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## HOW PRIVATIZATION THINKS

by

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How Privatization Thinks  
Sharon Dolovich<sup>1</sup>

Institutions create shadowed places in which nothing can be seen and no questions asked. They make other areas show finely discriminated detail, which is closely scrutinized and ordered.

-- Mary Douglas, *How Institutions Think*<sup>2</sup>

Debates over contracting out government functions to private, for-profit entities often play out within a deliberative framework that can be thought of as “comparative efficiency.”<sup>3</sup> From this perspective, the decision whether to privatize any given government function turns on which sector, public or private, would perform the relevant function more efficiently. Comparative efficiency thus has two defining features. First, it views the motivating question as a choice between public and private. Second, it assumes efficiency to be the sole value guiding the analysis.

That comparative efficiency is the appropriate way to approach the issue of privatization tends to be taken for granted. Comparative efficiency, after all, takes no position as to the functions the state ought to perform. It simply holds that whatever tasks the state undertakes should be performed as efficiently as possible. And if fulfilling a chosen aim is good, how could fulfilling it more efficiently not be better?

By remaining agonistic as to which needs society ought to seek to satisfy, comparative efficiency can lay claim to the virtue of value neutrality. As I show below with the example of private prisons, however, comparative efficiency is not value neutral, nor does the existence of the privatization option make the adoption of this framework inevitable. Why, then, does the perspective of comparative efficiency continue to dominate the privatization debate? The answer, I suggest, is that comparative efficiency operates as a rhetorical device that keeps the debate within particular bounds, excluding some concerns altogether and reframing others in ways consistent with its own priorities.<sup>4</sup>

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<sup>1</sup> Professor of Law, UCLA School of Law. I thank Matt Adler, Jody Freeman, Mark Greenberg, Martha Minow, and Rick Sander helpful comments and suggestions, and Diana Varat for excellent research assistance.

<sup>2</sup> Mary Douglas, *How Institutions Think* (Syracuse: Syracuse University Press, 1986), 69.

<sup>3</sup> This term is my own. See Sharon Dolovich, “State Punishment and Private Prisons,” *Duke Law Journal* 55, no. 3 (2005): 441. This framing is in theory consistent with any available method for calculating the efficiency of a given policy. For further discussion on cost-benefit and cost-effectiveness approaches to determining efficiency in the prison context, see *infra* Part II. Such approaches to analyzing efficiency are necessarily comparative. It thus may seem redundant to call the perspective I examine here *comparative* efficiency. I adopt this label nonetheless to call attention to the particular implications for the privatization debate of the comparative component of this perspective. I explore those implications in Part I below.

<sup>4</sup> In this essay, I approach the deliberative framework of comparative efficiency as a subject in its own right, distinct from the commentators who adopt and deploy it. This framing may lead to some perhaps jarring locutions. But it is consistent with my aim, which is to consider how the terms we use to talk about a

This process is clearly discernable in the debate over private prisons.<sup>5</sup> In this debate, the persistent focus is on comparing the performance of private prisons with their public counterparts in terms of their relative efficiency. This comparative focus, however, obscures troubling features common to public and private facilities alike, including the imposition of gratuitous inhumane punishment, indifference to the risk of imposing unjustifiably long sentences, and the distorting effects of financial interests on prison policy. Moreover, the exclusive concern with the value of efficiency shapes the inquiry to crowd out of the picture consideration of all other normative implications of incarcerating convicted offenders.

In this essay, I explore the mechanisms through which the “thought style”<sup>6</sup> of comparative efficiency achieves these effects in the private prisons context. Doing so helps explain why critics concerned with the normative implications of privatization have had so little success in influencing, much less defining, the terms of the private prisons debate. I do not attempt to make the empirical case for this lack of success; the minimal traction broader normative concerns have had in this context will be familiar to anyone who has tried—whether in print or in conversation—to introduce into discussion about private prisons issues of justice or legitimacy or any other considerations bearing on the state’s obligations to the incarcerated. True, debate over broad-based penal reform itself may be carried out in overtly normative terms. But the more focused debate over private prisons has somehow remained impervious to such considerations, as has the more general discourse regarding prison administration, such that the priorities of comparative efficiency have come to exert a sort of gravitational pull over the thinking of those whose job it is to run the prisons.<sup>7</sup> In this deliberative climate, virtually all policy challenges prison administrators face are likely to be framed in comparative efficiency terms—even those challenges that arguably call out for more explicitly normative analysis.

Readers already steeped in the privatization literature may wonder at yet another essay on private prisons.<sup>8</sup> Isn’t everything to be said on that topic already in print?<sup>9</sup> And

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given problem or phenomenon may operate as an independent force with tangible effects on the ultimate shape of the world.

<sup>5</sup> Many private, for-profit penal facilities are not prisons but jails. For ease of reference, in this essay I use the term “private prisons” to refer both to private, for-profit prisons and private, for-profit jails.

<sup>6</sup> Douglas, *supra* note 2, at 92.

<sup>7</sup> See, e.g., Sarah Armstrong, “Bureaucracy, Private Prisons, and the Future of Penal Reform,” *Buffalo Criminal Law Review* 7 (2003).

<sup>8</sup> It bears noting that, although the study of private prisons is somewhat out of fashion as a scholarly matter, this penal form continues to play a significant and ever-increasing part in corrections in the US and worldwide. At the end of 2005, there were 107,447 inmates held in private prisons and jails in the United States, up from 98,628 the previous year. See Paige M. Harrison and Allen J. Beck, Bureau of Justice Statistics, US. Dept of Justice, Bulletin No. NCJ 215092, *Prisoners in 2005*, at 6 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf>. Perhaps the clearest indication of the ongoing relevance of private prisons in American corrections may be seen in the enthusiasm expressed for the industry’s prospects by Lehman Brothers investment analysts Jeffrey T. Kessler and Manav Patniak, who assert in their “Security Industry Annual Report 2006,” that they “continue to remain positive on the private prison industry, quite simply because the demand that exists for private prisons today is at an all-time high since we started coverage in 2001.” See Jeffrey T. Kessler & Manav Patniak, *Security Industry Annual Report 2006*, “Converged” A’Comin’? (Lehman Brothers Global Equity Research North America), at 253; see also *id.* at 253-55 (including among their reasons for anticipating the private prison industry’s intermediate-term growth: “continued growth in the overall prison population; the overcrowding, or “over-occupancy” issue; and “baby boom echo,” which means that the children of baby boomers are “increasingly entering an age

given the many as-yet-unanswered questions posed by the nature and extent of privatization in the 21<sup>st</sup> century, wouldn't we be better served spending less time on the special case of private prisons and focusing instead on issues relevant to the main run of privatized governmental functions?

In fact, the topic of this essay—why the debate over private prisons takes the particular shape it does—is as yet unexplored in the literature. But my main purpose here is not to fill this gap. It is instead to use this example to illustrate a phenomenon with applicability to privatization in general, namely, how ways of thinking about matters of policy can shape the collective understanding of what is at stake; limit our capacity to question or transcend that collective understanding; and even have tangible effects on the world quite independent of what the individuals employing these ways of thinking might intend or prefer or even realize. With this aim in mind, I offer in what follows an account of the rhetorical effects of comparative efficiency with the aim of explaining its dominance over, and effects on, the private prisons debate. I then consider the interests and values served by the ways comparative efficiency structures this debate, and argue that it is the project of privatization itself that is the beneficiary.

