; if they are violated, then punishment must be executed. The very decision to act is a moral decision; acting without morality incites punishment. Consequently, punishment is an integral duty of the state to foster moral code, from legislation to retribution. Punishment must not attempt to subvert the prisoner into a means. Instead, a state reactively punishes for reprisal to achieve what is just.

Ultimately, the actions of corporate prison complexes conflict with Kant's theory of categorical imperatives. Private prisons assert a deviant morality to justify their actions, compromising universality. They conclusively violate the motivations their contract by failing to fulfill promises with deceitful motivations. Additionally, they ignore the importance of restoring autonomy in a prisoner as rehabilitation is an anti-rational motivation. Private punishment is often harsh and serves to overcorrect the prisoner eliminating the link with crime and punishment. Lastly, they undercut the state's duty to promote moral uniformity by instilling their own sense of morality in punishment. Thusly, the American private prison system is condemned through the second form of punishment presented in this project.

Foundational Analysis: Metaphysics and Universality

“Sapere aude!” commands Kant in *What is Enlightenment?*. Translated, Kant orders his readers to “dare to know.” Such a bold action of inquiry allows man to be free. Man reveals his true self by breaking from superfluous desire and comes to know the world around him. “Daring to know,” for Kant, is the process of enlightenment which affirms autonomy and frees man from his self-inflicted slavery. External forces constantly direct man, leaving him complacent: “If I have a book which provides meaning for me, a pastor who has conscience for me, a doctor who will judge my diet for me and so on, then I do not need to exert myself.” (I. Kant, Cambridge Edition of the Collected Works of Immanuel Kant 1784). Breaking this bondage is a simple, but taxing duty. Man must give himself over to the process of independent thought to reach freedom from this constant barrage of direction. Naturally, this freeing is uncomfortable, foreign, and unconventional for the common man. However, it is not impossible and will have an impactful effect. Once enlightened, an individual can spread this autonomy to others and rational freedom can be achieved on a large scale.

Kant posits that an individual is autonomous and free when they search for a metaphysical and universal truth. An individual acquires total freedom of through when one eliminates superfluous physical attributes and considers the world metaphysically. Seeking metaphysical truth reveals a universal justice that can be applied to all human action and not just the individual’s consideration (Munzel 1999). This starkly differs from Bentham’s consequentialism. Consequentialism, contrastingly, constructs legality through individual, corporal judgements of pain and pleasure which are applied to the societal conglomerate. Deontology aims to achieve ethical good by adhering to a

universal moral law that is later translated to the laws of a government (Steiker 2005). I first look to Kant's epistemology and metaphysics to establish his deontological framework. The metaphysical examination of the human experience provides the basis for subsequent human action (e.g. crime, individual harm, etc.) which shapes how punishment responds to these human actions.

Critique of Pure Reason and *Prolegomena to any Future Metaphysics* examine the basis of human knowledge. Kant defines cognition (*erkenntnis*) as the application of general categories of the understanding to the given manifold from intuition. However, we cannot have true insight into the thing in itself. Therefore, the true matter of an object must be metaphysically transcendent, beyond our cognition. Human knowledge exists within the physical real of time and space, meaning there are some limitations (I. Kant 1998A, A23).⁴⁰ While an object always retains its true matter, the mental consumption of an object varies due to bodily limitations of man's existence. However, Kant concludes that there are real, true forms of existence and essence termed as *noumena* (I. Kant 1998A, A252). The human experience of these things exists as *phenomena*. Importantly, Kant does not hold that nothing can be known. Indeed, there is a transformative process of knowledge due to the constraints of time and space, but *noumena* are still perceptible. They simply must be contextualized within *phenomena*, forcing one to recognize the limitations of the human experience. Kant distances himself from idealism in this manner. He is not asserting that nothing can be known. Instead, *phenomena* are an acknowledged barrier to *noumena*. Universal meaning exists even if *noumena* are never fully comprehended; Kant defines this as logical reflection. The value of Kant's work

⁴⁰ "Time can no more be intuited externally than space can be intuited as something in us..."

shows that there are universal actualities that cannot be altered when considered in isolation. Deviation from the *noumena* is due to *phenomena*. Therefore, *noumena* create a common law that is applicable universally once limitations are acknowledged

The concepts of pure reason presented here bring the first contrast with consequentialism based on value of perception. Bentham's consequentialism is based on empirical observation of bodily pains and pleasures, whereas Kant's deontology abstracts from empirical variation to find the true universal morality in what we share: our *noumenal* selves. Bentham upholds worldly perceptions of pain and pleasure to motivate action which naturally has variations based on who derives pleasure from what. Certainly, this variation can be detrimental: the greatest threat to utilitarian consequentialism is asceticism and sympathy and antipathy, caused by variation in mental processing (not by varying *schema*). Ignoring physical cues, for Bentham, creates inconsistency in utilitarianism. However, Kant looks inward at mental perception to shift the scope of addressing uniformity. Variation in perception is also detrimental to Kant's theory as it is to Bentham's. Unlike Bentham, one must process *phenomenon* mentally to create uniformity. He concedes that perceptions can vary due to *phenomena*, but the true *noumena* are the guiding principles for uniformity. The focus is shifted to universal ethics rather than overlapped ideas of physical gratification. Consequentialist corporeal reactions are unprocessed; they eliminate the use of mental faculties and allow the body to dictate action. Kant, however, roots himself in metaphysics, giving credence to the mind over the body through logical reflection.

Kant's command of "Sapere aude!" becomes more urgent with these considerations. The ability to question allows one to explore the true meaning of

metaphysics. Subsequently, the knowledge acquired through these actions can create universal standards for behavior. This aids in formulating legal code and the punishment that accompanies any breach of law. The deontological approach to punishment stems from Kant's interpretation of pure reason. Enlightenment frees man from the corporeal world and stabilize the study of metaphysics. Therefore, metaphysics is the ultimate study of freedom. When free reason is applied to human action, punishment can be rationally deduced based on universal morality. This punishment is executed based upon a categorical imperative, an idea that will be discussed in the subsequent section. I will now apply the process of logical reflection: Kant's second critique illuminates how universally approved behavior allows knowledge to dictate human action in the real world rather than the abstract. Deviancies from appropriate behavior violate a universal standard. Criminality met with punishment which helps to achieve the metaphysical goals of universality outlined here.

Deontological Punishment

Kant's foundation for thought before breaching the study of metaphysics is now applied to moral development. Kant develops his theory of ethics in *Critique of Practical Reason* and *Groundwork for the Metaphysics of Morals*. His previous work on pure reason shows that there is accessibility to the unknown, at least in acknowledgement, if not perception. Subsequently, this is the basis for forming universal morality, most notably the categorical imperative. Importantly in *Groundwork for the Metaphysics of Morals*, Kant states that laws exist simply to unify action and the ideas of freedom (I. Kant 1998B). Logical reflection develops morality as the mind has a transformative quality; it allows one to realize the meaning of objects and actions that build a true sense

of morality. Importantly, morality is not altered based on time and space. There is universal truth in *noumena* and therefore universal truth in morality. Ethics is not subjective and does not bend to *phenomena*. Morality is rationally reasoned through metaphysical means and is applicable to any action that one performs.

Firstly, I use this conclusion to situate Kant within a social contract society. Kant discusses his beginnings of a social contract in *The Metaphysics of Morals* which begins with property rights; however common themes in his previous work allow me to compare him to popular social contract theorist. A universal moral law that is later translated into law is especially Lockean. John Locke finds that there is a natural law that is rationally deduced, similar to the Kantian approach. This law, or morality as Kant holds, is defined as the categorical imperative. The inconveniences of Locke's state of nature can be translated to varying *schema* for Kant. Locke creates an impartial sovereign to remedy these issues. Kant follows these same conclusions to ensure that law promotes the uniform morality. Subsequently, a sovereign is created in the image of Lockean natural law or Kantian universal morality: "Under the moral law, all laws are to be determined independently of desires and inclinations to ensure universality" (Brooks 2003, 209). By contrast to Locke, however, this adherence to universal law is indicative of Rousseau's spirit of the people. The universalized ideas of governance that organically emerges from the state of nature can be substituted for *noumena* that are commonly accepted as the basis for government (Hoffe 1992). Therefore, one can be forced to be free, in Rousseauian theory, if one is unable to conform to the universal law. A sovereign can only be instated if they follow some sort of universal (or natural) law. Without this basis, a sovereign's laws are illegitimate

Deontological punishment is aptly fit for a social contract and therefore gives legitimacy to this project's method of examination. The use of punishment is dictated by a social contract, as I established in "The Debate's Missing Theory." This means punishment is a communal endeavor. I can examine if the use of punishment in a social contract (in this case the deontological punishment) allows a private prison industry that supports the sovereign. I now will explicate deontological punishment in the same method I used for consequentialism. Deontology has distinct goals that are achieved through punishment. The next section will create the methods of achieving these goals through legality. The goals and methods taken together give a complete view of deontological punishment which are examined in contrast to contract punishment. Privatization still cannot be reconciled in a social contract with the goals of deontological punishment. The goals of deontology are violated on all three formulations of the categorical imperative. First, private entities use deceptive terms of agreement and make illegitimate promises violating the first formulation. Secondly, private punishment violates deontological goals by using individuals as means rather than autonomous ends violating the second and third formulations. Ultimately, these goals are defined by Kantian justifications for rehabilitation over retribution. The methods of private punishment are also incompatible, firstly, due to private prison culture's harsh sentencing procedures that disconnect a criminal from the act of punishment and, secondly, a non-uniform, punishment culture that undermines the universalized categorical imperative.

Punishing for the Goals of Reason and Developed Morality

The goals for deontological punishment must fulfill a categorical imperative that conforms to both reason and principle. The categorical imperative contextualizes individual actions as either moral or immoral based on motivation. Thus, there is no reasoned morality that comes externally from a tacit agreement in a social contract. Morality is innate since it has always existed, and it is defined by the categorical imperative (Kant 1997 4:416).⁴¹ Consequences, positive or negative, do not alter the initial morality of an action. If an action was incepted in morality, no subsequent outcome from the action can remove the original morality. Morality is rooted in how an action is formed, not in any negative repercussions that an action brings so. This assertion constituted Kant's first formulation of the categorical imperative: an action can only be moral if it can be universalized to any other situation. Would one make the same decision regardless of other *schema*? If yes, then an action is moral. If no, then the action is immoral. Kant summarizes, "There is, therefore, only a single categorical imperative and it is this: *act only in accordance with that maxim through which you can at the same time will that it become a universal law.*" (I. Kant 1997, 4:421).

Kant uses the analogy of lying when making a promise to demonstrate the issues that can emerge when this imperative is not followed. One cannot make a promise that he cannot keep, because if this action was universalized, then the action of making a promise does not force a binding action (I. Kant 2002, 22). The motivation behind the promise was crooked from inception. If one makes a promise that he does not intend to keep, it is not a promise at all since promises are binding. Breaking that binding dedication even

⁴¹ "It has to do not with the matter of the action and what is to result from it, but with the form and the principle from which the action itself follows; and the essentially good in the action' consists in the disposition, let the result be what it may. This imperative may be called the imperative of morality."

before delivering the promise is a contradiction of terms.⁴² This means that human fulfillment is entirely mentally perceived. Actions do not constitute identity or give worth to a being. Instead, the morality and the mental inception of an action constitute worth. The categorical imperative establishes all beings as moral agents that discern the value of actions before they are committed. If all are moral agents who act upon a categorical imperative, then existence is an end within itself (I. Kant 1997, 4:433).⁴³

Subsequently, deontology makes an important distinction from consequentialism with Kant's second formulation of the categorical imperative. According to the second formulation, it is immoral to use others as a self-interested end. Conjoined with this concept is Kant's third formulation to respect the autonomy of others. Others are not tools to achieve selfish ends. Instead, others are an end just as an existence, not a mean to one's own ends. One is autonomous and free to exist as an end when following the categorical imperative. However, morality is violated two-fold in privatization. The initial, criminal violation is followed by a subsequent profit from criminality. This treats criminals as means for monetary profit despite the assumption that the criminal, as an individual is an assumed moral agent.

Kant's analysis of pure reason applied to practical reason establishes the beginnings of my critique on the private prison system. Firstly, Kant's theory of universality is applicable in the social contract. I have previously endeavored to disprove

⁴² Note that Kant's categorical imperative requires rationality to understand morality which differs from Bentham's interpretation of rationality. Bentham's definition of rationality means seeking sensational fulfillment. Universalized rationality in consequentialism means the greatest consequential happiness for the greatest number of people. Variation is written into rationality for consequentialism. If the consequences are the same, the motives or actions are not worth examining. However, morality in deontology only cares for motives, not outcomes.

⁴³ "Morality is thus the relation of actions to the autonomy of the will, that is, to a possible giving of universal law through its maxims."

the compatibility of contract punishment within a social contract from my chapter “The Debate’s Missing Theory.” All those criticisms still stand here. Moreover, universal morality is decidedly connected with the concept of the social contract. Both frameworks assume that humanity has commonality in practical reason. The action of promising to punish retributively is a broken promise. The actual promise is based on a subverted preference in which the contractor benefits. Treating an autonomous individual as a means violates Kantian enlightenment. Importantly this reveals flaws in Kant’s argument against rehabilitation. If the prisoner is not a means, he is autonomous, and the recognition of this independence is the very reason for his rehabilitation. Rehabilitating is not using the prisoner as a means for societal safety; it is part of the categorical imperative to recognize and spread autonomy. Rehabilitation can never be the conclusion of a private prison system, a reasoning I established in “The Debate.” This is because rehabilitation eliminates the source of income for private prisons; it is anti-rational and anti-capitalist. States rehabilitate under the categorical imperatives within deontology, but contract prisons operate under a flawed promise for societal benefit. I now look toward the concept of deontological, retributivist punishment through legality. I explain how a state is gratified when punishing for retributivism and how this fulfills a categorical imperative.

The three formulations of the categorical imperative constitute my critique against the private prisons complex. The first formulation of the categorical imperative states that all action must be moral and universalized. Deontological morality, as a rational conclusion, negates the relationship that private prisons have with state governments on the premise of a broken promise. Essentially, the promise that private prisons make in

contracting with the government is an unfulfilled promise and is not a universally applicable action. The private prison industry is, firstly, a capitalist venture incepted to profit off the state's shortcomings. Contract prisons note weakness in sovereignty and subsequently fill in the spaces where the state is lacking. The original motivate is to capitalize on the state's ability punishment to punish. However, because this is a duty of the state, the private prison is being paid to take on the duties that the state is unable to do. This is not an attempt to further governmental reach; the contract prison is not an extension of government but a paid, private, entity. Subsequently, the contract with private prisons are akin to a promise that was never intended to be kept. Punishing is incepted as a promise to adhere to universal morality. Deviant behavior must be brought to justice. The state fulfills this rule by strictly punishing for justice. Private prisons, however, lack the intention of justice. The consequences of retributive punishment (which admittedly could bring justice) are unintended when considering the chance to contract. Instead, private prisons initially intend to capitalize through governmental money and ensuing profit from prison labor goods. Therefore, private prisons make an unfulfilled promise, *i.e.* an illegitimate promise and violate the first formulation. Justice is not at the forefront of punishment. Deontology holds that any misdeed must be punished and is only applicable to a government that solely utilizes governmental punishment. However, when the promise of punishment is clouded by the prospect of profit in contract punishment, then the original promise to punish is underscored with the ability to profit.

My second critique regarding the goals of punishment address violations against the second and third formulations of the categorical imperative. This second formulation

concludes that individuals are always an end and never a means and the third formulation insists that autonomy is granted to all individuals. However, for-profit prisons do not have the correct Kantian motivations; they treat criminals simply as means to their own. Contract prisons treat prisoners as means to their profit maximization and also fail to rehabilitate prisoners in order to use them as tools for return on investment. Individuals act in accordance with “the sole principle of all moral laws and of the duties conforming to them” (I. Kant 2002, 33). However, heteronomous individuals act based on the confines of bodily pleasure (I. Kant 2002, 33).¹ Kant’s heteronomous label, then, can be aptly applied to contract punishment. For-profit prisons are not motivated by the law, but by interest, making their actions heteronomous. They are no longer free and are dictated by multiple facets of direction forcing them to lose autonomy. Private prisons stand to benefit from the context of *phenomenon* and do not achieve the universal truth of *noumena*. Consequentialism found that reform was the best way of dealing with the criminal to benefit society as a whole. Contrastingly, Kant’s theory states that rehabilitation for societal safety uses the prisoner as a means to end and not as an end itself. Kant holds that criminality is instilled at an early age and is absolute once imprinted on the individual (Kant 2002, 100). Subsequently the idea of rehabilitation, in typical Kantian interpretation, is not only using the criminal as a means, but is unnecessary due to the unchanging nature of a criminal will (R. A. Pugsly 1979, R. A. Pugsly 1981, Pearl 1982). The question that remains, considering Kant’s assertions on autonomy, is if Kant can incorporate a sense of rehabilitation in his punishment theory.

