Volume 60, Issue 4 Page 1197

Stanford Law Review

PRIVATIZATION AND THE LAW AND ECONOMICS OF POLITICAL ADVOCACY

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A common argument against privatization is that private providers will self-interestedly lobby to increase the size of their market. In this Article, I evaluate this argument, using, as a case study, the argument against prison privatization based on the possibility that the private prison industry will distort the criminal law by advocating for incarceration.

I conclude that there is at present no particular reason to credit this argument. Even without privatization, actors in the public *sector already lobby for changes in substantive law—in the prison context, for example, public corrections officer unions are active advocates of pro-incarceration policy. Against this background, adding the "extra voice" of the private sector will not necessarily increase either the amount of industry-increasing advocacy or its effectiveness. In fact, privatization may well reduce the industry's political power: Because advocacy is a "public good" for the industry, as the number of independent actors increases, the dominant actor's advocacy can decrease (since it no longer captures the full benefit of its advocacy) and the other actors may free ride off the dominant actor's contribution. Under some plausible assumptions, therefore, privatization may actually decrease advocacy. Under different plausible assumptions, the net effect of privatization on advocacy is*

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ambiguous, but in any event, privatization does not unambiguously increase *advocacy.*

The argument that privatization distorts policy by encouraging lobbying is thus unconvincing without a fuller explanation of the mechanics of advocacy.

INTRODUCTION

Over ninety years ago, opponents of World War I alleged that "munitions manufacturers frighten the popular mind with the fear of imaginary external enemies and inflame it with murderous patriotism."[1] According to a view attributed to Stefan Zweig, the war began only when "newspapers in the pay of the arms manufacturers began to whip up sentiment against Serbia."[2] After the war, that accusation morphed into the charge that arms makers were self-interestedly obstructing peace efforts.[3] Today, an opponent of U.S. military

1. *In re* Billings, 298 P. 1071, 1094 (Cal. 1930) (quoting a 1916 article by an "odious anarchist"); *see also, e.g.*, NIALL FERGUSON, THE PITY OF WAR 32-33 (1999); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 141, 180 n.180 (2004).

2. Andrew Cockburn, *The Great War*, WASH. MONTHLY, Jan./Feb. 2000, at 51 (reviewing FERGUSON, *supra* note 1). *But see* FERGUSON, *supra* note 1, at 215-16.

3. *See*, SPECIAL COMM. ON INVESTIGATION OF THE MUNITIONS INDUS., THE NYE REPORT, S. REP. NO. 74-944, pt. 3 at 4-10 (1936); *cf.* Dwight D. Eisenhower, Farewell Radio and Television Address to the American People, PUB. PAPERS 1035, 1038 (Jan. 17, 1961) (warning of the "military-industrial complex").

policy characterizes defense contractor CACI International, Inc.,[4] whose chairman speaks publicly of the "heinous[ness]," "fanatical horror," and "barbarism" of terrorism,[5] as "one of the most unabashed corporate backers of Bush's foreign policy and a key supporter of the military campaigns in Iraq and Afghanistan."[6] Critics also charge that private military interests affect what weapons systems we rely on[7] and what alliances we enter into,[8] and that, in some countries, those interests may even take over the government.[9]

This theme—that private contractors use their influence to advocate not just more privatization but also, insidiously, changes in substantive policy—sweeps more broadly than just defense contractors. The following list gives a sense of the generality of the accusation; the last few items illustrate that the critique comes from "the right" as well as from "the left."

- Private prison firms are often accused of lobbying for incarceration because, like a hotel, they have "a strong economic incentive to book every available room and encourage every guest to stay as long as possible."[10]
- Business improvement districts—coalitions of business and property owners, many of which have their own private security forces—have lobbied municipalities for, among other things, aggressive panhandling ordinances.[11]
- A toll road developer in Colorado has lobbied for statutory changes to

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4. *See* CACI Int'l, Inc., Welcome to CACI, http://www.caci.com.

5. Dr. J.P. (Jack) London, Chairman, President, and Chief Executive Officer, CACI Int'l Inc., Association of the United States Army John W. Dixon Medal Acceptance Speech (Oct. 8, 2003), http://www.caci.com/speeches/jpl_AUSA_10-8-03_speech.shtml.

6. Tim Shorrock, *CACI and Its Friends*, NATION, June 21, 2004, at 6; *see also* ROBERT MANDEL, ARMIES WITHOUT STATES: THE PRIVATIZATION OF SECURITY 86-88 (2002); NORMAN SOLOMON, WAR MADE EASY: HOW PRESIDENTS AND PUNDITS KEEP SPINNING US TO DEATH 113-15 (2005); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1015-16 (2004); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 952 (2004); James Surowiecki, *Army, Inc.*, NEW YORKER, Jan. 12, 2004, at 27. For a view from the very far left, see Anthony Arnove, *Pro-War Propaganda Machine*, SOCIALIST WORKER, Mar. 21, 2003, at 6.

7. *See* Leslie Wayne, *After High-Pressure Years, Contractors Tone Down Missile Defense Lobbying*, N.Y. TIMES, June 13, 2000, at A6.

8. *See* Russell Mokhiber & Robert Weissman, Op-Ed, *Arms Sellers Calling Shots*, BALT. SUN, May 16, 1999, at 1C.

9. *See* P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security*, INT'L SECURITY, Winter 2001/02, at 186, 206; Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75, 87-89 (1998).

10. Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC MONTHLY, Dec. 1998, at 51, 64; *see also infra* text accompanying notes 24-32; sources cited *infra* note 31.

11. *See* Franck Vindevogel, *Private Security and Urban Crime Mitigation: A Bid for BIDs*, 5 CRIM. JUST. 233, 244-45 (2005).

preempt county authority to set toll rates,[12] and a private road construction firm has been accused of contributing to Texas Supreme Court justices' campaign chests to influence a potential eminent domain suit related to a toll road in the state.[13]

- Private landfill companies have been accused of lobbying for weak environmental regulation of landfills[14] and opposing recycling initiatives.[15]
- Private water-supply owners have been accused of "lobbying to weaken water quality standards . . . and pushing for [trade agreements] that hand over the U.S. water resources to foreign corporations,"[16] and private water utilities have been accused of fighting conservation efforts.[17]
- Private redevelopment corporations, which have the power to condemn private property for purposes of "urban renewal," have opposed reform of eminent domain laws in the wake of the Supreme Court's decision in *Kelo v. City of New London*.[18]
- And "private attorneys general," for instance environmental groups[19] that benefit from fines available under environmental citizen suit provisions,[20] or members of the securities plaintiffs' bar[21] who benefit

12. *See* Colleen Slevin, *Senate Panel Kills Bill for "Super Slab" Toll Road*, ASSOCIATED PRESS, Mar. 23, 2005.

13. *See* Dan Genz, *Texas Court Nominee Challenges Possible TTC Builder's Campaign Contributions*, WACO TRIB.-HERALD, Oct. 3, 2006.

14. *See* Texas Campaign for the Environment, Statewide Landfill Rules, http://www.texasenvironment.org/landfill_rules.cfm.

15. *See* NEIL SELDMAN, INST. FOR LOCAL SELF-RELIANCE, THE NEW RECYCLING MOVEMENT (2003), http://www.ilsr.org/recycling/newmovement1.html; Winnebago County, Wisconsin, Solid Waste Management Board, http://www.co.winnebago.wi.us/Solid_Waste/SWMain.htm.

16. Public Citizen, Water Privatization Overview, http://www.citizen.org/cmep/Water/general; *cf.* David B. Schorr, *The First Water-Privatization Debate: Colorado Water Corporations in the Gilded Age*, 33 ECOLOGY L.Q. 313, 325 (2006); William E. Smythe, *The Struggle for Water in the West*, 86 ATLANTIC MONTHLY 646, 649 (1900).

17. Nat'l Association of Water Companies, About Private Water Service Providers, http://www.nawc.org/about/about-myth_facts.html#7.

18. 545 U.S. 469 (2005); New London Dev. Corp., A Review and Analysis of Eminent Domain, http://www.nldc.org/documents/NLDC-EMINENTDOMAINWP.pdf (July 28, 2005).

19. *See, e.g.*, As You Sow, Corporate Accountability, Shareholder Action and Toxics Reduction, http://www.asyousow.org.

20. *See* OFFICE OF THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, PROPOSITION 65 SETTLEMENT REPORT 2005 (2007), http://caag.state.ca.us/prop65/pdfs/Alpert_Report2005b.pdf (reporting settlement awards to As You Sow). *See generally* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 351-56 (1990).

21. *See, e.g.*, Milberg Weiss, About Milberg Weiss, http://www.milbergweiss.com/firm/firm.aspx.

> from the availability of securities fraud class actions,[22] fight for the continued vitality or even strengthening of the statutes under which they litigate.[23]

In this Article, I examine this "political influence" challenge to privatization using the case study of private prisons. I conclude that, in the prison context, there is at present no reason to credit the argument. At worst, the political influence argument is exactly backwards, by which I mean that privatization will in fact *decrease* prison providers' pro-incarceration influence; at best, the argument is dubious, by which I mean that its accuracy depends on facts that proponents of the argument have not developed.

Private prisons are a useful case study. First, they are a growth industry, having progressed from humble beginnings in the late seventies and early eighties to now house about one in sixteen prison inmates nationwide.[24] Second, the opponents of private prisons commonly make the political influence argument.

For example, in a recent *Duke Law Journal* article, Sharon Dolovich writes that "the legitimacy of punishment" is threatened "whenever parties with a financial interest in increased incarceration are in a position to exert influence over the nature and extent of criminal sentencing. If this concern is real"[25]—and she suggests that it may well be[26]—prisons should not be privatized because "the state ought not to foster yet another potentially influential industry that could seek to compromise further the possibility of legitimate punishment to promote that industry's own financial interests."[27]

David Shichor, a prominent contributor to the prison privatization literature, opposes prison privatization[28] in part because:

> Through political lobbying, PACs, campaign contributions, and the provision of perks to politicians (as industrial and business corporations do),

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22. *See Hearing Before the Subcomm. on Capital Market, Insurance and Government Sponsored Enterprises of the H. Financial Services Comm.*, 109th Cong. (2006) (statement of Vaughn R. Walker, C.J. of the U.S. District Court, Northern District of California), *available at* 2006 WL 1789367 (F.D.C.H.) ("[Securities] class actions are in important respects privatized public law enforcement.").

23. *See Proposition 65 and State Rights Under Attack*, SEEDS OF CHANGE—E-NEWS (As You Sow, San Francisco, Cal.), Summer 2006, http://www.asyousow.org/news/AYS_enews06Q3.html; Melvyn I. Weiss & Elizabeth A. Berney, *Restoring Investor Trust in Auditing Standards and Accounting Principles*, 41 HARV. J. ON LEGIS. 29, 56-57 (2004); Walter Olson, *The Lawsuit Lobby*, AM. SPECTATOR, Mar.-Apr. 2003, at 44.

24. *See* PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS IN 2004, at 6 tbl.7 (2005); DOUGLAS MCDONALD ET AL., ABT ASSOCS. INC., PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE 4-5 (1998).

25. Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 542 (2005).

26. *Id.* at 523-29.

27. *Id.* at 542-43.

28. DAVID SHICHOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS 256 (1995).

> corporations are likely to continue to support and even accelerate incapacitation-oriented legislation and policies by which more people will spend longer periods of time in correctional institutions. Conversely, this trend may diminish the emphasis on alternative programs and will result in the pursuance of the "Hilton Inn mentality," that is, trying to maintain high occupancy rates for profit purposes.[29]

And Brigette Sarabi and Edwin Bender's thesis is clear from the title of their report, *The Prison Payoff: The Role of Politics and Private Prisons in the Incarceration Boom*, in which they argue that prison privatization should be resisted in part because private prison firms have a "vested financial interest[] in increasing rates of imprisonment."[30] This is only a small sample of the literature.[31] For a sample of the art, see Figure 1.[32]

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29. *Id.* at 236.

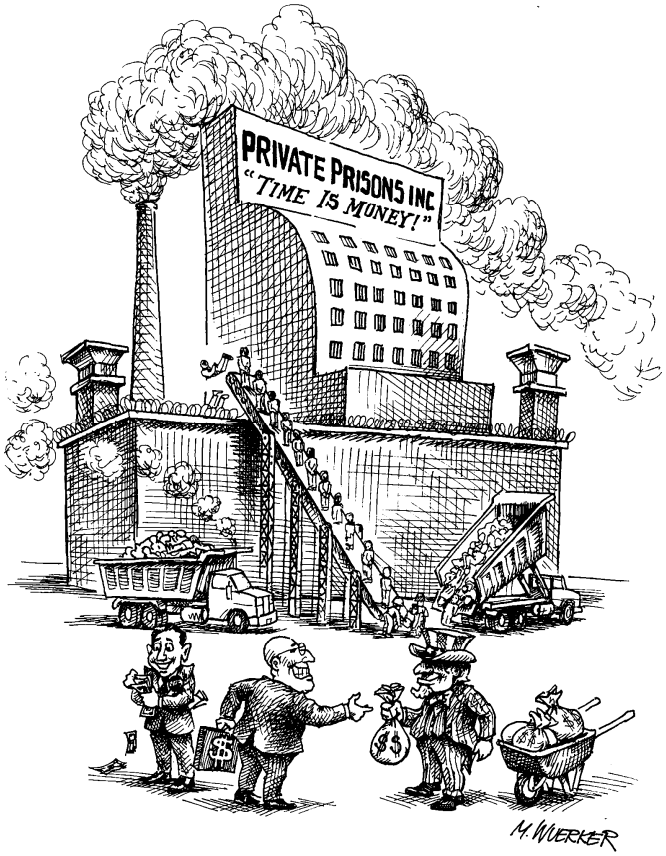
30. BRIGETTE SARABI & EDWIN BENDER, W. STATES CTR., THE PRISON PAYOFF: THE ROLE OF POLITICS AND PRIVATE PRISONS IN THE INCARCERATION BOOM vii, 21 (2000).

31. In addition to the sources cited in *supra* notes 10, 25, 28, and 30, see LEGISLATIVE RESEARCH COUNCIL, REPORT RELATIVE TO PRISONS FOR PROFIT, H. No. 6225, at 9, 56-58 (Mass. 1986); KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 101 (1997) (referring to influence on policy abroad); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 203-04 (2001); MICHAEL A. HALLETT, PRIVATE PRISONS IN AMERICA: A CRITICAL RACE PERSPECTIVE 141 (2006); CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS 159 (1990); PRESBYTERIAN CHURCH (USA), RESOLUTION CALLING FOR THE ABOLITION OF FOR-PROFIT PRIVATE PRISONS 7-8 (2003), *available at* http://www.pcusa.org/oga/publications/private-prisons.pdf; BYRON EUGENE PRICE, MERCHANDIZING PRISONERS: WHO REALLY PAYS FOR PRISON PRIVATIZATION? 74-75, 131-36 (2006); CHARLES R. RING, CONTRACTING FOR THE OPERATION OF PRIVATE PRISONS: PROS AND CONS 12 (1987); MARTIN P. SELLERS, THE HISTORY AND POLITICS OF PRIVATE PRISONS: A COMPARATIVE ANALYSIS 51 (1993); THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 87-88, 92-93 (Steven R. Donziger ed., 1996); Patrick Anderson et al., *Private Corrections: Feast or Fiasco?*, PRISON J., Autumn-Winter 1985, at 32, 35; Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 729 (2005) [hereinafter Barkow, *Administering Crime*]; Rachel E. Barkow, *Our Federal System of Sentencing*, 58 STAN. L. REV. 119, 125 (2005) [hereinafter Barkow, *Our Federal System*]; Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1319, 1349 n.249 (2003); Gilbert Geis, *The Privatization of Prisons: Panacea or Placebo?*, *in* PRIVATE MEANS, PUBLIC ENDS: PRIVATE BUSINESS IN SOCIAL SERVICE DELIVERY 76, 94 (Barry J. Carroll et al. eds., 1987), *cited in* SELLERS, *supra*, at 51, 116 n.5; Amanda George, *The State Tries an Escape*, LEGAL SERVICE BULL., Apr. 1989, at 53, 54, 57; Michael Janus, *Bars on the Iron Triangle: Public Policy Issues in the Privatization of Corrections*, *in* PRIVATIZING CORRECTIONAL INSTITUTIONS 75, 83 (Gary W. Bowman, Simon Hakim & Paul Seidenstat eds., 1993); Daniel L. Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 45 (2003); Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 69 JUDICATURE 325, 331 (1986); E.S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889, 898 (1987); Geiza Vargas-Vargas, *White Investment in Black Bondage*, 27 W. NEW ENG. L. REV. 41, 75 n.209 (2005); Edward Sagarin & Jess Maghan, Op-Ed, *Should States Opt for Private Prisons?: No*, HARTFORD COURANT, Jan. 12, 1986, at E2; Kenneth F. Schoen, *Private Prison Operators*, N.Y. TIMES, Mar. 28, 1985, at A31; Harmon L. Wray, Jr., *Cells for Sale*, S. CHANGES, Sept. 8, 1986, at 3, 6.

32. Matt Wuerker, *mw112*, *in* Group One Artists, Prisons and Sentencing, http://www.

I assume, for purposes of this Article, that the concern underlying this critique is reasonable—that is, that economically self-interested pro-incarceration advocacy is undesirable.[33] This concern, however, fails to support the argument against privatization for several reasons.

Figure 1.



First, self-interested pro-incarceration advocacy is already common in the *public* sector—chiefly from public-sector corrections officers unions. For instance, the most active corrections officers union, the California Correctional Peace Officers Association, has contributed massively in support of tough-on-crime positions on voter initiatives and has given money to crime victims' groups, and public corrections officers unions in other states have endorsed candidates for their tough-on-crime positions.[34] Private firms would thus enter,

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newsart.com/zz/zz16.htm. I am grateful to Sharon Dolovich for uncovering this cartoon, *see* Dolovich, *supra* note 25, at 529 n.363.

33. *But see infra* text accompanying notes 224-33.

34. *See infra* notes 93-98 for examples in other states.

and partly displace some of the actors in, a heavily populated field.[35]

Second, there is little reason to believe that increasing privatization would increase the amount of self-interested pro-incarceration advocacy. In fact, it is even possible that increasing privatization would *reduce* such advocacy. The intuition for this perhaps surprising result[36] comes from the economic theory of public goods and collective action.

The political benefits that flow from prison providers' pro-incarceration advocacy are what economists call a "public good," because any prison provider's advocacy, to the extent it is effective, helps every other prison provider. (We call it a public good even if it is *bad* for the *public*: the relevant "public" here is the universe of prison providers.)[37] When individual actors capture less of the benefit of their expenditures on a public good, they spend less on that good; and the "smaller" actors, who benefit less from the public good, free ride off the expenditures of the "largest" actor.

In today's world, the largest actor—that is, the actor that profits the most from the system—tends to be the public-sector union, since the public sector still provides the lion's share of prison services, and public-sector corrections officers benefit from wages significantly higher than their private-sector counterparts'. The smaller actor is the private prison industry, which not only has a smaller proportion of the industry but also does not make particularly high profits.

By breaking up the government's monopoly of prison provision and awarding part of the industry to private firms, therefore, privatization can reduce the industry's advocacy by introducing a collective action problem. The public-sector unions will spend less because under privatization they experience less of the benefit of their advocacy, while the private firms will tend to free ride off the public sector's advocacy.[38] This collective action

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35. Other actors that could also be in favor of incarceration for self-interested reasons include prosecutors, rural communities that could be sites for prisons, *see* Barkow, *Administering Crime*, *supra* note 31, at 729; Dolovich, *supra* note 25, at 536-42; Drake Bennett & Robert Kuttner, *Crime and Redemption*, AM. PROSPECT, Dec. 2003, at 36, 38, and providers of goods and services to prisons, *see* J. Robert Lilly & Paul Knepper, *An International Perspective on the Privatisation of Corrections*, 31 HOW. J. CRIM. JUST. 174, 174, 177 (1992). I focus on prison system actors because they are the ones affected by privatization.

