

The PRICE of MARKETS

How the Logic of the Market Transformed the American Penal System

Jacob Metz

Markets carry a social cost. The American penal system, among other institutions, has undergone a transformation in function and values as the logic of the market has come to play an ever more significant role. That is to say, the United States has moved toward a hyper-market society whereby an increasing number of social spheres and institutions have witnessed a market encroachment. By deeply embedding market logic in the penal system, it has not only incentivized incarceration over deterrence and rehabilitation, but it has also eroded the very values instilled within the penal system. This paper examines the impacts upon the prison institution when market values dominate. It does so by looking at how the American penal system became increasingly imbued with market forces, and details the effect of market logic in crowding out other non-market norms and values, particularly by treating the criminal, carceral geography, and the correctional officer. It then concludes with a critical theoretical analysis that questions whether the penal system is a civic institution that the market can honor, or whether the further encroachment of the market disrupts its very premise.

Legal Studies
Thesis Advisor: Professor Musheno

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This thesis would not have been possible without the encouraging support of my classmates, the consideration and dedication of my graduate student advisor Christina Carbone, the University of California library system, the feedback of professor Simon, Johann Koehler, Chase Burton, the love and understanding of Isabel Viegas de Lima, John, Lynn, and Zachary Metz, and most importantly the instruction and immeasurable support of professor Michael Musheno.

Our principle trouble in prison reform is that reforms have been patchwork. The time has come, it seems to me, for thorough-going studies followed by thorough-going reform.

- Theodore Roosevelt, "The New Penology"

1. An Introduction to the Hyper-Market Society

Walk with me into a day-care center in Haifa, Israel where anxious children have been waiting over half an hour after the scheduled pickup time because of the tardiness of their parents. This issue of late pickups has been a consistent problem at the day-care center, such that seven or eight parents per week fail to collect their children by the 4 p.m. deadline. In turn, this places an undue burden on the teacher who has to stay with the children; thus, the day-care center announced, “any parent arriving more than ten minutes late would pay \$3 per child for each incident.”¹ In standard economics, this form of deterrence predicts, “the introduction of a penalty that leaves everything else unchanged will reduce the occurrence of the behavior subject to the fine.”² However, a study was done by the University of California, San Diego whereby Uri Gneezy and Aldo Rustichini measured the effectiveness of this monetary penalty, and their conclusions proved contrary. That is to say, they found that the “number of late-coming parents increased significantly” after the penalty was instituted.³ What can explain this paradox?

The study by Gneezy and Rustichini demonstrates the central argument of this research thesis; namely, *the logic of the market can displace the preexisting social norms that govern a particular method of organization*. In order to understand the paradox of the Israeli day-care center, one must look at how the marketization of tardiness transformed the impetus to pickup children on time.⁴ Prior to the implementation of the penalty, parents largely felt guilty for imposing a burden on the teachers to have to watch their children for a

¹ Levitt, Steven, and Stephen Dubner. "Freakonomics." *New York Times* [New York] 15 May 2005, n. pag. Web. <http://www.nytimes.com/2005/05/15/books/chapters/0515-1st-levitt.html?_r=0>.

² GNEEZY, URI, and ALDO RUSTICHINI. "A FINE IS A PRICE." *Journal of Legal Studies* [University of San Diego] n.d., n. pag. Web. <<http://rady.ucsd.edu/faculty/directory/gneezy/pub/docs/fine.pdf>>.

³ Ibid.

⁴ Sandel, Michael. *What Money Can't Buy: The Moral Limits of Markets*. New York: Farrar, Straus and Giroux, 2013. Print., p. 119

prolonged period of time. However, after the market was introduced, parents now viewed late pickup as a service that could be purchased.⁵ As a result, the social norm of guilt and respect for the teachers' time had been eroded, which can be demonstrated through the study when they found that the monetary penalty caused there to be at least "twenty late pickups per week, more than double the original average."⁶

The example of the Israeli day-care center reflects just one area where non-market norms were unintentionally displaced by the encroachment of the market mechanism, which caused unintended erosion of values. However, this example is not an anomaly of the modern context, but rather represents a growing appeal over the past three decades⁷ to allow the logic of the market to organize and resolve social dilemmas that were previously governed by other values and norms. That is to say, the United States has moved toward a *hyper-market* society whereby an increasing number of social spheres have been transformed by the market. For instance, students are now being paid weekly to attend class, women are commercially selling their womb to be a surrogate, more private contracted personnel than U.S. military fought in Afghanistan and Iraq, and the number of private prisons has skyrocketed. The purpose of this study, however, is not to argue that the trend of increasing marketization is undesirable, but rather to bring to light how market mechanisms

⁵ "It is true that a 'large enough' fee would eventually reduce the behavior. For instance, many day-care centers in the United States clearly announce a fee for coming late at the start of the year, and this fee is large and proportional to the length of the delay. Casual observation shows that there are few delays, but we have not examined if the average delay is different from the one in our sample... The study we presented shows, we think, something different, which we may summarize as follows... People facing this game do not come to it simply with their preferences and beliefs; they also bring to it a perception of the strategic situation they are facing. The contract that is presented to them and any modification that is made later may change this perception... this is important, because there is no reason to believe that this effect is limited to minor faults, such as a delay in the time of picking up one's child. For instance, the announcement of a government that tax evasions are going to be more severely pursued may be interpreted in different ways, and have a different effect, than the anticipated increased compliance." (Gneezy and Rustichini)

⁶ Levitt, Steven, and Stephen Dubner. "Freakonomics." *New York Times* [New York] 15 May 2005, n. pag. Web. <http://www.nytimes.com/2005/05/15/books/chapters/0515-1st-levitt.html?_r=0>.

⁷ See Appendix A

(which has often been seen as a natural and value-neutral method of organization) erode the function of an institution, and thereby change the values which are subordinate to the grind of function.⁸ This line of reasoning then leads one to question what spheres markets should or should not be present.

It would be too ambitious for this study alone to examine every sphere – despite the fact that each deserves further academic inquiry - where markets have encroached; thus, this paper will focus on how market norms have come to govern and change the United States penal system. More specifically, this paper will examine a three part puzzle; namely: 1) Why has the American penal system become increasingly imbued with market forces over the last three decades? 2) How is market logic changing penal institutions and the values instilled within them? And 3) is the further encroachment of the market into the penal system desirable? In forthcoming pages, this paper will unfold into four primary sections that seek to answer this trifold puzzle; namely a overview of the emergence of the marketized penal system, a theoretical argument that explains the social cost of markets, supportive qualitative evidence of how markets are transforming the penal system's function and values, and a critical theoretical analysis that seeks to challenge the market induced transformation.

The overview of the marketized penal system, in short, will accomplish two main objectives; namely, to provide competing explanations to date on the market-evolution of the penal system, and an understanding of the penal institution's function in the modern context. In doing so, this will set the stage for understanding the contemporary ascendancy of markets in the penal system and the transformative effect they have upon the preexisting

⁸ The constructs of function and values of the penal institution will be illustrated in section 2.2.

social norms, values, and functions. Upon examining the literature, the paper will then shift focus to theorize the social cost of markets. More specifically, this section, subtitled “The Price of Markets,” will draw upon theorists, such as Walzer and Sandel, in order to demonstrate that the market practice once embedded can fundamentally change an institution by displacing non-market norms and values. Extensive evidence for this theoretical argument will be found in the following evidentiary component of the paper subtitled, “An Erosion of Penal Norms,” which examines the criminal, carceral geography, and correctional officer. Last, the paper will engage with the future implications of this work, and the need to normatively question the expansive role of markets in society today.

2. The Emergence of a Marketized Penal System

The statistics are well known by now. The United States, with roughly 5% of the world’s population, holds 25% of the world’s prisoners, the population up more than 700% since 1970. In fact, even with these staggering numbers, the U.S. population still commonly accepts prison as the reasonable destination for those identified as “criminal.” With that said, however, there has been a large body of literature in recent decades that examines this incarcerated population by critiquing increased sentencing laws, the war on drugs, the tough on crime mentality, and prison privatization. In a broad sense, the focus of this thesis will be to move beneath the headlines, cover stories, and scholarship on “prison privatization,” which can be primarily dichotomized into competing camps debating whether the further encroachment of the market mechanism into the penal system has been a positive component for cost-savings and efficiency of operation, or a negative one in which for-profit prison companies benefit by keeping more people locked up.

This section will take a step back from these two competing “prison privatization” camps so as to question the origin, which gave rise to a hyper-marketized penal system. To clarify, this paper will not be examining “prison privatization” per se, but rather “prison marketization” seeing as markets have infiltrated the penal institution from both the public and private sphere. First, this overview will begin by understanding the rise of the market triumphalist penology that has promulgated the high degree of market usage to organize, operate, and utilize prisons. Second, it will engage in understanding the operational, or first-order⁹, function of the penal system. By providing the analysis on these two topical areas, this paper will build a framework for understanding how markets alter the purpose and values of the U.S. penal system. In doing so, however, this paper does not seek to overstate the effects of marketization on prisons, nor is it to raise the issue above the contemporary consequences of mass incarceration put forward by the tremendous scholars in the field, such as Angela Davis, Jonathan Simon, Michelle Alexander, and Loïc Wacquant. Rather, the focus of this thesis is to act as a supplement to the *longue durée* of critical prison studies by taking a more nuanced view of how the market mechanism is transforming the penal system by corroding non-market values.

