A Domination Argument Against Private Prisons

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Abstract

This paper defends a domination-based argument against private prisons. I argue that it is impermissible for the state to delegate the administration of incarceration to private agents because, in doing so, it licenses private agents to exercise dominating power over inmates.

Private prisons are institutions of detention and punishment that are administered and operated by non-state agents on the state's behalf. Private prisons play a role in incarceration worldwide (Byrne, Kras, and Marmolejo 2019). The private prison population in the United States, where the modern practice of prison privatization originated, increased significantly over the last 30 years both absolutely and in proportion to the overall prison population.[1] The use of private carceral institutions is not limited to holding persons convicted of crimes. Private prisons are also used in the United States to incarcerate persons accused or convicted of violations of immigration law on behalf of the federal government. According to the ACLU, 90.8 percent of the immigration detainees in Immigration and Customs Enforcement custody are held in private facilities as of July 2023 (ACLU 2023). It seems unlikely that private prisons will soon be eliminated.[2] Thus, it is important to consider whether using private prisons to administer punishment is morally permissible.

The debate about private prisons has often focused on the costs and benefits of privatization.[3] While it seems appropriate to evaluate the legitimacy of private prisons by asking

[1] In 1999, a total of 71,208 inmates (5.2 percent of the total incarcerated population) were in the custody of private facilities. In 2022, the total was 91,320 (7.4 percent of the total prison population). This number includes prisoners held in halfway houses and home confinement. However, 2022 was the first time that Federal Bureau of Prisons reported that it did not have any prisoners in custody in secure private prisons since the Bureau of Justice Statistics began reporting in 1999 (Bureau of Justice Statistics, *Prisoners* 2023). At its peak in 2012, 137,220 inmates were held in private facilities. The percentage of prisoners held in private facilities in the United States has been remarkably consistent, hovering between 8.0 and 8.5 percent for the decade from 2011-2021).

[2] The private prison population declined 7.4% in 2022 (Bureau of Justice Statistics, *Prisoners*. 2023). While President Biden has ordered the BOP to cease contracting with private prisons (Biden 2021), private prisons continue to operate in thirty-one states (The Sentencing Project 2023) and are still used by the Department of Homeland Security to house immigration detainees (Hansen 2021).

[3] The instrumentalist literature on private prisons is vast. For a comprehensive discussion of the arguments for and against private prisons, see Harding (2001). For a more recent overview of

whether such institutions are effective and socially desirable means of administering criminal punishment, some theorists reject the cost-benefit approach to evaluating private prisons. Alon Harel, for example, has argued that the actions of private agents cannot count as public condemnation of wrongdoing and so do not count as punishment (Harel 2014, 96).[4] Chiara Cordelli has argued that systematic privatization is illegitimate because it subjects individuals to the unilateral will of others (Cordelli 2020) and has used this as a basis to reject privatization of prisons. These arguments aim to raise principled objections against private prisons either on the basis that they constitutively cannot achieve what they aim to do, or that, in doing so, they lack legitimacy.

In this paper, I pursue another attempt to develop a principled argument against private prisons. I argue that it is impermissible for the state to delegate the administration of carceral punishment to private agents because, in doing so, it licenses and permits private agents to exercise dominating power over inmates. Licensing private agents to exercise this type of power is wrong because in doing so the state communicates that inmates lack equal status and subordinates them to private agents.

The objection to private incarceration developed here does not necessarily apply to every possible form of private prison administration. However, the argument does identify a serious objection to a broad range of private prison arrangements. Moreover, this objection is non-instrumental since it does not rest on a claim that private prisons have worse outcomes than public prisons. The objection contributes to the project of justifying the discomfort many people feel about private prisons.[5] The argument has a second advantage. Since it does not turn on claims specific to punishment, it also applies to the use of private prisons for immigration detention. Because the incarceration of immigrants in private detention facilities licenses private agents to exercise domination over them, it is impermissible.

The Domination Argument

Prisons are strange institutions within liberal societies because they subject the incarcerated to a much more extensive exercise of power (both in degree and scope) than most other institutions. Prison officials and correctional officers have power and (at least de facto) authority to regulate the day to day lives of prisoners in ways that would be illegitimate if they

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the benefits and costs of private prisons, see Brooke-Eisen (2018). For a recent defense of instrumentalism, see Brennan (2017).