36. To my knowledge, this argument has not been made before in the privatization literature, except for a few brief mentions. Charles Logan made an offhand comment to this effect in 1990. *See* LOGAN, *supra* note 31, at 158. Many years later, in 2002, I flagged the issue in my own student note, but set the issue aside for future research. *See Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1873 (2002). And Alex Tabarrok briefly noted the argument in 2003. *See* Alexander Tabarrok, *Introduction* to CHANGING THE GUARD: PRIVATE PRISONS AND THE CONTROL OF CRIME 1, 6 (Alexander Tabarrok ed., 2003).

37. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 15 & n.22 (1965).

38. The story I tell here is also consistent with the view that political expenditures—instead of directly buying advocacy for particular policies—buy generalized "access" to a

problem is fortunate for the critics of pro-incarceration advocacy—a happy, usually unintended side effect of privatization. One might even say that prison providers under privatization are led by an invisible hand to promote an end which was no part of their intention.

This is the simplest form of the story, but one can also tell more complicated versions in which privatization does not *necessarily* decrease total industry-expanding political advocacy. After presenting my main model, I introduce a few realistic complications. I explain why I am focusing only on public-sector unions and private firms, and whether the individual private firms and the public sector compete or cooperate with each other on advocacy. I alter the assumption that money merely buys the passage of a pro-incarceration measure, and allow money to change the substance of the measure itself. I also relax the assumption that anti-incarceration advocacy is fixed. These complications do not change the basic result of the model. Other complications are more fundamental, and make the effect of privatization ambiguous—increasing private-sector advocacy but also decreasing public-sector advocacy. These complications include relaxing the assumption that the effectiveness of advocacy only depends on the total amount of money spent, and relaxing the assumption that the introduction of privatization into a state is exogenous. If those extensions of the model are closer to the truth, then total advocacy may rise—but it may also fall, depending on which effect dominates. We cannot determine the net effect a priori.

There is thus no reason to believe an argument against prison privatization based on the possibility of self-interested pro-incarceration advocacy—unless the argument takes a position on how lobbying, political contributions, and advocacy work, and why (for instance) any increase in private-sector advocacy would outweigh the decrease in public-sector advocacy. Either this argument against prison privatization is clearly false, or it is only true under certain conditions that the critics of privatization have not shown exist.

The analysis here not only sheds light on the prison privatization debate but also provides a roadmap for analyzing military contracting and other privatization contexts. Because privatization can affect the incentives of both the private and public sectors to wield political influence, one should not conclude that privatization distorts substantive policy in an undesirable direction unless one can tell a story, based on a plausible view of government agents' behavior, in which private-sector advocacy rises more than public-sector advocacy falls. In the end, each industry has its own idiosyncrasies, so I do not make a strong claim about the use of the argument outside of the prison context. But, at the very least, the use of the political influence argument is often theoretically unsound to the extent it ignores this comparative analysis.

Part I sets forth the main model of the paper. In this model, the sector with

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candidate, which is leveraged for specific favors once the candidate is elected. *See infra* text accompanying notes 154-55.

the greatest benefit from the expansion of the industry does all the advocacy, and the sector with the smaller benefit entirely free rides off the larger one. Accordingly, privatization reduces industry-expanding advocacy if, after privatization, the public sector remains the sector with the greatest benefit. Part II applies this theoretical model to prisons and suggests, based on an informal calculation, that the actors that would benefit the most from increased incarceration are indeed the public-sector corrections officers unions. Thus, we should expect the public sector to do all the pro-incarceration lobbying (though less than it would have done without privatization). That Part argues that the simple model, despite its stark result, may be quite close to the truth, as there is a wealth of evidence that public corrections officers unions advocate incarceration, and no such hard evidence on the private side. Part III elaborates on the model, explaining why it is appropriate to focus on public corrections officers unions and private prison firms as the relevant actors, and how cooperation within the prison industry affects the results. Part IV complicates the model in various ways. Some of these complications do not change the basic result of the simple model. Other complications make the result muddier, so that instead of unambiguously reducing advocacy, privatization has a theoretically ambiguous effect on the amount of industry-expanding advocacy.

I. ADVOCACY AS A PUBLIC GOOD

In this Part, I present the main model I use to predict how industry actors will react to privatization.[39] The central feature of the model is that industry-increasing advocacy is a public good. Privatizing part of the industry therefore introduces a collective action problem: unless everyone in the industry cooperates with each other, they will in aggregate spend less on industry-increasing advocacy than a single firm would if it covered the whole industry, because a portion of their expenditures will benefit their competitors.

This intuition should not be surprising, as it is standard in the literature on public goods. When a good is private, everyone pays for, and enjoys, only his own consumption. By contrast, when a good is public, in the classic model, everyone benefits from the total amount, and this amount is determined by the total amount of contribution.[40]

For example, if we benefit from our national defense, we benefit from the full amount, not just from the chunk we paid for; we cannot be excluded from

39. For a technical presentation and proofs, see Alexander Volokh, *Privatization, Free Riding, and Industry-Expanding Lobbying* 3-8, 10-17 (Georgetown Law & Econ. Research Paper No. 969789, 2007), *available at* http://ssrn.com/abstract=969789.

40. *See* ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 361 (1995); HAL R. VARIAN, MICROECONOMIC ANALYSIS 418 (3d ed. 1992); William H. Oakland, *Theory of Public Goods*, *in* 2 HANDBOOK OF PUBLIC ECONOMICS 485, 486-88 (Alan J. Auerbach & Martin Feldstein eds., 1987); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387 (1954).

the full benefit, no matter how little we paid; and the total amount of national defense is just determined by how much money Congress allocated to national defense from the Treasury. A tax-funded program that improves air quality benefits everyone who breathes the relevant air, whether or not they contributed to the program, and the total improvement is just determined by the amount of resources directed toward that goal.

Similarly, contributing to a candidate's campaign benefits all of his supporters, and it is not too implausible to say, as an approximation, that to the extent the money he raises and spends affects his probability of winning, it is only the *total* amount of money that matters.[41]

In all these cases, the temptation to free ride off one's peers' contributions is strong.[42] This Part illustrates the phenomenon of free riding in the context of political contributions.

A. *The Basic Model*

A monopolist is willing to invest some amount of money in lobbying to increase the size of his industry. To determine that amount, he weighs the benefit that his money can "buy"—the expansion of the industry is worth something to him, and money can help his policy pass—against the cost of the lobbying.

If that firm is broken up into two smaller firms—say a 90% incumbent firm and a 10% splinter firm—the larger incumbent is not willing to spend as much as it used to, because the costs of lobbying are the same while the benefits are 10% less than they used to be. And the smaller splinter firm will not be willing to spend anything, because it will be satisfied free-riding off the larger incumbent's lobbying. Thus, splitting up an industry can decrease total industry-expanding lobbying.

The rest of this Part illustrates this intuition graphically.

Suppose you are, as economists say, a rational, risk-neutral expected-utility maximizer.[43] One may dispute how much of life this assumption can explain, but on balance it seems to be at least a good starting point for predicting the behavior of business organizations. You are faced with the choice of whether or not to spend a dollar on political advocacy—donating to the campaign of a politician or voter initiative, contributing to your trade association's lobbying

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41. I relax this assumption in Part IV.C *infra*.

42. Indeed, economists commonly list "public goods" as a case of "market failure." *See, e.g.*, MAS-COLELL ET AL., *supra* note 40, at 350; *cf.* VARIAN, *supra* note 40, at 415.

43. *See* MAS-COLELL ET AL., *supra* note 40, at 168-94; VARIAN, *supra* note 40, at 172-81. For critiques of expected utility theory, see MAS-COLELL ET AL., *supra* note 40, at 179-81; VARIAN, *supra* note 40, at 192-94; Mark J. Machina, *Choice Under Uncertainty: Problems Solved and Unsolved*, J. ECON. PERSP., Summer 1987, at 121. For critiques of the assumption of (materialistic) rational utility maximization, as it relates to free-riding predictions, see *infra* sources cited note 229.

expenses, or running an ad—in favor of some reform that could increase the size of your market. We may assume that this dollar has some influence in the world, whether appropriate or inappropriate—it could corrupt a legislator, raise the chance of his election, contribute to the passage of the initiative, or change popular opinion.[44]

The benefit of this dollar is the value of the increased probability of getting your desired policy change.[45] It is reasonable to think that spending money on advocacy is subject to decreasing marginal returns, so each additional dollar gets you less and less benefit.[46] The cost of a dollar's worth of advocacy, on the other hand, is $1—and remains $1, no matter how many dollars you spend. As long as the benefit of an advocacy dollar is greater than $1, you continue spending. As soon as that benefit falls to $1, you stop spending. This is your optimal[47] total amount of advocacy spending—say $1 million.[48]

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44. The public-choice assumption that political choices are totally self-interested has been criticized, *see* Daniel A. Farber, *Democracy and Disgust: Reflections on Public Choice*, 65 CHI.-KENT L. REV. 161, 162 (1989); Abner J. Mikva, *Foreword*, 74 VA. L. REV. 167, 167 (1988), but this model does not require such a strong assumption.

45. I assume here that the incarceration-policy game is the only game these actors are playing. This is not entirely realistic; one can lobby (or not) on incarceration policy for reasons that have little to do with that particular policy issue. For instance, the California corrections officers union gave massively to Proposition 184, the Three Strikes initiative in 1994, even though the proponents outspent the opponents by a factor of 48 and won with 72% of the vote. *See* Mike Davis, *Hell Factories in the Field*, NATION, Feb. 20, 1995, at 229, 232; Dan Morain & Virginia Ellis, *Tobacco Industry Power May Go Up in Smoke, Foes Say*, L.A. TIMES, Nov. 10, 1994, at A3. The union may have been trying not merely to secure the passage of the initiative but also to flex its political muscle for other political battles, like fighting against privatization or in favor of wage increases. Similarly, private prison firms may shy away from advocacy in favor of incarceration for fear of a public backlash that could endanger prison privatization itself. *Cf.* Wayne, *supra* note 7. (Public sector unions may not fear such a backlash because public provision is still considered the default mode of provision.) However, I assume these complicating factors away for simplicity.

46. On this assumption, *see, e.g.*, David Austen-Smith, *Interest Groups, Campaign Contributions, and Probabilistic Voting*, 54 PUB. CHOICE 123, 128, 130, 135 (1987); David P. Baron, *Service-Induced Campaign Contributions and the Electoral Equilibrium*, 104 Q.J. ECON 45, 54 (1989); Paul Pecorino, *Is There a Free-Rider Problem in Lobbying? Endogenous Tariffs, Trigger Strategies, and the Number of Firms*, 88 AM. ECON. REV. 652, 654 (1998). It is possible that decreasing marginal returns only kick in after some threshold amount has been reached. *See, e.g.*, DENNIS C. MUELLER, PUBLIC CHOICE III, at 483 fig.20.1 (2003); OLSON, *supra* note 37, at 22. This would not change the results significantly. *See* Volokh, *supra* note 39, at 5-9.

47. That is, your *personally* optimal amount of advocacy. I have already assumed for the purpose of this Article that expenditure on advocacy is not *socially* optimal. *See supra* text accompanying note 33. *But see infra* text accompanying notes 224-33.

48. This number and the other thresholds presented in this example are purely illustrative, but they are approximately what you get if the effectiveness of advocacy expenditures is determined by a function p(e)—the probability that expenditures of e dollars gets you the desired policy change—equal to the square root of e/(e+10,000), and the value of the policy change is V = $200 million. Mathematically, this means finding expenditure e to maximize $\alpha Vp(e) - e$, where α is the actor's market share. The numbers in the text are rounded to the nearest $100,000. The more exact numbers are $992,509.41 for a monopolist,

Figure 2 below illustrates the situation. The expected benefit—that is, the probability of success times the benefit—is represented by the curved line below: the more you spend, the greater the probability of success, but the less you get for each extra dollar. Because a probability cannot get any higher than 100%, the curve is bounded above by the dashed line representing the total benefit of the policy. The cost of advocacy is represented by the straight line below: $1 of spending on advocacy costs exactly $1. Your problem is to maximize the vertical distance between the expected benefit curve and the cost line. In Figure 2, the maximum distance occurs at a spending level of $1 million.

Figure 2.

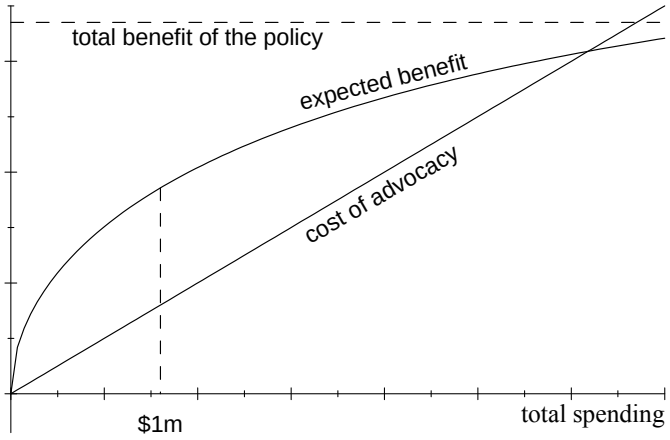
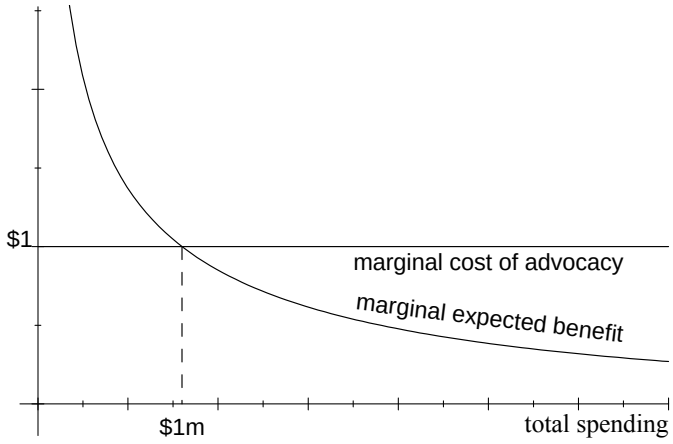


Figure 3 is an equivalent way of seeing the same problem.

$941,193.21 for a 90% duopolist, and $308,757.73 for a 10% duopolist. Thanks to Scientific WorkPlace for crunching the numbers.

Figure 3.



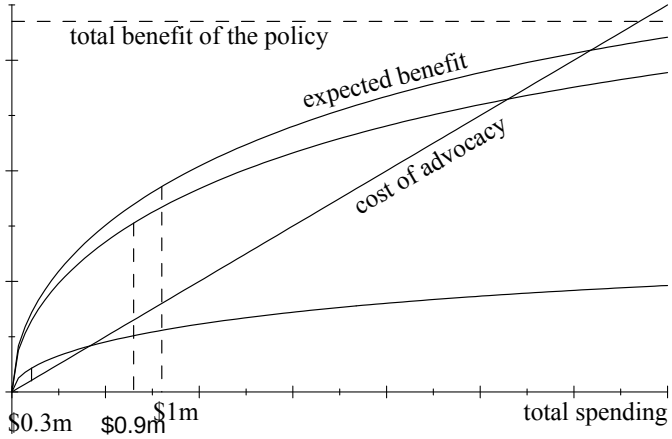
The curve below represents the marginal expected benefit—that is, the benefit of an extra dollar of spending, which is equal to the total benefit times the extra probability of success that a dollar buys you. As noted above, the marginal benefit is decreasing. The straight line is the marginal cost of advocacy: an extra dollar of advocacy spending always costs $1. If the marginal expected benefit is above $1, you're not spending enough; if it is below $1, you should cut back. At a spending level of $1 million, an additional dollar of spending gives you exactly $1 of expected benefit.

Now suppose the Department of Justice's Antitrust Division comes in and splits you up, so that you now have 90% of the market and are faced with a competitor with the other 10%. Your previous optimal amount of spending, $1 million, is no longer optimal for you: the cost of that last dollar was $1, and while the benefit of the dollar is $1 for the whole industry, you, who now represent only 90% of the industry, only see 90¢ of that benefit. All your benefits are now lower by 10% because you have to share them with your competitor.[49] For our purposes, the split-up thus has the same effect as a 10% tax on your benefit. Because your spending on advocacy—an investment in the growth of your industry—is only 90% as productive, you do less of it. You start cutting back on your spending, because a dollar saved puts $1 back in your pocket and only reduces your benefits by 90¢. As you cut back more, the benefit of the last dollar rises; you stop cutting back as soon as the benefit of your last dollar to the industry reaches about $1.11 (which is a $1 benefit to

49. This sort of public good, whose benefits are enjoyed in fixed proportions by different industry actors, is also called a "common good" (as opposed to a "pure public good," which is enjoyed in its entirety by everyone). *See* Jean-Marie Baland & Jean-Philippe Platteau, *Economics of Common Property Management Regimes*, *in* 1 HANDBOOK OF ENVIRONMENTAL ECONOMICS 127, 144-46, 150-61 (Karl-Göran Mäler & Jeffrey R. Vincent eds., 2003).

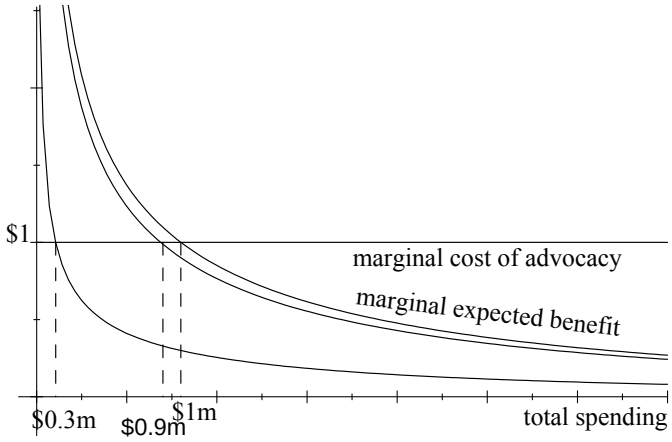
you). Your new amount is, say, $900,000.

Figure 4.



This new situation is illustrated in Figures 4 and 5. In Figure 4, the top curve is the expected benefit to the whole industry (as before), and the second curve is *your* expected benefit, newly reduced now that you have only 90% of the industry.[50] The bottom curve is your 10% competitor's expected benefit. As discussed above, the maximum vertical distance between your curve and the cost line now occurs at $900,000; and say the maximum distance between your competitor's curve and the cost line occurs at $300,000.

Figure 5.



50. The figures are not drawn to scale.

On Figure 5, the equivalent graph that shows marginal quantities instead of total quantities, you want to find the point where the marginal expected benefit to the industry is $1.11. This is equivalent to finding the point where 90% of the marginal expected benefit (i.e., the benefit to you) is $1. That point again occurs at $900,000. Your competitor wants to find the point where the marginal expected benefit to the whole industry is $10, which gives him $1. This point is at $300,000.

This story is incomplete. You do not want the amount spent to be *exactly* $900,000; obviously, you would be thrilled if other people happened to contribute more.[51] It's just that you are not *personally* willing to put a dollar more into the pot if the pot already contains $900,000. You want the total amount spent to be at least $900,000, and you are willing to contribute money until that point is reached, but you are no longer willing to personally contribute once you are holding the 900,001st dollar. This is because, if the benefit of a dollar only depends on the total amount of money spent, and if the 900,000th dollar had a benefit to the industry worth $1.11 (and thus a benefit to you worth $1), then the 900,001st dollar has a benefit worth slightly less than $1.11.

Your new competitor, who represents the remaining 10% of the industry, and who is equally interested in this reform that will increase the size of the pie, by a similar reasoning, wants the total amount spent to be at least $300,000 and will not put a 300,001st dollar into the pot.

