



Policing and Punishment for Profit

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Abstract

This paper examines ethical considerations relating to the current role of financial incentives in policing and punishment in the USA, focusing on the two methods of punishment most popular in the USA: (1) fines and forfeitures and (2) incarceration. It examines how financial incentives motivate much of our penal system, including how and when laws are enforced; discusses relevant ethical considerations and concerns connected with our current practices; proposes a theoretical solution for addressing these problems that involves realigning existing incentives to better serve the interests of justice; and considers how that theoretical solution can be applied in practice. While there are no easy solutions to resolving many of the current ethical problems related to policing and punishment, this paper will argue that some of our current practices, practices that many people believe are morally problematic (e.g., our current approach to prison labor), not only are not problematic, but also can point us toward more effective and efficient policy solutions in other areas.

Keywords Policing and punishment · Fines and forfeitures · Criminal justice reform

One of the earliest recorded accounts of a system of laws that aims at just punishment dates back to eighteenth-century BC Mesopotamia and the Babylonian King Hammurabi. For Hammurabi, the role of the state and function of juridical law was “to bring about the rule of righteousness in the land, to destroy the wicked and the evil-doers; so that the strong should not harm the weak” (Hammurabi 1910). Hammurabi’s Code contained 282 “laws of justice” for addressing topics as wide ranging as adoption, inheritance, the appropriate amount of payment for certain services, and penalties for harming other citizens or causing damage to their property.

Punishments dictated by the Code varied widely, with many being relatively severe by today’s standards. Twenty-eight laws prescribe death as the appropriate punishment for behavior ranging from murder, kidnapping, and negligent homicide to theft, making false accusations, adultery, and withholding compensation from mercenary soldiers. Perhaps more surprising is that for some crimes, such as when a man strikes a free-born woman and causes her to die (#210), death is prescribed as the appropriate punishment, not for the perpetrator, but for one of his children. Beyond

these 28 laws that prescribe death as the appropriately just punishment, other laws prescribe punishments that may strike us as even more barbaric: amputation of ears and hands, bone breaking, eye gouging, blows from an ox-whip, indentured servitude, and fines to be paid directly to the people who were harmed.

Noticeably absent from Hammurabi’s Code are the types of punishment that we see most frequently in our own society—fines paid to the state and imprisonment by the state. Although the Code makes reference to prisons, these prisons appear to have been private and were used for holding individuals who owed debts and were working those debts off through forced labor. The Code provided certain protections for these prisoners and outlined penalties for any individuals who mistreated them or caused their death while in custody. Although it is not clear why the early Babylonians did not utilize fines paid to the state or state imprisonment as methods of just punishment, one reasonable explanation is that they believed these two types of punishment failed to contribute to the goal of restoring the appropriate balance to the community that was upset by the unlawful behavior.

So why do we rely on these two types of punishment almost exclusively, especially when other options may be more successful at realizing the differing aims of just punishment? Follow the money. Policing and punishment is big business in the USA. Just how big? All included, it is at

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least a \$300- billion-dollar-a-year industry,¹ an industry that nearly everyone in the USA is profiting from. While public attention usually focuses on the profits of private individuals and corporations, focusing solely on private contractors distracts us from the reality that vast majority of state-sanctioned policing and punishment in the USA today, whether carried out by a government or private entity, is motivated by financial gain. This statement is true up and down the line, from prisons to parking tickets. But most of us are unaware of just how bad this problem is, as well as how the use of our criminal justice system as a revenue-collecting arm of the state has exacerbated existing social and economic problems.

This paper examines ethical considerations relating to the current role of financial incentives in policing and punishment in the USA, focusing on the two methods of punishment most popular in the USA: (1) fines and forfeitures and (2) incarceration. It examines how financial incentives motivate much of our penal system, including how and when laws are enforced; discusses relevant ethical considerations and concerns connected with our current practices; proposes a theoretical solution for addressing these problems that involves realigning existing incentives to better serve the interests of justice; and considers how that theoretical solution can be applied in practice. While there are no easy solutions to resolving many of the current ethical problems related to policing and punishment, this paper will argue that some of our current practices, practices that many people believe are morally problematic (e.g., our current approach to prison labor), not only are not problematic, but also can point us toward more effective and efficient policy solutions in other areas.

Fines and Forfeiture

If you've driven US Route 301 between Gainesville and Jacksonville, you've gone through the town of Waldo, Florida, population 1000. With the exception of having a name that might lead your kids to say, "There's Waldo!" from the back seat, the town is otherwise indistinguishable from the other small towns along 301 or across Florida generally. Driving through Waldo would take only a few minutes,

unless you are pulled over by one of Waldo's finest. And if you drove through in 2013, this outcome was not unlikely. In 2013, Waldo's seven police officers wrote 11,603 traffic citations, an average of just over 1658 citations per officer for the year (Dearen 2014). For comparison, that same year the 300 police officers in the nearby town of Gainesville, a town with 128,000 residents and an additional 50,000 students at the University of Florida, wrote 25,461 citations, or just under 85 per officer per year. Put differently, on average, each police officer in Waldo wrote 1850% more tickets than each police officer in Gainesville, the town where the University of Florida is located.

