

# PRIVATIZATION AND THE LAW AND ECONOMICS OF POLITICAL ADVOCACY

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*A common argument against privatization is that private providers, motivated by self-interest, will advocate changes in substantive policy. In this Article, Professor Volokh evaluates 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 incarceration.*

*This “political influence” argument applies at least as well to public provision: Government agencies, too, lobby for changes in substantive law. In the prison industry, for instance, it is unclear whether private firms advocate incarceration to any significant extent, but public guard unions are known to do so actively.*

*Moreover, adding the “extra voice” of the private sector will not necessarily increase either the amount of pro-incarceration advocacy or its effectiveness. Prison privatization may well reduce the political power of the pro-incarceration forces: Because advocacy is a “public good” for the industry, as the number of independent actors increases, the largest actor’s advocacy decreases (since it no longer captures the full benefit of its advocacy) and the smaller actors free-ride off the largest actor’s contribution. Under some plausible assumptions, privatization decreases advocacy, and under different plausible assumptions, the net effect of privatization on advocacy is ambiguous.*

*The argument that prison privatization distorts criminal law by fostering pro-incarceration advocacy is thus unconvincing without a fuller explanation of the mechanics of advocacy. The use of the political influence argument in other privatization contexts may also be*

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*theoretically unsound, to the extent it does not consider whether privatization reduces preexisting levels of public sector advocacy.*

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## I. INTRODUCTION

Over 90 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.”<sup>1</sup> According

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<sup>1</sup> *In re Billings*, 298 P. 1071, 1094 (Cal. 1930) (quoting a 1916 article by an “odious anarchist”); *see also, e.g.*, GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 141 (2004) (“Socialists maintained that war was a capitalist tool contrived by industrialists to boost armament sales”); *id.* at 180 & 598 n.80 (Postmaster General announced in 1917 that newspapers could not say “that this Government is the tool of . . . munitions makers”); NIALL FERGUSON, *THE PITY OF WAR* 32–33 (1999) (arms industry would benefit from war, and Alfred Hugenberg, director of the Krupp armaments company, made a pro-war statement).

to Stefan Zweig, the war began only when “newspapers in the pay of the arms manufacturers began to whip up sentiment against Serbia.”<sup>2</sup> After the war, that accusation morphed into the charge that arms makers were self-interestedly obstructing peace efforts.<sup>3</sup> Today, an opponent of U.S. military policy characterizes defense contractor CACI International Inc.,<sup>4</sup> whose chairman speaks publicly of the “heinous[ness],” “fanatical horror,” and “barbarism” of terrorism,<sup>5</sup> 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.”<sup>6</sup>

This theme—that private contractors use their influence to advocate not just privatization but also, insidiously, changes in the substantive law—sweeps more broadly than defense contractors.

- 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.”<sup>7</sup>
- 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.<sup>8</sup>

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<sup>2</sup> Andrew Cockburn, *The Great War*, WASH. MONTHLY, Jan./Feb. 2000. *But see* FERGUSON, *supra* note 1, at 215–16 (European press opinion, in Germany, Austria-Hungary, and Britain, was not particularly pro-war when the war began).

<sup>3</sup> *See Report of the Special Committee on Investigation of the Munitions Industry*, Senate, 74th Cong., 2d Sess., at 4–10 (Feb. 24, 1936) (the Nye Commission report, charging that the munitions industry opposes peace and disarmament efforts); *cf.* Dwight D. Eisenhower, *Farewell Radio and Television Address to the American People, in 1960–1961 PUB. PAPERS* ¶421, at 1035, 1038 (Jan. 17, 1961) (“In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.”).

<sup>4</sup> *See* CACI Int’l Inc., *CACI: Ever Vigilant*, <http://www.caci.com> (last visited Sept. 27, 2006).

<sup>5</sup> Speech by Dr. J.P. (Jack) London, Chairman, President, and CEO of CACI International Inc, on accepting the AUSA John W. Dixon Medal, Washington, D.C., Oct. 8, 2003, [http://www.caci.com/speeches/jpl\\_AUSA\\_10-8-03\\_speech.shtml](http://www.caci.com/speeches/jpl_AUSA_10-8-03_speech.shtml) (last visited Sept. 27, 2006).

<sup>6</sup> 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) (“private military companies could have an interest in seeing violence and turmoil perpetuated to drum up business for their services”); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 952 (2004); NORMAN SOLOMON, *WAR MADE EASY: HOW PRESIDENTS AND PUNDITS KEEP SPINNING US TO DEATH* 113–15 (2005) (linking government-friendly coverage of Iraq war with media ownership by weapons manufacturers). For a view from the very far left, *see* Anthony Arnove, *Pro-War Propaganda Machine*, SOCIALIST WORKER, Mar. 21, 2003, at 6.

<sup>7</sup> Eric Schlosser, *The Prison-Industrial Complex*, ATL. MONTHLY, Dec. 1998, at 51, 64; *see also* text accompanying notes 16–24 *infra* and sources cited in note 23 *infra*.

<sup>8</sup> *See* Franck Vindevogel, *Private Security and Urban Crime Mitigation: A Bid for BIDs*, 5 CRIM. JUST. 233, 244–45 (2005).

- A toll road developer in Colorado has lobbied for statutory changes to preempt county authority to set toll rates,<sup>9</sup> 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.<sup>10</sup>
- 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. New London*.<sup>11</sup>
- And some environmental groups,<sup>12</sup> which benefit from fines available under environmental citizen suit provisions,<sup>13</sup> fight for the continued vitality of those same statutes.<sup>14</sup>

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

Private prisons are a useful case study: First, because they are a growth industry, having progressed from humble beginnings in the late '70s and early '80s to now house about one in sixteen inmates nationwide;<sup>15</sup> and second, because the political influence argument against prison privatization is fairly common.<sup>16</sup>

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<sup>9</sup> See Colleen Slevin, *Senate Panel Kills Bill for "Super Slab" Toll Road*, AP ALERT—POLITICAL, Mar. 23, 2005.

<sup>10</sup> See Dan Genz, *Texas Court Nominee Challenges Possible TTC Builder's Campaign Contributions*, WACO TRIB., Oct. 3, 2006.

<sup>11</sup> 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) (last visited Oct. 21, 2006) (justifying the practice of eminent domain, post-*Kelo*, to the Connecticut General Assembly's Planning and Development Committee, see <http://www.cga.ct.gov/2005/PDdata/chr/2005PD-00728-R001400-CHR.htm>).

<sup>12</sup> See, e.g., As You Sow, *As You Sow: Planting Seeds for Social Change*, <http://www.asyousow.org/> (last visited Oct. 9, 2006).

<sup>13</sup> See Off. of the Att'y Gen., State of Cal., Dep't of Just., *Proposition 65 Settlement Report 2005*, [http://caag.state.ca.us/prop65/pdfs/Alpert\\_Report2005a.pdf](http://caag.state.ca.us/prop65/pdfs/Alpert_Report2005a.pdf) (last visited Oct. 9, 2006) (listing As You Sow as a major recipient of Prop. 65 settlement monies); see generally Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 351–54 (1990); *id.* at 356 (describing typical settlements of citizen suits, which include "above-cost attorneys' fees" and payment for environmental projects by the defendant).

<sup>14</sup> See As You Sow, *Proposition 65 and State Rights Under Attack*, SEEDS OF CHANGE—E-NEWS, Summer 2006, [http://www.asyousow.org/news/AYS\\_eneWS06Q3.html](http://www.asyousow.org/news/AYS_eneWS06Q3.html) (last visited Oct. 9, 2006).

<sup>15</sup> On the humble beginnings, see DOUGLAS McDONALD ET AL., *ABT ASSOCS. INC., PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE* 4–5 (1998). On the cur-  
(continued next page)

Sharon Dolovich writes, in a recent *Duke Law Journal* article, 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”<sup>17</sup>—and she suggests that it may well be<sup>18</sup>—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.”<sup>19</sup>

David Shichor, a prominent contributor to the prison privatization literature, opposes prison privatization<sup>20</sup> in part because:

Through political lobbying, PACs, campaign contributions, and the provision of perks to politicians (as industrial and business corporations do), 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.<sup>21</sup>

And Brigitte 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

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rent extent, see BUR. OF JUST. STATS., U.S. DEP’T OF JUST., BULLETIN: PRISONERS IN 2004, at 6 tbl.7.

<sup>16</sup> In focusing on this argument, I do not cover arguments based on cost and quality comparisons, arguments based on accountability concerns, or any other arguments in the debate. For arguments about cost and quality, see, e.g., BUR. OF JUST. ASSIST., U.S. DEP’T OF JUST., EMERGING ISSUES ON PRIVATIZED PRISONS 38 (2001) (“no data” or “definitive research evidence” supports the hypotheses of significant cost and quality differences between public and private prisons); *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1875–79 (2002) (private prisons do well in cost and quality comparisons); Judith Greene, *Bailing Out Private Jails*, AM. PROSPECT, Sept. 10, 2001, at 23 (sharply criticizing the performance of private prisons); Oliver Hart et al., *The Proper Scope of Government: Theory and an Application to Prisons*, 112 Q.J. ECON. 1127, 1147–54 (1997) (private prisons may perform poorly). For arguments about accountability, see, e.g., 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, 533–41 (2005); *Developments*, *supra* note 16, at 1879–86; Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1319, 1343 (2003); Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J. L. REFORM 249 (1995); Note, David N. Wecht, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815 (1987).

<sup>17</sup> Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 542 (2005).

<sup>18</sup> Dolovich, *supra* note 17, at 523–30.

<sup>19</sup> Dolovich, *supra* note 17, at 542–43.

<sup>20</sup> DAVID SHICHOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS 256 (1995).

<sup>21</sup> SHICHOR, *supra* note 20, at 236.

financial interest[] in increasing rates of imprisonment.<sup>22</sup> This is only a small sample of the literature.<sup>23</sup> For a sample of the art, see Figure 1.<sup>24</sup>

I assume, for purposes of this Article, that the foundation of this critique is correct, and that economically self-interested pro-incarceration advocacy is undesirable.<sup>25</sup> However, it is unclear how this critique supports an argument against privatization.

First, the public sector—chiefly in the form of public prison guards’ unions—is already a major self-interested pro-incarceration political force. The most active prison guards’ 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 prison guards’ unions in other states have endorsed candidates for their tough-on-crime positions. Private firms would thus enter, and partly displace some of the actors in, a heavily populated field.<sup>26</sup>

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<sup>22</sup> BRIGETTE SARABI & EDWIN BENDER, *THE PRISON PAYOFF: THE ROLE OF POLITICS AND PRIVATE PRISONS IN THE INCARCERATION BOOM* vii, 21 (W. States Ctr. & W. Prison Project, 2000).

<sup>23</sup> In addition to the sources cited in notes 7, 17, 20, and 22 *supra*, see MICHAEL A. HALLETT, *PRIVATE PRISONS IN AMERICA* 141 (2006); BYRON EUGENE PRICE, *MERCHANDIZING PRISONERS: WHO REALLY PAYS FOR PRISON PRIVATIZATION?* 74–75, 131–36 (2006); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 204 (2001); KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 101 (1997) (referring to influence on policy abroad); *THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION* 87–88, 92–93 (Steven R. Donziger ed., 1996); MARTIN P. SELLERS, *THE HISTORY AND POLITICS OF PRIVATE PRISONS: A COMPARATIVE ANALYSIS* 51 (1993); CHARLES H. LOGAN, *PRIVATE PRISONS: CONS AND PROS* 159 (1990); CHARLES R. RING, *CONTRACTING FOR THE OPERATION OF PRIVATE PRISONS: PROS AND CONS* 12 (1987); 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; *REPORT RELATIVE TO PRISONS FOR PROFIT* 9, 56–58 (Comm. of Mass., Leg. Res. Council, House No. 6225, July 31, 1986); Rachel E. Barkow, *Our Federal System of Sentencing*, 58 *STAN. L. REV.* 119, 125 (2005); Rachel E. Barkow, *Administering Crime*, 52 *UCLA L. REV.* 715, 729 (2005); Geiza Vargas-Vargas, *White Investment in Black Bondage*, 27 *W. NEW ENG. L. REV.* 41, 75 n.209 (2005); Freeman, *supra* note 16, at 1349 n.249; Daniel L. Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 1, 45 (2003); Michael Janus, *Bars on the Iron Triangle: Public Policy Issues in the Privatization of Corrections*, in *PRIVATIZING CORRECTIONAL INSTITUTIONS* 73, 83 (Gary W. Bowman, Simon Hakim & Paul Seidenstat eds., 1993); Amanda George, *The State Tries an Escape*, *LEGAL SERV. BULL.*, Apr. 1989, at 53, 54, 57 (Australia); E.S. Savas, *Privatization and Prisons*, 40 *VAND. L. REV.* 889, 898 (1987); Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 69 *JUDICATURE* 325, 331 (1986); Harmon L. Wray, Jr., *Cells for Sale*, *S. CHANGES*, Sept. 8, 1986, at 3, 6; Edward Sagarin & Jess Maghan, *Should States Opt for Private Prisons?: No*, *HARTFORD COURANT*, Jan. 12, 1986, at E1; Patrick Anderson et al., *Private Corrections: Feast or Fiasco?*, *PRISON J.*, Autumn-Winter 1985, at 35; Kenneth F. Schoen, *Private Prison Operators*, *N.Y. TIMES*, Mar. 28, 1985, at A31.

<sup>24</sup> Matt Wuerker, in *Prisons and Sentencing* (by Group One Artists), <http://www.newsart.com/zz/zz16.htm> (last visited Sept. 21, 2006); Dolovich, *supra* note 17, at 529 n.363.

<sup>25</sup> *But see* text accompanying notes 122–131 *infra*.

<sup>26</sup> There are actors other than public or private prisons that could be in favor of incarceration for self-interested motives. Prosecutors are known to be a strong pro-incarceration lobby, but other conceivable actors include rural communities that could be sites for prisons, *see* Dolovich, *supra* note 17, at 536–42; Barkow, *Administering Crime*, *supra* note 23, at 729; Drake Bennett & Robert

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FIGURE 1



Second, there is little reason to believe that reducing privatization, or eliminating it altogether, would reduce the amount of self-interested pro-incarceration advocacy. In fact, it is even possible that reducing privatization would *increase* such advocacy. The intuition for this perhaps surprising result<sup>27</sup> comes from the economic theory of public goods and collective action.

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Kuttner, *Crime and Redemption*, AM. PROSPECT, Dec. 2003, at 36 (“reverse NIMBY-ism” of communities surrounding prisons), 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. 174, 174, 177 (1992). I focus mostly on prison system actors because privatization potentially displaces public sector prison provision, while its effect, if any, on prosecutors or rural communities is unclear.

<sup>27</sup> As far as I can tell, this argument has never been made before in the privatization literature, except for two instances of speculation that, in the prison context, “[c]ompetition within the industry can serve to dilute, rather than concentrate, this political power.” LOGAN, *supra* note 23, at 158; see also *Developments*, *supra* note 16, at 1873.

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.<sup>28</sup> 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 the least 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, which still provides the lion's share of prison services and whose members benefit from wages significantly higher than those of their private-sector counterparts; the smaller actors are the private prison firms, which not only have small shares of the industry but also do not make abnormally high profits.

Privatization, by breaking up the government's monopoly of prison provision and awarding part of the industry to private firms, can thus reduce the industry's advocacy by exacerbating its collective action problem. The public sector unions will spend less because under privatization they experience less of the benefits of their advocacy, while the private firms will tend to free-ride off the public sector's advocacy. This collective action problem is unfortunate for the prison industry, but fortunate for the critics of self-interested pro-incarceration advocacy—a happy, usually unintended side effect of privatization. To coin a phrase, prison providers under privatization are led by an invisible hand to promote an end which was no part of their intention.

Of course, there is more than one type of advocacy: Prison providers are interested not only in incarceration policy but also in privatization policy (the private sector wants more, the public sector wants less), and privatization-related expenditures are not pure public goods. Some forms of advocacy may be precisely targeted—a contribution to the Three Strikes initiative is unambiguously pro-incarceration. But other forms are ambiguous—a contribution to a legislator's reelection campaign does not come with reasons attached. Contributors may thus be

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<sup>28</sup> It may seem funny to use the term "public good" in this context, since I have just assumed that such advocacy is *bad* for the *public*. Nonetheless, that's the terminology. The universe of prison providers, while fairly narrow, is the relevant "public" for purposes of public goods analysis. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 15 (1965) ("*[T]he achievement of any common goal or the satisfaction of any common interest means that a public or collective good has been provided for that group. The very fact that a goal or purpose is common to a group means that no one in the group is excluded from the benefit or satisfaction brought about by its achievement.*" (footnote omitted)); *id.* at 15 n.22 ("There is no necessity that a public good to one group in a society is necessarily in the interest of the society as a whole."). A private prison firm's pro-incarceration advocacy helps every other private prison firm; private firms' pro-incarceration advocacy helps the public prison guard unions; and the unions' pro-incarceration advocacy helps the private firms.

paying for access, which, once their candidate is elected, they use to advocate the policies of their choice. This story I tell here is consistent with that framework: The collective action problem is merely delayed until after the election, when favors are demanded. Once the candidate is elected and his contributors can come into his office and ask for favors, why should they spend any political capital asking for a vote on Three Strikes (a public good) when they can spend it instead trying to get (or kill) a prison contract?

The net effect of privatization on political advocacy doesn't have to be negative. I present a model below where privatization does decrease political advocacy; but I also present other models where the effect is ambiguous—for instance, where privatization might increase private sector advocacy but decrease public sector advocacy. If those models 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) increases in private sector advocacy would outweigh the decrease in public sector advocacy. Either this argument against prison privatization is false, or it is correct but under-theorized.

The analysis here provides a roadmap for analyzing the military and other contexts: Because privatization can affect the incentives of both the private and public sectors to wield political influence, one shouldn't conclude that privatization distorts substantive policy unless one can tell a story, based on a plausible view of government agents' behavior, that privatization doesn't decrease public sector advocacy in an offsetting way. In the end each industry has its own somewhat idiosyncratic twists, so I do not make a strong claim about the use of the argument outside of prisons. 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 II gives a factual overview of pro-incarceration advocacy among prison providers. Part III sets forth a public goods model where privatization decreases pro-incarceration advocacy. Part IV discusses how privatization may have an ambiguous effect on pro-incarceration advocacy. Part V concludes. The casual reader may skip sections II.A to II.B and III.D to III.F.

## II. POLITICAL ADVOCACY IN THE PRISON INDUSTRY

I use the term “advocate” 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 a shorthand to include the criminalization of a greater range of behavior, more active enforcement, greater reliance on imprisonment, longer sentences, and less parole; thus, endorsing a politician for being “tough on crime,” donating money to a “Three Strikes” initiative,<sup>29</sup> or testifying in favor of a “truth in sentencing” law<sup>30</sup> all count as advocating incarceration.

This Part summarizes what we know about prison industry advocacy. In brief, there is hard evidence of public prison guard union pro-incarceration advocacy (though a small part of prison guard union advocacy also cuts the other way). There is also hard evidence that most Departments of Corrections advocate the other way—in favor of alternatives to incarceration. But there is virtually no hard evidence of private sector pro-incarceration advocacy—maybe they do it, maybe they don’t. To sort out whether they do or not, we need to know whether we should expect such behavior of the private sector; and for that, we need theory. That theory comes in the next Part. The reader who is familiar with the empirics may skip sections A and B of this Part.

### A. *The Public Sector*

#### 1. *Employees: The 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.”<sup>31</sup>

Whether this was true even back then is questionable. At one time, corrections officials were politically aligned with liberal groups,<sup>32</sup> but by the 1970s correctional unions were already advocating incarceration:

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<sup>29</sup> Three Strikes laws are types of sentence-enhancing laws. California’s, 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).

<sup>30</sup> “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 §20102, Pub. L. No. 103-322, 108 Stat. 1796.

<sup>31</sup> Savas, *supra* note 23, at 898.

<sup>32</sup> See RICHARD BERK ET AL., A MEASURE OF JUSTICE: AN EMPIRICAL STUDY OF CHANGES IN THE CALIFORNIA PENAL CODE, 1955–1971, at 158 (1977) (“[C]orrections officials (prison personnel, administrators, and the Adult Authority) are difficult to place in a single camp. In the 1950s, the  
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In Massachusetts, Rhode Island, Pennsylvania, Ohio, and other jurisdictions, employee organization lobbying, publicity, lawsuits, and job actions pertaining to safety and security have often been attempts to counteract progressive correctional programs such as community-based facilities and to reestablish an emphasis on custody. Another feature of this campaign is that correctional unions have advocated longer prison terms and more stringent parole policies—for example, an increase in the minimum term an inmate must serve before he can become eligible for parole.<sup>33</sup>

This activism continues today. The most active public prison guards' union in advocating incarceration is the California Correctional Peace Officers Association (CCPOA).<sup>34</sup> It gives twice as much in political contributions as the California Teachers Association, though it's only one-tenth the size,<sup>35</sup> only the California Medical Association gives more in the state.<sup>36</sup> CCPOA spends over \$7.5 million per year on political activities.<sup>37</sup> It contributes to political parties, political events, and debates; it gives money directly to candidates; it hires lobbyists, public relations firms, and polling groups.<sup>38</sup> Through its PACs, it contributed at least \$100,000 to the California Democratic Party in 1998, \$175,000 to the California Republican Party in 1998, and \$946,400 to Gray Davis's 1998 gubernatorial campaign.<sup>39</sup> These 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's just as plausible that the contributions were made 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

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California correctional system was the darling of liberal reformers. By the late 1960s it had become a favorite whipping boy. Further, when in the late 1960s corrections officials tried to align with the law enforcement lobby, their earlier liberal ties caused uneasiness among potential allies. Even many conservative legislators could not be effectively recruited, since the corrections system appalled the fiscally orthodox by combining enormous budgets with demonstrated ineffectiveness.”)

<sup>33</sup> JOHN M. WYNNE, JR., PRISON EMPLOYEE UNIONISM: THE IMPACT ON CORRECTIONAL ADMINISTRATION AND PROGRAMS 217 (Nat'l Inst. of Law Enforcement & Crim. Just., Jan. 1978).

<sup>34</sup> See ADRIAN T. MOORE, PRIVATE PRISONS: QUALITY CORRECTIONS AT A LOWER COST 33–34 (Reason Pub. Pol'y Inst., Pol'y Study No. 240, 1998) (comparing correctional officers' \$1.5 million donations to Pete Wilson alone during his 1990 and 1994 California gubernatorial bids with private prison companies' \$150,000 total political contributions nationwide in 1995–96); James Bovard, *Pork Barrel Prisons: Who Profits from the War on Drugs?*, PLAYBOY, Feb. 1, 2002, at 48; Marx Arax & Mark Gladstone, *State Thwarted Brutality Probe at Corcoran Prison, Investigators Say*, L.A. TIMES, July 5, 1998, at A1 (“[State investigators] had watched the [prison guard] union under president Novey ride the prison construction wave, growing from a kind of social club into one of the more powerful forces in the state, with a rank-and-file 27,000 strong.”).

<sup>35</sup> 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 with Dan Pens & Paul Wright eds., 1998).

<sup>36</sup> See Pens, *supra* note 35, at 135.

<sup>37</sup> See Ctr. on Juv. & Crim. Just., *Political Power of the CCPOA*, [http://www.cjcj.org/cpp/political\\_power.php](http://www.cjcj.org/cpp/political_power.php) (last visited Sept. 15, 2006).

<sup>38</sup> See CJCJ, *supra* note 35.

<sup>39</sup> See CJCJ, *supra* note 35.

1994, making it the second-largest contributor.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> And 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.<sup>43</sup> And in 2005, it killed Gov. 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."<sup>44</sup>

Some union members explicitly recognize their self-interested motives. Dan Pens 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.<sup>45</sup>

Note, though, that the CCPOA is not uniformly pro-incarceration in all cases. In May 2006, to "give the system a breather" in the face of severe overcrowding, it endorsed a plan to allow "a select group of inmates convicted of nonviolent crimes who had behaved while behind bars" to get out of prison 30 days early.<sup>46</sup>

This isn't just a story about California. Though corrections officers' unions outside of California are nowhere near as active as the CCPOA,<sup>47</sup>

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<sup>40</sup> See Pens, *supra* note 35, at 137; CJ CJ, *supra* note 37.

<sup>41</sup> CJ CJ, *supra* note 37; Drug Pol'y Alliance, *California Proposition 36: The Substance Abuse and Crime Prevention Act of 2000*, <http://www.prop36.org> (last visited Nov. 3, 2006).

<sup>42</sup> See CJ CJ, *supra* note 37; Crime Victims United of Cal., *CVUC*, <http://www.crimevictimsunited.com/> (last visited Oct. 2, 2006); Doris Tate Crime Victims Bur., <http://www.doristate.com> (last visited Oct. 2, 2006).

<sup>43</sup> See Jenifer Warren, *Guards Union Is Giving Prisons Chief Hard Time*, L.A. TIMES, Nov. 15, 2004, at 1; Inst. of Gov't'l Stud., *Proposition 36: Limitation on "Three-Strikes" Law*, <http://www.igs.berkeley.edu/library/htThreeStrikesProp66.htm> (Dec. 2004) (last visited Nov. 3, 2006).

<sup>44</sup> Ed Mendel, *Governor May Act on Crisis in Prisons*, SAN DIEGO UNION-TRIB., Sept. 2, 2006, at A1 (ads against this initiative funded by prison guard union).

<sup>45</sup> Pens, *supra* note 35, at 137.

<sup>46</sup> Mark Martin, *Call for New Prisons, Shorter Sentences to Ease Crowding*, S.F. CHRON., May 24, 2006, at A1 ("give the system a breather" is a quote from CCPOA executive Chuck Alexander).

<sup>47</sup> Cf. Schlosser, *supra* note 7, at 55 ("in California . . . the correctional trends of the past two decades have converged and reached extremes").

many of them do advocate incarceration.<sup>48</sup> (As I note below, private prison firms spend money on advocacy nationwide, though they also spend more in California.<sup>49</sup>) The correctional wing of Florida's police-and-corrections union, the Police Benevolent Association,<sup>50</sup> has endorsed gubernatorial candidates for being tough on crime.<sup>51</sup> The Michigan corrections officers' union has opposed boot camp proposals.<sup>52</sup> The New York City corrections officers' union endorsed Gov. Pataki because he ended parole for violent felons.<sup>53</sup> The New York State corrections officers' union is said to have stymied efforts to overhaul mandatory minimum sentences.<sup>54</sup> And the Rhode Island corrections officers' union endorsed a senatorial candidate for his prosecutorial record and position in favor of tougher criminal penalties.<sup>55</sup> (I am not considering the more usual demands for tougher penalties for criminals who commit crimes while in prison—a particularly salient issue for prison guards, who are often victims of such crimes.<sup>56</sup>)

Some correctional officers' unions are combined with police unions, for instance in Florida<sup>57</sup> or New Jersey.<sup>58</sup> So except where (as in Flor-

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<sup>48</sup> See LOGAN, *supra* note 23, at 157; WYNNE, *supra* note 33, at 186, 195, 227; Bennett & Kuttner, *supra* note 26, at 36.