This leads to two conclusions. First, the total amount spent will be exactly equal to the larger actor's threshold—in this case, $900,000. If it were less, you, the larger actor, would want to spend more money. And if it were more, you would want to take some money out of the pot, since the dollars beyond the 900,000th are giving the industry a benefit below $1.11 and giving you a benefit below $1. Second, there is no reason for your competitor to spend anything. He is unwilling to spend any dollar beyond the 300,000th, since its marginal benefit to the industry is under $10 and its marginal benefit to him is under $1. Thus, suppose you were going to spend $600,000, and he was going to spend $300,000. These would not be equilibrium actions,[52] since he would prefer to keep his $300,000. Why should he spend any extra dollar beyond the $600,000 you are already spending, if the 300,001st dollar already is not worthwhile to him? Thus, the only equilibrium is where you give $900,000 and he gives $0. Because he is the smaller actor, he entirely free rides off you.[53]

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51. A payment of $900,000 by someone else has the same effect as $900,000 from you, with the subtle yet crucial distinction that you keep your money.

52. They would not form a Nash equilibrium, to be exact. *See* MAS-COLELL ET AL., *supra* note 40, at 246-53; VARIAN, *supra* note 40, at 265-68.

53. *See* MAS-COLELL ET AL., *supra* note 40, at 361-63; VARIAN, *supra* note 40, at 420-23; Baland & Platteau, *supra* note 49, at 152-53; Sandeep Baliga & Eric Maskin, *Mechanism Design for the Environment*, *in* 1 HANDBOOK OF ENVIRONMENTAL ECONOMICS, *supra* note 49, at 305, 310; Gene M. Grossman & Elhanan Helpman, *Electoral Competition and Special*

The result is what Mancur Olson calls the "systematic tendency for 'exploitation' of the great by the small."[54]

B. *Industry Shares Versus "Real" Shares*

If one accepts the fundamental assumption of this Part—that the probability of success only depends on the total amount of money in the pot—this simple model is flexible enough to accommodate many institutional details of privatization. The total free-riding result happens whenever one actor has a lower threshold than the other, for whatever reason. In this story, you and your competitor are identical except that you have 90% of the industry and he has 10%. But one's threshold could be lower for other reasons as well.

For instance, suppose that, to add insult to injury, the government not only breaks up your monopoly but also subjects your revenues to a high (50%) tax rate. The breakup already altered your spending threshold by shifting your curves down to 90% of their previous level (compare Figures 2 and 3 with Figures 4 and 5). Now, with the 50% tax, your revenue and marginal revenue curves shift further down—to 45% of their original levels. (If your competitor with a 10% share is subject to the same tax, his curves are 5% of the original industry curves.)

So the combination of the breakup and the tax makes you act like a firm with a 45% market share. These new percentages—call them "real" shares—no longer need to add up to 100% (in fact, with the 50% tax, they add up to 50%), but they convey the economic intuition that your spending threshold is lower when, for whatever reason, your benefits decrease.

After we determine everyone's "real" shares, the same analysis applies as before: the "biggest" firm does all of the advocacy, and the "smaller" firm is a free rider. The only difference is that we learn who is "biggest" not just by looking at proportions of the market but at shares of total industry revenue. Instead of calling this firm the "biggest" firm, we will call it the "dominant" firm. Thus, if the tax rate on your revenues is 90%, you will act as though your share is not 90% but 9%. If your competitor with a 10% share is exempt from

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Interest Politics, 63 REV. ECON. STUD. 265, 282, 284 (1996); *see also* Oakland, *supra* note 40, at 486-91, 514-15. This stark free-riding result occurs when utility is quasi-linear in income—that is, when the public good doesn't affect the marginal utility of income. *See* MUELLER, *supra* note 46, at 23 (explaining the "kangaroo problem," a mathematically equivalent problem where there is not complete free riding because utilities are not assumed quasi-linear). Quasi-linearity is a reasonable assumption with business firms, though not necessarily with individuals, whose marginal utility of consumption may be enhanced by higher levels of, say, environmental protection or national defense. Quasi-linearity seems defensible here, since prison providers are unlikely to get more enjoyment out of $1 if there is a more beneficial incarceration policy.

54. OLSON, *supra* note 37, at 29 (italics and footnote omitted); *see* TERRY M. MOE, THE ORGANIZATION OF INTERESTS 24-26 (1980) (explaining Olson's approach and containing similar diagrammatic exposition as herein).

the tax, then he is actually the dominant actor. Now *you* will free ride off *him*.

In short, anything that affects your revenues affects your "real" share. Suppose, for instance, that your competitor is less profitable than you are: your 90% share is a monopoly share in 90% of the geographic area, while the remaining 10% is divided among 100 competitors who act according to the textbook perfect competition model, where everyone makes zero economic profits.[55] Then those competitors—and thus that entire 10% of the market—act as though they had a 0% share of the industry.

Or, as a final example, suppose that your competitor is better at advocacy. Perhaps, for whatever reason (maybe he is a slicker lobbyist), each dollar he spends on advocacy is twice as effective as each dollar you spend. Then, he acts as though his share is 20%, and his threshold goes up accordingly. All these considerations affect your "real" shares for purposes of choosing how much to spend on advocacy. (In this example, he still won't do anything because 20% is still less than your 90% share.)[56]

C. *Does Privatization Always Reduce Advocacy in This Model?*

This model applies straightforwardly to privatization: partial privatization of an industry splits the industry up into a public sector and a private sector, much as one can split up a monopolistic firm into several competing firms. To be sure, the public sector is not a "profit maximizer" like a private firm. But the concept of profit maximization need not be interpreted in a narrow financial sense. Government agencies—or, more precisely, people who work at the agencies and who have some control over what the agencies do—pursue goals of some sort. Whether it is the Pentagon or a state department of corrections, a government agency (or, more precisely, its high-level officials) does obtain *some* benefit from its service provision.

Moreover, agencies are not the only actors. The employees of the agencies, through their unions, also enjoy some benefit from public provision of the service, and they also participate in political advocacy. The challenge is to determine who the relevant actors are and what benefits they might plausibly seek to maximize. This is what I try to do, informally, in Parts II and III for corrections agencies and corrections officers unions.

The model implies, at a minimum, that *some amount* of privatization will decrease advocacy, for two reasons. The first reason is that, as long as the level of privatization does not exceed a certain critical threshold, the public sector will dominate the entire private sector (in terms of "real" share). Therefore, the

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55. Recall that "zero economic profits" does not mean "zero profits." "Zero economic profits" means that no one is making higher profits than they could expect to make elsewhere; that is, they are indifferent between running the business they have and putting their money in the stock market. *See infra* text accompanying note 69.

56. *See* Section IV.D *infra*.

model predicts that the whole private sector's advocacy would be zero. The second reason is that as privatization increases, the size of the public sector falls, and thus the aggregate benefits of service provision to the public sector likewise fall. Because the public sector is smaller than it would be without privatization, its advocacy will fall accordingly.

How far can we continue to privatize before advocacy stops falling? As privatization increases, the second step always holds—by definition, privatization shrinks the size of the public sector. The first step, however, does not always hold for large enough levels of privatization. Obviously, at a certain point, the private sector can come to dominate the public sector. Then the private sector will do all of the advocacy, with the public sector acting as a free rider. From then on privatization would *increase* advocacy. The level of privatization at which advocacy stops falling is a threshold that we may call an "advocacy-minimizing privatization level."

For instance—going back to the graphical model above—suppose our two firms benefit identically from having a given proportion of the industry. Then the advocacy-minimizing breakup is an equal split of the industry. This is because the amount of advocacy spending depends on the dominant firm's real share, and the lowest possible real share of a dominant firm occurs when the dominant firm's real share equals that of the smallest firm.

If a split in the industry creates a splinter firm that is twice as profitable as the incumbent firm, or perhaps twice as slick, then the advocacy-minimizing split is 67%-33%, again allocating each firm an equal real stake in the system. The splinter firm is half as large but twice as profitable, so again the dominant firm (in terms of "real" share) is as small as it can possibly get. Conversely, if the splinter firm is only half as profitable as the incumbent firm, the advocacy-minimizing split is 33%-67%.

This concept becomes useful in the next Part. In Part II, I argue that the public sector share of total benefit is currently much larger than the private sector share—first, because the public sector still has a larger industry share, and second, because private firms are subject to a more competitive regime, so their profits are fairly low. Thus, the advocacy-minimizing level of privatization is probably quite high. Within this model, privatization would have to reach very high levels before pro-incarceration advocacy starts rising.

II. APPLYING THIS MODEL TO THE REAL WORLD

The model in Part I provides the intuition behind the story of industry-expanding lobbying after privatization. As privatization is introduced into an industry, the dominant sector—the public sector—advocates less than it used to, because it captures a smaller proportion of the benefits of its advocacy. The private sector is happy to free ride off the dominant sector's contributions.

A. *Different Kinds of Lobbying in the Real World*

This basic result—that, by fragmenting an industry, one can reduce that industry's political advocacy to increase its market—is also consistent with empirical studies on the relationship between industry concentration and lobbying.

In general, industry concentration can have two opposing effects on lobbying. On the one hand, a concentrated industry may be able to more easily overcome its collective action problems, so we might expect lobbying to increase as concentration increases.[57] This factor is definitely relevant for industry-expanding lobbying. But consider another type of lobbying—anticompetitive lobbying, which seeks to regulate the market (for instance, through entry restrictions) to allow existing firms to charge above-market prices. Firms in a more concentrated industry can more easily suppress competition in the product market (either by just charging supracompetitive prices or by cooperating to change monopoly prices), so they have less need to do so through lobbying. They can raise prices above market levels all by themselves by directly using anticompetitive methods, so we might expect that a highly concentrated industry would have less to gain from anticompetitive lobbying than would a more competitive one.[58]

Studies that do not disentangle these two effects can come up with results in either direction.[59] One study found a positive effect of concentration on industry contributions,[60] while another found that the percentage of firms with political action committees first rises and then falls as concentration increases.[61]

This Article, though, focuses only on advocacy for reforms that increase the size of the industry, and not on advocacy for reforms that would squelch competition in the industry—since it is primarily the first sort of advocacy that privatization critics urge is illegitimate.[62] So only the first of these forces comes into play here.

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57. *But see* Pecorino, *supra* note 46, at 657-58 (arguing that the assumption that a more concentrated industry can more easily overcome its collective action problems may not always be true); Kai-Uwe Kühn, *How Market Fragmentation Can Facilitate Collusion* (Ctr. for Econ. Policy Research Discussion Paper No. 5948, 2006).

58. *See* Kevin B. Grier et al., *The Industrial Organization of Corporate Political Participation*, 57 S. ECON. J. 727, 729-30 (1991).

59. *See, e.g.*, Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 223-24 (1976) (stating that regulation is more likely in competitive or monopolistic industries than in an oligopolistic industry).

60. Kevin B. Grier et al., *The Determinants of Industry Political Activity, 1978-1986*, 88 AM. POL. SCI. REV. 911, 918 & tbl.3, 919 (1994).

61. Grier et al., *supra* note 58, at 735 & tbl.III, 736.

62. *See* Dolovich, *supra* note 25, at 523-24; *infra* text accompanying note 123.

B. *What Does the Model Predict About Prisons?*

Now let us apply the theory to a real-world industry subject to the "political influence" critique of privatization: prisons. When I speak of "pro-incarceration advocacy," I use the term "advocacy" broadly to include any use of political influence, licit or illicit, including endorsements, political contributions, lobbying, and bribes. And I use the term "incarceration" as shorthand to include the criminalization of a greater range of behavior, more active enforcement, greater reliance on imprisonment, longer sentences, and less parole—anything that ultimately increases person-years in prison. Thus, endorsing a politician for being "tough on crime," donating money to a "Three Strikes" initiative,[63] or testifying in favor of a "truth in sentencing" law[64] all presumptively count as advocating incarceration.

Consider the main political actors in the prison industry: the private prison firms and the public corrections officers union.[65] Without privatization, the public sector is the monopoly provider of prison services, and the corrections officers union enjoys the benefits that flow from serving the whole system. Now suppose that part of the system is privatized. At first, the public sector is clearly the dominant sector, that is, the sector with the largest proportion of total benefits from provision of the service. While the public sector's proportion has gone down slightly from 100% of the industry, the private sector is still quite small. Because the public sector has shrunk, it is less willing than it used to be to spend money on reforms that would increase the size of the prison pie. Because the private sector is tiny, it acts as a free rider.

Privatization will always have this effect in the model presented above, *provided the public sector stays the dominant sector*. Any reform that shrinks the dominant sector will reduce industry-expanding advocacy. As it happens, this proviso is true in the case of prisons. At current levels of privatization, the public sector both has a larger industry share and extracts more benefit from the system than does the private sector.

We can easily perform some rough estimates to verify this:[66]

- *Industry share.* The private sector has a smaller share of the industry. Of the 1.5 million prisoners under the jurisdiction of federal or state adult correctional authorities in 2004, 7% were held in private

63. Three Strikes laws are types of sentence-enhancing laws. California's Three Strikes law, for instance, mandates life imprisonment for convicted felons who were twice previously convicted of two or more "serious" or "violent" felonies. California's scheme is described in *Ewing v. California*, 538 U.S. 11, 14-17 (2003).

64. Truth in sentencing laws require that persons convicted of violent crimes serve at least 85% of their sentence. *See* Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 13704 (2000).

65. On why these are the two relevant actors, see *infra* Part III.A.

66. I provide more detailed, though informal, derivations of these numbers elsewhere. *See* Volokh, *supra* note 39, at 13-18.

facilities. This includes 14% of federal prisoners and 6% of state prisoners. Among the thirty-four states with at least some privatization, the median percentage of private prisons was 8-9%. If we are interested in the private share of *marginal* prisoners—that is, how likely a prisoner is to go to a private prison if he is convicted today[67]—the private share becomes larger, mainly because private firms have absorbed much of the recent growth in federal incarceration. A reasonable estimate of the private share of marginal prisoners over the period 2000-2005 yields 6% for state systems, 54% for the federal system, and 22% overall.

- *Private sector profitability.* The profits of the private sector are low.[68] If the industry were perfectly competitive—like in textbook models of perfect competition—every firm would make zero economic profit.[69] "Economic profits" measures how profitable a company is relative to other ways of investing one's money. Thus, "zero economic profits" does not mean that firms are not making money, but rather that all firms are doing as well as the rest of the market. In such a (hypothetical!) world, firms would not care whether their market were growing or shrinking, because they would be indifferent between running prisons and putting their money into the stock market. This is, of course, somewhat unrealistic: the prison industry is oligopolistic, not perfectly competitive, so prison firms do make some profit. But their profits are not high: 10% would be a generous estimate of prison firms' profitability.
- *Public sector rents.* Public sector correctional officers, on the other hand, benefit substantially from public provision of prisons, because their wages are quite a bit above—about 30-65% higher than—what corrections officers make in the private sector. This is a lot of money, because wages are about 60-80% of most prisons' operating expenses.

These numbers are meant to be merely suggestive, not rigorous. I make the assumptions—oversimplified but common in the economic literature on firms and unions—that firms maximize profits[70] and that unions maximize total "union rents" (that is, here, the difference between public sector and private

67. *See, e.g.*, Meredith Kolodner, *Private Prisons Smiling over Illegal Immigration*, INT'L HERALD TRIB., July 20, 2006, at 12.

68. JOSEPH T. HALLINAN, GOING UP THE RIVER: TRAVELS IN A PRISON NATION 177-78 (2001); Dolovich, *supra* note 25, at 493; Sam Howe Verhovek, *Operators Are Not Worried by Ruling*, N.Y. TIMES, June 24, 1997, at B10.

69. *See, e.g.*, MAS-COLELL ET AL., *supra* note 40, at 335; VARIAN, *supra* note 40, at 221.

70. For simplicity, and because privatization critics treat pro-incarceration lobbying as profit-maximizing activity, I abstract here from agency problems within the firm. I apologize to corporations scholars. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

sector wages, times the size of the public sector).[71] Trying to put these numbers

71. I abstract away from any agency problems within the union and tentatively assume that a union is a faithful representative of workers' interests. However, the idea that unions faithfully represent their members has been forcefully critiqued. *See* Harry G. Hutchinson, *A Clearing in the Forest: Infusing the Labor Union Dues Dispute with First Amendment Values*, 14 WM. & MARY BILL RTS. J. 1309 (2006); Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 HARV. J. ON LEGIS. 347 (1998); Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367.

The union rents maximization hypothesis is admittedly an oversimplification of how unions work. *See, e.g.*, Henry S. Farber, *The Analysis of Union Behavior*, *in* 2 HANDBOOK OF LABOR ECONOMICS 1039, 1041 (Orley Ashenfelter & Richard Layard eds., 1986) (arguing that, "[w]hile the union members and their leaders may be maximizers, it does not necessarily follow that the union, as an organization, has a well-defined objective function," but nonetheless concluding that "it is fruitful" to analyze unions as though they had such a well defined objective).

But the hypothesis is common in the labor economics literature and will have to do for a preliminary survey. *See, e.g.*, GEORGE DE MENIL, BARGAINING: MONOPOLY POWER VERSUS UNION POWER 22 (1971); John T. Addison & Barry T. Hirsch, *Union Effects on Productivity, Profits, and Growth: Has the Long Run Arrived?*, 7 J. LABOR ECON. 72, 84 (1989); Guillermo Calvo, *Urban Unemployment and Wage Determination in LDC's: Trade Unions in the Harris-Todaro Model*, 19 INT'L ECON. REV. 65, 68 (1978); Steve Dowrick & Barbara J. Spencer, *Union Attitudes to Labor-Saving Innovation: When Are Unions Luddites?*, 12 J. LABOR ECON. 316, 329 (1994); Giovanni de Fraja, *Unions and Wages in Public and Private Firms: A Game-Theoretic Analysis*, 45 OXFORD ECON. PAPERS 457, 459-60 (1993); K.C. Fung, *Rent Shifting and Rent Sharing: A Re-Examination of the Strategic Industrial Policy Problem*, 28 CAN. J. ECON. 450, 452 (1995); Barry T. Hirsch & Kislaya Prasad, *Wage-Employment Determination and a Union Tax on Capital: Can Theory and Evidence Be Reconciled?*, 48 ECON. LETTERS 61, 64 & n.5; Andrew J. Oswald, *The Economic Theory of Trade Unions: An Introductory Survey*, 87 SCAND. J. ECON. 160, 162 (1985) [hereinafter Oswald, *Economic Theory*]; John Pencavel, *Wages and Employment Under Trade Unionism: Microeconomic Models and Macroeconomic Applications*, 87 SCAND. J. ECON. 197, 201-02 (1985); Sherwin Rosen, *Unionism and the Occupational Wage Structure in the United States*, 11 INT'L ECON. REV. 269, 269-70 (1970). *But see* JOHN T. DUNLOP, WAGE DETERMINATION UNDER TRADE UNIONS 41 (1950) (calling the rent maximization objective "analytical[ly] interest[ing]" but questioning its empirical relevance). Pencavel, *supra*, argues that the rent maximization approach is appropriate if the union redistributes income from employed to unemployed workers so as to equalize incomes.