I justify the use of rehabilitation in the Kantian scheme despite Kant's discussion on static criminality. Previous interpretations of Kantian retributivism label Kant as

mostly deontological, but slightly utilitarian in punishment (Brooks 2003, Pearl 1982). However, I argue that Kantian deontology can support rehabilitation within the confines of deontological thought in accordance with the second and third formulations of the categorical imperative stating that individuals are not to be used for some benefit and that autonomy should be protected. Legislative retributivism can promote positive law to foster moral agency for rehabilitation: "the innate character of agents requires their own development toward the establishment of and membership in a legal community..." (Merle 2000, 332). The assumption that the criminal cannot be rehabilitated is undermined by Kant's assertion against rehabilitation that uses the criminal as a means for society's benefit. The original Kantian interpretation states that the criminal is unjustly used as a means for societal benefit; the autonomy of the criminal is compromised. This shows, however that the criminal still retains a threshold of autonomy that may be violated. Subsequently, rehabilitation's motivations can be subverted. Instead of rehabilitating to ensure safety, a state under the legislation of universal law may rehabilitate to give the tools to achieve autonomy and create free citizens (Franke 2013). Kant's original rejection of rehabilitation can be reframed to facilitate autonomous action.

Punishment must adhere to the categorical imperative. Deontological punishment, thusly, is transformative of the criminal in a way that is different from the consequentialist view. While the consequentialist view looks to maximize the safety and sense of self-preservation in society, deontological punishment seeks the moral good of society and ultimately retributivist justice. The crux seems to be a value of bodily safety (self-preservation in consequentialism) versus rightness in character (morality in deontology). The motivation to instill autonomy preserves universal law. This then

implies that society has a duty to correct the deficiencies of those who stray from autonomy. Kant's instruction of "Sapere aude!" does not just end with those who hear the command; Kant specifically states that enlightenment can be spread so others may be autonomous. Autonomy is the most important motivator for all actions as it suggests that the soul is rightly calibrated to universal law. If the nature of universal law is its universality, then universal law should also dictate that society has an obligation to instill universal law in every way. Subsequently, the criminal should be given the tools through legislation to follow universal law. The conclusion here is that, yes, the state has an obligation to instate autonomy by any means necessary. Though Kant assumes that the criminal soul is predisposed to heteronomy, the state must provide the tools to autonomy, even if it is incremental autonomy. Like an algebraic line approaching a limit, but never touching it; the closer to perfection, the better the efforts to preserve universal morality

My second criticism of private prisons stems from the lack of recognized autonomy in the punishment given to a criminal for their rehabilitation. When considering the morality of an action outward, one should consider not only their worth based on motives, but also the worth of others. All people, therefore, are autonomous moral agents who act in consideration for morality through every rational decision. The categorical imperative assumes rationality to deduce such morality and the universal nature assumes rationality for all individuals. Subsequently, this establishes a mutual recognition of worth when applied properly. This concept again lends credence to deontology as part of the social contract which requires equal citizenship. Mutual recognition of moral agency can be substituted for political equality. This means that one must maintain the notion that all are rational moral agents the same as one's self. If an

action is truly moral (not perversely moral and unable to be universalized) then all would make the same decisions as a single individual. Therefore, a sovereign must promote these ideals of equality as the sovereign is instated from a people who recognize a categorical imperative.

Legal Punishment and the Categorical Imperative as Method

In *Metaphysics of Morals*, Kant makes general comments on how law should be implemented. He states, “All law whatever rests, it is true, on the consciousness of obligation under the moral law itself” (I. Kant 1997, 180). Therefore, the methods of punishment must be done with the categorical imperative in mind; punishment is based on how severely an action violated the categorical imperative. Essentially, legislation should inflict harm retributively based on the level of harm caused (an argument repeated from Enlightenment based punishment theory). The severity of this punishment is determined by human reason that calculates the impact of criminal transgression. Additionally, human reason also allows the prison to connect the act of punishment with the criminal action (I. Kant 2002, 37). If the criminal is unable to see punishment as a retaliation against their misdeeds, the punishment is useless and the motivation of the punishment itself can be questioned as moral or immoral. These prescriptions certify that actual justice is done and “the punished person... must himself admit that he has been dealt with rightly and that his lot is perfectly appropriate to his conduct” (I. Kant 2002, 37). Without this connection, justice is not served.

Deontological punishment rests upon the goals of the categorical imperative discussed in the preceding section. The metaphysical approach defines the goals of punishment. Now I will discuss how these goals are achieved through method. Rational

judgment defines the value of an action. If an action is immoral, it must be punished as it violates the categorical imperative. Laws, as part of a social contract, are constructed under categorical imperatives; a citizen cannot benefit in any capacity from breaking a law since it is immorally conceived as a motive. This section explores Kantian political philosophy to determine the methods in how a sovereign may punish. Deontological punishment does not employ excessive harm (an action against the categorical imperative). Instead, deontology looks to use the correct amount of harm to punish due to the harm originally committed. However, contract prisons do not follow the deontological methods. Firstly, private prisons do not utilize parsimonious punishment as this possibly reduces the flow of prisoners compromising future monetary benefits. Secondly, private prisons use harsh methods that eliminate the possibility of reform as extreme harm disconnects the prisoner from the criminal action.

The punishment styles of consequentialism and deontology can now be compared and contrasted against one another. Like Bentham, Kant agrees that harm is generally to be avoided. In deontology, harm is seen a negative, but as a necessity. For deontologists, inflicting pain is acceptable when it is a “consequence according to principles of a moral legislation” (I. Kant 2002, 37). When punishment is not guaranteed, deviant and criminal behavior is given a pass to flourish. Bentham-style consequentialists argue that punishment brings maximized happiness through deterrence. In deontology, happiness is detrimental. There is no benefit derived from the action. Therefore, punishment for some goals rather than retribution adheres to inconsistent goals of happiness (I. Kant 2002, 38).⁴⁴ Recall that Bentham found only interpretations of pain and pleasure serve to create

⁴⁴ “a machinery that is to serve solely to thereby put rational beings into activity toward their final aim (happiness), is very manifestly a mechanism of their will that annuls all freedom...”

uniformity in legislation; asceticism and sympathy and antipathy allowed too much variation based on human perceptions. Kant responds that punishment can be rational and uniform when derived from morality as happiness is the thing that varies, not perception. Connecting a prisoner to his crimes is much more effective when based on categorical imperatives rather than the varying and individual measures of pain and pleasure.

Now that I have established the methodological requirements for deontological punishment, I offer my critique of private prisons is based upon their over-harsh methods. The connectivity and parsimony of punishment provide basis for issues within private prisons. Again, the observed consequences of neoliberalism force harsh punishment and continuous imprisonment for monetary benefit. In “The Debate” I discussed how political culture can alter punishment legislation substantially (Norrander 2000, Zimring and Johnson 2006). With sentencing becoming harsher in American penal institutions, rehabilitation was inconsistent with investment returns. Instead, incapacitation became the punishing standard (Kyle 2013). The observations from the private prison system reveal a lack of connectivity. Harsh sentencing ensures a supply of profit via prisoners for private prison complexes. Private prisons allow severe penalization to continue at maximum capacity; prisoners have long prison sentences and diminishing chances of parole. Subsequently, the harshest punishment is not always the best punishment. Harm done must be rectified with the apt amount of harm in punishment. In deontology, apt levels of punishment allow the punisher to fulfill the categorical imperative of not inflicting excessive harm. However, rehabilitation can also be integrated into the method of deontological punishment.

Firstly, excessive harm from neoliberalism does not rehabilitate to restore the categorical imperative of autonomy. Previous critiques on the goals of punishment show that the lack of rehabilitation in private prisons violates the second and third formulations of the categorical imperative. However, the lack of rehabilitation due to harsh neoliberal methods violates the deontological prescription of parsimonious punishment. First, harsh sentencing culture is incompatible with the severity of the crime. Second this implies that the punishment is disconnected from the crime and subsequently, the criminal is disconnected from the crime. The criminal must know why he is being punished or he will not understand the concept of justice. The neoliberal call for harsh punishment allows for the contractor to invest in the failure of government. Neoliberalism acts as a continuous and coherent ideology. It infiltrates political culture to change sentencing, guides governmental contracts with private entities, and finally promotes the failure of government for private profit; it is motivated by capitalizing on monetary gain rather than adhering to morality. Subsequently, it violates the categorical imperative regarding punishment. It is not done for retributivist justice, but instead is done to benefit the individual.

Kant implies that the state's obligation to instilling morality is rooted in a process of synthesis and an understanding of universal, moral law (Brooks 2003). Legality must ensure all formulations of the categorical imperative (I. Kant 1998B, B373).⁴⁵ The state must give society the tools to make moral judgements that are rationally concurrent with universal morality (indicative of a social contract following natural law). Kant also

⁴⁵ "A constitution providing for the greatest human freedom according to laws that permit the freedom of each to exist together with that of others (not one providing for the greatest happiness, since that would follow of itself) is at least a necessary idea, which one must make the ground not merely of the primary plan of a state's constitution but of all the laws too..."

contradicts the corporeal signals of legislation from consequentialism. Corporeal happiness should not guide legislation and the constitutional composition; happiness will come from obeying laws that uphold morality. This joy is innately and organically achieved when morality is preserved. Obeying laws is its own reward. Laws are guided by the categorical imperative and not the inconsistent happiness of a conglomerate of people. Subsequently state control over political culture is necessary to maintain morality. If laws and governance are configured perfectly, then the negativity of punishment will be lessened. The state must cultivate a culture of morality. The duty of punishing is integral to the sovereign, as per the social contract.

If the state has a responsibility to create a culture of morality, the state's duty to rehabilitate prisoners is even more apparent. Rehabilitation is necessary as legality helps to ensure categorical imperatives. This obligation reveals further incompatibility with private punishment. Law inspired by the categorical imperative will create uniform standards of punishment. Universal morality is diminished when the state loses control over the moral sentiment delivered in punishment like in contract punishment. Private punishment is not incepted to uphold moral law. Instead, it is incepted to reap some benefit from the criminal as a means, not an end in himself. This violation originally was discussed as a trespass against the second and third formulation of the categorical imperative meaning the goals of deontology were not fulfilled because punishment was not incepted to rehabilitate. However, excessive punishment reveals that the method of punishment is too harsh, as well. A society must find that obeying laws provides a sense of satisfaction. Justice is a citizen's duty and can be fulfilled by being a law-abiding citizen. This outlook suggests that the state must use the method of parsimonious

punishment correct criminal behavior by promoting an ethical agenda. The state's method of ethical lawmaking utilizes retributivism to achieve good. In contrast, private punishment does not attempt to promote a universally ethical agenda in their methods. Instead, contract punishment attempts to benefit from crime and utilizes methods that sustain criminality. State punishment creates a homogeneous moral principle across society (Steiker 2005). Private prisons undermine the uniformity of punishment and moral code as individuals are now delivering the method of punishment with varying interpretations of the categorical imperative.

Punishment here should promote morality in society. The legislative aspect of punishment stems from categorical imperatives. There must be reason to punish and the punishment must match the crime. The American sentencing system is based around neoliberal ideals of harsh punishment and long sentences. This system lacks the deontological objectives necessary to punish appropriately. Additionally, the state must use punishment to promote a societal morality. Punishing must be part of this promotion. However, when individuals take control of the dispersed culture, they compromise uniformity. The state's duty to promote morality is taken over by an individual (i.e. the individual prison owners) that has already made a broken promise for punishment. The categorical imperative of rehabilitation is no longer a priority in privatization. The methods of punishment are overly harsh as proposed by neoliberalism. This means the method of punishment is incepted only to harm and not to reform. This is the first transgression against deontology. The second transgression is also rooted in the harsh sentencing culture that disconnects the prisoner from the action and does not foster

uniform moral law. Subsequently, the legal culture that arises out of private prisons creates a culture that is incompatible with deontology.

Conclusions

Deontology has been shown to be theoretically irreconcilable with private prison systems through its approach to metaphysics and the goals and methods of punishing. The retributive nature of deontology requires a categorical imperative that is violated in a profitable system. Kant's metaphysical examinations that popularize a single interpretation of morality structure the rest of his critiques regarding human action. Kant envisions a unifying principle of motivation that ultimately establishes deontology as part of a social contract tradition. This tradition has already been proved to be incompatible with contract punishment and this chapter's exploration of deontology confirms undoubtedly that the theory present contrasts with the rationale of profit. The broken promise that is delivered in contract punishment fits the bill for a broken categorical imperative. The promise of punishment is secondary and not a promise at all; the desire to profit is thrust to the forefront of a promise. Furthermore, punishing should attempt to achieve autonomy is any being as they are an end of rational existence, not a means for other benefit. Private prisons use autonomous beings (prisoners) as a means for profit, denying them the right to exist autonomously and freely.

If prisoners cannot be used as a means, the argument for rehabilitation is bolstered. Kant assumes that the soul is static, contradicting Montesquieu and Beccaria. Yet Kant insists that the process of enlightenment through free thought should be spread throughout a society. If the criminal is autonomous and acted heteronomously in crime, then there is hope for enlightenment. The state, which is built upon the social contract of

categorical imperatives, has a duty to restore autonomy. Private prisons detract from this endeavor. Additionally, private prisons have no incentive for rehabilitation as I mentioned in previous chapters. It is anti-rational to lose the most important source of income. The state can operate under categorical imperatives because it does not stand to profit in any way. After all, actions are only moral in their inception, not consequence; if the state is motivated to rehabilitate, then it is following the social contract.

Legal punishment, then, must follow these prescriptions. Kant joins with Montesquieu and Beccaria in calling for appropriately severe punishment. Laws must follow the categorical imperative if they are placed within the social contract. Therefore, punishment is a natural recourse for those who break natural law as they deserve punishment. Legal severity is again diminished in private prisons as severe punishment ensures contract quotas which subsequently increasingly harsh punishment. In this way, the criminal is disconnected from the harm of his crime and does not process the punishment correctly. Even worse, the criminal never has the hope of being rehabilitated when overcorrected. Additionally, the state loses control over dispersed universal culture when prisons are corrected by specific prison culture. Therefore, heteronomous desires of profit can complicate the cultural identity when prisoners are reformed outside the control of the state.

These reasons taken together show that deontology cannot punish appropriately within a private system. Deterrence tactics from consequentialism and retributivist strategies from deontology are frequently contrasted with one another. However, they converge in denial of contract punishment. The next chapter will address the final form of punishment in the triumvirate. Liberal punishment will complete this exploration of

punishment to demonstrate that none of the popular approaches to punishment can exist within a private prison system.

Chapter 5: Locke and Liberalism

The justifications of consequentialism and deontology paint punishment as a dichotomous concept; punishment is justified as retribution for an action's consequence or for an action's intent. However, my final examination approaches punishment differently. John Locke's theory on liberal punishment combines aspects from consequentialism and deontology to constitute an entirely new concept. I argue here that Lockean punishment creates specific criteria to punish that is more victim-oriented. Earlier in this dissertation, I explored Locke's justification for punishment within the social contract in the "The Debate's Missing Theory," but the liberal justification of punishment must be explicated in contrast with consequentialism and deontology. As mentioned in the previous chapter, and restated here, the Lockean form of punishment is unique compared to the others. If harm is done as a consequence of actions, then it is punished due to the harmful outcomes as prescribed in Jeremy Bentham's consequentialism.⁴⁶ If harm is done of because immoral motives, then it is punished due to a lack of morality as prescribed in Immanuel Kant's deontology.⁴⁷ However Locke's liberal punishment does not examine the actions or intent of the criminal to guide punishment, but rather examines the plight of the victim. Subsequently, liberal punishment interacts with individuals rather than a conglomerate. While consequentialism and deontology look at society and the ultimate communal goal for punishment, the liberal form of punishment narrows the scope by focusing on the violation of rights, and the consequences of these violations for offenders. The distinct

⁴⁶ Consequentialism aims to achieve the greatest happiness for the greatest number of people in a utilitarian manner.

⁴⁷ Deontology stresses a universal moral code that is agreeable and applicable to everyone.

and individualized act of crime and punishment is an indicator of overall societal safety. Here, the nuances of punishment are examined through the victim, the criminal, and, ultimately, the societal implications to preserve total freedom. Locke's theory allows me to extrapolate on the individuals' importance and construct a scheme of state punishment that is ultimately antithetical to contract punishment.

This chapter will analyze the liberal punishment specifically presented in John Locke's *Two Treatises of Government* and determine if contract punishment can punish per liberal justifications. First, I will present Locke's basis of equality that begins in the state of nature. The universal and equal recognition of rationality and intellect is an essential motivator for human interaction and the foundation of civil society. Secondly, equality is preserved with a socially contracted sovereign who then enforces tolerance; subsequently, a peaceable society is diverse, but harmonious. I assert that Locke's theory implies specific duties for a government to accommodate variation to avoid civil unrest. Individuals become tolerant through their rational ability to gain knowledge and equally recognize rationality in others. The sovereign then protects this equality by enforcing a tolerant society.