Why were police officers in Waldo writing so many citations? Again, we can follow the money. In 2013, the 11,603 citations generated nearly \$500,000 for the town, half of its total yearly revenue. Things got so bad in Waldo that the Automobile Association of America (AAA) not only identified the town as having one of the nation's worst speed traps, but the group also bought multiple billboards on US Route 301 to warn drivers to be especially cautious when driving through (O'Neill 2014). In 2014, as a result of numerous citizen complaints and the negative attention generated by the AAA, Florida's Department of Law Enforcement opened an investigation into Waldo's police department and the town suspended Police Chief Mike Szabo. When the investigation revealed that police officers had been given orders to write at least 12 tickets during each 12-h shift or face repercussions, violating Florida state law that prohibited ticket quotas, Waldo's city council voted to disband the police department.²

While this story has a somewhat happy ending, many municipalities around the country have turned to their police to act as an additional source of revenue for the city. A 2016 study by the Sunlight Foundation found that "thousands of American cities and towns [depend] on judicial fines and forfeiture to fund public services," with municipalities in Louisiana, Arkansas, Georgia, Illinois, and Mississippi topping the list of "states where city governments rely heavily on fines and forfeits for funding" (Shaw 2016). The most egregious abusers, calculated in terms of the percentage of revenue derived from fines, were smaller towns with populations under 1500, towns similar to Waldo. These tiny towns are the worst offenders "suggests that most of those fines were probably paid by people who did not live

¹ This number includes \$100 + billion in yearly expenditures nationwide on police (Justice Policy Institute 2012) and the \$182 + billion in direct costs of the criminal justice system (Wagner and Rabuy 2017a). It does not include the \$136 + billion in fine and forfeiture revenue reported by the states some of this money goes back into supporting the criminal justice system. To put this number in context, it is about half of what the USA spends on primary and secondary education nationwide, and about four and a half times what the USA spends on the Supplemental Nutrition Assistance Program (food stamps) (USDA 2017).

² Two of the more interesting documents I found when putting together this discussion were the 2015 and 2016 General Fund Budgets for the City of Waldo (City of Waldo, Florida 2015, 2016). For 2015, the city projected police revenue to be \$434,000. This number was then revised down to \$98,153.30 after the investigation and vote to disband the department. The 2016 budget indicated that Waldo actually generated \$177,216.24 in "police revenue" in 2015. After the disbanding of the department, Waldo projected that they would generate only \$5000 in "police revenue" in 2016.

in those towns, but who nonetheless had to drive through them” (ibid.). For example, the town Olla, LA, population 1400, projects that it will collect \$260,000 from fines and forfeitures in 2017, just over 25% of the town’s total yearly revenue and almost double what the town collects from its citizens to maintain the streets and pay for sanitation services (Town of Olla 2017).

Although tiny towns seem to be the worst offenders on a percentage basis, larger municipalities, often assisted by private companies such as American Traffic Solutions,³ get in on the action as well. For 2017, the cities of Atlanta, New Orleans, and Chicago project that they will collect \$28M, \$46M, and \$359M in revenue from fines and forfeitures, which comes to 4.6% (City of Atlanta, Georgia 2017), 7.5% (City of New Orleans, Louisiana 2016), and 9.7% (City of Chicago, Illinois 2016) of their total yearly revenues, respectively. Those are not insignificant percentages of yearly revenue, and it’s not unreasonable for people who live in or around these cities to be especially concerned about the likelihood of receiving questionable parking tickets, running into speed traps, or otherwise being negatively affected by the city’s dependence on this revenue.⁴

But even for cities in which a relatively low percentage of revenue comes from fines and forfeitures, actions that disrupt this flow can cause significant problems. New York

City generates less than 1% of its total revenue from fines and forfeitures, projecting to generate \$702M in 2017 (The Council of the City of New York, Department of Finance 2016). In 2014, New York City made international news when two NYPD officers killed Eric Garner, an unarmed African-American man who was selling “loose” cigarettes on the street near the Staten Island Ferry Terminal (Baker et al. 2015). In December of that year, the relationship between the office of Mayor Bill de Blasio and the New York Police Department began to deteriorate following statements made by de Blasio after a grand jury’s decision not to indict the two officers. The situation reached a tipping point on December 20 when two NYPD officers, Rafael Ramos and Wenjian Liu, were shot and killed in their squad car by an attacker who wanted to avenge Eric Garner’s death (Celona et al. 2014a).

The major police unions in the city, citing concerns about the safety of their officers and perceived lack of support from Mayor de Blasio, issued orders to their members to make arrests “only when they have to” (Celona et al. 2014a)—let that sink in for a second. The result of this virtual work stoppage, which had the secondary effect of hitting City Hall in the pocket by cutting off the flow of violation revenue until the police unions’ demands were met, was a 92% reduction in parking violations, a 94% reduction in traffic violations, a 94% reduction in criminal court summonses, and a general reduction of 66% in overall arrests. While the police unions ultimately got what they were asking for, their actions sparked a national conversation about the necessity of much of the policing done in the USA, “shin[ing] a light on the use of police officers to make up for tax shortfalls using ticket and citation revenue” (Taibbi 2014).

It’s not just for generating ticket and citation revenue where municipalities are using police officers to help fill the coffers. Lumped together in the city revenue numbers cited above are both fines (i.e., ticket and citation revenue) and forfeitures. Forfeitures are assets seized by the state under the justification that they were acquired illegally or are otherwise associated with the commission of a crime.⁵ Forfeiture programs exist at both state and federal level and

³ American Traffic Solutions (ATSs), and a handful of similar companies in the USA, have contracts with municipalities to install traffic cameras and process violations. While the specifics of each contract vary depending on the municipality, generally ATS will pay to install the equipment, send video of each violation to local law enforcement for review, and then take on some of the payment processing (mailing the violation notice, collecting the fine, etc.). For their work, ATS receives a percentage of fine revenue collected, often with certain guaranteed minimums. Given that many municipalities are trying increase revenue at no cost and without taking steps that are seen by the public generally as tax increases, it is not surprising that they have turned to these arrangements with companies such as ATS.

⁴ Not all cities rely so heavily on revenue from fines and forfeitures. Mobile, Detroit, and Houston, for example, project that they will collect \$3M, \$24.8M, and \$40M from fines and forfeitures, which comes to 1.2% (City of Mobile, Alabama 2017), 1.3% (City of Detroit, Michigan 2016), and 0.9% (City of Houston, Texas 2016) of their total projected revenue. The pattern connecting cities that rely disproportionately on revenue from fines and forfeitures is not what might be expected. One might expect that these cities would have features such as having a contract with companies like American Traffic Solutions to handle traffic enforcement or having many non-residents passing through or visiting for one reason or another. But neither of these features predict higher than average reliance on revenue from fines and forfeitures. What does predict it, according to recent work from Sances and You (2017), is the racial composition of the city and its elected leaders. Sances and You found that the higher the black population, the more likely the municipality will rely on fines to generate needed revenue. They also found that cities with at least one black member of the city council reduced the connection between race and fines by about half.