### I. The Insistence on Comparison

From the perspective of comparative efficiency, the sole issue in the private prisons debate is whether responsibility for incarceration should remain in public hands or be privatized. Comparative efficiency, in other words, wants only to know which is better, public or private. But framing the issue this way can lead us to miss altogether the more likely possibility that neither alternative is satisfactory or even adequate. Instead, what is most urgently needed may not be a change in the existing management structure, but meaningful reform of the prison system in general.

The problem arises as follows. Comparative efficiency frames the issue solely as a choice between public and private. What matters most are thus the *differences* between these two management forms. Similarities, in contrast, tell us nothing about the relative merits of one over the other, and thus offer no grounds for choosing between them. Similarities therefore fade or recede into the background on a comparative efficiency analysis, even when their content ought to be of great moral concern. It can thus be hard to see that the most troubling features of our penal institutions may be those that public and private have in common.

Consider, for example, levels of violence. Prisons and jails across America, public and private alike, are violent places.<sup>10</sup> That this is so ought arguably to prompt

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range (mid-teens to 24 years old) “that is ‘highest risk’ with regard to potential incarceration (especially males).” On the continued growth of prison privatization on the international front, consider the latest issue of Prison Privatisation Report International, which features stories discussing existing private prisons or plans for privatization in Honduras, Chile, Czech Republic, Hong Kong, Japan, Germany, France, the UK, the US, South Africa, Australia and Israel, among others. Prison Privatisation Report International, No. 76 (Oct. 2006), *available at* <http://www.psiru.org/justice/PPRI74W.htm#CHILE>.

<sup>9</sup> See Dolovich, *State Punishment and Private Prisons*: 440 n.4 (collecting citations to scholarly treatments of the issue of private prisons).

<sup>10</sup> According to the June 2006 report of the Commission on Safety and Abuse in America's Prisons, there were over 34,000 reported instances of assault among prisoners and almost 18,000 reported instances of assault by prisoners against staff in state and federal facilities in the year 2000. And even these numbers, the Commission found, understate the pervasiveness of the violence. Commission on Safety and Abuse in

policymakers to conduct a system-wide examination of the causes of violence in order to combat them. Yet, for comparative efficiency, prison violence is relevant only if there are appreciable differences between the levels of violence in private as opposed to public prisons. Should no such differences exist, levels of violence will offer no basis for choosing between public and private, and would therefore be viewed as irrelevant.

Absurd as it sounds, this process of dismissing as irrelevant even the most disturbing features of public and private prisons is standard fare in the private prisons debate. Horror stories about violence or serious deprivation and neglect in private prisons, evidence that there are aspects of this carceral form that ought to give us pause, are matched by equally horrific stories of violence, deprivation, or neglect in *public* prisons. This response, however, is not offered to confirm that there are serious problems with prisons across the board, but as a way to neutralize the concern, to demonstrate its ultimate irrelevance to the discussion. If the relevance of prison violence is acknowledged at all, it is only to the extent that one system can be shown to be worse than the other. Discussions of private prisons can thus devolve into contests over which system can be ascribed a worse litany of suffering and abuse, in order that one alternative may emerge as the marginally more palatable.

Other disturbing features common to both penal forms are likewise sidelined in the private prisons debate. For example, some commentators have expressed concern over the fact that private prison providers have a financial interest in increased incarceration and that industry members might therefore be tempted to use their political influence (which is often considerable)<sup>11</sup> to press for harsher sentencing policies regardless of whether increased punishments are warranted.<sup>12</sup> This concern is generally met with the response that the formulation of criminal justice policy is *already* subject to influence by a number of interest groups with a financial interest in increased incarceration regardless of what legitimate punishment requires<sup>13</sup>—groups that include correctional officers' unions,<sup>14</sup> purveyors of goods and services to prisons and prisoners,<sup>15</sup> and even voters in rural communities for whom prisons are a source of community economic development.<sup>16</sup> The point of this response is not that the worry is

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America's Prisons, "Confronting Confinement," Vera Institute of Justice (June 2006), 24-25, [www.prisoncommission.org/](http://www.prisoncommission.org/) (accessed 7/10/06). For anecdotal accounts of violence behind bars, see Sanyika Shakur, aka Monster Kody Scott, *Monster: The Autobiography of an L.A. Gang Member* (New York: Penguin Books, 1993) (describing truly horrific levels of violence in the high security wing of the L.A. County Jail); Michael G. Santos, *Inside: Life Behind Bars in America* (New York: St. Martin's Press, 2006) (recounting many extremely violent incidents in various federal penitentiaries, and characterizing this level of violence as routine in those facilities); K. C. Carceral, *Prison, Inc.: A Convict Exposes Life inside a Private Prison*, ed. Thomas J. Bernard (New York: New York University Press, 2006) (describing the slide toward systemic violence in a private prison in an unnamed Southern state).

<sup>11</sup> See Dolovich, "State Punishment and Private Prisons," 496n225, 526-528, 523n339.

<sup>12</sup> See, e.g., Christine Bowditch and Ronald S. Everett, "Private Prisons: Problems within the Solution," *Justice Quarterly* 4, no. 3 (September 1987): 451; see also Ira P. Robbins, "Privatization of Corrections: Defining the Issues," *Vanderbilt Law Review* 40, no. 4 (May 1987): 826.

<sup>13</sup> See, e.g., Charles H. Logan, *Private Prisons: Cons and Pros* (New York: Oxford University Press, 1990), 155-158.

<sup>14</sup> For more on the lobbying efforts of the politically powerful California Correctional and Peace Officers Association (CCPOA), see Dolovich, "State Punishment and Private Prisons," 530-532.

<sup>15</sup> See, e.g., J. Robert Lilly and Paul Knepper, "The Corrections-Commercial Complex," *Crime and Delinquency* 39, no. 2 (April 1993): 154-155.

<sup>16</sup> See Dolovich, "State Punishment and Private Prisons," 536-542.

unfounded as regards private prisons, nor that it is not of serious concern that sentencing policy may be driven by the economic interests of the politically influential. It is simply that, if this danger is in fact created by the state's use of private prisons, it is not *unique* to private prisons, and is thus irrelevant to the privatization discussion.

Or, to take one final example, consider the possibly worrisome effects of the profit motive in the prison context. Private prison contractors receive a set payment per inmate per day, and profit only when they spend less than this amount to run the facility. At the same time, if the state is to cut costs through privatization—the promise of private prisons—the contract price must *already* be less than the total cost the state would otherwise incur in operating the facility. If they are to make any profit, therefore, private prisons must be run for considerably less than the state would otherwise spend. Some observers have consequently expressed the concern that contractors will be tempted to cut corners in ways that cause harm to inmates. What tends to follow expression of this concern, however, is not investigation into whether this combination of factors does in fact generate abusive practices, but rather the observation that public prison officials too are under pressure to cut costs, and at times may also do so at the expense of inmates' health, safety, and well-being.<sup>17</sup> Again, the response does not deny the force of the concern, but nonetheless waves it away as besides the point.

There is, of course, a different conclusion one could draw from exchanges of this sort. Perhaps the value in focusing on private prisons is not the promise of greater efficiency, but rather that they help us see in a fresh light, in order to reform, troubling aspects of the penal system in general that are currently taken for granted. Thus, highlighting the violence in private prisons<sup>18</sup> might prompt us to acknowledge the extent of the violence in the penal system in general. Or recognizing the worrying possibility that private prison providers might be tempted to lobby for stiffer sentences in order to expand their business possibilities may lead us to notice that the development of sentencing policy is *already* prone to be shaped by parties who benefit financially from increased incarceration. Or exposing the incentives private contractors face to cut costs even at the expense of basic inmate needs might suggest the dangers that arise *whenever* prison administrators are pressured to prioritize their bottom lines. Comparative efficiency, however, is premised on a view of public and private as fundamentally distinct. There is thus no room in a debate framed on its terms for the possibility that public prisons and private prisons might create the same dangers.