After establishing the Lockean approach to rationality and individuality, I will unpack liberal punishment through its goals and methods. First, I will address the goals. Locke states that punishment is executed to achieve restitution and correction, benefitting both the victim and the criminal. This section will begin by discussing the preservation of universal rights in a society. Victimizing any individual compromises their equality and must be punished accordingly by the sovereign. However, based on Locke's importance of the individual, I claim that the individual right to punish is not entirely erased by the

sovereign's duty to punish. Instead I find that the victim acts as a guide towards this endeavor and helps assess how punishment will be given. Secondly, the punishment that is handed down from the sovereign must afford some dignity to a criminal in their punishment. This dignity is established through rehabilitation. The right of the individual as an equally governing being must be recognized by the state. When an individual is harmed, their right to self-governance is compromised. However, the state may restore this self-governance through rehabilitation to retribute the victim. Finally, the methods of punishment will be understood in two realms. First, I assert that Locke's theory transfers the victim's pain as an important indicator for how punishment can be given; punishment is essentially given from the victim, not the sovereign. According to Locke's theory, I deduce that this preserves the rights from the state of nature and maintains the individual's autonomy. Second, punishment must be methodically symmetrical so that individual rights of the criminal are protected from unnecessary harm. In accordance with Lockean assertions, I claim that punishment must look at case-by-case evidence to restore the focus of the individual and connect crime with punishment to avoid an illegitimate slavery.

Upon assessing the goals and methods of Locke's punishment, I argue that private punishment efforts undermine Lockean punishment. Liberalism aims to increase freedom, but private punishment takes such freedom away. In a private system, a victim can never be fully restituted as a private prison will never aim to rehabilitate and rehabilitation is a major factor for Lockean style restitution. The methods, too, are unsatisfied as the punishment technique is prescribed from an entity that is not privy to the degree of harm; the individual's harm is secondary. Additionally, the method of

punishment is harsh and unnecessary in private prisons. Without an individual level analysis, the punishment is harm without intent. Lacking guidance, the individual enters slavery rather than being corrected through punishment.

The Liberal Value of the Individual

In *Of the Conduct of the Understanding*, Locke states: “That *we should love our neighbor as ourselves* is such a fundamental truth for the regulating human society, that, I think, by that alone, one might without difficulty determine all the cases and doubts in social morality” (Locke 1996A, 223). This statement succinctly summarizes the liberal approach to organizing a civil society: rationality breeds toleration. Locke states that loving one’s neighbor is a fundamental truth, a verity that is reached from examination. Man can preserve peace (a logically deduced necessity) by loving another as one loves himself (e.g. toleration). A peaceable society recognizes a natural equality; there is no hierarchy of respect, only a uniform ability to reason. If individuals internalize this command, society benefits largely by achieving peace. The empirical approach, then, allows man to recognize fundamental truths about one another and avoid civil unrest. The individual’s role is prominent in liberalism and shifts the scope of consideration for human motivation compared to consequentialism and deontology. Bentham’s consequentialism is motivated by pain and pleasure from consequential actions. Kant’s deontology believes that all action should be dictated by moral rightness which is discoverable through metaphysics. However, Locke does not focus on universal motivators applied so broadly. Universal truth dictates how government should act (Grant 2010, 1).⁴⁸ The basis of the social contract, for Locke, uses natural law to create statutory

⁴⁸ “All men have an equal right to govern their actions as they see fit. No man has an intrinsic or natural right to govern another...men are equal in the sense that they are by nature free.”

law to preserve these universal truths. This sense of mutual equality in government constitutes the primary motivator in liberalism. My previous chapter discussed Locke and punishment as an endeavor purely for the state. The state of nature allowed multiple different judges and executioners which created inconveniences; the social contract remedied these variations. This chapter will further explore Locke's punishment justifications, first through liberal philosophy and then through the goals and methods of punishing. While assessing Locke's theory, I assert that liberal punishment, in the Lockean sense, exemplifies the social contract distinctly compared to consequentialism and deontology. I therefore extrapolate upon Locke's theory to examine the procedures of punishment. My previous chapter established the necessity of punishment in a social contract, but I now move to discuss the purpose of punishment in a social contract. Locke's liberal punishment ultimately stresses the freedom of the individual through equality. I break down Locke's ideology into two parts: empiricism and toleration.

I first begin by examining how empiricism shapes liberal ideology and subsequently Lockean punishment. Locke's theory for human perception begins with a *tabula rasa*. Contrasting Kant's categorical imperative, Locke finds there is no basis for innate knowledge (Locke 1996A, II: 1, 1-9). It is acquired by contextualizing the sensational world. Knowledge starts in basic perception but can grow and expand upon established base, a clear rejection of epistemology (Wall 1977, 22). Interestingly, Locke contradicts the Kantian method of perception and subtly nods towards Bentham's processes of knowledge. Bentham finds that pain and pleasure are stimuli which dictate rational thought. Locke also finds that corporeal responses are indicators for motivation,

but adds a cerebral process of reflection (Locke 1996A, II: 1, 4).⁴⁹ This helps to constitute the inner workings of the mind (Locke frequently refers to these as the faculties of the mind) which allow choice in action, reinforcing the ability to freely self-govern (Mabbott 1973, 65-66). The mind automatically perceives objects which are then processed. Indeed, great reflection on pain and pleasure can give way to asceticism and sympathy and antipathy (Recall that Bentham rejects these methods as they lack consistency). Locke, however, invites the process of reflection, as knowledge can be consumed and transformed by the faculties.

Locke takes great care to categorize how ideas and senses work and subsequently build upon one another to substantiate individual knowledge. Simple ideas which can constitute larger ideas are categorized in four ways: ideas from single senses, ideas from multiple senses, ideas from reflection, and ideas from sense and reflection (Locke 1996A, II: 5-7). The abstract ideas that come from simple ideas come purely from observation (Locke 1996A, III, 3: 13-15). Ultimately, this constant building and processing of ideas reveals true knowledge (Locke 1996A, IV: 1, 2).⁵⁰ Unlike Kant, liberal knowledge is not innate, and, unlike Bentham, liberal knowledge is a cerebral process rather than a corporeal interpretation. Using this basis for knowledge and the process of reflection, Locke establishes the concept of equality based in reason. All individuals universally reason, even if conclusions differ. Man recognizes this ability to empirically ground oneself in others and therefore recognizes the authority of another's mind. The ability to reason freely and govern oneself in the state of nature is the basis for equality which does

⁴⁹ "the notice which the mind takes of its own operations, and the manner of them, by reason whereof, there come to be ideas of the operations in the understanding."

⁵⁰ "*Knowledge* then seems to me to be nothing but *the perception of the connection and agreement, or disagreement and repugnancy of any of our ideas.*"

not diminish in a social contract: “Locke’s description of the free and rational man and his description of free and rational government are based on the same understanding of the relationships among freedom, reason, and will” (Grant 2010, 192). The empirical approach to knowledge reveals total equality amongst men who use such faculties to reach conclusions. Reason is a quality inherent in all men and subsequently creates equality (Locke, *Second Treatise of Government* 1980, VI). As discussed in "The Debate's Missing Theory" chapter of this project, the state of nature is governed by natural law and the equality in reason. The ability to reason allows man to be his own sovereign and govern himself rationally. Since every man has an equal opportunity to govern himself, every man is equal in sovereign power. However, this state of perfect equality causes complications due to biases and inconveniences. To remedy this, all men will instate a sovereign to eliminate such biases and create a civil society, as outlined in *Second Treatise* (Locke, *Second Treatise of Government* 1980, VII: 97). The sovereign must adhere to all the confines of natural law, namely, equality.

Aptly, Locke’s “A Letter Concerning Toleration” addressed concerns in 17th Century England regarding multiple sects of religion and Christianity. Locke responds by stating that the true Christian is not invested in conversion but should uphold toleration as it is “the chief characteristic mark of the true Church’ (Locke 1952, 1). Locke presents an empirically based argument in addition to this Christian based argument: toleration reduces tension in society that emerges from governmentally forced worship (Mabbott 1973). This ultimately leads to the assertion that government and religion are two entirely different spheres that should remain separated; government deals with external affairs while the Church deals with internal affairs. A magistrate then must

promote toleration and not conversion as the magistrate has no jurisdiction over the care of soul. Even if outward experience could change these things, the soul would still not be saved unless changed by man's own volition, so any attempt at coerced conversion to a state sanctioned religion is moot. In the same way that the magistrate cannot legislate against people becoming poor and sick, he cannot legislate religion or internal conviction. Subsequently if a church is founded and followed it is "a voluntary society of men, joining themselves together of their own accord" (Locke 1952, 4). Man's conclusions from internal analysis must be tolerated whether that is in the realm of religion or otherwise (Jolley 2016). Note that the process of gaining knowledge is an individual endeavor that comes from self-reflection. Religious convictions emerge similarly. Therefore, I find that Locke's theory on religious toleration can extend beyond spiritual variations. Instead, individual convictions of religion or any other personal belief stem from the ability to equally reflect. Subsequently, I find that Locke's liberalism supports a diverse society in more than just religious convictions. Society benefits from toleration because all are assured to be tolerated for any individual belief. Citizens do not fear that a magistrate will force a belief and show no resistance to the magistrate in a symbiotic relationship.

This discussion of empiricism and toleration sets the stage for Lockean punishment. The liberal philosophy discussed here promotes the individual's right to exist free from harm. When one is harmed, then they are dehumanized, and punishment must work to restore their individuality. The fundamental truth of "loving one's neighbor" means that one must respect individuality. When an individual recognizes equal mental faculties, they are obliged to tolerate differences among neighbors. Additionally, natural

law guides political law (as established in the third chapter of this project). If natural law asserts equality, then equality must be maintained; this extends to the process of toleration (Locke, *Second Treatise of Government* 1980, II: 5). A society is oppressive and prone to civil unrest when these aspects are not acknowledged. These truths then guide the process of punishment. The next section of this chapter will address how these principles of empiricism and toleration manifest in criminality and its consequences. Punishment, emerging from this liberal approach of empiricism and toleration, articulates the value of the individual from the criminal to the victim.

Liberal Punishment

As with the rest of this project, liberalism is a justification for punishment that can be implemented within the social contract. Natural law is the guiding legal history for a Lockean contract. Additionally, I will follow the structure I have used in previous chapters, establishing the goals and methods of punishment in this tradition. Liberalism punishes to protect the individual (Jacobs 2013). Victims hope for restitution through punishment and the state uses the individual's judgment as a guide. Locke's considerations go further than just the larger society's harm and incorporates the harm to those who are specifically damaged by criminal action and assigned the label of victimhood (Bedau and Kelly 2015). In addition to preserving the victim, liberalism showcases the value of the individual by preserves the dignity of the criminal; the criminal retains individual rights through fair judgment and punishment. Additionally, liberalism considers the criminal as part of society, making rehabilitation an obvious conclusion in the effort to preserve individual rights for all. The individual considerations

of Locke's liberalism create a basis for a punishment upon which I expand to create a "victim-centric" view of punishment.

Briefly, before defining and extrapolating on the Lockean view of punishment, I offer a recap of the social contract theory Locke posits that allows punishment to exist. In *Second Treatise*, Locke posits that the state of nature begins in equality from the universal ability to reason. Individuals are equal in their ability to serve as their own sovereign and because of this freedom, they create inequalities amongst themselves. The state of nature, although perfectly free, presents biases that could emerge and force a state of war. Because of this uncertainty, man will found a civil society and social contract to mediate these discrepancies. This brief summary is important for the following discussions because it highlights the importance of the individual in the formulation of a contract. The individual is important as an autonomous sovereign (prior to the contract) and important as a member of the contract. Subsequently, I posit that the individual's role in punishment will be the focal point in the following discussions.

The goals of punishment can be divided into two aspects. The first goal is to restore dignity to the victim of crime. The second goal is to afford the criminal dignity in punishment, but still punish per the crime committed. Liberal punishment rehabilitates to acknowledge both a victim's pain and a criminal's autonomy. This individual scope used in this justification for punishment secures some good for society by self-reinforcing a social contract and its governing mechanism. With the goals of restitution and rehabilitation, liberalism combines the rehabilitative aspect of consequentialism and the restitutive aspect of deontology. However, liberalism provides these goal on the individual level rather than on a broad, societal level. In this manner, both the individual

victim and the individual criminal are afforded equal stature in citizenship under law. With the goal of proportional and rehabilitative punishment established, the first method of Lockean punishment requires that punishment honor the victim and criminal and must be generally guided by the victim's level of harm. The victim is the primary indicator for how punishment must be administered to achieve the goal of restitution. The second methodological aspect of liberal punishment is that punishment must be symmetrical and level. An unnecessary amount of punishment leads to overcorrection which ignores the goal of rehabilitation. The method of punishment must be conducted along a case-by-case analysis to understand how the victim and criminal are larger parts of the societal conglomerate and assess the level of punishment required.

After I explore the goals and methods of liberal punishment in this section, the prevalent critique of for-profit prisons reemerges: the lack of rehabilitative options comes from a desire for profit. The purely capitalist approach does not fulfill the social contract that requires rehabilitation. This violates the first and second goals of dignifying the victim and criminal. In this instance, one individual or group of individuals have superseded the rights of the criminal. Locke makes no hierarchical distinctions of rights in this manner; no one member of a social contract is guaranteed rights over another. Additionally, the liberal methods are violated. First, a lack of rehabilitation in private prisons systematically ignores the pain of the victim and consequently does not recognize how the victim may guide punishment. The method is chosen by the private entity and not by the constituents in the social contract. Secondly, the neo-liberal rise in punishment has indicated an insistence on harsh punishment methods that have cemented the use of private prisons to combat the large and lasting prison populations. The individual's rights

are violated in a private prison setting where the prisoner is used as a tool for production of goods rather than as an equal. With no alternative to preserving his own individual rights, regarding work and production, the criminal is subjected to an anti-liberal means of production which can be interpreted as an illegitimate slavery.

The Goal of Individual Dignity

Liberalism's first goal is to minimize the label of victimhood and restore dignity to those harmed subsequently I assert that liberal punishment must take a victim-centric approach. Those within a social contract share the same goals as the sovereign who cannot exist without the will of the people. The social contract, as discussed in "The Debate's Missing Theory," creates a relationship with the sovereign and the governed. The liberal view assumes the individual is rational and will create a social contract that preserves his rights. Through consent in the social contract, the individual shares the goals of the state. When the sovereign establishes law that promotes justice and furthers the aims of rationality, these goals are appealing to the individual. The individual is then joined with other rational beings to punish for reparation (Locke, Second Treatise of Government 1980, II: 10).⁵¹ To fully accomplish these goals of justice, the law must rectify each individual case with the consent of the social contractors. Bentham and Kant focus on universal principles, while Locke begins with the restitution of one individual by another in the state of nature. In the state of nature, everyone has the right to enforce the law of nature. After transitioning to civil society, government still takes its bearings from the law of nature and its rules for punishment. Subsequently, consequentialism and

⁵¹ "the person who has been harmed has, in addition to the general right of punishment that he shares with everyone else, a particular right to seek reparation from the person who harmed him; and anyone else who thinks this just may also join with the injured party and help him to recover from the offender such damages as may make satisfaction for the harm he has suffered."

deontology punish in broad and sweeping strokes. Locke subverts this general approach and examines the individual's role. Harm, ultimately, is a rejection of the universal recognition of individualism. To correct this, the individual asserts his right to reason and govern himself through punishment. This reasoning then constitutes my first assertions for the goals of liberalism: to honor the harm that the victim faced, as the sovereign and the victim have similar goals of retribution.

The sovereign has a duty to respect a victim by reducing crime and preserving the individual right to freedom. Recall that equality is recognized from natural law which is then preserved in a civil society. The victim of criminal harm has his equality compromised when another attempt to subvert his equal stature. A criminal then bestows victimhood, a type of subjugation, to others. Originally, the ability to govern, execute law, and punish is the right of the individual. When a social contract is formed, this right is transferred to the sovereign: "The injured party has the power of taking for himself the goods or service of the offender, by right of self-preservation; and everyone has a power to punish the crime to prevent its being committed again ..." (Locke, *Second Treatise of Government* 1980, II: 11). The goal of punishment for the sovereign must be the same as the individual and must necessarily be retributivist for the victim.

However, the first goal of punishing to reduce victimhood requires a secondary effort. Retributivism appeals to the individualism of the victim, but reform appeals to the individualism of the criminal. Indeed "reparation and restraint" define the very action of legal harm; they "are the only reasons why one man may lawfully harm another, which is what we call 'punishment'" (Locke, *Second Treatise of Government* 1980, II: 8). The first component of punishment is for restitution to compensate the victim who faced a

violation of rights. As liberalism hopes to preserve the individual, the first goal of liberalism is to find retribution for harm and reform the criminal; the two concepts complement each other. Reform, as an effect on the criminal, will be explored later in this section. However, first I will address reform for the victim as an initial conclusion. Reintegration acknowledges the harm that the victim faced, tying the interests of sovereign and individual. By taking measures to prevent this harm from occurring again, the sovereign is recognizing that the victim felt a compromise in their ability to self-preserve. Thus, it is only rational to reform so that those within the social contract can be governed under the laws of nature that achieve the end of self-preservation (Locke, *Second Treatise of Government* 1980, XVI: 176).

When considering punishment from the criminal perspective (my second conclusion), he must be punished “to secure men from future crimes by this criminal” (Locke, *Second Treatise of Government* 1980, II: 7). Rehabilitation or deterrence works by fully acknowledging a victim’s harm and stopping further criminality that could inflict such pain. Deterrence allows the criminal to be restored to rationality and rejoin society as a rational individual and moral agent (Spellman 1988). Addressing this first point, to restitution a victim, the victim punishes “so he can do to anyone who has transgressed that law as much harm as may make him repent having done it” (Locke, *Second Treatise of Government* 1980, II: 7). The act of restitution has a condition of deterrence within (Rickless 2014, 178). This posits that a victim cannot be satisfied in punishment unless deterrence is entwined in punishment. Subsequently, Locke combines the two notions of punishment prevalent in other justifications. The consequentialist call for deterrence cannot be met without the consent of the victim who is being restituted. The

deontological call for justice cannot be met without deterrence. This means the value of a victim's harm is so great that leaving a harmful act uncorrected and deterred undermines the value of the individual. While preserving the dignity of the victim and utilizing retributivism to please the victim, Locke dignifies the criminal as an equally important aspect of society that must be rehabilitated as an ode to retribution for the victim. The harm felt by the victim is so great, that it cannot be repeated. Therefore, I assert that the criminal must be made to see the value of the individual.