<sup>49</sup> Cf. text accompanying note 93 *infra* (private prison contributions also much higher in California).

<sup>50</sup> See Fla. Police Benevolent Ass'n, Inc., *Florida PBA Chapters: State Correctional Officers*, <http://www.flpba.org/chapters/sco.htm> (last visited Sept. 21, 2006).

<sup>51</sup> See Aaron Deslatte, *Crist Courts Voters with Positive Focus*, FLA. TODAY, Aug. 16, 2006, at A1 ("The Florida PBA endorsed [attorney general and gubernatorial candidate Charlie] Crist last year, and the attorney general has been specific about one proposal they like: Crist's 'anti-murder' bill that would put violent criminals who violate probation back in jail until a judge determines whether they pose a threat."); 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, <http://www.flpba.org/pdf/corrections%20review/Corrections%20Review%2004-2006.pdf> ("As you are well aware, it . . . has been a priority during my term to keep violent offenders off our streets and to support legislation to get tough on probation violators in order to protect and defend our communities."); David Wasson, *Bush Lands Police Union Support*, TAMPA TRIB., July 12, 2002, at 9 (PBA endorsed Gov. Jeb Bush, crediting him "with spearheading legislative efforts to crack down on violent crime with tough new laws requiring enhanced prison sentences for repeat offenders").

<sup>52</sup> See Rob Gurwitt, *The Growing Clout of Prison Guards*, GOVERNING, Dec. 1991, at 37.

<sup>53</sup> Kathleen Murphy, *Labor Helps Pataki's Re-election Battle*, STATELINE.ORG, May 20, 2002, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&contentId=14817> (last visited Sept. 21, 2006).

<sup>54</sup> See Julie Falk, *Fiscal Lockdown Part II: Will State Budget Cuts Weaken the Prison-Industrial Complex—Or Strengthen It?*, DOLLARS & SENSE, Nov. 1, 2003, at 32.

<sup>55</sup> Whitehouse '06, *Rhode Island Brotherhood of Correctional Officers Endorses Whitehouse*, press release, Aug. 25, 2006 (last visited Sept. 21, 2006).

<sup>56</sup> 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> (last visited Sept. 21, 2006).

<sup>57</sup> See Fla. PBA, *supra* note 51.

<sup>58</sup> See N.J. State Policemen's Benevolent Ass'n, *We Walk NJ's Toughest Beat!: New Jersey State P.B.A. Corrections Officers' Committee*, <http://www.njspba.com/co.htm> (last visited Sept. 20, 2006); Michael Pollak, *New Jersey Daily Briefing: Police Back Whitman*, N.Y. TIMES, Oct. 1, 1997 (president of NJSPBA praised Gov. Whitman for, among other things, signing a Three Strikes law).

ida<sup>59</sup>) the corrections officers' wing of the union has been politically involved in its own right, any of these unions' pro-incarceration advocacy can't be traced directly to public prison guards.

In some states, corrections officers are also affiliated with AFSCME, the general public employees' union;<sup>60</sup> AFSCME Corrections United represents 60,000 corrections officers and 23,000 corrections employees nationwide.<sup>61</sup> The evidence that AFSCME has advocated incarceration is weak;<sup>62</sup> in fact, it has advocated alternatives to incarceration,<sup>63</sup> and the national organization recently came out in favor of legalizing medical marijuana.<sup>64</sup> The Oklahoma union has also advocated alternatives to incarceration.<sup>65</sup>

<sup>59</sup> See note 51 *supra*.

<sup>60</sup> 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 Am. Fed. of State, County & Muni. Employees, *Jobs We Do: ACU Local Web Sites*, <http://www.afscme.org/workers/5846.cfm> (last visited Nov. 3, 2006).

<sup>61</sup> See Am. Fed. of State, County & Muni. Employees, *Jobs We Do: Corrections*, <http://www.afscme.org/workers/67.cfm> (last visited Nov. 3, 2006).

<sup>62</sup> Wynne argues that AFSCME has explicitly opposed deinstitutionalization and community-based programs in the past, see WYNNE, *supra* note 33, at 228, but the evidence for this is an argument against deinstitutionalization of patients from mental hospitals, not regular criminals from prisons, see HENRY SANTIESTEVEAN, 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, Pub. L. No. 103-322, 108 Stat. 1796. See Am. Fed. of State, County & Muni. Employees, *AFSCME Corrections United: 10 Years of Federal Legislative Advocacy*, <http://www.afscme.org/workers/6590.cfm> (last visited Sept. 15, 2006). The Act includes new bans on the manufacture, possession, and transfer of certain guns and by certain categories of people, e.g., §§ 110102–110103, 110201, 110401; new white-collar crime categories, including telemarketing fraud, e.g., § 250002; enhanced penalties for certain drug crimes, e.g., § 90102, sex crimes, e.g., §§ 40111, 160001, gun crimes, e.g., §§ 110501, immigration crimes, § 130001, violent and drug trafficking crimes committed by gang members, § 150001, and other crimes, e.g., §§ 320101–320106; a federal Three Strikes provision, § 70001; victims' rights provisions, § 230101; and grants for states that adopt "truth-in-sentencing" laws, § 20102. Though civil libertarians at the time opposed it because of its emphasis on incarceration, see, e.g., Laura Murphy Lee, *The Senate's Misconceived Crime Bill*, WASH. TIMES, Apr. 14, 1994, at A19 (position of ACLU), 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, § 20101, correctional officer training provisions, § 20418, and enhanced penalties for offenses against correctional officers, e.g., § 60015. See AFSCME, *supra*.

<sup>63</sup> See *Connecticut Hires Firm to Teach Nonviolent Offenders*, CORRECTIONAL EDUC. BULL., Jan. 19, 2004 ("Officials with the union that represents the state's corrections officers said they agree with the need for more alternative-to-incarceration, drug treatment and vocational training programs for inmates, but they believe the centers should be in the communities where offenders live. 'When you're trying to help people make the transition to a more stable life, it's probably best not to put them on prison grounds,' said [an AFSCME spokesman]."); Dwight F. Blint, *Union Faults Sending More Inmates out of State*, HARTFORD COURANT, May 31, 2003, at B5 (Connecticut prison guard union advocates drug treatment, mental health programs, and alternative incarceration for minor offenders).

<sup>64</sup> See Am. Fed. of State, County & Muni. Employees, *Supporting the Legalization of Medical Marijuana*, Res. No. 93, 37th Annual Int'l Convention, Aug. 7–11, 2006, <http://www.afscme.org/members/11367.cfm> (last visited Nov. 3, 2006). AFSCME is also involved with the National Council of State Legislatures, see Nat'l Council of State Legis., *NCSL Foundation for State Legislatures: Board of Directors 2006–2007*, <http://www.ncsl.org/public/FSL/FSLBoard.htm> (last visited Nov. 6,

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## 2. Employers: The Departments of Corrections

The interests of Departments of Corrections are not always aligned with those of corrections officers and their unions.<sup>66</sup> DOCs advocate incarceration a lot less than corrections officers' unions (Florida is one exception<sup>67</sup>), and in fact it's common to see Departments of Corrections officials advocate alternatives to incarceration.<sup>68</sup>

The Alabama DOC commissioner has advocated sentencing reform, community correction programs, and other measures to "reverse the prison population growth trend."<sup>69</sup> 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 reincarcerated "before the ink is dry on their parole papers."<sup>70</sup> 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.<sup>71</sup> The Montana DOC director candidly tells crowds that "[p]rison isn't working," and his department considers measures to re-

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2006), which does not take a notably pro-incarceration line. See, e.g., Nat'l Council of State Legis., *2006–2007 Policies for the Jurisdiction of the: Law and Criminal Justice Committee*, <http://www.ncsl.org/statefed/LAWANDJ.HTM> (last visited Nov. 6, 2006) (critiquing the "competition to escalate punishments and build more prisons" resulting from "Federal jurisdiction over crimes also covered under state law").

<sup>65</sup> Ray Carter, *Union Leader Says State Prisons Understaffed*, J. RECORD LEGIS. REPORT, Aug. 7, 2003 (executive director of public employees union in Oklahoma called for reductions in inmate population if additional funding couldn't be provided to prisons).

<sup>66</sup> See, e.g., Richard Ferruccio, *Presidents Message*, <http://www.ri-brotherhood.com/pdfs/MessageFromThePresident.pdf> (n.d.) (last visited Oct. 20, 2006) (Rhode Island union president calls the DOC and the State "our enemies" in the context of labor-related disputes); Richard Ferruccio, *Presidents Message*, <http://www.ri-brotherhood.com/pdfs/MessageFromThePresident2.pdf> (n.d.) (last visited Oct. 20, 2006) (same).

<sup>67</sup> Florida is one exception. See Fla. Dep't of Corrections, *Governor's Budget Recommendations Help Department of Corrections Fight Crime*, press release, Jan. 16, 2001, <http://www.dc.state.fl.us/secretary/press/2001/budget5.html> (last visited Sept. 11, 2006) (praising Gov. Jeb Bush for "support[ing] Florida's tough-on-crime public protection initiatives" like the "10-20-Life" law and the "Three Strikes Felony Offender Act").

<sup>68</sup> See, e.g., WYNNE, *supra* note 33, at 194–95 ("While the administration is likely to lobby for increased funding for community programs, employee organizations are likely to lobby *against* community programs . . ."); Bennett & Kuttner, *supra* note 26, at 36 (many states are exploring alternatives to incarceration due to budget problems, and Marc Mauer of The Sentencing Project says "corrections people" aren't "advocating dramatically stepped-up punishment policy"); see also Jeanne S. Woodford, *Hard Time: Why I Quit the Prison System*, L.A. TIMES, Aug. 6, 2006, at M1 (former acting head of California corrections department advocates rehabilitation, criticizes "tough-on-crime bromides," and accuses prison guards' union of stymieing reform).

<sup>69</sup> Richard F. Allen, *Inflow of Inmates Must Be Slowed*, MONTGOMERY ADVERTISER, July 17, 2006, at 5.

<sup>70</sup> Rex W. Huppke, *Rehabilitation or Recycling?*, CHI. TRIB., Mar. 12, 2006, at 1.

<sup>71</sup> See Memo from Patricia L. Caruso, director of the Michigan DOC, to Sen. Alan L. Cropsy & Rep. Jack Brandenburg, Feb. 1, 2006, [http://www.michigan.gov/documents/02-01-06\\_-\\_Section\\_401\\_149197\\_7.pdf](http://www.michigan.gov/documents/02-01-06_-_Section_401_149197_7.pdf), at 2.

duce the prison population and increase community corrections.<sup>72</sup> The New Mexico Corrections Department is focusing on using early parole to control its prison population.<sup>73</sup> The North Carolina DOC advocates redirecting non-trafficking drug users from prison to “intermediate programs.”<sup>74</sup> Ohio corrections officials complain about the high costs of mandatory minimum sentences.<sup>75</sup> The Pennsylvania DOC is implementing programs “aimed at diverting less serious offenders from prison” to “free-up prison space needed for more serious offenders.”<sup>76</sup> The Washington DOC secretary “is a big believer in work-release programs.”<sup>77</sup> And the Wisconsin DOC secretary advocates focusing on “prevention and treatment in addition to effective law enforcement.”<sup>78</sup>

### B. *The Private Sector*

Private firms are generally thought to act in their self-interest.<sup>79</sup> 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, sensibly explains, under the heading “Risks related to our business and industry,” that “[p]ublic resistance

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<sup>72</sup> Ted Sullivan, *Bozeman’s Re-Entry Center Dedicated*, BOZEMAN CHRON., reprinted in CORRECTIONAL SIGNPOST (Mont. Dep’t of Corrections), Spring 2006, <http://www.cor.state.mt.us/News/Newsletters/Spring2006.pdf>, at 3 (last visited Sept. 27, 2006) (“[‘]Prison isn’t working,’ [Montana DOC director Bill] Slaughter told the crowd. ‘This re-entry program is what we’re all about.’”); see Bob Anez, *Advisory Council Studies Array of Offender Services*, CORRECTIONAL SIGNPOST, supra, at 9 (Montana DOC Communications Director writes that “[t]he goal of the study [of community services available for offenders] is to affect the prison population by reducing the number of offenders entering prison and the number of offenders returning to prison by providing more individualized community-based programs and services for offenders.”); Kelly Speer, *Community Corrections Grows to Meet Demand*, CORRECTIONAL SIGNPOST, Winter 2006, <http://www.cor.state.mt.us/News/Newsletters/Winter2006Signpost.pdf>, at 7 (last visited Sept. 27, 2006) (Corrections Manager discusses how, “[i]n response to the increase of offenders over the past two years and to help relieve prison overcrowding, the Community Corrections Division will increase program capacity by 278 beds over the next biennium”).

<sup>73</sup> N.M. Legis. Council Serv., *Information Bulletin No. 6*, <http://legis.state.nm.us/LCS/lcsdocs/148229.pdf> (Aug. 25, 2003) (last visited Oct. 20, 2006).

<sup>74</sup> Robert Lee Guy, N.C. Dep’t of Correction, *Evolution of Community Corrections* (2d ed. Oct. 2003), a PowerPoint presentation available at <http://www.doc.state.nc.us/dcc/index.htm> (last visited Nov. 3, 2006) (“Fact: Re-directing non-violent (property offenders) and high need (non-trafficking drug users) to intermediate programs reserves expensive prison beds for violent non-conforming offenders!” (gratuitous capitalization and emphasis removed)).

<sup>75</sup> See Debra Jasper, *Prison Expenses Straining Budget*, CINC. ENQ., May 28, 2001, at 1A.

<sup>76</sup> Jeffrey A. Beard, *Admissions, Population, & Releases*, <http://www.cor.state.pa.us/stats/lib/stats/population.pdf>, at 5 (Pa. Dep’t of Corrections, Feb. 2006).

<sup>77</sup> *Prison Officials Want to Expand Work-Release*, SEATTLE TIMES, Aug. 8, 2006.

<sup>78</sup> *Gov. Doyle Announces \$616,000 for Alcohol and Drug Treatment, Diversion*, US STATE NEWS, Sept. 19, 2006; see also Falk, supra note 54, at 32 (Bill Clausius of the Wisconsin Department of Corrections attributes focus on alternative sentencing to budget pressure on state agencies).

<sup>79</sup> I apologize below for my sloppy treatment of firms. See note 156 *infra*.

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.”<sup>80</sup> 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.<sup>81</sup>

Or, in the words of the Corrections Corporation of America (CCA), the largest private prison firm:

Further [revenue] growth is expected to come from increased focus and resources by the Department of Homeland Security dedicated to illegal immigration, stricter sentencing guidelines, longer prison sentences and prison terms for juvenile offenders, as well as the growing demographic of the 18 to 24 year-old at-risk population. Males between 18 and 24 years of age have demonstrated the highest propensity for criminal behavior and the highest rates of arrest, conviction, and incarceration.<sup>82</sup>

Similarly, from GEO:

The demand for our facilities and services could be adversely affected by the relaxation of criminal enforcement efforts, leniency in conviction and sentencing practices, or through the decriminalization of certain activities that are currently proscribed by criminal laws.<sup>83</sup>

Since private prison firms recognize the value to them of privatization and incarceration, it is natural to suspect that they may advocate these policies in the public square. No one denies that private prison firms engage in active political advocacy.<sup>84</sup> Their advocacy mainly takes the forms of contributions to politicians and participation in the Ameri-

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<sup>80</sup> GEO Group, Inc., Form 10-K at 23 (Mar. 10, 2004).

<sup>81</sup> GEO Group, *supra* note 80, at 22.

<sup>82</sup> Vargas-Vargas, *supra* note 23, at 76 (quoting Corrections Corp. of Am., Form 10-K at 16 (Mar. 12, 2004)).

<sup>83</sup> GEO Group, Inc., Form S-4 at 28 (Nov. 10, 2003); *see also* Vargas-Vargas, *supra* note 23, at 76 n.210 (citing Wackenhut Corrections Corp., Form S-3 at 12 (Jan. 20, 2004)). A CCA executive also said the 1994 federal crime bill was “very favorable to us,” *see* Paulette Thomas, *Making Crime Pay: Triangle of Interests Creates Infrastructure to Fight Lawlessness*, WALL ST. J., May 12, 1994, at A1 (CCA’s CFO said the federal crime bill is “very favorable to us”), but this is ambiguous evidence that private prison firms support incarceration—AFSCME, which represents prison guards in many states, actually *lobbied* in favor of that crime bill, but it attributed its support to the bill’s grants for correctional facilities, correctional officer training provisions, and enhanced penalties for offenses against correctional officers. *See* note 60 *infra*.

<sup>84</sup> *See, e.g.*, SARABI & BENDER, *supra* note 22, at 7–18 (giving examples of private firms’ expenditures on lobbyists, and counting 645 campaign contributions to 361 candidates (both Democratic and Republican) in 25 states totaling over \$540,000 in 1998 (comparable to NRA state-level giving), mostly in California).

can Legislative Exchange Council,<sup>85</sup> though they also testify before Congress and present arguments in the popular press. And no one denies that they advocate privatization.<sup>86</sup> That they advocate incarceration to any significant extent, though, is less clear.

Most of the evidence of advocacy specifically in favor of incarceration has been fairly speculative.<sup>87</sup> Some writers state that it doesn't happen,<sup>88</sup> while others who are concerned about the prospect hedge their statements with terms like "may" or "are likely to."<sup>89</sup> (Several authors draw a connection between supposed private prison pro-incarceration advocacy today and manipulation of incarceration to provide a steady supply of workers under the convict leasing system in the 19th century.<sup>90</sup>

<sup>85</sup> See Am. Legis. Exch. Council, *American Legislative Exchange Council*, <http://www.alec.org>.

<sup>86</sup> See, e.g., JOEL DYER, *THE PERPETUAL PRISON MACHINE: HOW AMERICA PROFITS FROM CRIME* 147–48 (2000) (Tennessee); SARABI & BENDER, *supra* note 22, at 7 (Tennessee); *id.* at 13–14 (Alaska); Greene, *supra* note 16, at 23 (warden of CCA's Tulsa Jail directed addiction-treatment manager "to make a 'sales pitch' to local judges, urging them to sentence offenders to a treatment program in the jail even though the program had been eviscerated in order to cut operating expenses"); Shaheen Borna, *Free Enterprise Goes to Prison*, 26 BRIT. J. CRIMINOLOGY 321, 332 (1986).

<sup>87</sup> Dolovich, *supra* note 17, 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).

<sup>88</sup> See RICHARD W. HARDING, *PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY* 94–97 (1997); Aman, *supra* note 16, at 544; Douglas C. McDonald, *Public Imprisonment by Private Means*, 34 BRIT. J. CRIMINOLOGY 29, 43 (1994).

<sup>89</sup> See, e.g., HALLETT, *supra* note 23, at 141 ("some fear that this new incentive for incarceration puts the traditional criminological goal of reducing crime in danger"); SHICHOR, *supra* note 20, at 235–36 ("[i]t is feasible" that private prison firms will lobby, and these firms "are likely to" support greater imprisonment); Dolovich, *supra* note 17, at 525 (analogy of U.S. defense industry suggests that "even if private prison providers have had no need as yet to pressure state legislators . . . these conditions are subject to change"); Low, *supra* note 23, at 45 ("Detractors fear that the next logical step for private prison firms is to lobby for harsher laws and longer sentences."); White, *supra* note 87, at 142 ("there is certainly structural potential for this type of conduct—but given current rates of growth in incarceration, such lobbying is for the moment quite unnecessary anyway"); Savas, *supra* note 23, at 898 ("opponents . . . claim that private prison firms will be inclined to lobby for more and longer prison sentences"); Schoen, *supra* note 23, at A31 ("Private operators whose growth depends upon an expanding prison population may push for ever harsher sentences."). But not all commentators hedge their statements. See Barkow, *Our Federal System*, *supra* note 23, at 125 ("[P]rivate prison companies . . . often lobby for longer terms because they stand to benefit from the construction of additional prisons."); Barkow, *Administering Crime*, *supra* note 23, at 729 (similar); Vargas-Vargas, *supra* note 23, at 75 n.209 ("[t]he private prison lobby is . . . powerful . . . in influencing draconian social policies"); George, *supra* note 23, at 54, 57 ("Th[e] company's vested financial interest in law and order issues will make them a lobby group for increased sentences as both 'victims' and a profit-seeking business. . . . Private prisons will and have tried to impact on government policy through lobbying just as any business concern does."). Freeman, *supra* note 16, at 1349 n.249, cites *Developments*, *supra* note 16, 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."

<sup>90</sup> See SARABI & BENDER, *supra* note 22, at 11; 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 87, at 128–29; Wray, *supra* note 23, at 5. For the 19th-century history, see DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 40 (1996); MATTHEW  
(continued next page)

But this colorful historical example is no substitute for actual evidence of contemporary pro-incarceration advocacy.<sup>91</sup>)

As with the corrections officers' unions' contributions above,<sup>92</sup> some commentators note private prison firms' advocacy but don't distinguish between pro-privatization and pro-incarceration advocacy. For instance, a key piece of evidence in Sarabi and Bender's argument that private prison firms fuel the "incarceration boom" is the total amount of their contributions to state candidates: In 1998, these totaled \$285,996 in California, between \$10,000 and \$50,275 in eight other states, between \$1000 and \$10,000 in 11 other states, and under \$1000 in five other states.<sup>93</sup>

This blanket approach is a mistake, unless one is attacking all political involvement by private prison firms. Generalized contributions to candidates, unlike contributions to single-issue voter initiative campaigns (or contributions to single-issue groups, or public statements in support of particular targeted policies or bills, or endorsements of public officials that explain why that official is worth supporting), are mute. Some of the industry's contributions to politicians may be multi-purpose, for privatization as well as for incarceration. Merely advocating increased privatization raises quite different concerns than advocating changes in the criminal law itself,<sup>94</sup> and certainly does not implicate the same sorts of "legitimacy" values.<sup>95</sup>

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MANCINI, ONE DIES, GET ANOTHER 24, 41 (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).

<sup>91</sup> How much 19th-century convict leasing tells us about present-day privatization is disputed. See LOGAN, *supra* note 23, at 216 ("most of this took place at a time when corruption was also much more prevalent in government-run prisons and in the criminal justice system generally"); *id.* at 217-18 (most historical comparisons fail to compare private prisons to public prisons of the same period, and even if they did, "it is questionable whether such differences would still apply in the socially, politically, and (most important) *legally* different world that exists today"); Dolovich, *supra* note 17, at 454 (historical experience, predating modern protections, isn't directly applicable, but "introduce[s] certain themes . . . that are still relevant today"); Rosky, *supra* note 6, at 912-13 (analogies to convict leasing ignore "the rise of modern, liberal administrative states"); Alexis M. Durham III, *The Future of Correctional Privatization: Lessons from the Past*, in PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* note 23, at 33, 45-48 ("some of the problems experienced in nineteenth-century initiatives were the product of unique historical circumstances" and "most of the important court cases establishing inmate rights were decided only in the last thirty years," but nonetheless "it seems likely that at least some of the errors committed [then] will recur in modern efforts"); see also LOGAN, *supra*, at 215 (state-run prisons also leased convicts, so the association of convict leasing abuses with privatization is erroneous).

<sup>92</sup> See notes 35-39 *supra*.

<sup>93</sup> See SARABI & BENDER, *supra* note 22, at 10.

<sup>94</sup> Even mere pro-privatization advocacy may raise *some* concerns. See Hart et al., *supra* note 16, at 1144-47 (corruption and patronage may skew the decision whether to privatize in a pro- or anti-privatization direction).

<sup>95</sup> See Rosky, *supra* note 6, at 955 (decisions to use government force "are some of the most elemental decisions of equality, freedom, and justice"); Dolovich, *supra* note 17, at 523-24 ("The  
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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), 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 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.<sup>96</sup>

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]educ[e] 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."<sup>97</sup> (He made similar recommendations to Ohio in the *Cincinnati Post*.<sup>98</sup>) 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.<sup>99</sup> (He noted

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private prison industry, to increase the demand for its services, exerts whatever pressure it can to encourage state legislators to privatize state prisons. This effort does not necessarily suggest a parsimony concern, for the fact of privatization alone need not affect the number of individuals who are actually incarcerated or the length of prison sentences." The "parsimony" reference is to the "principle of parsimony," a basic condition of "liberal legitimacy" according to Dolovich, *supra* note 17, at 465–69. Some commentators' failure to draw the distinction that Dolovich draws between privatization and pro-incarceration advocacy (and to draw the similar distinction between pro-funding and pro-incarceration lobbying) leads to some interesting blindspots. See note 121 *infra*.

<sup>96</sup> Personal communication, Paul Doucette, Executive Director, Ass'n of Private Correctional & Treatment Orgs., Oct. 13, 2006. 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, *More Reader Views: On Illegals, Aviation Fees, Private Prisons, WSU Gesture*, WICHITA EAGLE, Apr. 1, 2006, at A2 (letter to the editor).

<sup>97</sup> *The Open Forum—Letters to the Editor*, DENVER POST, Oct. 2, 2006, at B7 (letter of Paul Doucette).

<sup>98</sup> See Paul Doucette, *Ohio Prisons Are Full*, CINC. POST, Aug. 8, 2006, at A9.

<sup>99</sup> See *Letters to the Editor*, FT. PIERCE TRIB., May 10, 2006, at A6 (letter to the editor) ("Our organization believes that most juvenile offenders are best served in the juvenile justice system, and that it is essential for Florida to invest the funds necessary to ensure that these young people receive the treatment, education, and rehabilitative services needed to get them off the road to adult

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that APCTO's member companies mostly provide adult incarceration services, though some would like to expand their juvenile programs.<sup>100</sup>)

Even if one ignores the industry association's official statement as self-serving and dismisses their anti-incarceration positions as PR, at most 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 doesn't. Perhaps the hard evidence is missing because the industry covers its tracks; or perhaps the hard evidence is missing because there is no there there. To decide which of these scenarios is more plausible, we need a theory that would explain whether or not we would expect the industry to lobby for incarceration.

In addition to contributing to politicians, private prison firms participate in the American Legislative Exchange Council, an influential conservative organization that drafts model legislation.<sup>101</sup> Both CCA and the former Wackenhut Corp. (now called the GEO Group<sup>102</sup>) have been members of ALEC (and they and Sodexo Marriott, a major CCA stockholder, are prominent corporate funders of ALEC<sup>103</sup>), and, over the years, at least CCA has participated in (and two of its executives have chaired) ALEC's Criminal Justice Task Force,<sup>104</sup> which drafted, among other things, a "Truth in Sentencing Act" and a "Habitual Violent Offender Incarceration Act."<sup>105</sup>

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prison."); Paul Doucette, *Private Providers Agree: Bolster Juvenile Spending*, PALM BEACH POST, Apr. 25, 2006, at 15A (same); Paul Doucette, *In Juvenile Justice, Florida Gets Just What It Pays for*, PALM BEACH POST, Oct. 1, 2006, at 4E ("if Florida doesn't invest in trying to help these youngsters, it soon will need to build more adult prisons").