As it is, comparative efficiency uncritically accepts the current state of incarceration in the public system as the baseline against which private prisons should be measured. That present conditions in public prisons and jails are wholly inconsistent with the realization of important public values and thus represent an inadequate standard against which to judge policy alternatives is never considered.

That comparative efficiency structures the analysis in this way calls into question a claim that is sometimes made in the context of private prisons:<sup>19</sup> that privatization offers the possibility for broad innovation, for radically rethinking how we approach the

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<sup>17</sup> For discussion, see *ibid.*, 510-512.

<sup>18</sup> *Ibid.*, 502-505 (describing the elevated levels of violence in private prisons).

<sup>19</sup> See Richard Harding, "Private Prisons," *Crime and Justice* 28 (University of Chicago Press, 2001): 294, 296, 304; Sean McConville, "Aid from Industry? Private Corrections and Prison Crowding," in *America's Correctional Crisis: Prison Populations and Public Policy*, ed. Stephen D. Gottfredson and Sean McConville (New York: Greenwood, 1987), 240.

practice of incarceration.<sup>20</sup> In fact, the motivating question for comparative efficiency is not what approach to incarceration offers the healthiest, most promising, or most normatively defensible approach to imprisoning convicted offenders—a question that might drive an approach focused on meaningful innovation. It is instead whether, given how we as a society already incarcerate, private prison providers could save states money by doing essentially the same thing for less.<sup>21</sup>

Whether the same is true in the other contexts in which privatization is contemplated is an open question. But it is certainly true in the case of prisons. When policymakers discussing the privatization option ask the hallmark question of comparative efficiency—whether private providers “can do it cheaper than the state”<sup>22</sup>—they have a very particular “it” in mind: what the state is already doing in this area. The presumption is that we already know what we want to do. The only question is whether it can be done more efficiently if it is done by private actors.

Adopting the perspective of comparative efficiency is thus at odds with the possibility of true reform. Comparative efficiency is solely about increasing government efficiency by challenging public institutions to conduct themselves more like private actors or risk being replaced by private actors. By introducing state bureaucracies to competition, comparative efficiency aims to bring the logic of the market to the public sphere. And where the privatization question is framed in comparative efficiency terms, it can make it hard even to recognize the need for reform of existing penal practices, much less to move the debate over how to run the prisons onto a more explicitly normative plane.

Recognizing these effects suggests that, however natural and obvious comparative efficiency may seem as an approach to privatization, it is in fact bound up with a particular normative vision, one on which the public sphere is viewed primarily as a site of exchange where citizens *qua* taxpayers seek to maximize the return on their investment. The broad acceptance of this market-driven vision is integral to the possibility of privatization. As the next section demonstrates, its hold is only further reinforced by the nature of comparative efficiency’s exclusive focus on the value of efficiency.

## II. The Exclusive Focus on Efficiency

### A. Efficiency as Cost-Benefit Calculus

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<sup>20</sup> For further discussion of the innovation claim in the private prison context, see Dolovich, “State Punishment and Private Prisons,” 476-477.

<sup>21</sup> For an elaboration on the argument that private prisons function very much like public prisons, see Dolovich, “State Punishment and Private Prisons,” 500-502 (arguing that the main practical differences between public and private prisons stem from the fact that private prisons systematically under-invest in labor).

<sup>22</sup> Lisa Belkin, “Rise of Private Prisons: How Much of a Bargain?,” *New York Times*, March 27, 1989, A14 (“I’m an old state bureaucrat. . . I don’t have any philosophies. If they can do it cheaper than the state can, more power to them.”) (quoting Bob Owens, internal auditor for the Texas DOC); see also Nsong Xiong, “Private Prisons: A Question of Savings,” *New York Times*, July 13, 1997, F5 (“I think as long as it does not cost any more than it costs the state, then we should consider privatization. . . . We should compare and explore the options out there that would save the taxpayers money.”) (quoting Donal Campbell, Commissioner of the Tennessee Department of Corrections).

Comparative efficiency is exclusively concerned with maximizing efficiency. It assumes that, if the private sector can perform a task more efficiently than the public sector, there is no reason not to privatize. Arguably, in many contexts where privatization is contemplated, there are other values at stake that merit more focused attention than efficiency. Yet where the perspective of comparative efficiency dominates the debate, it can be hard to recognize these other values, much less take adequate account of them in any policy deliberation.

The prison example effectively illustrates this effect. Certainly, efficiency is a necessary and appropriate consideration for those officials running the prisons. Incarceration is expensive, and the more efficiently it can be achieved, the more taxpayer money may be freed up for satisfying other public needs. But ensuring efficient prisons is hardly the only or even the most urgent consideration raised by the incarceration of convicted offenders. Incarceration is among the most severe and intrusive manifestations of power the state exercises against its own citizens. When the state incarcerates, it strips offenders of their liberty and dignity and consigns them for extended periods to conditions of severe regimentation and physical vulnerability. Such an act implicates any number of values—legitimacy, humanity, dignity, respect, justice, and fairness among them—that are distinct from and arguably more pressing than a prison system’s relative efficiency. When viewing the penal system from the perspective of comparative efficiency, however, these other concerns necessarily become subordinated, if they are considered at all.

The deeply normative implications of the act of imprisonment suggests that penal policy, if it is to be consistent with the state’s obligations to those it incarcerates, must be designed with those obligations in mind. Elsewhere, I have argued that two principles in particular capture these obligations in the penal context: the *humanity principle*, which obliges the state to avoid imposing punishments that are gratuitously inhumane, and the *parsimony principle*, which obliges the states to avoid imposing punishments of incarceration that are gratuitously long.<sup>23</sup> In each case, gratuitous punishment is that which cannot be justified to all members of society under fair deliberative conditions.<sup>24</sup> Although this conception of legitimate punishment may not be universally shared, it does represent an understanding of the moral obligations, grounded in the foundational values of liberal democratic society, that bind such a society when it decides to incarcerate convicted offenders.<sup>25</sup> And if penal policy is to be consistent with these values, it is the requirements of these values, and not those of efficiency maximization, that ought to drive the policymaking process.

To some, the opposition just suggested between a commitment to honoring moral values and the goal of maximizing efficiency may seem to misunderstand the concept of

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<sup>23</sup> See Sharon Dolovich, “Legitimate Punishment in Liberal Democracy,” *Buffalo Criminal Law Review* 7, no. 2 (2004): 385-419; Dolovich, “State Punishment and Private Prisons,” 462-471, 515-518.

<sup>24</sup> As this formulation suggests, the approach I adopt is a self-consciously Rawlsian one. For an elaboration of this argument, including detailed derivation of these two principles, see Dolovich, “Legitimate Punishment in Liberal Democracy.”

<sup>25</sup> The foundational or “baseline” liberal democratic values include a commitment to individual liberty, dignity, and bodily integrity; limited government; the primacy and sovereignty of the individual; and the entitlement of all citizens to equal concern and respect. I assume that a liberal democracy is any society with a stated commitment to these values. See Dolovich, “Legitimate Punishment in Liberal Democracy,” 312n11, 313-314.



efficiency. In any system of limited resources, it might be argued, no policy alternatives will fully satisfy all relevant values or yield a perfect result.<sup>26</sup> The best possible outcome is therefore that which most increases social welfare or overall well-being.<sup>27</sup> And understood in these terms, efficiency is not *opposed* to the realization of society's moral obligations. To the contrary, to the extent that honoring these obligations is properly understood as a component of society's welfare, an analysis geared toward the most efficient outcome will necessarily *include* them in any ultimate weighing of the costs and benefits of a given policy alternative.