The second point of restitution reconfigures the criminal. This configuration is not virtuous like deontological rehabilitation. Additionally, this rehabilitation is not for the benefit of the criminal as discussed by Montesquieu and Beccaria. Instead, this rehabilitation reorients rationality, so the criminal is disarmed as a societal threat and reinstated as an equal part of civil society rather than destroyed as an animal in the state of nature (Locke, *Second Treatise of Government* 1980, II: 11). If one commits harm, it is because he is irrational. A rational person within a social contract will not act as such since they acknowledge the right of the individual to self-preserve. I mentioned earlier that rehabilitation legitimizes the victim's harm, but doubly works to restore the autonomy of the criminal. In this take on punishment, punishment aims to correct criminal action to establish "the protection of society (including deterrence) and restitution" where deterrence serves justice to the victim and deterrence protects society (Tuckness 2010). A rational being is an autonomous being who governs according to self-preservation. Rationality also means there is a mutual recognition of individuality. When a criminal harms another being, they are negating the victim's individuality. This insinuates that the criminal has lost his sense the universal sense of individuality and

poses a threat to the greater society (Mabbott 1973, 67). Rehabilitation, then helps reduce victimhood (an undesirable trait in a social contract) and restores rationality and reduce recidivism. Recidivism, Locke asserts, can reduce by appropriate punishment so the goal of punishment is to minimize a repeated offense. Additionally, punishing in a rehabilitative manner does not just affect the offender; the use of punishment in this manner allows others to see what is undesirable and reduce victimhood even beyond the scope of the individual criminal and begins to deter crime proactively. To this degree, the sovereign may punish and make an example of the criminal to deter others (Locke, Second Treatise of Government 1980, II: 8).

The goals of Lockean liberalism, succinctly, are to provide restitution through rehabilitation. This satisfies the natural rights of the victim, reorients the prisoner in rationality, and preserves society from future harm. These goals, however, cannot be met in the private prisons systems. Criminal harm is twofold in Locke's view: the individual and society. The individual is harmed as the victim lacks restitution through rehabilitation, which is the major goal of liberalism. Society is harmed as it placed at risk with a criminal that is not disarmed. Subsequently, private prisons are against the goals of Lockean punishment in a reconstructed liberal society. Deterrence is anti-rational to for-profit prisons, as discussed extensively in this project (Gottschalk 2015, Antonuccio 2008, LeBaron 2008, Kyle 2013, Lacey 2008). A continuous flow of bodies within a private prison ensures the prison is fulfilling its contract with the state. Subsequently, there is no effort to rehabilitate, but simply to carry out sentences creating high rates of recidivism further reinforcing the profit available in private prisons. This means that private prison in a Lockean context first continues the harm of the individual who never

feels restitution for the misdeed. Secondly, the harm is doubled for a society which is precariously housing a criminal that could reinforce victimhood once more. A lack of rehabilitative techniques in private prisons means that punishment is ineffectual and simply acts as unnecessary harm.

Punishment is ultimately lacking in any form in privatization. Liberalism must rehabilitate to retribute. Rehabilitation acknowledges the important individual role the victim faces and attempts to minimize the damage that might occur in future. If private prisons punished according to the liberal standard, they would necessarily have to rehabilitate as a punishment imperative. However, this is anti-rational behavior for a contract prisons and they will not aim to rehabilitate in the same manner that state prisons do. Instead, they will be complacent in increasing criminality which undermines the safety of the individual and maintains harm to society. Liberalism reiterates the goal that consequentialism and deontology share: rehabilitation is necessary for punishment. For liberalism, rehabilitation is used to reduce the prevalence of victimhood. Ultimately, privatization of punishment and utilization of labor for profit undercuts the prevailing views of punishment and serves to harm society.

The Method of Equality and Symmetry

I have thus far stated that the goal of punishment is to provide justice to a victim. I deduce two methodological approaches to punishment considering Locke's assertions. First, the method of applying punishment is conducted on a case-by-case basis to determine the pain of the individual, not just the society. Secondly, liberal punishment is guided by the victim, but has limitations on the harm it may inflict. While the victim may cite the minimum level of harshness used to retribute, natural law dictates the maximum

amount of punishment used. The second aspect of the liberal method states that the criminal must not be overly harmed in the quest for punishment (Locke, Second Treatise of Government 1980, II: 12) .⁵² This protects the individualism of the criminal from excessive harm and protects the victim from repeated harm. Excessive punishment disconnects the criminal from the punishment and is simply harm without cause. Punishment that is too light does not properly deter the criminal or retribute the victim. Once pain is inferred from the individual victim, there is an established standard of intensity for justice and deterrence.

As the goals of liberalism first attempt to satiate the victim with retribution and justice, as seen in deontology, the first method of punishment I reason is that the victim's pain should dictate punishment. The liberal view aims to satiate the victim's need for reprisal and consequently holds that discipline should not just deter crime, but also institute a sense of retributivism in justice as a form of "excess and instability" of general human interaction for punishment to be effective (Dilts 2012, 61). Locke holds that human empiricism and reason allows man to govern himself without interference. When there is interference, it is a slight against natural law. In natural law, man can punish as a sovereign. When that sovereignty transfers in a social contract, then the formal law takes over the duty of punishment from natural law. However, this formal law is still created by the people through representative legislators (Locke, Second Treatise of Government 1980, XII: 149). Subsequently, I find that the victim's role is not diminished to achieve the goal of retribution. The victim guides the established sovereign in punishing to honor the victim's autonomy and the communal consent to a social contract. The wrong done

⁵² "I answer, each transgression may be punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like."

by the criminal places a burden on those who receive the harm, so the primary informant and indicator of necessary punishment is the conferred status of victimhood on the individual. The goal of punishment is to satisfy the victim who subsequently informs the sovereign of the best method to take in punishment.

This method requires an individual assessment for each case of criminal harm and assumed victimhood which carry out the will of the individual. While the end goal is to protect society and retribute the victim, this starts with the method of micro-examination that restitutes the individual victim. When in a social contract, a victim gives the commonwealth the right of “carrying out of its judgments (which are really his own judgments, for they are made by himself or by his representative)” (Locke, Second Treatise of Government 1980, VII: 88). The consequentialist and deontological views of punishment focus solely on societal harm broadly defined. The relationship between the individual, the society, and the state are given more credence in Lockean punishment, whereas in consequentialism and deontology the individual is never recognized as a victim or a criminal and these views focus more on larger concepts of societal benefit or moral law. The individual is prominent in the Lockean social contract; the sovereign cannot exist without the individual consenting in a conglomerate. This means the goals of the sovereign and the individual are the same: the freedom to exist as an individual. With such a close relationship with the goals of the state, then also the method of punishing is tied to the individual.

The second method of punishment for liberalism states that punishment should have symmetrical penalties for harm committed. Punishment maintains a level treatment of individuals to protect individual rights of those harmed and of the criminal for absolute

moral justice. Overcorrecting is simply unnecessary harm. Under-correcting is a disservice to the victim. Subsequently, a crime is evenly punished as decided by an unbiased umpire. Liberalism echoes the calls from Montesquieu and Beccaria in this instance to punish accordingly but for different intentions. Montesquieu and Beccaria punish to uplift the individual rights and honor the individual as part of society. Locke punishes evenly so that crime is corrected and never repeated, for the benefit of society and the victim. In determining severity, punishment requires specific criteria. Locke is clear the sovereign mediates the power to punish and not an individual (Locke, *Second Treatise of Government* 1980, II: 13).⁵³ Subsequently, allowing an individual, such as a for-profit prison to punish, the power of the sovereign is undermined. The right of uniform punishment is forsaken. When this unbiased umpire is undermined, the social contract is no longer in existence (Locke, *Second Treatise of Government* 1980, VII: 89).⁵⁴

Some Thoughts Concerning Education can supplement the method of punishment derived from his *Second Treatise* regarding severity. If the purpose of punishment is to deter the criminal, that means they are involved in some processes of education that is given by the state. Locke finds that “great severity of punishment does but very little good; nay, great harm in education” (Locke 1996B, 43). Locke specifically refers to the education of children, but this can be translated to the prisoner’s situation. If the prisoner is harshly treated, then the punishment does not serve to educate the prisoner on proper

⁵³ “It is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends: and on the other side, that ill nature, passion and revenge will carry them too far in punishing others; and hence nothing but confusion and disorder will follow, and that therefore God hath certainly appointed government to restrain the partiality and violence of men.”

⁵⁴ “where-ever there are any number of men, however associated, that have no such decisive power to appeal to, there they are still in the *state of nature*.”

behavior. This harshness can be escalated, but only so much so that the prisoner recognizes the authority of the sovereign and deters future criminality (Locke, Second Treatise of Government 1980, II: 12).⁵⁵

The two methods outlined by Lockean punishment fare poorly when utilized in conjunction with private prisons. The first method requires the victim to take an active role in punishing as he did in the social contract. The victim's individual harm is assessed and subsequently the crime is punished based on this level of harm. Then, the criminal is rehabilitated to acknowledge the pain of the victim and reduce this event from reoccurring. The prisoner is rational through fear of punishment, which restitutes the victim by preventing his level of pain from occurring again. Simultaneously, society benefits as this fear is eliminated and peace in the social contract is restored (Seuss 2015). For-profit prisons do not punish to rehabilitate which is the main purpose of punishment. Private prisons would behave anti-rationally should they rehabilitate, as noted in the previous section. Without rehabilitation, there is no punishment, simply unnecessary harm. Locke is clear on the allowance of this behavior: man "may not, unless it be to do justice on an offender, take away, or impair the life, or what tends to the preservation of the life, liberty, health, or goods of another" (Locke, Second Treatise of Government 1980, II: 6). This means, that private prisons act only to cause unnecessary harm as they lack the ability to rehabilitate. They act against the laws of nature and provide no justice in restitution and rehabilitation.

Additionally, the lack of rehabilitation constitutes an illegitimate slavery. Private prisons stress containment rather than rehabilitation, therefore violating individual rights

⁵⁵ "each offence may be punished severely enough to make it a bad bargain for the offender, to give him reason to repent, and to terrify others from offending in the same way."

of the criminal who lacks rehabilitation. Locke discusses the use of slavery in his fourth chapter of the *Second Treatise* which requires man to only exist within the laws of a consented legislature. Under the social contract, only the consented sovereign may punish. An individual punisher subverts the social contract. Individual punishing, as seen in the state of nature creates inconsistencies that cannot be remedied without the use of an arbitrator or umpire for Locke. Subsequently, the use of an individual punisher creates a partial judge meaning private punishment is an illegitimate slavery. Slavery is legitimate if there is consent to such a condition (Locke, *Second Treatise of Government* 1980, IV: 24). As discussed in “The Debate’s Missing Theory,” a private punisher acts as an individual punisher. This is outside of the confines of the original social contract. Contract prisons act as if they are in the state of nature, destroying the social contract. When a criminal offends, they have consented to be punished in the social contract. They have also consented to be punished in the liberal fashion which rehabilitates to retribute. However, the private prison complex does not punish in this way meaning the state of slavery is instated without consent. Moreover, punishment intends to protect a society from criminal activity that acts harmfully within the social contract as the power of making laws. Locke states that this act outside of the social contract is an act of war and subsequently, the people have a right to end this institution. The for-profit prison complex is an act that subverts the power of the sovereign and subsequently remains firmly outside the social contract. Through the powers of war and peace, the people have a right to abolish this institution.

The second method of punishment requires symmetry in punishment. As I mentioned in previous sections of this project, the symmetry of punishment is nonexistent

in private prisons (LeBaron 2008). The neo-liberal rise in America constituted a severe punishment culture. One study shows that private prisoners ultimately serve longer prison sentences because private prisons issue more incarcerated infractions that add to sentences and minimize the chance of parole (Mukherjee 2016). The two concepts of harsh punishment and private punishment are complementary to one another. The harsher the punishment, the longer the sentence for the criminal meaning contractors have larger benefits conferred to them from governmental contracts (Gottschalk 2015). Long, arduous sentences ensure that the prisoner is placed in a private prison fulfilling the governmental contract and subsequently lining the pockets of the owners with contract money. The punishment here is simply harm with no intent. The intent of punishment, in liberalism is to rehabilitate. Private prisons do not rehabilitate and capitalize on the failure of a sovereign; they allow a failing sovereign to exist. A sovereign should be able to protect its people and when it does not it must be altered. However, private prisons allow this weakening sovereign to remain as it privatizes the areas the sovereign cannot address. This means an illegitimate sovereign is in place.

With an illegitimate sovereign, private prisons then can punish. However, the punishment is categorized as severe. The punishment is severe as it has no rehabilitation element. Subsequently, punishment was not levied evenly, but with longer sentences in prisons for profit. This naturally benefits an economic endeavor that is supported by a flow of criminal activity. The longer a prisoner must be housed, the more money a private prison stands to gain from contracting with the government. Private prisons have a history rooted in sentencing culture that puts problems away from the rest of society

(the problem being the prisoner) rather than attempting to solve the problem and reintegrate the solved issue back into society.

Lockean punishment aims to correct harm done to the victim and subsequently punishment can be reconstructed to value the individual. Their individualistic spirit is the vital guiding force for punishment. Punishment ought to restore the individualism of the victim, recognizing the sovereign's duty in a social contract. The individual was once an individual sovereign and could punish to preserve himself; this right is solidified in a social contract where a sovereign corrects misdeeds. The correction, however, has a second goal to retribute and rehabilitate. Restitution means the victim is satisfied that the criminal is properly handled by the state and that the pain inflicted on the victim can never occur again. Therefore, the sovereign must rehabilitate to realize the harm done to the victim. Private prisons, however, do not fulfill these goals. Rehabilitation is the lynchpin for punishment, preserving the individual and eliminating civil unrest. In this project, I have extensively discussed how rehabilitation is anti-rational for a private prison. It does not subsequently create a profit for a private prison as their means of profit (e.g. prisoners) disappear as behavior is corrected. Additionally, the goals of punishment are achieved through two methods: utilizing the victim's harm to guide punishment and create punishment that properly addresses harm without overcorrecting. Again, private prisons do not rehabilitate and therefore do not consider the victim when punishing. A rational victim urges rehabilitation to be restituted. Additionally, without rehabilitating, private prisons inflict harm that is too harsh for the crime. Private prisons use harm without direction and therefore create an illegitimate slavery. Subsequently, private

prisons are not compatible with liberalism. They cannot honor the victim's harm, rehabilitate accordingly, and punish appropriately.

Conclusions

Locke's theory incorporates how the social contract plays a role in punishing. Liberalism upholds the value of the individual throughout the theory, from world perspective to punishment. First, liberal ideology establishes the importance of empiricism and toleration. The ability to reason constitutes the right of an individual. Reasoning allows others to see the equality amongst men and subsequently is an equalizing force for a society. Additionally, once this ability is established, a society must tolerate all differences within itself. Locke specifically states this toleration is for religion, but I claim that toleration extends to any varied, internal reasoning. The sovereign must promote tolerance and never become oppressive over man's ability to reason for himself. These prescriptions mean the individual can govern over himself in the internal and external spheres. However, when man enters a social contract, he forfeits his ability to rule externally, giving it to the sovereign to preserve. Otherwise, man must be free to rule over his internal abilities freely.

When a sovereign governs externally, it must incorporate the wants of the people in the contract and create a victim-oriented style of punishment. The goals of punishment consolidate the wants of the individual into the goals of the sovereign. The individual must want restitution through rehabilitation and the sovereign must offer this to offset the pain of being a victim. The goals of the sovereign and the individual are one in the same as the sovereign only exists based on the individual. That means the goal of any punishment is to retribute through rehabilitation. Private prisons act as individual

punishers. They do not share the same goals as the individual as they are asserting their own punishment. They subvert the intent of the social contract and punish outside of the prescribed goals. Moreover, they do not rehabilitate for societal safety; they punish for monetary benefit.

The goals of punishment give way to the methods of liberal punishment. While the victim's goals are the goals of the state, the methods of the state must be constructed around the wants of the victim. This, as discussed, means rehabilitation. Rehabilitation as the second method, means that punishment must be even and connected to the crime. Private prisons do not make this connection and instead punish for profit, not for reform. This then means that the harm inflicted has no goal and is simply harm without benefit. The harm from private prisons does not achieve the aims of the victim and instead places a criminal in slavery. Private prisons, therefore, satisfy neither the goals nor the methods of liberal punishing.