[4] Harel (2014), 96). For criticism of Harel, See Brennan (2107), Huigens (2015) and Vasanthakumar (2018).

[5] Two qualifications should be made here. First, by punishment, I refer to state punishment for violation of its criminal laws, not other forms of punishment such as parental punishment or punishment through informal social sanctions (e.g., shaming or ostracizing). Second, there is a difference between a private system of criminal punishment and delegation of state punishment to private agents. Many people agree that a private system of criminal punishment would not be legitimate. The puzzle addressed in this paper concerns cases in which the state delegates its task of administering punishment to private agents. These are the cases that both the instrumental arguments and the principled arguments must consider.

were free persons. The argument of this paper begins with the idea that this power is a form of domination. The argument can be stated as follows.

(1) Incarceration (whether administered publicly or privately) exposes inmates to domination.
(2) It is wrong for the state to license private agents to exercise domination over others.
(3) It is pro tanto wrong for the state to permit private agents to exercise domination over others.
(4) In delegating the administration of imprisonment to private agents, the state both licenses and permits private agents to exercise domination over others.

(C) It is wrong for the state to delegate the administration of imprisonment to private agents.

It follows from this argument that it is wrong for the state to administer punishments in private prisons even if the outcomes of such prisons are no worse and perhaps even if they are better than those in public prisons.

Before embarking on a defense of this argument, let me clarify a few points. First, (1) claims that domination is enabled by incarceration generally regardless of whether it is publicly or privately administered. Incarceration in a public prison exposes inmates to domination by state agents. Incarceration in a private prison exposes inmates to domination by private agents and, sometimes, state agents. This paper does not claim that domination arises only in private prisons, but rather that there is a special problem with empowering private agents to exercise domination or failing to prevent their exercise of dominating power.

Second, there are two important points in the background of this argument.

(5) Incarceration is morally permissible.
(6) If incarceration is morally permissible, then it is permissible to expose inmates to (some degree of) domination.

As (5) makes clear, I assert for the purpose of this argument that imprisonment by the state is morally permissible for some forms of wrongdoing. This is a controversial assumption. While I am far from certain that (5) is true, I think it is likely that incarceration is justifiable in some cases at least for purposes of incapacitation and perhaps for other reasons. However, if you reject (5), you can still get something out of this paper. First, you can add (1) to the list of reasons that support abolition of prisons. Second, you can hopefully accept the claims expressed in (2) that there is something distinctly wrong with the state licensing private agents to exercise domination. Since that principle has application in other areas as well, it may still be useful.

If (5) and (6) are granted, then the following is true.

(7) It is morally permissible for the state to expose convicted offenders to (some degree of) domination in public prisons.

If (7) is correct, this must be because incarceration serves important ends such as incapacitation of dangerous wrongdoers. However, it seems correct to say that the state should work to reduce the degree to which inmates are subject to domination and even that it is under a duty to do so. But insofar as incarceration gives rise to some degree of domination, its permissibility presupposes that such domination is permissible. It is also plausible to hold that there must an upper limit on the degree of domination to which it is permissible to expose inmates. If

imprisonment exposes inmates to an unacceptable degree of domination, it is unjust even if imprisonment would be otherwise permissible.

Premises (2) and (3) involve a distinction between licensing and permitting domination. These concepts will be explained below, but, briefly, I think of licensing domination in terms of granting an agent the liberty to arbitrarily interfere with another person's options and choices in a range of ways. I think of permitting domination in terms of a range of behaviors including actively endorsing, tolerating or failing to stop the exercise of dominating power even if one does not authorize it. (2) and (3) reflect the idea that the state ought not to license or permit private domination. It is also plausible to hold that is a duty of the state to prohibit private domination and reduce the extent to which both state agents and private parties dominate others.

Finally, notice that (2) is formulated as an all-things-considered moral claim that it is wrong for the state to license domination while (3) states only that permitting domination is pro tanto wrong. As I will argue, this is because authorizing domination has a different significance and effect than permitting domination. In licensing B's domination by private agent, A, the state thereby communicates that B's status is not equal to that of A and subordinates B to A. Permitting domination by private agents does not typically communicate the same message about B's status or have the same effect on it (although it sometimes does affect B's status). Typically, however, even though it may be that you are subordinated to others because the state permits them to dominate you, it is not the case that the state subordinates you to them. This will be addressed more fully below. [Note to reader – it isn't fully addressed in this draft.]