2.1 A Market Triumphalist Penology

The focus of this section is to demonstrate that the marketization of prisons has taken on a more expansive form, which has altered the values and functions of institutions, such as prisons, in a manner that is unparalleled to market encroachment of the past. However, this is not to say the market historically is different than the modern context in regards to having

⁹ What I distinguish as the first-order and second-order functions of the penal system will be clarified in section 2.2.

an embedded social cost of non-market value displacement, but rather that there is a difference in degree and scope in the contemporary context. In order to do so, this section will look at the historical market involvement in the penal system, which will then provide a comparison to the hyper-market encroachment of the present day. Albeit the complex history of penal bondage in its various forms, according to Pieter Spierenburg, “stretches over more than four centuries,”¹⁰ this section will look solely at the American context.

Market involvement in the U.S. penal system got heavy attention as early as the 1820s with the implementation of the “Auburn” system in New York, which lasted until the 1860s. The foundation and deployment of legal punishment in the Auburn model was contractual penal servitude involving hard productive labor.¹¹ Louis Dwight, the strongest champion for the Auburn system, summarized the prison’s function when he stated, “there is the most perfect attention to business from morning till night, interrupted only by the time necessary to dine, and never by the fact that the whole body of prisoners have done their tasks, and the time is now their own, and they can do as they please.”¹² This labor-based model stood in sharp contrast to early moral objectives of republican penology; and thus, Auburn prison marked the turning point and origin of the direct marketization of the penal system with the state selling the labor power of convicts to private interests. A memoir from Austin Reed, who was a black inmate inside Auburn prison in the 1840s, reinforces this notion of labor by recalling when “he was sent to work on the farmer’s property as retribution and recompense. Reed once told the farmer that he was tired of laboring and that

¹⁰ Pieter Spierenburg, *The Prison Experience: Disciplinary Institutions and Their Inmates in Early Modern Europe*, New Brunswick: Rutgers University Press, 1991. p 275

¹¹ Lichtenstein, Alexander C.. *Twice the work of free labor: the political economy of convict labor in the New South*. London: Verso, 1996, p. 22

¹² Harry Elmer Barnes *Journal of the American Institute of Criminal Law and Criminology*, Vol. 12, No. 1 (May, 1921), p. 54

he would go home to see his mother and siblings, and the man responded with the whip.”¹³ Moreover, Rebecca McLennan further illustrates this point in her book, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776-1941*, when she writes, “contrary to the commonplace view that labor was an insignificant element of the ‘Auburn system’ of imprisonment, this activity and the revenues it generated quite rapidly became indispensable to the financial and disciplinary order of Auburn prison and the dozens of other prisons that would eventually adopt the plan.”¹⁴ Thus, the Auburn model gave rise to a market penology whereby hard productive labor for the benefit of private contractors was the integral and constitutive practice of nineteenth century incarceration.

Following the Civil War, the American penal system allowed large-scale industrial interests to play a vital role. That is to say, penal labor became immersed in only one or a few enterprises; the southern prisoners, most of whom were former slaves, became primarily entangled in the convict leasing to plantation owners whereas those in the North, Midwest, and Far West were situated in large prison factories and work camps.¹⁵ Much of the penal literature on the Reconstruction Era focuses on the convict lease system as a perpetuation of slavery, such as when Michael Hallet asserts, “Upon release from their former owners’ captivity, “emancipated” slaves often had nowhere to go...caught between the legal restrictions of abolition and a paramount need for cheap labor, convict leasing emerged as a uniquely Southern solution to the post-bellum labor shortage and facilitated a continuation

¹³ Ritchin, E. (2014, Feb. 16). Free writing. *The New Journal*, Retrieved from <http://www.thenewjournalat Yale.com/2014/02/free-writing/>

¹⁴ McLennan, R. (2008). *The crisis of imprisonment: Protest, Politics, and the Making of the American Penal State, 1776-1941*. New York: Cambridge University Press. P. 58

¹⁵ Ibid. 87,89

of the ideology of white supremacy.”¹⁶ However, Hallett, unlike other scholars, does a good job in understanding that the convict lease system was not instigated by “white supremacy,” but rather was due to a historical market context involving the need for “cheap labor.” That is to say, the market underpinned this large-scale prison labor practice, which in 1887 was documented by the U.S. Commissioner of Labor, Carroll Wright, in his report entitled *Convict Labor in the United States*. This 604-page report begins by stating,

“It is universally conceded that convicts should be employed at some useful labor. Formerly the convict-labor question meant whether convicts should be employed in useful labor or at what is known as penal labor; that is, engaged in turning a crank, running a tread-mill, or some such profitless exercise, have in itself no useful results beyond the exercise of the body, and this exercise being usually carries so far as to injure the body.”¹⁷

This report also documents that on any one day, “upwards of 45,000 prisoners – fully seventy percent of the nation’s total population of incarcerated men, women, and youths – were being put to hard, productive labor in the service of profit-making enterprises of one sort or another.”¹⁸ Thus, American prisoners in this Postbellum era found themselves contractually laboring for large-scale capitalist industry in an effort to accrue tens of millions of dollars worth of goods annually.

¹⁶ Hallett, M. (2004), *Commerce with Criminals: The New Colonialism in Criminal Justice*. *Review of Policy Research*, 21: 49–62. doi: 10.1111/j.1541-1338.2004.00057.x, p. 51

¹⁷ Report of the Secretary of the Interior, Carroll Wright, Vol. 5, U.S. Commissioner of Labor, *Convict Labor in the United States* (Washington: Government Printing Office, 1887). p. 3

¹⁸ McLennan, R. (2008). *The crisis of imprisonment: Protest, Politics, and the Making of the American Penal State, 1776-1941*. New York: Cambridge University Press. P. 88

Beginning in 1877, the U.S. penal system began transitioning away from a large-scale labor leasing institution toward what McLennan calls the “therapeutic community.”¹⁹ This new rehabilitative penology, rather than primarily focusing on extracting labor, centered on adjusting inmates for civil life and occupation by way of investing in recreational and educational programs. This transition was instigated on two main accounts; namely, external pressure by free laborers (in the form of local and national labor unions and workingmen’s associations) who saw cheap convict labor flooding the market, and internal pressure by the convict laborers themselves who experienced injurious labor conditions.²⁰ The most prominent demonstration Brian Greenberg recounts is that of a “monster meeting” in March 1883, where “some 10,000 Albanians [Merchants, mechanics, tradesmen and manufacturers] marched under banners reading ‘LABOR AND CAPITAL UNITE TO ABOLISH PRISON CONTRACTS’...The real enemy of workers as well as of employers became simply the individual prison contractor.”²¹ Similar protests and rebellions lasted until around 1892 during which they exposed the inhumane living and laboring conditions; ultimately culminating in New York abolishing contract prison labor and other states taking similar action to scale back market forces. In addition, this was coupled with a drive to ameliorate the prison conditions by reducing the time in the cell, and allowing for recreational activities, such as athletics and musical shows.

However, despite moving into a post-contractual era, different labor market variants remerged within the penal system shortly thereafter, such as the chain gang and Piece-Price scheme, which according to Blake McKelvey, “proposed to eliminate the disturbing

¹⁹ Ibid. 195

²⁰ Ibid. 148

²¹ Brian Greenberg, *University of Delaware Free and Unfree Labor: The Struggle Against Prison Contract Labor in Albany*, New York, 1830-85, p. 174

influence of the contractor within prison walls by giving the officers full control over discipline of the convicts and management of the industries.”²² To put it simply, labor models continued to pervade the penal sphere in differing forms and alterations, and the historical relationship between the market and the American penal system never ceased.

Even with the shift towards a human rights logic that occurred after World War II, the immoral forces of the market from the penal landscape were not removed. Jonathon Simon asserts the transformation after WWII when he writes, “Following the war, penal systems in the wealthy democracies slowly moved toward a greater realization of the therapeutic model of reform penology, one bolstered in part by the rising wave of human rights thinking.”²³ Furthermore, from the 1960s to the 1980s, prisoners besieged the federal courts with civil rights suits; thereby forming a powerful prisoners’ rights movement that was able to produce a substantial degree of prison reform and to some extent disrupt the prison-market hegemony. However, despite the transition toward rehabilitation in the post-WWII era and a growing discourse on reform in the wake of prisoners’ rights movements, market forces remained strong. In fact, the market mechanism has expanded to an unprecedented degree so as to colonize and condition much of the penal sphere, which will be demonstrated with supportive qualitative evidence in section 4.