Rent maximization is a special case of certain other "utilitarian" or "democratic" objective functions, *see, e.g.*, Alison Booth, *A Public Choice Model of Trade Union Behaviour and Membership*, 94 ECON. J. 883, 888 (1984); Alan A. Carruth & Andrew J. Oswald, *On Union Preferences and Labour Market Models: Insiders and Outsiders*, 97 ECON. J. 431, 433 (1987); Oswald, *Economic Theory, supra*, at 163-64; Andrew J. Oswald, *The Microeconomic Theory of the Trade Union*, 92 ECON. J. 576, 584 (1982); Pencavel, *supra*, at 200, when the utility of money is linear, *see* Farber, *supra*, at 1060-61; Oswald, *Economic Theory*, *supra*, at 165. It is also a special case of objectives in Dowrick & Spencer, *supra*, at 335; *see also* James N. Dertouzos & John H. Pencavel, *Wage and Employment Determination Under Trade Unionism: The International Typographical Union*, 89 J. POL. ECON. 1162, 1169 (1981); Denise J. Doiron, *Bargaining Power and Wage-Employment Contracts in a Unionized Industry*, 33 INT'L ECON. REV. 583, 590 (1992); Farber, *supra*, at 1061; Alan Manning, *How Robust Is the Microeconomic Theory of the Trade Union?*, 12 J. LABOR ECON. 430, 436 (1994); John H. Pencavel, *The Trade-Off Between Wages and Employment in Trade Union Objectives* 13 (Nat'l Bureau of Econ. Research, Working Paper

together more or less rigorously requires a fair amount of algebra, which I provide elsewhere.[72] But it should be intuitively plausible that our public-sector actors extract substantially more benefit from any given prison than do private firms. It is likewise clear that the public-sector unions have a greater share of the industry than do private firms.

Thus, overall, the public-sector actors enjoy a greater benefit from prison provision than the private-sector actors do, perhaps by an order of magnitude. This model predicts that the public-sector unions should be doing all of the pro-incarceration advocacy, and the private firms should be entirely free-riding.

C. *Is This Realistic?*

The theoretical model predicts that if an industry is divided, the actor that enjoys the greatest total benefit will foot the bill for all of the industry-expanding political advocacy, and the smaller sector will free ride. The rough estimates above suggest that, in the prison context, the sector with the greater benefit is the public sector, which not only still has a greater share of the industry but also benefits more from any given project. Therefore, we should expect to see pro-incarceration advocacy coming from the public, not the private, sector. Moreover, privatization reduces the public sector's share of total benefits. So, at current levels, privatization should cause total pro-incarceration advocacy to decrease.[73]

One may wonder about the realism of simple, highly stylized models. Will the private sector really do *zero* advocacy? Whatever the general merits of such skepticism, in this particular case the simple model may be close to true.

The next Subparts document what we know about prison industry advocacy. In brief, there is a lot of hard evidence of pro-incarceration advocacy by public corrections officers unions (though a small part of union advocacy also cuts the other way). On this issue, they are opposed to most departments of

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No. 870, 1982).

One cannot know the benefit of being in a public corrections officers union without having a baseline of comparison. In principle, this should be the benefit that union members would be enjoying if not for the union. In this but-for hypothetical, the corrections officers might be private corrections officers making a market wage, or they might take jobs elsewhere. I use private sector corrections officers' wages as the baseline of comparison because it is the best available estimate of public sector corrections officers' next best option.

72. *See* Volokh, *supra* note 39, at 13-18.

73. Indeed, recall the discussion of "advocacy-minimizing breakups." *See supra* text accompanying note 56. Splitting up the industry reduces the total amount of advocacy. If the private splinter firm enjoys much less benefit from a prison project than the public incumbent—for instance, because, being subject to a more competitive regime, its profits are lower—the advocacy-minimizing breakup of the industry may be very heavily skewed toward privatization, much more than current privatization levels. This would mean not only that current levels of privatization have decreased industry advocacy, but that there is a long way yet to go before the absolute minimum is reached.

corrections, which advocate in favor of *alternatives* to incarceration. But there is *virtually no evidence* of private sector pro-incarceration advocacy. This may simply mean that the private sector advocates incarceration secretly. But, in light of the theory, it may be more plausible that the private sector simply is a free rider, saving its political advocacy for policy areas where the public good aspect is less severe—*pro-privatization* advocacy.

Even if one disagrees with the preceding sentence, this model need not be realistic in a literal sense. Advocacy need not be an entirely public good, and the smaller actors in the industry need not be *complete* free riders. The point is merely that these assumptions are plausible, perhaps even likely. Advocacy has some public-good aspects, and free riding happens to some extent in the world. If people act enough like this model, privatization will still, on balance, reduce total pro-incarceration advocacy.

This plausible scenario rebuts the simple anti-privatization claim that privatization *does* increase pro-incarceration advocacy. (The extended models presented later on,[74] in which the effect of privatization on advocacy is ambiguous, further rebut the simple unidirectional claim.) This scenario also points out a potential irony in the position of some incarceration opponents who, so as to avoid "reinforc[ing] the incarceration boom by introducing the profit motive into incarceration,"[75] would make common cause with public corrections officers unions, who *concededly* are active lobbyists for incarceration.[76]

D. *Public Corrections Officers Unions*

In 1987, E.S. Savas, a supporter of privatization, dismissed the claim that private firms advocate incarceration by noting that "[i]f this argument was sound . . . prison officials, guards, and their unions presumably would act in the same manner for the same reasons. This, however, is not the case."[77]

Whether this was true even back then is questionable. At one time, corrections officials were politically aligned with liberal groups,[78] but by the 1970s correctional unions were already advocating incarceration.[79]

This activism continues today—for instance, through the California Correctional Peace Officers Association (CCPOA).[80] The CCPOA gives twice

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74. *See* Volokh, *supra* note 39, at 9-12; *infra* Part IV.B-D.

75. *See* SARABI & BENDER, *supra* note 30, at 21.

76. *Id.*

77. Savas, *supra* note 31, at 898.

78. *See* RICHARD A. BERK ET AL., A MEASURE OF JUSTICE: AN EMPIRICAL STUDY OF CHANGES IN THE CALIFORNIA PENAL CODE, 1955-1971, at 158 (1977).

79. JOHN M. WYNNE, JR., NAT'L INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, PRISON EMPLOYEE UNIONISM: THE IMPACT ON CORRECTIONAL ADMINISTRATION AND PROGRAMS 214-17 (1978).

80. *See* Center on Juvenile & Criminal Justice, Political Power of the California

as much in political contributions as the California Teachers Association, though it is only one-tenth the size—only the California Medical Association gives more in the state.[81] CCPOA spends over $7.5 million per year on political activities.[82] It contributes to political parties, political events, and debates; it gives money directly to candidates; it hires lobbyists, public relations firms, and polling groups.[83]

Many of its contributions are impossible to trace back to any particular agenda item: since the union also opposes privatization, favors higher wages, and has positions on other issues, it is just as plausible that the contributions are for those other purposes.

But many of its contributions are directly pro-incarceration. It gave over $100,000 to California's Three Strikes initiative, Proposition 184 in 1994, making it the second-largest contributor.[84] It gave at least $75,000 to the opponents of Proposition 36, the 2000 initiative that replaced incarceration with substance abuse treatment for certain nonviolent offenders.[85] From 1998 to 2000 it gave over $120,000 to crime victims' groups, who present a more sympathetic face to the public in their pro-incarceration advocacy.[86] It spent over $1 million to help defeat Proposition 66, the 2004 initiative that would have limited the crimes that triggered a life sentence under the Three Strikes law.[87] And in 2005, it killed Governor Schwarzenegger's plan to "reduce the prison population by as much as 20,000, mainly through a program that diverted parole violators into rehabilitation efforts: drug programs, halfway houses and home detention."[88] CCPOA does not always favor increasing incarceration,[89] but the bulk of its advocacy has been in this direction.

Correctional Peace Officers Association, http://www.cjcj.org/cpp/political_power.php; *see also* ADRIAN T. MOORE, REASON FOUNDATION, PRIVATE PRISONS: QUALITY CORRECTIONS AT A LOWER COST 33-34 (1998).

81. *See* Dan Pens, *The California Prison Guards' Union: A Potent Political Interest Group*, *in* THE CELLING OF AMERICA: AN INSIDE LOOK AT THE U.S. PRISON INDUSTRY 134, 135 (Daniel Burton-Rose et al. eds., 1998).

82. *See* Center on Juvenile & Criminal Justice, *supra* note 78.

83. *Id.*

84. *See* Pens, *supra* note 81, at 137; Center on Juvenile & Criminal Justice, *supra* note 82.

85. Center on Juvenile & Criminal Justice, *supra* note 82; Drug Policy Alliance, California Proposition 36: The Substance Abuse and Crime Prevention Act of 2000, http://www.prop36.org.

86. *See* Center on Juvenile & Criminal Justice, *supra* note 82; Crime Victims United of California, About CVUC, http://www.crimevictimsunited.com; Doris Tate Crime Victims Bureau, About Doris Tate, http://www.doristate.com.

87. *See* Jenifer Warren, *Guards Union Is Giving Prisons Chief Hard Time*, L.A. TIMES, Nov. 15, 2004, at A1; Institute of Governmental Studies, University of California, Berkeley, Proposition 66: Limitation on "Three-Strikes" Law (Dec. 2004), http://www.igs.berkeley.edu/library/htThreeStrikesProp66.htm.

88. Ed Mendel, *Governor May Act on Crisis in Prisons*, SAN DIEGO UNION-TRIB., Sept. 2, 2006, at A1.

89. In 2006, to "'give the system a breather,'" the California Correctional Peace

That corrections officer unions benefit from increasing incarceration is plausible. Dan Pens has quoted CCPOA member Lt. Kevin Peters as saying:

> You can get a job anywhere. *This* is a career. And with the upward mobility and rapid expansion of the department, there are opportunities for the people who are [already] correction staff, and opportunities for the general public to become correctional officers. We've gone from 12 institutions to 28 in 12 years, and with "Three Strikes" and the overcrowding we're going to experience with that, we're going to need to build at least three prisons a year for the next five years. Each one of those institutions will take approximately 1,000 employees.[90]

This is not just a story about California. Though corrections officers unions outside of California are nowhere near as active as the CCPOA,[91] many of them do advocate incarceration.[92] (As I note below, *everything* is bigger in California: while private prison firms make political contributions nationwide, they, too, spend more in California.)[93] The correctional wing of Florida's police and corrections officers union[94] has endorsed candidates for being tough on crime.[95] The Michigan corrections officers union has opposed boot camp proposals.[96] The New York City corrections officers union endorsed Governor Pataki because he ended parole for violent felons.[97] The New York State corrections officers union is said to have stymied efforts to overhaul mandatory minimum sentences.[98] And the Rhode Island corrections officers union endorsed a candidate for his prosecutorial record and position in favor of

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Officers Association (CCPOA) endorsed releasing "a select group of inmates convicted of nonviolent crimes who had behaved while behind bars" 30 days early. Mark Martin, *Call for New Prisons, Shorter Sentences to Ease Crowding*, S.F. CHRON., May 24, 2006, at A1.

90. Pens, *supra* note 81, at 137.

91. *Cf.* Schlosser, *supra* note 10, at 55 ("[I]n California . . . the correctional trends of the past two decades have converged and reached extremes.").

92. *See* LOGAN, *supra* note 31, at 157; WYNNE, *supra* note 79, at 186, 195, 227; Bennett & Kuttner, *supra* note 35, at 38.

93. *Cf. infra* text accompanying note 121 (stating that private contributions also much higher in California).

94. *See* Florida Police Benevolent Association, Florida PBA Chapters: State Correctional Officers, http://www.scopba.org/welcome.htm.

95. *See* Aaron Deslatte, *Crist Courts Voters with Positive Focus*, FLA. TODAY, Aug. 16, 2006, at A1; David Wasson, *Bush Lands Police Union Support*, TAMPA TRIB., July 12, 2002, at 9; Letter from Charlie Crist to Jim Baiardi, President, State Correctional Officers Chapter (Mar. 15, 2006), *reprinted in Letters*, FLA. PBA CORRECTIONS REV., Apr. 2006, at 7, *available at* http://www.flpba.org/pdf/corrections%20review/Corrections%20Review%2004-2006.pdf.

96. *See* Rob Gurwitt, *The Growing Clout of Prison Guards*, GOVERNING, Dec. 1991, at 37.

97. Kathleen Murphy, *Labor Helps Patakis* [sic] *Re-election Battle*, STATELINE.ORG, May 20, 2002, http://www.stateline.org/live/ViewPage.action?siteNodeId=136&contentId=14817.

98. *See* Julie Falk, *Fiscal Lockdown Part II: Will State Budget Cuts Weaken the Prison-Industrial Complex—Or Strengthen It?*, DOLLARS & SENSE, Nov./Dec. 2003, at 32.

tougher criminal penalties.[99] (I am not considering the more usual demands for tougher penalties for criminals who commit crimes while in prison—a particularly salient issue for corrections officers, who are often victims of such crimes.)[100]

Some corrections officers unions are combined with police unions, for instance in Florida[101] and New Jersey.[102] So except where (as in Florida)[103] the corrections officers' wing has been independently politically involved, these combined unions' advocacy cannot be traced directly to corrections officers.

In some states, corrections officers are also affiliated with American Federation of State, County, and Municipal Employees (AFSCME), the general public employees union.[104] AFSCME Corrections United represents 60,000 corrections officers and 23,000 corrections employees nationwide.[105] It is plausible that corrections officers' concerns would be swamped by the potentially contrary concerns of public employees as a whole (who tend to be fairly liberal). And, indeed, the evidence that AFSCME has advocated incarceration is weak.[106] AFSCME has advocated alternatives to

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99. Press Release, Sen. Sheldon Whitehouse, Rhode Island Brotherhood of Correctional Officers Endorses Whitehouse (Aug. 25, 2006) (on file with author).

100. *See, e.g.*, Gregg M. Miliote, *Correction Officers Back Sutter*, HERALD NEWS (Fall River, Mass.), Aug. 23, 2006, http://www.heraldnews.com/site/index.cfm?newsid=17097791.

101. *See* Florida Police Benevolent Association, About Us, http://www.flpba.org/aboutus.php.

102. *See* Michael Pollak, *New Jersey Daily Briefing: Police Back Whitman*, N.Y. TIMES, Oct. 1, 1997, at B1; New Jersey State Policemen's Benevolent Association, We Walk NJ's Toughest Beat!: New Jersey State P.B.A. Corrections Officers' Committee, http://www.njspba.com/co.htm.

103. *See* sources cited *supra* note 95 and accompanying text.

104. These states include Connecticut, Illinois, Kansas, Minnesota, New York, Oregon, Pennsylvania, Texas, and Wisconsin. AFSCME also represents Corrections Health Services medical personnel in Florida. *See* American Federation of State, County, and Municipal Employees (AFSCME), Jobs We Do: ACU Local Web Sites, http://www.afscme.org/workers/5846.cfm.

105. *See* AFSCME, Jobs We Do: Corrections, http://www.afscme.org/workers/67.cfm.

106. Wynne argues that AFSCME has explicitly opposed deinstitutionalization and community-based programs in the past, *see* WYNNE, *supra* note 79, at 228, but the evidence for this is an argument against deinstitutionalization of patients from mental hospitals, not regular criminals from prisons. *See* HENRY SANTIESTEVAN, AM. FED. OF STATE, COUNTY, & MUN. EMPLOYEES, DEINSTITUTIONALIZATION: OUT OF THEIR BEDS AND INTO THE STREETS 5-12 (AFSCME, Feb. 1975). More recently, AFSCME lobbied in favor of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 13701-13726c (2000). *See* AFSCME, Jobs We Do: AFSCME Corrections United: 10 Years of Federal Legislative Advocacy, http://www.afscme.org/workers/6590.cfm. The Act includes several new criminal provisions, *e.g.*, *id.* §§ 110102-110103, 110201, 110401, 250002; enhanced penalties, *e.g.*, *id.* §§ 40111, 90102, 110501, 130001, 150001, 160001, 320101-320106; a federal Three Strikes provision, *id.* § 70001; victims' rights provisions, *id.* § 230101; and grants for states that adopt "truth-in-sentencing" laws, *id.* § 20102. Though civil libertarians at the time opposed it because of its emphasis on incarceration, *see, e.g.*, Laura Murphy Lee, *The*

incarceration,[107] and the national organization has advocated legalizing medical marijuana[108] (though of course this would only account for a tiny proportion of crime). The Oklahoma public employees union—also a general union—has also advocated alternatives to incarceration.[109]

E. *Private Prison Firms*

Private prison firms depend, for their livelihood, on two policies: privatization and incarceration. Indeed, they admit as much to the world, in their annual reports filed with the SEC. As to privatization, The GEO Group, the second largest private prison firm, explains that "[p]ublic resistance to privatization of correctional and detention facilities could result in our inability to obtain new contracts or the loss of existing contracts, which could have a material adverse effect on our business . . . ."[110] As to incarceration, GEO candidly remarks:

> [A]ny changes with respect to the decriminalization of drugs and controlled substances or a loosening of immigration laws could affect the number of persons arrested, convicted, sentenced and incarcerated, thereby potentially reducing demand for correctional facilities to house them. Similarly, reductions in crime rates could lead to reductions in arrests, convictions and sentences requiring incarceration at correctional facilities.[111]

Similar statements are easily available in prison firms' public filings.[112] It

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Senate's Misconceived Crime Bill, WASH. TIMES, Apr. 14, 1994, at A19 (explaining the ACLU's position), the Act is so wide-ranging that AFSCME's support is not a clean case of union pro-incarceration lobbying. AFSCME attributes its support in part to the Act's grants for correctional facilities, Violent Crime Control and Law Enforcement Act of 1994 § 20101, corrections officer training provisions, *id.* § 20418, and enhanced penalties for offenses against corrections officers, *e.g.*, *id.* § 60015. *See supra* AFSCME, Jobs We Do: AFSCME Corrections United: 10 Years of Federal Legislative Advocacy.

107. *See* Dwight F. Blint, *Union Faults Sending More Inmates out of State*, HARTFORD COURANT, May 31, 2003, at B5; *Connecticut Hires Firm to Teach Nonviolent Offenders*, CORRECTIONAL EDUC. BULL., Jan. 19, 2004.

108. *See* AFSCME, *Supporting the Legalization of Medical Marijuana*, Res. No. 93, 37th Annual Int'l Convention, Aug. 7-11, 2006, http://www.afscme.org/resolutions/11367.cfm. AFSCME is also involved with the National Council of State Legislatures (NCSL); *see* NCSL, NCSL Foundation for State Legislatures: Board of Directors 2007-2008, http://www.ncsl.org/public/FSL/FSLBoard.htm, which does not take a notably pro-incarceration line, *see, e.g.*, NCSL, 2007-2008 Policies for the Jurisdiction of the: Law and Criminal Justice Committee, http://www.ncsl.org/statefed/LAWANDJ.HTM (critiquing the "competition to escalate punishments and build more prisons" resulting from "federal jurisdiction over crimes also covered under state law").

109. Ray Carter, *Union Leader Says State Prisons Understaffed*, J. REC. LEGIS. REP., Aug. 7, 2003.

110. GEO Group, Form 10-K at 23 (Mar. 10, 2004).

111. *Id.* at 22.

112. *See, e.g.*, GEO Group, Form S-4 at 28 (Nov. 10, 2003); *see also* Vargas-Vargas, *supra* note 31, at 76 n.212 (citing various other sources). A CCA executive also said the 1994 federal crime bill was "very favorable to us," *see* Paulette Thomas, *Making Crime Pay:*

is thus natural to suspect that prison firms may advocate both privatization and incarceration in the public square. Their political advocacy—which is extensive[113]—mainly takes the forms of contributions to politicians and participation in the American Legislative Exchange Council (a conservative organization that drafts model legislation),[114] though they also testify before Congress and present arguments in the popular press. But, while it is clear that these firms advocate privatization,[115] it is unclear that they advocate incarceration to any significant extent.

Most of the evidence of advocacy specifically in favor of incarceration has been speculative.[116] Some writers state that it does not happen[117] or that "the impact of any private prisons lobby is, for the foreseeable future, likely to be peripheral at best,"[118] while others who are concerned about the prospect describe the concern but stop short of claiming that it *does* or *will* happen.[119]

Triangle of Interests Creates Infrastructure to Fight Lawlessness, WALL ST. J., May 12, 1994, at A1, but this is ambiguous evidence that private prison firms support incarceration—AFSCME, which represents corrections officers in many states, actually *lobbied* in favor of that crime bill, but it attributed its support to the bill's grants for correctional facilities, corrections officer training provisions, and enhanced penalties for offenses against corrections officers. *See supra* note 106.

