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What Good Are Markets in Punishment?

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There are two chronically unexamined assumptions about privatisation in punishment. First is the idea that it is a relatively new development. In fact, penal activity has always been (at least partly) private (Feeley 2002). Second, people seem to think the state can create a market when and where it wants.

This article aims to unpack such intuitions in order to expose neglected aspects of privatisation in punishment. The path I take towards this end is a circuitous one. First I argue that the experiment with the kinds of privatisation that sceptics worry most about, private companies owning and running whole prisons, has amounted to a ripple rather than a tidal wave in the sea of penal activity. So-called 'prisons-for-profit' have not fundamentally or single-handedly altered the state's relationship to the individual nor do they seem likely to. The public bureaucracies responsible for administering punishment in the UK and the US have expanded substantially rather than shrunk over the last quarter century, the period of our recent infatuation with markets. The paper then turns to the experience of an American state, which attempted to privatise its entire system of juvenile justice services, to offer a view of how a local market in punishment has worked. The focus here is on the dynamic interrelationship between state and private actors. Informed by this case, I suggest that a marketization of punishment has taken place, despite evidence of market failure.

Thus this article commits itself to an apparent contradiction: it claims that the private sector has failed to unsettle the state's monopoly on punishment, but the public penal bureaucracy is thoroughly marketized. The solubility of this paradox lies in the distinction between real markets and metaphorical ones. That is, a market *discourse* has taken root, frequently in the absence of actual markets, which has profoundly altered organisational identities and values in criminal justice. Similar processes are taking place across the public sector, in areas such as health care and education. The common experience in all these fields has been the aggressive introduction of market techniques, their failure to constrain the growth of bureaucracies or realise ambitious gains in efficiency, and their ironic success in transforming civil servants into conscientious business managers.

Let us begin with an opening dismissal of markets in criminal justice. The classic model of the market in which numerous buyers and sellers are guided by the laws of supply and demand to efficient exchanges simply does not apply to punishment. Critics of privatisation have long advanced this argument but based it on moral and ethical concerns rather than empirical economic ones (e.g. DiIulio 1988, 1990; Robbins 1989).

They argue that we should reject privatisation of prisons because doing so would remove from the state one of its defining activities, thus undermining its legitimacy. Ironically, such normative criticisms assume that privatisation ‘works’ even more effectively than its advocates claim. The argument that it is wrong to put a price on or delegate to private actors a core government duty, implicitly concedes that it is possible to price punishment and that privatisation actually effects the devolvement of penal activity. Policy analysts and economists, however, do address these logistical matters, and in doing so acknowledge that the major obstacle facing efforts to privatise prisons – let alone punishment – is that it is almost impossible to define exactly what it is that is being priced or whether a contract actually secures a delegation of responsibility (Donahue 1989, McDonald et al. 1998; see also the U.S. Supreme Court decision in *Richardson v. McKnight* 1997).

The difference, and the lack of connection, between these two levels of analysis – moral perspectives and policy-oriented or economic ones – is in how markets are being defined. For the latter, they are empirical phenomena, whereas the former thinks about them theoretically and, indeed, idealistically. While a substantial literature on the actual operation of markets in human and social services is accumulating (e.g. Smith and Lipsky 1993, U.S. General Accounting Office 1999, Romzek and Johnston 2005, Schwartz 2005, Zullo 2006), this has not been relied on much in the setting of political priorities. More often, theoretical positions are delivered through rhetorical flourishes. The New Public Management and Reinventing Government movements have brought the ideology of the marketplace into the public sector backed up by sparse attempts to buttress these efforts with research evidence (Spicer 2004). In the next section of the paper, I argue that the policy analysts and scholars of punishment who are in the best position to bring some of the empirical evidence to bear on the debate have been sidetracked by the more sensational, but I argue, less salient aspects of penal privatisation. This distracts attention away from ways that privatisation and marketization might already have effected fundamental changes in how punishment is administered.

The glamorous and banal dimensions of penal privatisation

In terms of privatisation in the field of punishment, the headline grabbing story is the one about the role of profitmaking companies, often global businesses, in the construction, ownership and operation of prisons. The practice is indeed growing. In England and Wales, PFI has paved the way for the private sector design, construction, financing, and management of several institutions. Once, Scotland was more hesitant to embrace the private sector, with the privately run Kilmarnock prison standing out as the exception to the rule of public management of convicted offenders. However, Scotland’s planning for future prisons reflects a much more positive attitude towards privatisation. The planned 700 cell Addiewell prison is a private venture, and once operational in 2009, will mean nearly a fifth of all Scottish inmates would be housed in private facilities; the strong likelihood that future prison projects will be tendered to the private sector would launch

Scotland right to the top of the world rankings of national prison systems with the highest proportion of inmates under private management (SCCCJ 2006).¹

This is a striking statistic, underlined by the fact that what is being privatised is an institution that exists fundamentally to deprive people of freedom. Media coverage, policy analysis, and the academic literature all proceed in the shadow of this insight. However, profitmaking prisons represent a false vanguard of penal commercialization because they represent a negligible amount and a comparatively recent development of all that is private about punishment. Overestimating their influence distracts us from seeing and considering more pertinent ways that privatisation, and possibly prisons for that matter (Sparks 1994), affect the nature of democratic government.