By and large, the marketization of the penal sphere can be attributed to the neoliberal moral and political philosophy of the mid-1970s that contended that the actions of the state are contrary to the individual freedoms of its people; thus, the argument follows, the size and the extensiveness of the state can often be seen to logistically regress with individual rights

²² The Prison Labor Problem: 1875-1900, Blake McKelvey, *Journal of Criminal Law and Criminology (1931-1951)*, Vol. 25, No. 2 (Jul. - Aug., 1934), p. 256

²³ Jonathan Simon and Richard Sparks, *Sage Handbook of Punishment and Society* (2013) Jonathan Simon, "Punishment: Socio-legal Aspects

and freedoms. This political philosophy can be seen in the theoretical writings of the Chicago School and Robert Nozick who argues that “the minimal state is the most extensive state that can be justified.”²⁴ Implicitly coinciding with the rise of the night watchman state is a celebration of markets and denigration of other means of allocation and organization. Robert Kuttner emphasizes this recent transition in his book *Everything for Sale: The Virtues and Limits of Markets* when he opens the book by stating, “the ideal of a free, self-regulating market is newly triumphant. The historical lessons of market excess, from the Gilded Age to the Great Depression, have all but dropped from the collective memory. Government stands impeached and impoverished, along with democratic politics itself. Unfettered markets are deemed both the essence of human liberty, and the most expedient route to prosperity.”²⁵ Similarly, other scholars echo these claims, such as Michael Sandel when he writes, “The era began in the early 1980s, when Ronald Reagan and Margaret Thatcher proclaimed their conviction that markets, not government held the key to prosperity and freedom.”²⁶ The public imaginary is still constituted by market triumphalist rhetoric as illustrated when Obama stated, “the market is the best mechanism ever invented for efficiently allocating resources to maximize production.”²⁷ In this regard, we can see the emergence of the free-market as an importance concept that governs political economy, and one that has tangible consequences.

Thus, in the forthcoming sections, this thesis will demonstrate how the historical market triumphalist penology that began with the inception of the Auburn model has

²⁴ Robert Nozick, *Anarchy, State, and Utopia*, (Basic Books Inc. 1974), p. 149

²⁵ Kuttner, Robert. *Everything for Sale: The Virtues and Limits of Markets*. Chicago: The University of Chicago Press, 1996. Print., p. 3

²⁶ Sandel, Michael. *What Money Can't Buy: The Moral Limits of Markets*. New York: Farrar, Straus and Giroux, 2013. Print., p. 6

²⁷ Leonhardt, David. 2008. “[Advanced] Obamanomics.” *New York Times Magazine*, August 24, 2008, p. 28

become magnified in the transition toward a hyper-market society, creating a new robust carceral economy governed by free-market logic. Furthermore, this paper will show how penal marketization produces a transformation (in function and values) that surpasses the labor models of the past in terms of scale and the targeted population. In providing this review of the American penal system, this paper has not only demonstrated the importance of markets historically to the American penal landscape, but also has established a reference point for comparing the modern marketized penal state.

2.2 First-Order Functionality of the Modern Penal State

The central argument of this research thesis is to show that markets carry a social cost; more specifically, once embedded, the logic of the market can displace preexisting social norms that govern a particular institution thereby fundamentally transforming the function and values that previously governed. However, to make this claim it requires a clear understanding of an institution's function. Furthermore, this requires a distinction to be made between an institution's first-order and second-order functionality. For instance, to put it simply, a shop on the first-order functions to provide goods, but on the second-order it seeks to generate capital. Similarly, this paper will contend that the penal system functions on the first-order for rehabilitation, deterrence, incapacitation, and retribution (though arguably not equally); but the second-order is less certain despite canonical sociological works providing distinct camps of thought. This idea is reinforced by David Garland when he writes, "Like all complex institutions, the prison simultaneously pursues a number of objectives and is kept in place by a range of forces."²⁸ Albeit this thesis is primarily

²⁸ DAVID GARLAND, *Punishment and Modern Society: A Study in Social Theory*. Oxford: The Oxford University Press, 1990. P. 289

concerned with how markets have transformed the first-order function of prisons, it will also seek to explain prisons as a means to a market end by offering a second-order analysis in the concluding section 5.2.

Albeit “few Americans read Bentham, and even fewer took him seriously”²⁹ during the formation of the American penal system, his utilitarian aims of deterrence, rehabilitation, and incapacitation have influenced modern criminal sentencing, even as late as the 1960s. Recently, however, the penal system has witnessed a rise in the Kantian notion of retribution, or to redress the imbalance that was created by the offender. Although penal policy is a dense and fluid tradition that has encompassed a wide range of justifications, the three utilitarian elements comprised (in some form or another) the rehabilitative model in the 1950s and 1960s. Moreover, the U.S. penal system carries out prisoners’ designated rights, such as equal protection and procedural due process, which were expanded upon during the prisoner’s rights movement to include aspects like humane prison conditions and adequate medical care. This section will seek to define these utilitarian elements while situating them within a recent penal context, and provide an overview of the commonly held rights that we afford prisoners. In doing so, this paper will then be able to demonstrate in the following two sections how many of these facets have been eroded by an amalgam of market forces over the last three decades, which has given rise to a more retributive, or desert model of punishment amongst other transformations.

²⁹ Rothman, D. J. (n.d.). Perfecting the prison: United states, 1789-1865. In N. Morris & D. Rothman (Eds.), *The Oxford History of the Prison: The Practice of Punishment in Western Society*. Oxford: Oxford University Press. P. 121

During the late 1970s, Francis Allen chronicles the “substantial and precipitous”³⁰ decline of the rehabilitative ethos, but prior to this “sentencing systems and incarceration traditionally [had] a variety of goals, which include[d] incapacitation, punishment, deterrence and rehabilitation,” according to the Sentencing Project.³¹ Over the last three decades, rehabilitation has been the most criticized and controversial justification among the three utilitarian justifications. At the most fundamental level, according to Van den Haag, “[Rehabilitation]...attempts to produce law-abiding (or more law-abiding) behavior of convicts usually by non-punitive means.”³² Rehabilitative efforts sought to shape convicts lives so to make them law-abiding and productive citizens upon release, but the result proved futile by the 1970s as Morris and Rothman illustrate, “it’s hard to train for freedom in a cage.”³³ The most critical blow to the rehabilitation movement came from Governor Rockefeller’s Special Committee on Criminal Offenders, which released a report that concluded that the available research on rehabilitation was poorly conducted, and that rehabilitation efforts did not produce positive results.³⁴

Incapacitation and deterrence did not receive the same mountain of criticism as rehabilitative efforts, and by and large are still justifications being employed presently. Incapacitation, at its core, “refers to the crimes averted in the general society by isolation of the identified offenders during periods of incarceration.”³⁵ Beginning in the 1980s,

³⁰ FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 1-2 (1981)

³¹ Wright, V. (2010). Deterrence in criminal justice evaluating certainty vs. severity of punishment. *The Sentencing Project*, p. 1

³² Ernest Van Den Haag, Could Successful Rehabilitation Reduce the Crime Rate, 73 J. Crim. L. & Criminology 1022 (1982)

³³ Morris, Norval & Rothman, David, ed. (1995). *The Oxford History of the Prison: the practice of punishment in western society*. Oxford University Press.

³⁴ Duffee, D. (1989). *Corrections: Practice and policy*. New York: Random House. P. 14

³⁵ Blumstein, Alfred. Selective Incapacitation as a Means of Crime-Control. *American Behavioral Scientist* 27(1), 1983, p. 94

incapacitation gained traction on the assumption that it can take “a slice out of an individual criminal career.”³⁶ Currently, the mission statement of the Federal Bureau of Prisons (BOP) is “to protect society by confining offenders in the controlled environments of prisons and community-based facilities.” In the same vein, methods of deterrence that seek to invoke a “responsiveness to sanction threats” that makes individuals less likely to offend³⁷ are also currently at play, such as three strikes, zero tolerance, and mandatory sentencing. Thus, albeit the rehabilitative utilitarian justification for punishment has by and large disappeared from the penal sphere, deterrence and incapacitation still exist as prominent values.

In the place of rehabilitation, the desert model of retribution has come to fore in the late 1970s and continues to play a guiding role in penal justification. This paper will explain the transition toward retribution in the section entitled “Examining the Erosion of Penal Norms” as it is not an obvious conversion. For now, however, this paper will seek to merely define retribution in line with M. Davis who claims that there are three elements: “(1) Punishment is acceptable only against persons who have committed crimes. (2) The degree of punishment must match the severity of the crime. (3) The degree of punishment specified is independent of the actual or predicted consequences of the punitive act.”³⁸ Retribution theories do not necessarily focus on empirical arguments on whether or not a particular punishment provides utility to society, but are more concerned with ensuring an ethical

³⁶ Ibid.

³⁷ Tittle, C.R. *Sanctions and Social Deviance –The Question of Deterrence*. New York: Praeger, 1980.