113. *See, e.g.*, SARABI & BENDER, *supra* note 30, at 7-18.

114. *See* American Legislative Exchange Council, http://www.alec.org; *see also infra* text accompanying notes 130-41.

115. *See, e.g.*, SARABI & BENDER, *supra* note 30, at 7, 13-14.

116. Dolovich, *supra* note 25, at 524, 529; Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 142 (2001).

117. *See* Alfred C. Aman, Jr., *Privatization, Prisons, Democracy, and Human Rights: The Need to Extend the Province of Administrative Law*, 12 IND. J. GLOBAL LEGAL STUD. 511, 544 (2005); Douglas C. McDonald, *Public Imprisonment by Private Means*, 34 BRIT. J. CRIMINOLOGY 29, 43 (1994).

118. RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY 96 (1997). In the related context of alternative-to-incarceration programs, Harding also mentions an instance, from Australia, of lobbying by *nonprofit* providers of a "residential Wilderness program, modeled on the America Vision Quest scheme," for juveniles. *See id.* at 96-97 (citing RICHARD W. HARDING, AUSTL. INST. OF CRIMINOLOGY, PRIVATE PRISONS IN AUSTRALIA 3 (1992)). However, though Harding refers to "advocacy" by the proponents of the program, he does not cite any instances of such advocacy.

119. *See, e.g.*, HALLETT, *supra* note 31, at 141; SHICHOR, *supra* note 28, at 235-36; Dolovich, *supra* note 25, at 525; Low, *supra* note 31, at 45; Savas, *supra* note 31, at 898; Schoen, *supra* note 31, at A31; White, *supra* note 116, at 142. But not all commentators hedge their statements. *See* Barkow, *Administering Crime*, *supra* note 31, at 729; Barkow, *Our Federal System*, *supra* note 31, at 125 (noting that prison firms "often lobby for longer terms"); George, *supra* note 31, at 54, 57 (arguing that firms' financial interest "will make them a lobby group for increased sentences"); Vargas-Vargas, *supra* note 31, at 75 n.209 (private firms are "powerful . . . in influencing draconian social policies"). Freeman, *supra* note 31, at 1349 n.249, cites *Developments*, *supra* note 36, at 1872, for the proposition that "the private prison industry . . . lobb[ies] for stiffer criminal penalties," but in fact *Developments* only states that private prisons "may" do so and that the claim that they do is "plausible."

Several authors draw a connection between private prisons' supposed advocacy today

I noted above that the *general* contributions of corrections officers unions cannot be traced back to any *specific* goal, like pro-incarceration advocacy.[120] Some commentators note private prison firms' advocacy without distinguishing between pro-privatization and pro-incarceration advocacy,[121] but this blanket approach is a mistake, unless one is attacking all political involvement by prison firms. Generalized contributions to candidates, unlike targeted activities like contributions to single-issue voter initiative campaigns, are mute. The industry's contributions to politicians may not be pro-incarceration at all; or they may be multipurpose, for privatization as well as for incarceration. This is an important distinction, as merely advocating increased privatization arguably raises quite different concerns than advocating changes in the criminal law itself,[122] and may not implicate the same sorts of "legitimacy" values.[123]

Since the industry's public statements virtually all relate to favoring privatization, there is little hard evidence on the basis of which to attribute part of their political contributions to a pro-incarceration motive. Indeed, the Association of Private Correctional and Treatment Organizations (APCTO),[124] the industry's trade group, speaking for its member firms, denies that the industry lobbies for increased penalties:

> Individually and as an Association, we do not lobby in favor of longer

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and the nineteenth-century experience of convict leasing. *See* SARABI & BENDER, *supra* note 30, at 11; PRESBYTERIAN CHURCH (USA), *supra* note 31, at 20; Beverly A. Smith & Frank T. Morn, *The History of Privatization in Criminal Justice*, *in* PRIVATIZATION IN CRIMINAL JUSTICE: PAST, PRESENT, AND FUTURE 3, 17 (David Shichor & Michael J. Gilbert eds., 2001); White, *supra* note 116, at 128-29; Wray, *supra* note 31, at 5. For the nineteenth-century history, see MATTHEW J. MANCINI, ONE DIES, GET ANOTHER 24, 41 (1996); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 40 (1996); ALRUTHEUS AMBUSH TAYLOR, THE NEGRO IN TENNESSEE, 1865-1880, at 43 (1941); 2 GEORGE WASHINGTON WILLIAMS, HISTORY OF THE NEGRO RACE IN AMERICA 415-16 (photo. reprint 1968) (1883); William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. S. HIST. 31, 50-51 (1976). But how much this history tells us about present-day privatization is disputed. *See* LOGAN, *supra* note 31, at 215-18; Dolovich, *supra* note 25, at 454; Alexis M. Durham III, *The Future of Correctional Privatization: Lessons from the Past*, *in* PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* note 31, at 33, 45-48; Rosky, *supra* note 6, at 912-13.

120. *See supra* notes 81-83.

121. *See, e.g.*, SARABI & BENDER, *supra* note 30, at 10 (merely listing total contributions to candidates as evidence that prison firms fuel the "incarceration boom").

122. Even mere pro-privatization advocacy may raise *some* concerns. *See* Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1522 (2001); Oliver Hart et al., *The Proper Scope of Government: Theory and an Application to Prisons*, 112 Q.J. ECON. 1127, 1144-47 (1997) (arguing that corruption and patronage may skew the decision whether to privatize in a pro- or anti-privatization direction).

123. *See* Dolovich, *supra* note 25, at 523-24; Rosky, *supra* note 6, at 955. Some commentators' failure to draw the distinction that Dolovich draws between pro-privatization and pro-incarceration advocacy (and to draw the similar distinction between pro-funding and pro-incarceration lobbying) leads to some interesting blindnesses. *See infra* note 151.

124. *See* Association of Private Correctional & Treatment Organizations, http://www.apcto.org.

> sentences, so-called "three-strikes" laws, or other legislation which could result in an increase in the jail or prison population. To the contrary, the Association and its member companies encourage the use of appropriate alternatives to incarceration; provide inmates with treatment, education and rehabilitative services designed to positively impact and reduce recidivism rates; and encourage effective transitional programs for offenders upon release.[125]

APCTO frequently endorses alternatives to incarceration, treatment programs, and other measures to reduce recidivism. Its executive director recently suggested in the *Denver Post* that to alleviate prison overcrowding, Colorado should "[l]ook to alternatives to incarceration that can provide treatment and rehabilitative programs to first-time, nonviolent drug and alcohol offenders," "[r]educe recidivism by investing in the treatment, education and rehabilitation that offenders need to be successful when they leave prison," and "[i]ncrease the likelihood that released inmates will not re-offend by providing substantive transitional programs to help released inmates adjust to the community outside the walls of prison."[126] (He made similar recommendations regarding Ohio in the *Cincinnati Post*.)[127] He also suggested in the *Fort Pierce Tribune* and the *Palm Beach Post* that Florida should invest more in juvenile justice services in order to reduce the adult prison population in the long run.[128] (He noted that APCTO's member companies mostly provide adult incarceration services, though some would like to expand their juvenile programs.)[129]

Even if one ignores the industry association's official statement as self-serving and dismisses their anti-incarceration positions as public relations, at most generalized political contributions are "soft evidence" of pro-incarceration advocacy. The most we can say empirically based on such evidence is that maybe pro-incarceration lobbying happens and maybe it does not. Perhaps the hard evidence is missing because the industry covers its tracks; or perhaps the hard evidence is missing because there is nothing to cover up.

Prison firms also participate in the American Legislative Exchange Council, an influential conservative organization that drafts model

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125. E-mail from Paul Doucette, Executive Director, Ass'n of Private Correctional & Treatment Orgs. (Oct. 13, 2006) (on file with author). Doucette continues: "Our members' financial success is driven not by the number of detainees or inmates they confine, but rather by the superior service and savings they provide to their contracted clients." *See also* Paul Doucette, Letter to the Editor, WICHITA EAGLE, Apr. 1, 2006, at A2.

126. Paul Doucette, Letter to the Editor, DENV. POST, Oct. 2, 2006, at B7.

127. *See* Paul Doucette, *Ohio Prisons Are Full*, CINCINNATI POST, Aug. 8, 2006, at A9.

128. *See* Paul Doucette, Letter to the Editor, FT. PIERCE TRIB., May 10, 2006, at A6 [hereinafter Doucette, FT. PIERCE TRIB. letter]; *see also* Paul Doucette, Letter to the Editor, *In Juvenile Justice, Florida Gets Just What It Pays for*, PALM BEACH POST, Oct. 1, 2006, at 4E [hereinafter Doucette, *In Juvenile Justice*]; Paul Doucette, Letter to the Editor, *Private Providers Agree: Bolster Juvenile Spending*, PALM BEACH POST, Apr. 25, 2006, at 15A.

129. *See* Doucette, *In Juvenile Justice*, *supra* note 128, at 4E; Doucett, FT. PIERCE TRIB. letter, *supra* note 128, at A6.

legislation.[130] Both Corrections Corp. of America (CCA) and the former Wackenhut Corp. (now called the GEO Group)[131] have been members of ALEC (and they and Sodexho Marriott, a major CCA stockholder, are prominent corporate funders of ALEC)[132], and, over the years, at least CCA has participated in (and two of its executives have chaired) ALEC's Criminal Justice Task Force,[133] which drafted, among other things, a "Truth in Sentencing Act" and a "Habitual Violent Offender Incarceration Act".[134]

The inner workings of ALEC are hazy,[135] and indeed, some commentators argue that the private prison industry expressly seeks out channels that are "conveniently out of public view" and "behind closed doors" to promote its pro-incarceration agenda.[136] The trouble with this view is that we can also presume that prison firms work within ALEC on *privatization* issues: Prison privatization is one of the "major issues" of the very same Criminal Justice Task Force;[137] the Task Force has a Subcommittee on Private Prisons[138] and has a model "Housing Out-of-State Prisoners in a Private Prison Act";[139] and CCA is known to have talked to the Task Force on the subject.[140] Therefore, this, too, is "soft" evidence; we do not know that they also work on sentencing

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130. *See* PRICE, *supra* note 31, at 74-75, 131-36; Dolovich, *supra* note 25, at 526-29; Silja J.A. Talvi, *Follow the Prison Money Trail*, IN THESE TIMES, Sept. 4, 2006.

131. Wackenhut Corrections Corp. changed its name to The GEO Group in November 2003 under the terms of a share purchase agreement with another company. *See* GEO Group, Milestones, http://www.thegeogroupinc.com/milestones.asp.

132. *See* SARABI & BENDER, *supra* note 30, at 4 (citing *Inside ALEC* newsletter, Sept. 1999).

133. *See* ALEC, Criminal Justice and Homeland Security Task Force, http://www.alec.org/2/criminal-justice.html (Brad Wiggins of CCA presented at the Dec. 14, 2002 Task Force meeting.); *see also* SARABI & BENDER, *supra* note 30, at 4; Karen Olsson, *Ghostwriting the Law*, MOTHER JONES, Sept./Oct. 2002, at 17. Dolovich cites Olsson as stating that CCA participated in "that session which produced ALEC's model truth-in-sentencing bill," *see* Dolovich, *supra* note 25, at 528 & n.360. But Olsson states only that CCA was "[o]ne of the members of the task force that drafted the bill." Olsson, *supra* at 17. (The task force that drafted the bill is the Criminal Justice Task Force. *See* ALEC, Criminal Justice and Homeland Security Model Legislation, http://www.alec.org/6/criminal-justice.html; ALEC, *supra*.) This can be read as merely stating that CCA was a participant in that Task Force, not that it had any role in that particular bill.

134. *See* ALEC, Criminal Justice and Homeland Security Model Legislation, *supra* note 133.

135. For instance, ALEC doesn't disclose the current membership of its Task Forces. *See* Scott Blake, *CCA Dominates Prison Privatization*, FLA. TODAY, June 13, 2004, at 8.

136. Dolovich, *supra* note 25, at 529; *see also* Olsson, *supra* note 133.

137. *See* SARABI & BENDER, *supra* note 30, at 4.

138. *See* ALEC, Criminal Justice and Homeland Security Task Force, *supra* note 133 (Dec. 11, 2003).

139. *See* ALEC, Criminal Justice and Homeland Security Model Legislation, *supra* note 133.

140. *See* ALEC, Criminal Justice and Homeland Security Task Force, *supra* note 133. (Brad Wiggins of CCA presented *Developments*, *supra* note 36, at the Dec. 14, 2002 Task Force meeting.).

or incarceration issues. Indeed, CCA asserts that it has not participated in, voted on, or endorsed any stand on model legislation for sentencing or crime policies within ALEC.[141]

Apparently,[142] the only CCA official to have ever publicly taken a stand on sentencing is J. Michael Quinlan, formerly Director of the Federal Bureau of Prisons and now a CCA Senior Vice President,[143] who, after he joined CCA in 1993,[144] told a House subcommittee that mandatory minimum sentences "are unnecessary for non-violent, non-serious offenses" and "pose[] a severe threat to prison discipline and management."[145]

So far, I have found[146] a single piece of evidence of arguably pro-incarceration advocacy by a private firm. In 1995, Wackenhut chairman Timothy P. Cole testified in favor of certain amendments to the Violent Crime Control and Law Enforcement Act of 1994.[147] The main point of his testimony was to propose additional provisions (1) making clear that prison grants under the 1994 Act would "help pay for the entire range of correctional services states can provide in-house or under contract" (not merely for "alternative correctional facilities"), (2) requiring states to "show that they have all the necessary legislative authority to embark upon a comprehensive, integrated program and that they will employ the best technology at the lowest cost" (presumably to boost privatization), (3) directing the Attorney General to "give top priority to the construction of larger, 'harder' [i.e., higher-level security] facilities," and (4) directing the Attorney General to give priority to states with "an executive body dedicated to the review and consideration of privatization."[148] During this testimony, he said the following:

- "Our proposed amendment . . . would help to assure that these grants

141. Interview with Louise Gilchrist, Vice President of Marketing and Communications, Corrections Corp. of America (Sept. 15, 2006); *see also* Corrections Corp. of America, The Corrections Industry: Myths vs. Reality in Private Corrections: The Truth Behind the Criticism, http://www.correctionscorp.com/myths.html.

142. Gilchrist interview, *supra* note 141.

143. *See* Corrections Corp. of America, Why Do Business with CCA, http://www.correctionscorp.com/salesteam.html.

144. *Id.*

145. *Crime Prevention and Criminal Justice Reform Act: Hearing Before the Subcomm. on Crime and Criminal Justice*, 103d Cong. (1994) (statement of Michael Quinlan), *available at* 1994 WL 214215.

146. My search was not systematic, since I do not know how one would systematically search for evidence of industry pro-incarceration advocacy. But I have investigated claims that such advocacy does occur, when I have found them, by following the footnotes and checking whether the source was really pointing to some hard evidence of such advocacy (rather than merely evidence of generalized advocacy, pro-privatization advocacy, or an analyst's fear of such advocacy).

147. *Overhauling the Nation's Prisons: Hearing on the Violent Crime Control and Law Enforcement Act of 1994 Before the S. Comm. on the Judiciary*, 104th Cong. (1995) (statement of Timothy P. Cole), 1995 WL 449225.

148. *Id.*

will help the states incarcerate more violent criminals and not make the state governments more dependent on federal tax dollars in the long term."

- "By passing 'truth-in-sentencing' laws, states have begun to restore a fundamental sense of justice and fairness to our system of crime and punishment."
- "The new grant program [under the 1994 Act, without the proposed amendments] is available for 'alternative correctional facilities' and does not recognize the urgent need for more cells in secure facilities."[149]
- "Current law encourages billions to be spent on new or retrofitted facilities that are not large enough, secure enough or efficient enough to keep the maximum number of violent criminals in prison for the least cost."[150]

This is not great evidence—Cole was primarily advocating funding priorities and privatization-friendly decisionmaking. Cole's request to divert money from alternative facilities, his kind words for truth-in-sentencing laws, and his positive attitude toward locking up violent criminals are hardly a pro-incarceration smoking gun. But this is the best I have found. Private prison firms may have made other statements and taken other public positions that are arguably pro-incarceration, but I have not found any, and to my knowledge, privatization critics have not brought them to light.[151]

F. *Sometimes, No Smoke Means No Fire*

As noted above, there is little hard evidence that private firms advocate stricter criminal law at all. Perhaps they do so secretly, in which case this simple model may be entirely unrealistic.[152] Or perhaps this simple model is

149. *Id.*

150. *Id.* at Attachment 1.

151. Interestingly, the anti-privatization source from which I learned about the Cole testimony characterized it fairly innocuously, as testimony in favor of amendments "that authorized the expenditure of $10 billion to construct and repair state prisons"—with the author only focusing on the generalized desire for funding. Ken Silverstein, *America's Private Gulag*, *in* THE CELLING OF AMERICA, *supra* note 81, at 156, 159.

152. See *supra* note 45, where I suggest that private contractors may be more subject to a public relations backlash if they lobby to change substantive policy in an area traditionally heavily associated with state functions, like prisons or the military. The fear of such a backlash may make private contractors do their industry-expanding lobbying more secretly, or it may make them not engage in industry-expanding lobbying at all. I also suggest in that note that public unions may be playing a broader game, where there is more to be gained than achieving results in the political market. Part of the union leadership's goal is to mobilize the union members, and this arguably requires more communication with the members than the board of a corporation would necessarily disclose to the public or its stockholders. Finally, there are statutory and constitutional reasons—related to unions' democratic structure and the First Amendment rights of union members—for why unions

basically right, and the private firms are actually spending their money on a form of advocacy where the public good aspect is not important—*pro-privatization advocacy*.

Pro-privatization advocacy is an area where, obviously, the private sector cannot free ride off the public sector, since the public sector is their enemy on that issue. If the private firms cooperate with each other, they reap all the benefits of their pro-privatization advocacy. Even if they do not cooperate with each other, an individual firm's pro-privatization contribution may benefit it directly to the extent that the contribution (perhaps improperly) increases the likelihood that the firm will obtain a particular contract.[153]

In real life, of course, money may be multi-purpose. So far, I have treated "mute" campaign expenditures as though they were for some purpose—either privatization or incarceration—that was known to the donor but unknown to us. In fact, they could be for "access" to the candidate, which can be used at any time after the candidate prevails. The model is general enough to accommodate this framework. At some point, donors will try to call in a favor. Favors cost something in terms of "political capital," and political capital is scarce: calling in one favor makes it harder to call in another favor.[154] At the point where donors have to determine what to ask for, we are back in the previous model.[155]

The "access" framework has thus only postponed the applicability of the model until after the election. One would still predict, under this model, that the smaller donors would prefer to spend their capital supporting something with more of a private-good component, like privatization, and leave the pro-incarceration advocacy to the dominant actor. And this may in fact be what happens.

III. OF FIRMS, UNIONS, AND COOPERATION

This Part elaborates on two curlicues of the theory. Subpart A explains why I have focused only on public-sector unions and private firms. In short, I have done so because the other potential prison-based actors do not participate

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must be more open about their advocacy than corporations.

153. *See infra* text accompanying notes 190-92.

154. *Cf.* Wayne, *supra* note 7 ("The contractors are saving their gunpowder for other challenges.").