<sup>100</sup> See *Letters to the Editor*, *supra* note 99, at A6 ("The bulk of our membership is made up of companies that provide adult incarceration services"); Doucette, *In Juvenile Justice*, *supra* note 99, at 4E ("Several members of the Association of Private Correctional and Treatment Organizations provide juvenile justice services in Florida, and several more would like to, but the state's budget for juvenile justice discourages additional competitors.").

<sup>101</sup> See PRICE, *supra* note 23, at 74–75, 131–36; Dolovich, *supra* note 17, at 526–29; Silja J.A. Talvi, *Follow the Prison Money Trail*, IN THESE TIMES, Sept. 4, 2006.

<sup>102</sup> Wackenhut Corrections Corp. changed its name to The GEO Group, Inc. in November 2003 under the terms of a share purchase agreement with another company. See GEO Group, Inc., *Milestones*, <http://www.thegeogroupinc.com/milestones.asp> (last visited Oct. 4, 2006).

<sup>103</sup> See SARABI & BENDER, *supra* note 22, at 4 (citing *Inside ALEC* newsletter, vol. 1, no. 5, Sept. 1999).

<sup>104</sup> See Am. Legis. Exch. Council, *Criminal Justice Task Force*, <http://www.alec.org/task-forces/criminal-justice> (last visited Sept. 6, 2006) (Brad Wiggins of CCA presented at the Dec. 14, 2002 Task Force meeting); SARABI & BENDER, *supra* note 22, 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 17, at 528 & n.360. But Olsson states only that CCA was "[o]ne of the members of the task force that drafted the bill." (The task force that drafted the bill is the Criminal Justice Task Force. See ALEC, *supra*; Am. Legis. Exch. Council, *Criminal Justice Model Legislation*, <http://www.alec.org/6/criminal-justice.html> (last visited Sept. 20, 2006).) 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.

<sup>105</sup> See ALEC, *Criminal Justice Model Legislation*, *supra* note 104.

The inner workings of ALEC are hazy,<sup>106</sup> 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.<sup>107</sup> One presumes that private prison firms work within ALEC on privatization issues: ALEC’s Criminal Justice Task Force reports that prison privatization is one of its “major issues,”<sup>108</sup> the Task Force has a Subcommittee on Private Prisons<sup>109</sup> and has a model “Housing Out-of-State Prisoners in a Private Prison Act,”<sup>110</sup> and CCA is known to have talked to the Task Force on the subject.<sup>111</sup> But here, too, there is no hard evidence that they also work on sentencing or incarceration issues—participation in a multi-purpose organization is as “soft” evidence as generalized contributions to politicians. 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.<sup>112</sup> According to CCA,<sup>113</sup> the only CCA official to have ever publicly taken a stand on sentencing policies is J. Michael Quinlan, formerly Director of the Federal Bureau of Prisons and now a Senior Vice President of CCA,<sup>114</sup> who, after he joined CCA in 1993,<sup>115</sup> 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.”<sup>116</sup>

So far, I have found a single piece of evidence of arguable 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.<sup>117</sup> The main point of his testimony was to propose additional provisions (1) making clear that

<sup>106</sup> 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.

<sup>107</sup> Dolovich, *supra* note 17, at 529; see also Olsson, *supra* note 104.

<sup>108</sup> See SARABI & BENDER, *supra* note 22, at 4.

<sup>109</sup> See ALEC, *Criminal Justice Task Force*, *supra* note 104 (Dec. 11, 2003 Task Force meeting).

<sup>110</sup> See ALEC, *Criminal Justice Model Legislation*, *supra* note 104.

<sup>111</sup> See ALEC, *Criminal Justice Task Force*, *supra* note 104 (Brad Wiggins of CCA presented *Developments*, *supra* note 16, at the Dec. 14, 2002 Task Force meeting).

<sup>112</sup> Personal communication, Louise Gilchrist, Vice President of Marketing and Communications, Corrections Corp. of Am., Sept. 15, 2006 (see Corrections Corp. of Am., *About CCA*, <http://www.correctionscorp.com/officers.html> (last visited Sept. 15, 2006)); see also Corrections Corp. of Am., *The Corrections Industry: Myths vs. Reality in Private Corrections: The Truth Behind the Criticism*, <http://www.correctionscorp.com/myths.html> (last visited Sept. 18, 2006).

<sup>113</sup> Gilchrist interview, *supra* note 112.

<sup>114</sup> See Corrections Corp. of Am., *Why Do Business with CCA*, <http://www.correctionscorp.com/salesteam.html> (last visited Sept. 15, 2006).

<sup>115</sup> See CCA, *supra* note 114.

<sup>116</sup> Testimony of Michael Quinlan before the Subcommittee on Crime and Criminal Justice, House Judiciary Committee, Feb. 22, 1994, 1994 WL 214215 (F.D.C.H.).

<sup>117</sup> Testimony of Timothy P. Cole, Chairman, Wackenhut Corrections Corp., before the Senate Judiciary Committee, July 27, 1995, 1995 WL 449225 (F.D.C.H.).

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.”<sup>118</sup> During this testimony, he said the following:

- “Our proposed amendment . . . would help to assure that these grants 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.”<sup>119</sup>
- “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.”<sup>120</sup>

This isn’t great evidence—Cole was really only 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’ve found. Private prison firms may have made other statements and taken other public positions that are arguably pro-incarceration, but I haven’t found any, and to my knowledge, privatization critics have not brought them to light.<sup>121</sup>

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<sup>118</sup> Cole testimony, *supra* note 117.

<sup>119</sup> Cole testimony, *supra* note 117.

<sup>120</sup> Cole testimony, *supra* note 117, at Attachment 1.

<sup>121</sup> Interestingly, the 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”—only focusing on the generalized desire for funding. Ken Silverstein, *America’s Private Gulag*, in *THE CELLING OF AMERICA*, *supra* note 40, at 156, 159.

In short, based on the evidence we have, the most we can say about whether private prison firms advocate increased incarceration to any significant extent is that maybe they do and maybe they don't.

### C. *Is Pro-Incarceration Advocacy Bad?*

Of course, 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 the CCPOA, says he just wants to lock up scumbags,<sup>122</sup> perhaps we should take him at his word. The same goes when a Department of Justice official speaks of the need to fight “the scourge of child pornography,”<sup>123</sup> when CACI says terrorism is “heinous,”<sup>124</sup> when a leading environmental citizen-suit litigator argues against weakening the environmental laws whose monetary penalties fund its operations,<sup>125</sup> or when doctors who perform abortions oppose abortion restrictions.<sup>126</sup>

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 the overlap between their industry's interest and 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.<sup>127</sup>

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<sup>122</sup> See Dan Morain, *California's Profusion of Prisons*, L.A. TIMES, Oct. 16, 1994, at 1 (“Novey said his organization donates money ‘to change the system’ so career criminals are locked up for life, not to increase the number of guards. ‘There are scumbags out there,’ Novey said.”); Jenifer Warren, *When He Speaks, They Listen*, L.A. TIMES, Aug. 21, 2000, at 1 (similar).

<sup>123</sup> Testimony of Daniel P. Collins, Associate Deputy Attorney General, before the Subcommittee on Crime, Terrorism, and Homeland Security, House Judiciary Committee, Mar. 11, 2003, 2003 WL 1079511 (F.D.C.H.).

<sup>124</sup> See text accompanying notes 4–6 *supra*.

<sup>125</sup> See text accompanying notes 12–14 *supra*.

<sup>126</sup> See Nat'l Abortion Fed., *About NAF*, [http://www.prochoice.org/about\\_naf/index.html](http://www.prochoice.org/about_naf/index.html) (last visited Oct. 19, 2006) (“The National Abortion Federation (NAF) is the professional association of abortion providers in the United States and Canada. We believe that women should be trusted to make private medical decisions in consultation with their health care providers.”). For an accusation of self-interestedness, see Paul M. Weyrich, *Memos Might Reveal Profit Motive in Senate*, INSIGHT ON THE NEWS, Mar. 15, 2004, at 52 (“The abortion-rights lobby is just a front for something worse, which is the abortion-clinic lobby, represented by the National Abortion Federation. . . . [O]n average abortion clinics make \$1,000 for every abortion they perform.”).

<sup>127</sup> 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, for instance, in historians' debates over the social influences of the early 19th-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 AND SLAVERY* 169 (reprint 1994) (1944) (abolitionism served to destroy the West Indian monopoly). 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 David Brion Davis, *AHR Forum: Reflections on Abolitionism and Ideological Hegem-* (continued next page)

Nor is even nakedly self-interested pro-incarceration advocacy an obvious evil: From a procedural perspective, some argue that optimal criminal law should reflect all interests, including the benefit to the criminal of committing the crime;<sup>128</sup> and if this is right, prison providers' self-interest is also relevant. Moreover, some see lobbying as a means by which groups provide their views to decisionmakers and the public and thus enrich democratic debate.<sup>129</sup> Others may find it illegitimate, on democratic grounds, to even consider the substance of people's future political advocacy in deciding whether to privatize.<sup>130</sup>

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ony, 92 AM. HIST. REV. 797, 802 (1987) (British capitalists were deceiving themselves); see also John Ashworth, *AHR Forum: The Relationship Between Capitalism and Humanitarianism*, 92 AM. HIST. REV. 813, 815 (1987) ("false consciousness" is a better theory than "self-deception," since the capitalists may have been deceived by society, not by themselves). For an argument that the market discipline imposed by capitalism nurtured humanitarianism and abolitionism, see Thomas L. Haskell, *AHR Forum: 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* 495–97 (1942); Ashworth, *supra*, at 813 (Whig historians believed "waves of humanitarian sentiment came lapping onto the shores of Britain . . . as part of the divinely ordained scheme of things"); Howard Temperley, *Capitalism, Slavery and Ideology*, 75 PAST & PRESENT 94, 98 (1977) (citing REGINALD COUPLAND, *THE BRITISH ANTI-SLAVERY MOVEMENT* 111, 250–51 (1933)).

Or take a somewhat different context: There is a class of strategic games (similar to that in the model presented later in this Article) 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 sources cited *infra* note 135, 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).

<sup>128</sup> See 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. LIT. 45, 48 & n.12 (2000) (it is "conventional in the literature on enforcement" to include all people's utility in social welfare, including the criminal's). But see George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527 (1970) (illicit utility shouldn't count); Dolovich, *supra* note 17, at 515–16 (profit-making shouldn't count in determining optimal criminal law).

<sup>129</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 19–23 (1976) (importance of political expenditures for free expression); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 411 (2000) (Thomas, J., dissenting); *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961); LOGAN, *supra* note 23, at 159 ("We cannot prevent 'lobbying' (though it may not always be called that) by nonprofit organizations, government agencies, public employee unions, or commercial companies, any of whose agenda may or may not coincide with the public interest. However, allowing these groups to compete, both in the provision of a service and in the public formulation of policy for the provision of that service, is a better method of protecting the public interest than is granting a monopoly to one particular service provider. 'Pluralism' is what we call the condition in which the 'public interest' must be sorted out from among competing definitions and claims."); REPORT RELATIVE TO PRISONS FOR PROFIT, *supra* note 23, at 57 (lobbying is legitimate and "often promotes better informed decisions").

<sup>130</sup> I have defined "advocacy" broadly, so that it even includes, at one extreme, bribery. See text accompanying notes 29–30 *supra*. The arguments in the paragraph above, of course, may apply (continued next page)

And from a substantive perspective, if criminal policy should be judged by a substantive external standard—for instance, whether sentences are too long in an objective sense—one cannot object to pro-incarceration advocacy on criminal-law-specific grounds without first establishing that such advocacy would move criminal law in a substantively undesirable direction.<sup>131</sup>

Nonetheless, I will assume, for purposes of this Article, that economically self-interested pro-incarceration advocacy is undesirable. The interesting question, therefore, is what policies would reduce the amount, or effectiveness, of such advocacy.

### III. ADVOCACY AS A PUBLIC GOOD: ONE MODEL

In this Part and the next, I present a few models of how different actors in the prison system may react to privatization. (The technical version of these stories appears in Appendix A and the other appendices referenced there.) These models share the following features:

- First, pro-incarceration advocacy is a public good. Privatizing part of the prison industry therefore introduces a collective action problem: Unless everyone in the industry cooperates with each other, they will spend less on pro-incarceration advocacy because part of their expenditures will benefit their competitors.
- Second, I argue, private prison firms extract less benefit from the system than public prison guards' unions; therefore, even if all actors cooperate with each other, the total profit in the system is less than it would be under monopoly government provision. For these two reasons, the total amount of pro-incarceration advocacy may well decrease with privatization.

My models differ, though, in the following ways:

- In this Part, I also assume that the effectiveness of advocacy only depends on its total amount, regardless of who contributed the money. This assumption implies, as I will show, that the largest actor does all the advocacy and the smaller actors do none at all, instead free-riding totally off the largest actor's contributions.

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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) (“In terms of economic growth, the only thing worse than a society with a rigid, overcentralized, dishonest bureaucracy is one with a rigid, overcentralized, honest bureaucracy.”); Francis T. Lui, *An Equilibrium Queueing Model of Bribery*, 93 J. POL. ECON. 760, 761 (1985) (“It is often argued that bribes serve as ‘lubricants’ in an otherwise sluggish economy and improve its efficiency.”).

<sup>131</sup> See, e.g., LOGAN, *supra* note 23, at 154 (industry lobbying for longer sentences isn't necessarily negative because the public favors stiffer penalties).

- In the next Part, I present a model where I relax that assumption and allow the different sectors to have independent effects on the probability that pro-incarceration reforms are adopted. Under this more relaxed assumption, privatization does increase the private sector's pro-incarceration advocacy, but it also decreases the public sector's pro-incarceration advocacy. Whether the former effect outweighs the latter is unknown unless we can say something empirical about how effective at advocacy the different sectors are. I also discuss the effect of privatization when one takes into account that states that privatize are likely to have weaker unions; here, too, the effect of privatization is ambiguous. I dub these the "anything goes" models.

In these models, the common assumption that prison privatization will actually increase pro-incarceration advocacy turns out to be either false, or true but under-theorized.

In section A, I describe intuitively, with a few easy graphs, the collective action problem as it applies to the funding of public goods. In section B, I explore how the model might apply to the prison industry, with the help of a bit of data and some back-of-the-envelope calculations. Then I make some ancillary points: In section C, I discuss whether the model is realistic. In section D, I explain why I am focusing on private prison firms and public prison guards' unions—rather than private guards or public agencies—as the players in this game. In section E—since the precise effect of privatization depends on whether different actors in the prison system are acting independently or cooperating with each other—I discuss which form of cooperation is the most plausible. In section F, I explain how the model applies not only to advocacy that influences the probability that a given change in the law will occur but also to lobbying that affects the substance of the change in the law. In the next Part, I present the "anything goes" models.

#### A. *An Illustration of Free Riding*

When a good is private, everyone pays for, and enjoys, only his own consumption of the good. By contrast, in the classic model of public goods, everyone benefits from the total amount of the public good,<sup>132</sup> and

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<sup>132</sup> Compare William H. Oakland, *Theory of Public Goods*, in 2 HANDBOOK OF PUBLIC ECONOMICS 487 (Alan J. Auerbach & Martin Feldstein eds., 1987) (inequality 1a, expressing that, for a private good, the sum of all consumptions must not exceed total production), *with id.* at 486 (inequality 1, expressing that for a public good, no individual's consumption may exceed total production).

this amount is determined by the total amount of contribution.<sup>133</sup> If we benefit from our national defense, we benefit from the full amount, not from any chunk we may have paid for; we cannot be excluded from that 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 everyone who wants that candidate to win; and it is not too implausible to say, as an approximation, that his probability of winning just depends on how much money he raises and spends.

Suppose you are, as economists say, a rational, risk-neutral expected utility maximizer.<sup>134</sup> The validity of this assumption is disputed,<sup>135</sup> but suppose it is a reasonably good approximation of your behavior. 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 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.<sup>136</sup>

The benefit of this dollar is the value of the increased probability of getting your desired policy change.<sup>137</sup> It is reasonable to think that

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<sup>133</sup> See, e.g., ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 361 (1995); HAL R. VARIAN, MICROECONOMIC ANALYSIS 418 (3d ed. 1992); Oakland, *supra* note 132, at 488; Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387 (1954).

<sup>134</sup> See MAS-COLELL ET AL., *supra* note 133, at 168–94; VARIAN, *supra* note 133, at 172–81.

<sup>135</sup> The stylized assumptions of expected utility theory do not always hold. See MAS-COLELL ET AL., *supra* note 133, at 179–81 (discussing the Allais and Machina's paradoxes, examples of real-life behavior that violate expected utility theory); VARIAN, *supra* note 133, at 192–94 (discussing the Allais and Ellsberg paradoxes, which violate expected utility theory); Mark J. Machina, *Choice Under Uncertainty: Problems Solved and Unsolved*, J. ECON. PERSP., Summer 1987, at 121. The assumption of (materialistic) rational utility maximization has also come in for some criticism, in particular as it relates to the prediction below that actors will free-ride. 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); Marwell & Ames, *supra* note 127 (the title says it all: *Economists Free-Ride, Does Anyone Else?*).

<sup>136</sup> Some have questioned the assumption in the public choice literature that political choices are self-interested. See, e.g., 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). This model, however, only assumes that self-interested lobbying has *some* effect on outcomes.

<sup>137</sup> I assume here that the incarceration-policy game is the only game these actors are playing. This is not entirely realistic. For instance, the California prison guards' union gave massively to Proposition 184, the Three Strikes initiative in 1994, even though the proponents outspent the oppo-

(continued next page)

spending money on advocacy is subject to decreasing marginal returns, so each additional dollar gets you less and less benefit.<sup>138</sup> The cost of a dollar, on the other hand, is and remains \$1, no matter how many of them you spend. As long as the benefit of an advocacy dollar is greater than \$1, you continue spending; and you stop as soon as that benefit reaches \$1. You have now settled on the optimal<sup>139</sup> total amount of advocacy spending—say \$1 million.<sup>140</sup>

Figure 2 below illustrates the situation graphically. 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; and because a probability can't get any higher than 1, the curve is bounded above by the dashed line representing the total benefit of the policy. The

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nents by a factor of 48 and won with 72% of the vote. See Mike Davis, *Hell Factories in the Field: A Prison-Industrial Complex*, NATION, Feb. 20, 1995, at 229; *Tobacco Industry Power May Go Up in Smoke, Foes Say*, L.A. TIMES, Nov. 10, 1994, at 3. 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. (Public sector unions may not fear such a backlash because public provision is still considered the default mode of provision.)

<sup>138</sup> It is possible that the benefit of the extra dollar is not *always* decreasing. Specifically, the first dollar might be totally useless; there could be a threshold below which extra dollars are more and more beneficial and above which the benefit of an extra dollar tapers off. Then, instead of having a concave graph as in Figure 2 (which corresponds to a decreasing marginal graph in Figure 3), we would have an S-shaped graph (which would correspond to a hump-shaped marginal graph in Figure 4). See DENNIS C. MUELLER, PUBLIC CHOICE III, at 483 fig.20.1 (2003); cf. OLSON, *supra* note 28, at 22 (average cost curves have a U shape, which is another way of saying the same thing). This would not change the results significantly. The technical model, see text accompanying note 296 *infra*, allows for such a threshold. However, an assumption of decreasing marginal returns everywhere is also common in the literature. See Pecorino, *supra* note 178, at 654 (defining the level of a tariff as  $t(S)$ , where  $S$  is the sum of lobbying contributions from the industry, and assuming  $t' > 0$  and  $t'' < 0$ ); David P. Baron, *Service-Induced Campaign Contributions and the Electoral Equilibrium*, 104 Q.J. ECON. 45, 54 (1989) (assuming  $P(X_1, X_2)$ , the probability that candidate 1 wins the election as a function of campaign expenditures (which equal contributions)  $X_1$  by candidate 1 and  $X_2$  by candidate 2, to be continuously differentiable and strictly increasing and concave in  $X_1$  and strictly decreasing and convex in  $X_2$ ); David Austen-Smith, *Interest Groups, Campaign Contributions, and Probabilistic Voting*, 54 PUB. CHOICE 123, 128, 130, 135 (1987) (defining a function  $r(t, c)$ , the probability that a candidate wins the election given policy announcements  $t$  and campaign expenditures  $c = (c^A, c^B)$ , and noting, in the proof of Lemma 2, that “ $r(t, c)$  is strictly concave and increasing in  $c^A$ , and convex and decreasing in  $c^B$ ”)

<sup>139</sup> That is, optimal to yourself. I have already assumed for the purpose of this Article that the expenditure is not socially optimal. See text accompanying notes 25, 131 *supra*.

<sup>140</sup> This number and the other thresholds presented in this example are purely illustrative, but they happen to be approximately what you get if the effectiveness of advocacy expenditures is determined by a function  $p(e)$ —the probability that expenditures of \$ $e$  get you the desired policy change—equal to the square root of  $e/(e+10,000)$ , and the value of the policy change is \$200 million. Verifying that this function satisfies the technical assumptions below, see notes 282–285 *infra*, is left as an exercise to the reader. The numbers in the text are rounded to the nearest \$100,000; the more exact numbers are \$992,509.41 for a monopolist, \$699,620.10 for a 50% duopolist, \$308,757.73 for a 10% duopolist, and \$941,193.21 for a 90% duopolist. Thanks to Scientific Workplace for crunching the numbers for me.

cost of advocacy is represented by the straight line below: Each dollar of advocacy costs \$1. Your problem is to maximize the vertical distance between the expected benefit curve and the cost line. In the figure, that maximum distance occurs at a spending level of \$1 million.

FIGURE 2

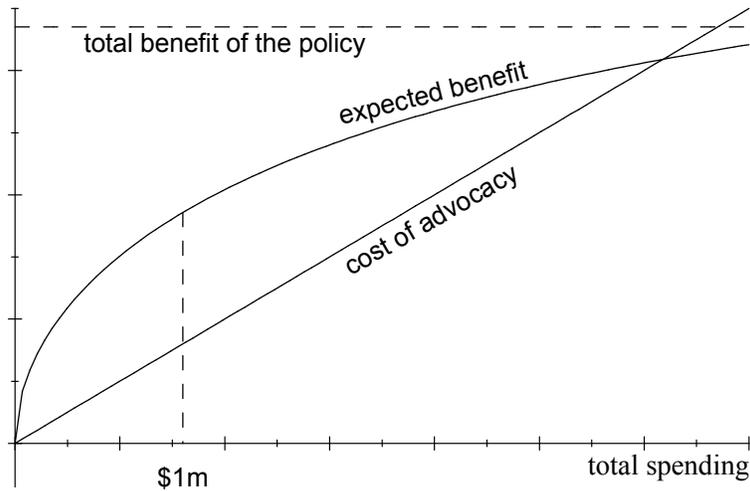
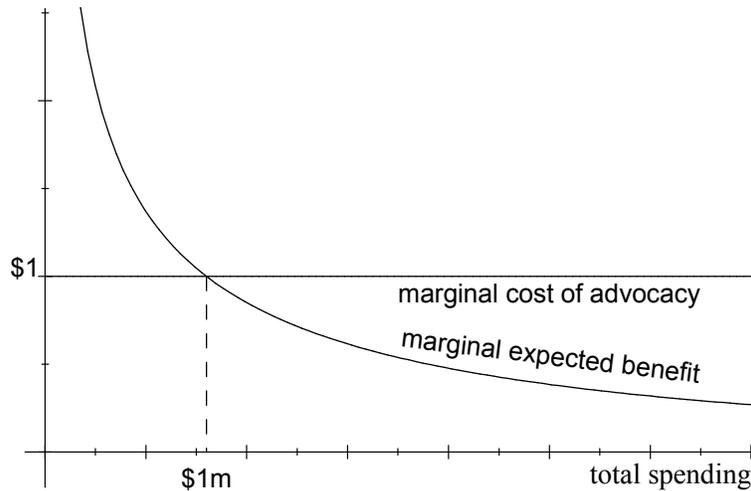


Figure 3 is an equivalent way of seeing the same problem. The curve below represents the marginal expected benefit—that is, the benefit of an extra dollar of spending, which is just equal to the total benefit times the extra probability that a dollar buys you. As noted above, the marginal benefit is decreasing. The straight line is the marginal cost of advocacy: An extra dollar of advocacy always costs \$1. If the marginal expected benefit is above \$1, you're not spending enough; if it's 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.

FIGURE 3



Now suppose the Department of Justice's Antitrust Division comes in and splits you up, so that you are now two identical firms, each with half the market share. Your previous optimal amount, \$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 half the industry, only see 50¢ of that benefit. All your benefits are now halved because you have to share them with your competitor; for our purposes, the split-up thus has the same effect as a 50% tax on revenues. Because your spending on advocacy—an investment in the growth of your industry—is only half 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 50¢. 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 \$2. Call the new amount \$700,000.

This new situation is illustrated in Figures 4 and 5. In Figure 4, the lower curve is your reduced expected benefit, now that you only have half the industry.<sup>141</sup> The maximum vertical distance between that curve and the cost line now occurs at \$700,000.

<sup>141</sup> The figures are not drawn to scale.

FIGURE 4

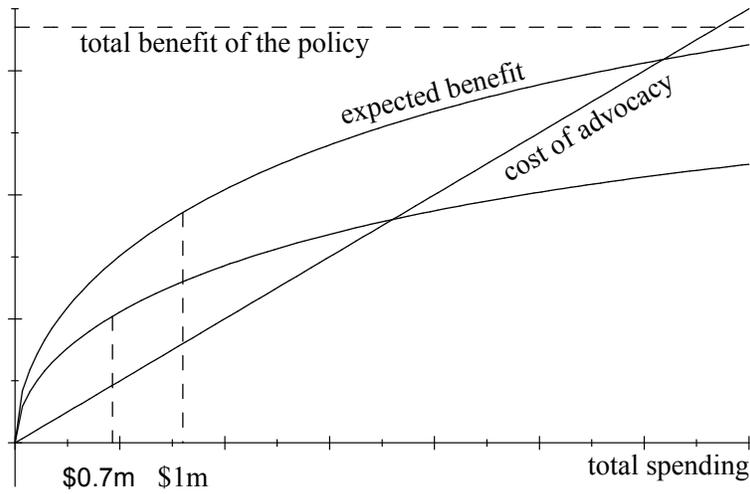
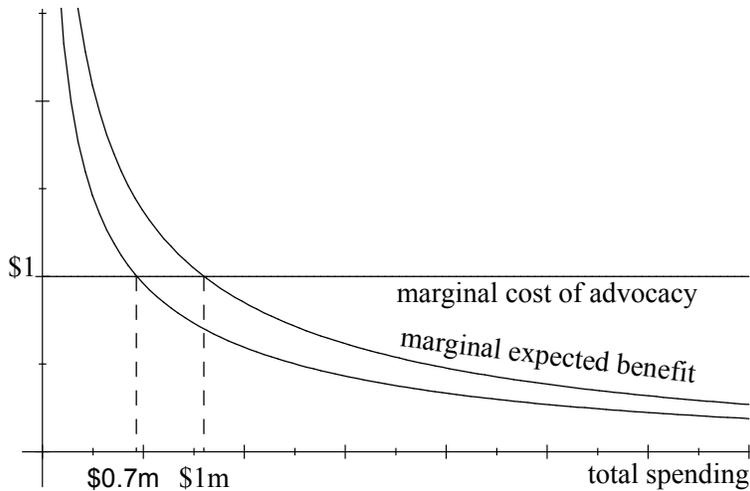


FIGURE 5



On Figure 5, the equivalent graph that shows marginal quantities instead of total quantities, we want to find the point where the marginal expected benefit to the industry is \$2. This is, of course, equivalent to finding the point where half the marginal expected benefit (i.e., the benefit to you) is \$1. That point is again \$700,000.