⁵ While the use of forfeiture has risen dramatically over the last 20 years, it has always been on the books in the USA as a possible punishment for participating in criminal activity. The first mention of asset forfeiture in US law is in the Act of July 31, 1789, which allowed the equivalent of customs officers to seize and retain goods unloaded from merchant ships if the merchant had not paid the appropriate taxes to receive the required permits. Its use expanded significantly after 1978, when Congress authorized its use to allow for the seizure of money connected to the buying, selling, and trafficking of illegal drugs, and then again in 1984 when Congress revised the statute to allow for the seizure of property connected to those activities. Since then, the amount of assets seized by the federal government has increased constantly and consistently.

on both the criminal and civil sides of the law.⁶ There is an important distinction between criminal and civil forfeiture, one relevant to understanding how forfeiture programs have been abused to help generate revenue for states and municipalities.

Criminal forfeiture is a penalty resulting from legal action brought against *a person* who is acknowledged to have broken the law, because he was convicted of or pled guilty to a crime. The property is forfeited because it was used in or otherwise derived from the crime. Perhaps the best-known case of criminal forfeiture in recent memory is that of Bernard Madoff, who in 2009 was arrested and pled guilty to running the largest Ponzi scheme in US history, swindling over \$50B from his investors. In an effort to provide restitution to these investors, the federal government seized Madoff's assets and auctioned them off, including his houses, vehicles, collection of fine wines, and even his wife's fur coat. Even though these assets were held jointly between Madoff and his wife and it seems she had no knowledge of her husband's fraudulent activity, they were seized because they were purchased with money acquired through Madoff's criminal activity (CBS News 2009).

Civil forfeiture, by comparison, does not require a conviction or guilty plea for the government to seize an individual's assets because civil forfeiture is an action brought against *the property itself* and not the person who owns that property. The property is seized under the suspicion that it is somehow connected to a crime, which is a much lower burden than proving that it was used in or derived from a crime. The burden is then on the individual to demonstrate that the seized property was not connected to a crime before it is returned.

A good example of civil forfeiture in action is the case of Mark Brewer, a disabled Air Force veteran who had \$63,530 in cash seized by a Douglas County (Nebraska) sheriff's deputy when he was pulled over on Interstate 80 for supposedly changing lanes without signaling. After Brewer consented to a search of his vehicle, the deputy discovered the cash in the trunk and testified that the bag containing

the cash smelled like marijuana. No drugs were found in the vehicle; Brewer was never charged with a crime (not even changing lanes without signaling, which is what he was supposedly pulled over for); and he had disability documents, paystubs, and tax returns showing that the cash in his possession was acquired legally. Nevertheless, the district court sided with the government (Sibilla 2015) finding that the "quantity of currency" and "manner in which it was bundled and concealed" (i.e., in a bag in the trunk) "provided sufficient evidence to prove a substantial connection between the currency and drug activity" (United States of America v. \$63,530.00 in United States Currency 2015).

Brewer appealed the district court's decision to the US Court of Appeals for the Eighth Circuit, where the district court's ruling was affirmed. It is worth your time to read the ruling. Aside from the substance of the decision, there are at least two interesting things to note from the structuring of the original action. First, the case is "the United States of America" (as plaintiff) versus "\$63,500 in United States Currency" (as defendant), with "Mark A. Brewer" as the claimant and appellant. This structure makes sense given that civil forfeiture is an action against the property itself and not against the person, but it is still odd to think about actions being brought against real property or currency in this way.

Second, the plaintiff is the USA, not the State of Nebraska as one might expect given that Brewer was pulled over by a Nebraska county sheriff's deputy. Instead of trying the case under state law, which in many states (including Nebraska) requires a more substantial burden to be met, the sheriff's office asked the federal government to adopt the seizure so that the case could proceed under federal law. Why would Douglas County do that? Individual states have benefitted from the federal government's involvement in asset forfeiture, via adoptions, joint task forces, and other arrangements, to take advantage of the DOJ's "Equitable Sharing Program," which "distributes an equitable share of forfeited property and proceeds to participating state and local law enforcement agencies that directly participate in an investigation or prosecution that result in a federal forfeiture" (US Department of Justice 2017). This program gives state law enforcement agencies the option of prosecuting some cases involving asset forfeiture under federal law (which has more permissive forfeiture rules), instead of state law. Taking this route, state agencies receive up to 80% of the assets seized under federal law (Ingraham 2016). Assisted by state law enforcement agencies motivated by this program, the federal government seized over \$5B in assets (yes billion, with a "b") in 2014, a 550% increase over the amount seized in 2004 and 50% more than what was stolen by burglars in the USA during the same year (Ingraham 2015).