155. The same goes for participation in ALEC. One pays to be on the Task Force, but when the time comes to influence the content of model legislation, one of two things might happen. The legislation might have the desired form anyway without any effect from the additional participation. (This is fairly likely in a conservative group like ALEC.) Or it would not have had the desired form. In which case, even if one were participating in the process, which CCA denies, *see supra* text accompanying note 141, one would need to spend some political capital to try to help bring the change about. It is reasonable to think that a firm would rather spend its political capital on advocating privatization, which has less of a public-good component.

in pro-incarceration advocacy. Private-sector workers are not unionized, which makes it hard for them to act collectively; and public departments of corrections actually want *fewer* prisoners. Subpart B explains why I have assumed that the private firms act as a bloc instead of competing with each other, or, at the opposite extreme, cooperating with the public sector in a grand prison coalition. In short, I have made this assumption because cooperation within a fairly concentrated oligopoly is not that difficult: firms interact with each other a lot and have ample opportunity to punish each other for non-cooperative behavior. Moreover, private-sector firms interact with each other more than they do with the public sector, so enforcing cooperation across the whole prison industry would be more difficult than merely doing so among private firms. However, it turns out that how the industry cooperates, or whether it cooperates at all, does not make much of a difference for the main result.

A. *Why Focus on Public-Sector Unions and Private Firms?*

One might ask, at this point, why I have focused primarily on two apparently asymmetrical groups: the private sector *firms* and the public sector *employees*. What about the other two obvious candidates—the employees of those firms, or the employers of those public guards?

In principle, it is unclear a priori who would want to lobby, and so a case-by-case analysis of the incentives of the various parties' incentives is necessary. In this case, my choice of actors was inspired by the state of the evidence and the debate: public corrections officers unions, especially in California, are known to engage in pro-incarceration advocacy; and private prison firms are alleged to do so. But let us also think about this theoretically.

First, let us consider the workers. No single employee has enough of a stake in the system to benefit from spending resources on advocacy to help his industry. We should only expect workers to be a significant political force if they can enforce some sort of collective action by punishing their own free riders.[156] The easiest way to accomplish this is to require membership in or contribution to a union, which then lobbies out of members' dues.[157] Private

156. *See, e.g.*, OLSON, *supra* note 37, at 72-73 (stating that unions offer selective incentives like insurance, seniority privileges, or preferential treatment in handling grievances); E.P. THOMPSON, CUSTOMS IN COMMON 467, 519-21 (1991) (providing examples of "rough music," which is directed hostility against workers who offended community norms); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 177 (1996); *cf.* ÉMILE ZOLA, GERMINAL, pt.5, chs. 3-4, at 317-36 (Garnier-Flammarion 1968) (1885); MATEWAN (Cinecom Entertainment Group et al. 1987) (showing unions using a combination of shame and violence); NEWSIES (Walt Disney Pictures et al. 1992) (same).

157. *See* CAL. GOV'T CODE § 3502.5 (authorizing agency shop agreements); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 511 (1991) ("Michigan's Public Employment Relations Act . . . which applies to faculty members of a public educational institution in Michigan,

corrections officers are not unionized in most states,[158] which explains why they have not been observed lobbying.[159]

As I explain above,[160] I assume that unions represent their members and seek to maximize total union rents—the difference between union and non-union wages, times the size of the public sector. The prediction that such unions would seek to increase the size of their sector is straightforward (though not automatic).[161] A larger sector may mean a more powerful union and therefore potentially higher wages, benefits, or job security down the road (and perhaps—to introduce agency costs for a moment—perks for union officials).[162] It is possible that unions may sometimes oppose expansion of their industry—for instance, if increases in prisoners made corrections officers worse off because they were not accompanied by compensating wage or staff increases. Anti-expansionary lobbying may occur in some industries, but it apparently does not occur in the prison industry. The public corrections officers

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permits a union and a government employer to enter into an 'agency-shop' arrangement under which employees within the bargaining unit who decline to become members of the union are compelled to pay a 'service fee' to the union."); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 211 (1977) (similar); OLSON, *supra* note 37, at 71; Memorandum of Understanding, Bargaining Unit 6: Agreement Between State of California and California Correctional Peace Officers Association (CCPOA), § 3.02 (1999), http://www.dpa.ca.gov/collbarg/contract/Unit06contract99.htm (establishing agency shop); *see also* Robert G. Gregory & Jeff Borland, *Recent Developments in Public Sector Labor Markets*, *in* 3C HANDBOOK OF LABOR ECONOMICS 3573, 3586-87 (Orley Ashenfelter & David Card eds., 1999) (discussing why unionization may be more widespread in the public than in the private sector).

158. *See* SHICHOR, *supra* note 28, at 198; Dolovich, *supra* note 25, at 501; *see also* Ronald G. Ehrenberg & Joshua L. Schwarz, *Public-Sector Labor Markets*, *in* 2 HANDBOOK OF LABOR ECONOMICS, *supra* note 71, at 1219, 1219-22, on how unionization is greater in the public than in the private sector.

159. There are two related effects at work here. Non-unionized workers probably (1) find it hard to organize for lobbying purposes and (2) find it hard to organize for wage purposes (which means they are probably making market wages). If they could organize, they would be *able* to lobby effectively, but that by itself would not make them *want* to lobby. If a worker, once unemployed, can quickly find another job paying the same, he will not care as much about lobbying for job security. What gives unions a good incentive to lobby is that, in addition to increasing job security, they can increase their wages above market levels through organizing. Their job gives them special benefits and, as a result, they care more deeply about their job security. Indeed, we do observe strong private-sector unions lobbying for the welfare of their industries. For instance, the United Mine Workers joined the coalition challenging EPA's air-quality standards in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001). *See* Petition for a Writ of Certiorari at ii, Browner v. Am. Trucking Ass'ns, 529 U.S. 1129 (No. 99-1257) (Jan. 17, 2000), 2000 WL 33979605; *see also* Brief of the Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers et al., AFL-CIO, & the Elec. Reliability Coordinating Council as Amici Curiae Supporting Respondents at 13-14, Envt'l Defense v. Duke Energy Corp., 127 S. Ct. 1423 (2007) (No. 05-848), 2006 WL 2689786.

160. *See supra* text accompanying note 71.

161. *See* Ehrenberg & Schwartz, *supra* note 158, at 1258 & n.51.

162. *See, e.g.*, Schwab, *supra* note 71, at 380-81.

unions seem, so far, strong enough that they believe that an increased flow of prisoners will not make them worse off (even if budgets are tight elsewhere in the system).

Now, let us consider the employers. Some private prison firms also run alternatives to incarceration,[163] so it is not obvious that they would advocate an increased emphasis on imprisonment.[164] Still, they may benefit from the other elements I have included in the term "incarceration": increased illegalization, increased law enforcement, and longer sentences (once the imprisonment decision has already been made). Though increased incarceration may also increase costs for private firms, they have a built-in protection against too much deterioration in their position: they do not have to bid on a contract unless they anticipate making enough profit. So it is not implausible that private firms would benefit from incarceration; though of course (as explained in the previous Parts) their willingness to spend money to increase incarceration depends in part on how profitable they are.

What about the public employers, the departments of corrections? They are not players in the pro-incarceration advocacy game for a simple reason: generally, they favor *alternatives* to incarceration.[165]

The Alabama Department of Corrections (DOC) commissioner has advocated sentencing reform, community correction programs, and other measures to "reverse the prison population growth trend."[166] The head of the Illinois DOC advocates reentry programs that would lower the prison population by countering the "awful, vicious cycle" by which recidivist parolees are re-incarcerated "before the ink is dry on their parole papers."[167]

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163. *See, e.g.*, Camille Graham Camp & George M. Camp, THE CORRECTIONS YEARBOOK 2000: ADULT CORRECTIONS 91-92 (2000) (listing privately run community correctional facilities in Arizona, D.C., Florida, Maine, and North Carolina); COLO. LEGISLATIVE COUNCIL, RESEARCH PUB. NO. 487, AN OVERVIEW OF THE COLORADO ADULT CRIMINAL JUSTICE SYSTEM 137 (2001), *available at* http://www.state.co.us/gov_dir/leg_dir/lcsstaff/2001/research/01CriminalCorrections.htm (noting that twenty-six of thirty-two community correctional facilities are privately operated); LITTLE HOOVER COMM'N, REPORT NO. 144, BEYOND BARS: CORRECTIONAL REFORMS TO LOWER PRISON COSTS AND REDUCE CRIME (1998), *available at* http://www.lhc.ca.gov/lhcdir/144/Private.html (listing privately run community correctional facilities in California); Cornell Companies Adult Services: Community-Based Corrections Services, http://www.cornellcompanies.com/ page.cfm?ctid=1#community; GEO Group, Fort Worth Community Corrections Facility, http://www.thegeogroupinc.com/northamerica.asp?fid=100.

164. *See also* LOGAN, *supra* note 31, at 160-61.

165. *See, e.g.*, WYNNE, *supra* note 79, at 194-95; Bennett & Kuttner, *supra* note 35, at 36; *see also* Jeanne S. Woodford, *Hard Time: Why I Quit the Prison System*, L.A. TIMES, Aug. 6, 2006, at M1. *But see* Press Release, Florida Department of Corrections, Governor's Budget Recommendations Help Department of Corrections Fight Crime (Jan. 16, 2001), *available at* http://www.dc.state.fl.us/secretary/press/2001/budget5.html (an exception to the trend of DOCs favoring alternatives to incarceration).

166. Richard F. Allen, *Inflow of Inmates Must Be Slowed*, MONTGOMERY ADVERTISER, July 17, 2006, at A5.

167. Rex W. Huppke, *Rehabilitation or Recycling?*, CHI. TRIB., Mar. 12, 2006, at 1.

The Michigan DOC director concerns herself with measures to reduce the prison population and thus delay the day the state runs out of funded capacity for prison beds.[168] The Montana DOC director candidly tells crowds that "[p]rison isn't working," and his department considers measures to reduce the prison population and increase community corrections.[169] The New Mexico Corrections Department is focusing on using early parole to control its prison population.[170] The North Carolina Division of Community Corrections advocates redirecting non-trafficking drug users from prison to "intermediate programs."[171] Ohio lawmakers complain about the high costs of mandatory minimum sentences.[172] The Pennsylvania DOC is implementing programs "aimed at diverting less serious offenders from prison" to "free-up prison space needed for more serious offenders."[173] The Washington DOC secretary "is a big believer in work-release programs."[174] And the Wisconsin DOC secretary advocates focusing on "prevention and treatment in addition to effective law enforcement."[175]

This makes some sense: while it is commonly thought that agencies want to aggrandize themselves,[176] that intuition is only a special case of a more general belief that agency officials act in their own self-interest[177] and that their self-interest tends to be aligned with the size and power of their agencies. Increasing prisoners without a corresponding budget increase to match the increasing cost of incarceration (a cost that includes corrections officers'

168. *See* Memorandum from Patricia L. Caruso, Director of the Mich. Dep't of Corr., to Sen. Alan L. Cropsey & Rep. Jack Brandenberg (Feb. 1, 2006), *available at* http://www.michigan.gov/documents/02-01-06_-_Section_401_149197_7.pdf.

169. Ted Sullivan, *Bozeman's Re-Entry Center Dedicated*, BOZEMAN CHRON., *reprinted in* THE CORRECTIONAL SIGNPOST, Spring 2006, at 3, http://www.cor.state.mt.us/News/Newsletters/Spring2006.pdf; *see* Bob Anez, *Advisory Council Studies Array of Offender Services*, THE CORRECTIONAL SIGNPOST, *supra*, at 9; Kelly Speer, *Community Corrections Grows to Meet Demand*, THE CORRECTIONAL SIGNPOST, Winter 2006, at 7, http://www.cor.state.mt.us/News/Newsletters/Winter2006 Signpost.pdf.

170. N.M. Legislative Council Serv., Information Bulletin No. 6, http://legis.state.nm.us/LCS/lcsdocs/148229.pdf (Aug. 25, 2003).

171. ROBERT LEE GUY, N.C. DIV. OF CMTY. CORR., THE EVOLUTION OF COMMUNITY CORRECTIONS (2d ed. 2003), http://www.doc.state.nc.us/dcc/index.htm.

172. *See* Debra Jasper, *Prison Expenses Straining Budget*, CINCINNATI ENQUIRER, May 28, 2001, at 1A.

173. JEFFREY A. BEARD, PA. DEP'T OF CORR., ADMISSIONS, POPULATION, & RELEASES 5 (2006), *available at* http://www.cor.state.pa.us/stats/lib/stats/population.pdf.

174. *Prison Officials Want to Expand Work-Release*, SEATTLE TIMES, Aug. 8, 2006, at B4.

175. Press Release, Gov. Jim Doyle, Governor Doyle Announces $616,000 for Alcohol and Drug Treatment and Diversion (Sept. 18, 2006) (on file with author); *see also* Falk, *supra* note 98, at 34.

176. *See, e.g.*, WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36-42 (1971).

177. *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932-34 (2005).

salaries, as well as health care and other factors) can easily make prison officials worse off.[178] Thus, the interests of departments of corrections may not be aligned with those of corrections officers and their unions.[179] Moreover, DOCs run both prisons and many alternative programs, so even if more inmates mean more power for the DOCs, it makes sense that the DOCs would want to handle those inmates in cheaper ways than incarceration. Thus, it is not surprising to find prison systems arguing for alternatives to incarceration in a time of tight budgets.

B. *Who Cooperates with Whom?*

The discussion in the previous Parts of how the 10% firm acts and the profits of "the industry" assumes that the private sector, in deciding how much to spend, acts as a bloc: the private firms all cooperate[180] with each other, but do not cooperate with the public sector. This is possible, but it is not the only imaginable story. I could have made either of two other, more extreme assumptions. First, there could be no cooperation at all—all the firms could be acting independently and competing with each other. Second, there could be total cooperation—all the firms could be cooperating not only with each other but also with the public sector. This section explores the implications of these alternative assumptions and tentatively defends my decision to adopt the intermediate assumption of cooperation within the private sector but not with the public sector. In the end, however, making different assumptions would not significantly alter the conclusions.

If all firms act independently, the relevant shares are even less than indicated above. In 1999, CCA had a bit over half the market, Wackenhut (now the GEO Group)[181] had about a quarter, Management & Training Corp. had about 5-8%, Cornell Corrections, Inc. and Correctional Services Corp. each had about 5-6%, CiviGenics, Inc. had about 2-3%, and a handful of other firms had under 1%.[182]

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178. We are past the days when county sheriffs were paid according to their jail counts. Wray, *supra* note 31, at 6; *see also* LOGAN, *supra* note 31, at 217; Schlosser, *supra* note 10, at 64. More prisoners without more funding can also lead to political grief when combined with early-release requirements imposed by court orders as a result of overcrowding. *Cf.* Sue Doyle, *Proposal: Inmates to Serve 25% of Sentence*, DAILY BREEZE (Torrance, Cal.), Aug. 21, 2006, at A1.

179. *See, e.g.*, Richard Ferruccio, Presidents [sic] Message (2006), http://www.ri-brotherhood.com/pdfs/MessageFromThePresident.pdf (Rhode Island union president calls the DOC and the State "our enemies" in the context of labor-related disputes); Richard Ferruccio, Presidents [sic] Message (2006), http://www.ri-brotherhood.com/pdfs/MessageFromThePresident2.pdf.

180. "Cooperation" is what economists mean when they say "collusion."

181. *See supra* note 131.

182. These numbers are taken from two sources from 1999 (which is why the shares are expressed as ranges). *See* JAMES R. MACDONALD & JAIMI GOODFRIEND, FIRST ANALYSIS SECURITIES CORP., FASC INDUSTRY OUTLOOK: OFFENDER MANAGEMENT: 1999, at 10 (1999),

So, while the private-sector share in some state may be 10%, that number is irrelevant if all firms act independently. The relevant shares may be, for instance, 6% for CCA, 2% for The GEO Group, 1% for Management & Training Corp., and 1% for Cornell Corrections, leaving 90% for the public sector. The assumption of independent firms makes public sector domination even more probable.

Now consider the opposite assumption—that everyone cooperates. A single prison industry bloc would choose an optimal total amount to maximize total industry benefit. Because the actors are still formally separate, they would also choose some way to allocate the contributions among themselves.

If private firms had the same benefit per prison as the public-sector union, then total cooperation would be indistinguishable from monopoly: total industry benefit would be the same before and after privatization, thus the strategy that chooses contribution amounts to maximize that benefit would likewise be the same.

However, as I argue above,[183] private firms are not terribly profitable, while public-sector unions have significant public-sector wage premiums to protect. By replacing part of the public sector with a relatively unprofitable private sector, privatization actually decreases the industry's total benefit. Therefore, even under total cooperation, there is less to maximize. Expenditures on pro-incarceration advocacy are thus less productive (just as if there were a tax rate on industry revenues), and expenditures on advocacy still go down under privatization.[184]

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available at http://www.lib.uwo.ca/business/prison1999.pdf; Stephen McFarland et al., Prisons, Privatization, and Public Values 6 (Dec. 2002) (unpublished paper prepared for Prof. Mildred Warner, Cornell University), *available at* http://government.cce.cornell.edu/doc/pdf/PrisonsPrivatization.pdf (reprinting a table of market shares from Charles Thomas that is otherwise unavailable). Cornell has apparently grown since then. *See* Michael Brush, *Company Focus: 3 Prison Stocks Poised to Break Out*, MSN MONEY, Jan. 5, 2005, http://moneycentral.msn.com/content/P105034.asp (reporting a 12% market share for Cornell). GEO has grown slightly. *See* GEO Group, Fast Facts About GEO, http://www.thegeogroupinc.com/facts.asp (28% share of U.S. market).

183. *See supra* text accompanying notes 68-69.

184. Note that there is an important difference between the total cooperation case and the other two cases (no cooperation or private-sector cooperation). In the other cases, the "largest" actor does all of the advocacy, and "largest" is determined by *both* per-prison benefits *and* industry shares. For example, even if per-prison profits were identical between the public and private sectors, a 10% actor would free ride off a 90% actor because the absolute amount of the benefits differ. But in the total cooperation case, it is only per-prison benefits that matter. For example, suppose per-prison benefits are the same—say $100—and there are 100 prisons. Then, under monopoly public provision, total benefit is 100 × $100 = $10,000. Under a 10%-90% split, total benefit is (10 × $100) + (90 × $100), which is exactly the same. Likewise, under a 20%-80% split, total benefit is (20 × $100) + (80 × $100)—again exactly the same. On the other hand, if private sector benefits are, say, $50, then a 10%-90% split reduces total benefit to (10 × $50) + (90 × $100) = $9500; a 20%-80% split reduces it still further to (20 × $50) + (80 × $100) = $9000; and so forth. (This has a quite different implication for the advocacy-minimizing split, *see supra* Part II.C. Under total cooperation, the advocacy-minimizing level of privatization is either 0% or 100%—all the

How can we tell which form of cooperation is most likely? Not being able to find explicit cooperation does not mean anything: the cooperation may just be tacit.[185] Observing the private industry's trade association, APCTO,[186] also fails to answer the question, because although trade groups may provide a forum for discussing common lobbying strategies,[187] talk is cheap and many trade groups are ineffective.[188] In particular, APCTO does not seem to fulfill much of a coordinating function, as firms do their own lobbying and most of their own advocacy.[189]

Even observing some actual lobbying by the major firms[190] does not answer the question. As I noted above,[191] they may all be lobbying for privatization, which has a strong private-good component, since a firm's contributions may increase the probability that it gets a project in the future[192]

On theoretical grounds, it seems at least plausible that the private firms would cooperate among themselves. They are repeat players in a long-term process, which includes both political advocacy and bidding on actual prison projects. Therefore, there is ample opportunity for private firms to enforce a regime of cooperative behavior.[193] If firms free ride off each other in their advocacy expenditures, their fellows could punish them in the future in any number of ways—for instance, by never cooperating on campaign spending

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weight should go on the sector with the lowest per-prison benefits. Or, if the sectors have equal per-prison benefits, any split is equivalent. *See* Volokh, *supra* note 39, at 59.)

185. *See* Ian Ayres, *How Cartels Punish: A Structural Theory of Self-Enforcing Collusion*, 87 COLUM. L. REV. 295, 296-327 (1987).

186. *See supra* text accompanying notes 124-29.

187. Coordinating industry lobbying strategies doesn't violate antitrust law. *See, e.g.*, E. R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961).

188. *Cf.* OLSON, *supra* note 37, at 36 & n.54.