Defending the Domination Argument

We can now turn to the defense of the domination argument. I turn first to the defense of (1). According to this premise, imprisonment exposes inmates to domination.[6] As noted above, this claim is intended to apply to incarceration in both public and private prisons.

There is no doubt that prison exposes inmates to discretion (Cordelli 2020), control and (at least de facto) authority. But is (1) true? To answer this question we need an account of domination. Here I draw on the accounts offered by Philip Pettit and Frank Lovett. I will amend these accounts of domination in an important way in my defense of (1), but their theories offer important insights needed to build the domination argument. On this view, a person A is dominated when they are in a relationship with another natural person B that meets the following conditions.

a. The relationship has high exit costs. (In Lovett's terms, B is "dependent" on the relationship.)
b. B has the power to interfere with A, i.e., B can remove one or more of A's options or increase the cost of exercising them.

[6] On the republican approach, punishment might be regarded as a form of domination. Punishment involves significant (liberty-limiting) interference with an offender. But republicans might argue that although punishment involves interference, this interference does not emerge on an arbitrary basis. The claim that punishment is domination is unnecessary for my argument in this paper, and I take no stand on it here.

c. B's power to interfere is arbitrary.

There is disagreement in the literature about how to conceive of the arbitrariness condition. One view is that power is arbitrary when it is not constrained by rules, procedures and norms (Lovett 2010). A second view is that it is arbitrary when it is not subject to control by those over whom it is exercised (Pettit 2012). A third view might be that power is arbitrary when it is not appropriately tempered by certain conditions (adapted from Kolodny 2023), and a fourth possible view is that power is arbitrary when it does not meet conditions such that it can be said to be authorized by an omnilateral will (Cordelli 2020). I'll return to this subject in the discussion below.

Let's consider the dependency condition (a). Incarceration typically places inmates into relationships with prison officials, corrections officers, and even other inmates that involve a high degree of dependency. It is usually quite difficult for prisoners to exit the relationship with prison officials, and it is typically legally prohibited to do so. The costs of exiting the relationship into which incarcerated individuals are delivered are, therefore, quite high, and so is their corresponding level of dependence.

Incarceration typically satisfies the condition of having the power to interfere as well. Officials and correctional officers charged with administering the imprisonment have a significant power to affect the inmate's options. Many aspects of prison administration expose inmates to the power of prison officials and guards. Here are a few examples.

Prisoner Classification: The classification of an inmate's level of risk will determine the type of institution in which they will be incarcerated. This decision exposes the inmate to a greater or lesser degree of risk (e.g., of danger from other inmates) and will have a significant effect on the set of options available to her (e.g., access to educational programs) While initial classifications (typically called external classification) upon admission to the prison system may be made by specialists utilizing "objective" criteria, continuing classification of inmates' custody levels (internal classification and re-classification) will often be subject to the inmate's evaluation by prison officials (Frisch-Scott 2020). At least in internal classification and re-classification, there is apparent space for officials to exercise significant power over inmates.

Bodily Autonomy and Property: Incarcerated persons lose autonomy over their body and property to a significant degree. Insofar as inmates are subject to surveillance, searches (e.g., body cavity searches), and drug tests, which can materialize at the discretion of prison officials, inmates are subject to the power to directly interfere with their bodies. Additionally, if an inmate requests segregated housing, the decision to grant this request may be at the discretion of prison officials. Moreover, inmates are sometimes subjected to sexual coercion and assault by prison staff (Bureau of Justice Statistics, Substantiated Incidents 2023). In addition to the harm that results from these incidents, the occurrence of sexual assault by prison staff and the tolerance of assault by inmates illustrate the degree to which staff may have the power to alter or change the cost of inmates' options. Prisoner's property is also subject to confiscation or destruction by guards.[7] Even in systems that are considered relatively humane, such as that of Norway, guards have the power to subject inmates to physical restraint and solitary confinement under some conditions (Norwegian Parliamentary Ombudsman 2019).

[7] In her memoir, for example, Keri Blakinger recounts the experience of arbitrary destruction of inmate property during cell searches (Blakinger 2022).