States benefit from their participation in the DOJ's Equitable Sharing Program, as well as from their own state-level

⁶ In addition to criminal and civil forfeiture, the Federal Bureau of Investigation (FBI) also identifies a third type of forfeiture: administrative forfeiture. According to the FBI, "Administrative forfeiture occurs when a property is seized but no one files a claim to contest the seizure. Property that can be administratively forfeited includes merchandise prohibited from importation; a conveyance used to import, transport, or store a controlled substance; a monetary instrument; or other property that does not exceed \$500,000 in value. Houses and other real property may not be forfeited administratively. Federal law imposes strict deadlines and notification requirements in the administrative forfeiture process. If the seizure is contested, then the U.S. government is required to use either criminal or civil judicial forfeiture proceedings to gain title to the property" (FBI 2017). Since administrative forfeiture occurs under guidelines for criminal or civil forfeiture, but it occurs when the property seized under those guidelines is not contested, there's no need to focus on it at length here.

forfeiture laws, laws that vary greatly by state in terms of what assets can be seized under what conditions, the procedure for reclaiming seized assets, and how forfeited cash or funds generated by the sale of forfeited property is distributed among various state agencies (Hall and Mercier 2017: 216–20). Hawaii, for example, has one of the most lucrative and aggressive asset forfeiture programs in the country, generating nearly \$2.5M during 2014, 1.4M from assets seized by state and county agencies directly (State of Hawaii, Department of Attorney General 2016), and an additional 1.1M from its participation in the Equitable Sharing Program (US Department of Justice 2015). States like Hawaii have gone to great and sometimes ridiculous lengths to defend these programs. Hawaii's Attorney General even has a website dedicated to this purpose. It not only provides a brief history of asset forfeiture as a penalty—complete with biblical references—but also provides a justification based on its benefits, which includes generating revenue to support law enforcement activities.⁷

That asset forfeiture programs generate revenue to support police activities is not a problem in and of itself, but when states and municipalities want to raise revenue and turn to forfeiture programs as a means to that end, we should not be surprised when those programs are abused. As in the case of Mark Brewer, one troubling feature of civil asset forfeiture is that individuals do not have to be convicted of a crime, or even charged with a crime, to have their assets seized. Then, once assets have been seized, the burden is on the individual to prove that those assets are *not* connected with criminal activity, an almost impossible burden in many cases. Another troubling feature of how incentives are aligned relative to asset forfeiture programs is that it has changed how municipalities police. For example, when disrupting drug trade activities, any illegal drugs seized by law enforcement agents must be destroyed, but they can retain seized cash believed to be connected to drug activity and use it to fund their own operations. That cash can be kept but drugs must be destroyed has led many police departments to establish checkpoints and otherwise run operations to target individuals after sales have been made, rather than preventing those sales from being made in the first place.

⁷ That justification via benefits is contained within one paragraph, which reads: “As a result [of asset forfeiture], criminals are deprived of their working capital and their profits, thereby preventing them from operating. A secondary benefit of forfeiture laws is that forfeited property, or the proceeds of its sale, has been turned over to law enforcement and is used to fight against crime. While the purpose of forfeiture and the evaluation of a forfeiture law or program should never be based solely on the generation of revenue, it is only fitting that forfeited property be used to combat those who seek to profit from crime.” The entire discussion can be found on the Attorney General's website, <http://ag.hawaii.gov/cjd/asset-forfeiture-unit/history-of-asset-forfeiture/>.

One of the more egregious examples of this policy in practice comes from central Tennessee. In 2011, reporter Phil Williams of Nashville's NewsChannel 5 investigated drug traffic stops along Interstate 40 west of Nashville, a well-known route for drug trafficking to Northeastern states (Williams 2016). Although increased traffic stops to prevent drug smuggling would be expected, Williams uncovered that nearly all of the stops took place on the westbound lanes of I-40, lanes used by cars returning from the Northeast, not the eastbound lanes, which would have been used by cars transporting drugs to the Northeast. Instead of trying to seize illegal drugs to prevent them from being distributed, law enforcement officers seemed more interested in seizing the cash connected to their sale to help fund their own operations. As a result of this selective policing, I-40 became a cash cow for a handful of county police departments taking advantage of state asset forfeiture programs. It was such a cash cow that the two multi-county agencies patrolling this stretch of I-40 engaged in a turf war with each other that ended only when they reached a formal agreement outlining who would patrol the westbound lanes on which days.

Although some of these examples seem especially egregious, there is reason to be hopeful when it comes to the reform of civil asset forfeiture laws in the USA. In the past 2 years New Mexico, Nebraska, North Carolina, and Connecticut have passed sweeping asset forfeiture reform bills that have effectively eliminated civil forfeiture. Eleven other states—California, Iowa, Minnesota, Missouri, Montana, Nevada, New Hampshire, Ohio, Oregon, Utah, and Vermont—now require a criminal conviction for all or nearly all forfeiture cases, which abolishes one of the more objectionable components of the asset forfeiture program. Seven states—Arizona, California, Colorado, Maryland, Nebraska, New Mexico, and Ohio—and the District of Columbia have passed legislation that aims to close the equitable sharing loophole that has allowed transferring of state cases over to federal jurisdiction. Progress on this issue has been made and likely will continue being made until the use of forfeiture programs to generate revenue is greatly reduced or eliminated. But even if these steps are taken with asset forfeiture programs, the history of policing in the USA suggests that police departments and municipalities will turn to other law enforcement programs to generate revenue, programs operated under the banner of promoting public safety.

Incarceration

Police departments and municipalities are not the only ones who profit from the US criminal justice system. Private companies and individuals do as well. Thus far the twenty-first century has been kind to most investors in US financial markets. From January 2001 through May 2017, the S&P

500 index has nearly doubled, and investments in blue chip companies such as Microsoft, Exxon Mobil, Procter & Gamble, and Nike all would have returned 300–800% during this same period. While there have been a handful of really big winners during this time period—Amazon and Apple come to mind—two less well-known companies, CoreCivic and the GEO Group, have each returned a whopping 5000% to their investors. CoreCivic, formerly known as the Corrections Corporation of America, and the GEO Group own and manage prisons, detention centers, and correctional mental health facilities throughout the USA and abroad under US government contracts. Together, as of May 2017, they own and manage approximately 225 US facilities, have a combined yearly revenue of 4 billion dollars, and a combined market capitalization of 8 billion dollars. In short, CoreCivic and the GEO Group are not small companies, and business has been very, very good over the last 16 years.