189. *See supra* text accompanying notes 121, 130-34.

190. *See* PRICE, *supra* note 31, at 74; SARABI & BENDER, *supra* note 30, at 9.

191. *See supra* text accompanying notes 73, 152-54.

192. This would not happen if auctions were nondiscretionary—for instance if the state were required to accept the lowest bid. But because governments have the flexibility to reject a low bid where a higher bid proposes more and better services, or where they have their doubts as to the trustworthiness of the bidder, *see* HARDING, *supra* note 118, at 75-79, there are enough "soft factors" that a firm's contributions may make a difference in whether it wins a bid.

193. *See, e.g.*, James W. Friedman, *A Non-Cooperative Equilibrium for Supergames*, 38 REV. ECON. STUD. 1, 4-8 (1971). On cooperation in auctions, see PAUL KLEMPERER, AUCTIONS: THEORY AND PRACTICE 28-29 & nn.75-77 (2004); Jean-Jacques Laffont, *Game Theory and Empirical Economics: The Case of Auction Data*, 41 EUR. ECON. REV. 1, 25-26 (1997); Martin Pesendorfer, *A Study of Collusion in First-Price Auctions*, 67 REV. ECON. STUD. 381, 384-88 (2000); Paul Klemperer, *Bidding Markets* 16-22, 18 n.61 (UK Competition Comm'n Working Paper, 2005); Andreas Blume & Paul Heidhues, Modeling Tacit Collusion in Auctions (Sept. 2002) (unpublished manuscript, on file with the University of Pittsburgh). On specific collusive mechanisms in auctions, see Daniel A. Graham & Robert C. Marshall, *Collusive Bidder Behavior at Single-Object Second-Price and English Auctions*, 95 J. POL. ECON. 1217, 1220-21 (1987); R. Preston McAfee & John McMillan, *Bidding Rings*, 82 AM. ECON. REV. 579 (1992).

anymore, by bidding aggressively in prison auctions, or by bidding aggressively only in certain markets.

By contrast, public corrections officers unions may have fewer ways of punishing private firms. They do not bid against each other in the underlying auctions, so they cannot threaten to end cooperative behavior. Public unions are bitter political adversaries in the privatization advocacy world, so again there seems to be no preexisting cooperation that can be terminated. They can threaten to not cooperate anymore in pro-incarceration advocacy or to step up their anti-privatization advocacy, but this may not be as effective a threat.

For these reasons, I believe that cooperation among private prison firms is more likely than either, on the one hand, totally non-cooperative behavior or, on the other hand, totally cooperative behavior between the public and private sectors. However, because the ultimate results under any of the assumptions do not differ that much, which assumption we choose is not terribly important.

IV. COMPLICATING THE MODEL

The theoretical model in Part I was highly simplified. It is, therefore, not surprising that its central prediction—that smaller actors would do no advocacy at all, and that privatization (up to the "advocacy-minimizing" level)[194] would unambiguously decrease the level of industry-expanding advocacy—was also simple. This Part complicates the model in various ways.

In Subpart A, I drop the assumption that money only buys victory for a given reform or candidate and introduce the possibility that money can also change the substance of the reform or the candidate's position. This does not significantly alter the conclusion. In Subpart B, I drop the assumption that anti-incarceration political advocacy is fixed. I find that pro-incarceration advocacy still falls with privatization, though the effect of privatization on anti-incarceration advocacy is ambiguous.

The following two Subparts show how privatization may have an ambiguous effect on pro-incarceration advocacy. In Subpart C, I relax the assumption that all money is fungible and that only the total amount of money in the pot matters. Once we allow public-sector money and private-sector money to have different effects, privatization has an ambiguous effect on total pro-incarceration advocacy: private advocacy rises, but public advocacy falls. In Subpart D, I introduce the possibility that the pattern of privatization, as we observe it today, is already the result of a political process where strong unions have successfully opposed privatization while weak unions have not. I find that exogenously increasing privatization in such an environment would likewise have an ambiguous effect on pro-incarceration advocacy; the effect depends on the correlation between actors' influence in privatization politics and their influence in incarceration politics.

194. *See supra* Part II.C.

The bottom line is that, if one wants to argue that privatization will *increase* pro-incarceration advocacy, one must argue either, from outside the model, that the model is wrong, or, from inside the model, why privatization would increase private-sector advocacy more than it would decrease public-sector advocacy.

A. *Allowing Money to Change Candidates' Positions*

So far, I have taken the political agenda as given: I did not explain the source of the proposed reform. Thus, I have assumed that money is important because it buys victory—for instance, by persuading voters of the benefits of the policy or the merit of the candidate.[195] But money can also affect the agenda by changing candidates' positions, inducing the sponsors of voter initiatives to propose a different initiative, and so on.

When money affects candidates' agendas (but the other assumptions are unchanged), the analysis is similar. Suppose you are considering whether to contribute to place an initiative on the ballot. The initiative is supported by some group or other, but for specificity, assume a politician sponsors it.[196] This politician may be fairly pro-incarceration himself, but he is limited in how strict an initiative he can propose: his effort will fail unless the median voter, whose views control the outcome of the election,[197] prefers the proposal over the status quo. However, before the substance of the initiative is set in stone, you can move him in a more pro-incarceration direction if—by offering him money to pay for persuasive advertising—you offer him the possibility to also move the median voter.[198]

A monetary contribution has the following effects:

1. *Electoral influence.*
   a. As before, you benefit because your contribution pays for persuasion, directly increasing the probability that the initiative prevails.
   b. But the contribution also moves the initiative in a more pro-incarceration direction, which cuts against the effect above.
2. *Substantive influence.* Finally, you benefit if the initiative prevails, because the policy is better for you than it would have been if you had not contributed.

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195. *See* MUELLER, *supra* note 46, at 478-79.

196. *See, e.g.*, Michael Finnegan, *Props. 57, 58 Big Items in Homestretch*, L.A. TIMES, Mar. 2, 2004, at B1; Michael Finnegan & Robert Salladay, *Voters Reject Schwarzenegger's Bid to Remake State Government*, L.A. TIMES, Nov. 9, 2005, at A1.

197. *See, e.g.*, MUELLER, *supra* note 46, at 85-86. In assuming a stable identity of the median voter, I abstract away from voter participation issues. *See id.* at 232-34.

198. *See id.* at 479; Richard Ball, *Opposition Backlash and Platform Convergence in a Spatial Voting Model with Campaign Contributions*, 98 PUB. CHOICE 269, 273-74, 279 (1999); Grossman & Helpman, *supra* note 53, at 273-74, 279.

It turns out that this complication to the model does not much change the underlying result. As a prison provider thinking about how much to contribute, you follow the same framework as before: you contribute until the benefit of an extra dollar is worth $1 to you. The benefit of an extra dollar is more complicated than it was in the earlier model because, in addition to encompassing the positive electoral influence effect, it now also includes the negative electoral influence effect, as well as the benefit of substantive influence. The basic idea, however, remains the same.

Now suppose, again, that the industry is split up into a 90% sector (you) and a 10% sector (them). As before, your benefits shrink to 90% of their previous level, so you now want to contribute until the benefit of an extra dollar to the industry is worth $1.11. As before, you contribute less than before the split, because having only 90% of the industry is like facing a 10% tax on benefits. Also as before, your competitor free rides off you, because when he takes your contribution level into account, an extra dollar in the pot is no longer worthwhile to him.[199]

B. *Anti-Incarceration Advocacy*

This model focused only on pro-incarceration advocacy, taking the anti-incarceration advocacy as given. But clearly anti-incarceration advocacy exists,[200] and it is plausible that the pro- and anti-incarceration forces respond strategically to each other's expenditures. This suggests two questions.

First, one might wonder whether the existence of anti-incarceration advocacy changes my conclusions about the effect of privatization on pro-incarceration advocacy. It turns out that it does not: just as in the simple case, privatization makes pro-incarceration advocacy decrease, even when we consider interactions with anti-incarceration advocacy.[201]

Second, one might wonder how privatization changes anti-incarceration advocacy. After all, some anti-incarceration advocacy is as plausibly self-interested as the prison providers' pro-incarceration advocacy. For instance, Proposition 66, which would have limited California's Three Strikes Law,[202] was partly funded by "Sacramento businessman Jerry Keenan whose son Richard is serving time for manslaughter after crashing his car while driving drunk and killing two passengers."[203] Proposition 36, the drug treatment

199. This is not as obvious as it was in the previous models: the marginal benefit of advocacy expenditures is no longer guaranteed to be downward sloping over its whole range, so Figure 3 is not accurate for this case. Nonetheless, the largest actor's contributions still fall. *See* Volokh, *supra* note 39, at 7-8, 22-24.

200. *See* BERK ET AL., *supra* note 78, at 200.

201. *See* Volokh, *supra* note 39, at 9-10.

202. *See supra* text accompanying note 87.

203. *See* Institute of Governmental Studies, *supra* note 87.

diversion initiative,[204] was supported by dozens of drug treatment providers and seventeen medical and public health organizations, including the California Association of Alcoholism and Drug Abuse Counselors and the County Alcohol and Drug Program Administrators Association of California.[205] And, as shown above, state DOCs generally advocate against incarceration.[206] Perhaps those who are concerned about self-interest coloring people's positions on criminal justice should be concerned about this self-interested anti-incarceration advocacy as well.

It turns out that the privatization-induced decrease in pro-incarceration advocacy has an indirect effect on anti-incarceration advocacy. Unfortunately, we cannot say anything a priori about the direction of this effect.[207] On the one hand, pro-incarceration advocacy decreases the effectiveness of anti-incarceration advocacy by counteracting it. A decrease in pro-incarceration advocacy, therefore, makes anti-incarceration advocacy more effective, which would tend to increase it. On the other hand, a decrease in pro-incarceration advocacy also makes anti-incarceration advocacy less necessary, which would tend to decrease it. There is no theoretical way to know how these conflicting effects would balance out; but in principle, future research could answer the question empirically.

What this means normatively depends on one's attitude toward anti-incarceration advocacy. If one opposes pro-incarceration advocacy because there is already too much incarceration,[208] then there is nothing wrong, and perhaps everything right, with advocacy the other way.

On the other hand, if one opposes pro-incarceration advocacy because it is assumed[209] to be self-interested, then perhaps anti-incarceration advocacy is just as bad if it comes from boot camps, halfway houses, drug treatment providers, and other presumptively self-interested parties.[210] This model,

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204. *See supra* text accompanying note 85.

205. *See* National Families in Action, A Guide to Drug-Related State Ballot Initiatives: California Proposition 36 Proponents, http://www.nationalfamilies.org/guide/california36-endorsements.html.

206. *See supra* notes 165-79.

207. *See* Volokh, *supra* note 39, at 9-10. *But cf.* Andrew F. Daughety & Jennifer F. Reinganum, *Appealing Judgments*, 31 RAND J. ECON. 502, 523 (2000) (discussing concept of "complementarity"); Andrew F. Daughety & Jennifer F. Reinganum, *Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts*, 1 AM. L. & ECON. REV. 158, 170-71 (1999) (axiom (ii), suggesting that $\ell_{xy} \geq 0$, where ℓ is an analogous variable to the probability that the reform passes in this model); George B. Shepherd, *An Empirical Study of the Economics of Pretrial Discovery*, 19 INT'L REV. L. & ECON. 245, 262 (1999) (discussing whether plaintiffs or defendants "counterpunch" in response to additional discovery by their adversary).

208. *See, e.g.*, SARABI & BENDER, *supra* note 30, at v.

209. *But see infra* text accompanying notes 224-33.

210. In Dolovich's framework, punishment, which burdens one's "urgent interests," can only be justified when "interests of equal or greater urgency" (such as, presumably, potential victims' interests in safety) are served, and this balance must be struck "under fair

which says nothing specific about *total* advocacy (either its amount or its effect), is thus normatively ambiguous.

C. *Relaxing the Assumption of Fungible Money*

Recall the main model presented in Part I, in particular Figures 4 and 5. A monopoly provider would have spent $1 million on advocacy, but under a 90-10 split, the 90% provider is unwilling to spend beyond the 900,000th dollar and the 10% provider is unwilling to spend beyond the 300,000th dollar; and so total advocacy falls to $900,000, with the dominant provider spending everything and the other one spending nothing.

The result that the smaller-share-of-total-benefit sector totally free rides off the efforts of the dominant sector was driven by the assumption that the probability of getting the change in policy only depended on the total amount of money in the pot. All advocacy was fungible. A dollar from a public actor had the same effect as a dollar from a private firm. This is not an implausible assumption. For instance, dollars are fungible in buying advertising, which increases the probability of a change. A politician may adopt the view of whatever "policy position" contributed the most to his war chest.

On the other hand, some alternate assumptions may also be plausible.[211] For example, one group might be attractive only to Democrats, while another might be attractive only to Republicans.[212] More generally, perhaps politicians are just sensitive to the variety of voices in a coalition, feeling (rightly or wrongly) that having a wide variety of groups shows that a policy has wide support. Then neither group's contributions totally "crowd out" the other's. *Your* 500,001st dollar still has less benefit than *your* 500,000th dollar—there are still decreasing marginal returns—but (unlike in the previous model) it does

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deliberative conditions." Dolovich, *supra* note 25, at 515. Pro-incarceration advocacy violates this condition because it burdens people's urgent interests (their interest in liberty) merely "in order that others might benefit financially." *Id.* at 515-16. Dolovich doesn't make this point, but it seems that under her framework, self-interested anti-incarceration advocacy is equally problematic: The interests of potential victims are sacrificed so that some (drug treatment providers) may benefit financially. Those victims' interests would have been protected (through incarceration) under fair deliberative conditions, so by hypothesis, they are of equal or greater urgency than the liberty interests of the people who are no longer being incarcerated. The level of incarceration is thus unjustly low.

One might argue that incarceration is currently too high, so self-interested anti-incarceration advocacy at least pushes the system in the right direction; but Dolovich's theory does not seem to allow for using self-interested advocacy instrumentally in that way, nor does her discussion of the parsimony principle take a position on whether incarceration is too high or too low.

211. *See* Baland & Platteau, *supra* note 49, at 158-59.

212. This is a made-up example; it doesn't apply to prison advocacy, where both the California corrections officers union and private prison firms give to both Republicans and Democrats. *See* SARABI & BENDER, *supra* note 30, at 13; Pollak, *supra* note 102; Talvi, *supra* note 130; Center on Juvenile & Criminal Justice, *supra* note 82.

not have the same benefit as your first dollar added on to your competitor's 500,000th. Therefore, the total free-riding effect from the simple model above no longer occurs. There are many ways that private and public spending *could* interact. For instance, the effect of a public dollar could be the same regardless of the level of private spending, and vice versa. Or, alternatively, public and private spending could be complementary if politicians are eager to endorse a policy supported by actors from both the public and private sectors. This is an empirical question to be answered by future research.[213]

In this context, privatization may have two opposing effects. First, it increases the private-sector share, so private-sector advocacy goes up. Second, it decreases the share of the public sector, so public-sector advocacy goes down. We cannot say anything a priori about whether the first effect outweighs the second. If we know some facts about public or private sector advocacy—for instance, if one sector is completely unpersuasive, while the other sector is slick and sympathetic[214]—then we can hazard some predictions, but we cannot say anything without such empirical facts. Because the empirical effect of privatization is ambiguous, the normative effect of privatization is also ambiguous if one opposes pro-incarceration advocacy. Unless we can be specific about how different groups' advocacy has different effects and how effective the groups are, it is impossible to say whether prison privatization increases or decreases self-interested pro-incarceration advocacy.

D. *Strong and Weak Unions*

Let us return to the point I made above that an industry's effectiveness at advocacy is relevant to its "real" share for purposes of this analysis.[215] For instance, if your competitor, with a 10% share, is twice as slick a lobbyist as you, meaning that his marginal dollars produce twice the benefit of yours, he will act as though his share is 20%.

Which way this cuts is not clear, as we do not know which sector is more effective at lobbying in favor of incarceration. The CCPOA, as we have seen,[216] is highly effective, but corrections officers unions are much less active outside of California, and perhaps this is because they are less effective. It is hard to say how effective private prison firms are at lobbying in favor of incarceration, since, as we have seen, there is little evidence that they do this at all,[217] and if they do it secretly, it is likewise hard to gauge how effective they are.

But let us suppose that one's effectiveness at lobbying for incarceration is

213. I am grateful to Joseph Bankman for this point.
214. *See infra* Section IV.D.
215. *See supra* text accompanying notes 56, 214.
216. *See supra* text accompanying notes 80-88.
217. *See supra* Part II.E.

correlated with one's effectiveness at lobbying for (or against) privatization. For simplicity's sake, let us suppose that they are *perfectly* correlated. Consider the states with high levels of privatization. We may conclude that those states have high privatization because their corrections officers unions were not effective at opposing privatization; the private industry was just too strong for them. When that relatively "weak" public sector was partly displaced by a relatively "strong" private sector, a weak pro-incarceration voice was similarly displaced by a strong pro-incarceration voice. Pro-incarceration advocacy, then, may plausibly have increased.

Similarly, consider the states with low levels of prison privatization, like California (1.8% private in 2004), or no privatization at all, like New York or Rhode Island.[218] The unions in those states, on this view, must have been stronger than the industry, or else we would see privatization there now. If privatization were introduced, total pro-incarceration advocacy would go down; but privatization is unlikely to be introduced there, so we will not see that happen.

This is a story where—contrary to my implicit assumption so far—privatization is endogenous: the states where privatization has gained a foothold are not randomly chosen; rather, privatization emerges where corrections officers unions are weak and fails to emerge where the unions are strong.[219] Thus, past privatization may have, on balance, increased pro-incarceration advocacy. If one could somehow eliminate prison privatization (despite the confluence of powerful political forces that established it to begin with), one would reestablish the rule of the ineffective corrections officers unions in those states where they were ineffective—to the benefit of those who oppose pro-incarceration advocacy. By a similar logic, one should *introduce* privatization where it is currently absent: if it is currently absent, it is because it was not a powerful enough political force to win on its own, which means it will also be an ineffective political force in fighting for incarceration.

In fact, the assumption here—that the effectiveness of pro-incarceration advocacy is perfectly correlated with the effectiveness of pro- or anti-privatization advocacy—implies that pro-incarceration advocacy is already as high as it can get, because the slick advocates, who were already slick enough to establish themselves in the industry, are now plying their slickness in the incarceration policy field. Adding a thumb to the privatization scales in either direction would tend to support the victory of the less persuasive party and would therefore reduce the total amount of pro-incarceration advocacy.

This story may be plausible, but it requires more fleshing out. For one thing, the assumption may not be right. Low-privatization states need not be

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218. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 24, at 6 tbl.7.

219. For a case of selection bias in another context, see Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. (forthcoming 2008).

high-union-strength states. While antipathy to privatization and the strength of public-sector unions are probably correlated, a very Democratic state may plausibly oppose privatization even if, for whatever reason, its corrections officers union is weak.

Moreover, actors in the prison industry may not be similarly effective in the privatization debate as in the incarceration debate. While one's effectiveness at advocacy probably depends on one's general characteristics, like goodwill, persuasiveness, and slickness, the specific subject matter of the advocacy also plays a big role. The incarceration debate is peopled by different interest groups than the privatization debate. For instance, prosecutors, police officers, victims' rights groups, and rural communities are interested in incarceration policy[220] but not so much in privatization policy. Conversely, prison privatization is a matter of interest even to interest groups without a direct interest in prisons, like, on one side, generalized public employee unions, and, on the other side, small-government advocates, who assume (probably sensibly enough) that a victory for privatization in any field is a victory for the general privatization movement.[221] Moreover, the appeal of incarceration arguments, which connect to fears of drugs and crime and concerns over civil liberties, seems to have a very different source than the appeal of privatization arguments, which relate to taxes, spending, and the effectiveness of government services.