The last three chapters in this project have individually explored how private prisons cannot be utilized in the three prominent justifications of punishment. Consequentialism, deontology, and liberalism all require different goals and methods to achieve proper punishment. None of these justifications can be properly upheld when government outsources punishment. This discussion adds to the current debate on privatization but in a novel way; thus far, the debate has looked at outcomes and failings of the private system. While these observations show that the private system has missteps, the theory of punishment provides the logical deduction of if private prisons can exist within American society. The answer I have reasoned is that punishment cannot facilitate the private endeavors. A social contract, which is applicable to all justifications

considered here, cannot facilitate an outside punisher. This theoretical examination is a novel approach to the debate and does not look at the outcome of the private prison complex, but the inception of it.

This project has given new insight into the debate on private prisons. The debate, so empirically based, lacked a theoretical understanding of how states are authorized to punish and what choices they are presented with to punish. However, the theory I have posited does not need to remain in a theoretical vacuum. The proceeding chapter will return to empiricisms to create a seamless exploration of privatization in American punishment. The next chapter takes the theoretical assertions made in this dissertation and applies them back to empirical study through a descriptive analysis of survey responses from the multiple prison system that exist in the United States. This approach then integrates the theory presented in this dissertation into a comprehensive condemnation of contract punishment.

Chapter 6: Actualizing Theory

Throughout this project, all discussions on punishment have concluded that punishment converge on critiquing private punishment, because they all think that private punishment subverts the common good, common will of the society, or rights of individuals. I began with the early social contract tradition and concluded that private prisons circumvent the necessity of a singular and impartial judge. Punishment theory from Charles de Montesquieu and Cesare Beccaria showed that private prisons subvert popular sovereignty. Modern contractarians maintain the integrity of the social contract, confirming that an American social contract rejects a punisher independent of the collective will. In conjunction with the survey of social contract theory, this project also discussed the purpose and function of punishment. I examined Jeremy Bentham's consequentialism that rejects private prisons because they create imbalanced consequences for criminality with harshness and inefficiency. Immanuel Kant's deontology ensures that a criminal finds true autonomy by being rehabilitated to the categorical imperative, a requirement that private prisons dodge. Finally, John Locke's liberalism finds that retribution cannot be achieved without rehabilitation to reduce victimhood and private prisons achieve neither. The theoretical examination therefore reveals that private punishment is incompatible with a social contract and the prevailing discussions on punishment.

This chapter aims to reconnect theory back into the empirical sphere. I previously critiqued the prevailing debate on private prisons for lacking a theoretical basis. The conclusions I have reached in this dissertation allow me to examine the empirical debate with this missing theoretical background. The theories examined reveal a singular major

objection: excessive and independent punishment is detrimental to a social contract. A healthy society should expect to see shorter sentences, low recidivism rates, and fewer private prisons. Previous empirical research on private prisons found that they may fulfill theoretical obligations, but only at a certain threshold. Specifically, private prisons may provide minor rehabilitation, but it is a self-interested achievement that maintains contractual obligations with a state, not with the broader society (Mukherjee 2016, Austin and Coventry 2001). Private contractors cannot seem completely ineffective as they will reveal that they are no longer useful for punishment. Naturally then, a state has no incentive to continue a contract with an entirely inefficient entity. If private contractors do not attempt some level of rehabilitation and reintegration, then the state has no use for their services. However, they cannot appear entirely effective in rehabilitating, releasing prisoners early, or preventing recidivism entirely. If they are completely effective, then the main source of revenue (prisoners) is compromised.

Previous studies on the performance of private prisons have focused extensively on the cost saving initiatives. These results have been mixed but more studies find that private prisons are negligibly or not at all cost effective. Pratt & Maahs (1999) found via meta-analysis that out of 33 cost-effective evaluations in adult, male prisoners, there was no evidence to show that private prisons provided higher levels of cost efficiency and what influenced cost savings were economies of scale, age of the prison, and security level regardless of private or public status. Segal & Moore (2002) found that the cost savings offered by private prisons “are themselves a product of competition, and that competition has beneficial effects on the entire system” but this is an unsurprising conclusion considering the study was funded by the Reason Public Policy Institute, a

libertarian think-tank that promotes privatization. However, Perrone & Pratt's meta-analysis of 9 studies (2003) contradicted this conclusion as they also found that there is a cost savings associated with private prisons, but little is said about the quality of prison life and punishment. This insinuates that cost savings compared to quality are ultimately unknown and could lead to further costs in future to offset the grievances prisoners might face. Addressing these grievances, Lundahl et al. (2009) examined 12 separate studies and concluded that cost savings are minimal and only provide better trained staff and "slightly fewer inmate grievances." Finally, Patrick Bayer and David Pozen (2005) found that private, juvenile facilities in Florida are more cost effective, but their high rates of recidivism cancel any additional cost saving analysis.

Continuing the study of recidivism, some studies have focused solely on this measure in private and public institutions. Empirical studies on recidivism rates and private prisons became prominent when Lanza-Kaduce, Parker, and Thomas (1999) concluded that private prisons did rehabilitate more efficiently than their public counterparts. Additionally, in a paper presented at the National Conference of the Bureau of Justice, Lanza-Kaduce and Maggard (2001) found similar evidence based on technical violations (violations of post-release conditions) and new offenses. Critics of these studies states that the sample size was too small, the matched pairs were done injudiciously, and the criteria for inclusion was skewed. Further controversy emerged when it was discovered that one of the authors from the Lanza-Kaduce studies was influenced by private prison interests prompting the Florida Commissions on Ethics to file a complaint against one of the authors.⁵⁶ Farabee and Knight (2002) attempted to

⁵⁶ Charles Thomas of the original 1999 study was the director of the Private Corrections Project at the University of Florida and received consulting fees from private correctional companies amounting to

rectify some of the methodological errors (e.g. time spent in facilities) and bias in the original studies and examined matched pairs in Florida. Over the course of 3 years, their study revealed that men had no difference of release, but women recidivated less (25% for private facilities versus 35% for public facilities). However, criticism for Farabee and Knight (2002) rests in their 6-month residency requirement; 6 months, proportionally, might not constitute the majority facility of an imprisonment.

Since 2003, four studies have emerged on recidivism and private prisons comparing the performance of both. Bales et al. (2003) and examined rates of recidivism in Florida. With the largest sample size, this study found no significant difference in facilities and recidivism rates. Spivak and Sharp (2008) replicated Bales et al. (2003) with data from Oklahoma and found that recidivism rates are higher in private facilities than in public facilities in 6 out of 8 models. Duwe and Clark (2013) replicated the Bales et al. (2003) study and found that Minnesota's private facilities also have high rates of recidivism compared to publicly run prisons. Finally, the most recent study (Mukherjee 2016) found that in Mississippi, private prison inmates spend more time in prison than their public counterparts based on the use of infractions. Private prisons issue higher levels of discipline and count infractions against prisoners to keep them imprisoned for

\$50,000 to \$60,000 annually in addition to the various stipends from private companies. The Florida Commissions on Ethics alleged "There is probable cause to believe that Dr. Thomas violated [ethics standards] by having a contractual relationship with private corrections companies...which conflict with his duty to objectively evaluate the corrections industry through his research with the University" (Friedmann 1999). The exchange of money was considered a conflict of interest for Thomas and additionally might have influenced the findings of his colleagues (Spivak and Sharp 2008). Thomas has served on the Board of Directors for the Prison Realty Trust, for CoreCivic (formerly Corrections Corporation of America [CCA]), and Avalon Correctional Services. Thomas also contributed a chapter to *Changing the Guard: Private Prisons and the Control of Crimes*, where he wrote of the creative potential and efficiency of private prisons. In his chapter, Thomas wrote of his "potential bias that might unintentionally color [his] assessment" (Thomas 2003, 62). The controversy surrounding Thomas throws skepticism on these original studies out of the University of Florida.

longer and reduce the possibility of parole. This study captures not just recidivism, but also cost efficacy. As these prisons are paid *per diem* for occupied space, the prison secures a profit via contractual obligation thereby offsetting predicted cost savings. Additionally, regardless of this excessive time spent in prison, there were no observed change in recidivism rates and fewer cost savings as the time spent in prison was extended in private facilities compared to public facilities. Private prison inmates, who spend more of their sentences in prison, do not recidivate less meaning they are not rehabilitated to a greater degree than prisoners in public facilities and force payments *per diem* for every subsequent year of imprisonment.

With this literature in mind, this chapter will attempt to explore three relationships with prisoners to determine if the private prison rationale against rehabilitation is exacerbating other issues within the prison complex. I will explore the claims that neoliberal culture of the 1980's has created harsher sentencing procedures, note how release conditions can possibly cause private prisons to maximize their economic benefit, and determine if the proportion of private prisoners has been increasing.

The Debate Revisited: Theoretical Application

Before examining the empirical analysis necessary to connect theory with observable trends, I will first revisit some of the arguments presented in my chapter "The Debate." Briefly recapping the current debate will situate my project appropriately. Initially, I mentioned that the current debate on private prisons only focuses on observable outcomes. However, this current debate is problematic because it ignores the theoretical backing necessary to truly condemn or support the practice. The bulk of this project explored the theory behind punishment to ascertain the purpose, goals, and

methods of punishment. This analysis concluded that the theory of punishment is incompatible with the practice of private prisons. Now I aim to reconnect these theoretical conclusions back into the prevalent debate based on empiricism.

In “The Debate” I identified three common areas of contention for private prisons. Proponents and critics approach benefits or issues in culture, economy, and institutional autonomy. Those who support private prisons often espouse neoliberal ideology, interpreted as a solution to the failings of government that allows the individual to act in place of a state to personally benefit (Logan 1990). This cultural approach gained traction in the 1980’s which coincided with the contemporary use of private prisons. Neoliberalism saw a massive rise in the 1980’s under the Ronald Reagan Administration and a continuation of these privatized policies in the 1990’s under the Bill Clinton Administration. However, there is reason to believe that neoliberalism is losing footing in public discourse due to a public desire for novel solutions to combat economic recessions (Harvey 2007). Neoliberalism stresses individual benefit and allows an individual to self-interestedly act and punish appropriately. Subsequently, the rational self-interest of the individual is compounded through neoliberalism which promoted the use of maximum sentences and other harsh punishment (Kyle 2013, Wacquant 2009). Neoliberal punitive policies aimed to decrease leniency, increase bureaucratic innovation to crack down on crime, broadcast insecurity to the public, stigmatize subcultures associated with violence, garner massive public support, and tout harsh punitive culture as the solution to criminality (Wacquant 2009). This action stressed the importance of the individual in an unparalleled way. First, neoliberalism promoted the safety of the individual over the reformation of a criminal. Secondly, neoliberalism allowed the individual to profit from

such sentencing procedures which circumvent the power of a state. Critics of this cultural approach view this profitable approach as uncontrollable. The rational self-interest to profit from criminality created a prison industry complex that treats crime as desirable for profit (Antonuccio 2008). Additionally, this might reveal a larger racially motivated issue that contains minority populations at higher rates (Davis 2000, Nicholson-Crotty and Meier 2003). The cultural implications of neoliberal thought will be examined in this study to ascertain if neoliberalism has increased the use of punishment. As sentencing procedures get harsher, the state has an excess population of inmates which requires the use of privatized facilities.

The theory presented in previous chapters of this project also condemns excessive use of punishment. Montesquieu and Beccaria warned that a society with zealous punishment leads to ineffective punishment in all aspects. When a society is so used to harsh punishment, any punishment is excessive and does not properly deter future crime. The harshness of the punishment disconnects the criminal from the action and punishment then becomes necessary harm. Bentham's consequentialism weighs in on parsimony and believes that all actions have consequences, but in the most efficient way. Incorrectly assigning consequences to actions is a violation of man's natural relationship with the decision-making process. Additionally, excessive punishment is wasteful. Bentham's consequentialism maintains that actions should be done in the most efficient way possible to rationally conserve resource and provide the maximum benefit. Subsequently, the critical condemnations of the observed privatized system have a connection to theory. The harshness of the punishment is ineffectual, and the neoliberal approach contradicts the theory of Montesquieu, Beccaria, and Bentham.

The next arena of argument in private prisons was the economic benefits of privatizing. Using the cultural implications of neoliberalism, the economic benefits are clear: the individual can profit from the use of private punishment. Additionally, proponents assert that tax payers are less responsible for prisoners and the construction of prisons. Labor utilized in prisons offsets the economic burden on companies to provide at least minimum wage compensation and benefits as required for free-world workers (LeBaron 2008). Furthermore, any product produced from this labor will come at a lower price point for consumption. The economic benefits come to the prison owners who profit from *per diem* contracts and the public who receive cheaper goods and are less responsible for prison costs. Critics contradict these claims and find that free-world laborers lose job opportunities when they are outsourced to prisoners. However, there is reason to doubt the promises of economic efficiency. Firstly, there is evidence that private prisons are not as cost effective as initially perceived. A case study in Australia (Andrews 2011) and numerous American analyses (Pratt and Maahs 1999, Perrone and Pratt 2003, Lundahl, et al. 2009) find that private prisons do not actualize these economic claims and with other variables considered, offset the initial findings of cost savings with other costs down the line. Due to this evidence, the economic benefits are dubious. Bayer and Pozen (2005) and Durose et al. (2014) found that the economic benefits of private punishment in juveniles is offset by high rates of recidivism which are connected to release conditions. Conditional releases increase the likelihood of recidivism which cancel any economic benefit that was previously promised. Subsequently, I will examine the economic claims of private punishment by determining if prison populations are

subjected to higher levels of conditional releases that could return prisoners back to prison.

The economic issues in the debate also have theoretical implications. First, Thomas Hobbes and James Buchanan's contractarianism explain cost/benefit ratios. Hobbes states that punishment must be done to provide a benefit and studies show that the benefit received is minimal or incorrectly calculated. Similarly, Buchanan establishes a social contract to give consistency and cohesion to the rules of economic engagement. Society, in forming a social contract, deems crime unbeneficial. Subsequently, if an institution is allowed to profit from the unbeneficial (i.e. criminality), then society is allowing a largely unbeneficial practice to benefit an individual. Additionally, Immanuel Kant addresses profit from punishment and finds that the economic benefit one receives is against a categorical imperative that defines what is valuable universally. Kant states that you cannot use a prisoner as a means as individual existence is an end, not a tool for profit. Critics in the prevalent debate find that there is no real economic benefit due to improper calculations and unforeseen costs. For Hobbes and Buchanan, private prisons can be accused of improper calculations which end up costing society in other arenas. For Kant, private prisons can be charged with unforeseen costs, notably the moral cost of using a prisoner as a means.

The final subject of argument for private prisons is the institutional autonomy in private punishment. Supporters of privatization hold that private prisons are unhindered by bureaucratic standards and can efficiently hire and train staff, build rapidly, and utilize their own incarceration philosophies (Antonuccio 2008). This leads to speedy expansion of such facilities in physical structure and in staff. Those opposed to privatization

contradict these claims. The unique incarceration philosophies may be interpreted as a free pass for prisoner abuse. The rapid staffing may lead to untrained personnel that are ill-equipped to offer security and reprimand prisoners appropriately. This can be exacerbated by the specific carceral culture within the prison that translates to a punishment culture where guards simply follow cultural orders and punish freely.⁵⁷ The effectiveness of these autonomous institutions is reduced without the same level of state oversight that is given to public prisons creating distinct punishment cultures. Additionally, some critics argue that multiple other arenas of criminal justice are already delegated to independent business. Things like investigation, victim services, prison services, and transportation of prisoners outsourced to private industries, so the private prison emergence is not notable or unique (Logan 1990).

The independence implications for private prisons have been a large part of my inquiry into the social contract. The social contract cannot support an individual punisher that acts outside the sovereign as punishment is the reason that a social contract is instated. Private prisons are given too much autonomy, too little accountability, and this creates a partial state of nature where an individual is a biased punisher. Recall that the sovereign's duty is to ensure man can self-preserve (a rule of natural law). The sovereign strives to rehabilitate to reduce victimhood in public prisons as the state has oversight over all procedures, but private institutions strive for self-interested benefit and will profit from an unstable society. The social contract is entirely compromised when considering

⁵⁷ A popular example of this include the Milgram shock experiments of 1963 in which volunteer subjects were forced to inflict painful shocks upon other subjects at the behest of an authority figure. The subjects receiving the shocks were actually unharmed and were aware of the research being conducted. However, the subjects inflicting the pain were pressed, even when the victims cried out, to continue shocking the victims. 26 out of 40 subjects obeyed the authority figure to completion were as only 14 halted their involvement in the experiment. (Milgram 1963)

an outside force as a punisher because there is another contract that outsources an innate duty of the sovereign. The individual contract between a prison and a state negates the initial social contract which requires individuals to give up their right to executive punishment for guaranteed safety. Subsequently, Hobbes, Locke, and Jean-Jacque Rousseau would find that private punishment negates the stipulations of a social contract and preserves the natural right of some while ignoring the natural rights of others. Even further, John Rawls and Buchanan look towards stability in a contract and Buchanan specifically questions how such an institution is to be controlled. Essentially, this sets up two competing sovereigns over the same people leading to instability in agreements. If two state entities exist, no uniform justice can be promulgated (against Rawls' justice as fairness doctrine) and no uniform rules of economic exchange can be established (against Buchanan's economic doctrine). Considering these observations, the last component of the contemporary debate has theoretical connection to both Enlightenment and contemporary American contractarians who condemn this practice.