This story is incomplete. You don't want the amount spent to be *exactly* \$700,000; obviously, you would be thrilled if other people happened to contribute more. It's just that you're not *personally* willing to put any dollar into the pot after the 700,000th. You want the total

amount spent to be at least \$700,000, and are willing to contribute money until that point is reached, but you stop being willing to personally contribute once you're holding the 700,001st dollar. This is because the benefit of a dollar only depends on the total amount of money spent, and if the 700,000th dollar had a benefit to the industry worth \$2 (and thus a benefit to you worth \$1), then the 700,001st dollar has a benefit worth slightly less than \$2.

Your new competitor, who represents the other half of the industry, and who is equally interested in this reform that will increase the size of the pie, also wants the total amount spent to be at least \$700,000, and won't put a 700,001st dollar into the pot. Any belief about how the contributions are divided, provided they add up to \$700,000, is an equilibrium of sorts.<sup>142</sup> If you believe that your competitor will spend \$350,000 and your competitor believes you will also spend \$350,000, neither of you has any incentive to deviate from that shared understanding. If your shared beliefs are that your competitor will spend \$100,000 and you'll spend \$600,000, there's likewise no reason to deviate from that plan. Any division of contributions adding up to less than \$700,000 is unstable because someone will want to contribute more; and any division adding up to more than \$700,000 is likewise unstable because someone will want to withdraw an insufficiently productive 700,001st dollar.

Suppose, though, that the Antitrust Division split the baby unevenly, so that your share is 10% and your competitor's is 90%. You are unwilling to spend beyond the point where the marginal dollar has a benefit to the industry of \$10 (because 10% of that is \$1), while your competitor is unwilling to spend beyond the point where the marginal dollar has a benefit to the industry of \$1.11 (because 90% of that is \$1). Recall that the returns to spending on advocacy are decreasing, so your threshold is fairly small—say \$300,000—while his is quite a bit larger—say \$900,000. This is illustrated in Figures 6 and 7, where the lowest curve is your expected benefit (or marginal expected benefit), 10% of the total, and the middle curve is your competitor's expected benefit (or marginal expected benefit), 90% of the total.

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<sup>142</sup> A Nash equilibrium, to be exact. See MAS-COLELL ET AL., *supra* note 133, at 246–53; VARIAN, *supra* note 133, at 265–68.

FIGURE 6

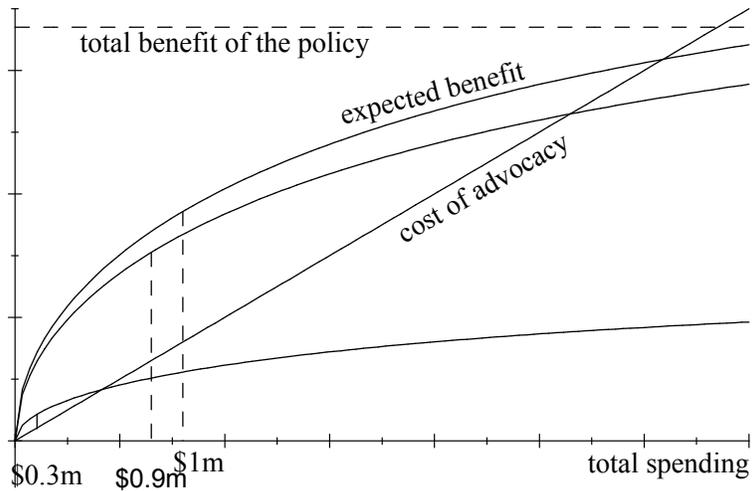
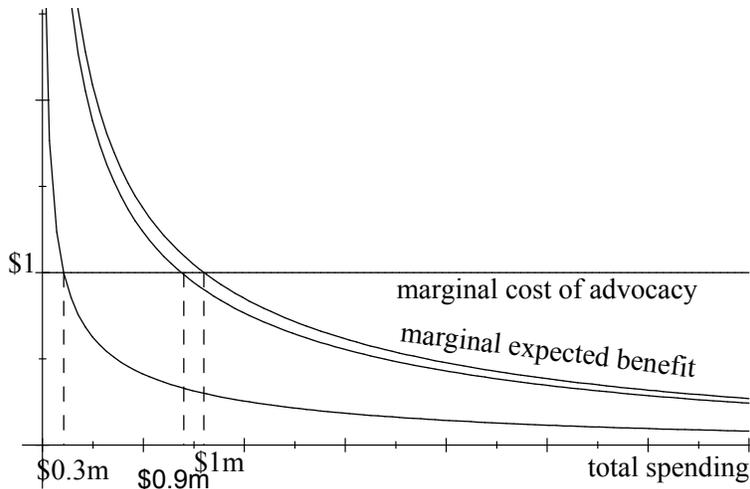


FIGURE 7



Your competitor is willing to spend up to the \$900,000 point. Since this is above \$300,000, there's no reason for you to spend anything: You're unwilling to spend any dollar beyond the 300,000th, since its marginal benefit to the industry is under \$10, and so its marginal benefit to you is under \$1.

Suppose your shared beliefs were that your competitor would spend \$600,000 and you would spend \$300,000. These beliefs would not be an equilibrium, since you would prefer to keep your \$300,000. Why spend any extra dollar beyond your competitor's \$600,000, if the 300,001st dollar already isn't worthwhile to you? The only equilibrium is where

your competitor gives \$900,000 and you give \$0. Because you're the smaller actor, you totally free-ride off your competitor.<sup>143</sup> The result is what Mancur Olson calls the "systematic tendency for 'exploitation' of the great by the small."<sup>144</sup>

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 sector has a lower threshold than the other, for whatever reason. In this story, you and your competitor are identical except that you've got 10% of the industry and he's got 90%. But you could have a lower threshold for other reasons.

For instance, you might in addition be subject to a higher tax rate—if half your revenues are taxed away, then you will act like your share is 5% instead of 10%. Or, to flip the tables, suppose your competitor's revenues are subject to a 90% tax rate. Then, though his industry share is 90%, he acts as though his share is 9%. You, with your 10% share, are now the larger actor, and he free-rides off of you. So your "real" share—the share of total profits—is a function not just of the nominal industry share, but also of the rate of profit.

Similarly, you might be better at advocacy. Perhaps, for whatever reason, each dollar of yours is worth twice your competitor's dollars, and twice what a dollar was worth before the breakup. (Perhaps you are now a slicker lobbyist.) Then, you act as though your share is 20%, and your threshold goes up accordingly. This, too, affects your "real" share for purposes of choosing how much to spend on advocacy. In this example, you still won't do anything because your competitor still has a 90% share; but this is an important point that I will return to below.<sup>145</sup>

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<sup>143</sup> See MAS-COLELL ET AL., *supra* note 133, at 361–63; VARIAN, *supra* note 133, at 420–23; Gene M. Grossman & Elhanan Helpman, *Electoral Competition and Special Interest Politics*, 63 REV. ECON. STUD. 265, 282, 284 (1996); see also Oakland, *supra* note 132, at 485, 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 138, 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 with individuals, whose marginal utility of consumption may be enhanced by higher levels of, say, environmental protection or national defense. Quasi-linearity certainly seems defensible here, since prison providers are unlikely to enjoy their consumption more because of a more beneficial incarceration policy.

<sup>144</sup> See OLSON, *supra* note 28, at 29 (italics and footnote omitted); TERRY M. MOE, THE ORGANIZATION OF INTERESTS 24–26 (1980) (similar diagrammatic exposition).

<sup>145</sup> See text accompanying note 247 *infra*.

## B. *Applying This Model to Prisons*

That's the intuition behind the story of lobbying after privatization. Consider the main political actors in the private prison industry: the private prison firms and the public prison guards' union. (On why these are the two relevant actors, and on what might motivate them, see below.<sup>146</sup>)

Before privatization, the public sector is the monopoly provider of prison services, and the prison guards' union enjoys the benefits that flow from serving the whole system. Now suppose that part of the system is privatized. Because the larger sector only controls part of its market, it is less willing than the previous monopoly provider to spend money on reforms that would increase the size of the prison pie. The effect is the same as that of a tax on revenues: If its share is 90%, then instead of spending until the benefit of the last dollar is \$1, it now only spends until the benefit of the last dollar is \$1.11 (that's 1 divided by 0.9).

So which is the larger sector? I argue that it is the public sector. As the next subsection suggest, the public sector has a larger industry share and extracts more benefit from the system than does the private sector.

### 1. *Industry Shares*

In the first place, 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 at the end of 2004,<sup>147</sup> 6.6% were held in private facilities; this includes 13.7% of federal prisoners and 5.6% of state prisoners.<sup>148</sup> Of the 34 states with at least some prisoners in private facilities, the percentages ranged from near 0.0% (seven states had percentages below 1.0%)<sup>149</sup> to 42.1% (five states had percentages above 25.0%).<sup>150</sup> Among these 34 states, the median percentage in private facilities was between 7.9% (Louisiana) and 9.2% (Georgia).<sup>151</sup>

So—flipping these percentages—the share of the public sector is between 57.9% and 100% in every state, is over 92% in two-thirds of the

<sup>146</sup> See text accompanying notes 187–209 *infra*.

<sup>147</sup> See PRISONERS IN 2004, *supra* note 15, at 1. The total number of incarcerated people, including in federal and state prisons, territorial prisons, local jails, Bureau of Immigration and Customs Enforcement facilities, military facilities, jails in Indian country, and juvenile facilities, was 2.3 million at the end of 2004. *Id.*

<sup>148</sup> See PRISONERS IN 2004, *supra* note 15, at 6 tbl.7.

<sup>149</sup> South Carolina (0.0%), South Dakota (0.2%), Wisconsin (0.4%), Maryland (0.5%), North Carolina (0.6%), Alabama (0.9%), and Pennsylvania (0.9%). See PRISONERS IN 2004, *supra* note 147, at 6 tbl.7.

<sup>150</sup> New Mexico (42.1%), Alaska (30.6%), Montana (30.1%), Wyoming (28.1%), Hawaii (28.0%), and Oklahoma (25.3%). See PRISONERS IN 2004, *supra* note 147, at 6 tbl.7.

<sup>151</sup> See PRISONERS IN 2004, *supra* note 147, at 6 tbl.7.

states (including half of the states with at least some prisoners in private facilities), and is 93.4% nationwide.

I am assuming here that a 10% share means that the private sector gets 10% of all benefits resulting from the reform. This is of course a vast oversimplification. Imagine, for instance, that “the era of public prisons is over,” and all new capacity is built in the private sector. If that’s so, then the private sector knows that it will obtain the *entire* benefit of any pro-incarceration reform, so it acts as though it has a 100% share in the flow of *marginal prisoners*, even though a snapshot of the system might show that it only has a 10% share of the existing stock of prisoners.<sup>152</sup> The challenge is to determine the private sector’s share of marginal prisoners.

One first attempt to determine marginal shares would be, instead of dividing private prisoners by total prisoners, dividing *change* in private prisoners over some period by *change* in total prisoners over the same period. Unfortunately, this approach yields widely varying numbers because of small state-by-state numbers and temporary blips in prison populations.<sup>153</sup> As my best stab at this problem, I offer the following: Over the period from June 30, 2000 to June 30, 2005, the state system added 88,500 total prisoners and 5703 private prisoners, for a marginal private share of 6.4%.<sup>154</sup> Similarly, over this same five-year period, the federal system added 41,954 total prisoners and 22,615 private prisoners, for a marginal private share of 53.9%.<sup>155</sup> Adding this all up, total prison-

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<sup>152</sup> See, e.g., Meredith Kolodner, *Private Prisons Smiling over Illegal Immigration*, INT’L HERALD TRIB., July 20, 2006, at 12 (“With all the federal centers filled and the U.S. government not planning to build more, most of the new money is expected to go to private companies or to county governments. Even some of the money paid to counties, which hold 57 percent of the immigrants in detention, will end up in the pockets of the private companies, since they manage a number of the county jails.”).

<sup>153</sup> For instance, Wyoming added 4 total prisoners from Dec. 31, 2000 to Dec. 31, 2001, but the private prison population increased by 191. This yields a marginal private share of 4775% for Wyoming over that period. On the other hand, North Dakota’s prison population stayed constant at 1168 between June 30, 2002 and June 30, 2003, but its private prison population dropped from 40 to 1 during this period, which seems to yield a negative infinite marginal private share for North Dakota over that period. Taking longer periods doesn’t help much: Mississippi added 184 total prisoners between June 30, 2001 and June 30, 2005, but added 1394 private prisoners, for a marginal private share of 758%. All numbers here and in this portion of the text are taken from the spreadsheets associated with the Bureau of Justice Statistics’ *Prisoners in 2004* report, *supra* note 147, and its predecessors, and the *Prison and Jail Inmates at Midyear 2005* report and its predecessors. The end-of-year reports and spreadsheets are available at <http://www.ojp.usdoj.gov/bjs/pubalp2.htm#Prisoners> (last visited Oct. 18, 2006), and the midyear reports and spreadsheets are available at <http://www.ojp.usdoj.gov/bjs/pubalp2.htm#pjmidyear> (last visited Oct. 18, 2006). Where numbers differ between reports, I have used the numbers from the latest report.

<sup>154</sup> It makes sense that the marginal private share in state prisoners is about the same as the total private share in state prisoners, since the total private share has stayed about constant over the last five years.

<sup>155</sup> It likewise makes sense that the marginal private share in federal prisoners is so much larger than the total private share in federal prisoners, since the total private share has increased substantially over the last five years, from 2.8% at the end of 1999 to 14.4% in mid-year 2005.

ers increased by 130,454, and private prisoners increased by 28,318, for a marginal private share of 21.7%.

The bottom line is that, if we care about the private sector's share of total prisoners, roughly 6–10% is a reasonable estimate, with 0–42% as the outer range. If we care about the private sector's share of marginal prisoners, my best estimate for the marginal share over the last five years would be about 22%, with 0–54% as the outer range.

## 2. *The Benefits to Each Sector*

In the second place, the profits of the private sector are relatively low.<sup>156</sup> If the industry is perfectly competitive—like in textbook models of perfect competition—every firm makes zero economic profits,<sup>157</sup> therefore, they don't care whether the market gets bigger or smaller, because they're indifferent between running prisons and putting their money into the stock market. This is, of course, an unrealistic view of the world—the prison industry is oligopolistic, so the prison firms do make some profit. But not that much:<sup>158</sup> CCA's net profit margin<sup>159</sup> is

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<sup>156</sup> My conventional assumption that firms maximize profits is admittedly sloppy. “The firm is not an individual. It is a legal fiction that serves as a focus for a complex process in which the conflicting objectives of individuals (some of whom may ‘represent’ other organizations) are brought into equilibrium within a framework of contractual relations. In this sense the ‘behavior’ of the firm is like the behavior of a market: the outcome of a complex equilibrium process. We seldom fall into the trap of characterizing the wheat or stock market as an individual, but we often make this error by thinking about organizations as if they were persons with motivations and intentions.” Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976), reprinted in MICHAEL C. JENSEN, A THEORY OF THE FIRM: GOVERNANCE, RESIDUAL CLAIMS, AND ORGANIZATIONAL FORMS 83, 89 (2000). Nonetheless, in this paper I do not consider any agency costs internal to the firm—with apologies to corporations scholars—and assume, in accordance with primitive microeconomics, that the firm is a profit-maximizing “black box.” My only defense is that, for certain purposes, (managers of) firms often act more or less as though they were profit-maximizing individuals, and this is sufficient for my purposes here. More importantly, the lobbying critique that I address here generally rests on the ground that firms lobby for incarceration because such lobbying is a profit-maximizing activity, which of course assumes that, at least in this instance, firms do act to maximize their utility.

<sup>157</sup> See, e.g., MAS-COLELL ET AL., *supra* note 133, at 335 (“active firms must earn exactly zero profits in any long-run competitive equilibrium”); VARIAN, *supra* note 133, at 221 (“firms earn zero profits in equilibrium”).

<sup>158</sup> JOSEPH L. HALLINAN, GOING UP THE RIVER: TRAVELS IN A PRISON NATION 177–78 (2001) (“The [private] prison business is intensely competitive. Winning bids for prison contracts are often separated by pennies per day. Those pennies mean the difference between a profitable prison and a money-loser.”); Dolovich, *supra* note 17, at 493; Sam Howe Verhovek, *Operators Are Not Worried by Ruling*, N.Y. TIMES, June 24, 1997, at B10 (“Even a small increase in their costs could be enough to eliminate the price advantage that many companies can now offer . . . which is almost uniformly the factor that leads governments to privatize.”).

<sup>159</sup> Net profit margin is net income after taxes divided by revenue. See *Net Profit Margin: Investing Lesson 4—Analyzing an Income Statement*, <http://beginnersinvest.about.com/cs/investinglessons/l/blnetprofitmarg.htm> (last visited Oct. 19, 2006). One may well be interested in net income after taxes divided by *cost*, not revenue; if so, that number is  $1 / (1 - \text{NPM})$ , where NPM is the net profit margin. This is approximately the same as NPM if NPM is small. Thus, NPMs of 7.23%, 1.08%, 2.60%, and 4.66% translate to profit-over-cost of 7.79%, 1.09%, 2.67%, and 4.89%.

7.23%, the GEO Group's is 1.08%, Cornell's is 2.60%, and Avalon's is 4.66%. By way of comparison, Microsoft's net profit margin is 28.45%, IBM's is 9.56%, Coca-Cola's is 21.85%, Ford's is -0.66%, and Wal-Mart's is 3.61%.<sup>160</sup> I will take 0–8% as a reasonable range for industry profit.

Compare this to the public sector. I abstract away from any agency problems within the union and tentatively assume that a union is a faithful representative of workers' interests,<sup>161</sup> and the benefit of a policy is measured by the "union rents," that is, the difference between public-sector and private-sector wages times the size of the public sector.<sup>162</sup> This is admittedly an oversimplification of how unions work, but it will have to do for a preliminary survey.<sup>163</sup>

<sup>160</sup> These numbers were obtained by entering the following symbols at MSN Money's website, <http://moneycentral.msn.com/investor/invsb/results/hilite.asp> (last visited Oct. 19, 2006): CXW (for CCA), GEO, CRN (for Cornell Companies), CITY (for Avalon Correctional Services), MSFT (for Microsoft), IBM, KO (for Coca-Cola), F (for Ford), and WMT (for Wal-Mart).

<sup>161</sup> This is also not exactly true. The idea that unions faithfully represent their members has been forcefully critiqued. See, e.g., Representative 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. But see Alison Booth, *A Public Choice Model of Trade Union Behaviour and Membership*, 94 ECON. J. 883, 883 (1984) (modeling unions as democracies maximizing the welfare of the median union member).

<sup>162</sup> This "rent maximization" approach to unions' objectives can be found in, e.g., 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 (1995); 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); 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); Andrew J. Oswald, *The Economic Theory of Trade Unions: An Introductory Survey*, 87 SCAND. J. ECON. 160, 162 (1985); John Pencavel, *Wages and Employment Under Trade Unionism: Microeconomic Models and Macroeconomic Applications*, 87 SCAND. J. ECON. 197, 201–02 (1985); Guillermo A. Calvo, *Urban Unemployment and Wage Determination in LDC's: Trade Unions in the Harris-Todaro Model*, 19 INT'L ECON. REV. 65, 68 (1978); GEORGE DE MENIL, BARGAINING: MONOPOLY POWER VERSUS UNION POWER 22 (1971); Sherwin Rosen, *Unionism and the Occupational Wage Structure in the United States*, 11 INT'L ECON. REV. 269, 269–70 (1970); JOHN T. DUNLOP, WAGE DETERMINATION UNDER TRADE UNIONS 41 (1950) (calling this 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.

<sup>163</sup> My specification of unions' benefit is a special case of certain other "utilitarian" or "democratic" objective functions. See, e.g., Alan A. Carruth & Andrew J. Oswald, *On Union Preferences and Labour Market Models: Insiders and Outsiders*, 97 ECON. J. 431, 433 (1987) (utilitarian union); Oswald, *supra* note 162, at 163–64 (same); Pencavel, *supra* note 162, at 200 (same); Andrew J. Oswald, *The Microeconomic Theory of the Trade Union*, 92 ECON. J. 576, 584 (1982) (same); Booth, *supra* note 161, at 888 (democratic union). Those specifications reduce to the one I use here when the utility of money function is linear. See HENRY S. FARBER, THE ANALYSIS OF UNION BEHAVIOR 31 (NBER Working Paper No. 1502, Nov. 1984); Oswald, *supra* note 162, at 165.

My specification is also a special case of ones in Dowrick & Spencer, *supra* note 162, at 335; Alan Manning, *How Robust Is the Microeconomic Theory of the Trade Union?*, 12 J. LABOR. ECON. 430, 436 (1994); Denise J. Doiron, *Bargaining Power and Wage-Employment Contracts in a Union-*

(continued next page)

Public prison guards' wages are substantially higher than those of their private counterparts.<sup>164</sup> The 2000 *Corrections Yearbook* reported that, at private prisons responding to their survey, correctional officers faced an average entry-level salary of \$17,628 and an average maximum salary of \$22,082.<sup>165</sup> By contrast, correctional officers at public prisons faced an average entry-level salary of \$23,002 (30% more than at private prisons) and an average maximum salary of \$36,328 (65% more).<sup>166</sup> So public-private salary differences span quite a big range, and these national averages conceal significant state-level variation. In Pennsylvania, the differences were somewhat higher—entry-level salaries were 39% higher in public prisons and maximum salaries were 125% higher—while in Texas, the differences were somewhat lower—entry-level salaries were 9% higher in public prisons and maximum salaries were 21% higher.<sup>167</sup>

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*ized Industry*, 33 INT'L ECON. REV. 583, 590 (1992); FARBER, *supra*, at 32; JOHN H. PENCANEL, THE TRADE-OFF BETWEEN WAGES AND EMPLOYMENT IN TRADE UNION OBJECTIVES 13 (NBER Working Paper No. 870, Mar. 1982); Dertouzos & Pencavel, *supra*, at 1169.

*But see* FARBER, *supra*, at 3 (“While 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.”). (Farber nonetheless concludes that “it is fruitful to analyze labor unions as maximizing a well defined objective function.” *Id.*)

<sup>164</sup> See Fraja, *supra* note 162, at 466 (public wages usually higher than those of private counterparts, in part because government employers may be fulfilling social objectives through public employment). I take no view on whether the difference in wages is due to being unionized or being in the public sector; all that matters here is that the public and private wages are different empirically. Compare Chris Robinson & Nigel Tomes, *Union Wage Differentials in the Public and Private Sectors: A Simultaneous Equations Specification*, 2 J. LABOR ECON. 106, 107–08 (1984) (public employment wage premium appears to be due to union status, not public sector status), with Richard B. Freeman, *Unionism Comes to the Public Sector*, 24 J. ECON. LIT. 41, 53 (1986) (unionization effects on public sector wages are small).

Some have claimed that, in particular cases, private wages have been competitive with public wages. See RING, *supra* note 23, at 29; Dana C. Joel, *The Privatization of Secure Adult Prisons: Issues and Evidence*, in PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* note 23, at 51, 65. But this isn't the rule. Several sources indicate that private wages are competitive with market wages, which makes sense. See, e.g., Brian David, *Firm Offers Savings Running Jail: Beaver County Officials Hope Success in Ohio Can Be Duplicated*, PITTS. POST-GAZ., July 14, 2005, at W6; Robert Nelson, *Big House Inc.*, PHOENIX NEW TIMES, Apr. 3, 2003.

<sup>165</sup> THE 2000 CORRECTIONS YEARBOOK: PRIVATE PRISONS 98 (Crim. Just. Inst. 2000).

<sup>166</sup> THE 2000 CORRECTIONS YEARBOOK: ADULT CORRECTIONS 150–51 (Crim. Just. Inst. 2000). This is apparently the same data cited in Am. Fed. of State, County & Muni. Employees, *Jobs We Do: Public and Private Prisons Compared—2000*, <http://www.afscme.org/workers/6493.cfm> (last visited Sept. 18, 2006); Nelson, *supra* note 164 (citing hourly salaries).

<sup>167</sup> Compare YEARBOOK: PRIVATE PRISONS, *supra* note 165, at 98 with YEARBOOK: ADULT CORRECTIONS, *supra* note 166, at 150–51. Other states are harder to compare: Three private prisons in California responded to the survey, but the public system didn't submit its numbers. Nonetheless, we can get an idea for the differences by consulting a different source. A 2001 survey by the *Corrections Compendium* reports the annual starting salary for correctional officers in California as “\$33,708/\$38,988.” *Staff Hiring/Retention—Part 1: Correctional Officer Recruitment*, CORRECTIONS COMPENDIUM, Mar. 2001, at 8. Even the lower one of these numbers is more than twice the average starting salary for correctional officers at the three reporting private prisons in California, which is \$16,310. (But keep in mind that the numbers may have been gathered differently in the *Yearbook* and in the *Compendium* surveys. Promisingly, the two sources overlap for starting salaries (continued next page)

One limitation of the *Corrections Yearbook* numbers is that only some private prisons responded to their survey.<sup>168</sup> However, we can supplement this source with others, which give qualitatively similar results. For instance, an AFSCME chart comparing public to private hourly salaries in selected cities in the occupational category of “Guard I,” using 1993 data, shows that public sector hourly salaries ranged from 26% higher in Kansas City to 87% higher in San Francisco. In Chicago, the median city included on AFSCME’s chart, salaries were 57% higher in the public than in the private sector.<sup>169</sup>

Based on the *Corrections Yearbook* numbers, I will take 30–65% as a reasonable range for the public wage premium, with (somewhat arbitrarily) 9–125% as an outer range.