Prison Discipline: The power to impose sanctions for violations of rules in an incarceration context may also be exercised arbitrarily. The sanctions available to prison officials are extensive and range from loss of privileges to impounding of property or loss of job, to disciplinary segregation in a Special Housing Unit (SHU), or rescission of recommended parole date (Bureau of Prisons, Inmate Discipline Program). When officials of prisons are authorized to impose such sanctions for violation of institutional rules, they wield a significant degree of power over inmates that may be exercised arbitrarily to a greater or lesser degree.

Health and Sanitary Needs: Inmates may be at the mercy of prison staff for access to treatment for health issues. Many incarcerated persons do not have the option to choose their doctors or other health professionals (Pont 2018, 472). This fact already introduces a significant degree of arbitrariness since prisoners must choose between the option of being diagnosed and treated by a particular physician and the option of forgoing care. The choices of officials may further constrain the range of care available to prisoners. Prisoners may also lack the ability to retain complete privacy over their health information since healthcare professionals may be required to report their health status to prison officials (Pont 2018, 473).[8]

These examples show that prison staff typically have extensive power to interfere in inmates' lives. This power is often wielded arbitrarily within many prison systems. However, the claim that the power that prison officials exercise over inmates is arbitrary requires further investigation.

As noted above, Lovett holds that an exercise of power is arbitrary when rules, procedures, or norms do not effectively constrain it. On this conception, the power of prison officials over inmates is not necessarily arbitrary even though it involves discretion and judgment. Typically, rules, procedures, and norms constrain how officials charged with administering punishment may act. This seems to imply that imprisonment need not expose inmates to domination even though it does expose them to the power of officials in the context of a relationship on which they are highly dependent.

This point raises two questions, one empirical and the other philosophical. Are the constraints on prison officials' exercise of their power effective? Do effective constraints on official power render that power non-dominating?

Are the constraints on prison officials' exercise of their power effective? In the United States, there is little doubt that constraints on the power of prison staff are ineffective, and oversight is inadequate. The B.O.P., for example, fails to exercise effective oversight over its private prisons despite its extensive policies and procedures (Review of the Federal Bureau of Prisons Monitoring of Contract Prisons 2016). There is every reason to think this is typically true of publicly federal prisons, state prisons, and jails. At least in the United States, the rules,

[8] In some prisons, the distribution of feminine hygiene products is left to the guards' discretion. Some incarcerated women report that guards use access to feminine hygiene products to control or humiliate prisoners (Greenberg 2017). Kimberly Haven, reporting on her own experience, shows how guards use access to menstrual products to control women. She also shows how officials have the power to punitively worsen the options available for prisoners by replacing the good quality tampons and pads sold in the commissary with subpar ones that are usually given for free (ACLU 2019).

procedures, and norms governing incarceration do not sufficiently constrain the power of prison officials and guards, as the examples discussed above illustrate. Thus, we can conclude that, at least in the United States, prisons are characterized by a high degree of domination. Moreover, the fact that these policies fail to constitute effective constraints is evidence of the difficulty of constraining officials who are given this type and degree of power over others. They illustrate the difficulty of crafting and enforcing effective rules to constrain those who exercise power over the incarcerated.

Turn now to the philosophical question. Do effective constraints on power suffice to render that power non-arbitrary in a high-dependency relationship? Lovett's account holds that power administered according to clear norms and procedures is not a form of domination. On this view, highly organized systems of racial segregation, such as apartheid, do not count as domination (Lovett 2010, 117-119). It seems that a system of incarceration constrained by clear norms and procedures would not count as domination either.

Conceding that such systems do not involve domination would be a mistake. Intuitively, some forms of domination do not involve unfettered discretion in the exercise of power. Imagine a system of incarceration whose rules and policies required prison officials to subject inmates to humiliating, and invasive rituals designed to make them more docile and controllable. Although the power of the officials would be constrained here, it seems right to think that the inmates are subject to dominating power in a case like this. If it is possible for there to be highly organized and effective systems of domination through which agents exercise power over others, then a broader account of domination is needed.

This observation suggests that we should introduce another dimension into the account. We might note that the system of apartheid involves power exercised in the pursuit of a particular unjust goal – promoting and sustaining a system of white supremacy. The rules exist to subordinate a particular group. This might prompt us to include in our conception of domination the idea that power exercised in pursuit of or service to the goal of subordination counts as domination. This leads to the following account. An exercise of power counts as domination if it is arbitrary in the sense of being unconstrained by effective norms, rules, or procedures, and/or exercised in service of the unjust goal of subordination.

