
Privatization and the Elusive Employee-Contractor Distinction

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Does it matter whether government services are managed publicly (by state employees) or privately (by contractors)?

Yes, for all sorts of empirical reasons. Chiefly, we reasonably expect and observe that public and private providers will act differently and otherwise affect the real world.

But is there any inherent, normatively relevant difference between employee- and contractor-managed services, independent of such data-driven concerns?

No.

The state is an abstract set of relationships; therefore, to act, the state must use agents of some sort. Both employees and private contractors are private individuals; both do things for the state in exchange for money; both have private purposes, as well as the discretion to follow those purposes sometimes, even contrary to the desires of the state. Private contractors can be unaccountable, but so can public employees; private contractors can lack legitimacy in the eyes of the public, but so can public employees.

The extent to which the public and private sectors differ is an empirical, contingent question. It makes sense to favor or oppose privatization, and to treat the public and private sectors differently in the law, but the

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reasons for doing so must be based not on any inherent difference between sectors but rather on the empirical — and often contested — differences in how the two sectors will act in the real world.

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INTRODUCTION

Critics of privatization (for instance, of prisons) often argue that privatization is inappropriate because of *inherent* differences between the public and private sectors. There are, of course, plenty of arguments that focus on empirical issues — on the one hand, “mere accounting” concerns like whether private prisons are cheaper; on the other, larger questions like whether private prisons mistreat their inmates. But the “inherent” critics use a different sort of discourse, one that supposedly transcends contingent, empirical claims, instead staking out a position based on high-level political or moral theory, the purposes of criminal punishment, liberal legitimacy, liberty and dignity, symbolism and social meaning.

Thus, criminologist John DiIulio has written:

[T]o remain legitimate and morally significant, the authority to govern behind bars, to deprive citizens of their liberty, to coerce (and even kill) them, must remain in the hands of government authorities. . . . The badge of the arresting policeman, the robes of the judge, and the state patch on the uniform of the corrections officer are symbols of the inherently public nature of crime and punishment.¹

Alon Harel and Ariel Porat argue in a recent *Cornell Law Review* article:

[C]ertain tasks[, particularly tasks involving the infliction of violence, such as criminal sanctions,] . . . must be performed by public officials not because public officials are better at performing them (or can perform them more cheaply) but because the identity of the agent who performs these tasks is considered to have an intrinsic value. . . . [T]his view is grounded in foundational intuitions concerning political legitimacy.²

And Mary Sigler has similarly argued recently that private prisons implicate “the nature and justification of punishment in a liberal democratic polity”³:

¹ John J. DiIulio, Jr., *What’s Wrong with Private Prisons*, PUB. INTEREST, Summer 1988, at 66, 79.

² Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics*, 96 CORNELL L. REV. 749, 769, 777 (2011).

³ Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 151 (2010).

Punishment under law is a profound exercise of state power the meaning and justification of which depend on the social and political institutions that authorize it. In a liberal state . . . punishment is inflicted for public wrongs in the name of the people. . . . The delegation of punishment through prison privatization attenuates the meaning of punishment in a liberal state and undermines the institution of criminal justice.⁴

These concerns are echoed in the law as well. In 2009, the Israeli Supreme Court ruled that prison privatization violates “the constitutional rights to personal liberty and human dignity of inmates who are supposed to serve their sentence in that prison. This is because of the actual transfer of powers of management and operation of the prison from the state to a private concessionaire that is a profit-making enterprise.”⁵

These are not just throwaway paragraphs in otherwise empirical pieces. Sigler’s and Harel and Porat’s arguments, by design, avoid empirics entirely.⁶ And the Israeli Supreme Court, in invalidating private prisons, declined to consider their real-world functioning — in fact, explicitly assuming that, as between public and private prisons, “the term of imprisonment . . . is identical and . . . the violation of . . . human rights that actually takes place . . . is identical.”⁷

Nor is the concern limited to “privatization of force” areas like prison management, military work, policing, air transport security, or tax collection.⁸ In 2005, a Massachusetts bill to ban the “privatization

⁴ *Id.*

⁵ HCJ 2605/05 Academic Ctr. of Law & Bus., Human Rights Div. v. Minister of Fin., ¶ 18 [2009] (Isr.), available at http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm. The Israeli Supreme Court, in this case, was sitting as the High Court of Justice. See *The Judiciary: The Court System*, ISRAEL MINISTRY OF FOREIGN AFF. <http://www.mfa.gov.il/MFA/Government/Branches%20of%20Government/Judicial/The%20Judiciary-%20The%20Court%20System>.

⁶ Sigler does summarize the empirical concerns, see Sigler, *supra* note 3, at 155-63, and suggests that these may be reason enough to oppose privatization, see *id.* at 151, 178, but she presents her own thesis as an independent, and “more fundamental” reason to oppose privatization, see *id.* at 151, one that doesn’t rely on the empirical concerns.