If all other forms of penal privatisation were demolished tomorrow, it is what we think of as the *public* prison system that would collapse. Offender management courses, food and health care, post-imprisonment throughcare services and technologies (like electronic monitoring and proprietary risk assessment tools), prison clothing, bed linens, telephone services, court transportation services, and architecture are areas that have made prisons big business long before PFI emerged as policy. Many commentators dismiss these forms of privatisation as lying at periphery of what counts as punishment, or ignoring them altogether, thus treating them as irrelevant to the big questions of accountability, legitimacy and democracy. The supply of file clerks, toilet paper and drug test kits and training may not hold out much allure to students of crime and justice, but it is for these products and services that there is a real market. Andrew Coyle (2004: 5) writes that, 'Canada, the northern neighbour of the US, as in other prison issues, has steadfastly refused to embrace the notion of privatisation.' He might be surprised to learn how Canada's office to develop business investment in government enthuses: 'CSC [the Correctional Service of Canada] buys a wide range of goods and services and the following is only a small sample of what we purchase: food products, health care products and health care services, clothing and linen, toiletries, and recreational products' (Business Access Canada 2007).

Other, 'soft' forms of privatisation include the widespread involvement of the voluntary sector in prison and prison-related operations. In some parts of America, entire probation systems are run by the Salvation Army. Charitable organisations are no less important for the UK's penal network. The common assumption that charities are entirely altruistic and so need not undergo the same level of scrutiny that applies to the profitmaking firms is too simplistic when government contracts provide such a substantial proportion of income that they might not survive without them (Armstrong 2002, Smith and Lipsky 1993). By excluding them from the analysis, we are prevented from seeing that far from being a quintessentially public activity, prisons may actually be an exemplar of devolved governance in which the state is doing more steering than rowing and public services are,

¹ Further evidence of Scotland's enthusiasm for market models is on show in plans to redevelop Low Moss Prison via a tendering process which would require the Scottish Prison Service itself to bid for the project alongside private vendors. Compare this to the United States, where the private prison population consistently hovers around only five percent of the total number of adults in prison throughout the nation (Harrison and Beck 2006).

and long have been, delivered through complex and multi-layered arrangements of public and private interactions.

These banal aspects of privatisation deserve a place at the centre of attention. Only then might we be able to understand why and to what effect a prison operator like Kalyx (formerly United Kingdom Detention Services) is a wholly owned subsidiary of Sodexo Alliance, a global catering and hospitality corporation, rather than the other way around. If there is concern about the erosion of punishment as a public activity, we should be as interested in the privately supplied goods and services on which public prisons are reliant as we are about private prisons, which account for an exceedingly small percentage of all prisoners in the world. Private prisons may well become the norm for future generations, and I am not suggesting that they should fall off the radar of scholarship entirely. Rather, I want to suggest that the significance of the relatively limited number of private prisons in our midst today is not as harbingers of an apocalyptic *future*, but as only one of a number of factors that has already affected the *present* – in how public prisons are operated, in how criminal justice is defined, in how public servants understand their role.

A case study in systemic privatisation

The case study presented here provides an example of a thoroughly privatised market for justice services, but one which has received almost no attention in the literature. The commonwealth of Massachusetts has long used a contracting system for operating juvenile justice placements, but it is a case that has held little interest for the field partly because of a preoccupation with adult offenders where deprivation of liberty as a penal purpose is more clear cut, and partly because Massachusetts limits participation in the juvenile market to nonprofit organisations.² It nevertheless provides a rare example of a jurisdiction that has attempted a complete conversion from public to private operations. In the early 1970s under radical leadership, the state shut down all of its juvenile training schools, thus effectively deinstitutionalising its entire committed population of around a thousand young people.³ The data on which the following discussion is based covers the period when the market for juvenile services first emerged through the early part of this century (i.e. from 1981 to early 2005), and was collected between 2001 and 2005 from publicly available documents and records with some additional detail and clarification provided through interviews. (The methodology is fully described in Armstrong (2006).)