### 3. Comparing the Sectors

Let’s try to put these numbers in comparable terms. The model presented above requires us to determine who is the “largest” actor, and the “size” of the industry for that purpose is not its per-prison benefit but the absolute total benefit. This means that the total benefit is the industry

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in Arizona and Oklahoma. They’re different for other states, but then again, salaries may also have changed between 2000 and 2001.) See YEARBOOK: PRIVATE PRISONS, *supra*, at 98. Another source reports that California public guards’ average base salary was boosted to \$65,000 a year in 2002 from about \$50,000. See *Prison Guard Clout Endures*, L.A. TIMES, Apr. 1, 2002, California Metro section, at 10. This \$50,000 number is presumably less than the average *maximum* salary, but even that is more than twice the average maximum salary for correctional officers at the three reporting private prisons in California, which is \$22,174. See YEARBOOK: PRIVATE PRISONS, *supra*, at 98.

<sup>168</sup> For a few states, only one private prison responded to the survey (but the public numbers are reported for the entire system). With this caveat in mind, the corresponding differences in Arizona were 33% and 73%, the differences in Georgia were 16% and 90%, the differences in Oklahoma were 9% and 110%, the differences in Ohio were 22% and 48%, and the differences in Utah were –6% and 43%. Compare YEARBOOK: PRIVATE PRISONS, *supra* note 165, at 98 with YEARBOOK: ADULT CORRECTIONS, *supra* note 166, at 150–51. Yes, the Utah public average of starting-level salaries was 6% *lower* than at the reporting private prison; this probably indicates, more than anything else, the pitfalls of relying on a single data point. The Arizona numbers may also not be representative, since one source (admittedly from the popular press) reports that the public-private divide in Arizona is on the low side. See Nelson, *supra* note 164. For other impressionistic reports, see Kit Miniçlier, *Trinidad Leery of Prison Plan*, DENVER POST, Jan. 28, 1999, at B4 (differences of \$5000 to \$6000 between entry-level state prison guard positions in public and private in Colorado); Steven Harmon, *New Prison Sparks Privatization Debate*, LANSING STATE J., July 13, 1999, at 1A (difference of \$23,500 at one Michigan private prison vs. \$32,000 public average); Schlosser, *supra* note 7, at 58 (average New York State correctional salary is \$36,000, about 50% higher than typical salary in the North Country; correctional officers have to queue to get a job there).

<sup>169</sup> See Am. Fed. of State, County & Muni. Employees, *Getting It Right: Comparing State and Local Government Workers’ Salaries with the Private Sector*, <http://afscme.org/publications/1221.cfm> (last visited Sept. 21, 2006). The chart of “Guard I” salaries is available at <http://afscme.org/publications/1221.cfm> (last visited Sept. 21, 2006). The data was collected for the 1993 National Summary of Average Pay by Type. See AFSCME, *supra*, at <http://www.afscme.org/publications/2382.cfm> (last visited Sept. 21, 2006) (“Location, Location, Location”).

share times the per-unit benefit. I will express the final numbers as percentages of the total cost of the system.

First, take the private sector. Taking 0–8% as a reasonable range of industry-wide profits, and a private-sector industry share ranging from 0% to 54% in each state:

$$\begin{array}{rcccl} \text{Total benefit of the} & & & & 0\% \text{ to } 4.32\% \\ \text{private sector} & = & 0\% \text{ to } & \times & 0\% \text{ to } \\ & & 8\% & & 54\% \\ & & & & = & \text{of the total cost} \\ & & & & & \text{of the system.} \end{array}$$

Now take the public sector. I've expressed public employees' benefit as a percentage of private sector wages: To recap, perhaps 30–65% is a reasonable range for the public-over-private wage premium, with 9–125% as an outer range. We can put this in terms of total cost by observing that salaries are about 60–80% of most prisons' operating expenses.<sup>170</sup> So an estimate of the wage premium's reasonable range is:

$$\begin{array}{rcccl} \text{Total per-prison} & & & & 18\% \text{ to } 52\% \\ \text{benefit for the} & = & 30\% \text{ to } & \times & 60\% \text{ to } \\ \text{private sector} & & 65\% & & 80\% \\ & & & & = & \text{of total} \\ & & & & & \text{per-prison cost.} \end{array}$$

(Doing the same for the 9–125% outer range, we get 5.4–100%.)

Now, combining this range of per-prison costs with an industry share of 46–100% in each state:

$$\begin{array}{rcccl} \text{Total benefit of the} & & & & 8.28\% \text{ to } 52\% \\ \text{public sector} & = & 18\% \text{ to } & \times & 46\% \text{ to } \\ & & 52\% & & 100\% \\ & & & & = & \text{of the total cost} \\ & & & & & \text{of the system.} \end{array}$$

(The same calculation for the outer range yields a range of 2.48% to 100%.)

<sup>170</sup> See SHICHOR, *supra* note 20, at 149 (citing J.D. DONAHUE, PRISONS FOR PROFIT: PUBLIC JUSTICE, PRIVATE INTERESTS (1988); D.C. McDonald, *The Costs of Operating Public and Private Correctional Facilities*, in PRIVATE PRISONS AND THE PUBLIC INTEREST 179 (D.C. McDonald ed. 1990)) (60–80%); LOGAN, *supra* note 23, at 81 (citing GEORGE CAMP & CAMILLE CAMP, THE REAL COST OF CORRECTIONS: A RESEARCH REPORT 3 (Crim. Just. Inst., Apr. 1985)) (80%); *id.* (citing Corrections Corp. of Am., Company Report, Apr. 3, 1987) (60%); JOHN D. DONAHUE, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS 163 (1989) (citing BUR. OF JUST. STATS., BULLETIN (July 1986)) (60%); Schlosser, *supra* note 7, at 65 (labor is 60–80% of prison operating costs); Dolovich, *supra* note 17, at 475 n.134 (citing other sources suggesting 80–90% (including training), 75%, and 60–70%); see also GA. DEP'T OF CORRECTIONS, FY 2004 ANNUAL REPORT, <http://www.dcor.state.ga.us/pdf/FY04AnnualReport.pdf>, at 28 (last visited Oct. 6, 2006) (in Georgia in FY 2004, "personal services" were \$546 million out of total costs of \$944 million, which makes 58%); Va. Dep't of Corrections, *Financial/Operating Overview*, <http://www.vadoc.state.va.us/resources/statistics/financial/2004/05expendcat.pdf> (last visited Oct. 6, 2006) (in Virginia in FY 2005, "personal services" were \$544 million out of total costs of \$859 million, which makes 63%).

Compare this range with the private sector range of 0–4.32%. There's no overlap between these ranges (and not much overlap between the private range and the outer public range<sup>171</sup>). Moreover, by my rough approximation, the public sector's average benefit from the system exceeds the private sector's by perhaps an order of magnitude.

### C. *The Realism of the Model*

Thus, because the public sector is the larger actor, the model predicts that it does all the advocacy—and privatization reduces this amount because it acts like a tax on the public sector's revenues. And because the private sector is the smaller actor, it free-rides off the public sector's contributions. The net result is that total pro-incarceration advocacy decreases as a result of privatization.

This model focused only on the pro-incarceration side's lobbying, taking the anti-incarceration side's as given. But clearly anti-incarceration advocacy exists,<sup>172</sup> and some of it 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,<sup>173</sup> 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."<sup>174</sup> And Proposition 36, the drug treatment diversion initiative,<sup>175</sup> was supported by dozens of drug treatment providers and 16 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.<sup>176</sup>

So, to be more realistic, we should consider the effect of incarceration on both kinds of advocacy. It turns out that the effect on pro-incarceration advocacy is the same as in the simple case: Privatization, under this model, makes it go down. But the decrease in pro-incarceration advocacy has an indirect effect on anti-incarceration advo-

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<sup>171</sup> Bear in mind that the low bound of the outer range is derived from a high estimate of private profitability, a high value for the private share of marginal prisoners, a very low estimate of the public wage premium, and a low estimate of salaries as a percentage of total cost.

<sup>172</sup> See also BERK ET AL., *supra* note 32, at 200 (ACLU and Friends Committee on Legislation were major actors in "civil liberties lobby" in 1955–71).

<sup>173</sup> See text accompanying note 43 *supra*.

<sup>174</sup> See IGS, *supra* note 43.

<sup>175</sup> See text accompanying note 41 *supra*.

<sup>176</sup> See Nat'l Families in Action, *A Guide to Drug-Related State Ballot Initiatives: California Proposition 36 Proponents*, <http://www.nationalfamilies.org/guide/california36-endorsements.html> (last visited Nov. 3, 2006).

cacy, which is ambiguous.<sup>177</sup> On the one hand, pro-incarceration advocacy decreases the effectiveness of anti-incarceration advocacy by counteracting it. So a decrease in pro-incarceration advocacy 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 a priori way to know how these conflicting effects would balance out.

The 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. The first effect is the one discussed above: A concentrated industry can more easily overcome its collective action problems, so we should expect it to lobby more.<sup>178</sup> But much lobbying is for reforms that would make the market less competitive and allow firms to charge above-market prices. A more concentrated industry can more easily cooperate in the product market, so they can raise prices above market levels all by themselves by directly using anticompetitive methods. So a more concentrated industry would have less need to lobby.<sup>179</sup>

Thus, one study found a positive effect of concentration on industry contributions,<sup>180</sup> while another found that the percentage of firms in an industry that had political action committees rises and then falls as concentration goes up.<sup>181</sup> This model is only about advocacy for increased incarceration—that is, for reforms that increase the size of the industry—not about advocacy for reforms that would squelch competition in the prison industry. So only the first of these forces comes into play here.

One may wonder about the realism of any simple, highly stylized model. How believable is it that the private sector engages in *zero* advo-

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<sup>177</sup> See Appendix A.1.b *infra*. If one is only against self-interested pro-incarceration advocacy, this is an improvement, since pro-incarceration advocacy has declined. If one is against *any* self-interested advocacy, then whether privatization has improved matters also depends on what happens to anti-incarceration advocacy, to the extent this comes from self-interested providers of “anti-incarceration services,” like boot camps, halfway houses, and drug treatment centers. See text accompanying notes 242–244 *infra*.

<sup>178</sup> But see Paul Pecorino, *Is There a Free-Rider Problem in Lobbying? Endogenous Tariffs, Trigger Strategies, and the Number of Firms*, 88 AM. ECON. REV. 652, 657–58 (1998) (the assumption that a more concentrated industry can more easily overcome its collective action problems may not always be true).

<sup>179</sup> See Kevin B. Grier et al., *The Industrial Organization of Corporate Political Participation*, 57 S. ECON. J. 727, 729–30 (1991).

<sup>180</sup> See Kevin B. Grier et al., *The Determinants of Industry Political Activity, 1978–1986*, 88 AM. POL. SCI. REV. 911, 918 & tbl.3, 919 (1994).

<sup>181</sup> See Grier et al., *supra* note 179, at 735 tbl.III, 735–36 (finding that an industry concentration level of 43.85 maximizes the percentage of firms with PACs).

cacy? Whatever the merits of such skepticism generally, in this case the simple model may be close to the truth.

As noted above,<sup>182</sup> 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. Or perhaps this simple model is basically right, and the private firms are actually spending their money on a form of advocacy where the public good aspect isn't important—*pro-privatization advocacy*.

Pro-privatization advocacy is an area where, obviously, the private sector can't 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; and even if they don't cooperate with each other, an individual firm's pro-privatization contribution may benefit it directly to the extent that it (improperly) increases the likelihood that that firm will obtain a particular contract.

In real life, of course, money may be multi-purpose. 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 both—to implement the donor's agenda in a general way. But the model is general enough to accommodate this framework. During campaign time, money may indeed be general. It buys generalized "access" to the candidate, which can be used at any time after the candidate prevails, if he prevails. But how do donors use their access? At some point, they must call in a favor, and favors cost something in terms of "political capital," and political capital is scarce. Calling in one favor makes it more difficult to call in some other favor. At the point where donors have to determine what to ask for, we are back in the previous model.<sup>183</sup>

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 largest actor. And this may in fact be what happens.

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<sup>182</sup> See text accompanying notes 87–121 *supra*.

<sup>183</sup> 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—in which case one's participation would have no effect. (This is fairly likely in a conservative group like ALEC.) Or it wouldn't have the desired form—in which case, even if one were participating in the process, which CCA denies, *see* text accompanying note 112, one would need to spend some political capital to 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 any event, what is important here is not whether the model is realistic in a literal sense. Advocacy needn't be an entirely public good, and the actors in the industry needn't totally free-ride. The point is merely that these assumptions are plausible, perhaps even likely. We know that advocacy has some public-good aspects, and we know that free riding happens to some extent in the world. If people act enough like this model, total pro-incarceration advocacy will still decline.

The existence of this plausible scenario is a sufficient rebuttal to the simple anti-privatization claim that privatization *does* increase pro-incarceration advocacy. (The "anything goes" models presented later on,<sup>184</sup> in which the effect of privatization on advocacy is ambiguous, further rebut the claim.) This possible scenario also points up 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,"<sup>185</sup> would make common cause with public prison guard unions, who *concededly* are active lobbyists for incarceration.<sup>186</sup>

#### D. *Why Focus on Public Sector Unions and Private Firms?*

This and the next few sections elaborate on some curlicues of the theory. They are important, but the reader who is only interested in the broad view may skip this and the following section and go to the next Part.

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

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

##### 1. *Employee Advocacy*

First, the workers. If workers are acting independently, the collective action problem is especially acute. No single worker has enough of a stake in the system to benefit from spending resources on advocacy to

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<sup>184</sup> See text accompanying notes 242–255, 292–293 *infra*.

<sup>185</sup> See SARABI & BENDER, *supra* note 22, at 21.

<sup>186</sup> See SARABI & BENDER, *supra* note 22, at 21.

help his industry. We should only expect workers to be a significant political force if they can enforce some sort of collective action. Industrial organization theorists and game theorists surmise that businesses, when they are in it for the long haul,<sup>187</sup> cooperate by threatening to punish anyone who deviates from the desired cooperative action. (I explain this at greater length below in the section on cooperation.<sup>188</sup>) Workers can do the same thing through a system of social ostracism or informal sanctions for non-cooperative behavior,<sup>189</sup> or by rewarding cooperative behavior with non-public benefits.<sup>190</sup> But they can more easily enforce cooperative behavior by requiring membership in or contribution to a union, which would lobby out of union dues.<sup>191</sup>

This is a sufficient explanation for why private prison guards, who aren't unionized in most states,<sup>192</sup> haven't been observed lobbying.<sup>193</sup> Note, though, that when a strong union does exist, it is not surprising to see it lobbying for the welfare of its industry; this is probably what happened when the United Mine Workers of America joined the coalition challenging EPA's ozone and particulate matter standards in *Whitman v. American Trucking Ass'ns*.<sup>194</sup>

<sup>187</sup> What, in the biz, is called an "infinitely repeated game."

<sup>188</sup> See text accompanying notes 215–235 *infra*.

<sup>189</sup> See, e.g., NEWSIES (Walt Disney Pictures et al. 1992) (combination of shame and violence); MATEWAN (Cinecom Entertainment Group et al. 1987); ÉMILE ZOLA, GERMINAL, pt.5, chh.3–4, at 317–336 (Garnier-Flammarion 1968) (1885); E.P. THOMPSON, *Rough Music, in* CUSTOMS IN COMMON 467, 519–21 (1991).

<sup>190</sup> See OLSON, *supra* note 28, at 72–73 (unions offer selective incentives like insurance, seniority privileges, or preferential treatment in handling grievances).

<sup>191</sup> See OLSON, *supra* note 28, at 71 ("Compulsory membership and picket lines are . . . of the essence of unionism."); *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, 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); CAL. GOV'T CODE §3502.5 (authorizing agency shop agreements); *Memo. of Understanding, Bargaining Unit 6, Agreement Between State of California and California Correctional Peace Officers Association*, effective 7/1/99 through 7/2/01, §3.02, <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).

<sup>192</sup> See SHICHOR, *supra* note 20, at 198; Dolovich, *supra* note 17, at 501.

<sup>193</sup> 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're probably making market wages). If they could organize, they would be *able* to lobby effectively, and moreover, their wages would be higher, which would make them *want* to lobby. Mere effectiveness at lobbying doesn't create the will to lobby: You need to have some benefit to lobby for. If a worker could (if unemployed) quickly find another job paying the same, he wouldn't care as much about lobbying for job security as a worker who (because he is making above-market wages) would have a hard time finding another job as good.

<sup>194</sup> See Pet. for a Writ of Cert., *Browner v. Am. Trucking Assn's*, 519 U.S. 457 (2000), at ii, 2000 WL 33979605; see also Br. of the Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, & the Elec. Reliability Coordinating Council as *Amici Curiae* in (continued next page)

As I have explained above,<sup>195</sup> I follow a good chunk of the economic literature on unions in assuming 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: 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<sup>196</sup>).

On the other hand, what if the extra prisoners make workers worse off because they're not accompanied by compensating wage increases or more staff? This could be why some unions argue against incarceration,<sup>197</sup> but it doesn't appear to be a significant concern.

Nationwide, entry-level corrections officers' real wages held roughly constant over 2001–04.<sup>198</sup> This entry-level data may not tell us the whole story about the full range of corrections officers' wages, but the idea that corrections officers' unions are strong enough in many states to get compensating wage hikes for their members is also plausible from anecdotal evidence<sup>199</sup> and imperfect statistics.<sup>200</sup>

Support of Resp., *Env't Defense v. Duke Energy Corp.*, No. 05-848, 2006 WL 2689786 (U.S. filed Sept. 15, 2006).

<sup>195</sup> See text accompanying notes 161–163 *supra*.

<sup>196</sup> See, e.g., Schwab, *supra* note 161, at 380–81 (“Some commentators criticize union leaders for organizing new workers rather than attending to the needs of current members. Prestige accrues to the fastest growing or largest unions, not always the most effective.” (footnote omitted)).

<sup>197</sup> See text accompanying notes 62–65 *supra*.

<sup>198</sup> The American Correctional Association's *Corrections Compendium* surveys corrections officers' salaries every few years. Entry-level corrections officers' yearly salaries went up, on average, by 6% to 8% from 2001 to 2004, which—given a roughly 6.7% increase in the consumer price index over that same period—translates into between a 1% drop and a 1% rise. (The range given contains both the average and the median over states.) The salary numbers are taken from *Staff Hiring and Retention*, CORRECTIONS COMPENDIUM, Mar. 2001, at 6, 8–11; *Wages and Benefits—Table 1: Salary Ranges and Options*, CORRECTIONS COMPENDIUM, Jan. 2003, at 10–15; *Correctional Officers—Table 2: Wages*, CORRECTIONS COMPENDIUM, July/Aug. 2004, at 16–17. The averages and medians were only calculated over states that reported salaries for both 2001 and 2004. To make the salary figures comparable, I assumed 40 hours per week, 26 biweekly periods per year, and 12 months per year. Where a range was given, I took the lower number in the range.

<sup>199</sup> See, e.g., WYNNE, *supra* note 33, at 201–07 (prison guards' effective use of strikes and other job actions, such as “sick-outs, lock-ins, slowdowns, and speed-ups” to achieve their goals); Falk, *supra* note 54, at 32 (California prison guards' union used its clout to prevent all budget cuts, “except in prison education and vocational training programs”); *Prison Guard Clout Endures*, *supra* note 167, at 10 (“State agencies and employees are sharing the pain of Gov. Gray Davis' attempt to reduce a numbing \$17-billion deficit. No, wait. That doesn't include prison guards. In his new budget Davis not only spares them from belt-tightening, he hikes their pay 33.76% over the next five years. This shower of riches came four years after the guards union helped raise \$2.3 million for Davis' first gubernatorial campaign . . .”).

<sup>200</sup> For instance, in Ohio, the inmate population has increased from 33,353 in 1991 to 44,270 from FY 1991 to FY 2005. See Ohio Dep't of Rehabilitation & Correction, *Fiscal Year Intake and Population on July 1 (1972–2005)*, available at <http://www.drc.state.oh.us/web/Reports/reports18.asp> (last visited Nov. 6, 2006) (explaining a slight change in definitions in 1994). Meanwhile, staff-

(continued next page)

As for corrections officer-to-inmate ratios, these did increase nationwide over 1996–2004, but only slightly,<sup>201</sup> and in certain states the ratios went down. In California, for instance, the ratio went down by 26%,<sup>202</sup> so California guards don't seem to have been hurt by increased incarceration. The ratios went down by 22% in Delaware, 23% in New Jersey, and 13% in New York.

## 2. Employer Advocacy

Now, let's consider the employers. Some firms also run alternatives to incarceration,<sup>203</sup> so it is not obvious that they would advocate an increased emphasis on imprisonment.<sup>204</sup> 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).

Could increased incarceration, which also increases costs, harm private prison firms? Perhaps, but private firms have a built-in protection against too much deterioration in their position: They don't have to bid

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ing levels increased from over 8739 in FY 1991 to 16,186 in FY 2001, and then dropped somewhat to 14,282 in FY 2005, and the average annual wage at the DRC (this is more than just prison guards) increased from \$38,944 in FY 1994 to \$60,482 in FY 2005. See OHIO DEP'T OF REHABILITATION & CORRECTION, FISCAL YEAR 2001 ANNUAL REPORT 27, 29; OHIO DEP'T OF REHABILITATION & CORRECTION, BRIDGING THE GAP: REHABILITATION TO REALITY, FISCAL YEAR 2005 ANNUAL REPORT 34. The Ohio annual reports are available at <http://www.drc.state.oh.us/web/Reports/reports2.asp> (last visited Nov. 3, 2006).

<sup>201</sup> These numbers, and the numbers reported in the next sentence, are taken from the charts in front of AM. CORRECTIONAL ASS'N, 2005 DIRECTORY (67th ed.), and its predecessor volumes. Nationwide, the average increase in the corrections officer-to-inmate ratio was 18%, and the median over reporting states was 10%.

<sup>202</sup> The range for California is actually 1996–2003; California didn't report its number of corrections officers in 2004.

<sup>203</sup> See, e.g., Cornell Cos., Inc., *Adult Services: Community-Based Corrections Services*, <http://www.cornellcompanies.com/page.cfm?ctid=1#community> (last visited Oct. 20, 2006); GEO Group, Inc., *Fort Worth Community Corrections Facility*, <http://www.thegeogroupinc.com/northamerica.asp?fid=100> (last visited Nov. 6, 2006); YEARBOOK: ADULT CORRECTIONS, *supra* note 166, at 91–92 (listing privately run community correctional facilities in Arizona, D.C., Florida, Maine, and North Carolina); AN OVERVIEW OF THE COLORADO ADULT CRIMINAL JUSTICE SYSTEM, [http://www.state.co.us/gov\\_dir/leg\\_dir/lcsstaff/2001/research/01CriminalCorrections.htm](http://www.state.co.us/gov_dir/leg_dir/lcsstaff/2001/research/01CriminalCorrections.htm), ch. 11, at 137 (Colo. Legis. Council, Research Pub. No. 487) (26 of 32 community correctional facilities privately operated); *Private Options*, in BEYOND BARS: CORRECTIONAL REFORMS TO LOWER PRISON COSTS AND REDUCE CRIME, <http://www.lhc.ca.gov/lhcdir/144/Private.html> (Little Hoover Comm'n, Report No. 144, Jan. 1998) (listing privately run community correctional facilities in California).

<sup>204</sup> See also LOGAN, *supra* note 23, at 160–61 ("Because commercial enterprises survive and prosper by accurately anticipating and responding to shifts in demand, we should not assume that correctional corporations will always be motivated to lobby for expansion of high-security facilities. Such corporations can be expected to diversify both within and outside of corrections. . . . Right now, there is a genuine unmet demand for imprisonment. However, if the demand for alternatives to prison increases, commercial companies should be able to respond rapidly to such a shift. One INS detention contractor, for example, also provides (and aggressively markets) electronic monitoring services as an alternative to jail.").

on a contract unless they anticipate making enough profit. Still, the extent of private firms' benefit from increasing the market depends on how profitable they are. In the extreme textbook perfect competition case, all firms make zero economic profit and are indifferent between expanding their presence in their industry and any other use of their funds. The less competitive an industry is, the more profit it makes and the more it would want to increase the pie.

What about the public employers, the Departments of Corrections? As noted above,<sup>205</sup> with some exceptions,<sup>206</sup> Departments of Corrections generally favor *alternatives* to incarceration. This makes some sense: While it is commonly thought that agencies want to aggrandize themselves,<sup>207</sup> that intuition is only a special case of a more general belief that agency officials act in their own self-interest<sup>208</sup> and that their self-interest tends to be aligned with the size and power of their agencies. And increasing prisoners without corresponding budget increases to match the increasing cost of incarceration (a cost that of course includes corrections officers' salaries, as well as health care and other factors) can easily make prison officials worse off.<sup>209</sup>

Moreover, DOCs run both prisons and many alternative programs, so even if more inmates means more power for the DOC, it makes sense that the DOC 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.

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<sup>205</sup> See text accompanying notes 68–78 *supra*.

<sup>206</sup> See text accompanying note 67 *supra*.

<sup>207</sup> See, e.g., WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36–42 (1971).

<sup>208</sup> See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 916, 932–34 (2005) (“empire-building” hypothesis is doubtful, and agency officials’ well-being isn’t systematically aligned with their department’s power).

<sup>209</sup> We are past the days when county sherrifs were paid according to their jail counts. Wray, *supra* note 23, at 6; see also LOGAN, *supra* note 23, at 217 (“In some counties today, the sheriffs are allowed to keep for themselves any money not spent on food for prisoners. . . . [A 1945 article by E.R. Cass described] the exploitation and corruption of jails run for profit on the fee system[, under which the sheriff’s] ‘chief interest is to increase the population of the jail . . . .’” (quoting E.R. Cass, *Jails for Profit*, 50 CORRECTIONS TODAY 84, 86 (1988) (originally published in 1945))); Schlosser, *supra* note 7, at 64 (“New York State’s experience with the ‘fee system’ during the nineteenth century suggests that the temptation to [keep an inmate longer than necessary] is hard to resist.”). 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 (L.A. County Sheriff had this problem with overcrowded county jails).

### E. *Who Cooperates with Whom?*

#### 1. *The Importance of Alternative Assumptions*

All this talk of how the 10% firm acts and the profits of “the industry” assumes that the private sector, in deciding how much to spend on advocacy, acts as a collective bloc and doesn’t cooperate<sup>210</sup> with the public sector. This is possible, but it’s not the only possible 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. Second, there could be total cooperation—all the firms could be cooperating with each other and 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; but in the end, the different assumptions don’t significantly alter the bottom line.

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<sup>211</sup>) 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%.<sup>212</sup>

So, while the average private sector share in State X may be 10%, this 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 . . . and 90% for the public sector. The assumption of independent firms would make it even more likely that the public sector is the dominant sector.

Now consider the opposite assumption—that everyone cooperates. A single prison industry bloc would choose an optimal total amount to

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<sup>210</sup> “Cooperation,” I word I use here throughout, is what economists mean when they use the uglier word “collusion.”