³⁸ Duffee, D. (1989). *Corrections: Practice and policy*. New York: Random House. P.10

moral balance is achieved by causing a level of misery for the prisoner that is proportional to that of the crime.³⁹

Lastly, there exist a wide array of commonly held rights that we afford prisoners. Many fundamental rights given to prisoners and those convicted stem from negotiation among the courts, administrators, and legislatures; most of which has involved the First, Eighth, and Fourteenth Constitutional amendment rights. Administrative observance of these rights dates back to the Declaration of Principles adopted by the American Prison Association in 1870, and recently similar intentions were put forth by the American Correction Association when they stated, “The administrator should always be certain that he is not acting capriciously or unreasonably but that the established procedures are reasonable and not calculated to infringe on the legal rights of prisoners.”⁴⁰

Up until the 1960s with the creation of the prisoners’ rights movement, the court often refused to get involved with prison conditions and administration, which became known as the hands-off doctrine. However, with the first prisoners’ rights case, *Cooper v. Plate*, awarding religious freedom to inmates paved the way for future penal reform, such as *Brown v. Plata*, which declared, “prisoners retain the essence of human dignity inherent in all persons.”⁴¹ In addition to opening the door to litigation, the prisoners’ rights movement also established a string of general principles, such as grievance mechanisms, reasonable access to courts, prisoner councils, visitation practices, disappearance of strip cells, and increased public awareness and accountability of staff. Furthermore, many of the most

³⁹ Bushway, Shawn D. & Paternoster, Raymond (2009). "The Impact of Prison on Crime". In Raphael, Stephen & Stoll, Michael. *Do Prisons Make Us Safer?: The Benefits and Costs of the Prison Boom*. Russell Sage Foundation. p. 120.

⁴⁰ Duffee, D. (1989). *Corrections: Practice and policy*. New York: Random House. P. 311

⁴¹ *Brown v. Plata*, No. 09–1233. (2011)

impactful rights have animated from constitutional amendments. Currently, the First amendment has not extended in many regards to the inmate population, but it has guaranteed a freedom of religious practice in most cases, and the protection against blanket censorship of mail. In the same vein, the Fourth Amendment doesn't provide much beyond some protections during body searches, particularly female inmates being searched by male correctional officers. However, Eighth Amendment rights have placed a number of constraints on how inmates are punished within prison walls; presumably, the six most important consequences for prison administration are: "(1) to govern the use of force, (2) to govern the use of isolation or segregation cells, (3) to govern the availability of medical care, (4) to govern the use of certain intrusive rehabilitation or treatment techniques, (5) to govern the conditions of confinement, and (6) to control the length of confinement, the proportionality of the punishment to the crime, or the lack of purpose in punishment."⁴² Similarly, the Fourteenth Amendment's equal protection and due process clauses go along way to ensure access to courts and legal services, while also guaranteeing "equal protection of the laws" so as to protect from certain disciplinary procedures, certain modes of decision-making by officials, and against unequal treatment on the basis of race, sex, and creed.⁴³ By providing these rights and institutional protections in conjunction with the justifications being employed for punishment, it gives structure as to what the market is transforming. More specifically, section 4 will illustrate the market induced penal practices that have eroded many of these aforementioned elements, particularly by examining the criminal, carceral geography, and correctional officer.

⁴² Duffee, D. (1989). *Corrections: Practice and policy*. New York: Random House. P. 320

⁴³ Cornell University. (n.d.). Prisoner's rights. In *Legal Information Institute*. Cornell: http://www.law.cornell.edu/wex/prisoners_rights

3. The Price of Markets: A Theoretical Study

The primary focus of this section is to establish a framework for understanding how the logic of the market is transforming the American penal system as alluded to in the introduction with the example of the Israeli daycare. More specifically, this theoretical component of the paper will seek to put forward a paradigm for understanding how internal mechanisms are tinkered with, which carries into an institution the logic of the market that begins to erode or eat away at existing processes, of which three in the penal system will be treated in section 4. Culture, in turn, lags transformation, because it is a deeper flesh of an institution when compared to mechanisms and processes; this will be illustrated in the final section of the paper explaining how market logic has become fused with penal culture, and in turn, has transformed the practice on a second-order.

3.1 The Effects of a Price-Tag Society

As referred to in the opening sections of this paper, the United States is in a period of market triumphalism. It is a market ascendant era that marks a high point for the limitlessness of capital and purchase, unparalleled to the Gilded Age or the Belle Époque. Instigating and accompanying this rise, according to Kiren Aziz Chaudhry, is “the reification of ‘the market’ as a neutral and natural institution, apolitical and ahistorical-as an end in itself rather than a means to promote social and individual welfare-has become common in academic and policy circles.”⁴⁴ That is to say, the market price for goods has come to be favorably accepted, but the ‘price of markets’ has largely been left to the wayside.

⁴⁴ Chaudhry, K. *The myths of the market and the common history of late developers*, POLITICS & SOCIETY, Vol. 21 No.3, September 1993 245-274 ©1993 Sage Publications Inc.

Of the academics that have questioned the role of markets in the twentieth century, most have examined the inequality that arises from the increased influence of money. Take for instance, professor Thomas Piketty and former Labor Secretary Robert Reich, who examine the economic perils that arise from having the “one percent.” Few, however, have questioned the embedded social costs of markets, particularly in the context of the penal system. Of the first economists to question the transformative effect markets have on institutions is perhaps Marx with his notion of commodity fetishism, but more explicitly Fred Hirsch when he posits that there is a “commercialization effect – meaning the effect on satisfaction from any activity or transaction being undertaken on a commercial basis through market exchange or its equivalent, as compared with its being undertaken in some other way.”⁴⁵ More recently, Michael Sandel questioned the inherent social cost of markets when he acknowledged that there is a “corrosive tendency of the markets...because markets don’t only allocate goods; they also express and promote certain attitudes toward the goods being exchanged.”⁴⁶ Thus, the essential logic being communicated is that marketizing a good can potentially alter that good’s value.

However, many standard economists reject this notion that goods are altered by marketization, such as Nozick who understands markets as a value-neutral method of voluntary exchange and mutual benefit.⁴⁷ This is due by and large to the fact that the subject matter of economics after the 18th century departed from Aristotelian notion of being examined as a branch of moral and political philosophy, and toward a value neutral science. For instance, this can be seen when Milton Friedman took the podium at a 1977 – 1978

⁴⁵ Hirsch, F. (1977). *Social limits to growth*. London: Routledge and Kegan Paul Ltd.

⁴⁶ Sandel, Michael. *What Money Can't Buy: The Moral Limits of Markets*. New York: Farrar, Straus and Giroux, 2013. Print. p 9

⁴⁷ Robert Nozick, *Anarchy, State, and Utopia*, (Basic Books Inc. 1974), pp. 149-150

lecture series at Stanford University to answer whether it was moral to let markets dictate the price of a human life in the case of the Ford Pinto. In his answer, Friedman argues that markets are not about values and morals, but rather economic calculation. In this conversation, he goes on to say that Ford is justified in their decision to not pay the additional thirteen dollars (per car) to prevent rear-end gas tank explosions because it would amount to spending more than two-hundred thousand per estimated life saved. Thus, the bottom-line for Friedman and Nozick is weighing costs and benefits correctly, and not the moral implications associated with the market; it is this viewpoint, which has occupied much of the debate on prison marketization.

Therefore, albeit Milton Friedman famously stated, “the great virtue of a free market system is that it does not care what color people are; it does not care what their religion is; it only cares whether they can produce something you want to buy. It is the most effective system we have discovered to enable people who hate one another to deal with one another and help one another,”⁴⁸ other scholars argued that he could not be further from the truth. That is to say, markets do more than only caring about whether they can produce something you want to buy, they carry a social cost by actively displacing and corrupting other non-market values that exist in an institution. For instance, Michael Walzer observes this phenomenon when he states in *Spheres of Justice: A Defense of Pluralism and Equality*, “one can conceive the market as a sphere without boundaries...a radically laissez-faire economy would be like a totalitarian state, invading every other sphere, dominating every other distributive process. It would transform every social good into a commodity. This is

⁴⁸ Friedman, Milton. "The Free to Choose Lecture Series." . Stanford University, n.d. Web. <http://hoohila.stanford.edu/friedman/ftc_lectures.php>.

market imperialism.”⁴⁹ Thus, one must be conscious of the social costs that markets place when they enter into other institutional spheres, and we must be able, as Walzer contends, “to define the boundaries within which [they] properly operate.”⁵⁰

Michael Sandel gives a clear instance of this corrosive effect of markets when he discusses the value of the Nobel Prize. Albeit the Nobel Prize is greatly sought after, one simply cannot purchase the award. One could, however, purchase the award from a prior recipient, but “the bought award would not be the same as the real thing. The market exchange would dissolve the good that gives the prize its value. This is because the Nobel Prize is an honorific good. To buy it is to undermine the good you are seeking.”⁵¹ In the same vein, one should view the penal institution as an institution that can have its function – namely, to maintain inmates’ rights as it seeks to deter, incapacitate, rehabilitate, and retribute – corroded by the market. To put it metaphorically, markets can be seen to be the Trojan Horse entering into the gates of the penal system. Albeit markets appear to be a benign value-neutral method of organization, they can in fact be quite destructive in transforming the institution from the inside out. It is this broader question of the proper role of markets, which will be the subject of the following section.

4. Examining the Erosion of Penal Norms

Thus far, this thesis has put forward the claim that the last three decades can be characterized by a transition toward a hyper-market society. Then, the paper shifted gears, and described the first-order functions of the modern penal state, while also laying the

⁴⁹ Walzer, Michael. *Spheres of justice: a defense of pluralism and equality*. New York: Basic Books, 1983. p. 119-120

⁵⁰ Ibid.

⁵¹ Sandel, Michael. *What Money Can't Buy: The Moral Limits of Markets*. New York: Farrar, Straus and Giroux, 2013. Print. p 94

theoretical pillars for which the argument will stand; namely, that markets have an embedded social cost. In this section, I will provide the evidence for how markets are transforming the penal system in relation to the criminal, carceral geography, and correctional officer.