Few areas of our criminal justice system elicit stronger reactions from the general public than the use of private prisons. Motivated by negative public attention directed at the use of these facilities, in 2016 the US Department of Justice (DOJ) Office of the Inspector General (OIG) initiated a systematic investigation into private prisons to compare them to their state-run counterparts. The OIG released this report in August 2016. It concluded that private prisons not only offered no significant cost savings over prisons run by the Federal Bureau of Prisons (BOP), but also performed worse than BOP facilities in most of the important metrics, including contraband, inmate incidents, and lockdowns (US Department of Justice, Office of the Inspector General 2016).

As a result of these findings, the DOJ announced that same month that it would begin the process of winding down its use of private prisons, leading ultimately to their discontinuation in the federal prison system (US Department of Justice 2016). But no contracts were terminated and reductions in use were nominal at best. In November 2016, just 3 months after this supposedly landmark directive was issued, CoreCivic announced that the Federal Bureau of Prisons had renewed their contract on a facility in McRae, Georgia for an additional 2 years, with a bed reduction of less than 10% (CoreCivic 2016). Other renewals of private prison contracts followed, either with no reductions or similarly nominal reductions. Then, in February 2017, the DOJ formalized what everyone already knew, rescinding the directive to reduce its reliance on private prisons (Zapototsky 2017).

Why the change of heart? Although no formal explanation was provided, it is not unreasonable to follow the money. The GEO Group was one of only a handful of publicly traded companies to make significant contributions to super PACs during the 2016 election, all to support Republican candidates, including more than \$225,000 to pro-Trump

super PAC Rebuilding America Now. While federal law prohibits federal contractors from making political contributions, in an effort to get around the law, contributions from the GEO Group were made through “GEO Corrections Holdings Inc.,” a separate but wholly owned subsidiary of the company. Although a complaint regarding these contributions has been filed with the Federal Election Commission (FEC) (Hamilton 2016),⁸ even if the FEC found that the GEO Group knowing and willfully violated federal law, it would be up to the DOJ to enforce any criminal penalties. Such enforcement seems unlikely in part because in October 2016 the GEO Group hired three former aides of Jefferson Sessions, now Attorney General and head of the DOJ, to serve as lobbyists for the company (Arnsdorf 2016).

Incarceration is big business in the USA. As a nation, the USA incarcerates more people than any other nation in the world: 2.3 million or just under 1% of its total population. Of this total, just over 20% are in prison for the possession of illegal drugs (Wagner and Rabuy 2017b), and it is estimated that over 50% are in prison for drug-related activities (consumption, distribution, violence associated with the drug trade, or committing crimes due to drug influence or addiction) (Bureau of Justice Statistics 2017). On a per capita basis, the USA incarcerates more people than any other nation in the world with the exception of the tiny island nation of the Seychelles, which comes in first only because it volunteered its prison system to house all of the Somali pirates captured in the Indian Ocean. While we often think of incarceration as a national problem, of the 2.3 million people incarcerated in the USA at the start of 2017, 2 million are held in state prisons and local jails, not federal prison (Bureau of Justice Statistics 2017). If US states were nations, the District of Columbia and eight states—Louisiana, Georgia, Oklahoma, Alabama, South Dakota, Arizona, and Texas, and Florida, in that order—would have a higher per capita incarceration rate than the circumstantially inflated rate of the Seychelles (Wagner and Walsh 2016). After the Seychelles, 25 other US states have a greater per capita incarceration rate than the next highest nation on the list, Turkmenistan (Wagner and Walsh 2016).

When thinking about the ethical issues related to the business of policing and punishment, as well as possible paths for reform, it is important to keep in mind not only how many people are incarcerated in the USA, but also that there is no one, uniform set of rules governing their incarceration or the laws that put them there. There are at least 52 different sets of rules—50 states, the District of Columbia, and the federal government—and 52 different arenas for private parties to try to advance their interests. What is also important is just how big a business incarceration in the USA has

⁸ This complaint is still pending with the FEC as of September 2017.

become. While the focus is often on the business of private prisons, put in terms of dollars, private prisons represent only \$4.2 billion of the \$80.7 billion a year spent on the corrections industry (Wagner and Rabuy 2017a). This number includes the cost for corrections employees, healthcare, building upkeep, food, and utilities, but it does not include the cost of policing, the court system, or expenses charged to the inmates or their families, such as bail fees, items from the commissary, or telephone calls. The complete incarceration pie, from arrest to release, represents a 182-billion-dollar-a-year industry.

While it is reasonably clear how companies such as CoreCivic and the GEO Group profit directly from policies like mandatory minimum sentences and three strikes laws that put more people in prison and keep them there for longer periods of time, only around 7% of persons incarcerated in the USA are held in private prisons. The rest are held in government facilities, at either the federal, state, or local level. So, who makes money off of them? In short, almost everyone. The easiest group to identify are employees of the correctional institutions themselves. In 2016, we spent 38.4 billion dollars on the salaries and benefits for these employees, and they're very much interested in protecting their jobs and growing their ranks. Police and prison guard unions and lobbying groups are some of the strongest and most vocal in the country. They have been at the center of efforts to implement mandatory minimum sentences and three strikes laws (Reilly and Knafo 2014), as well as some of the most vocal opponents of efforts to decriminalize the use of recreational drugs (Fang 2014). Given the financial incentives at play, it should not be surprising that they have been opposed to almost any program or law that would reduce the number of people sentenced to prison, reduce the length of time inmates spend there, or otherwise disrupt the flow of resources to prisons (Jethani 2013).

There are also less obvious financial beneficiaries of mass incarceration. Prison healthcare is a 12.3-billion-dollar industry. "In a bid to cut costs, more state prisons and county jails are adding healthcare to the growing list of services that are outsourced to for-profit companies,... [and] more than half of all state and local prisons have outsourced their healthcare" (Neate 2016). The largest provider of prison healthcare nationwide is Corizon, which has contracts with over 300 correctional facilities in 22 states, covering 220,000 prisoners or just under 10% of the US prison population (Corizon 2017). But Corizon's ability to secure additional contracts and keep its existing ones seems to depend not so much on its ability to provide quality healthcare for the lowest cost, as on its effectiveness at lobbying the relevant decision-makers at the state and local level.