The Department of Youth Services (DYS) is the Massachusetts agency responsible for the care of young people who have been adjudicated delinquent, and also oversees detention of youths awaiting adjudication on offences ranging from the less serious to the

² Elsewhere, I have suggested that it is the introduction of the contracting relationship rather than the profitmaking status of the contractor that forms the fulcrum of the debate about privatisation (Armstrong 2002, 2006). For the purposes of this article, we can bracket that analysis in order to proceed to an overview of the characteristics of this market.

³ The American state of Massachusetts, the capital of which is Boston, has a total population of around 6.3 million. In early 2007 it held a caseload of around 2,100 young people committed to its care after being adjudicated delinquent (the number of young people detained on remand while their cases are being adjudicated adds another 300 or so).

very worst cases of rape and murder. DYS manages a population of around 2,600 young offenders and detainees, on an annual budget of approximately USD130 million. About two-thirds of beds are privately operated, down from a high of nearly 80% private beds in the early 1980s. Private providers in this market operate services for all security levels and are not confined to the 'lighter' end of the market, i.e. programmes for minimum security youths.

Competition

When markets work well they bring benefits such as cost reduction, service innovation, and responsiveness through competition. Vendors who offer unwanted services or charge too much for needed ones will be driven out of the marketplace, while market participants that respond imaginatively to requests for service will gain an advantage by distinguishing themselves from their competitors. Fully realising these market efficiencies requires the optimal conditions of a large and balanced number of buyers and sellers. In addition to the previously noted difficulty of defining exactly what it is that is being bought when one contracts for penal services, whatever these are there is no ambiguity about the significant costs and constraints in the management of involuntarily confined populations. Providing secure housing involves the substantial costs of major insurance policies, property acquisition and development, security equipment, highly trained personnel, legal advice, and mastering exhaustive procurement rules. Hence, like other places where contracting in criminal justice has been tried, the number of potential bidders in the Massachusetts market for juvenile services is limited.

A few examples illustrate less than ideal competitive conditions. Of 62 contracts for core programme services in place on January 2005, nine of the contract competitions had lured only a single bidder, and a further 24 competitions involved only two bidders.⁴ That means that more than half of all contracts were awarded under conditions of limited or no competition. The money involved is not insignificant: these 33 contracts together were worth over USD82 million. And during this period, whenever a bidder who was already a DYS contractor went up against a bidder who was not on a contract at the time of the competition, the former *always* prevailed in winning the contract. This preference for vendors with pre-existing market share has a historical dimension as well: of the top ten residential contractors⁵ in 1998, seven of these were also in the top ten in 1981.⁶ The top ten contractors also operated about 80% of all private placements in 1998, and continue to exert a dominant influence today. This suggests that the biggest hurdle is getting into the market in the first place. Once a vendor has gained an initial foothold, it will not be easily dislodged. There is evidence that the consistent market dominance of a handful of

⁴ Services being tendered included a range from community-based non-residential programmes all the way through to high security detention and treatment services delivered in locked facilities.

⁵ Measured by number of beds operated. 'Residential services' covers all forms of care in the juvenile system where the young person is not housed at home or in foster care, from high security institutions through detention programmes, to residential group care.

⁶ One of the top ten contractors from the earlier period in fact was acquired by another contractor which made both the 1981 and the 1998 top ten, so in effect, *eight* of those in the top ten in 1981 were among the top ten in 1998.

contractors over the 1980s and 1990s rose to the level of regional monopolies at various points in time. For example, during the mid-1980s in two of the five state regions into which DYS divided its operations all contracts for secure treatment services were held by a single contractor; in another region, a third contractor held 80% of all residential contracts.

Management of the market

These inefficiencies of limited competition might be ameliorated through rigorous market regulation and contract monitoring. This entails several prerequisites: that the public agency is a sophisticated contract manager; that it has the capacity to determine a fair price for services it needs (and that it knows what these needs are); that goals are readily converted into contractual benchmarks; that contract breaches can and will be acted upon swiftly. Aside from the empirical evidence showing that these conditions are rarely achieved in practice (U.S. General Accounting Office 1999), there is an internal conceptual incoherence in the argument that bureaucracies should be replaced by markets because the former are slow to act, non-entrepreneurial, and generally wasteful, but that government agencies – that is, the failed bureaucracies that needed replacing – will be agile and savvy consumers and regulators of these markets.