4.1 The Criminal

First and foremost, at the heart of the penal system rests the notion of ‘the criminal;’ or, an individual who has been found guilty of the commission of conduct that causes social harm and that is punishable by law. Albeit the experience of a criminal has been fluid and historically situated, the penal system of the modern context asserts that inmates maintain a degree of rights and explicitly states that it serves utilitarian functions that are detached from the influences of the market. Thus, the question remains for this sub-section: how have the market forces of the last three decades transformed the criminal experience?

The starkest example of the market’s influence on the penal system is that of the burgeoning of the complete privatization of prisons began in 1984 when the Corrections Corporation of America (CCA) was awarded a contract to take over a facility in Hamilton County, Tennessee. After establishing the first private prison in Hamilton County, Tennessee, the marketization of prison has been expanding at a phenomenal rate, such that private prison population went from only 1,345 inmates in 1985 to holding over 1.6 million as of December of 2010.⁵² In likewise fashion, the expenditure on prisons has also skyrocketed to \$68 billion a year (federal, state, and local) as of 2009, such that “over the last 10 years the average yearly increase of state spending on corrections has been

⁵² "Bureau of Justice Statistics." *Office of Justice Programs*. U.S. Department of Justice, 02 09 2012. Web. <<http://www.bjs.gov/content/pub/pdf/p10.pdf>>. See Appendix B, Figure A

approximately 3 percent. If such trends continue, states would be expected to spend more than \$50 billion on corrections per year by 2010.”⁵³

Thus, it is evident that markets are playing an increasing role in the penal system today than ever before, and it transforms the very functions of punishment by establishing “multiple symbiotic institutional relationships that dynamically link private business and government/state apparatuses in projects of multiply-scaled human immobilization and imprisonment.” That is to say, private prisons rely upon locking up more and more bodies, and private corporations are incentivized to advocate for tough on crime legislation despite the need. Arthur McDonald, former owner of California’s largest private prison firm, Eclectic Communications Inc., reinforces this point when he told the *Los Angeles Times*, “Crime pays. I hate saying that, but it really does.”⁵⁴ Thus, it becomes evident how the function of incapacitation and longer sentences become the dominant value when privatized prisons enter the frame. Furthermore, the privatization of prisons also changes the very mindset of how prisoners see themselves as demonstrated by Texas death row inmate Ray Jasper when he writes, “you can go to any penitentiary in this nation and you will see slavery... If a prisoner refuses to work and be a slave, they will do their time in isolation as a punishment...there are those in the corporate world making money off prisoners, so the longer they're in prison, the more money is being made. It's not about crime & punishment,

⁵³ “Pruning Prisons: How Cutting Corrections Can Save Money and Protect Public Safety.” Justice Policy Institute, 05 2009. Web. <http://www.justicepolicy.org/images/upload/09_05_rep_prunningprisons_ac_ps.pdf> See Appendix B, Figure B

⁵⁴ Strickland, L. (1998). *Frontiers of justice vol ii: Coddling or common sense*. Biddle Publishing.

it's about crime & profit. So the political move is to tell the people they're tough on crime and give people longer sentences.”⁵⁵

To illustrate this point further, there are a series of instances whereby private firms also rely on an incarcerated society with lengthy sentences because it provides a cheap stable slave-like workforce. For example, the commodification of the criminal in the post-WWII era was made explicit in 1979 when Congress created the Prison Industries Enhancement Certification Program (PIE) – which, essentially provided a readily available workforce for the corporate sphere – in conjunction with twenty one states passing laws requiring prisoners to work. Furthermore, according to the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), “Just as important, taking a job can reduce your sentence, often on a day worked per day served basis, and not taking one can subject you to penalties that lengthen your sentence.”⁵⁶ As a result, from 1980 to 1994, state-run and private industries saw a 358 percent increase in the number of federal and state prisoners working in industry and the value of goods produced by prisoners rise from \$392 million to \$1.31 billion,⁵⁷ which prompted USA to summarize in their headline: “Everybody’s doin’ the jailhouse stock.”⁵⁸

The range of occupations that prisoner’s find themselves in ranges anywhere from “Inmates in New Mexico making hotel chain reservations...[and in] California inmates producing the logos for Lexus automobiles.”⁵⁹ To name a few, prison labor has been used in the production of “clothes, car parts, computer components, shoes, golf balls, soap, furniture

⁵⁵ The Huffington Post, "A Letter From Ray Jasper, Who Is About To Be Executed." http://www.huffingtonpost.com/2014/03/04/death-row-letter_n_4898902.html.

⁵⁶ Jane Slaughter, *Prison Labor is not Beneficial*, (San Diego: Greenhaven Press, 2000), 147.

⁵⁷ Silverstein, K. *America’s private gulag*. (pp. Volume 7 No. 4 972-418-8993). Retrieved from <http://famguardian.org/PublishedAuthors/Media/Antishyster/V07N4-AmericasPrivateGulag.pdf> p. 38

⁵⁸ *Ibid.* 34

⁵⁹ Jane Slaughter, *Prison Labor is not Beneficial*, (San Diego: Greenhaven Press, 2000), 145.

and mattresses,” and even the production of designer blue jeans in Oregon, called “Prison Blues.”⁶⁰ In addition, the contracting of labor is not merely relegated to the private sphere; the New York Times recently noted that the Pentagon has even turned “to federal prisons, where wages are under \$2 per hour. Federal inmates this year stitched more than \$100 million worth of military uniforms.”⁶¹ The Pentagon and other firms often turn to prison labor because they forced or find it more profitable to have the Made-in-the-U.S.A label on the product, and prison labor provides an American workforce at a globally competitive rate, which is made more lucrative by the fact that inmates do not require benefits, vacations, unemployment pay, can be hired and fired with consumer demand, and are extremely reliable. These examples are just a few of the many instances whereby the prison operates as a factory, and the inmate as a labor-commodity. In an honest assessment, the owner of the east Texas detention center, Bobby Ross, reinforced this logic by remarking, “It’s kind of like a factory in a sense.”⁶² Thus, if prisoners have incentives to take prison jobs, private companies have equally strong motivation to locate behind bars and take advantage of the prison population. As a result, the market transforms the penal system and incentivizes criminal sentencing and increased lengths of incapacitation.

Moreover, even prisoner’s rights seem to be at the stake when markets enter into the penal system. For instance, jails in Southern California have been “renting upscale cells to affluent people convicted of crimes in Los Angeles County. These pay-to-stay programs, also called self-pay jails, cost prisoners between \$45 and \$175 a day and include such

⁶⁰ Brown, S. (2000). *Providing financial incentives for incarceration is unethical*. San Deigo: Greenhaven Press. P. 116

⁶¹ Gentilviso, Chris. The Huffington Post, "Military Turns To Prison Labor For \$100 Million In Uniforms -- At \$2-Per-Hour Wages." Last modified 12 24, 2013. http://www.huffingtonpost.com/2013/12/24/military-prison-uniforms_n_4498867.html.

⁶² Brown, S. (2000). *Providing financial incentives for incarceration is unethical*. San Deigo: Greenhaven Press. P. 115

amenities as iPods, cell phones, computers, private cells and work release programs.”⁶³ Consequently, markets have disrupted equal protection for criminal sentencing by allowing those with capital to receive a differing sentence despite being punished for a comparable crime. In the same vein, wardens nationwide are offering inmates the ability to purchase special meals, such as “meatball subs, cheeseburgers, chicken parmesan-even a ‘Pizza and Wings Party Pack,’ complete with celery, blue cheese and a Pepsi.”⁶⁴ The program goes beyond the old-fashioned prison commissary, and provides inmates who have the cash to partake in a degree of leniency within the prison walls.

Lastly, as demonstrated in the second section on the first-order functionality of the modern penal state, there has been a transition in the 1970s from a rehabilitative ethos toward retribution, or a desert model. This transition occurred because of the market mentality that merged with the penal sphere. That is to say, the market carries the idea of natural order, or that the market efficiently and fairly allocates resources in a nondiscriminatory manner. The retribution model is built on the same premise as this market transaction because it “requires that penalties be allocated consistently with their blaming implications. The severity of the punishment (and thereby its degree of implied censure) should comport with the blameworthiness (that is, the seriousness) of the defendant's criminal conduct.”⁶⁵ In this regard, the influence of the logic of the market can seep into the penal institution and change the very justification for the function of punishment.

⁶³ Clarke, M. (2014). *Celebrity Justice: Prison lifestyles of the rich and famous*. Prison Legal News. Retrieved from https://www.prisonlegalnews.org/22532_displayArticle.aspx

⁶⁴ Simon, S. (2010). *Jailbirds order up hot wings junk food lifts inmates' spirits, prison revenue, but envy and diet are concerns*. The Wall Street Journal. Retrieved from <http://online.wsj.com/news/articles/SB10001424052748703441404575206153521909136>

⁶⁵ von Hirsch, A. *The "desert" model for sentencing: Its influence, prospects, and alternatives*. (p. social research Vol 74 : No 2 : Summer 2007). P. 414

4.2 Carceral Geography

Often the term *carceral geography* is employed narrowly to describe “a sub-strand of ‘geographical security studies’, drawing attention to consideration of ‘the spaces set aside for ‘securing’ – detaining, locking up / away – problematic populations of one kind or another’.”⁶⁶ However, this paper will put forth a more expansive vision of the term so as to include externalities of market activity within the penal system, which will be referred to as *carceral spillover*. Within the category of carceral spillover, this paper will examine political lobbying, familial separation of the inmate, and worker displacement and business concerns.