In 2013, Corizon's \$42M per year contract with the city of Philadelphia to provide healthcare at city correctional facilities came up for review. Many observers thought that

Corizon would likely lose the contract to one of its competitors—such as Correction Medical Care, which offered to provide the same services for \$3.5M less per year, saving the city \$35M over the life of the 10-year contract. Not only did competitors offer to provide the same services at a lower price, but Corizon had just settled with the city for \$1.85M after it came to light that Corizon had passed money through a dummy subcontractor to satisfy the city's minority-participation requirements.

How was Corizon able to secure the contract? As with many of its contracts around the country,⁹ and as with many businesses that depend almost entirely on government contracts, it successfully lobbied the relevant government decision-makers. In addition to donating to the campaigns of several local politicians in Philadelphia, including \$26,600 to Mayor Michael Nutter's campaign committee, Corizon also hired S.R. Wojdak & Associates, a Pennsylvania lobbying firm with strong ties to Philadelphia's City Hall and Mayor Michael Nutter's administration. When the City of Philadelphia's Inspector General recommended that Corizon be banned from competing for city contracts for a period of 2 years after participating in the dummy subcontractor scam, "not only was [Corizon] allowed to keep doing business with the city, the [Nutter] administration went out of its way to make sure it could bid on the next prison contract," including extending "the [contract submission] deadline by 6 months to give Corizon time to implement reforms it was required to adopt as part of its settlement [with the city]. And in the meantime, the city simply extended Corizon's existing contract for those 6 months for a cool \$21 million" (Walsh 2013).

If you're uncomfortable with private companies profiting from housing and caring for inmates, then you likely will be even more uncomfortable with private companies and state entities profiting from prison labor. There are two kinds of prison labor: "First, there are [jobs]...where inmates work for the prison, and the employer—the government—doesn't make a profit per se off prisoners' backs, though it holds down expenses by paying little or nothing to get essential tasks done" (Bozelko 2017). These jobs include working in the prison laundry facility, painting prison walls, and doing other jobs that connect to the proper functioning or upkeep of the prison facilities. The second "are jobs under the Prison Industry Enhancement (PIE) program, in which inmates are employed by a private business that has contracted with

⁹ Corizon has actively lobbied officials in Alabama (Toner 2014), California (Swan 2016), Florida (Bottari and Persson 2014), Washington DC (Hauslohner 2015), and so forth. Find a state where Corizon has government contracts, and you'll find that they have lobbied significantly to get those contracts. But Corizon is not unique and operates like any other company dependent on government contracts. As Ice-T says, "Don't hate the player, hate the game."

local correctional authorities for low-cost labor” (Bozelko 2017) or by Federal Prison Industries (abbreviated as FPI or UNICOR), a wholly owned US government corporation.

UNICOR partners with government entities and corporations to produce a wide range of products, including body armor, office furniture, clothing, and food (milk, beef, fish, etc.), and services, such as word processing, call center operations, and data encoding (UNICOR 2017a). As of September 2016, UNICOR “has agricultural, industrial and service operations at 63 factories and 3 farms located at 52 prison facilities” and employs over 12,000 inmate workers (UNICOR 2017a, b, c, d, e). And business at these factories and farms is quite good. During 2016, UNICOR had a yearly revenue of nearly \$500M and a net income or profit of just over \$44M (UNICOR 2016a).

You have almost certainly bought UNICOR products or used UNICOR services without even knowing about it. In the past few years, they have provided Whole Foods with tilapia and goat cheese (Aubrey 2015); McDonald’s with plastic utensils, packaging, and uniforms (Flounders 2011); Victoria’s Secret with casual wear and lingerie (Winter 2008); AT&T with call center operations (Prison Legal News 1993); and BP with oil cleanup crews after the Deepwater Horizon explosion (Young 2010). But many of these companies have kept their use of prison labor hidden, and for good reason. Not only do corporations receive lucrative tax write-offs for hiring work-release inmates—up to \$2400 per year per inmate through the Work Opportunity Tax Credit Program—inmates working in UNICOR factories or on UNICOR farms make between \$0.23 and \$1.15 per hour (UNICOR 2017b), a fraction of the federally mandated minimum wage of \$7.25 per hour. (The salary for prisoners working non-industry jobs, the first type listed above, is not much better—they earn between \$0.00 and \$2.00 per hour (Sawyer 2017)) And UNICOR passes this savings on to its business partners. The \$12-a-pound tilapia at Whole Foods, for example, was raised by prisoners who were paid as little as \$0.74 per day (Curry 2015). As UNICOR says on its website, “Imagine... All the benefits of domestic outsourcing at offshore prices. It’s the best kept secret in outsourcing” (UNICOR 2017c)!

How are prisons, as well as UNICOR and its partners, able to get around federal wage requirements and pay prison laborers so little, operating in a way that many opponents have called modern day slavery? While the 13th Amendment to the US Constitution outlaws slavery and indentured servitude, an exception is made for prison labor. It reads: “Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the USA, or any place subject to their jurisdiction” (my emphasis). Prisons have taken advantage of this exemption, as well as being able to deduct up to 80% of earned wages to account for costs of room and

board. For UNICOR and its partners, although they should be required by law to pay “prevailing wages...for similar work performed in the locality, and comparative benefits (overtime, worker’s compensation, etc.)” (UNICOR 2017d), a requirement outlined clearly on their own website, they have found ways to get around it. One loophole is that all prison laborers working as part of UNICOR are considered to be volunteers,¹⁰ and, as volunteers, generally are exempt from prevailing wage requirements. They’re considered to be volunteers because they volunteer to participate in UNICOR instead of working a regular prison job.