From Theory to Observation: Returning to the Empirical

The cultural, economic, and institutional problems that are prevalent in the debate for private punishment can be examined in three different arenas. I have incorporated these concepts throughout my examination of theory and subsequently will return to them empirically. Private punishment can have bad cultural consequences because of neoliberalism's tendency to harsh sentencing, privatization, and aggressive capitalism. Such ideology creates a large prison population which requires special accommodation. Private prisons, promoted by neoliberalism in this manner, harm culture through excessive punishment creating an incarceration culture that needs to be offset through

privatization. The economic implications of private punishment claim to save money but could be offset by conditional releases that increase the likelihood of returning to prison and incurring greater cost. Lastly, a sovereign is threatened when an independent institution overtakes its duties, so I will examine the increase of private prisons and determine if their independence undercuts the sovereign. First, I will describe the data used in this project and go on to provide an overview of the cultural, economic, and independence relationships and provide respective expectations, variables, and methods. I will then conclude with a discussion of these results and possible explanatory factors while connecting theory to my observations.

The Data

This chapter will look at data obtained from the National Prisoner Statistics survey conducted by the Inter-University Consortium for Political and Social Research. This data collection project was funded by the United States Department of Justice Bureau of Justice Statistics and provides data from 1978 to 2011. The data collection efforts began in 1926 after a congressional mandate to consolidate prison statistics on the state and federal level so the data provided is inclusive of all prison systems in the United States. The data was collected via mailed questionnaire and web-based surveys to state, federal, and the former prison system for the District of Columbia.⁵⁸ The unit of analysis for the data is each individual prison system from 1978 to 2011. There are 216 distinct variables and 1,836 responses or cases from states.

The data has certain limitations as it self-admittedly has adapted over time to provide information that is relevant to the public agenda. Additionally, there are

⁵⁸ Washington D.C. prison systems were absorbed by the federal system at the end of 2001.

limitations in a survey format that produce non-uniform responses. Some states chose not to respond to portions of questionnaires leading to missing data. States also had individual interpretations regarding prison populations. One example of this is certain states labeling Hispanic prisoners as unknown races. Another example is that total state prison populations were calculated with and without private custody within the same year and same questionnaire leading some states to include private custody and others to exclude this population. Additionally, the changing nature of the survey means that some questions were only asked in later years and do not span entirely from 1978 to 2011. I have attempted to circumvent some of these issues by dropping missing data, creating new variables by combining existing variables, and tailoring my inquiries to the years available.

The Cultural Approach to Private Punishment

The three arenas of contention I have previously identified (cultural, economic, and institutional independence) will form the basis for my subsequent expectations. I will explore how this affects male and female populations individually for each expectation and then provide the variables that address this question. Then I will explain my methodology and discuss the implications. The gendered approach in this project is done as the male and female populations are distinct in size and in history. In 2015, the male prison population was 1,415,297 compared to the 444,495 female prisoners (Carson and Anderson 2016). Additionally, the social approach to criminality has been gendered in terms of resource availability, gendered programming, gender-specific needs, and policy changes (Zaitzo and Thomas 2003). The social differences between men and woman

reflect in perceptions of criminality and subsequently I consider these two distinct populations.

First, the cultural concerns of critics have addressed the neoliberal sentencing culture that I recapped in *The Debate Revisited*. I will assess the relationship between sentencing and the rise of private prisons. Neoliberal culture has been touted as one of the main factors in the push towards privatization. Subsequently, part of neoliberal culture has been a rise in sentencing culture. I aim to examine sentencing culture in the United States by examining a timeline of mean sentencing behavior from states. If there is an increase in longer sentences, then there is a confirmed effect of neoliberal culture, a main component for privatization, on sentencing in the United States. The harsher the sentence, the more private firms stand to make from criminality as state prisons are unable to facilitate such a large inmate population. My cultural expectations will address decade-related trends and will be the following:

Cultural Expectation (a): The data will a high proportion of harsh sentences in the 1980's for male prisoners, will show a proportional drop in the 1990's, and will be stable in the 2000's as neoliberalism falls from public discourse.

Cultural Expectation (b): The data will a high proportion of harsh sentences in the 1980's for male prisoners and will show a proportional drop in the 1990's and will be stable in the 2000's as neoliberalism falls from public discourse.

Variables and Methods

To test these expectations, I selected variables that define sentences as greater than one year (CUSGT1M for males, CUSGT1F for females) and less than one year (CUSLT1M for males, CUSLT1F for females) in all prison systems. First, I dropped any data that was missing because the state did not respond, because the item was not

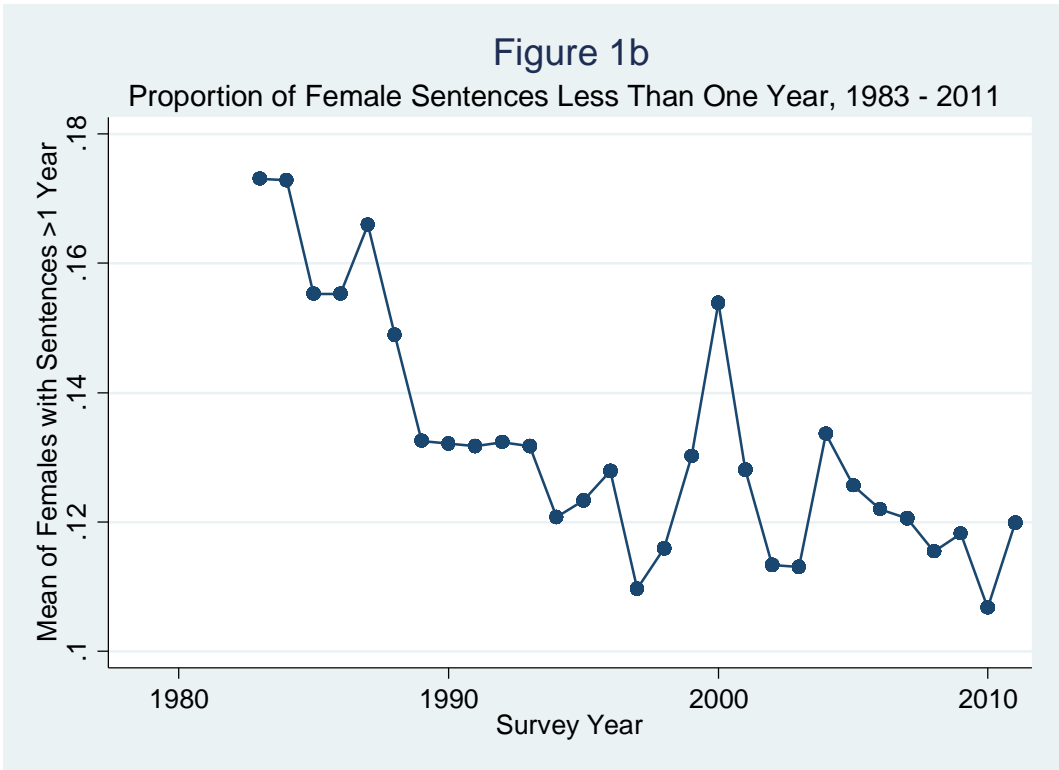
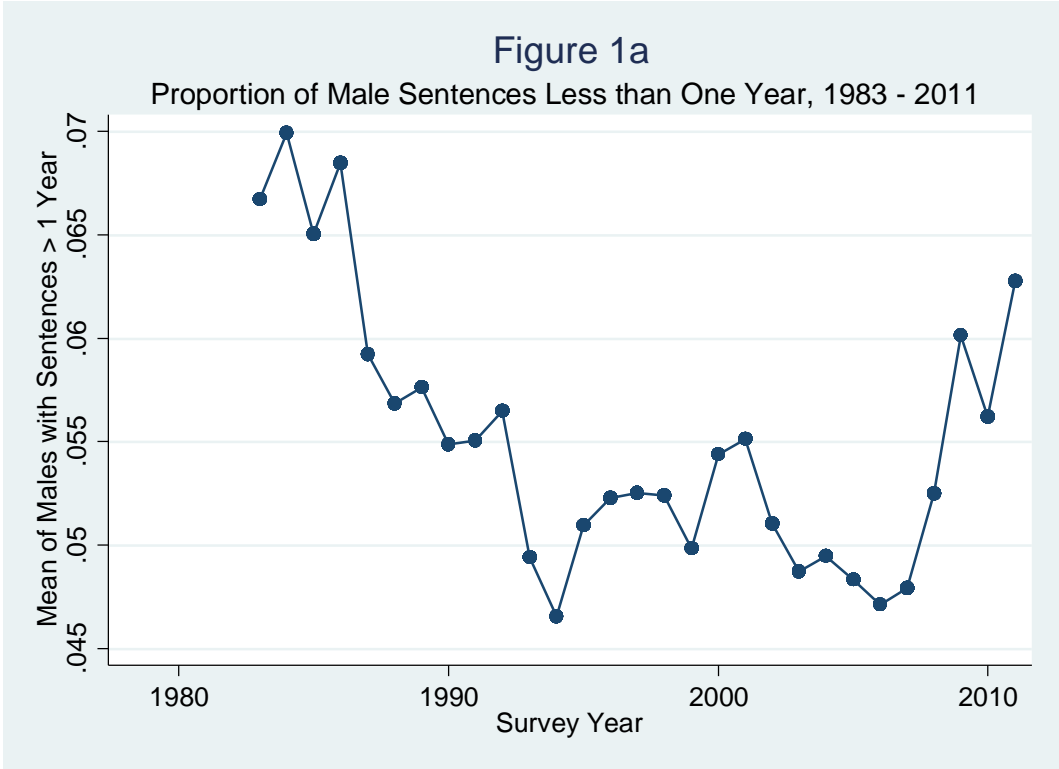
applicable to the state, if the item was asked but only in the aggregate prison population (not by male or female), and data not asked in the survey for that year. These initial data drops were done based on non-numerical values built into the data set. I additionally dropped all values of 0. Some states legally did not have sentences less than one year and instead calculated their prison population to be 0 inmates in custody with less than 1-year sentences. Conversely, other states responded that this item did not apply to the state. The variation in this variable complicated uniformity for sentencing procedures so I dropped the response values of 0.

Then I generated new variables for the total number of inmates in custody (totalcustodymale and totalcustodyfemale) by summing the variables for greater than one-year and less than one-year sentences. I then generated the total male proportion of those with greater than one-year sentences over the total males in custody and generated a mean of this proportion by year. I repeated this process for females. This method effectively gives a mean of sentencing culture of all state prisons and the federal prison system, so I could understand the general trend of sentencing in the United States throughout the decades. Then I generated a line graph of these means by years for both males and females displayed in Figure 1a and Figure 1b, respectively.

Results

Figure 1a shows the mean proportion of male sentences less than one year from 1983 to 2011. The lowest value of the mean proportion is .047 in 1994 and the highest value is .070 in 1984. Translated, this means 4.7% of sentences in 1994 were less than one year and almost 7.0% of sentences in 1984 were less than one year. The general trend of the data in Figure 1 shows an overall drop from 1983 to 1990 (6.7% of sentences to

5.5% of sentences), and a slight increase and then significant drop in 1994 and 1995 (4.6% and 5.1%, respectively). The less than one-year sentences increase overall until 2000 (5.4%) and then decrease in 2003 (4.9%) until an increase in 2006 (4.7%). Concisely, the data show harsh sentencing in the 1980's, a drop in the 1990's and an increase again in 2011. This partially confirms Cultural Expectation (a). Relatively, the harshest sentencing began to emerge in the 1980's towards the 1990's, a trend confirming the 1980's portion of my expectation. In the 1990's neoliberalism fades from public discourse and less than one-year sentences begin to increase from 1994 onwards, again confirming the 1990's portion of my expectation. However, I expected sentencing to stay stable in the 2000's. The data reflects an increase in less than one-year sentences meaning harsh sentencing procedures for males are not being implemented as seen in previous decades.



Source: United States Department of Justice. Office of Justice Programs. Bureau of Justice Statistics. National Prisoner Statistics, 1978-2011

Figure 1b shows the mean proportion of female sentences less than one year from 1983 to 2011. The lowest value of the mean proportion is .107 in 2010 and the highest value is .173 in 1983. Translated, this means 10.7% of sentences in 2010 were less than one year and 17.3% of sentences in 1984 were less than one year. One striking difference between males and females is that females receive more sentences that are less than one year than males on average by year. The highest value of less than one-year sentences for males is still lower than the lowest value of less than one-year sentences for females. The general trend of the data in Figure 1b shows an overall drop from 1983 to 1994 (17.3% of sentences to 12.1% of sentences), and a slight increase and then significant drop in 1997 (11.0%). The less than one-year sentences increase dramatically until 2000 (15.4%) and then decrease until 2004 (13.4%). The means then decrease significantly in 2010 (10.7%) and increase to higher levels in 2011 (12.0%). The data show the most proportion of less than one-year sentences in the 1980's, drop steadily in the 1990's and then stay steady in the 2000's except for the year 2000. This shows Cultural Expectation (b) as partially confirmed. Relatively, the harshest sentencing began to emerge in the 1990's for women, later than the harshest sentencing procedures for men. I had expected to see harsh punishment rise in the 1980's and fall in the 1990's but this was delayed for women compared to men. Only by the late 1990's did harsh sentences drop. However, sentences have stayed relatively stable in the 2000's. The data reflects a decrease and steady nature of sentences less than one year for females.

The Economic Approach to Private Prisons

The economic concerns of private prisons have been explored as minimally effective or entirely devoid of economic benefit by critics (LeBaron 2008) and studies

(Pratt and Maahs 1999, Perrone and & Pratt 2003, Bayer and Pozen 2005, Lundahl, et al. 2009). I look to explore this relationship based on how conditional releases determine recidivism and subsequently determine cost efficiency. Specifically, Durose et al. (2014) found that more conditional releases lead to higher rates of recidivism. Therefore, I look to examine the relationship of conditional releases within the prison system. Elevated levels of conditional releases have been previously shown to increase the likelihood of recidivism and increase the need for privatization. The high rates of recidivism ultimately offset whatever meager economic savings that private prisons provide. My second set of expectations address the economic concerns and will predict the following by decade:

Economic Expectation (a): The data will show an increase of conditional releases for male prisoners in the 1980's necessitating the use of private prisons to offset the economic burden of high prison populations. Male conditional releases will decrease from the 1990's onward as neoliberalism falls from public discourse and sentencing becomes less extreme. In the 2000's, male conditional releases will remain steady.

Economic Expectation (b): The data will show an increase of conditional releases for female prisoners in the 1980's necessitating the use of private prisons to offset the economic burden of high prison populations. Female conditional releases will decrease from the 1990's onward as neoliberalism falls from public discourse and sentencing becomes less extreme. In the 2000's, female conditional releases will remain steady.

Variables and methods

To test these expectations, I had to create new variables that encompassed all conditional and unconditional releases. I created a new variable for males and females (totaluncondreleasemale and totaluncondreleasefemale, respectively) that combined unconditional releases due to expired sentences, unconditional releases due to commuted sentences, and other unconditional releases. I also created a new variable for males and females (totalcondreleasemale, totalcondreleasefemale) that combined conditional