This, of course, is the basic idea behind cost-benefit analysis.<sup>28</sup> This is not the place to engage the vast economics, public policy, and legal literatures analyzing the idea of cost-benefit analysis or the many features associated with it.<sup>29</sup> For present purposes, it is enough to recognize this approach as a tool through which policymakers attempt to determine how best to meet society's needs.<sup>30</sup> And the suggestion to be considered is simply that, through its use, policymakers are able adequately to account for all relevant normative concerns.

There are, however, grounds for thinking that a cost-benefit approach to the private prisons question would not ensure adequate consideration of normative concerns. For one thing, the suggestion that the value of satisfying a given moral obligation or the disvalue of its violation may be weighed against other implications of a given policy assumes that such values may be meaningfully captured in quantitative terms suitable for comparison with other costs and benefits. This possibility, however, is by no means a given. Certainly, where the arguably negative effects of the state's use of private prisons include, for example, a compromise in the extent to which citizens will trust in the integrity of the state's criminal justice institutions or an increase in the extent to which prisoners are regarded by state officials as financial burdens rather than humans, it is not obvious that the various harms at stake may be adequately expressed in terms that allow for such comparison. This problem of the "incommensurability" or "incomparability" of

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<sup>26</sup> As Robert Frank puts it, "[s]carcity is a simple fact of the human condition. To have more of one good thing, we must settle for less of another." Robert H. Frank, "Why is Cost-Benefit Analysis So Controversial?" *Journal of Legal Studies* 29, no. 2 (University of Chicago, June 2000): 914.

<sup>27</sup> See Diana Fuguitt and Shanton J. Wilcox, *Cost-Benefit Analysis for Public Sector Decision Makers* (Westport, CT: Quorum, 1999), 36. See also *infra*, note 28.

<sup>28</sup> The conventional way to understand the aim of cost-benefit analysis is "Kaldor-Hicks" efficiency, which is achieved "if there is a hypothetical costless lump sum redistribution in the project world, from winners to losers, such that this amended project world is Pareto efficient relative to the status quo." Matthew D. Adler and Eric A. Posner, "Implementing Cost-Benefit Analysis When Preferences are Distorted," *Journal of Legal Studies* 29, no. 2 (University of Chicago, June 2000): 1108. In contrast, Adler and Posner have a "revisionary take," which characterizes cost-benefit analysis "as a way to implement overall well-being." Personal communication with Matt Adler, Sept. 24, 2006; see also Adler and Posner, "Implementing Cost-Benefit Analysis When Preferences are Distorted," 1108-1116. Although I use the language of overall well-being here, I do so because it best captures the understanding of cost-benefit analysis that motivates my discussion. I do not intend thereby to take sides in the debate among economists as to the appropriate way to characterize the aims of cost-benefit analysis.

<sup>29</sup> Even attempting to pin down a precise meaning of this concept would be a difficult enterprise. As Amartya Sen notes, "the term 'cost-benefit analysis' has considerable plasticity and various specific procedures have been called by that name." Amartya Sen, "The Discipline of Cost-Benefit Analysis," *Journal of Legal Studies* 29, no. 2 (University of Chicago, June 2000): 932-933; see also Adler and Posner, "Implementing Cost-Benefit Analysis When Preferences are Distorted," 1108-1116.

<sup>30</sup> See Fuguitt and Wilcox, *Cost-Benefit Analysis*, 35.

goods in a choice situation has received extended treatment by moral philosophers.<sup>31</sup> Here, it is enough to note that this problem exists for any efforts to incorporate normative concerns into a cost-benefit analysis, and represents a serious obstacle to any fully adequate consideration of such concerns.

Another key reason to doubt the potential of cost-benefit analysis to adequately consider incarceration's normative implications stems from the inability of cost-benefit analysis to fully grasp the import of moral obligations. Assume that privatizing a prison would have only two identifiable effects: a reduced cost to taxpayers and an increase in the extent to which the humanity principle would be violated.<sup>32</sup> As is true of consequentialism more generally,<sup>33</sup> a cost-benefit calculation that the money-saving benefits of privatization would outweigh the costs in terms of moral obligations left unfulfilled would yield the conclusion that privatizing would be the right thing to do.<sup>34</sup> But this conclusion reflects a fundamental misunderstanding as to the force of a moral obligation. It assumes that we ought to honor our moral obligations only when—and because—the balance of utilities will thereby be maximized. What this perspective thereby fails to recognize is that an extant moral obligation binds us regardless of the results of any welfare calculus.

It is not that such obligations always necessarily trump; in the real world, policymakers must balance many competing demands and partial compliance is inevitable. But a perspective that made space for meaningful debate over the normative implications of a given policy alternative would recognize that in such a case, a decision to privatize would represent only partial compliance with our collective obligations. Moreover, such a perspective would allow—indeed, it would *require*—further debate as to how, notwithstanding our limited resources and capacities, we could still attempt to do better. There would be, in other words, a collective recognition that we had fallen short, and that we are still bound to satisfy the full reach of our obligations as soon as we are able.<sup>35</sup> In contrast, a cost-benefit approach is generally unable to contemplate the possibility that under some circumstances, even actions consistent with maximizing efficiency may violate our collective moral obligations.<sup>36</sup>

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<sup>31</sup> See, for example, the essays in Ruth Chang, ed., *Incommensurability, Incomparability, and Practical Reason* (Cambridge, MA: Harvard University Press, 1997).

<sup>32</sup> I assume that under the real world conditions of partial compliance, *all* incarceration will be to some extent inconsistent with the demands of this principle. Full compliance is therefore unrealistic, and the best we can do is aim to be as compliant as possible.

<sup>33</sup> For discussion as to whether cost-benefit analysis is necessarily consequentialist, see Martha Nussbaum, "The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis," *Journal of Legal Studies* 29, no. 2 (University of Chicago, June 2000): 1028-30; Sen, "The Discipline of Cost-Benefit Analysis," 936-38.

<sup>34</sup> Again, even this way of framing the issue may concede too much, since it implies the possibility of articulating the "cost" of violating a moral obligation in terms comparable with the financial cost of privatization.

<sup>35</sup> See Nussbaum, "The Costs of Tragedy," at 1017 (suggesting that systematically considering the possibility that no available alternative is morally justified "reinforces commitments to important moral values that should in general be observed, . . . motivates us to make appropriate reparations for conduct that, while in a sense inevitable, was also unethical, . . . and leads us to ask how the tragic situation might have been avoided by better social planning.") See also *ibid.* at 1011.

<sup>36</sup> At least this is true of what Sen has called the "limited mainstream methodology" of cost-benefit analysis. See Sen, "The Discipline of Cost-Benefit Analysis," 945. Sen's work suggests that a more sophisticated version of cost-benefit analysis may transcend the concern just articulated. But for my purposes, it is enough that the limitation I identify is shared by "limited mainstream" versions of cost-

A still further obstacle this approach creates to ensuring adequate consideration of incarceration's moral implications stems not from a problem with cost-benefit analysis *per se*, but from the likely rhetorical effects of its use. Even granting that in some contexts, analysts using sophisticated valuation techniques might be able meaningfully to capture explicitly normative concerns in quantitative terms, if such is even to be possible, there must first be a concerted effort to *identify* all such effects and determine how best to quantify even those effects that are hard to capture in easily measurable terms. Otherwise, the analysis is sure to include only the most easily quantifiable "practical" considerations at the expense of the less easily quantifiable. Such an analysis is thus likely to be under-inclusive. And in the prison context, what is most likely to be excluded under such conditions are the hard-to-measure benefits of ensuring a punishment regime consistent with society's moral obligations to the incarcerated.