<sup>211</sup> See note 102 *supra*.

<sup>212</sup> These numbers are taken from two sources from 1999 (which is why the shares are expressed as ranges). See James R. Macdonald & Jaimi Goodfriend, *FASC Industry Outlook: Offender Management: 1999*, <http://www.lib.uwo.ca/business/prison1999.pdf>, at 10 (First Analysis Securities Corp., May 27, 1999); Stephen McFarland, Christ McGowan & Tom O’Toole, *Prisons, Privatization, and Public Values*, <http://government.cce.cornell.edu/doc/pdf/PrisonsPrivatization.pdf>, at 6 (Dec. 2002) (reprinting a table of market shares from Charles Thomas that is apparently otherwise unavailable). Cornell has apparently grown since then. See Michael Brush, *Company Focus: 3 Prison Stocks Poised to Break Out*, <http://moneycentral.msn.com/content/P105034.asp> (Jan. 5, 2005) (last visited Oct. 19, 2006) (reporting a 12% market share for Cornell). GEO has grown slightly. See The GEO Group, Inc., *Fast Facts About GEO*, <http://www.thegeogroupinc.com/facts.asp> (last visited Oct. 5, 2006) (28% share of U.S. market).

maximize total industry benefit. Because the actors are still formally separate, they would also choose some way to allocate the contributions among themselves.

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

However, as I argued above,<sup>213</sup> private firms aren't 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 so expenditures on advocacy still go down under privatization.<sup>214</sup>

## 2. *The Empirical Path?*

How can we tell which form of cooperation is most likely? Unfortunately, direct observation of the world is of limited use here. For instance, suppose we can't find any explicit cooperation on advocacy. This doesn't matter: The cooperation at issue here may just be tacit. If cooperation is beneficial, then firms may independently understand the "game" they're playing with other firms and figure out their optimal strategy. The outcome may then appear *as if* it were the result of explicit coordination; but in fact, this "cooperative" behavior would have just

<sup>213</sup> See text accompanying notes 157–169 *supra*.

<sup>214</sup> Note 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 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. (This implies that there is an "optimal" amount of privatization if you want to minimize pro-incarceration advocacy. In this example, where per-prison profits are identical between sectors, that level is 50%; and even if per-prison benefits differed, like if the private benefit were only one-half the public benefit, that optimal level would be 67%.) 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  $100 \times \$100 = \$10,000$ . Under a 10%–90% split, total benefit is  $(10 \times \$100) + (90 \times \$100)$ , which is exactly the same. Likewise, under a 20%–80% split, total benefit is  $(20 \times \$100) + (80 \times \$100)$ —again exactly the same. On the other hand, if private sector benefits are, say, \$50, then a 10%–90% split reduces total benefit to  $(10 \times \$50) + (90 \times \$100) = \$9,500$ ; a 20%–80% split reduces it still further to  $(20 \times \$50) + (80 \times \$100) = \$9,000$ ; and so forth. (This has a quite different implication for the "optimal" amount of privatization if you want to minimize pro-incarceration advocacy: It is either 0% or 100%—all the 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.)

resulted from their correct expectations about their rivals' behavior.<sup>215</sup> (Recall the earlier discussion of "shared understandings" about who would contribute what.<sup>216</sup>)

Conversely, suppose we observe the existence of the private prison firms' trade association, the Association of Private Correctional and Treatment Organizations.<sup>217</sup> This also doesn't answer the question. It's true that trade associations may provide a forum for discussing common lobbying strategies,<sup>218</sup> but talk is cheap: Why should companies give money to a coordinated advocacy campaign when it's in their personal interest to free-ride off each other? The primary question is still whether cooperation is worthwhile for these prison industry actors. (This is why many organizations exist but are ineffective.<sup>219</sup>) The trade association may make it worthwhile for its member firms by offering "selective incentives" to those who pay sufficient dues to support cooperative levels of lobbying.<sup>220</sup> APCTO, for instance, has different tiers of membership, and offers full members—who pay between \$2000 and \$30,000, depending on their revenues—voting rights.<sup>221</sup> But APCTO does not seem to fulfill much of a lobbying or advocacy coordination function, since firms do all their own lobbying and most of their own advocacy.<sup>222</sup>

But if observing the presence or absence of explicit cooperation doesn't answer the question, what about observing lobbying behavior? All the major firms do some advocacy;<sup>223</sup> doesn't the previous model predict that, absent some cooperation, they would all free-ride off of the

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<sup>215</sup> "Legal scholars have traditionally distinguished between explicit and tacit collusion. The law punishes the former, so that the act of communication is of central importance. For economists, however, this distinction has no meaning. In game theory models of collusion, the term 'agreement' does not imply a formal communication—all that is needed is for the cartel members to have an 'understanding' of how others will react to their behavior. Such shared beliefs—whether acquired tacitly or not—can support a self-enforcing, collusive equilibrium." Ian Ayres, *How Cartels Punish: A Structural Theory of Self-Enforcing Collusion*, 87 COLUM. L. REV. 295, 296–27 (1987) (footnotes omitted).

<sup>216</sup> See text accompanying note 142 *supra*.

<sup>217</sup> See Ass'n of Private Correctional & Treatment Orgs., *APCTO*, <http://www.apcto.org/> (last visited Sept. 21, 2006).

<sup>218</sup> Coordinating industry lobbying strategies doesn't violate antitrust law. See, e.g., *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

<sup>219</sup> Cf. OLSON, *supra* note 28, at 36 & n.54 (collective action theory would "tend to explain the continual complaints that international organizations and alliances are not given adequate (optimal) amounts of resources").

<sup>220</sup> See OLSON, *supra* note 28, at 132–39; MOE, *supra* note 144, at 28–29.

<sup>221</sup> APCTO, *Become a Member of APCTO*, <http://apcto.org/membership/join.html> (last visited Oct. 27, 2006).

<sup>222</sup> See text accompanying notes 93, 102–104 *supra*, note 223 *infra*.

<sup>223</sup> See SARABI & BENDER, *supra* note 22, at 9 (in 1998, CCA, with 56% of the private prison market, gave \$353,106; Cornell Corrections, Inc., with 6% of the market, gave \$110,575; Correctional Services Corp., with 5% of the market, gave \$34,378; and Wackenhut Corrections Corp., with 22% of the market, gave \$33,325); PRICE, *supra* note 23, at 74 (both CCA and Wackenhut involved with ALEC).

public sector, or off of CCA, the largest firm? Alas, no. True, we don't observe everyone totally free-riding. But as I noted above,<sup>224</sup> 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.<sup>225</sup>

### 3. *The Theoretical Path*

To answer the question of how cooperation works (if at all) in pro-incarceration lobbying, I return to theory. I have already mentioned the possibility that a trade association could offer selective incentives to members to overcome the private firms' collective action problem. If this happens, that would support the theory that private firms cooperate with each other but don't cooperate with the public sector; but as I noted above, this doesn't seem to be empirically relevant in the prison case.<sup>226</sup>

But sticks may be more important than carrots here. Game theorists have long theorized that, even if the only equilibrium of a game is non-cooperative—say, the well known Prisoners' Dilemma—repetition of the game can lead to cooperative behavior.<sup>227</sup> In particular, when a game is infinitely repeated (or when the number of periods is unknown), the players can maintain cooperative behavior by threatening to punish non-cooperative players in future periods. This can explain why firms in an oligopolistic industry may cooperate (i.e., collude) to charge high prices.<sup>228</sup> The industrial organization literature mostly discusses cooperation between actors who sell products in markets, rather than auctions, which is how private prison firms compete; but there is also a literature on how cooperation can be maintained in auctions.<sup>229</sup>

<sup>224</sup> See text accompanying note 182 *supra*.

<sup>225</sup> This wouldn't happen if auctions were nondiscretionary, for instance if they 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 88, at 75–79, there are enough “soft factors” that a firm's contributions may make a difference in whether it wins a bid.

<sup>226</sup> See text accompanying notes 217–222 *supra*.

<sup>227</sup> See, e.g., James W. Friedman, *A Non-Cooperative Equilibrium for Supergames*, 38 REV. ECON. STUD. 1, 4–8 (1971).

<sup>228</sup> Such a strategy can work as long as anyone's gain from deviating is less than the loss from the future punishment. See JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 245–61 (1988) (also discussing other ways of supporting collusion, for instance the presence of price rigidities or the desire to maintain a reputation for friendly behavior). For a discussion of threats other than the simple (and expensive for the punisher) “trigger” strategy of reverting to competitive behavior forever, see Ayres, *supra* note 215, at 306–12.

<sup>229</sup> See PAUL KLEMPERER, *AUCTIONS: THEORY AND PRACTICE* 28–29 & nn.75–77 (2004); Martin Pesendorfer, *A Study of Collusion in First-Price Auctions*, 67 REV. ECON. STUD. 381, 384–88 (2000); Jean-Jacques Laffont, *Game Theory and Empirical Economics: The Case of Auction Data*, 41 EUR. ECON. REV. 1, 25–26 (1997); Paul Klemperer, *Bidding Markets* 16–22 & 18 n.61, [http://papers.ssrn.com/soL3/papers.cfm?abstract\\_id=776524](http://papers.ssrn.com/soL3/papers.cfm?abstract_id=776524) (June 2005); Andreas Blume & Paul Heid-

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Cooperation-forcing threats can take many forms. For instance, firms in an industry can tell each other, “Charge monopoly prices, and reduce your output to the monopoly level, and I’ll do the same. But if anyone tries to undercut me, we’ll revert to competitive pricing and output decisions *forever*, where *no one* will make a profit.” Or, even without saying it, they can follow this strategy as a matter of shared understandings. This will work if the threatened loss from future competitive pricing is greater than the one-period benefit from undercutting.<sup>230</sup>

If some firm is extremely impatient—so it discounts future losses very heavily and puts a lot of weight on the present—then it may not be deterred. The same may happen if the punishment stage is far in the future; for instance, if competition only happens once every 10 years, it will take a lot of future pain to outweigh the benefit of cheating on one’s partners today. But if competition happens often, people aren’t too impatient, and the potential losses to defectors are large, the threat can be effective.

This particular threat is painful to everyone in the industry—carrying through with it means that even the punisher is punished—but its very painfulness is what makes it effective and decreases the chance that it will ever be used.<sup>231</sup> But there are other threats that are less painful but might still work in particular circumstances. For instance, the punishment period may last for only a set number of periods. Or the punishment may be limited in scope—“Let’s behave monopolistically, or else I’ll start *advertising* at competitive levels.”<sup>232</sup> “Or else I’ll cut you out of the market by executing exclusive dealing contracts with your suppliers.”<sup>233</sup> “Or else I’ll start undercutting you in some other market.”<sup>234</sup> “Or else I’ll blow up your store.” The number of possible forms of punishment is limited only by firms’ ingenuity—and other firms’ ability to converge on this shared understanding.

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hues, *Modeling Tacit Collusion in Auctions*, <http://www.pitt.edu/~ablume/images/tacit17.pdf> (working paper, Sept. 2002) (last visited Sept. 21, 2006). On specific collusive mechanisms, see Daniel A. Graham & Robert C. Marshall, *Collusive Bidder Behavior at Single-Object Second-Price and English Auctions*, 95 J. POL. ECON. 1217, 1221 (1987); see also R. Preston McAfee & John McMillan, *Bidding Rings*, 82 AM. ECON. REV. 579 (1992).

<sup>230</sup> See MAS-COLELL ET AL., *supra* note 133, at 400–05 (oligopoly behavior in an infinitely repeated game); TIROLE, *supra* note 228, at 245–46 (same); see also MAS-COLELL ET AL., *supra*, at 417–23 (more general “Folk theorem” for infinitely repeated games); TIROLE, *supra*, at 268–69 (same).

<sup>231</sup> Such threats may also be more common in the price collusion case, where successful collusion requires 100% participation, than in the lobbying case, where the public good can be produced (though not necessary at the optimal level) even if not everyone participates. See OLSON, *supra* note 28, at 42–43 (distinction between “exclusive” and “inclusive” collective goods).

<sup>232</sup> See Ayres, *supra* note 215, at 306–07.

<sup>233</sup> See Ayres, *supra* note 215, at 308–09.

<sup>234</sup> See Ayres, *supra* note 215, at 311–12.

Crucially, the punishment doesn't need to be in the same form as the defection. So how can prison firms enforce cooperative levels of campaign spending? They could threaten never to cooperate on campaign spending anymore. This is a plausible threat, but whether it is effective depends on how often political campaigns come around and how painful non-cooperation is for the defecting firm. Another possibility—assuming the firms were cooperating on the underlying prison bids before, for instance by segmenting the market among themselves—is to threaten never to cooperate on prison bids again. This seems like a much more painful threat, though as discussed before, it is also painful for the punishers. Fortunately for private prison firms, there is any number of intermediate conceivable punishments.

By contrast, public prison guard unions seem to have fewer ways of punishing private firms. They don't bid against each other in the underlying auctions, so they can't threaten to end any cooperative behavior there. They're 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 any more in pro-incarceration advocacy, but this may not be a highly effective threat.<sup>235</sup>

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 don't differ that much, which assumption we choose isn't terribly important.

#### F. *Allowing Money to Change Candidates' Positions*

So far, I have taken the political agenda as given: I didn't explain where the proposed reform came from. Thus, I've 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.<sup>236</sup> But money can also affect the agenda—by inducing candidates to change their views, by inducing the sponsors of voter initiatives to propose a different initiative than they otherwise would, and so on.

When money can affect the agenda (but the other assumptions are unchanged), the analysis is essentially the same. Suppose you are considering whether to contribute to place a voter initiative on the ballot.

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<sup>235</sup> In this model, new contracts come up to bid every period, while lobbying only happens once, at the beginning of the game; so this model rules out threats based on future lobbying behavior by construction. But even if I were to include recurring opportunities for lobbying in the model, they'd probably come up less often than opportunities to bid on contracts.

<sup>236</sup> See MUELLER, *supra* note 138, at 478–79.

The initiative is supported by some group or other, but for specificity, let's say it's being sponsored by a politician.<sup>237</sup> This politician may be fairly pro-incarceration himself, but he is limited in how strict an initiative he can propose: He won't prevail unless the median voter, whose views control the outcome of the election,<sup>238</sup> prefers his 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.<sup>239</sup>

A monetary contribution has the following effects:

1. *Electoral influence.* As before, you benefit because your contribution directly increases the probability that the initiative prevails.
2. The contribution moves the substance of the initiative in a more pro-incarceration direction. This has two effects, which cut in opposite directions:
  - a. *Substantive influence.* You benefit if it prevails because the policy is better for you. But:
  - b. *Extremism.* The initiative is somewhat less likely to prevail because it may now be too harsh for the median voter.

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—in addition to encompassing electoral influence, it now adds the benefit of substantive influence and subtracts the cost of extremism—but the basic idea is the same.

Now suppose, again, that the industry is split up into a 90% sector (them) and a 10% sector (you). As before, your competitor's benefits go down to 90% of their previous level, so he now wants to contribute until the benefit of an extra dollar to the industry is worth \$1.11.<sup>240</sup> As before,

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<sup>237</sup> See, e.g., Michael Finnegan & Robert Salladay, *Voters Reject Schwarzenegger's Bid to Re-make State Government*, L.A. TIMES, Nov. 9, 2005, at 1 (Gov. Schwarzenegger aggressively (but unsuccessfully) pushed 4 initiatives "central to his larger vision" for reforming California politics); Michael Finnegan, *Props. 57, 58 Big Items in Homestretch*, L.A. TIMES, Mar. 2, 2004, at 1 (Gov. Schwarzenegger aggressively (and successfully) pushed 2 budget initiatives).

<sup>238</sup> See, e.g., MUELLER, *supra* note 138, at 85–86. In assuming a stable identity of the median voter, I'm abstracting away from voter participation issues. See *id.* at 232–34 (discussing how voter indifference and alienation may or may not affect outcomes).

<sup>239</sup> See MUELLER, *supra* note 138, 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 143, at 273–74, 279.

<sup>240</sup> This is not as obvious as it was in the previous models. It turns out that the electoral influence and extremism effects both tend to make the benefit of each additional dollar decrease. But the substantive influence effect is ambiguous. Thus, 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 (continued next page)

your competitor contributes less, because having only 90% of the industry is like facing a 10% tax on revenues. And as before, you free-ride off of your competitor, because when you take his contribution level into account, an extra dollar in the pot is no longer worthwhile to you.<sup>241</sup>

#### IV. SOME “ANYTHING GOES” MODELS

I have already hinted at a way in which privatization can have an ambiguous effect. If we take both pro- and anti-incarceration advocacy into account in the model of the previous Part, privatization decreases pro-incarceration advocacy but has an ambiguous effect on anti-incarceration advocacy. What this means normatively depends on one’s attitude toward anti-incarceration advocacy. If one opposes pro-incarceration advocacy because the U.S. already has too much incarceration,<sup>242</sup> then there’s nothing wrong, and perhaps everything right, with advocacy in the other direction.

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case. Nonetheless, for reasons explained below, *see* text accompanying note 291 *infra*, it turns out that the largest actor’s contributions still fall.

<sup>241</sup> This expanded model is still fairly easy because the opponent of the initiative is the status quo, which, being the status quo, doesn’t act strategically. Things get more difficult if we instead make this a race between two candidates. The substantive influence effect—your desire to make the ultimate policy favor you, whoever wins—could make you contribute to both candidates simultaneously. Moreover, your contributions to one candidate can influence not only that candidate’s position but also that of his opponent. As a result, the marginal benefit of advocacy expenditures becomes quite a bit more complicated. *See* MUELLER, *supra* note 138, at 479–80. Nonetheless, the qualitative result should be the same.

<sup>242</sup> *See, e.g.,* SARABI & BENDER, *supra* note 22, at v.

On the other hand, if one opposes pro-incarceration advocacy because it is assumed<sup>243</sup> 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.<sup>244</sup>

In this Part, I present two other models in which the effect of privatization is ambiguous. In section A, I relax the assumption that money is fungible. In section B, I relax the assumption that privatization is exogenous. In both models, the effect of privatization cannot be determined a priori; whether advocacy goes up or down depends on the facts.

#### A. *Relaxing the Assumption of Fungible Money*

Recall the main model presented in section III.A, in particular Figures 6 and 7. 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 larger provider spending everything and the smaller one spending nothing.

That model's results—chiefly the result that the smaller-total-profit sector totally free-rides off the efforts of the larger-total-profit sector—were 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.

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<sup>243</sup> *But see* text accompanying notes 122–131 *supra*.

<sup>244</sup> 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 deliberative conditions.” Dolovich, *supra* note 17, 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.)

On the other hand, some alternate assumptions may also be plausible. For example, one group might be attractive only to Democrats, while another might be attractive only to Republicans.<sup>245</sup> 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 not have the same benefit as your first dollar added on to your competitor's 500,000th.

As before, let us adopt an extreme assumption, though this assumption is the opposite of the previous one: The effectiveness of your dollars is entirely unrelated to how much money your competitor has spent. This corresponds to the case where (for whatever reason) you are only effective in lobbying for one sort of beneficial reform—say, Three Strikes laws—while your competitor is only effective in lobbying for another—say, decreasing diversion to drug treatment programs. Advocacy is still a public good, as before. But the results are not as stark as in the previous model.

When you were a monopolist and both reforms—Proposition X and Proposition Y—were on the agenda, you were willing to spend \$1 million on each, for a total of \$2 million. You divided your money optimally between them, so a dollar spent on either one returned a benefit of \$1.

Now, having been split up by the Antitrust Division, you have 10% of the industry, and can only lobby effectively on Proposition X. Because your competitor captures 90% of the benefit of Proposition X if it passes, you spend money on Proposition X until an extra dollar returns a benefit of \$5. Call this amount \$300,000.

Meanwhile, your competitor, with 90% of the industry, is busy lobbying for Proposition Y. Because you capture 10% of that benefit, he spends money on Proposition Y until an extra dollar returns a benefit of \$1.11. Call this amount \$900,000.

The split-up of the industry, and the resulting (partial) free riding, is responsible for reducing the previous amount of lobbying—\$2 million—down to a total of \$1.2 million (just like, in the previous model, the 90-10 split was responsible for bringing \$1 million of lobbying down to

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<sup>245</sup> This is a made-up example; it doesn't apply to prison advocacy, where both the California prison guards union and private prison firms give to both Republicans and Democrats. See SARABI & BENDER, *supra* note 22, at 13; Talvi, *supra* note 101; CJCJ, *supra* note 37; Pollak, *supra* note 58 (the New Jersey State PBA tends to give to incumbents, including Democratic Gov. Florio and Republican Gov. Whitman).

\$900,000). In this example, the larger actor gives more, but that needn't be the case, since there's no reason to believe that both actors are equally effective in their advocacy. What if either private firms or public unions are particularly incompetent lobbyists or political strategists? All we can say is that increasing an actor's industry share tends to increase his contribution.

In this context, privatization has two effects. First, it increases the share of the private sector, so private sector advocacy goes up. Second, it decreases the share of the public sector, so public sector advocacy goes down. We can't 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 just completely unpersuasive, while the other sector is slick and sympathetic<sup>246</sup>—then we can hazard some predictions, but we can't say anything without such empirical facts.

As noted above, this was an extreme assumption—and I pulled the assumption of two separable reforms out of a hat—but there are intermediate assumptions that yield the same result—that privatization makes private lobbying go up and public lobbying go down. 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.

#### B. *Strong and Weak Unions and Industries*

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.<sup>247</sup> For instance, if you, with a 10% share, are twice as slick a lobbyist than your competitor—and than the industry before the breakup—meaning that your marginal dollars produce twice the benefit, you will act as though your share was 20%.

We can't say a priori which way this cuts: It's not clear which sector is more effective at lobbying in favor of incarceration. The CCPOA, as we've seen,<sup>248</sup> is highly effective, but corrections officers' unions are much less active outside of California, and perhaps this is because they are less effective. It's hard to say how effective private prison firms would be at lobbying in favor of incarceration, since, as we've seen, there's little evidence that they do this at all.<sup>249</sup>

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<sup>246</sup> See text accompanying note 247 *infra*.

<sup>247</sup> See text accompanying note 145 *supra*.

<sup>248</sup> See text accompanying notes 34–44 *supra*.

<sup>249</sup> See text accompanying notes 87–121 *supra*.

But let us suppose that one's effectiveness at lobbying for incarceration is 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. By simple observation, we may conclude that, obviously, those states' correctional officers' unions were not effective at opposing privatization; the 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.<sup>250</sup>

Similarly, consider the states with low levels of privatization, like California (1.8% private in 2004), or no privatization at all, like New York or Rhode Island.<sup>251</sup> 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 advocacy would go down; but privatization is unlikely to be introduced there, so we won't 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 aren't randomly chosen; rather, privatization emerges where prison guard unions are weak. Thus, past privatization may have, on balance, increased pro-incarceration advocacy. Eliminate prison privatization, and you reestablish the rule of the ineffective prison guard unions—to the benefit of those who oppose pro-incarceration advocacy.

It's a powerful story, but it requires more fleshing out. For one thing, low-privatization states need not be high-union-strength states. While antipathy to privatization and the strength of public sector unions are probably correlated, a very Blue state may plausibly oppose privatization even if, for whatever reason, its unions were weak.

Moreover, it's not clear that this argument counsels against privatization generally. It may, instead, tell us to oppose privatization where it's widespread<sup>252</sup> but to endorse it where it's low or non-existent,<sup>253</sup> on the "balance of power" theory that the private sector should be strengthened where unions are strong but weakened where unions are weak.

Or, perhaps, the policy recommendation may be indeterminate: Suppose the equilibrium we observe today already reflects the victory of the stronger party in each state. Then—under the assumption that the

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<sup>250</sup> I am grateful to Margo Schlanger and Giuseppe Dari-Mattiacci for this point.

<sup>251</sup> See PRISONERS IN 2004, *supra* note 147, at 6 tbl.7.

<sup>252</sup> For instance, in the high-privatization states listed in note 150 *supra*.

<sup>253</sup> For instance, in the low-privatization states listed in note 149 *supra*, or in the non-privatization states listed in PRISONERS IN 2004, *supra* note 147, at 6 tbl.7.

effectiveness of pro-incarceration advocacy is perfectly correlated with the effectiveness of pro- or anti-privatization advocacy—pro-incarceration advocacy is already as high as it can get. Adding a thumb to the privatization scales in either direction would tend to support the victory of an otherwise weaker party and would therefore reduce the total amount of pro-incarceration advocacy.

Most importantly, though, this line of argument depends on the empirical—and contestable—assertion that actors in the prison industry are similarly effective in the privatization debate as in the incarceration debate.

Perhaps this is true—one’s effectiveness at advocacy probably depends on one’s general characteristics, like goodwill, persuasiveness, and slickness. But perhaps the correlation is weak. 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<sup>254</sup> 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 generalized public employee unions or small-government advocates, who assume (probably sensibly enough) that a victory for privatization anywhere is a victory for the general privatization movement. 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 “largest” actor, where “largest” also takes effectiveness into account. I have given arguments above as to why the private sector is currently probably the smaller actor.<sup>255</sup> The “slickness adjustment” described here might change that in some places, but it is an empirical question. Similarly, in the terms of the “anything goes” model, privatization will still have the effect of increasing the private sector’s advocacy but decreasing that of the public sector. The slickness adjustment may change the de facto shares of the different sectors, but it doesn’t change the qualitative result. Anything still goes.

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<sup>254</sup> See note 26 *supra*.

<sup>255</sup> See text accompanying notes 146–171 *supra*.

## V. CONCLUSION

This Article is not a brief for or against privatization, in prisons or elsewhere. It takes no position on whether private providers are sufficiently accountable, whether privatization decreases cost or increases quality,<sup>256</sup> whether lower costs (if real) are even desirable,<sup>257</sup> whether privatizing certain functions like imprisonment is invalid because these functions are inherently public,<sup>258</sup> or any of the other arguments in the literature.<sup>259</sup> (Nor do I explore whether the advocacy problem could be addressed in other ways, for instance by direct controls on advocacy<sup>260</sup>—though I have, I suppose, tacitly assumed that such controls will not be effective.<sup>261</sup>) This Article’s only goal is to point out the inadequacies in the current formulation of the political influence argument against privatization.

My opinion, based on the above models, is that privatization will probably not worsen the political influence problem, and may alleviate it. The public goods model seems to describe many situations of political advocacy fairly well. The assumption of the first model—that the probability of getting a policy change only depends on the total amount spent—likewise seems to describe many situations, like initiative or election campaigns.

There’s always room for more realistic theories—for instance, my analysis of what motivated the public-sector union was somewhat speculative; in assuming that private prison firms were profit-maximizing, I suppressed any analysis of agency costs within the firm; and my back-of-

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<sup>256</sup> See note 16 *supra*.

<sup>257</sup> See White, *supra* note 87, at 145 (“in a society that claims a basis in rule of law norms, it is probably always a good thing for the state to wage its . . . wars against its citizens . . . in an obvious and maximally costly way”).