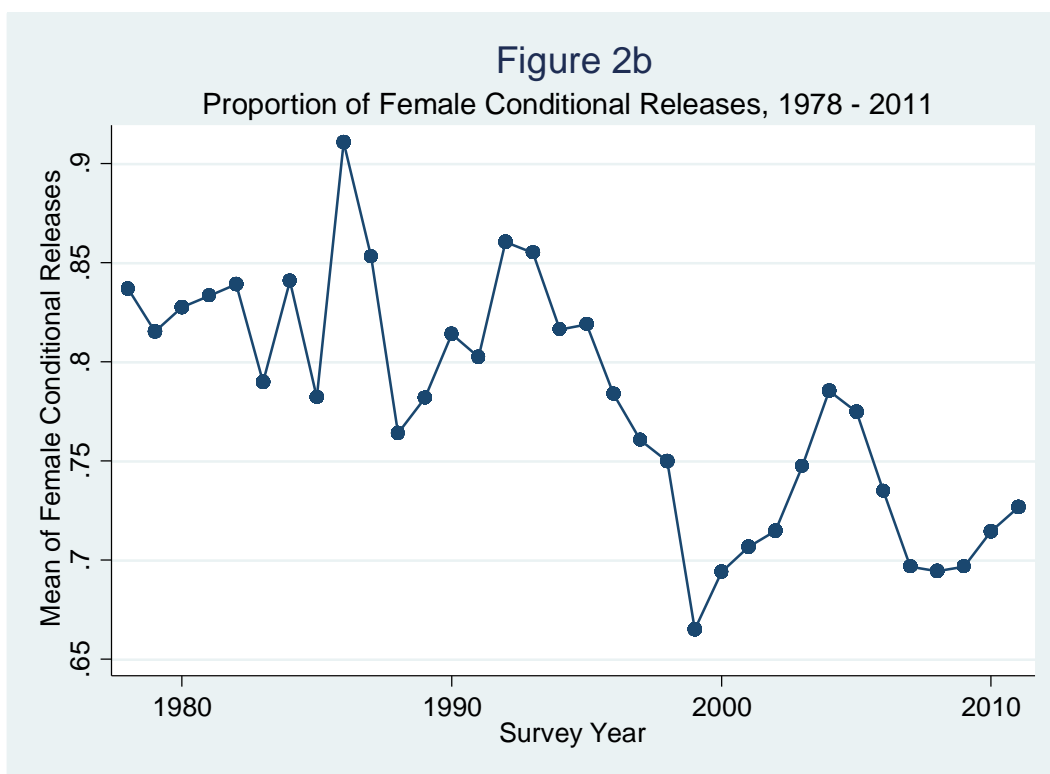
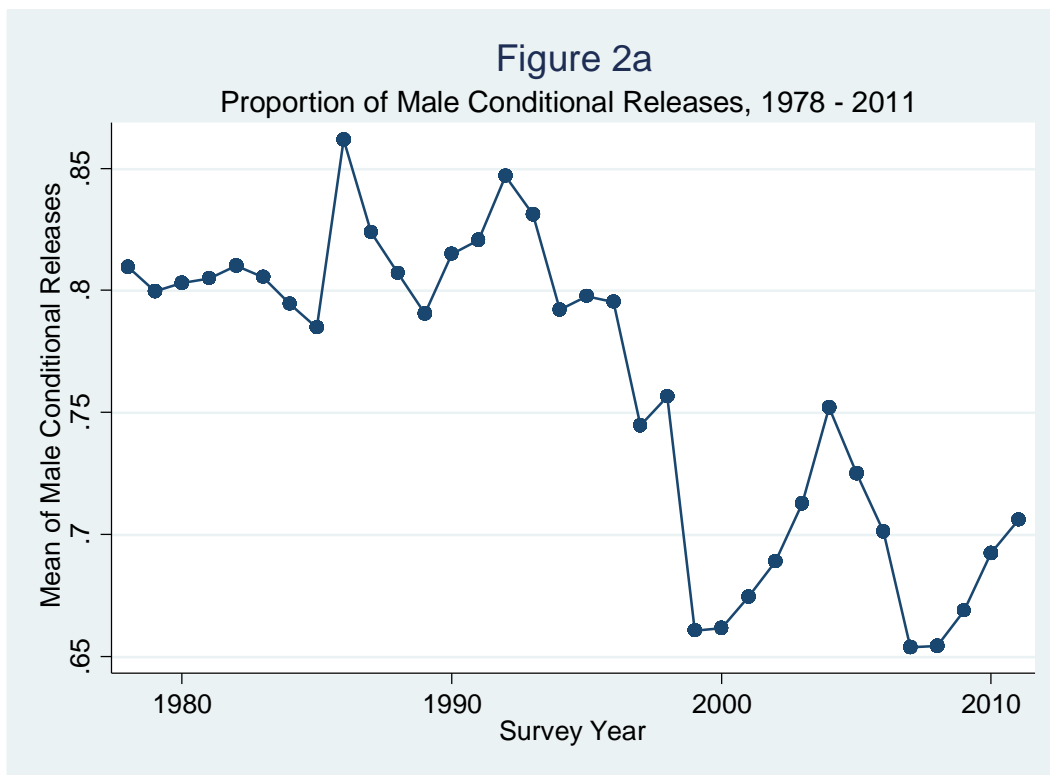
releases for probations, supervised mandatory releases, discretionary parole, and other conditional releases. I then generated the total male proportion of those with conditional releases over the total number of releases (both conditional and unconditional) and generated a mean of this proportion by year. I repeated this process for females. This mean gives the average of releases conditions for all American prison systems showing a general trend of release culture in the United States. Then I generated a line graph of these conditional release means by years for both males and females displayed below in Figure 2a and Figure 2b respectively.

Results

Figure 2a shows the mean proportion of male conditional releases from 1978 to 2011. The lowest value of the mean proportion is .654 in 2008 and the highest value is .862 in 1986. This means 65.4% of sentences in 2008 were conditional and 86.2% of sentences in 1986 were conditional. The general trend of the data in Figure 2a is a steady proportion of conditional releases from 1979 at around 80%. This increases to the highest value (86.2%) in 1986 and then sharply drops to 79.1% in 1989. While there is an increase in conditional releases to 84.7% in 1992, conditional releases steadily fall to 66.1% in 1999. I observe an increase until 2004 (75.1%) and then a decline to 65.4% in 2007. Finally, by 2011, conditional releases have increased to 70.6%. While there have been rapid increases and decreases in conditional releases, conditional releases have fallen from 80.1% in 1978 to 70.6% in 2011. The data reveal Economic Expectation (a) as partially confirmed. There is an observed increase in the 1980's for conditional releases and a severe decrease in the 1990's, according to Expectation (a)'s predictions. However, conditional releases do not remain steady in the 2000's. Instead there is a sharp

increase, decrease, and then increase again, negating the expectation' predictions that sentencing will remain steady during this time.

Figure 2b shows the mean proportion of female conditional releases to all releases from 1979 to 2011. The lowest value of female conditional releases is .665 in 1999 and the highest proportional value of female conditional releases is 91.1 in 1986. This means that in 1999 66.5% of all female releases were conditional and in 1986 91.1% of all releases were conditional. While the female conditional releases follow similar increases and decreases to male conditional releases, there is more variation in the mid-1980's than male releases. Female conditional releases in 1978 begin at 83.7% and fluctuate wildly until an increase in 1986 at 91.1%. The data drops to 76.4% in 1988, increases to 86.1% in 1992, and then steadily decreases to 66.5% in 1999. Then, the data increases to 77.5% in 2005, dips to 69.4% in 2008 and ends in 2011 at 72.7% of all releases. This data reveals that Economic Expectation (b) is also partially confirmed. While the 1980's saw the highest proportion of conditional releases, these releases dropped to a record low by 1999. These observations were expected in Economic Expectation (b). However, I expected the data to be steady in the 2000's but there is an observed increase to 2005 and then decrease in conditional releases, negating the 2000's expectation of



Source: United States Department of Justice. Office of Justice Programs. Bureau of Justice Statistics. National Prisoner Statistics, 1978-2011

The Institutional Independence Approach to Private Prisons

Finally, I have extensively discussed the theoretical problems apparent in private prisons as they supersede the actions of a sovereign. To understand the independence assertions, I will explore the growth rate of private prisons by measuring a proportion of prisons in custody. I look at a timeline of private prisons to determine if there is an increase of prisoners are being held in private prisons proportional to those held in state prisons. This will reveal if the sovereign's independence is progressively being compromised as private prisons take over a larger portion of punishment, a duty specifically reserved for the sovereign. As previous chapters of this dissertation dissect, the independence of the sovereign is compromised the more power a sovereign delegates to an independent firm. The expectations I develop here are limited in their timelines due to constraints within the data set and therefore do not reflect the decade specifications that the cultural and economic expectations contain. The independence expectations I present reads:

Independence Expectation (a): The data will show a proportional increase of male inmates held in private prisons compared to state prisons as more states utilize private prisons.

Independence Expectation (b): The data will show a proportional increase of female inmates held in private prisons compared to state prisons as more states utilize private prisons.

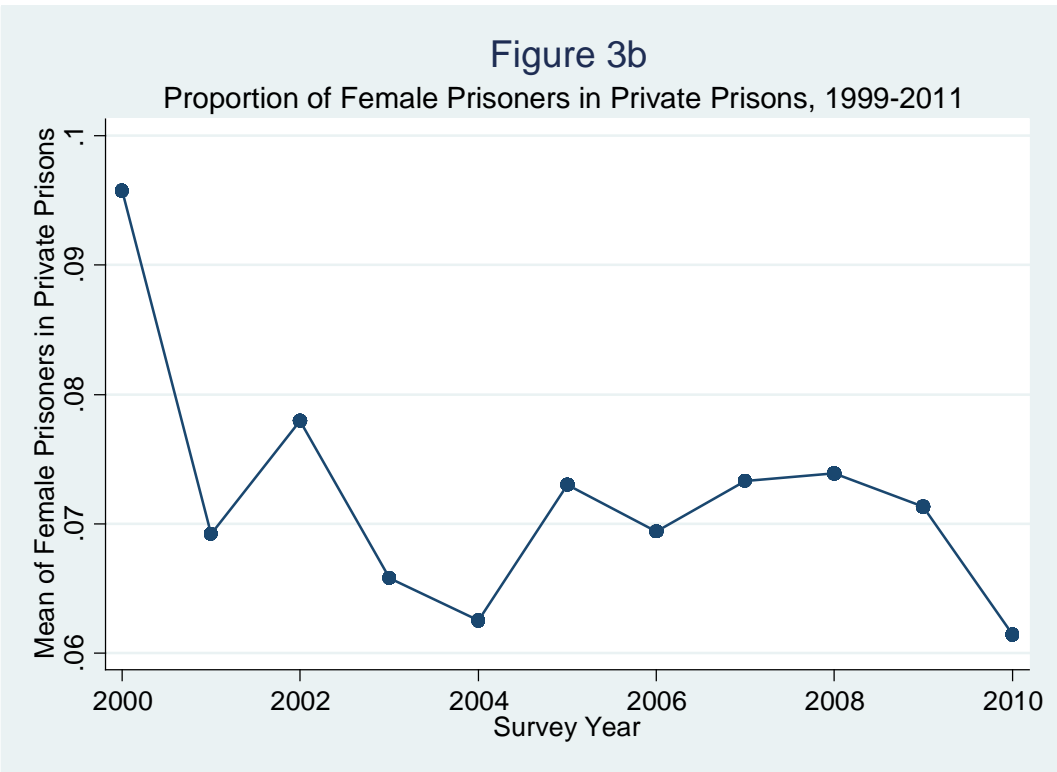
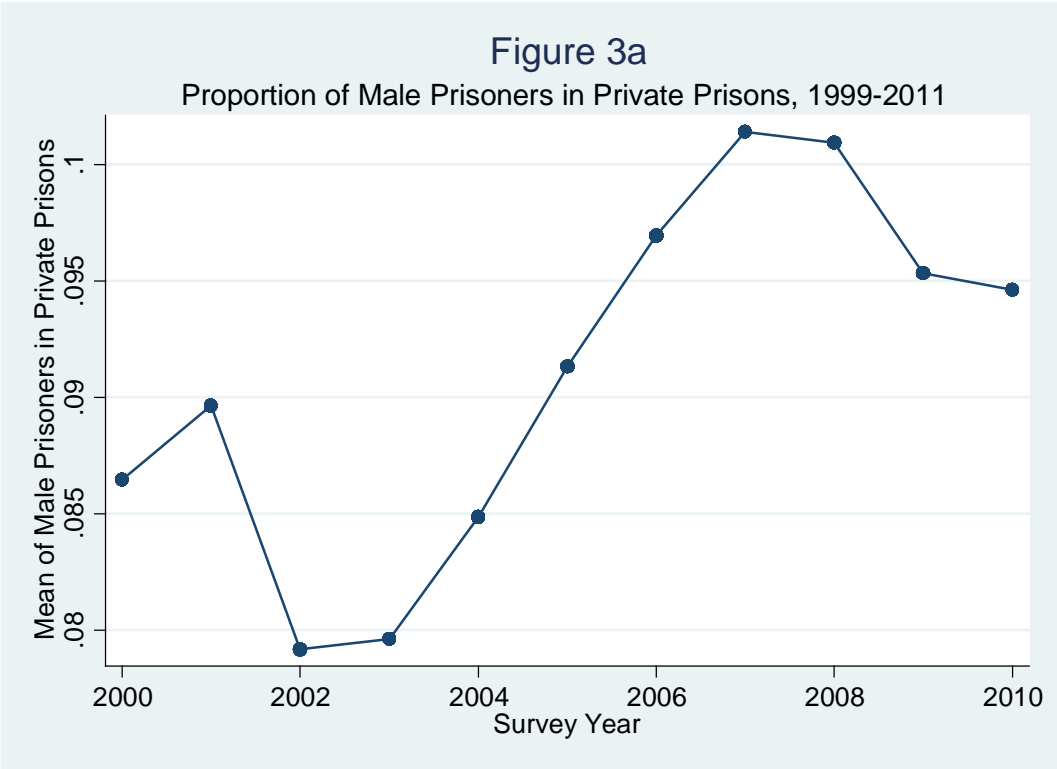
Variables and Methods

To test these final expectations, I dropped any missing data inputs. Unfortunately, this meant that data was only available from 1999 onward as this survey item was only including from 1999, limiting the scope of study. Despite these limitations, the data can still provide a contemporary picture of private prison use in the new century. I created

new variables to determine the private population of prisoners by subtracting the number of prisoners in private custody from the total number of prisoners in custody for both males and females in all states and federal prisons. Then I placed the proportion of males in private custody to those over the total males in custody including private prisons and repeated the same steps for females. I created a mean by year of this custody proportion for males and females and generated a line graph of private custody displayed in Figure 3a and Figure 3b, respectively.

Results

Figure 3a displays the mean proportion of males held in private prisons. The lowest proportion of males held in private prisons was in 1999 at .0781 and the highest proportion was in 2007 at .101. This means that in 1999 7.81% of male prisoners were held in private prisons and in 2007, 10.1% of male prisoners were held in private prisons in 2007. The use of private prisons increased from 1999 to 2001 (8.97%) and then decreased to 7.92% in 2002. Steadily, the use of private prisons rose to 10.1% in 2007 and then decreased to 9.46% in 2011. Despite some fluctuation, the data confirms Independence Expectation (a) as there is an increase over time in the use of private prisons for males in custody.



Source: United States Department of Justice. Office of Justice Programs. Bureau of Justice Statistics. National Prisoner Statistics, 1978-2011

Figure 3b displays the mean proportion female prisoners in custody in private prisons. The lowest proportion of females held was in 2011 at .0568 and the highest was in 1999 at .1068. This means that in 1999 10.68% of female prisoners were held in private prisons and in 2011 5.68% of prisoners were held in private prisons. The data show the highest proportion of female prisoners in private custody in 1999 and a steady drop until 2004 at 6.25%. Females in private custody rise until 7.39% in 2008 and drop to 5.68% in 2011. The data show that Cultural Expectation (b) is unconfirmed for female prisoners in private custody. Over time, there are fewer females in private custody than in state run custody which is entirely contradictory to what was observed for male prisoners and what I initially expected.

Discussion of Results

Table 1: Expectations Results

<u>Type of Expectation</u>	<u>Expectation Classification</u>	<u>Results</u>	<u>Discrepancies</u>
Cultural Expectations	a (males)	Partially confirmed expectations	Less than one-year sentences unstable in 2000's
	b (females)	Partially confirmed expectations	Less than one-year sentences lowest in 1990's
Economic Expectations	a (males)	Partially confirmed expectations	Conditional releases unstable in 2000's
	b (females)	Partially confirmed expectations	Conditional releases unstable in 2000's
Independence Expectations	a (males)	Confirmed expectations	
	b (females)	Unconfirmed expectations	Use of private prisons declined overall

The results in this examination can be summarized by Table 1. Using these results, I observe that my original expectation had some confirmation based on the

previous literature on sentencing culture, economic doubts, and the independence of delegated institutions. However, there are two specific areas that require further exploration. First, the table shows that there was fluctuating in sentences and release conditions (the cultural and economic expectations). Second, women have different experiences in prisons than men as demonstrated by the differing results in the cultural results and independence results. An exploration into the policy surrounding prisons is necessary to try and explain these results. This will establish some correlation with policy events and the levels of sentencing, releases, and the use of private prisons. It is important to clarify that the discussion presented here explores suggested avenues of influence. Further research should consider these discussions as guiding interpretations for solidified causation.

First, I will address the cultural issues in sentencing and how the data deviated from initial expectations. Considering males, the data did not conform to my expectations as sentences were not stable in the 2000's. Instead, less than one-year sentences increased in 2008. Economic downturn could be the primary explanation for this change considering the effects of the 2007 and 2008 recession. 2008 was a distinct year in U.S. prisons. The Bureau of Justice Statistics reports that the prison population had grown the slowest since 2000 in 2008 and that there were fewer new court commitments during 2007 and 2008. Additionally, there was an increase in unconditional releases in 2008 (as my expectations confirmed). The Pew Charitable Trusts releases a comprehensive understanding of policy changes on a state and federal level every year and their 2008 report shows that a sudden increase in prisoners in 2007, placed large prison populations that were eating into monetary supplies. Prison costs, coupled with a burgeoning

discussion on community corrects, seemed to influence 2008 more than other years due to economic downturn. Pew reports that states like Kansas and Texas⁵⁹ are “diversifying their menu of sanctions with new approaches that save money but still ensure that the public is protected and that offenders are held accountable” (Warren, et al. 2008, 4). Additionally, prison costs totaled \$49 billion in 2007 with some states such as Texas and California paying figures as high as \$8.8 billion and \$3.3 billion respectively strapping many states for monies to spend on other priorities such as education, and a diversified economy. This has led to policy changes were previously unprecedented to take a softer stance on crime. In 2007, for instance, Texas chose not to increase spending by \$523 billion dollars, but instead expand drug treatment and facility policies. Pew quotes state Sen. John Whitmire of Houston to say: “It’s always been safer politically to build the next prison...but we’re at a point where I don’t think we can afford to do that anymore” (Warren, et al. 2008, 18). To combat this, Texas and other states have been adjusting sentencing procedures to reduce time behind bars and instead use parole boards, adhere to minimum standard sentencing, and give credits for earned time. These changes from 2007 are observed in the 2008 prison population. The minimum sentencing reduces the amount of time spent and this is mostly cost driven in the face of economic recession.