Policing, Punishment, and Profit: A Path Forward

There are at least three important takeaways from this discussion of policing and punishment in the USA: (1) Government agencies are not immune from responding to financial incentives and operating as if they were for-profit corporations. (2) Private actors, either individuals or corporations, will spend significant sums of money to lobby government agents or agencies when doing so will benefit their bottom line, and they will usually get what they want, even if it’s at the expense of sound public policy. (3) People are not perfectly virtuous, and it is not reasonable to expect them to act against their own interests when those interests conflict with doing what is best for the community as a whole. Programs created with good intentions can cause more harm than good when they are implemented without considering how real-world actors, actors who are not motivated by the goals that the program was enacted to realize, respond when operating inside of the rules of that program. Any strategy for reforming the current approach to policing and punishment must take into account (1), (2), and (3).

Incentives matter, especially financial incentives. Resolving many of the problems connected to policing and punishment in the USA requires greatly reducing or eliminating the financial incentives that lead to abuse, or aligning those incentives in such a way that we are able to achieve desirable social outcomes when individuals, corporations, or government entities act from self-interest. Accomplishing this goal in practice is much easier said than done for at least three reasons: First, many individuals and corporations have their financial interests aligned with maintaining the status quo. Second, it is incredibly difficult to cut off revenue streams from government agencies or municipalities that are now

¹⁰ “UNICOR is a voluntary industrial work program that provides offenders job skills training in a real world environment” (4). And “Those who volunteer to work in UNICOR learn and practice the most valuable skill of all: How to work” (UNICOR 2016b, 17).

dependent on them for regular operations. Third, and perhaps the greatest barrier to widespread outrage that would bring about significant change more quickly, is that current social culture in the USA is to regard criminals, especially those convicted of felonies or in prison, as second-class citizens or worse. People in the USA seem to care more about the welfare of animals in shelters than they do about the welfare of prisoners. A sound approach to reform should consider operating within this social constraint, not imagining that it will somehow change overnight—because it won't.

Keeping these three challenges in mind, as well as the three takeaways from the discussion in the previous sections—(1), (2), and (3) above—what is the path forward for reform? For most problems related to policing and punishment for profit, practical reform requires realigning incentives. For problems connected to fines and forfeitures, identifying the theoretical solution is relatively easy, even if it is difficult to bring that solution about in practice. All of the problems outlined in the previous sections could have been avoided if police departments and municipalities did not profit financially from issuing citations or seizing property. That doesn't mean that they would stop issuing citations or seizing property when appropriate, but rather that any fines paid or property seized would not go to them for financial support. Where would it go? There are a variety of options. It could be returned to the taxpayers, directed to legitimate charities, or directed to accounts for victim restitution.

In July 2017, for example, there was significant discussion in Colorado about a proposed ballot measure that would accomplish this goal of redirecting fine revenue. "Instead of the fining agency keeping that money, it first would go to reimburse a victim for any financial losses. If there is no victim, such as in a speeding incident, the money would go to a charity of the fine payer's choice" (Ashby 2017). Although proposals like this one in Colorado are certainly a step in the right direction, we should be wary of potential rent-seeking or abuse with a policy that directs fine money to charities. In 2017, for example, the DOJ ended a fine settlement practice enacted under the Obama administration that allowed payments to be made directly to certain community and legal aid organizations, instead of making the payments to the Treasury Department directly (Walsh and Reilly 2017). To encourage settlement amounts to be paid to these community and legal aid organizations, any payments made to them received a 2 for 1 credit toward the settlement amount. So, if a bank settled with the DOJ for \$100M, they could pay \$50M to the qualifying organizations and their settlement obligation would be met (Higgins 2016). It is easy to see how a program like this one, where the government is picking winners and losers by determining which organizations are able to receive settlement funds and which are not, is ripe for abuse.

There are other good options for redirecting fine funds. For example, instead of allocating fine revenue in a manner consistent with the Colorado proposal, the entire amount could be sent to a victim restitution fund, established and maintained in such a way so that no one profits from lobbying for more fines. All real crimes have victims. One way to make sure victims are restored as much as possible to the condition they were in before the crime is to have a healthy restitution fund available for support. My point here is not to advocate for one solution in particular, but to show the direction that policy solutions must trend toward. Many solutions could adequately address the problems connected to the collection and use of fine revenue. For all of these solutions, the aim is not to return money to taxpayers or to build a restitution fund, but rather to eliminate the added financial incentive to fine individuals or seize their property. No one should profit from crime. That includes the state.

For prison policy, aligning incentives with public goals is a bit more complicated, but only because there are more moving parts. One solution to accomplishing this goal is to rely on market forces across the board. Suppose it is in the public interest to have prisoners treated humanely for the lowest reasonable cost. We could accomplish this goal by treating prisoners like customers, implementing a voucher system where prison dollars follow the prisoners. The prisoners themselves would choose the prison in which they wanted to serve their time. Under this model, all prisons could be privatized (although that wouldn't be necessary), and the role of the government would be to set the appropriate price for the vouchers and monitor for abuse. But a voucher program in and of itself would not prevent the kind of lobbying abuse we see today. While the cost per individual prisoner would be fixed, it does nothing to ensure that the cost of the prison population generally would be fixed. Without taking other steps to align incentives, it is likely that we would continue to see lobbying with the aim of getting more people to serve prison sentences and to make those sentences longer.

Perhaps the greater challenge when looking at prison policy and how to align individual incentives with public goals is simply identifying what those appropriate public goals are and how they manifest themselves in policy decisions. Consider the prison work program discussed in the last section, a program that many people believe (perhaps wrongly) is morally problematic.

No reasonable person would object to requiring prisoners to perform basic upkeep functions in the prison (mopping floors, painting walls, doing laundry, etc.), as long as they are capable of doing so, are not being overworked, and are otherwise treated humanely. Since it's not unreasonable to require them to perform these tasks for no compensation, no injustice is done if they are given a nominal amount of

money as a reward for this work, money that they're then able spend in the commissary on small luxury items like nicer personal hygiene products, snacks, and coffee.