It is necessary to require that the exercise of power aims or promotes *unjust* subordination in order not to capture potentially legitimate forms of hierarchy such as military rank or supervisor/supervisee relationships in an employment context. Including the notion of unjust subordination in the definition of domination transforms this account into a moralized conception of domination. Identifying instances of domination sometimes requires us to determine whether power is exercised in pursuit of unjust subordination to classify it as an instance of domination.

With the addition of this amendment, domination can be characterized as the ability to affect options in a social relationship unconstrained by effective norms, rules, or procedures and/or exercised in the service of the unjust goal of subordination. This allows us to account for rule-constrained systems of domination and the actions of agents within them. The revised account will enable us to classify apartheid as a system of domination in which a white minority uses rules, procedures, and organized institutions to dominate people of color.

Domination understood in this way can take two primary forms. First, some forms of domination arise from the fact that power is effectively unconstrained. The parental power to

withhold vaccines from their children or to send their children to conversion therapy might be examples of this form of domination. The second form arises when power is effectively constrained to subordinate. The U. S. Fugitive Slave Act of 1850 is an example of this kind of domination. The Fugitive Slave Act of 1850 required citizens to assist in the capture of persons who had escaped from slavery and required officials to order enslaved persons to be returned to their owners regardless of their moral convictions. The power of these officials was constrained, but in a way that made them pursue the goal of upholding and stabilizing the system of slavery (Library of Congress, The Fugitive Slave Law).

The advantage of this account is that it can classify a system of white supremacy correctly. It also provides potential support for the claim lodged by some critics of the various U.S. prison systems that they are systems of racial domination. Suppose the exercise of power in the justice systems in the United States is exercised in service of the goal of white supremacy. In that case, it counts as a system of domination, no matter how constrained by procedures and norms it may be. (I assume that a system of procedures and norms can be said to be organized in pursuit of a goal even if its architects and the agents who operate within it and enforce it are not or not all pursuing that goal.) Likewise, this account classifies patriarchal family law as a system of domination; patriarchal family law is the use of legal rules to structure family life and relations in a way that subordinates women and children and upholds the power of men. It does this by constraining men in specific ways (to live by a heteronormative ideal, for example) and liberating them in other important ways by giving them control of money and property or not recognizing the possibility of sexual assault in the context of marriage.

Non-domination, on the other hand, requires not merely effective constraint, but effective constraint to appropriate goals. Thus, an exercise of power within a social relationship would be non-arbitrary when it is constrained by rules, norms, and procedures to pursue the relationship's morally appropriate goal(s). In some cases, this is sufficient to establish that these exercises of power are non-dominating. Take the case of parental decision-making power, for example. Parental power emerges in social relationships with high stakes and high exit costs. However, when that power is exercised in ways that are constrained to pursue the appropriate goals of child-rearing, it does not count as the domination of the child. Some cases of mental health care might be similar. Institutionalization places patients in high stakes, high exit-cost situations, and such patients are afforded little control over their lives. In this case, it seems sufficient to render the control to which they are subjected non-arbitrary that it is constrained to pursue only the appropriate goals of their health and well-being.

In other cases, however, non-domination requires more than effective constraints to the pursuit of appropriate goals. This is because the account developed so far does not seem appropriate for cases involving fully autonomous adults. Here, we need to add a further condition to render exercises of power non-dominating. This additional condition is that the power can be controlled by those over whom it is exercised. This condition is suggested in Philip Pettit’s version of non-domination (Pettit 2012, 57-58). Pettit is thinking here of top-down democratic control. Going further, Cordelli argues that legitimate exercises of discretion must be subject to both top-down democratic control and bottom-up control by the parties whose normative situation is changed by the exercise of discretion.

Inmates do not exercise ongoing control over the norms, rules, and procedures according to which the judgments of prison officials are made.[9] If we think of rule-constrained exercises of power as arbitrary when they emerge in ways that are not subject to ongoing control by those over whom the power is exercised, then we can see that the power of prison officials will usually be arbitrary. So even if incarcerated individuals are subject only to control governed by rules, procedures, and norms, that control still counts as arbitrary, and subjection to it still counts as domination because it emerges on terms they do not control (e.g., through ongoing democratic input).