Take, for example, the humanity principle introduced above.<sup>37</sup> To some extent, a prison's humanity may be understood in terms of the quality of conditions of confinement and the extent of inmate safety.<sup>38</sup> And plainly, there is any number of quantifiable measures readily available to capture these concerns: what is the ratio of correctional officers to prisoners? How many assaults on prisoners occur? Is the facility overcrowded? If so, by how much? How large are the cells? How much light do they get? Are they clean? Does the plumbing work? How many calories and nutrients do prisoners receive a day? How much programming is available? How many GEDs or GED equivalents do prisoners earn? Etc., etc.

But these questions do not capture the whole of it. If a penal institution is to qualify as humane, it is not enough that it satisfy a checklist of items. It must also foster a particular culture, one of mutual respect between staff and prisoners, in which brutality and the humiliation of prisoners are at a minimum and prisoners are able to feel and function like full human beings as much as possible.<sup>39</sup> A crucial component of a humane institution is thus the attitude with which prison officials approach the inmates in their

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benefit analysis. For one thing, my aim here is to sketch the broad concerns raised by the approach and not to demonstrate its inability to satisfy them on any conceivable version. Moreover, however appealing a sufficiently nuanced and sophisticated cost-benefit approach may be in theory, such an approach is unlikely to inform debate in the practical context of prison privatization even assuming an effort to incorporate broader normative concerns into the analysis.

<sup>37</sup> See *supra*, text accompanying note 23. This principle requires that criminal punishments not be gratuitously inhumane. Given the extremely limited circumstances under which this principle would authorize inhumane punishment—circumstances that in practice would be very rare indeed if they existed at all—the working assumption when applying this principle must be that *any* inhumane punishment would represent a violation. See Dolovich, "Legitimate Punishment in Liberal Democracy," 409-419; Dolovich, "State Punishment and Private Prisons," 469-470. An assessment in terms of this principle thus requires consideration of the relative humanity of a given facility.

<sup>38</sup> See e.g., Oliver Hart, Andrei Schleifer, & Robert W. Vishny, *The Proper Scope of Government Theory and an Application to Prisons*, 112 *Quarterly Journal of Economics*, 1127 (1997) (arguing against prison privatization on the grounds that the inevitably incomplete contracts that establish the scope of the contractor's responsibilities accord considerable discretion to private prison administrators and guards, discretion that allows scope for physical abuse against inmates). See also Dolovich, "State Punishment and Private Prisons," 478-79 (discussing the problem of incomplete contracts in the private prisons context).

<sup>39</sup> Simon Dinitz, "Are Safe and Humane Prisons Possible?" *Australian and New Zealand Journal of Criminology* 14 (March 1981): 3-19.

charge. Do they view prisoners as fellow human beings, deserving of respect as such? Or do they instead see them as “garbage,” rightly “written off” by society?<sup>40</sup>

It may be that a nuanced cost-benefit approach could incorporate into its calculations an awareness of the cultural and psychological dimensions that shape prison life—the fears, anxieties, hatred, and even disgust with which prisoners and custodial staff often approach one another. Perhaps, that is, given the highly-developed methods available for characterizing the value of even intangible effects of various policy alternatives,<sup>41</sup> it would be possible to develop measurable standards to determine the extent to which prisoners are accorded dignity and respect in a given institution. I take no position on this possibility here. Instead, I mean simply to point out that even assuming this possibility, absent an explicit commitment to identifying the full range of concerns, approaching the problem through the lens of efficiency would direct the inquiry in a way that focuses on the most easily and obviously quantifiable aspects of a given facility and thus makes us less likely even to *recognize* the more intangible dimensions of a humane environment.

This problem will be even more pronounced with concerns less obviously open to empirical investigation than that of a prison’s humanity. Consider, for example, the implications for the integrity of the criminal justice system of introducing an overt concern with profit into the carceral context. Will the use of private prisons compromise the legitimacy of sentences officially imposed or actually served? Will it undermine the public trust in the system? And what will it mean for the communities that most feel the weight of the criminal justice system?<sup>42</sup> Perhaps these questions could be answered empirically at least to some extent. But absent explicit attention to the particular dangers private prisons create for the legitimacy of punishment and the integrity of the system, we will be unlikely even to recognize this set of concerns, much less to address them in any meaningful way.

This concern suggests that, if policy deliberation is to take account of the full range of moral issues incarceration raises, we need a genuine commitment to supplementing the language of efficiency with the language of moral obligation. Honoring this commitment would require inviting moral philosophers and political theorists to join a conversation presently dominated by economists and policy analysts.

Admittedly, to openly acknowledge and debate explicitly normative concerns can be difficult and even contentious—difficult because there may appear to be no obvious anchors to shape the inquiry,<sup>43</sup> and contentious because by definition attention to such issues places one immediately and explicitly in the realm of value, about which

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<sup>40</sup> See Robert P. Weiss, “Private Prisons and the State,” in *Privatizing Criminal Justice*, ed. Roger Matthews (London: Sage, 1989), 43 (“‘The vast majority [of inmates] are what Saul Bellow refers to as the mindless ‘superfluous population,’ the ‘doomed people’ who have been ‘written off.’””) (quoting John Mack, “Writing Off the Doomed,” *The Progressive* (September 1984): 21).

<sup>41</sup> See, e.g., Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton, NJ: Princeton University Press, 1994); Matthew D. Adler, Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety,” *Chicago-Kent Law Review* 79 (2004): 977-1052.

<sup>42</sup> For discussion of these issues, see Dolovich, “State Punishment and Private Prisons,” 515-42

<sup>43</sup> A rich literature exists that addresses the challenges and appropriate parameters of public debate on matters of value. See, e.g., John Rawls, *Political Liberalism* (New York, Columbia University Press: 1993); Amy Guttmann and Dennis Thompson, *Democracy and Disagreement: Why Moral Conflict Cannot Be Avoided in Politics, and What Should Be Done About It* (Cambridge, MA, Belknap:1996).

disagreements are inevitable. Not to do so, however, brings its own risks, most notably that we will lose sight of prisoners as fellow human beings and fellow citizens to whom we owe obligations, and come to see them instead as consumers of services who owe us for the privilege. Indeed, the recent history of the professionalization of prison administration,<sup>44</sup> with its focus on standard setting, statistical analysis, and efficiency maximization, illustrates this very process.<sup>45</sup> The language of comparative efficiency simply reinforces the tendency. As Sarah Armstrong nicely puts it, “an enthusiasm for economic techniques to manage public services and values ignores the way that the techniques of management can re-shape values and . . . compromise them.”<sup>46</sup>

## B. Efficiency as Cost-Minimization

Whether or not a cost-benefit approach could adequately consider the full set of normative issues incarceration implicates, the fact is that policymakers contemplating the use of private prisons are little concerned with addressing this set of issues, whether through cost-benefit analysis or otherwise. Instead, the efficiency standard actually driving the debate is what can be thought of as *cost-minimization*—that is, how to run the prisons at the lowest possible price. This approach is akin to what is known in the public policy literature as “*cost-effectiveness* analysis.” An alternative to cost-benefit analysis, cost-effectiveness simply asks which of the available policy options *can produce a given output at the lowest cost*.<sup>47</sup> The difference between cost-effectiveness analysis and what I am calling “cost-minimization” is that, unlike more sophisticated versions of cost-effectiveness analysis, which consider a range of costs including those that are hard to measure, in the private prisons debate, the only cost that tends to command much attention is *the financial cost to taxpayers*. This means that, even if theoretically an efficiency analysis could take adequate account of broader normative concerns, in the case of private prisons, there is no meaningful effort on the part of policymakers to do

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<sup>44</sup> For a history of this process, which the author characterizes as the bureaucratization of American penal administration, see Sarah Armstrong, “Bureaucracy, Private Prisons, and the Future of Penal Reform,” *Buffalo Criminal Law Review* 7 (2003): 288.