The development of public-private partnerships is not specific to the private prison industry, but political lobbying has come to play an increasing role in the operation and existence of privately contracted firms and wholesale private facilities of the penal system. The growing influence of these private prison firms over the penal system has been achieved by way of lobbying, contributing to political campaigns, and close political networks; the former method being most aptly represented by the data that shows “private prison companies have played a key role in lobbying for and passing harsher sentencing for non-violent offense... Private prison companies employ legions of lobbyists... Since 2001, three major prison companies, CCA, GEO Group and Cornell, have spent over \$22 million lobbying Congress.”⁶⁷ Furthermore, the scope of the political ramifications that come about due to the market encroachment into the penal

⁶⁶ Philo, C. (2012), Security of geography/geography of security. *Transactions of the Institute of British Geographers*, 37: 1–7. doi: 10.1111/j.1475-5661.2011.00488.x

⁶⁷ Donnelly, D. (2011). *Private prisons industry: Increasing incarcerations, maximizing profits and corrupting our democracy*. Huffington Post. Retrieved from http://www.huffingtonpost.com/david-donnelly/private-prisons_b_1097667.html

sphere is illustrated by the fact that it was “a small investment for the prison guard union to contribute nearly a half million dollars (\$425,000) to Governor Pete Wilson’s gubernatorial campaign. This was the largest single contribution ever reported by a candidate for governor.”⁶⁸ In turn, by marketizing spheres of the penal system, it has coincided with a rise in political lobbying that alters how the carceral geographic landscape is governed. Thus, the effect of prisons on a community has a much further reach than simply within the penal sphere.

Perhaps the most dominant facet of carceral spillover is the effect that prison industries have upon local labor and business, particularly worker displacement. That is to say, as businesses begin to setup shop within prison walls and employ the cheap inmate labor pools, it displaces many of the workers within that industry. A prime example of this was when LTI – a firm that assembles circuit boards for Texas Instruments and IBM – decided to relocate from Austin, Texas to a private prison run by Wackenhut in Lockhart. The transition occurred because “Wackenhut built LTI a brand new facility (using prisoner labor) and charges the company a rent of \$1 per year. To top it off, LTI gets a tax abatement from the city;” but before this, “LTI operated a circuit board plant in nearby Austin, employing 150 workers. The company laid them all off and moved its equipment to Lockhart.”⁶⁹ In addition, many of America’s iconic companies, such as General Electric and American Express are investing millions in the construction of private prisons in Oklahoma and Tennessee. As a result of allowing market encroachment, it has had serious impacts upon the communities in the geographic proximity. Moreover, prisons and jails also become

⁶⁸ Brown, S. (2000). *Providing financial incentives for incarceration is unethical*. San Deigo: Greenhaven Press. P. 115

⁶⁹ Jane Slaughter, *Prison Labor is not Beneficial*, (San Diego: Greenhaven Press, 2000), 150.

the new economic base for those who can find employment in the institution; thereby making these communities live off the presence of prisons.

Furthermore, at the same time workers are being displaced with the transfer of industry within prison walls, inmates are suffering a brutal displacement from their family. Under the pseudonym of K.C. Carceral, a prisoner opens his first hand account of life behind bars, entitled *Prison, Inc.: A Convict Exposes Life Inside a Private Prison*, by stating, “Family ties and family values were no longer a concern. It didn’t matter where your family was located – the state shipped you where was convenient...prisoners would be required to serve a part of their sentence in out-of-state facilities that were run by a private profit-making corporation.”⁷⁰ Thus, the visitation rights of prisoners, though not unconstitutional, are severely strained by the transfer of convicts to distant out-of-state private facilities.

With these aforementioned instances of carceral spillover, this paper has hoped to demonstrate that market encroachment does more than merely privatize a component of the penal system; rather it often poses serious externalities for those within the proximate carceral geography. The most notable of among the externalities being the issue of displacement for both the community and the criminal, which can be aptly symbolized by the prison paraphernalia sold at Angola Penitentiary, which reads “Angola, A Gated Community.”⁷¹ Not only is the sweatshirt illustrative of market encroachment as it is a commodity to be purchased, but it also seems to pride itself on Angola’s ability to displace, allowing criminals and community members to be a part of their own “gated community.”

⁷⁰ Carceral, K. C. (2006). *Prison, inc.: A convict exposes life inside a private prison*. New York: New York University Press. p. 3

⁷¹ See Appendix C. Figure A.

4.3 The Correctional Officer

In terms of the correctional officer, the primary unit of analysis is the private prison. Overall, private prison staff have not received the empirical attention they deserve such that Eric Lambert remarks, “A lieutenant with a large urban county sheriffs department described the negative image of jails by stating that law enforcement is the golden child of the criminal justice system, prisons are the stepchild, and jails are the unwanted bastard child who is locked in the attic and ignored.”⁷² To expand on this analogy, Lambert maintains that private prison staff has been abandoned at an orphanage. Primarily, this is due to the fact that markets have not had the same degree of impact upon the correctional officer as they have on the criminal. The biggest market induced transformations in relation to the correctional officer result from cost-cutting techniques in an attempt to achieve greater efficiency of operation; the three most prominent being higher turnover and stress, the development of a siege mentality amongst staff, and lack of training for guards.

Many proponents of the private prison model contend that the facility designs that are implemented allow for a reduction in correction officers, while at the same time allowing for an increase in the number of inmates able to be housed. This argument is aptly summarized by Charles Logan when he notes that “contracting avoids civil service and other government...restriction that interfere with efficient personnel management;”⁷³ and further reinforced by president of Wackenhut Corporations, Wayne Calabrese, when he states, “the elimination of a single unnecessary 24-hour officer post can result in annual savings of

⁷² Lambert, E., & Paoline III, E. (2010). *Take this job and shove it: An exploratory study of turnover intent among jail staff*. *Journal of Criminal Justice* 38 (2010) 139–148.

⁷³ Logan, Charles, *Privatization Would Improve the Prison System*, (San Diego: Greenhaven Press, 2000), p. 97

nearly \$150,000 - \$200,000 based upon wages and benefits.”⁷⁴ Albeit one may disagree with these empirical assertions, as does Harvard professor John Donahue, one cannot dispute that these changes produce a transformation in the functioning of the institution itself. That is to say, by not having to deal with the government restrictions, private prisons often have higher turnover rate than public prisons, and generally have lower pay and fewer benefits. In turn, Camp and Gaes found that these salient differences in private prisons translate to “job stress, job satisfaction, and organizational commitment...[may be] lower at private than public prisons.”⁷⁵ In turn, these higher levels of stress in the work environment may lead to a decrease in organization commitment, and correctional officers taking unnecessary violent action against inmates. In the same vein, with fewer correctional officers in the staff-to-inmate ratios, it can often lead to the development of a siege mentality amongst the officers, which Ami Lerman captures when she states, “Prison workers, like inmates, display a set of social dynamics that are readily understood as a practical response to an often unreasonable set of pressures and constraints...it can motivate and justify the infliction of international harms on others. Under sustained duress, the injudicious use of violence can come to seem like an acceptable and even righteous response to a perceived threat.”⁷⁶ Thus, the profit motive can be seen to inhibit the proper performance of duties in its attempt to cut financial corners.

Last, endemic to the private prison industry’s attempts to cut costs is a lack of training for guards, which is often accompanied with an increase in violence and disorder as

⁷⁴ Calabrese, Wayne, *Private Prisons Are Cost Effective*. (San Diego: Greenhaven Press, 2000) p. 105

⁷⁵ Lambert, E., Hogan, N., Paoline III, E., & Clarke, A. *The impact of role stressors on job stress, job satisfaction, and organizational commitment among private prison staff*. *Security Journal* 2005, 18 (4), 33ñ50. Retrieved from <http://www2.cohpa.ucf.edu/crim.jus/documents/Paolinetheimpactofrolestressorsonjobstress.pdf>

⁷⁶Lerman, A. (2013). *The modern prison paradox: Politics, punishment, and social community*. New York: Cambridge University Press, p. 66

in the case of Youngstown, Ohio. Youngstown's private prison, operated by the Correction Corporation of America's (CCA), experienced "in its first seventeen months of operation...seventeen stabbings and two homicides. Also, homemade weapons were discovered...More specifically, CCA responded to the inmate complaints by dropping canisters of tear gas designed for outdoor use into four cell blocks."⁷⁷ Youngstown stands as the encapsulation of how a reduction in prison guards' salary can result in higher turnover, which leads, according asserted inmate Alex Friedman at a CCA prison in Tennessee, to "less stability...new employees come in; they really don't know what's going on. That leads to conflict with the inmates."⁷⁸ Thus, one can see how the market in its attempt to achieve efficiency produced inexperienced correctional officers who often use excessive force on inmates; thereby, negating the idea that prison is a stable institution of correction. This is not to say that public facilities do not encounter similar problems, but rather that private facilities witness violence due to the very structure of a privatized operation.