Thus, imprisonment exposes inmates to a high degree of domination. The degree of domination will vary depending on the different institutional incarceration arrangements. It is hard to imagine a carceral institution that did not allow space for some forms of domination. This is because it is difficult (although perhaps not impossible) to imagine a system that would give incarcerated offenders ongoing effective control over their conditions of incarceration or over the rules, norms, and constraints that govern it.[10] It seems to be part of the nature of incarceration to deprive inmates of control over many of the decisions that free persons normally are in the position to make and over the policies and procedures that govern these decisions.

Moreover, the bottom-up control condition is arguably not a requirement of legitimacy in the punishment context (even if it's probably a good way to safeguard the interests of the incarcerated). Suppose we think that the point of prison is to deprive wrongdoers of their liberty. It's odd to think that this can be legitimate only if we preserve their control over the rules that govern them. Firstly, requiring this kind of bottom-up control would arguably often undermine the aims of punishment. (Imagine if populations could veto requirements that they attend drug and alcohol treatment or rehabilitative programs.) Generally speaking, prisons are a distinct type of institutions because their point is to constrain and control in certain ways.

An objection to (1) arises from the claim that non-domination in the prison context requires inmates to exercise ongoing control over the norms, rules, and procedures that constrain prison officials' power over them. To secure non-domination in the exercise of state power, citizens must exercise ongoing control over some of the officials who employ state power. However, it is neither necessary nor desirable that they exercise continuing control over all officials. For example, legislators might be required to be subject to continuous democratic control, but the same could hardly be said for prosecutors or judges. Indeed, it would be undesirable for citizens to exercise too much control over the decisions of prosecutors and judges. Prosecutorial decisions, like judicial decisions, must, to some extent, be insulated from control by citizens for those decisions to embody the ideal of the rule of law. On this view, it might be argued that the exercise of ongoing control by inmates over the power of wardens

[9] It might be thought that previous democratic authorization of the rules that constrain the power of prison officials is sufficient to make their power non-arbitrary. This gambit is ruled out by the claim that the power of officials must be subject to *ongoing* control by those over whom is it exercised. If this is plausible, then previous democratic authorization isn't sufficient.

[10] This is not to say that something like such an institution has never been imagined and at least partially tried. The George Junior Republics institutions were explicitly meant to be institutions that rehabilitated troubled youth through collective self-government.

and other prison officials is neither a necessary nor a desirable condition of non-domination. It is worth noting that the force of this objection does not stem from any claim that inmates may or ought to be excluded from exercising ongoing control over the power to which they are subject. Rather it stems from the general concern that requiring continuous control over all state officials cannot be a necessary condition of non-domination.

Does the claim that non-domination requires control only over some officials in some of their decisions undermine (1)? Even if the claim is granted, it does not threaten (1). First, it is plausible to claim that the higher the stakes, the more critical it is that citizens exercise direct control over state officials. In relatively low-stakes situations, we may not worry if state officials have relatively unfettered power and discretion over certain decisions. These cases may not raise any particular worries about subjection to arbitrary power. In high-stakes cases, however, the threat to citizens is more significant, and corresponding concerns about domination may be more serious. Thus, it is plausible to claim that the higher the stakes, the greater the necessity for citizens exercise ongoing control over state officials. The application of this claim to prisons is relatively straightforward. Many decisions that may be within the power of prison officials, including decisions about prisoner classification, discipline, or access to medical care, are relatively high-stakes decisions. So even if not every exercise of state power needs to be subject to ongoing control by citizens, it is plausible to think that many of the powers exercised by prison officials are precisely of the sort that requires continuous control by those subject to that power.

It might be pointed out in response to this argument that prosecutors' decisions often involve extremely high stakes. The decision to charge someone with a capital crime or offer someone a plea bargain are just two examples of the type of high-stakes discretion prosecutors may exercise. Nevertheless, it is still essential that prosecutors be insulated from political control in these decisions. If it is neither necessary nor desirable that prosecutorial decisions be subject to ongoing political control, then perhaps, it is neither necessary nor desirable that the decisions of prison officials be subject to this type of control. However, in the case of prison officials, none of the considerations seem to be present that support the need for insulating prosecutorial decisions from the political process. For example, one reason to insulate prosecutorial decisions from democratic control arises from considerations about the rule of law. Subjecting the powers of prison officials to ongoing control does not raise any of the rule of law concerns that might arise when citizens exercise continuing control over prosecutorial decisions, for example. If the considerations that support prosecutorial independence are not present in the case of prison officials, then the need for prosecutorial independence need not threaten (1).