<sup>258</sup> See, e.g., John J. DiIulio, *What’s Wrong with Private Prisons*, PUB. INTEREST, Summer 1988, at 66, 82 (“‘employing the force of the community’ via private penal management undermines the moral writ of the community itself”).

<sup>259</sup> See, e.g., Dolovich, *supra* note 17, at 518–23 (prison officials can affect time served through disciplinary procedures and recommendations to parole boards).

<sup>260</sup> See Rosky, *supra* note 6, at 955–56 (whether privatization or political influence is easier to control is an uncertain empirical question).

<sup>261</sup> See, e.g., *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (corporations have First Amendment rights); *Buckley v. Valeo*, 424 U.S. 1 (1976), *et sua progenies* (First Amendment rights include political advocacy); LOGAN, *supra* note 23, at 159 (“We cannot prevent ‘lobbying’ (though it may not always be called that) by nonprofit organizations, government agencies, public employee unions, or commercial companies, any of whose agenda may or may not coincide with the public interest.”); Sheryl Gay Stolberg, *House Passes Limit on Cash for Groups in Campaigns*, N.Y. TIMES, Apr. 6, 2006, at A21 (quoting a Republican opponent of a campaign finance bill comparing campaign finance restrictions to “whack-a-mole”). *But see* Paul Guppy, *Private Prisons and the Public Interest: Improving Quality and Reducing Cost Through Competition*, <http://www.washingtonpolicy.org/ConOutPrivatization/PBGuppyPrisonsPublicInterest.html> (Wash. Pol’y Ctr., Pol’y Br., Feb. 2003) (last visited Oct. 23, 2006) (campaign finance laws are an “obvious,” “simple and effective way[] to prevent corruption of the law-making process).

the-envelope estimate of the benefit of incarceration to the different sectors was just that—a back-of-the-envelope 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.<sup>262</sup> So my specific conclusions here are tentative.

But what is not tentative is that this sort of analysis is necessary if one is to make the political influence argument properly. General assumptions will not do. As Mancur Olson (somewhat hyperbolically) observed over 40 years ago—in a seminal work, *The Logic of Collective Action*, that rewards reading even today—“the customary view that groups of individuals with common interests tend to further those common interests appears to have little if any merit.”<sup>263</sup> Critics of privatization who have charged that privatization has increased (or will increase, or runs a substantial risk of increasing) pro-incarceration advocacy have not explained what it is about the lobbying world that would make this happen.

More important than any specific model in this paper is the negative point<sup>264</sup> that even if the privatization critics are right, it is unclear *why* they are right, for their point is not obvious. The proof that their point is not obvious is that under one set of plausible assumptions about human behavior and the effectiveness of advocacy, privatization decreases such advocacy, and under another set of plausible assumptions, privatization has an ambiguous effect.

There are a few ways for the critics to support their view. There is the empirical route: If one can observe hard evidence of private sector pro-incarceration advocacy, and if one can observe that total advocacy, or the effectiveness of total advocacy, has increased as privatization has increased, then one can argue strongly for a presumptive causal relation between privatization and pro-incarceration advocacy.

The better routes—available even without hard evidence—wed the empirical with the theoretical: One can argue that privatization increases pro-incarceration advocacy by spelling out a set of assumptions under which this would happen and then arguing that those assumptions are more plausible than alternative assumptions. When there is hard empirical evidence, that evidence is itself the best argument for the plausibility

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<sup>262</sup> There were no resource constraints in the models above—the effectiveness of advocacy wasn’t assumed to depend on whether there was any other advocacy out there (the public or politicians didn’t 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).

<sup>263</sup> See OLSON, *supra* note 28, at 2.

<sup>264</sup> Cf. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81–86 (3d ed. 1950) (“The Process of Creative Destruction”).

of the supporting assumptions. When the evidence is of the “maybe, maybe not” variety, then the argument must proceed more circumstantially.

In any event, because theoretically privatization may have an ambiguous effect on pro-incarceration advocacy—and under some assumptions may decrease it—those whose argument hinges on the view that privatization will increase it must do the theoretical work, empirical work, or both to convince the rest of us.

The same sort of analysis that I have conducted here on the prison industry can also be used to evaluate the claim that, say, defense contractors will exacerbate pro-war lobbying. Since governmental providers of defense services—i.e., armies—have, on some accounts, been notorious pro-war lobbyists throughout history,<sup>265</sup> such a claim is not credible unless one can tell a plausible story about why any defense contractor lobbying won’t crowd out some lobbying by the military itself, and doing this requires taking a position on what motivates the people at the Pentagon.<sup>266</sup> The same goes for private attorneys general, private redevelopment corporations, and the like. The result won’t always be the same, and the political influence argument may turn out to be correct in some of these cases.<sup>267</sup> But this should be the structure of the argument.

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<sup>265</sup> See JAMES CARROLL, *HOUSE OF WAR: THE PENTAGON AND THE DISASTROUS RISE OF AMERICAN POWER* 499 (2006) (“[A]rguments for preventive war had defined the culture of the Pentagon since right after World War II, with Leslie Groves being the first to make them. Over the years, not even the Soviet nuclear arsenal inhibited many senior American military officials from making the case for first attack—even in the teeth of the Cuban Missile Crisis.”); JAMES F. SCHNABEL, *POLICY AND DIRECTION: THE FIRST YEAR 370–74* (U.S. Army in the Korean War, Maurice Matloff gen. ed., 1972) (Douglas MacArthur made public statements adopting a more hawkish line with respect to China and Korea than the Truman Administration); SAMUEL E. FINER, *THE MAN ON HORSEBACK: THE ROLE OF THE MILITARY IN POLITICS* 74 (1962) (British military helped push Britain into World War I); *id.* at 107 (“In 1955, the [Soviet] military opposed Malenkov on two important counts: his apparent intention to turn from heavy industry to consumer goods and his pessimism about the effects of nuclear war.”). But see CARROLL, *supra*, at 501–03 (dissenting voices in the Pentagon); SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* 69 (1957) (“The military man normally opposes reckless, aggressive, belligerent action. If war with a particular power is inevitable at a later date with decreased chances of success, the military man may favor ‘preventive war’ in order to safeguard national security. . . . [But] generally war should not be resorted to except as a final recourse, and only when the outcome is a virtual certainty. . . . Thus, the military man rarely favors war. . . . Accordingly, the professional military man contributes a cautious, conservative, restraining voice to the formulation of state policy.”).

<sup>266</sup> See, e.g., SEYMOUR MELMAN, *PENTAGON CAPITALISM: THE POLITICAL ECONOMY OF WAR* 8 (1970) (“[T]he operation of Vietnam war policies by the federal government [does not benefit an important segment of U.S. industrial corporations, but] is quite consistent with the maintenance and extension of decision-power by the new industrial management centered in the Department of Defense—for the management of the Vietnam war has been the occasion of major enlargement of budgets, facilities, manpower, capital investment and control over an additional million Americans in the labor force and more than one-half million additional Americans in the armed forces.”).

<sup>267</sup> 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  
(continued next page)

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One may object at this point that I have not exonerated private prisons with my economic legerdemain.<sup>268</sup> Rather, I have only shown that the entire system is corrupt,<sup>269</sup> 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.<sup>270</sup>

Fair enough. If I have been correct in assuming in this Article that self-interested pro-incarceration lobbying is undesirable, then perhaps the system is corrupt.<sup>271</sup> But how does this observation translate into an argument against prison privatization? It’s not enough to show that private prisons are part of the problem: Removing one problem isn’t 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 reduces the activity of the public sector and may reduce total activity; eliminating the private sector would thus exacerbate the problems of the public sector.<sup>272</sup>

Nor is it just economists who oppose making the best the enemy of the good: 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”<sup>273</sup>—is acting in the realm of “nonideal

reduced costs also increase incarceration, *see* White, *supra* note 87, at 137; note 257 *supra* and accompanying text, that reduced costs increase incarceration).

<sup>268</sup> *Cf.* Competitive Enter. Inst. v. Nat’l Highway Traffic Safety Admin., 956 F.2d 321, 324 (D.C. Cir. 1992) (“statistical legerdemain”); *id.* at 327 (“bureaucratic mumbo-jumbo”); STAR WARS: EPISODE I—THE PHANTOM MENACE (Lucasfilm Ltd. 1999) (“You think you’re some kind of Jedi, waving your hand around like that? . . . [M]ind tricks don’t work on me.”).

<sup>269</sup> *See* Dolovich, *supra* note 17, at 532 (“the problem is more widespread than previously recognized”).

<sup>270</sup> Dolovich, *supra* note 17, at 543.

<sup>271</sup> *Cf.* WILLIAM SHAKESPEARE, ROMEO AND JULIET, III.i.89, 97–98, 104, *in* WILLIAM SHAKESPEARE: THE COMPLETE WORKS 855, 876 (Alfred Harbage gen. ed., Viking 1969) (“A plague a both your houses!”); STEPHEN SONDHEIM, SWEENEY TODD: THE DEMON BARBER OF FLEET STREET 94 (1979) (“They all deserve to die!”).

<sup>272</sup> 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) (“If  $n$  distortions (where  $n \geq 2$ ) exist, we cannot claim that the competitive equilibrium with  $n-1$  distortions is preferable to the competitive equilibrium with  $n$  distortions . . . . The results obtained in second-best analysis may contradict the economist’s intuition developed in the first-best analysis.”); R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956–57) (“in a situation in which there exist many constraints which prevent the fulfillment of the [Paretian] optimum conditions, the removal of any one constraint may affect welfare or efficiency either by raising it, by lowering it, or by leaving it unchanged”); *see also* Barenaked Ladies, *Second Best*, *on EVERYTHING TO EVERYONE* (Reprise 2003); *SECOND BEST* (Keep Your Head et al. 2004) (starring Joe Pantoliano); *SECOND BEST* (Regency Enters. et al. 1994) (starring William Hurt).

<sup>273</sup> *See* JOHN RAWLS, A THEORY OF JUSTICE 8 (1971); *see also* Sharon Dolovich, *Legitimate Punishment in Liberal Democracy* 307, 324 (2004) (discussing “partial compliance”).

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.”<sup>274</sup>

Because nonideal theory requires that we ask about the real-world effectiveness of any reform, merely observing undesirable lobbying by the private sector will not support an argument against prison privatization unless, say, privatization actually increases “the danger of . . . corrupting influence”<sup>275</sup> or “compromise[s] further the possibility of legitimate punishment.”<sup>276</sup>

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.<sup>277</sup> If “private prisons are by no means unique,”<sup>278</sup> and if any prison provider, public or private, will lobby for incarceration, any “tension” has nothing to do with private prisons and everything to do with the crooked timber of humanity.<sup>279</sup>

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At least with respect to prisons, the surprising moral of this story should not be that surprising. From their inception, the antitrust laws were justified in part as a means to reduce the political influence of corporations: William Howard Taft wrote, shortly after their enactment, 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 cor-

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<sup>274</sup> See JOHN RAWLS, *THE LAW OF PEOPLES* 89–90 (1999) (“To this point we have been concerned with ideal theory. . . . Nonideal theory asks how this long-term goal 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. So conceived, nonideal theory presupposes that ideal theory is already on hand. For until the ideal is identified . . . nonideal theory lacks an objective, an aim, by which its queries can be answered.”); see also RAWLS, *supra* note 273, at 245–48 (even “slavery and serfdom . . . are tolerable . . . when they relieve even worse injustices”).

<sup>275</sup> Dolovich, *supra* note 17, at 532.

<sup>276</sup> Dolovich, *supra* note 17, at 542–43.

<sup>277</sup> Dolovich, *supra* note 17, at 529.

<sup>278</sup> Dolovich, *supra* note 17, at 530.

<sup>279</sup> Cf. ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* xi, 19, 48 (1991); *id.* at vii & n.2 (“cross-grained” timber in R.G. Collingwood’s 1929 lecture); Isaiah Berlin, *Montesquieu*, 41 *PROC. BR. ACAD.* 267, 284 (1955), reprinted in *AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS* 130, 148 (1980); 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”).

rupt machines and bosses threatened us with a plutocracy.”<sup>280</sup> The argument is plausible, and it is likewise plausible that prison privatization, by fragmenting the prison industry into at least two chunks (and more if private firms don’t cooperate on advocacy), has similarly made the industry less powerful.

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 a happy, unintended side effect of privatization that, if real, should be taken into account in future analysis.

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<sup>280</sup> 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) (suggesting “an empirical base for the argument that antitrust policy is necessary to avoid not just undue concentrations of economic power but also threatening concentrations of political power”). *But cf.* DeNeen L. Brown, *Rejected as a Planet, Pluto Has a Space in People’s Hearts*, WASH. POST, Sept. 2, 2006, at C1.

## TECHNICAL APPENDIX

Note to Law Review editors: I am flexible on inclusion of this section.<sup>281</sup>

A. *A More Technical View*

Let us recap the central question: If self-interested pro-incarceration advocacy is wrong, does privatization lead to more or less of it? The following models show technically how adding more voices can lead to less pro-incarceration advocacy. The intuition, again, is mainly that more competitive industries, or industries with more scattered voices, may advocate less because advocacy is a public good and more scattered industries have more trouble overcoming their collective action problem. The largest actor does all the lobbying, and the smaller actors free-ride. And because the largest actor, under current conditions, is still the public sector, privatization reduces the public sector's advocacy while keeping the private sector's advocacy at zero. Another model, also plausible, shows that privatization has no predictable effect on pro-incarceration advocacy a priori; thus, showing that it will increase pro-incarceration advocacy requires a precise explanation of how advocacy by different sectors works.

1. *Privatization May Reduce Pro-Incarceration Advocacy*

a. *A One-Sided Model*

The model has the following assumptions. The prison system, whose size is normalized to 1, is divided into small, separate projects that can be run by either the public sector or a private firm. Prisons operate for infinitely many periods, and because private contracts run out periodically, many projects are put out to bid to the private sector each period. Actors in both the public and private sectors are rational, risk neutral expected utility maximizers whose utility depends only on their financial well-being, as described below. All workers have reservation wage  $W_m$ .

The public sector wage is  $W_g$  per unit, which is higher than the equilibrium market wage  $W_m$ .<sup>282</sup> The public sector runs a proportion  $\alpha_g$  of the

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<sup>281</sup> If you are unwilling to print this section, I could release it separately as ALEXANDER VOLOKH, *PRIVATIZATION AND THE LAW AND ECONOMICS OF POLITICAL ADVOCACY: TECHNICAL APPENDIX* (Georgetown Univ. Law Ctr., Working Paper No. xx, 2007), and simply refer to that working paper in this Article.

<sup>282</sup> See text accompanying notes 164–169 *supra*. I treat  $W_g$  as a constant—not dependent on  $\alpha_g$ —for simplicity. More properly, it is probable that  $W_g$  decreases with privatization, since the public sector union will then have less bargaining power. I leave the complications this would add to the analysis for further research, perhaps along the lines of Fraja, *supra* note 162, at 461–66, who  
(continued next page)

projects. The benefit of prison provision to the public sector employees is  $\Delta W = W_g - W_m$  per unit.<sup>283</sup> The public sector employees are presumed to act collectively through their union, membership in which is mandatory.

In the private sector, there is a fixed number of firms  $n$ , all equally efficient and able to produce at unit cost  $C$ . Each firm  $i$  runs a proportion  $\alpha_i$  of the system.<sup>284</sup> The contract price per unit is  $P$ , so the benefit of prison provision to the private sector is  $\Pi = P - C$  per unit.<sup>285</sup>

Wages, prices, and costs in this model should be understood as the present value of the flow of wages, prices, and costs over the whole game. As a purely technical matter, they are also normalized to be “per unit,” meaning (in this system of size 1) that they represent wages, prices, or costs scaled up to the level of the entire system.

Before prisons operate, actors in the industry can advocate. This is a one-sided model, where the advocacy of the opposing side is taken as given. By spending an amount  $e_i$  on pro-incarceration advocacy, actor  $i$  can affect the probability that the size of the prison system is increased by a proportion  $\varepsilon$  (that is, from 1 to  $1 + \varepsilon$ ). (This assumes that “pro-incarceration” policy, as I have defined it,<sup>286</sup> actually increases the extent of incarceration, rather than decreasing it through deterrence or, say, more lenient behavior by other actors not covered in the reform.)

The assumptions I make about the probability of this increase and about firm shares under privatization are listed in Appendix B1. The main assumptions are that only the total amount of advocacy matters to the probability of the policy change; more advocacy increases the prob-

explicitly considers wage determination in a “mixed duopoly” consisting of a public firm and a private firm with unions.

<sup>283</sup> The foundation for this assumption is either risk neutrality of workers or—more likely—income redistribution within the union. See Pencavel, *supra* note 162, at 201–02, and text accompanying notes 161–163 *supra*.

<sup>284</sup> This share or proportion is different from “market share” as it is used in antitrust. For instance, if a single large firm is broken up into two identically sized firms, under my framework each firm has a 50% share of the industry, because its total benefits are 50% of what they were before. In antitrust analysis, if the two firms compete for the same market, they each have a 50% market share, whereas if the two firms don’t compete with each other because they’re limited to separate geographical areas, they each have a 100% share of a smaller market. I am grateful to Steven C. Salop for this point.

<sup>285</sup> I treat  $P$  as a constant—not dependent on  $\{\alpha_i\}$ —because it’s not clear what effect different industry shares will have on  $P$ . In the first place, as I explain in note 284 *supra*, these industry shares are not “market shares”; that is, the companies may not be competing against each other. In the second place, even if they were competing against each other, it’s not clear whether privatization would lead to the entry of more firms, the growth of all existing firms, or the consolidation of existing firms into fewer firms. Finally, suppose privatization led to the entry of more firms. Our intuitions suggest that collusion would be more difficult in this case, and so  $P$  should drop; but Pecorino points out that, under standard models, this intuition may not necessarily be true (which might either rebut our intuitions or indict the standard models). See Pecorino, *supra* note 178.

<sup>286</sup> See text accompanying notes 29–30 *supra*.

ability but (after a certain threshold) at a decreasing rate; and I rule out uninteresting cases where advocacy is so unproductive that some actors wouldn't even be willing to spend the first dollar.

Denote all the assumptions listed above as  $A_1$ .

*Proposition 1.* Under assumptions  $A_1$ :

- *No collusion.* If the public sector and all private firms act separately: If  $\alpha_g \Delta W > \max_i \{\alpha_i\} \Pi$ , increasing privatization decreases pro-incarceration advocacy. Otherwise, increasing privatization increases pro-incarceration advocacy.
- *Private sector collusion.* If all private firms collude with each other: If  $\alpha_g \Delta W > \alpha_m \Pi$ , where  $\alpha_m = \sum \alpha_i$  over all private firms, increasing privatization decreases pro-incarceration advocacy. Otherwise, increasing privatization decreases pro-incarceration advocacy.
- *Full collusion.* If the public sector and all private firms collude with each other: If  $\Delta W > \Pi$ , increased privatization decreases pro-incarceration advocacy. If  $\Delta W < \Pi$ , increased privatization increases pro-incarceration advocacy. If  $\Delta W = \Pi$ , increased privatization has no effect.
- *Sometimes, the local can be the global.* In the no-collusion case when  $\alpha_g \Delta W > \max_i \{\alpha_i\} \Pi$ ; in the private sector case when  $\alpha_g \Delta W > \alpha_m \Pi$ ; or in the full collusion case: Decreasing privatization slightly and eliminating it entirely have effects on advocacy that go in the same direction.

*Proof.* See Appendix B.3.

This general result is familiar from the literature on public goods: Any degree of fragmentation in the industry reduces expenditures on public goods that benefit the whole industry, because each actor receives only a portion of the benefit from advocacy attributable to his contribution to the public good.<sup>287</sup> As explained above,<sup>288</sup>  $\alpha_g \Delta W$  is likely greater than  $\max_i \{\alpha_i\} \Pi$  and than  $\alpha_m \Pi$  (and, for the full-collusion case,  $\Delta W$  is likely greater than  $\Pi$ <sup>289</sup>).

#### b. *A Two-Sided Model*

Suppose that the assumptions of  $A_1$  apply, except the following. The probability of getting a “tougher” policy change is  $p(e,y)$ , where  $e$  is the

<sup>287</sup> See sources cited *supra* note 143.

<sup>288</sup> See text accompanying notes 147–151 *supra*.

<sup>289</sup> See text accompanying notes 157–169 *supra*.

expenditure of prison providers and  $y$  is the expenditure of anti-incarceration forces to prevent the increase  $\varepsilon$ . The disutility of these forces from incarceration is  $B < 0$ . Denote these assumptions, and those listed in Appendix C1, as  $A_2$ .

*Proposition 2.* Under assumptions  $A_2$  and if all private firms collude with each other: If  $\alpha_g \Delta W > \alpha_m \Pi$ , increasing privatization decreases pro-incarceration advocacy. Otherwise, increasing privatization increases pro-incarceration advocacy. In either case, increased privatization has an ambiguous effect on anti-incarceration advocacy.

*Proof.* See Appendix C.2.

It is easy to show that the results are analogous using the other collusion assumptions from above. If, as argued before,  $\alpha_g \Delta W$  is larger, then, as in the previous model, the amount of pro-incarceration advocacy goes down, because  $e_m$  remains zero and  $e_g$  falls with privatization (because of the same public goods problem). The “total amount” of advocacy ( $e+y$ ) is not meaningful in this model; the more relevant quantity is the probability  $p(e,y) - p(0,0)$ , which is the total effect of all advocacy. (We can interpret  $p(0,0)$  as the probability that the policy change happens anyway under “fair deliberative conditions.”<sup>290</sup>) In any event, the effect of privatization on  $p(e,y)$  is indeterminate without further information.

### c. Expenditures and Substantive Influence on Policy

Suppose that  $\varepsilon$  is not exogenous but can be influenced by expenditures. Then the probability of success (in a one-sided model) can be expressed not as  $p(e)$  but as  $p(\varepsilon(e),e)$ , where  $p_\varepsilon < 0$ ,  $p_e > 0$ , and  $\varepsilon' > 0$ .

The public employees choose  $e_g$  to maximize:

$$\pi_g(e_g) = \alpha_g (1 + p(\varepsilon(e),e) \varepsilon) \Delta W - e_g.$$

The first-order condition of this problem (omitting the arguments of  $p$  and  $\varepsilon$  for clarity) is:

$$(p_\varepsilon \varepsilon' + p_e) \varepsilon + p \varepsilon' \leq 1 / \alpha_g \Delta W \text{ (with equality if } e_g^* > 0\text{).}^{291}$$

(Similarly, the first-order condition of the private sector is the same expression, with  $e_g$  replaced by  $e_m$  and  $\alpha_g \Delta W$  replaced by  $\alpha_i \Pi$ .) Suppose that  $\alpha_g \Delta W > \alpha_i \Pi$ . For reasons explained in the proof of Proposition 1, only the public sector gives anything:  $e_g^* > 0$  and  $e_m^* = 0$ . If the left-hand side of the above expression—call it  $L(e)$ —is decreasing in  $e$ , then it is clear that decreasing  $\alpha_g$  will decrease  $e$ —that is, privatization will

<sup>290</sup> See Dolovich, *supra* note 17, at 515.

<sup>291</sup> This is similar to equation (20.9) in MUELLER, *supra* note 138, at 480.

decrease total advocacy. However, it is unclear that  $L(e)$  is decreasing in  $e$ :

$$dL/de = (p_{ee} \varepsilon' + p_e \varepsilon'' + p_{ce}) \varepsilon + (p_e \varepsilon' + p_c) \varepsilon' + p_e \varepsilon' + p \varepsilon''.$$

Consider the expression  $(p_e \varepsilon' + p_c)$  contained in the second term;  $p_e \varepsilon'$  is negative while  $p_c$  is positive. So just from that term alone, we can see that  $L(e)$  is not necessarily decreasing in  $e$ .

Fortunately, the previous comparative static result still goes through, for reasons stated in Lemma 1.

*Lemma 1.* Suppose  $f$  is differentiable,  $\operatorname{argmax}_x (f(x) - x) = x^* > 0$ ,  $f'(\infty) = 0$ , and  $\alpha \in (0,1)$ . Then  $\operatorname{argmax}_x (\alpha f(x) - x) = x' < x^*$ .

*Proof.* See Appendix D.

By Lemma 1, decreasing  $\alpha_g$  decreases total advocacy. Thus, even in a model where advocacy not only alters the probability that a pro-incarceration reform will succeed, but also alters the substantive content of that reform, privatization still decreases advocacy.

## 2. Privatization May Have an Indeterminate Effect

Instead of assuming that the probability of getting the change in policy was  $p(e)$ , where  $e = \sum e_i$ , let us assume that the probability of the policy change is  $p(e_g) + q(e_m)$ , where  $e_g$  and  $e_m$  are the respective contributions of the public and private sectors. The assumptions of this model (which I label  $A_3$ ) are the same as  $A_1$ , with  $q$  behaving like  $p$ . The only exception is that, so that the probabilities make sense, we also have  $p(\infty) + q(\infty) \leq 1$ . As before,  $p(0) + q(0)$ , the world without self-interested advocacy, can be interpreted as the probability that the reform occurs under conditions of “fair deliberation.”<sup>292</sup>

If the public and private sectors were colluding with each other, they would, given any total advocacy amount, allocate  $e_g$  and  $e_m$  optimally, and would then choose an optimal total advocacy amount.<sup>293</sup> But let us continue supposing that the two sectors are not colluding, and each has a share  $\alpha_g$  and  $\alpha_m$ .

*Proposition 3.* Under assumptions  $A_3$  and if all private firms collude with each other, increasing privatization has an ambiguous effect on pro-incarceration advocacy.

*Proof.* See Appendix E.

<sup>292</sup> See text accompanying note 290 *supra*.

<sup>293</sup> See Appendix B.2 *infra*.

In this model, both sectors can advocate, and no sector totally free rides off the other, as the smaller sector did in the previous model.

The result of this proposition makes sense: Privatization increases the advocacy of the private sector but decreases the advocacy of the public sector. Of course, these models are all polar cases; in principle, there can be other intermediate advocacy effectiveness functions  $p(e_g, e_m)$  or  $p(e_g, e_m, y)$  (or, more generally,  $p(e_{\text{non-prisons}}, e_g, e_m, y)$ ). But they do show that concerns that privatization *will* increase the amount or effect of advocacy, or even that they run of risk of doing so, are unfounded unless one is more specific about the effectiveness and interaction of advocacy by the different sectors.

Obviously, if the effect of privatization is ambiguous in this one-sided model, it remains ambiguous if we add anti-incarceration advocacy. Thus, there is no need to look into the two-sided model.