5. Have Markets Left Their Mark? What Can Change?

Since the initial example of the Israeli day care to the treatment of the criminal, carceral geography, and the correctional officer, this paper has demonstrated the *price of markets*; namely, that internal mechanisms are tinkered with, which carries into an institution – the case here being the penal system – the logic of the market that begins to erode or eat away at existing processes thereby producing a functional transformation. This thesis has sought to accomplish this by beginning with an understanding of where the

⁷⁷ Grapes, Bryan, *Prisons: Should Prisons be Privatized?* (San Diego: Greenhaven Press, 2000), p. 95

⁷⁸ Friedman, A., & Parienti, C. (2003). *Capitalist punishment: Prison privatization and human rights*. Atlanta: Clarity Press Inc.

contemporary market triumphalist penology has its origins, and a background on the first-order functionality of the penal system, namely, that of utilitarian and Kantian justifications. Then the paper turned to providing a theoretical argument for the social cost of markets, which showed how markets can transform the function and values of an institution upon their use as a method of organization. Finally, the paper went about examining the erosion of penal norms by exploring the criminal, carceral geography, and correctional officer. However, upon reflecting on the three transformations treated, it is important to question the implications by raising the central question: have markets left their mark? In the following two subsections, this paper will outline two speculative claims on further market encroachment. The first subsection section will raise the question as to why correctional officers have witnessed a slower pace of transformation relative to the other two areas treated. Second, the implications of market logic becoming fused with penal culture will be explored. More specifically, this will entail explaining how the market triumphalist logic has merged into the penal sphere thereby making law serve the function of legitimating the market and punishing those who “deviate from the natural order.”⁷⁹

5.1 Non-Linear Transformations

Albeit it is true that markets are difficult to forcibly abstract from an institution once embedded, (hence, the rise of the term prison industrial complex) the market can be constrained. In fact, this becomes evident when comparing the criminal, carceral geography, and correctional officer in terms of the degree and rate of change induced by the market. That is to say, the correctional officers in the state penal system successfully diminished the

⁷⁹ Harcourt, B. (2011). *The illusion of free markets: Punishment and the myth of natural order*. Cambridge: Harvard University Press. p. 35

speed of market intrusion through union mobilization and the accumulation of political power in the elective process. This non-linear dynamic of market transformation, although not explicitly stated, is reinforced in section 2.1 by documenting the ebb and flow of market encroachment. By and large, the marketization of the penal system was challenged by the powerful arm of the unions, as is the case in 1877 where local and national labor unions succeeded in halting the increasing trajectory of marketization and even removed the large-scale labor leasing model at play in the penal system. Thus, this non-linear market dynamic raises questions for future research. First, to what degree has the unionization of correctional officers halted the market in the contemporary context, and can unions indefinitely stall market encroachment as the U.S. moves towards a hyper-market society? Second, while unions have halted the market for correctional officers, have they helped to set in motion the development of private prisons, a new formation of correctional officers, and an overall greater shift in markets to other domains? Answer to these questions would prove of great use to understanding the future implications and trajectory of markets in the penal system; however, it would require a study comparable in time and depth to the one performed here.

5.2 Implications for the Second-Order Function of Punishment: A Market Perspective

This thesis primarily focused on functional changes by the market at the first-order level of analysis by suggesting a process of transformation in which practical mechanisms are first implemented and with them, the external culture – market culture – is instantiated in a setting as a practice. However, this paper will also illustrate one way in which the increasing marketization of society has also altered the function of punishment on the second-order by legitimating the need for an increased penal sphere to prevent market

bypass. Even so, as will be discussed, this leaves the question as to how the shift towards a hyper-market society went from encouraging a more dominant penal apparatus to marketizing the very penal system itself.

Trying to decipher which sociological lens best accounts for explaining the second-order function of punishment today is undoubtedly the most complex Rorschach test in the field. It is comparable to asking a young child playing baseball in the street how the neighbor's window was broken just after watching the ball sail through it. The child could explain the incident by claiming the window broke due to brittle glass, the fact that the window wasn't open, because he used a leather ball instead of a plastic one, his friend missed the catch, or by taking agency and claiming that he hit the ball through glass. Albeit the other explanations do explain and contextualize the incident, the latter seems to provide the most pertinent explanation. In turn, this thesis will agree with David Garland's work *Punishment and Modern Society* that understands penal theory as mutually deepening reciprocal commentaries, but will contend that the driving explanation for understanding the changes in the penal system over the last three decades can be attributed to market logic, or what Bernard Harcourt calls, "a neoliberal penalty."⁸⁰

The sociological accounts of punishment to date constitute a wide range of theoretical approaches; however, each tends to isolate their particular perspective in narrow contours, "leaving out of focus as much as it brings in."⁸¹ The exception being David Garland, who reworks the entire spectrum of social thought into an interpretive synthesis by arguing that punishment is a complex social institution, which "enables us to locate the other

⁸⁰ Harcourt, B. (2011). *Neoliberal penalty a brief genealogy*. Chicago: University of Chicago Press. Retrieved from [http://www.uam.es/otros/afduam/documentos/Bernard Harcourt - Neoliberal penalty.pdf](http://www.uam.es/otros/afduam/documentos/Bernard_Harcourt_-_Neoliberal_penalty.pdf)

⁸¹ DAVID GARLAND, *Punishment and Modern Society: A Study in Social Theory*. Oxford: The Oxford University Press, 1990. P. 282

images of punishment within this overall framework while also suggesting the need to see penalty as being tied into wider networks of social action and cultural meaning.”⁸² Prior to Garland’s study, punishment was understood as a technical apparatus as seen in the prominent works of Émile Durkheim, Max Weber, Michel Foucault, and Georg Rusche and Otto Kirchheimer. That is to say, punishment is an instrumental means to an end; it can be understood as enhancing social solidarity as argued by Durkehim; Weber, who highlights the rationalization of punishment by examining how modern penalty came out of processes of centralization and use of hierarchical systems, bureaucracies, and infrastructures of professionalism; Foucault, who explains punishment as technology of power to achieve social control; and Georg Rushe and Otto Kirchheimer, who argue that penal policies mirror changes in the labor market. Albeit this is not a complete enumeration of the penology of crime, it does demonstrate how the canonical works in the field capture certain aspects of punishment, but often do so in virtual disregard of one another.

In turn, this thesis will follow Garland’s lead to think of punishment as a complex social institution, something akin to “Mauss’s idea of a ‘total social fact,’ which on its surface appears to be self-contained, but which in fact intrudes into many of the basic spheres of social life. Like the institutions of gift exchange, punishment is a distinctive social institution which, in its routine practices, somehow contrives to condense, a whole web of social relations and cultural meanings.”⁸³ That is to say, punishment parallels the institution of gift giving in so far as they are both actions provided to another, which carry multiple functions, implications, and values.⁸⁴ Furthermore, Garland posits that cultural

⁸² Ibid.

⁸³ Ibid. 287

⁸⁴ Punishment is, on the face of things, an apparatus for dealing with criminals – a circumscribed, discrete, legal – administrative entity. But it is also, as we have seen, an expression of state power, a statement of

mentalities and sensibilities influence penal institutions and thereby embody values. Garland goes on to say, “any external force or determinant which seeks to transform penal practice – whether it be a law, a policy directive, or some economic or cultural rationality – must first transform this penal culture if it is to become effective.”⁸⁵ Thus, this section will seek to explain how market logic has become fused with penal culture, and in turn, has transformed the practice. To do so, Bernard Harcourt’s logic of neoliberal penalty will be employed.

Harcourt argues that the massive expansion of the carceral sphere stems from Coase’s orderliness in economics and the need for ordering through punishment.⁸⁶ More specifically, Harcourt posits that belief in natural order is tied to the hip with the expansion of the penal apparatus because it makes it easier to “embrace criminalizing any and all forms of ‘disorder.’ It facilitates passing new criminal statutes and wielding the penal sanction more liberally because that is where government intervention is perceived as legitimate, effective, and necessary.”⁸⁷ In other words, the criminal sphere can be seen to surround the market sphere so as to push people back into the market and prevent market bypass. Thus, government’s role in the hyper-market society is not to intervene in the marketplace, but rather to police and punish individuals who seek to bypass or disrupt it. For this reason, beginning in 1973, there has been an exponential growth of the penal system coinciding with the expansion of neoliberal policies. The enactment of tough-on-crime politics and new methods of social control have been wrongly categorized, according to Harcourt, by “Malcom Feely and Jonathon Simon under the moniker of ‘new penology’ or, for Jonathan

collective morality, a vehicle for emotional expression, an economically conditioned social policy, an embodiment of current sensibilities, and a set of symbols which display a cultural ethos and help create a social identity. DAVID GARLAND, *Punishment and Modern Society: A Study in Social Theory*. Oxford: The Oxford University Press, 1990.

⁸⁵ Ibid.