Additionally, female sentences were at their harshest in the 1990’s. I expected to see the highest amount of less than one-year sentences during this decade but instead this decade had some of the lowest levels of less than one-year sentences. Historically, policy decisions may be at the heart of this discrepancy. In the 1980’s, Ronald Reagan, a figure that helped spur neoliberal ideology, encouraged a crackdown on drug offenses with his

⁵⁹ Texas has the largest prison population in the United States, so reform is particularly important.

“War on Drugs.” In 1984, the Sentencing Reform Act (SRA) passed but took 8 years to be fully implemented. This expectation delay means the effects of SRA were only prevalent in 1992. Additionally, the Anti-Drug Abuse Act (ADAA) was passed in 1986 in conjunction with SRA. These acts combined created a unique policy problem for women and criminal drug use. Young and Reviere (2005, 76) state “The effects of SRA were most obvious in sentencing trends for drug offenders...more than doubling their time served.” This drastically changed the sentencing for women compared to men. Women, aggregately, commit fewer violent crimes compared to men (Pollock 2002). In 1995, 59.9% of female inmates were imprisoned for drug charges where as in 1984 only 34.3% of female prisoners served time for drug charges (Harrison and Beck 2002) (Compendium of Federal Justice Statistics, 1984 1989). This indicates a large jump in the percentage of drug crimes from women. Comparatively, in 1984, 55% of men were imprisoned for drug charges (Compendium of Federal Justice Statistics, 1984 1989) and in 1995 58% of men were federally imprisoned for drug charges (Harrison and Beck 2002). Men increased only by 3 percentage points of imprisonment while women increased by over 25 percentage points for drug offenses. Exacerbated by the “Three Strikes” rule in California (one of the largest prison populations in the U.S) and the subsequent states that adopted such a policy, the drug sentencing legislation disproportionately affected women more than men causing their sentencing to increase in the 1990’s (Banks 2003).

Next, the economic expectations for males and females deviated as there was large fluctuation in the 2000’s. 2004 (for males and females) and 2009 (for males) saw increases in conditional releases. The conditional releases that were prevalent in 2003 and

2004 for both males and females could be explained by state legislative policy. With a serious economic downturn at the turn of the century, many states overhauled their criminal justice legislation. With budgetary concerns at the forefront of legislative sessions, many states closed prisons, laid off guards, and created new sentencing procedures. Gottschalk (Gottschalk 2006, 240) reports that in 2001, 2002, and 2003, nearly 37 states reexamined their drug policies and created softer sentencing procedures. The conditional release increase could be explained by the fact that many states were facing economic problems with holding prisoners. However, these economic problems, coupled with the increase in conditional releases is a minimal change that leads to population surges in future when release violations come to light. Research in future should look at this lagged effect to determine if the surge of conditional releases in the early 2000's contributed to high rates of violations in the future and compare those violation patterns with the use of private prisons.

Finally, my independence expectations were confirmed for males, but had different results for females. While the use of private prisons for males increased as expected, the use of private prisons for females decreased dramatically at the turn of the century. First, the proportional increase of male prisoners in private prisons is on par with the level of incarceration in the United States. From 1999 to 2010, the prison population increased from 1,366,721 (Beck 2000) to 1,598,780 (Guerino, Harrison and Sabol 2011). The increase could account for the male prison population in private prisons. However, females experienced a decline in the proportion held in private prisons. Explanations for this phenomenon are simplistic when considering the rationale of the private prison industry. Prisons are separated by sex and subsequently there are fewer female prisoners

than men. In 1999, there were 82,594 female prisoners compared to 1,222,799 male prisoners (Beck 2000). In 2011, there were 1,487,393 male prisoners and 111,387 female prisoners. This discrepancy indicates that males are less likely to face overcrowding in prisons and subsequently the male population will require more facility space compared to women. Ultimately this means that female prisons do not necessitate the use of private prisons compared to men. When looking at the history of female inmates, Young and Reviere (2005) report that in 1997 the first female-only private prisons were introduced in Arkansas, Florida, Kentucky, Nevada, and New Mexico. The use of female only prisons was introduced late, but as prison populations fell at the turn of the century, female prisons faced fewer problems than male prisons in term of efficient housing and staffing. Rationally, female prisons are then not considered a lucrative endeavor for profit margins.

Conclusions

The descriptions presented in this chapter connect theory back to the empirical. I initially critiqued the prevalent discussion on private prisons because they lacked theoretical understanding. With this examination, theory can be applied to the debate, the areas of contention can be identified, and the results of private punishment can be judged against a theoretical ideal. This process can then either confirm or deny the theoretical assertions with empirical proof.

When considering cultural implications, the length of sentences progressively intensified as states began to use private prisons in the 1980's and 1990's. However, when faced with economic recession, states were stressed on capacity thresholds with so many bodies to accommodate. Rationally, private contracts can ease a state's housing

burden and the contractor can benefit from the sentencing procedures. However, the harshness of a sentencing does not fulfill the theoretical necessity of punishment. As Montesquieu and Beccaria assert, the benefit from such harsh punishment is minimal. Imprisonment occurs, but re-offense is more likely. Citizens will not view such harsh punishment as legitimized state force. Instead, they become jaded by such violent measures and recidivate at higher levels. Additionally, the punishment does not fit the crime which eventually taxes the resources of a sovereign. As Bentham states efficiency and consequences are intertwined. The 1980's and 1990's seem to deviate specifically from Bentham's prescriptions, but the 2000's show the consequences attempting efficient reform as neoliberalism fades from public discourse. As policy embraces more varied approaches, neoliberalism no longer has the stronghold in public discourse as observed in the 1980's and 1990's.

The economic implications run throughout this chapter as they have affected sentencing culture and effect the decision to privatize. However, I focused specifically on the use of conditional releases that increase recidivism. As noted in the discussion of my cultural results, many states have begun to reduce such conditional releases and reduce recidivism rates. Specifically, drug policy has changed in the 2000's greatly influencing the outcome for women and for the prison population. When considering the theoretical basis for the economic implications, theory asserts that more is at stake in a cost/benefit ratio than simple economic savings. Hobbes and Buchanan assert that a state regulates economic decisions for institutional stability, yet the external economic agreements of a private prison and a state lead to instability. The rules of economic engagement differ from individuals to private prisons as private prisons can profit from crime. The desire to

profit leads to an unstable society, but also leads to an unstable state that loses control over dispersed punishment. Additionally, Kant displays that the costs associated with such a prison scheme are more than just economic. The cost of compromising the categorical imperative is greater and private prisons incur this cost consistently. They utilize humans as a means and do not respect the autonomy of those within a social contract.

Finally, the independence implications of the data show that male prisoners are faced with a higher likelihood of being a private prison over time, but there was a decrease in the use of private prisons for females. The prison population for males is greater than that of the female population and subsequently there are more resources needed to house such prisoners. Additionally, the gendered divisions mean that private prisons are uninterested in constructing female-only prisons as there are fewer prisoners to house and fewer prospects for profit. When considering the theoretical implications, the increase in private prisons shows a compromised sovereign. I have explored how a social contract is utilized in terms of punishment. A sovereign must punish to eliminate the uncertain state of nature. However, the state enacted by the social contract has turned to alternative measures to handle such a problem. The private prison industry shows a state that is unable to punish and unable to fulfill a social contract. Citizens are subjected to high criminality and inflated cost to house prisoners and the private prison industry exacerbates these issues. The U.S. prison system reveals, through this examination, that there are real, pressing issues regarding criminality. The private prison system, however, does not offer a solution to these issues.

The insight presented in this chapter describe only the outcomes of sentencing, conditional releases, and the rise of private prisons. Subsequently, I speculate on the causes of such outcomes. However, this is not a comprehensive understanding of these mechanisms. Future research regarding private prisons should examine individual state prison systems and determine if policy, demographics, and context have affected these outcomes. Even more important is to examine these things comparatively and determine which states are able to control prison populations without the use of privatization or which state have enacted massive reform to their contracts. Specifically, important is an examination of the time period; there is a stark difference in prison sentencing, releases, and privatization in the new century. An examination of individual states by decade can help ascertain how and why states chose to punish privately. Not only will this type of research aid in understanding the choices states make to privatize, but it will also offer insight into the larger problem of criminality in the United States.

Conclusion

This dissertation has extensively analyzed the American approach to contract punishment and inserted a theoretical approach that has been lacking in the relevant literature. The debate on the merits and ills of contract punishment has failed to incorporate theoretical reasoning. Subsequently, the discussion has only focused on the outcomes and observable failures of the private prison complex. This dissertation creates a comprehensive survey of theory to display the inconsistencies of private punishment and the theory of punishment. However, this theory cannot exist in a vacuum, and I returned to the empirical approach by applying theory directly to descriptive data. This inclusive approach provides a complete overview of private prisons from their inception to contemporary state. The debate regarding private punishment has multiple facets of argumentation such as the cultural, economic, and institutional independence implications. However, the debate is anemic without proper basis and conjecture. This dissertation provides direction for prevalent critiques and is imperative for a contemporary public agenda that is currently considering the legitimacy of such a practice.

This project began with the history of American prisons and revealed that contracting has been a component of American prisons for much of United States' history. However, the levels of contracting were minimal and mostly concerned with the use of prison labor. Private prisons only became a full-fledged reality in the 1980's. Despite this contemporary development, the same condemnations that were historically presented reemerged: private management often leads to prisoner abuse and undermines

state power. Modern discussions on such a practice stem from judicial precedent, statutory law, and a public agenda that is progressively moving away from contract punishment. As noted, the debate brings up cultural, economic, and institutional independence issues. These issues are byproducts that can oftentimes be predicted by theory, which I explored in multiple different facets.

The first foray into theory began with the social contract in which I developed a historically linear progression of punishment from Enlightenment theory to contemporary America. Beginning with the established social contract theorists, I outlined the necessity of punishment as a state mechanism. Thomas Hobbes, John Locke, and Jean-Jacque Rousseau established the sovereign as the sole punisher and posited that punishment contracts within a social contract created a partial state of nature. Charles de Montesquieu and Cesare Beccaria took the social contract and solidified the importance of a sovereign punisher. These theorists extended the discussion of punishment beyond the duty to punish but examined the execution of punishment. Ultimately their theory found that a private punisher violates the effects of parsimony and uniformity. Finally, John Rawls and James Buchanan acted as important contemporary lynchpins that solidified the validity of an American social contract. John Rawls envisioned justice for an agreed contract while Buchanan envisioned stability. Both found that the private prison system is incompatible with uniform morality and stable economic guidelines in the American context.

The inception of the right to punish was incompatible with contract punishment, but the prevailing notions of punishment might rationalize these initial assertions away. However, I moved to explore these assertions through consequentialism, deontology, and

liberalism. First, Jeremy Bentham exposed that all actions have consequence and punishing criminal actions should be efficient, succinct, and parsimonious. Private prisons, however, do not follow these efficient standards as it is anti-rational to act against one's own benefit. They do not rehabilitate and exacerbate inefficiency by housing prisoners who recidivate which violate the goals and methods of consequential punishment.

Immanuel Kant's deontology approached punishment from a moral standpoint rather than the corporeal standpoint that Bentham explored. Kant stressed the value of the human spirit and stated that beings are an end in themselves and cannot be used for benefit elsewhere. I reconfigured this theory to accommodate the prisoner who cannot be a means to immoral profit. Additionally, if uniform morality is a universal good, no institution can profit from actions that break a categorical imperative such as an illegitimate promise. Subsequently the individual profit from contract punishment ensures a continuously broken categorical imperative and deontology also cannot abide by private prisons.

Finally, Locke's theory was revisited, but I moved away from his social contract theory and constructed his liberal punishment theory to accommodate a victim-centric form of punishment. Locke found that an individual punisher in the state of nature is at liberty to punish so that they feel rewarded and restituted in their punishment. However, restitution is not the only outcome. A punisher must acknowledge the harm caused to them and rationally work to eliminate this painful outcome. This means that a punisher must rehabilitate a criminal. Rehabilitation therefore, is a primary goal of liberal punishment, but as I have displayed through this project, rehabilitation is anti-rational for

the contract punisher. Subsequently, all forms of punishment condemn the practice of private punishment for assorted reasons. Ultimately, a private contractor can never fulfill the theoretical goals of punishment.

With these theoretical conclusions, I then proceeded to apply theory to the empirical debate, rejoining the initial points of my discussion on private prisons. The literature showed that, socially, private prisons and neoliberalism have influenced sentencing culture in the United States, necessitating longer sentences when private prisons were first introduced. Ultimately, this violated the theories of parsimony in Montesquieu, Beccaria, and Bentham. Additionally, I showed that economically, private prisons became a necessity because sentencing culture introduced more bodies into the prison system. This violated the economically beneficial assertions of Hobbes, Buchanan, and Kant. Finally, I explore the institutional independence concerns and found that private prisons behave rationally, exploiting the largest prison population (males) and choosing not to engage with a population that provides less benefit (females). This violated the social contract theories of the Enlightenment thinkers and of the contemporary Americans that find punishment to be an inclusive endeavor of the sovereign and not a selective form of punishment

The findings in this dissertation have large implications for the private prison system in the United States. One beneficial aspect of this dissertation is the role it may play in public policy. As noted in “The Debate,” public policy regarding contract punishment is changing rapidly as more states phase out private prisons. The federal discussion was sensationalized with Sally Yates and the Donald Trump Administration. The considerations I have discussed are relevant now as states decide how to continue

with punishment. Punishing, morally, is necessary. It binds a society in stability and validates the individual. However, punishment cannot be unguided and unfettered. The state must reign in these actions and combat ideologies such as neoliberalism that seek to undermine the existence of a sovereign. This dissertation reveals those attempts and thoughtfully parses out the desirable aspects of punishment while condemning the private practices. Subsequently, this dissertation can provide the theoretical understanding necessary to condemn the practice of private prisons from their inception.

Political theory is often delegated as an ideal that has no bearing on the real relationship of public policy and citizenry. However, that ideal sets standards of accomplishment and rightly positions a society. The theoretical understanding of punishment allows a society to set its own goals and constantly reevaluate itself. When a society strays from the ideals of punishment, articulated political theory is a constant reminder of the original goals. This dissertation provided such goals for the American context. The punishment theory presented in this project was relevant to the American situation as it established a current and existing social contract. I endeavored to show that a social contract can accommodate consequential, deontological, and liberal punishment. This means then, that the United States contract has a choice of these theories. Even if these theories are not incorporated wholly and are utilized partially to create a new combination, these theoretical ideals, whether singular or combined, are starkly against the use of privatized punishment.

While the theory here condemns private prisons, there is more to explore when considering the state of punishment. If private prisons exist at all, it is a symptom of an unhealthy sovereign and excessive criminality. This implies that there is a great mismatch

of theoretical value with punishment reality. This dissertation explored only one aspect of the prison system in the United States. The literature on American penal institutions is deep and far-reaching. The implications for public policy are more than just those focused on private punishment, but for prison reform as a whole. With the United States having the highest rates of incarceration per capita worldwide, either the United States is aggressively effective at instating law and order or the United States has a problem of criminality. Either of these conclusions is worrisome. On one hand, the United States may be the most effective state at enforcing law and order and soon the prison population will be too great for citizens to handle. This can be avoided through prison alternatives or sentencing reform. If the United States has a problem of criminality, there are numerous pathways that could lead to such outcomes such as inequality in wealth, education, income, or job opportunities. With these reflections, this dissertation is situated as a major contribution to private prisons, but a minor contribution to the vast topic of criminality.

There is reason to be cautiously optimistic, given the findings presented in this project. As noted in “Actualizing Theory,” many states have not renewed private contracts and are slowly phasing out their use. Additionally, states are turning to sentencing reform and offering alternatives to incarceration through probationary actions and other reformatory programs. This indicates a shift away from neoliberalism and the effects it had on public policy, namely the creation of a large criminal class and privatizing governmental functions. These optimisms, however, are slightly dampened when considering the greater problem of criminality. There is a distinct criminal problem in the United States. The use of private punishment is a merely a symptom of this

overarching issue. Subsequently, future considerations beyond this project should aim to correct criminality and answer the questions of why the United States is so notably criminal and how policy can combat these issues while minimizing dependency on private systems. Consequent discussions on the issues presented here should be intersectional and beyond the gender division studied in “Actualizing Theory.” Class, race, education, institutional history, and geographical locations have all been considered in the widespread use of punishment on both state and national levels. The necessary next step is a thorough examination of the role these variables play in the development of private prisons. An examination in this fashion could provide insight into the motivations for privatization beyond just an economic return on investment. This method of inquiry can constitute a larger critique of American capitalist system and the intersectional components that have been established in the broader context of punishment literature. Ultimately this can culminate in an examination of institutional oppression that straddles the lines between the public and private spheres.

This project has addressed the broad issue of privatized punishment, but the nuances within this topic are many. Firstly, political theory can be usefully applied in policy decisions to reshape criminality and the American justice system. Additionally, this project examines a symptom of the punishment system as a whole. Criminal justice is a broader concern for the United States that rectifies criminality with prominent levels of incarceration, a method that is proving to be unmanageable for the states. While I have addressed a singular aspect of punishment, the American justice system must look within itself to correct itself using theory. Lastly, future research should examine the connection between contract punishment and a capitalist system that encompasses gender, race,

class, and resource accessibility. Theory cannot exist in a vacuum and the derivations presented in this project display the usefulness of punishment theory in a social contract. The United States is obligated to incorporate these theoretical considerations into policy changes to achieve a punishment tradition that is sound in theory and beneficial in practice.

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