<sup>45</sup> Discussing an emerging trend in corrections policy toward charging prisoners a daily fee for room and board, for example, a Michigan jail administrator recently asked “why law-abiding citizens should be burdened with the cost of incarceration *when they never use that service*, or why taxpayers should be further victimized by supporting inmates who have the wherewithal to pay.” Michelle M. Sanborn, “The Pay-to-Stay Debate: Inmates Must Take Financial Responsibility,” *Corrections Today* 65, no. 5 (August 1, 2003): 22 (emphasis added). See also E. S. Savas, “Privatization and Prisons,” *Vanderbilt Law Review* 40 (May 1987): 899 (describing recidivists who have been imprisoned in multiple facilities as “comparison shopper[s]” whose opinion as to the virtues of various institutions might contribute to comparative assessments of public and private facilities).

<sup>46</sup> *Ibid.*, 302.

<sup>47</sup> See, e.g., Eric A. Posner, “Transfer Regulations and Cost-Effectiveness Analysis,” *Duke Law Journal* 53 (December 2003): 1069. Cost-effectiveness analysis may also allow the assessment of policies to determine which of the available options can “maximize effectiveness for a given budget or set of resources,” although this alternative is not a focus of the private prisons debate. Fuguitt and Wilcox, *Cost-Benefit Analysis*, 277. For a brief explanation of the differences between cost-benefit and cost-effectiveness approaches, see *infra*.

so.<sup>48</sup> The possibility that some concerns are more urgent than cost savings, even if not ruled out in theory, is rarely if ever taken seriously in practice.

True, the private prisons debate does not completely ignore considerations other than cost. In fact, one finds therein a general acceptance of the view that private prisons must be *at least as good as* public prisons on measures of quality and safety, which are important factors in any humanity determination. But this concession is wholly consistent with—and even demanded by—an approach that aims to identify the cheapest way to perform a specified task. Such an approach *takes as given the nature and scope of the job to be done*. For cost-minimization to remain the operative efficiency standard in the private prison debate, therefore, privatization must be thought not to fundamentally alter the character of the service in question. Otherwise, it could not be argued that private contractors would perform the specified task for less money, since they would not be performing the specified task at all but rather some other, fundamentally different task. This is why advocates of privatization insist that privatization would effect no meaningful change to the character of the governmental function to be privatized—so, for example, private prisons would be no more violent, and at least as safe, secure, humane, etc. as public prisons. It is also why debate over privatization is so often a contest between competing characterizations of the government function at issue and the likely effects of privatization, with advocates arguing strenuously that the nature of the function would be unchanged by privatization, and opponents arguing just as strenuously that it would be thereby transformed.<sup>49</sup>

That comparative efficiency's crude version of cost-effectiveness—what I am calling “cost-minimization”—makes it difficult to find space in the debate for the full range of incarceration's normative implications is itself unsurprising. If cost-minimization is the only thing that matters, those adopting this approach will have no call to look beyond considerations of cost to society's moral obligations to the incarcerated. But the problem with comparative efficiency's cost-minimization approach is not merely that it does not consider other implications of incarceration. It is that, with its implicit adoption of this approach, comparative efficiency affirmatively *obscures* a set of broader normative concerns. What's more, by keeping the focus on relative cost, comparative efficiency subtly reinforces the prevailing approach to criminal punishment in ways that belie comparative efficiency's apparent value neutrality.

To understand just how comparative efficiency achieves these effects, it is necessary to say a little more about cost-effectiveness analysis, with which cost-minimization shares a basic structure. Cost-effectiveness analysis developed as a response to a particular criticism of cost-*benefit* analysis touched on above, *i.e.*, that it reduces all effects of a given policy to pecuniary (or at least quantitative) values, whether

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<sup>48</sup> See Joseph T. Hallinan, *Going up the River: Travels in a Prison Nation* (New York: Random House, 2001), 167 (“The success of private prisons . . . is driven by a single premise: They are cheaper than their public counterparts”); see also Harding, “Private Prisons,” 310 (describing the interest in prison privatization in the United States as “less about doing a different job more innovatively than doing the same job less expensively”).

<sup>49</sup> Thus, even if a given proposal to privatize is defeated, to keep the debate focused on cost-minimization is still a victory for privatization, since it signals the official belief that no further normative issues relating to incarceration require attention, and relative cost is the only thing that matters. And, it bears noting, once this belief is in place, any normative concerns that arguably remain are rendered invisible.

or not a numerical value is fully able to capture the concern at issue.<sup>50</sup> In contrast, *cost-effectiveness* allows at least one value-laden policy consideration to be quantified not in monetary terms but in “physical units,” thus avoiding the need to assign a putatively objective number to a consideration the moral significance of which cannot adequately be captured in numerical terms.<sup>51</sup>

The health policy context makes clear the benefits of this difference. The difficulty faced by health policy analysts is in assigning a dollar amount to the value of saving a human life. Cost-effectiveness analysis avoids this problem by simply quantifying the number of quality-adjusted human life years (or “QALYs”) saved by a given medical technology, and then comparing the ratio of the years saved to the cost of that technology.<sup>52</sup> This move allows analysts to determine which approach provides for the most QALYs saved at the lowest cost, without having to confront the difficult question of how much a year of human life is worth.<sup>53</sup>

A cost-effectiveness approach thus necessarily takes for granted the desirability of the specified goal. And by framing the policy analysis in terms of how best to achieve that goal, it reinforces the likelihood that it is this goal, rather than any other, that society will ultimately realize. In the health policy context, this effect is relatively unproblematic. If the aim of medicine is to allow people to live longer healthy lives, any health policy seeking to maximize the number of QALYs will be arguably consistent with society’s best interests.<sup>54</sup> But the same cannot be said of the prison context. What comparative efficiency’s cost-minimization approach seeks in the prison context is not the lowest cost per healthful human life year saved—an incontrovertibly positive social end—but *the lowest cost per human life year incarcerated*. And since this approach takes as given the

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<sup>50</sup> See, e.g., Henry M. Levin and Patrick J. McEwan, *Cost-Effectiveness Analysis: Methods and Application*, 2nd ed. (Thousand Oaks, CA: Sage, 2001), 14-19. See also supra note 34.

<sup>51</sup> Fuguitt and Wilcox, *Cost-Benefit Analysis*, 274.

<sup>52</sup> In health policy analysis, the net benefit of a given treatment is measured in “quality adjusted life years” or “QALYs.” The term seeks to capture both the extent to which a given medical treatment extends life and the quality of life that would be experienced by those thereby kept alive. Henry M. Levin and Patrick J. McEwan, *Cost-Effectiveness Analysis: Methods and Applications* 2<sup>nd</sup> Ed. (Thousand Oaks, CA: Sage, 2001), 204. On this approach, quality of life is measured as a number between zero (death) and one (perfect health) and is generally derived from one of a number of “stated preference format[s],” W. Kip Viscusi, “Monetizing the Benefits and Risks of Environmental Regulation,” *Fordham Urban Law Journal* 33 (May 2006): 1014, including the “standard gamble, time trade-off and the use of rating scales.” Certi Phillips and Guy Thompson, “What is a QALY?” available at <http://www.jr2.ox.ac.uk/bandolier/booth/glossary/QALY.html> (accessed 9/17/06), 2. When the benefits of a particular treatment are measured in QALYs, the QALY figure given represents the number of years of life application of that treatment is expected to save, times the value for the quality of life (between one and zero) that is expected to result from this application. For example, if a treatment extends a person’s life by four years at a quality of life of .75, then the QALY is equal to 3. Ibid. This approach allows doctors to use QALY values to compare various medical treatments and pursue the treatment that promises to save the highest number of QALYs. And more importantly for our purposes, it also allows policy-makers to use QALY values to compare various public health initiatives, and to pursue the approach which saves the highest number of QALYs at the lowest possible cost. For further discussion on this approach, see Levin and McEwan, *Cost-Effectiveness Analysis*, 204-205.