⁷ *Academic Ctr. of Law & Bus., Human Rights Div.*, at ¶ 33.

⁸ On privatization of force, see generally Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004). On concerns that air transport security is inherently governmental, see CONG. REC. S11,975 (daily ed. Nov. 16, 2001) (statement of Sen. McCain) (“Law enforcement is a proper function of the Federal Government. Law enforcement will be carried out by Federal employees.”); CONG. REC. S11,981 (daily ed. Nov. 16, 2001) (statement of Sen. Rockefeller) (“We can no longer allow the lives of our citizens to be

of public water and sewer systems” stated in its preamble that “the very idea of turning such a basic resource as water . . . into a commodity should be repugnant to a democratic society” and that every Massachusetts citizen should have the *right* to “a supply of clean water” that is not only “reasonably priced” but also “*publicly administered*.”⁹ Some critics of for-profit hospitals object, in apparently non-empirical terms, to the conflict between the profit-maximization imperative and “the needs or rights of . . . patients.”¹⁰ Partisans of public education or Social Security complain that privatizing these functions would signal a retreat from the ideals of equality and community.¹¹ And even public ownership of banks, airlines, post offices, and electric utilities is sometimes presented as (perhaps separately from how these enterprises are run) undermining civil society.¹²

placed into the hands of private companies. . . . [A]viation security is national security, plain and simple. Like all other aspects of national security, it must be entrusted to Federal law enforcement personnel. . . . [The bill nationalizing air transport security] answers [the American people’s] demands and ensures that the safety of our skies is given the same priority as the safety of our streets and borders.”). Note, though, that it’s unclear how much Sen. Rockefeller believed that air transport security had to be a responsibility of public employees, since in the same statement, he also defended the ability of airports to opt out of the TSA and hire private screeners, provided they could “offer security equivalent to that provided by Federal law enforcement.” *Id.* On tax collection, see Paul Starr, *The Limits of Privatization*, in 36(3) PROC. ACAD. POL. SCI. 124, 125, 133 (Steve H. Hanke ed., 1987).

⁹ H.B. 1333, 184th Gen. Court, Reg. Sess., § 1 (Mass. 2005) (emphasis added); Alfred C. Aman, Jr., *Privatization and Democracy: Resources in Administrative Law*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 261, 281, 466 nn.102-03 (Jody Freeman & Martha Minow eds., 2009).

¹⁰ ROBERT LEKACHMAN, VISIONS AND NIGHTMARES: AMERICA AFTER REAGAN 106 (1987).

¹¹ See Starr, *supra* note 8, at 135.

¹² EVA COX, A TRULY CIVIL SOCIETY 73 (1995) (“The first category of public policy we must question is that of the various privatisations, the loss of public capital goods that makes us feel poorer. We used to own banks, an airline, post office buildings, water, electricity and many other assets. Now we have to buy these services back from the private sector or government business enterprises. This may reduce the debt momentarily but it leaves us with a sense of loss.”). I say “perhaps” because Cox suggests that even having these services run by “government business enterprises” is insufficient, *id.*, perhaps because such corporatization brings with it “user pays costing,” *id.* at 50, and that a problem with telecom privatization is that the business will be “driven by profit motives rather than the daily communication needs of communities,” *id.* at 73-74. So at least part of the concern may be empirical. See also *id.* at 50 (suggesting that privatization is connected to a withdrawal of services or protection for the poor). But concern over the extent of service isn’t the whole complaint: part of Cox’s point is merely that governments should be “visible as providers of social and communal resources,” *id.* at 79, that “elected officers and their

The Israeli Supreme Court's assumption noted above suggests a simple hypothetical implicit in many of these arguments. *Even if switching from public to private provision didn't change any actions in the world, and even if nobody cared whether provision is public or private* — so these arguments imply — *privatization would still be illegitimate*.¹³

I believe that this line of attack is generally unsound. For purposes of this Article, I don't deny that, as a matter of political theory, only the state should punish. But the argument that the provision of all these services must *therefore* be undertaken by public actors — by state employees rather than by private contractors — misunderstands what it means for the state to act.

"The state" isn't the president or governor; it's not a legislator, or the set of all legislators, or even the set of all government employees. It's a network of relationships among people. An important network, a real network, a network whose workings perhaps lead to politically legitimate decisions — but still just a network, independent of, and not identified with, any person. Like friendship, parenthood, or the corporation, it's abstract.

And yet, to catch a criminal, beat a prisoner, launch a bomb, or do anything else, one needs a body: fingers and hands to grab people and pull triggers and press buttons; perhaps feet, eyes, a brain. A state needs a corporeal manifestation to do anything in the world.