## B. Details of Proposition 1

### 1. Technical Assumptions of $A_1$

I make the following assumptions about the probability of the policy change:

- the probability  $p(e)$  is a continuous and twice differentiable function<sup>294</sup> of  $e = \sum e_i$ , i.e., only the total amount of advocacy matters;<sup>295</sup>
- $p \in [0, 1]$  (this is part of the definition of a probability);
- $p' > 0$ , i.e., more advocacy increases the probability;
- Decreasing returns to advocacy kick in eventually:  $p''' < 0$ ;  $\exists e_i$  such that  $p''(e) < 0 \forall e > e_i$ ;<sup>296</sup>
- $\exists e'$  such that  $(p(e') - p(0)) \alpha_g \varepsilon \Delta W > e'$ , and  $\exists e''$  such that  $(p(e'') - p(0)) \alpha_{i^*} \varepsilon \Pi > e''$  for  $i^* = \text{argmax}_i \{\alpha_i\}$ ; i.e., for both the public sector and the largest private firm, I require that there be some level of advocacy that makes him better off than no advocacy at all, thus ruling out the uninteresting case where some sector would be satisfied even if there were no advocacy at all.

I make two assumptions about firm shares under privatization.

First, I assume that individual firm shares are continuous and differentiable functions of  $\alpha_g$ ; this implies that when privatization increases (in

<sup>294</sup> The continuity condition merely states that the probability of getting a policy change is a smooth function of total lobbying effort. Twice differentiability is a purely technical constraint.

<sup>295</sup> The assumption that there is only a single form of advocacy and a single type of benefit is harmless. See Appendix B.2 *infra*.

<sup>296</sup> See note 138 *supra* and accompanying text.

other words, when  $\alpha_g$  falls) by a small amount, the individual  $\alpha_i$  do not jump discontinuously.

Second, I interpret privatization as taking certain projects away from the government and awarding them to the private sector according to some allocation method. When privatization increases, I assume that each private firm keeps its original projects, and at least the largest firm acquires some of the formerly government projects. This implies that as  $\alpha_g$  falls, the largest  $\alpha_i$  increases.<sup>297</sup> Similarly, when privatization decreases ( $\alpha_g$  rises), at least the largest  $\alpha_i$  falls.

## 2. *The Harmlessness of Homogeneous Advocacy*

This appendix shows that it is harmless to assume that there is a single type of advocacy expenditure that goes to obtain a single type of benefit.

Suppose, instead, there were two types of expenditure,  $e$  and  $i$ , used to obtain two types of benefit,  $X$  and  $Y$ . Instead of merely having a benefit  $B(e) = \alpha_i p(e) X$ , one would then have a benefit:

$$B^+(e, i) = \alpha_i [p(e) X + q(i) Y],$$

where both  $p$  and  $q$  satisfy the technical assumptions of A1, and one would choose  $e$  and  $i$  to maximize:

$$U(e, i) = B^+(e, i) - e - i.$$

But this is equivalent to defining  $M \equiv e + i$ , and then choosing  $e$  and  $M$  to maximize:

$$V(e, M) = B^+(e, M-e) - M.$$

And this, in turn, is equivalent to the two-step problem of:

- first choosing  $e^*$  to maximize  $V(e, M)$ , denoting the solution  $e^*(M)$  and the maximized value  $V^*(M) \equiv V(e^*(M), M) \equiv B^+(e^*(M), M-e^*(M)) - M \equiv B^*(M) - M$ ;
- then choosing  $M$  to maximize  $V^*(M)$ .

Consider the “new” benefit function  $B^*(M)$ , which is a function of total advocacy expenditures  $M$ . Taking derivatives, we have (by the Envelope Theorem<sup>298</sup>):

$$dB^*/dM = B^+_{21}(e^*(M), M-e^*(M)) = \alpha_i q'(M-e^*(M)) Y > 0,$$

$$d^2B^*/dM^2 = B^+_{22}(e^*(M), M-e^*(M)) = \alpha_i q''(M-e^*(M)) Y,$$

$$d^3B^*/dM^3 = B^+_{222}(e^*(M), M-e^*(M)) = \alpha_i q'''(M-e^*(M)) Y < 0.$$

<sup>297</sup> If we interpret  $\alpha_i$  as the probability that a private firm  $i$  gets any project, then  $\alpha_i/\alpha_m$  is the conditional probability that it gets the project given that the project goes to the private sector. So, as  $\alpha_g$  falls (and thus  $\alpha_m$  rises) by  $\eta$ ,  $\alpha_i$  rises to  $(\alpha_i/\alpha_m)(\alpha_m+\eta) = \alpha_i + \alpha_i \eta / \alpha_m \forall i$ . But I do not need such a strong assumption.

<sup>298</sup> See MAS-COLELL ET AL., *supra* note 133, at 964–66; VARIAN, *supra* note 133, at 490–91.

So the first and third derivatives of  $B^*$  behave like the first and third derivatives of  $B$ . As for the second derivative, we need to check whether it eventually becomes negative, for which a sufficient condition is that  $\lim_{M \rightarrow \infty} M - e^*(M) = \infty$ , for which in turn a sufficient condition is that  $de^*(M)/dM < 1$ .

Note that at the first stage of choosing  $e^*$  to maximize  $V(e, M)$ , the first-order condition was  $\alpha_i [p'(e^*) X - q'(M - e^*) Y] = 1$ , and the second-order condition was  $p''(e^*) X + q''(M - e^*) Y < 0$ . Differentiating the first-order condition with respect to  $M$  (and assuming, for simplicity, an interior solution), we obtain:

$$[p''(e^*) X + q''(M - e^*) Y] de^*/dM = q''(M - e^*) Y,$$

or:

$$de^*/dM = q''(M - e^*) Y / [p''(e^*) X + q''(M - e^*) Y].$$

We know from the second-order condition that the denominator of this expression is negative, and we know by assumption that the first term of the denominator,  $p''(e^*) X$ , is negative. If  $q''(M - e^*) Y < 0$ , it is easy to see that  $de^*/dM < 1$ . If  $q''(M - e^*) Y > 0$ , then the numerator is positive and the denominator is negative, so again  $de^*/dM < 1$ .

Therefore, the second derivative of  $B^*$  likewise acts like the second derivative of  $B$ . So  $U(e) = B(e) - e$  can thus be interpreted as though it were a more generalized value function  $V^*(M) = B^*(M) - M$ , where the actor chooses a total amount of advocacy and allocates it optimally among both types of advocacy. This is straightforward to generalize to a larger number of types of advocacy.

### 3. Proof

#### a. No collusion

The public employees choose  $e_g$  to maximize:

$$\pi_g(e_g) = \alpha_g (1 + p(e)\varepsilon) \Delta W - e_g.$$

The first-order condition of this problem is:

$$p'(e^*) \alpha_g \varepsilon \Delta W \leq 1 \text{ (with equality if } e_g^* > 0),$$

or:

$$e^* \geq (p')^{-1}(1 / \alpha_g \varepsilon \Delta W) \text{ (with equality if } e_g^* > 0).$$

Consider the function  $f(e) = [p(e) - p(0)] \alpha_g \varepsilon \Delta W - e$ . It is clear that  $f(0) = 0$ ; by assumption,  $\exists e' > 0$  such that  $f(e') > 0$ ; and it is likewise clear that  $f(\infty) = -\infty$ . Therefore,  $f(e)$  has an interior maximum, and at that maximum we must have  $f'(e) = p'(e) \alpha_g \varepsilon \Delta W - 1 = 0$ . The second derivative is  $p''(e) \alpha_g \varepsilon \Delta W$ , which is negative  $\forall e > e_i$ ; thus, the maximum of  $f(e)$  occurs at some  $e > e_i$ . These are the same derivatives as

those of the public sector's objective function, so the public sector's first-order condition (with equality) also has a solution, which is a maximum.

Each private sector firm  $i$  chooses  $e_i$  to maximize:

$$\pi_i(e_i) = \alpha_i (1 + p(e)\varepsilon) \Pi - e_i.$$

The first-order condition of this problem (analogously to the public sector case) is:

$$p'(e^*) \alpha_i \varepsilon \Pi \leq 1 \text{ (with equality if } e_i^* > 0) \forall i,$$

or:

$$e^* \geq (p')^{-1}(1 / \alpha_m \varepsilon \Pi) \text{ (with equality if } e_m^* > 0).$$

By an analogous argument, the first-order condition with equality has a unique solution greater than  $e_i$ , which is a maximum.

*Case 1.* If  $\alpha_g \Delta W > \max_i \{\alpha_i\} \Pi$ , then:

$$p'(e^*) \alpha_g \varepsilon \Delta W = 1 \text{ and}$$

$$p'(e^*) \alpha_i \varepsilon \Pi < 1 \forall i.$$

The public sector does all the advocacy, and  $e_i^* = 0 \forall i$ . Denote the amount of public sector advocacy, as a function of the public sector share, by:

$$e^*(\alpha_g) = (p')^{-1}(1 / \alpha_g \varepsilon \Delta W).$$

Public sector advocacy is increasing in  $\alpha_g$ , since:

$$de^*/d\alpha_g = -1 / \alpha_g^2 \varepsilon \Delta W p''((p')^{-1}(1 / \alpha_g \varepsilon \Delta W)) > 0.$$

Thus, increased privatization (i.e., decreasing  $\alpha_g$ ) decreases total advocacy.

*Case 2.* If  $\alpha_g \Delta W < \alpha_i \Pi$  for some  $i$ : Let  $I$  denote the set of  $i$  such that  $i = \operatorname{argmax}_i \{\alpha_i\}$ . Then all firms  $i \in I$ , as the "largest" actor(s), does (do) all the advocacy, and  $e_g^* = e_i^* = 0 \forall i \notin I$ . (If there is more than one  $i \in I$ , those firms advocate as much as they would if they were a single firm; the division of advocacy among those firms is arbitrary. Case 3 below explains the mechanism.) Denote  $\alpha_i^* = \max \{\alpha_i\}$ . Total private sector advocacy,  $e^*(\alpha_i^*) = (p')^{-1}(1 / \alpha_i^* \varepsilon \Pi)$ , is increasing in  $\alpha_i^*$ , by an analogous argument to Case 1. By assumption, as privatization increases, the largest  $\alpha_i$  increases, so the private sector's advocacy increases, and thus total advocacy increases.

*Case 3.* If  $\alpha_g \Delta W = \alpha_i \Pi = K$  for some  $i \in I$ , then the first-order conditions of the public sector and of the firms in  $I$  hold with equality simultaneously, and  $p'(e^*) = 1/\varepsilon K$ .

Any division of advocacy expenses between the public sector and the firms in  $I$  can be sustained as a Nash equilibrium. Let  $(e_g, e_1, \dots, e_n)$  be any division of advocacy expenses such that,  $\forall i$ ,  $e_i = 0$  if  $\alpha_i \Pi < K$ , and  $e_g + \sum_{i \in I} e_i = (p')^{-1}(1/\varepsilon K)$ . Then the first-order conditions of the public sector and of the firms in  $I$  are satisfied, and all other first-order conditions hold with strict inequality. Therefore, this division is individually ra-

tional for each firm, so no firm would benefit from deviating. This division is thus a Nash equilibrium.

If  $\alpha_g$  decreases, by assumption, all the  $\alpha_i$  increase. Then we are back in Case 2, and total advocacy increases. If  $\alpha_g$  increases, the largest  $\alpha_i$  falls; then we are in Case 1, and advocacy also increases.

b. *Private sector collusion*

As before, the public sector's first-order condition is:

$$p'(e^*) \alpha_g \varepsilon \Delta W \leq 1 \text{ (with equality if } e_g^* > 0), \text{ or}$$

$$e^* \geq (p')^{-1}(1 / \alpha_g \varepsilon \Delta W) \text{ (with equality if } e_g^* > 0).$$

For the same reasons as in subsection a above, the first-order condition with equality has a unique solution  $e_g^* \in (e_t, \infty)$  for any  $\alpha_i$ , which is a maximum.

The private sector chooses  $e_m$  to maximize:

$$\pi_m(e_m) = \alpha_m (1 + p(e)\varepsilon) \Pi - e_m,$$

where  $\alpha_m = \sum \alpha_i$  over all private firms. The first-order condition of this problem is:

$$p'(e^*) \alpha_m \varepsilon \Pi \leq 1 \text{ (with equality if } e_m^* > 0), \text{ or}$$

$$e^* \geq (p')^{-1}(1 / \alpha_m \varepsilon \Pi) \text{ (with equality if } e_m^* > 0).$$

For the same reasons as above, the first-order condition with equality has a unique solution  $e_m^* \in (e_t, \infty)$  for any  $\alpha_i$ , which is a maximum.

*Case 1.* If  $\alpha_g \Delta W > \alpha_m \Pi$ , as before, we have:

$$p'(e^*) \alpha_g \varepsilon \Delta W = 1 \text{ and}$$

$$p'(e^*) \alpha_m \varepsilon \Pi < 1.$$

The public sector does all the advocacy, and  $e_m^* = 0$ . The amount of public sector advocacy,  $(p')^{-1}(1 / \alpha_g \varepsilon \Delta W)$ , is increasing in  $\alpha_g$ ; thus, increased privatization decreases total advocacy.

*Case 2.* If  $\alpha_g \Delta W < \alpha_m \Pi$ , then the private sector, as the "larger" sector, does all the advocacy, and  $e_g^* = 0$ . The private sector's advocacy,  $(p')^{-1}(1 / \alpha_m \varepsilon \Pi)$ , is increasing in  $\alpha_m$ ; thus, increased privatization increases advocacy.

*Case 3.* If  $\alpha_g \Delta W = \alpha_m \Pi = K$ , then both first-order conditions hold with equality simultaneously,  $p'(e^*) = 1/K$ , and again any division of advocacy expenses between the public and private sectors can be sustained as a Nash equilibrium. If  $\alpha_m$  increases, then we are back in Case 2; the private sector takes over all the advocacy, which increases, and the public sector falls to 0, so the total amount of advocacy increases.

c. *Full collusion*

The colluding public and private sectors choose  $e$  (and divide that contribution among themselves in some way) to maximize:

$$\pi(e) = (1 + p(e)\varepsilon) (\alpha_g \Delta W + \alpha_m \Pi) - e.$$

This has an interior maximum, by a reasoning analogous to that given above. The first-order condition is:

$$p'(e^*) = 1 / \varepsilon (\alpha_g \Delta W + \alpha_m \Pi).$$

Differentiating, we obtain:

$$p''(e^*) de^*/d\alpha_m = -\varepsilon (\Pi - \Delta W) / (\alpha_g \Delta W + \alpha_m \Pi)^2,$$

or:

$$de^*/d\alpha_m = -\varepsilon (\Pi - \Delta W) / p''(e^*) (\alpha_g \Delta W + \alpha_m \Pi)^2,$$

which is negative if  $\Pi < \Delta W$ , positive if  $\Pi > \Delta W$ , and 0 if  $\Pi = \Delta W$ .

d. *Sometimes, the local can be the global*

The previous sections of the proof all proceeded by showing that, in each case, increasing  $\alpha_m$  (or, equivalently, decreasing  $\alpha_g$ ) would have a particular effect because  $de^*(\alpha_m)/d\alpha_m$  (or  $de^*(\alpha_g)/d\alpha_g$ ) was either positive, negative, or zero. But in all the cases above,  $de^*(\alpha_m)/d\alpha_m$  has the same sign for all values of  $\alpha_m$ . Thus, suppose one of the results above was that privatization decreases advocacy, or  $de^*(\alpha_m)/d\alpha_m < 0$ ; thus, the function  $e^*(\alpha_m)$  is decreasing in  $\alpha_m$ . This means that  $e^*$  is decreasing at a particular value of  $\alpha_m$  (this is a local effect, or what happens if you increase privatization by a small amount), or  $e^*(\alpha_m - h) > e^*(\alpha_m)$  for a small value of  $h$ . But, because  $de^*(\alpha_m)/d\alpha_m < 0 \forall \alpha_m$ , this also means that  $e^*(0) > e^*(\alpha_m) \forall \alpha_m$ :

$$e^*(0) = e^*(\alpha_m) - \int_0^{\alpha_m} [de^*(\alpha_m)/d\alpha_m] d\alpha_m > e^*(\alpha_m).$$

So the effect of decreasing privatization by a small amount goes in the same direction (but, naturally, may have a different magnitude) as the effect of eliminating privatization entirely, as long as we remain in the same case. This happens in Case 1 of the no-collusion case, Case 1 of the private sector collusion case, and the full collusion case.

C. *Details of Proposition 2*

1. *Technical Assumptions of  $A_2$*

The assumptions about  $p$  are the same as in  $A_1$ , except as amended by the following:

- $p$  is a continuous and twice differentiable function of  $e = \sum e_i$  and  $y$ , i.e., only the total amount of advocacy by each side matters;

- $p_1 > 0$  and  $p_2 < 0$ , i.e., more advocacy by the pro-incarceration side increases the probability and more advocacy by the anti-incarceration side decreases it, other things being equal;
- Decreasing returns to each type of advocacy kick in eventually:  $p_{111} < 0$ ;  $p_{222} > 0$ ;  $\forall y, \exists e_t(y)$  such that  $p_{11}(e) < 0 \forall e > e_t(y)$ ; and  $\forall e, \exists y_t(e)$  such that  $p_{22}(e, y) > 0 \forall y > y_t(e)$ ;
- $\forall y, \exists e'$  such that  $(p(e', y) - p(0, y)) \alpha_g \varepsilon \Delta W > e'$ , and  $\exists e''$  such that  $(p(e'') - p(0)) \alpha_m \varepsilon \Pi > e''$ . Similarly,  $\forall e, \exists y'$  such that  $(p(e, y') - p(e, 0)) \varepsilon B > y'$ ; i.e., for the public sector, private sector, and anti-incarceration forces, I require that there be some level of advocacy that makes them better off than no advocacy at all, thus ruling out the uninteresting case where some actor would be satisfied even if there were no advocacy at all.

The private and public sectors' objective functions remain the same, with  $p(e)$  replaced by  $p(e, y)$ . The objective of the anti-incarceration forces (assumed to be a unitary black box), taking advocacy into account, is  $\pi_y(y) = (1 + p(e, y) \varepsilon) B - y$ .

## 2. Proof

The private sector chooses  $e_m$  to maximize  $\pi_m(e_m)$ , and the public sector chooses  $e_g$  to maximize:

$$\pi_g(e_g) = \alpha_g (1 + p(e, y) \varepsilon) \Delta W - e_g.$$

The anti-incarceration forces choose  $y$  to minimize:

$$\pi_y(y) = (1 + p(e, y) \varepsilon) B - y.$$

The first-order conditions are:

$$\begin{aligned} \alpha_m p_1(e^*, y^*) \varepsilon \Pi &\leq 1, \\ \alpha_g p_1(e^*, y^*) \varepsilon \Delta W &\leq 1, \text{ and} \\ -p_2(e^*, y^*) \varepsilon B &\geq 1. \end{aligned}$$

For the same reasons as above, it's likely that one of  $e_m$  or  $e_g$  is zero (and that variable's first-order condition holds with inequality). Because of the technical assumptions, the other two first-order conditions hold with equality and imply single unique maxima. (By a reasoning analogous to that in Proposition 1,  $e^* > e_t(y^*)$  and  $y^* > y_t(e^*)$ , and since  $p_{11} < 0$  and  $p_{22} > 0$  for those values, the second-order conditions are satisfied.)

For simplicity, consider the case that  $\alpha_g \Delta W > \alpha_m \Pi$ . Differentiating the first-order conditions, we obtain:

$$\begin{aligned} de_g/d\alpha_m &= -p_1 p_{22} / (1 - \alpha_m) (-p_{11} p_{22} + p_{12} p_{21}) < 0, \text{ and} \\ dy/d\alpha_m &= p_1 p_{21} / (1 - \alpha_m) (-p_{11} p_{22} + p_{12} p_{21}). \end{aligned}$$

The sign of  $dy/d\alpha_m$  depends on that of  $p_{21}$ , that is, on the interaction between the effectiveness of pro- and anti-incarceration advocacy. Thus, total pro-incarceration advocacy declines with increased privatization

(since  $e_g$  declines and  $e_m$  is zero), while the effect of increased privatization on anti-incarceration advocacy is ambiguous.

It is straightforward to show that if  $\alpha_g \Delta W \leq \alpha_m \Pi$ , total pro-incarceration advocacy increases with increased privatization, while the effect of increased privatization on anti-incarceration advocacy is ambiguous.

#### D. Proof of Lemma 1

Because  $\operatorname{argmax}_x (f(x) - x) = x^* > 0$  and  $f$  is differentiable, we know that  $f'(x^*) = 1$  and  $f''(x) < 0$ . Moreover (assuming for simplicity that  $x^*$  is a unique maximum),  $\forall x \neq x^*, f(x^*) - x^* > f(x) - x$ .

Now suppose that  $\operatorname{argmax}_x (\alpha f(x) - x) = x'' > x^*$  (and suppose this is a unique maximum). Then we have  $f'(x'') = 1/\alpha$  and  $f''(x'') < 0$ . But, because  $f'(\infty) = 0$ ,  $\exists x^{**} > x''$  such that  $f'(x^{**}) = 1$ . (This is the “next”  $x$  such that  $f' = 1$  “after”  $x''$ .) Because  $x^*$  was a maximum for  $f(x) - x$ , we know that  $f(x^{**}) - x^{**} < f(x^*) - x^*$ .

Now define  $x'$  as the “previous”  $x$  such that  $f' = 1/\alpha$  “before”  $x^*$ :  $x' = \max \{x \mid f(x) = 1/\alpha, x < x^*\}$ , or (if there is no such  $x$ )  $x' = 0$ . Because  $x''$  was a maximum for  $\alpha f(x) - x$ , we know that  $\alpha f(x'') - x'' > \alpha f(x') - x'$ , which implies that  $f(x'') - x''/\alpha > f(x') - x'/\alpha$ .

Because  $f(x^{**}) - x^{**} < f(x^*) - x^*$ , we have  $\int_{x^*}^{x^{**}} (f'(x) - 1) dx < 0$ . And, since  $f(x'') - x''/\alpha > f(x') - x'/\alpha$ , we have  $\int_{x'}^{x''} (f'(x) - 1/\alpha) dx > 0$ . Therefore, if we subtract these two integrals from each other, we must have:

$$\int_{x^*}^{x^{**}} (f'(x) - 1) dx - \int_{x'}^{x''} (f'(x) - 1/\alpha) dx < 0.$$

But if we actually evaluate that difference, we get:

$$\begin{aligned} & \int_{x^*}^{x^{**}} (f'(x) - 1) dx - \int_{x'}^{x''} (f'(x) - 1/\alpha) dx = \\ & = \int_{x^*}^{x^{**}} [(f'(x) - 1/\alpha) + (1/\alpha - 1)] dx - \int_{x'}^{x''} (f'(x) - 1/\alpha) dx = \\ & = -\int_{x'}^{x^*} (f'(x) - 1/\alpha) dx + \int_{x^*}^{x''} (1/\alpha - 1) dx + \int_{x''}^{x^{**}} (f'(x) - 1) dx. \end{aligned}$$

By construction of  $x'$  and  $x^*$ ,  $f'(x) \in [1, 1/\alpha]$  when  $x \in [x', x^*]$ , so the first term above is the negative of a negative expression, i.e., positive. The second term is clearly positive because  $1/\alpha > 1$ . The third term is positive because, again by construction of  $x''$  and  $x^{**}$ ,  $f'(x) \in [1, 1/\alpha]$  when  $x \in [x'', x^{**}]$ . Thus,  $\int_{x^*}^{x^{**}} (f'(x) - 1) dx - \int_{x'}^{x''} (f'(x) - 1/\alpha) dx > 0$ , which contradicts the result that  $\int_{x^*}^{x^{**}} (f'(x) - 1) dx - \int_{x'}^{x''} (f'(x) - 1/\alpha) dx < 0$ .

By contradiction, we must have  $\operatorname{argmax}_x (\alpha f(x) - x) = x'' < x^*$ .

#### E. Details of Proposition 3

The public sector chooses  $e_g$  to maximize:

$$\pi_g(e_g) = \alpha_g (1 + (p(e_g) + q(e_m))\epsilon) \Delta W - e_g,$$

so it sets:

$$p'(e_g^*) \leq 1 / \alpha_g \varepsilon \Delta W \text{ (with equality if } e_g^* > 0).$$

This first-order condition and the next one have unique solutions for any  $\alpha_i$  for analogous reasons to those stated above. Similarly, the private sector chooses  $e_m$  to maximize:

$$\pi_m(e_m) = \alpha_m (1 + (p(e_g) + q(e_m))\varepsilon) \Pi - e_m,$$

so it sets:

$$q'(e_m^*) \leq 1 / \alpha_m \varepsilon \Pi \text{ (with equality if } e_m^* > 0).$$

The assumptions here guarantee an interior solution. However, if the relevant assumption is weakened and we have  $\alpha_g \varepsilon \Delta W < 1 / p'(e_i)$  or  $\alpha_m \varepsilon \Pi < 1 / p'(e_i)$  for some parameter values, one or both of the first-order conditions cannot be solved with equality, in which case it would not be profitable for the relevant sector or sectors to advocate at all. (This could also explain why the private sector might not advocate— $\alpha_m$  is not high, and neither is  $\Pi$ .)

The total effect of advocacy, at the optimum, is:

$$E = p(e_g^*) + q(e_m^*),$$

which we can express in terms of  $\alpha_m$ :

$$E(\alpha_m) = p(e_g^*(\alpha_m)) + q(e_m^*(\alpha_m)).$$

(For convenience, I'll drop the  $\alpha_m$  argument.) To gauge the effect of increased privatization, we examine:

$$\begin{aligned} dE/d\alpha_m &= p'(e_g^*) de_g^*/d\alpha_m + q'(e_m^*) de_m^*/d\alpha_m \\ &= p'(e_g^*) / p''(e_g^*) \alpha_g^2 \varepsilon \Delta W - q'(e_m^*) / q''(e_m^*) \alpha_m^2 \varepsilon \Pi \\ &= 1 / p''(e_g^*) \alpha_g^3 \varepsilon^2 \Delta W^2 - 1 / q''(e_m^*) \alpha_m^3 \varepsilon^2 \Pi^2. \end{aligned}$$

This expression is of indeterminate sign. (Again, if the relevant assumption is weakened, see above, then there might be a corner solution; in that case, it is clear that moving a little bit in the direction of that sector will not increase that sector's investment, while it will decrease the investment of the other sector, so the total effect of pro-incarceration advocacy will drop. But for a big enough discrete movement in  $\alpha_m$ —for instance, an increase from an  $\alpha_m < 1 / \varepsilon \Pi p'(e_i)$  to  $\alpha_m = 1 / \varepsilon \Pi p'(e_i)$ —then there will be a discrete jump in advocacy—in this example, from  $e_m = 0$  to  $e_m = e_i$ .) Intuition: The first term, which is negative, represents the decrease in the advocacy effectiveness of the public sector when privatization increases, since the public sector gets less of the benefit of its advocacy. The second term, which is positive, represents the increase in the advocacy effectiveness of the private sector when privatization increases (for analogous reasons).