<sup>53</sup> *Ibid*, 276-280.

<sup>54</sup> This account necessarily oversimplifies the complex issues arising in the health policy context. For further discussion of these issues, see Erik Nord, *Cost-Value Analysis in Health Care: Making Sense Out of QALYs* (1999); John La Puma & Edward F. Lawlor, *Quality-Adjusted Life-Years: Ethical Implications for Physicians and Policymakers*, 263 *JAMA* 2917 (1990).

specified goal and seeks only to achieve it at the lowest possible cost, and since, as we have seen, it frames the goal of incarceration in terms that take existing conditions for granted, we must also assume for purposes of comparative efficiency that this is a human life year incarcerated *under existing conditions of confinement*.

But—and here is the key point—unlike a healthful human life year saved, a human life year incarcerated under existing conditions is only an obvious social good if one assumes that both (1) the prison sentences imposed and (2) the conditions under which those sentences will be served are justified and appropriate.

These twin assumptions are therefore necessary premises of cost-minimization in the private prisons context. That is, cost-minimization will remain a plausible approach to corrections policy only if we assume that prison sentences currently imposed and existing prison conditions are justified and appropriate.<sup>55</sup> In taking these assumptions for granted, comparative efficiency focuses the inquiry in a way that effectively forecloses reexamination of the very aspects of state punishment a more normatively capacious standard would want to question.

This aspect of comparative efficiency further confirms its normative bias: in adopting a cost-minimization approach, comparative efficiency favors the criminal punishment status quo. Some might think this stance wholly appropriate. It is, after all, the democratic process that defines social goals, and any objections to current sentencing policy or existing conditions in prisons and jails ought therefore to be addressed through the political process. On this view, comparative efficiency is simply a tool for deciding how most cheaply to house those prisoners society has deemed it appropriate to incarcerate, and is rightly agnostic on the more difficult normative questions of who should be imprisoned, for what and for how long, and under what conditions.

But this account fails to appreciate the way that taking comparative efficiency for granted as the appropriate tool for addressing the challenges of prison administration has a direct and palpable limiting effect on any political debate over the nature and scope of state punishment. In framing as the key issue for prison administration that of whether privatization will reduce the cost of corrections, comparative efficiency prompts the very people who ought to be most focused on the hard normative questions raised by mass incarceration—state legislators, prison officials and other policymakers and analysts—to gloss over these difficult questions. Moreover, in redirecting attention away from these hard questions, comparative efficiency makes it less likely that those in a position to shape penal policy will even to register the existence of more urgent issues in this arena.<sup>56</sup>

Again, we see that comparative efficiency is not value neutral, but instead plays a key role in shoring up the existing penal system. Once this role is appreciated, the

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<sup>55</sup> Note that these two considerations are the central concerns of parsimony and humanity, respectively.

<sup>56</sup> The notion that comparative efficiency is apolitical, its concerns value-neutral, is implicit in the private prisons literature. In that literature, it is a commonplace that issues relating to the “allocation” of punishment—*i.e.*, who should be incarcerated, for what offense, and for how long—are necessarily distinct from and must be kept separate from those issues relating to the “administration” of punishment—*i.e.*, how the prisons should be run and who should run them. The implication of this distinction is that questions of allocation are normative and thus necessarily require political determinations outside the scope of the private prisons debate, while questions of administration are simply (value neutral) management issues which comparative efficiency can therefore appropriately resolve. See Richard Harding, *Private Prisons and Public Accountability* (New Brunswick, NJ: Transaction, 1997), 22; see also Paul Moyle, “Separating the Allocation of Punishment from Its Administration: Theoretical and Empirical Observations,” *Current Issues in Criminal Justice* 11, no. 2 (November 1999): 166-170.



relentless focus on comparative efficiency no longer seems obviously appropriate, but instead seems a way to distract from the more difficult and contentious questions of what the state may legitimately do to fellow citizens in the name of criminal punishment, and whether existing practices adequately conform to these limits. Notice that when these latter questions come to the fore, privatization no longer appears the appropriate centerpiece of prison reform efforts. Widespread acceptance of the claim that the animating question of comparative efficiency is value-neutral is thus arguably integral to the continued appeal of private prisons.

The success of private prisons did not always rest on painting the relevant issues in wholly non-normative terms. In fact, when the modern private prison emerged,<sup>57</sup> privatization appealed partly because it promised to relieve the considerable overcrowding that marked prisons and jails across the country. Private prisons were thus seen as the means through which states could continue to imprison convicted offenders at prevailing levels while at the same time reversing the deterioration in prison conditions that is overcrowding's inevitable result.<sup>58</sup> Private prisons could thus be promoted and defended in terms of quality and safety, which have obvious normative implications.

But this particular justification soon dissolved as private prisons quickly became as overcrowded as the public facilities they were intended to relieve.<sup>59</sup> What remained was solely their potential for greater efficiency. For privatization to maintain pride of place on the corrections agenda, therefore, any concern with the problem of overcrowding, along with the most obvious solution to that problem—rethinking prevailing sentencing policies—had to be downplayed. Hence the appeal of cost-minimization, which in taking for granted the legitimacy of prevailing incarceration levels and existing conditions of confinement steers us away from critical assessment of either the character of prison conditions or the extent of imprisonment. For those committed to ensuring the legitimacy of state punishment, however, this effect is problematic, since these aspects of the penal system are arguably the very ones most urgently demanding justification.

### III. Comparative Efficiency: How Privatization Thinks

The foregoing account sketches the rhetorical mechanisms through which comparative efficiency structures the debate over private prisons. The puzzle that remains is how this particular perspective came to dominate the debate in the first place. Because the forces that shape individual and collective deliberation are multi-faceted and

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<sup>57</sup> On the early history of private involvement in American corrections, see Dolovich, "State Punishment and Private Prisons," 450-454.

<sup>58</sup> As is well known to any corrections official, overcrowding in penal facilities raises stress levels, exacerbates interpersonal tensions, and creates endless opportunities for the development of rancor and hostility among inmates and between inmates and line officers. It thus makes the job of keeping order more difficult and leads to increased violence. It also overtaxes prison services like health care, dental care, drug treatment, and other programming, and burdens the physical plant in ways guaranteed to compromise living conditions.

<sup>59</sup> See Harding, *supra* note 56 (describing the authorization for, and realization of, overcrowding in private prisons that occurred in the United States, the United Kingdom, and Australia by the mid-1990s, and stating that "the brief halcyon period when private sector prisons were in effect quarantined from overcrowding has already come to an end").

complex, one can only speculate. Still, some explanations will fit a given phenomenon better than others. In this spirit, I suggest that, far from a free-floating set of premises that stands or falls on the strength of its justifying arguments, comparative efficiency is best understood as a key cognitive component of the entrenched political/structural institution of privatization. There is, moreover, a discernibly symbiotic relationship between the cognitive framework of comparative efficiency and the political/structural framework of privatization; each simultaneously produces and is reinforced by the other.