The relevant ethical issue is as follows: Suppose someone is required to do something. After he does it, is it just to (1) pay him nothing, (2) pay him a regular wage, or (3) pay him a token amount? Considerations of justice would not make any of these responses impermissible, although the relevant circumstances may dictate when we would choose one response over another. While the common objection to prison labor is that the prisoners are being treated like slaves because they are not provided with at least the federally mandated minimum wage for their labor, this position misunderstands the nature of prison labor and the relationship between the prison and the prisoners. Prisoners are not employees of the prison. No amount of pay would justify compelling prisoners to perform tasks that were dangerous or otherwise inappropriate for them to perform for free. Any financial rewards they receive for doing work that is required of them, or that they volunteer for beyond what is required of them, is not compensation, but a reward. In this way, any pay received by prisoners for their labor is more appropriately thought of like a child's allowance rather than a worker's wage. If my wife and I give our daughter a dollar a week for making her bed every morning, no reasonable person would accuse me of violating labor laws, even though her wage would be around a dollar an hour. That we choose to give her a small amount of money for completing this task, perhaps as a way of teaching money management or to minimally incentivize her to make her bed without a fuss, has no bearing on whether is reasonable for us to require this behavior of her.

For prisoners participating in programs like UNICOR, there are additional factors in play: prison labor provides a direct or indirect financial benefit to third-party organizations, and prisoners are not required to participate in UNICOR; they do so voluntarily. So, the relevant ethical questions are: (1) Is it just, or even obligatory, to pay a volunteer nothing, a regular wage, or a token amount for performing the task he volunteered to do? (2) Are prisoners who volunteer for UNICOR actual volunteers? And (3) is it objectionable to realize financial gain from someone else's volunteer work?

Someone who volunteers for a task does so freely and without the expectation of receiving monetary compensation. While volunteers may expect to receive something for volunteering—feeling good about themselves, future considerations, etc.—none of those things are owed to the volunteer and are not guaranteed. As for the prison workers being volunteers, although many are under an obligation to do some kind of work, they are under no obligation to work in UNICOR. They choose to work in UNICOR because they would rather spend their time manufacturing furniture,

raising goats for milk, or working in a call center, than cleaning the floors in the prison, either because they find these activities to be a better way to pass the time or because they believe doing so will put them in a better position get a job when they are released. Given that prisoners who participate in programs like UNICOR are “24% less likely to recidivate and 14% more likely to be gainfully employed” (UNICOR 2017e) holding this belief is not unreasonable.

As for companies receiving financial gain from prisoner labor, in general it does not seem objectionable for one party to gain financially from someone else's willingness to volunteer, as long as no deception is involved. There are many examples of this practice in the world around us, none of which seem controversial or exploitative. People who work for nonprofit organizations gain financially, through their employment with that organization, from the volunteer work of the organization's board members. Companies frequently have unpaid student interns help to produce things of value.¹¹ What is consistent about all of these unproblematic cases is that no deception is involved. The volunteer knows that someone is gaining financially from his work, either directly or indirectly, and chooses to volunteer anyway. Applying this reasoning to UNICOR and similar prison work programs that operate in the same way and benefit third-party corporations or government agencies, while the public may be unaware of UNICOR, public ignorance is not the same as deceiving program participants. Prison workers know the tasks they will be performing, whether they will be paid for that task, and, if so, how much.

The real concern relevant to prison work programs is rent-seeking (manipulating public policy to increase private profits) and abuse, which is the same concern we should have about all aspects of policing and punishment capable of generating revenue or otherwise allowing for financial gain. Just as asset forfeiture programs have been abused by police departments and municipalities to serve as a secondary

¹¹ The US Department of Labor has set requirements outlining the conditions under which unpaid internships are legal or illegal. They include: “(1) The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment; (2) The internship experience is for the benefit of the intern; (3) The intern does not displace regular employees, but works under close supervision of existing staff; (4) The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded; (5) The intern is not necessarily entitled to a job at the conclusion of the internship; and (6) The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship” (US Department of Labor 2010). The easiest way to get around these requirements is to hire interns who are receiving academic credit from a college or university. So not only are these students not being paid by the company to work, they are paying the university for the opportunity to work for the company for free.

revenue stream, if it were the case that more people were being sent to prison or that prison sentences were increased for the purpose of having more laborers in the prison work program, then public outrage would be appropriate. While prison guard unions and police unions have pushed for public policies that send more people to jail or keep them there longer as a way of protecting their own interests, there is no evidence to suggest that the prison work program is being taken advantage of in this way. That doesn't mean that such rent-seeking and abuse couldn't happen with this program in the future, as some sheriffs right now see their prisoners as sources of free labor (O'Donoghue 2017), and so it's not unreasonable to be on the lookout for policies or programs that can be abused, putting a stop to them before they are abused.

While solutions for some problems, such as those connected to fines and forfeitures, may be relatively straightforward, solutions to other criminal justice problems are more difficult, especially when there is reasonable disagreement about whether one of our current practices is problematic in the first place. The reason for examining how private corporations, state agencies, and individuals profit from policing and punishment is not to question the moral permissibility of this behavior generally. People commit real crimes that cause real harms, there is a real cost to punishing these individuals appropriately, and the state may be acting responsibly when it tries to defray these costs. The challenge is to implement a system of policing and punishment that accomplishes the desired judicial goals, without creating obvious incentives for individuals, corporations, or government actors to pursue their own financial interests at the expense of the freedom of individuals or the public good. Many of our current approaches to policing and punishment fail in this way.

Compliance with Ethical Standards

Conflict of interest Chris Surprenant declares that he has no conflict of interest.

Human and Animal Rights This article does not contain any studies with human participants or animals performed by any of the authors.

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