I now turn to a defense of (2) and (3). According to (2), it is morally wrong for the state to license private agents to exercise domination over others. According to (3), it is pro tanto morally wrong for the state to permit private agents to exercise domination over others. If these premises are true, then it would be wrong for the state to place individuals in relationships with private agents licensed and/or permitted to exercise arbitrary power over them.

The claim that it is morally wrong for the state to *license* private agents to exercise arbitrary power over others is distinct from the claim that it is morally wrong for the state to *permit* private agents to exercise arbitrary power over others. In licensing domination, the state

authorizes or empowers someone to exercise domination. We might cash this out in terms of a Hohfeldian liberty. An agent who has been licensed to exercise dominating power is granted a liberty to do so. To permit domination is to adopt a range of attitudes towards it or to take or refrain from taking actions that advance or hinder the exercise of power. In some cases, the state might fail to prevent an exercise of arbitrary power by private agents because it cannot stop it or because it must balance competing considerations in determining how to reduce domination. However, in permitting domination for either of these reasons, the state does not license private agents to exercise domination. This distinction is directly relevant in the incarceration context.

In some cases, incarceration involves prisoners in relations of domination with other inmates, which can be as bad and as harmful as the domination that prison officials exercise over them. The state does not (typically) license inmates to exercise domination over other inmates but merely permits this to happen. By contrast, it does license prison officials or guards to exercise domination (to a greater or lesser extent) over inmates. While it is typically seriously wrong for the state to permit domination by private agents, that claim does not play a role in my argument. I rely only on the claim that it is wrong for the state to license domination by private agents.

This distinction between licensing domination and permitting it is important for the following reason. There may be many cases where permitting domination is unavoidable or is recommended by a moral weighting of the various considerations at stake. However, considerations determining that it is permissible or necessary to allow dominating power to be exercised over others do not determine that licensing domination is permissible. There are further reasons that bear on the question of whether licensing domination is permissible. These reasons have to do, for example, with what the act of licensing domination communicates about the status or value of those who are to be subject to the arbitrary power of others.

The principle that it is morally wrong for the state to license private agents to exercise domination over others is a highly plausible limit on the state's powers. Part of the explanation for why it is wrong for the state to license private domination is that it fails to show appropriate respect for the moral status of those whose domination it licenses. It fails to treat them as equals vis-à-vis other private individuals. It does this in two ways. First, it communicates a message about their status in relation to others. By subjecting inmates to dominating power, the state says that they are not equal to those others. Second, it subordinates them to these other private individuals.

This appeal to moral status supports the claim that it is morally wrong for the state to license private agents to exercise arbitrary power over others. The principle also helps to accurately explain the wrongness of various legal arrangements that involve domination. One example is legal slavery and the legally authorized "punishment" of enslaved people by slaveholders in the form it took in the United States. Another example is a legal arrangement in a patriarchal society that gives husbands the right to control the property of their wives.[11] A

[11] Patriarchal family law is probably best understood as a system that both licenses and permits extensive domination of women and children by men.

final example is the convict leasing system practiced in the American South.[12] Each of these examples has several wrong-making features. It is plausible that part of what makes them wrong is that the state licenses private individuals to exercise domination over others.

This concludes my defense of (2) and (3). If these premises have been adequately established, then (4) is plausible. According to (4), the state licenses (or mandates) private agents to exercise domination over others when it delegates the task of criminal incarceration to private agents. It places inmates in social relationships that subject them to the arbitrary power of prison officials and guards. Given that imprisonment in private prisons involves licensing private agents to exercise domination over others and that it is wrong for the state to license domination by private agents, the conclusion follows. It is morally wrong for the state to delegate the administration of imprisonment to private agents.

Conclusion

This paper has argued for a domination-based objection to private prisons. While it seems wrong to exclude instrumental considerations altogether from the assessment of the moral status of private prisons, the case against private prisons should be built, in part, on the basis of non-instrumental moral considerations. One such consideration concerns the fact that incarceration involves exercising power over inmates. Insofar as this exercise of power can count as domination, there is good reason to oppose licensing private agents to exercise it.

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