The path from privatization to comparative efficiency is a straightforward one. Comparative efficiency is not just coincidentally consonant with the interests and values of privatization but is presupposed by the very idea of privatization itself, that government functions may be appropriately delegated to private contractors. The operative assumption when privatization appears an appropriate move is that society has a need for  $x$  task to be performed or  $x$  service to be provided in the most efficient way possible. Either the state can do it, or it can contract with the private sector to do it. Once the issue is understood in these terms, the only remaining question is which method is more efficient, which is the motivating question of comparative efficiency.

Somewhat more excavation is required to understand the process by which the structuring assumptions of comparative efficiency reinforce the perceptions and values on which the possibility of privatization depends. But careful examination suggests that comparative efficiency does indeed perform this role. For privatization to be regarded as an acceptable policy option, it must be thought to make no meaningful difference whether a public official or a private actor fulfills the state's assigned role. Government must be perceived simply as an agent of service provision. A robust program of privatization in any given context thus depends on widespread rejection of a rich normative understanding of the moral obligations of the state and its citizens, in favor of this "depoliticized" view.<sup>60</sup> And although comparative efficiency did not create this stripped-down view of the public sphere, it nonetheless sustains and fortifies it. As we have seen, for example, the adoption of this deliberative framework in the context of prison administration obscures the normative concerns posed by current penal practices, thus reinforcing the notion that the exercise of state power in the prison context raises no meaningful normative issues. In this way, notwithstanding its implicit claim to value neutrality, comparative efficiency shores up the normative picture on which the possibility of privatization depends.

Comparative efficiency also channels debate in other ways conducive to the privatization project. For example, the comparative component of comparative efficiency divides state actors into two kinds, public and private. This move validates the basic assumption, noted above, on which the possibility of privatization depends: by taking for granted that the sole issue is which state actor is more efficient, it casts the private sector as a wholly appropriate candidate for carrying out the government's work, thereby steering the focus of the debate well past the point at which this role might be questioned. Moreover, by defining the terms of the debate in this way, comparative efficiency reshapes the very concepts of "public" and "private" to make any notion of public actors as the morally appropriate agent of state purposes seem quaint, outdated, and even naïve. From this seemingly more sophisticated perspective, the difference between public and

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<sup>60</sup> The term is Feigenbaum and Henig's. Harvey B. Feigenbaum and Jeffrey R. Henig, "The Political Underpinnings of Privatization: A Typology," *World Politics* 46 (1994): 195 (italics omitted).

private is no longer understood in terms of their respective purposes, with the public sector doing the state's business on behalf of society as a whole, and the private sector working on behalf of private interests to accumulate private wealth. Instead, consistent with its presupposition that public and private are just two different kinds of actors available to perform the state's business, comparative efficiency recasts the public/private distinction as simply one between different organizational forms. On this redefinition, "public" means only that the task in question is done directly by state employees, and "private" means that the task has been contracted out. To successfully frame the issue in this way prepares the ground for the legitimacy and thus the possibility of privatization—and is thus a victory for the institution of privatization regardless of whether a given privatization effort succeeds or fails.

Comparative efficiency thus recasts the public/private distinction. But it nonetheless continues to posit a fundamental and inherent difference between the two spheres.<sup>61</sup> We have already seen the way this foundational assumption of inherent difference between public and private can obscure the similarities that exist between the two.<sup>62</sup> It is, moreover, this assumed difference that grounds the necessary choice comparative efficiency constructs: because, on this view, public and private are essentially different and there are two and only two alternatives, we must choose one or the other. In fact, there is arguably a wide variety of options for realizing any governmental purpose, some "public" in the sense of being run by state employees in state agencies, others "private" in the sense of being run by non-state actors working by contract. But to recognize the range of choices that exist within this array of options—say, between state corrections agencies as currently organized and such agencies operating with significant independent state oversight, or between private, for-profit companies seeking a financial return and non-profits with a stated commitment to reducing recidivism—would require acknowledging that there is more to the success of a public policy than whether state agents are public employees or private contractors. It even introduces the notion that the public prison system may be improved and its problems resolved without contracting out to private parties. These possibilities, however, are at odds with the essential logic of privatization. By excluding them from the debate, comparative efficiency reinforces the perceptions on which the possibility of privatization depends.

This account of the symbiotic relationship between privatization and comparative efficiency helps to explain why critiques of privatization on grounds other than efficiency have had so little success at influencing the debate. Once privatization has come to be affirmed as an appropriate alternative to the public provision of a given government

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<sup>61</sup> In positing an inherent difference between public and private, comparative efficiency need not assume that this difference has any particular content. It bears noting, however, that in the private prisons literature, the comparative efficiency question plays out before an ideological backdrop that *does* give particular content to the distinction. Specifically, it tends to regard state institutions as "bloated, wasteful, [and] ineffective," in contrast to the "more flexible, more innovative, and more entrepreneurial" character of the competitive private sector. David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Reading, MA: Addison-Wesley, 1992), 12. From this ideological perspective, the private sector is presumed to be the better option. Theoretically, comparative efficiency could exist independently of this ideological picture. But where comparative efficiency is informed by this ideology—which in practice it frequently is—the assumption of the inherent difference between public and private invariably leads to arguments in favor of privatization.

<sup>62</sup> See *supra*, Part I.

function, a broad-based commitment to the view that society has particular obligations which demand the collective engagement of citizens *qua* citizens must have already been displaced by a view of state officials as managers, who are obliged only to carry out their assigned responsibilities as efficiently as possible (and who can thus be replaced by other, private actors should these others prove the more efficient alternative). And once this displacement has occurred, it becomes difficult to generate debate as to whether privatization is the best way to satisfy our collective normative obligations to those we punish, or even what those obligations might involve. At that point, it is as if the words necessary to frame these questions are no longer widely understood.

It might be argued that, even assuming the power of comparative efficiency to shape debate over privatization in the ways I have described, nothing prevents those concerned with the state of American prisons from directly criticizing prison conditions or sentencing policy in other terms. But although this claim has intuitive appeal, it fails to appreciate the extent to which the privatization option, with its “thought style” of comparative efficiency,<sup>63</sup> has come to occupy the deliberative field of prison administration. Comparative efficiency’s success in this regard is partly because of the way the very possibility of privatization has channeled the energy of interested parties. Those individuals and institutions most inclined toward expanding the conversation beyond the normative vision of comparative efficiency are also most likely to be privatization’s biggest opponents, and the widespread acceptance of privatization as a viable policy option has meant that much of the energy of this group has been directed toward fighting privatization and away from considering other issues. Private prisons, moreover, are the single biggest innovation in American corrections in the past three decades (save perhaps supermax prisons). As such, they have also commanded the attention of those policymakers, academics, journalists, and other interested parties who are not predisposed either way regarding the possibility of privatization but have still found themselves engaging the issue, and who, in its absence, might have focused on other aspects of the prison system.

But even more central to comparative efficiency’s success at occupying the deliberative field is the success of the privatization movement itself in placing the possibility of privatization—not only of whole penal facilities but also of discrete prison services like health care, dental and psychiatric care, laundry, food service, transportation, etc.—at the center of the corrections agenda. Privatization has become a lens through which to view virtually all problems of prison administration, defining available options even when the problem at issue does not obviously call for choosing between public and private management for maximum cost-effectiveness. And, appropriate or not, once privatization appears as a possible solution, comparative efficiency immediately arises to set the deliberative terms, with predictable effect: for purposes of meaningful policy debate, other ways of understanding the problem, along with the solutions suggested by alternative constructions, disappear.

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<sup>63</sup> Douglas, *supra* note 2, at 92.