⁸⁶ Harcourt, B. (2011). *The illusion of free markets: Punishment and the myth of natural order*. Cambridge: Harvard University Press. p. 127

⁸⁷ Ibid. 196

Simon, ‘governing through crime,’ and Nikolas Rose under the category of ‘advanced liberal governmental technologies.’” These authors fail to see Harcourt’s logic of neoliberal penalty; which can be summarized in Harcourt’s own words as “a form of rationality in which the penal sphere is pushed outside political economy and serves the function of a boundary: the penal sanction is marked off from the dominant logic of classic economics as the only space where order is legitimately enforced by the state.”⁸⁸

Lastly, it is pertinent to note that Harcourt is not drawing a sharp distinction between the unfettered market and the penal apparatus. Harcourt asserts this claim explicitly when he states, “I am not suggesting that the penal sphere is insulated from economics. I am emphasizing the inverse: that the free market, governed by ‘natural order,’ is insulated from punishment.” Thus, this thesis seeks to demonstrate just that: the sacred quality of free-market logic has relegated the role of government to primarily policing and punishing, but currently, market forces are now seeping into the penal system and permeating. Harcourt put forth a viable explanation for understanding the expansion of the penal sphere in the night watchman state that arose in the mid-1970s, but did not extend his study to include an extensive explanation on why there has been an increasing use of markets in the penal sphere. However, Harcourt offers that a good starting point would be economic incentives and profit motive, which is made readily apparent in section 2.1 by drawing from much of Rebecca McLennan’s work on the intimate connection between the profit of penal servitude and prison expansion.

In turn, this paper has sought to frame the emergence of a marketized penal system, but does not seek to theoretically ascribe causation for the marketization of the penal sphere.

⁸⁸ Harcourt, B. (2011). *Neoliberal penalty a brief genealogy*. Chicago: University of Chicago Press. Retrieved from http://www.uam.es/otros/afduam/documentos/Bernard_Harcourt_-_Neoliberal_penalty.pdf, p. 4

Rather, the focus of this study has been to show the effects of marketization upon the penal institution by displacing preexisting social norms. However, this still leaves a nebulous gap between the general rise of markets and the creation of a marketized penal sphere, which future studies can hopefully fill by uncovering the independent variable that caused market forces to become more prevalent in the penal sphere.

5.3 Concluding Remarks

Implicitly embedded within this thesis is a normative argument that the penal system is a civic institution that the market has not been able honor, but instead has disrupted the very function and values of the institution. That is not to say, however, that markets are inherently a destructive force, but rather society must rigorously question their every application so as to avoid despotism by the invisible hand. To do so, there must be a collective engagement to “understand what the goods [such as prison] mean, what parts they play, how they are created, and how they are valued.”⁸⁹ This thesis has hoped to take a step in this direction by showing that markets do have a price; not a monetary evaluation, but a social cost (of displacing non-market values) that must be considered when debating whether or not to marketize a certain institution or public good. In turn, a good deal of future research should be done to explore the other fields that have witnessed market encroachment. This paper began by noting that there has been a transition toward a hyper-market society, where more goods have been commoditized than ever before. Thus, further academic inquiry can explore other institutions, such as education and health, to see if market forces are sowing the same transformative tendencies.

⁸⁹ Walzer, Michael, “Spheres of Justice: An Exchange,” *The New York Review of Books* 1983, <http://www.nybooks.com/articles/archives/1983/jul/21/spheres-of-justice-an-exchange/>

Appendix A

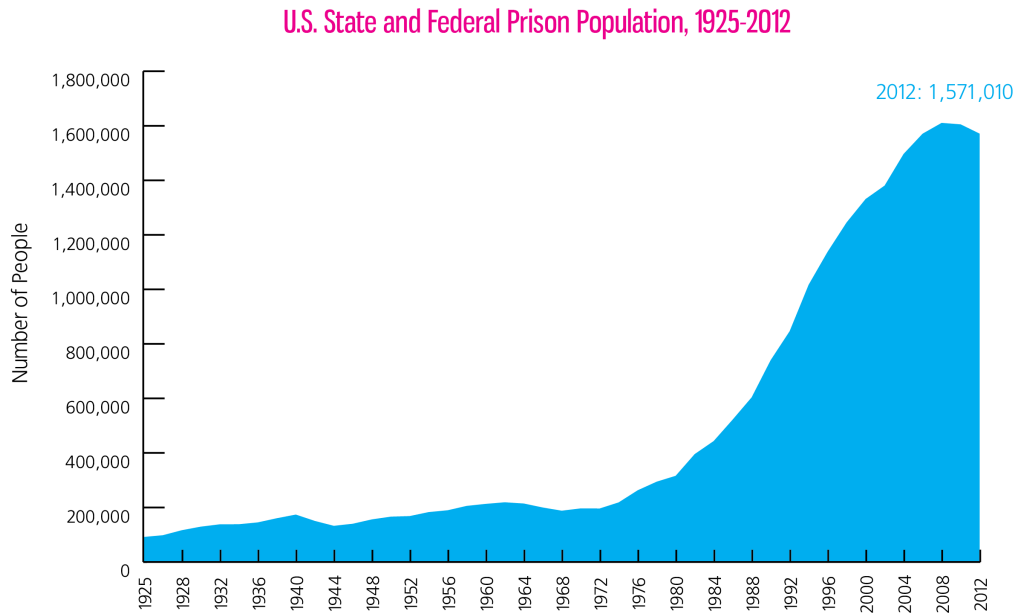
This paper makes the argument that the last three decades can be characterized as the rise of the “*hyper-market society*.” The term “market society” was taken from Karl Polanyi’s *The Great Transformation: The Political and Economic Origins of Our Time*. In this work, Polanyi contends that “a market economy can exist only in a market society...A market economy must comprise all elements of industry, including labor, land, and money. (In a market economy the last also is an essential element of industrial life and its inclusion in the market mechanism has, as we will see, far-reaching institutional consequences.) But labor and land are no other than the human beings themselves of which every society consists and the natural surroundings in which it exists. To include them in the market mechanism means to subordinate the substance of society itself to the laws of the market.”

Therefore, my research thesis agrees with Polanyi that the “market society” was established in England during the nineteenth century when the market economy was fused with the modern nation-state allowing for the commodification of land, labor, and capital. However, my thesis posits, as illustrated in the “Anticipated Findings” section, that the “market society” has expanded dramatically in recent decades to warrant the description as a “*hyper-market society*.” That is to say, markets have increasingly entered more domains of society since its inception; today, however, the market has entered more spheres than ever before. Thus, I disagree with Michael Sandel when he argues in the last three decades “we drifted from *having* a market economy to *being* a market society.” I believe that the move towards a market society dates back to the nineteenth century. However, I do agree with Sandel when he writes, “the most fateful change that unfolded during the past three decades was not an increase in greed. It was the expansion of markets, and of market values, into spheres of life where they don’t belong...we live at a time when almost everything can be bought and sold. Over the past three decades, markets – and market values have come to govern our lives as never before.” Thus, this is why I have characterized the last three decades as the rise of the “*hyper-market society*.” And the increasing marketization of the penal system is just one facet of this recent trend despite it being the focus of this paper.

My argument, however, is not that a market society is inevitably destructive and undesirable, but rather can be properly regulated through political-legislative mediums to keep markets in their place and from encroaching into certain spheres. In order to determine what spheres the market should or should not encroach, it requires a critical-theoretical understanding and questioning of the proper role of markets, and how markets affect and change the very institutions they have become embedded. This is what this research paper hopes to do in the context of the penal system.

Appendix B

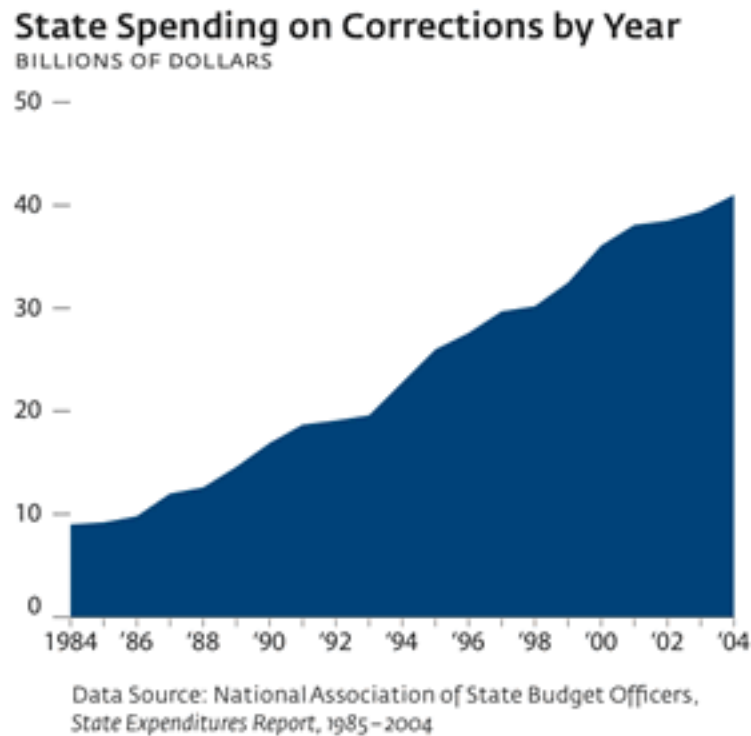
Figure A.



Source: Bureau of Justice Statistics *Prisoners Series*.



Figure B.



Appendix C

Figure A.



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