We are back, then, to a general state-by-state analysis. In the first set of models—where the effectiveness of advocacy only depended on the total amount of money in the pot—everything was driven by the dominant actor, where the term "dominant" also takes effectiveness into account. I have given arguments above as to why the private sector is currently probably the smaller actor.[222] The "slickness adjustment" described here might change that in some places, but it is an empirical question. As is by now familiar, privatization still increases the private-sector share but decreases the public-sector share. This "slickness adjustment" may change the de facto shares of the different sectors, but it does not change the qualitative result. The effect of privatization is theoretically ambiguous.

CONCLUSION

I have explored how privatization affects the amount, or effectiveness, of economically self-interested pro-incarceration advocacy. For purposes of this

220. *See supra* note 35.

221. This can be an example of a "political momentum" slippery slope. *See* Steven Callander, *Bandwagons and Momentum in Sequential Voting*, 74 REV. ECON. STUD. 653 (2007); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1121-27 (2003).

222. *See supra* Part III.

Article, I have so far assumed, with the critics of prison privatization,[223] that such advocacy is undesirable. But this assumption is highly questionable.

For one thing, members of an industry, whether public or private, who advocate a policy that benefits them are not necessarily motivated by self-interest, even unconsciously. When Don Novey, the president of CCPOA, says he just wants to lock up scumbags,[224] perhaps we should take him at his word. The same goes when a DOJ official speaks of the need to fight "the scourge of child pornography,"[225] when CACI says terrorism is "heinous,"[226] when a leading environmental citizen-suit litigator argues against weakening the environmental laws whose monetary penalties fund its operations,[227] or when doctors who perform abortions oppose abortion restrictions.[228]

People who advocate a policy that benefits them or their industry may be acting out of naked self-interest; they may be deluded into believing their particular interest is the general interest; their participation in an industry may lead them to rightly appreciate their industry's contribution to the public interest; they may have joined the industry because they were sympathetic to its interests; or maybe they just coincidentally believe that the policy is right.[229]

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223. At least the ones cited above, *see supra* note 31.

224. *See* Dan Morain, *California's Profusion of Prisons*, L.A. TIMES, Oct. 16, 1994, at A1; Jenifer Warren, *When He Speaks, They Listen*, L.A. TIMES, Aug. 21, 2000, at A1.

225. *Child Pornography and Abduction Prevention: Hearing on H.R. 1161 and H.R. 1104 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Daniel P. Collins, Associate Deputy Att'y Gen.), 2003 WL 1079511.

226. *See supra* text accompanying notes 4-6.

227. *See supra* text accompanying notes 19-23.

228. *See* National Abortion Federation, About NAF, http://www.prochoice.org/about_naf/index.html. For an accusation of self-interestedness, see Paul M. Weyrich, *Memos Might Reveal Profit Motive in Senate*, INSIGHT ON THE NEWS, Mar. 29, 2004, at 52.

229. On affiliation bias, see PAUL SLOVIC, THE PERCEPTION OF RISK 311-13 (2000). The question of how to interpret behavior that serves the interests of a class is featured in historians' debates over the social influences of the early nineteenth-century British antislavery movement. Each of the above rationales for why British elites opposed slavery (except for the self-selection hypothesis) has its defenders. For an argument that abolitionism served the naked self-interest of British capitalists, see ERIC WILLIAMS, CAPITALISM & SLAVERY 169 (1961). For an argument that British capitalists were deluded into thinking that their abolitionism was moral, when in fact it served to legitimize "wage slavery," see John Ashworth, *The Relationship Between Capitalism and Humanitarianism*, 92 AM. HIST. REV. 813, 815 (1987); David Brion Davis, *Reflections on Abolitionism and Ideological Hegemony*, 92 AM. HIST. REV. 797, 802 (1987). For an argument that the market discipline imposed by capitalism nurtured humanitarianism and abolitionism, see Thomas L. Haskell, *Convention and Hegemonic Interest in the Debate over Antislavery: A Reply to Davis and Ashworth*, 92 AM. HIST. REV. 829, 852-53 (1987). And for an argument that British capitalists' self-interest and their interest in abolitionism were coincidental—that is, that the middle classes were really just motivated by humanitarianism—see G.M. TREVELYAN, ENGLISH SOCIAL HISTORY: A SURVEY OF SIX CENTURIES, CHAUCER TO QUEEN VICTORIA 495-97 (1942); Ashworth, *supra*, at 813; Howard Temperley, *Capitalism, Slavery and Ideology*, 75 PAST & PRESENT 94, 98 (1977) (citing REGINALD COUPLAND, THE BRITISH ANTI-SLAVERY MOVEMENT 111, 250-51 (1933)).

Nor is even nakedly self-interested advocacy an obvious evil, even when prison policy is at stake. Some argue that optimal criminal law should reflect all interests, including the benefit to the criminal of committing the crime;[230] and if this is right, prison providers' self-interest is also relevant. Some see lobbying as a means by which groups provide their views to decisionmakers and the public and thus enrich democratic debate.[231] Others may find it illegitimate, on democratic grounds, to even consider the substance of people's future political advocacy in deciding whether to privatize.[232]

And if, as still others believe, criminal policy should be judged by a substantive external standard—for instance, whether sentences are too long in an objective sense—one cannot specifically object to the effect of pro-incarceration advocacy on criminal law without first establishing that the effect would be substantively undesirable.[233]

Nonetheless, if one believes that the effect of privatization on pro-incarceration advocacy is relevant, this Article has pointed out the inadequacies

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Or take a somewhat different context: There is a class of strategic games (similar to that in the model presented in Part II *supra*) where, according to standard economic theory, the "best" strategy is to free ride off other players. Though several laboratory experiments suggest that people consistently act more cooperatively than predicted by economic theory. *See* James Andreoni, *Why Free Ride? Strategies and Learning in Public Goods Experiments*, 37 J. PUB. ECON. 291 (1988); Robert Sugden, *On the Economics of Philanthropy*, 92 ECON. J. 341 (1982). However, one set of researchers finds that economists are an exception to this pattern. Perhaps economists are the only group to act according to naked self-interest. Or, the researchers suggest, self-selection or false consciousness may play a role: "Economists may be selected for their work by virtue of their preoccupation with the 'rational' allocation of money and goods. Or they may start behaving according to the general tenets of the theories they study." Gerald Marwell & Ruth E. Ames, *Economists Free-Ride, Does Anyone Else?: Experiments on the Provision of Public Goods*, 15 J. PUB. ECON. 295, 309 (1981).

230. *See* DAVID D. FRIEDMAN, LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 229-31 (2000); Louis Kaplow & Steven Shavell, *Economic Analysis of Law*, *in* 3 HANDBOOK OF PUBLIC ECONOMICS 1661, 1748 (Alan J. Auerbach & Martin Feldstein eds., 2002); A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45, 48 & n.12 (2000). *But see* Dolovich, *supra* note 25, at 515-16 (suggesting that profit-making should not count in determining optimal criminal law); George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527 (1970) (arguing that illicit utility should not count).

231. *See, e.g.*, Nixon v. Shrink Mo. Gov't Political Action Comm., 528 U.S. 377, 411 (2000) (Thomas, J., dissenting); Buckley v. Valeo, 424 U.S. 1, 19-23 (1976) (noting the importance of political expenditures for free expression); E. R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127, 137 (1961); LEGISLATIVE RESEARCH COUNCIL, *supra* note 31, at 57; LOGAN, *supra* note 31, at 159.

232. I have defined "advocacy" broadly, so that it includes, at one extreme, bribery. *See supra* text accompanying notes 63-64. The arguments in the paragraph above, of course, may apply more naturally to the more licit, non-bribery, forms of advocacy. Even bribery has its defenders, though it is unclear how much relevance the arguments for bribery have for incarceration policy. *See, e.g.*, SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 69 (1968); Francis T. Lui, *An Equilibrium Queuing Model of Bribery*, 93 J. POL. ECON. 760, 761 (1985).

233. *See, e.g.*, LOGAN, *supra* note 31, at 154; Tabarrok, *supra* note 36, at 7 n.6.

in the current formulation of the political influence challenge to privatization. My opinion, based on the above theory and evidence, is that privatization may not worsen any political influence problem, and might even alleviate it. The public goods model seems to describe many situations of political advocacy fairly well. The assumption of the principal model—that the probability of getting a policy change only depends on the total amount spent—likewise seems to be a good approximation for many situations, like initiative or election campaigns.

There is always room for more realistic theories. For instance, my analysis of what motivated public-sector unions, while based on assumptions common in the labor economics literature, was highly simplified. In assuming that private prison firms were profit-maximizing, I suppressed any analysis of agency costs within the firm. And my back-of-the-envelope estimate of the benefit of incarceration to the different sectors was just that—an estimate. Nor have I entertained the possibility that, when privatization is on the agenda, prison system actors spend more resources fighting over that, which might crowd out pro-incarceration advocacy.[234] So my specific conclusions here are tentative.[235] This Article is meant to stimulate and discipline further debate, not end it.

But what is not tentative is that this sort of analysis is necessary if one is to make the political influence argument properly, whether in the prison context or more generally. General assumptions will not do. As Mancur Olson (somewhat hyperbolically) observed, "the customary view that groups of individuals with common interests tend to further those common interests appears to have little if any merit."[236] Critics of privatization who have charged that privatization has increased (or will increase, or runs a substantial risk of increasing) industry-expanding advocacy have not explained what it is about

234. There were no resource constraints in the models above—the effectiveness of advocacy was not assumed to depend on whether there was any other advocacy out there (the public or politicians did not have limited attention spans), and prison system actors were assumed to be able to make any positive-net-expected-value investment (capital markets were liquid).

235. Nor have I explored whether advocacy could be controlled in other ways, for instance, by direct regulation, *see* Rosky, *supra* note 6, at 955-56—though I have, I suppose, tacitly assumed that such regulation will not be effective, including regulation specifically designed to control advocacy by unions (*à la* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 211 (1977)). *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (holding that corporations have First Amendment rights); Buckley v. Valeo, 424 U.S. 1 (1976) (holding that First Amendment rights include political advocacy); LOGAN, *supra* note 31, at 159; Sheryl Gay Stolberg, *House Passes Limit on Cash for Groups in Campaigns*, N.Y. TIMES, Apr. 6, 2006, at A21 (referring to campaign finance restrictions as "whack-a-mole"). *But see* PAUL GUPPY, WASH. POLICY CTR., PRIVATE PRISONS AND THE PUBLIC INTEREST: IMPROVING QUALITY AND REDUCING COST THROUGH COMPETITION (2003), *available at* http://www.washingtonpolicy.org/ConOutPrivatization/PBGuppyPrisonsPublicInterest.html (arguing that campaign finance laws will prevent such corruption).

236. *See* OLSON, *supra* note 37, at 2.

the lobbying world that would make this happen. Either they are unambiguously wrong, or they are only right under a particular set of empirical assumptions that they must spell out.

One further note: If one opposes self-interested pro-incarceration advocacy, one may object at this point that this economic analysis does not exonerate private prisons. Rather, perhaps I have only shown that the entire system is corrupt,[237] and perhaps I have unwittingly demonstrated that the only way out of this mess is to reject the "interest group model of politics" entirely as it applies to criminal justice policy.[238]

Fair enough. If self-interested pro-incarceration lobbying is indeed undesirable, then perhaps the system is corrupt.[239] But how does this translate into an argument against prison privatization? It is not enough to show that private prisons are part of the problem: removing one problem is not guaranteed to make things better when there are other problems around. As the models above have suggested, even if all this political advocacy is illegitimate, the existence of the private sector can reduce public-sector advocacy and may reduce total advocacy; eliminating the private sector may thus exacerbate the problem.

Nor is it only economists who oppose making the best the enemy of the good:[240] as Rawls (no economist he) teaches, the analyst who makes specific policy recommendations in our fallen world—not in the idealized world of "strict compliance" with the principles of justice that characterizes a "well-ordered society"[241]—is acting in the realm of "nonideal theory," which asks how the "long-term goal" dictated by ideal theory "might be achieved, or worked toward, usually in gradual steps. It looks for policies and courses of action that are morally permissible and politically possible as well as likely to be effective."[242]

Because nonideal theory requires that we ask about the real-world effectiveness of any reform, merely observing undesirable lobbying by the

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237. *See* Dolovich, *supra* note 25, at 532.

238. *Id*. at 543.

239. *Cf.* WILLIAM SHAKESPEARE, ROMEO AND JULIET act 3, sc. 1, ll. 89, 97-98, 104, *in* WILLIAM SHAKESPEARE: THE COMPLETE WORKS 855, 876 (Alfred Harbage ed., Viking 1969) ("A plague a both your houses!").

240. Economists know this as the theory of the second best. *See* JEAN-JACQUES LAFFONT, FUNDAMENTALS OF PUBLIC ECONOMICS 167 (John P. Bonin & Hélène Bonin trans., rev. ed. 1988); R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11 (1956-1957).

241. *See* JOHN RAWLS, A THEORY OF JUSTICE 8 (1971); *see also* Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 324 (2004) (discussing "partial compliance").

242. *See* JOHN RAWLS, THE LAW OF PEOPLES 89-90 (1999); *see also* LIAM B. MURPHY, MORAL DEMANDS IN NONIDEAL THEORY (2000); RAWLS, *supra* note 241, at 245-48 (suggesting that even "slavery and serfdom . . . are tolerable . . . when they relieve even worse injustices"); Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 552-53, 581-84 (2005).

private sector will not support an argument against prison privatization unless, say, privatization *actually* (not speculatively) increases "the danger of . . . corrupting influence"[243] or "compromise[s] further the possibility of legitimate punishment."[244]

If it turns out that privatization actually reduces pro-incarceration lobbying—if, with privatization, prisoners' sentences are less influenced by improper factors than they otherwise would be—it is unclear that there is any "tension between the state's use of private prisons and the demands of" liberal legitimacy.[245] If "private prisons are by no means unique,"[246] and if any prison provider, public or private, can lobby for incarceration, any "tension" has nothing to do with private prisons and everything to do with the crooked timber of humanity.[247]

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The same sort of analysis that I have conducted here on the prison industry can also be used to evaluate the claim that, say, buying weapons from defense contractors (rather than having the military make them in-house) will exacerbate pro-war lobbying. Since governmental providers of defense services—i.e., the military leadership—have, on some accounts, been notorious pro-war lobbyists throughout history,[248] such a claim is not credible unless one can tell a plausible story about why any defense contractor lobbying will not

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243. Dolovich, *supra* note 25, at 532.

244. *Id.* at 542-43.

245. *Id.* at 529.

246. *Id.* at 530.

247. *Cf.* ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS at xi, 19, 48 (Henry Hardy ed., 1992) [hereinafter BERLIN, CROOKED TIMBER]; Isaiah Berlin, *Montesquieu*, 41 PROC. BRIT. ACAD. 267, 284 (1955), *reprinted in* ISAIAH BERLIN, AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS 130, 148 (Henry Hardy ed., 1980); Henry Hardy, *Editor's Preface* to BERLIN, CROOKED TIMBER, *supra*, at v, vii & n.2 (Henry Hardy ed., 1992) (discussing R.G. Collingwood's use of "cross-grained" timber in his 1929 lecture); IMMANUEL KANT, *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*, *in* WAS IST AUFKLÄRUNG?: AUSGEWÄHLTE KLEINE SCHRIFTEN 3, 10 (Philosophische Bibliothek Bd. 512, 1999) (1784) ("aus so krummem Holze, als woraus der Mensch gemacht ist, kann nichts ganz Gerades gezimmert werden"), *translated in* IMMANUEL KANT, *Idea for a Universal History with a Cosmopolitan Purpose*, *in* POLITICAL WRITINGS 41, 46 (H.S. Reiss ed., 2d ed. 1991) ("Nothing straight can be constructed from such warped wood as that which man is made of.").

248. *See* JAMES CARROLL, HOUSE OF WAR: THE PENTAGON AND THE DISASTROUS RISE OF AMERICAN POWER 499 (2006); S.E. FINER, THE MAN ON HORSEBACK: THE ROLE OF THE MILITARY IN POLITICS 74, 107 (1962); JAMES F. SCHNABEL, UNITED STATES ARMY IN THE KOREAN WAR: POLICY AND DIRECTION: THE FIRST YEAR 370-74 (Maurice Matloff ed., 1972); Jim Hoagland, *Musharraf's Obsolete Way*, WASH. POST, Aug. 5, 2007, at B7 ("Pakistan continues to exist as a one-dimensional national security state, with its military fomenting crises in Kashmir and Afghanistan to justify the army's size and its control over the politicians."). *But see* CARROLL, *supra*, at 501-02; SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE 69 (1957) (portraying the military as a conservative, anti-war force).

crowd out some lobbying by the military itself; and doing this requires taking a position on what motivates the people at the Pentagon.[249] The same goes for private attorneys general, private redevelopment corporations, private landfill operators, and the like. The result will not always be the same, and the political influence argument may turn out to be correct in some of these cases and incorrect in others.[250] But this should be the structure of the argument.

The surprising moral of this story should not be that surprising. Indeed, the central insight here was also an important argument in favor of the antitrust laws. Discussing the conditions that preceded the enactment of those laws, William Howard Taft wrote that "business methods and plans . . . directed to . . . suppressing competition . . . had resulted in the building of great and powerful corporations which had, many of them, intervened in politics and through use of corrupt machines and bosses threatened us with a plutocracy."[251] The argument is plausible, and it is likewise plausible that privatization, by fragmenting an industry into at least two chunks (and more if private firms do not cooperate on advocacy), may similarly reduce that industry's political power.

In a roundabout way, then, privatization is a form of antitrust, and antitrust is a form of campaign finance regulation. It may not be worthwhile to privatize industries—or break up large corporations—merely to reduce their political advocacy, but at the very least this may count as an unintended—and possibly happy—side effect of privatization that, if real, should be taken into account in future analysis.

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249. *See, e.g.*, SEYMOUR MELMAN, PENTAGON CAPITALISM: THE POLITICAL ECONOMY OF WAR 8 (1970) (describing the Vietnam war as beneficial for Department of Defense officials); *see also* AARON L. FRIEDBERG, IN THE SHADOW OF THE GARRISON STATE 294-95 (2000) (arguing that if arms were made by government instead of by private contractors, "[p]ublic producers might actually have been better situated than their private counterparts to delay or prevent deep reductions in military spending . . . it is difficult to believe that a large, deeply entrenched public bureaucracy with nowhere to go but out of business would have been a less effective opponent of peace"); *id.* at 295 (citing F.M. SCHERER, THE WEAPONS ACQUISITION PROCESS: ECONOMIC INCENTIVES 388 (1964)). *Compare also* FER. R. ACQ. 34 ("War is good for business."), *with* FER. R. ACQ. 35 ("Peace is good for business."), *in* QUARK, THE FERENGI RULES OF ACQUISITION 19, 21 (Ira Steven Behr ed., 1995).

250. In particular, I suspect that privatization that displaces public provision will likely displace public lobbying, while privatization that supplements public provision will likely supplement public lobbying. Private attorneys general seem to fit more easily into the latter case, while private military contractors or prison firms seem to fit more easily into the former case (despite the possibility that reduced costs also increase incarceration). *See* Bruce L. Benson, *Do We Want the Production of Prison Services to Be More "Efficient"?*, *in* CHANGING THE GUARD, *supra* note 36, at 163, 197-98; White, *supra* note 116, at 137, 145.

251. WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 4 (photo. reprint 1993) (1914); *see also* Arthur P. Dudden, *Men Against Monopoly: The Prelude to Trust-Busting*, 18 J. HIST. IDEAS 587, 590 (1957); Lester M. Salamon & John J. Siegfried, *Economic Power and Political Influence: The Impact of Industry Structure on Public Policy*, 71 AM. POL. SCI. REV. 1026, 1039 (1977). *But cf.* DeNeen L. Brown, *Rejected as a Planet, Pluto Has a Space in People's Hearts*, WASH. POST, Sept. 2, 2006, at C1.