Compared with other cases documented in the literature, Massachusetts is not an especially inexperienced market regulator. In fact, it has one of the more sophisticated and thorough procurement systems of U.S. state governments, and the DYS staff responsible for implementing it are highly professional and have long-term experience and training. Despite this, there have been no contract revocations or major fines levied by the DYS in the past couple decades, a period in which an investigation by the state auditor of one of the DYS's major contractors concluded that the vendor had made over USD13 million in 'in unallowable and highly questionable' payments from a nonprofit arm to a for profit related organisation (Armstrong 2006: 205).

Why has it been so difficult to manage the market for effectiveness and accountability? The answer is not a simple one and is partly dependent on the particular details and dynamics of the case. But there are also aspects of this story that are generally applicable. For one thing, the decision to privatise services here, as in many other places, was not accompanied by much investment in contract monitoring; in the beginning of the contracted system, there was no contract management unit at all. Investment in this function continues to be relatively low. Oversight of vendor activity partly occurs through a 'self-monitoring' programme. Self-monitoring begins in the setting of performance indicators, which establish measurable criteria by which contractor conduct can be evaluated. The use of performance measures in Massachusetts certainly reflects a widespread trend of American and British public administration. Performance measures not only transform open-ended social goals into quantified notions of compliance, but also limit areas of liability by construing activities into their narrowest possible meaning.

Consider the genesis of a contract for a secure residential programme for youth who had violated conditions of probation:

- an overall DYS mission to ‘protect the public and prevent crime...through...chang[ing] the behavior of youth in our care,’ guided development of....
- a programme goal to ‘provide for the acquisition of pro-social skills by program residents,’ which is to be measured by....
- A contractual performance measure requiring proof that ‘90% of residents whose individual service plans require participation in violence reduction and Skillstreaming groups receive the group sessions within one week of intake’ (DYS 2000: 21).

We see here how an aspirational interest in the content and impact of offender treatment has been whittled down to a paper trail exercise to document the timings of programme attendance. This trajectory from visionary mission to quantified target will be familiar to anyone working in contemporary justice agencies. Inadequately supported to pursue active contract management (for example via frequent observation of operations, regular meetings with provider staff, flexible allowances for modifications of practice over the course of a contract, and staff development), public managers instead compile and publish statistics on compliance, accumulate progress and annual reports from providers, and generate year-to-year budget comparisons on programme costs in order to assess efficiency. These in turn, provide the basis for the agency’s own annual reports (and forward looking business plans) and its strategy of accountability to superior departments and the public.

Performance measures, benchmarks, targets, and their ilk introduce a statistical, future-focused discourse that actually turns the New Public Management slogan on its head: rather than more steering and less rowing, the mechanisms for monitoring rowing activities are affecting where it is possible to steer. Privatisation, conveyed here as a method of contractual governance (Crawford 2003), becomes important as one of several techniques that speed the managerialisation of public agencies along a course that seems to diverge from the one leading to old-fashioned penal aims like rehabilitation or even retribution. Thus the quite reasonable sounding assumption that the state makes markets where it wants to fails to appreciate, on the one hand, that the benefits of the market – efficiency, innovation, flexibility cannot be ordered into existence via a process of privatisation. And, on the other hand, such an assumption presumes a unilateral relationship between the state and private sectors leaving us unprepared to consider how private activities re-shape public ones at the level of discourse and consciousness. The transformation taking place in marketized penal realms is not that punishment has been commodified, but that bureaucracies have become marketized.

Marketization versus markets in punishment

In Massachusetts, privatisation has neither provided a compelling case to expand the contractual governance of punishment more generally, nor demonstrated the dangers of attaching a profit incentive (in this particular case, an income incentive) to institutionalisation. There certainly was evidence that the providers to the state proposed new programme models, and this may have had the consequence of increasing demand

for their services (and thereby widening or thinning nets), displaying a kind of penal entrepreneurialism (Feeley 2002). But adult and juvenile penal populations have been growing at least as rapidly, if not more so, in publicly-run systems.

So has privatisation changed anything? One of its main effects has been to bring an additional stakeholder, the private sector, into the field of all those interested in management of young offenders. Linking this new stakeholder into operations via a contractual relationship opens up this as a mode of communicating its distinctive organisational culture to the public sector and thereby influencing how the public sector goes about its 'business'. Thus in spite of the failure of real markets to materialise, a market *style* has become predominant. We need more research that tracks this process in other fields and jurisdictions in order to build up a sense of its wider implications for punishment in late modernity.

Let us now return briefly to the title of this piece. The question is intentionally slippery in its choice of the word 'good'. In the current climate such simple, morality-focused words feel out of place, and this provides one answer: markets are good at directing our anxieties into moral debates in which calls for greater accountability lead to more transparency and more information about compliance, but less certainty that what we are doing is right.

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