Fortunately, there are plenty of potentially available bodies — 300 million at home and 7 billion if we cast a wider net, to say nothing of K-9 police dogs, mine-locating dolphins, and homing pigeons.¹⁴ It

public servants" are "*our* servants," *id.* at 42 (emphasis added), and that citizens see "public ownership of resources as extensions of their personal property to which they have the right of access," *id.* at 51; *see also id.* at 53 ("No wonder people are confused as to who owns the country!").

¹³ The last part — "and even if nobody cared whether provision is public or private" — isn't implicit in the Israeli Supreme Court's quote above, which only focuses on the actions being the same. But, as I argue later, it's clear that utilitarians, and potentially many others, would be willing to consider mere attitudes toward private prisons, even ones unsupported by empirical evidence; and I have no intention of quarreling with that view in this Article. From this point of view, actions in the world and people's attitudes are both empirical (and utility-relevant) facts about the world. My argument here only opposes theories of privatization that purport to be non-empirical.

¹⁴ *See, e.g., Delaware Department of Correction, Bureau of Prisons, STATE OF DELAWARE*, <http://www.doc.delaware.gov/BOP/BOP.shtml> (last updated Feb. 2, 2012, 8:47:16 AM) ("K-9 Unit provides enhanced institutional security and a drug interdiction capability. The K-9 training regimen includes on-going proficiency training, narcotic drug detection, offender disturbance control, perimeter security, evidence collection, escapee apprehension and crowd control, as well as basic training."); *Marine Mammal Program*, U.S. NAVY, <http://www.public.navy.mil/spawar/Pacific/71500/Pages/default>

turns out, though, that — given the assumptions of modern liberal society — all of these come from the private sector. Liberal assumptions make us private at birth; we don't work for the government or pursue its goals by default. The government can convince us to work for it by appealing to our sense of duty, by forcing us, or by paying us money, and sometimes in all three ways at once: in case of a draft, the Military Selective Service Act speaks of “shar[ing]” “the obligations and privileges of serving in the armed forces” “in a free society,”¹⁵ threatens draft dodgers with fines and imprisonment,¹⁶ and rewards draftees with a salary.¹⁷ Modern liberal societies generally prefer voluntary service to compulsory service, and duty can only go so far, so people who do things for the government are generally paid to do so.

In short, government can only “act” by turning to people who are initially outside of government. Government may be more than the sum of its agents,¹⁸ but it does need agents — more than that, it has no physical existence without them. And these agents, by and large, are attached to it by means of market transactions. Sometimes these

.aspx (last visited Sept. 22, 2012); *The Price of Freedom: Americans at War: Cher Ami*, SMITHSONIAN INSTITUTION, NAT'L MUSEUM OF AM. HIST., <http://americanhistory.si.edu/militaryhistory/collection/object.asp?ID=10> (last visited Sept. 22, 2012) (“Cher Ami was a registered Black Check cock carrier pigeon, one of the 600 birds owned and flown by the US Army Signal Corps in France during World War I.”); cf. Holly Allen & Christopher Beam, *Cats of War*, SLATE (May 5, 2011, 6:26 PM) http://www.slate.com/articles/news_and_politics/low_concept/2011/05/cats_of_war.html.

¹⁵ 50 U.S.C. app. § 451(c) (1948).

¹⁶ *Id.* § 462(a) (1948).

¹⁷ *Id.* § 454(e) (1948).

¹⁸ Note that, for purposes of this Article, I'm not at all denying the independent existence of the state. Therefore, my argument doesn't rest on the philosophical concept of reductionism. See Alyssa Ney, *Reductionism*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <http://www.iep.utm.edu/red-ism/> (last updated Nov. 10, 2008). A close cousin of reductionism is the concept of methodological individualism, famously advocated by Joseph Schumpeter and Max Weber and more recently by Jon Elster. See MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 13-18 (Guenther Roth & Claus Wittich eds., 1968); John Elster, *Marxism, Functionalism, and Game Theory*, 11 *THEORY & SOC.* 453 (1982); Joseph Schumpeter, *On the Concept of Social Value*, 23 *Q.J. ECON.* 213, 231 (1909); Joseph Heath, *Methodological Individualism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/methodological-individualism/> (revised Nov. 16, 2010); see also Robert Ahdieh, *Beyond Individualism in Law and Economics*, 91 *B.U. L. REV.* 43 (2011). But the debate over reductionism or methodological individualism isn't necessary for this Article: whether or not the actions of the state should be discussed as such (independently of the actions of people), the question remains whether the actions of *certain* people should be considered actions of the state while the actions of *other* people shouldn't.

transactions are called “employment contracts,” and the agents become “employees”; sometimes the process is called “contracting out,” and the agents become “contractors.”¹⁹

Is there any reason for us to distinguish between employees and contractors? Yes, there is. One can’t specify in complete detail what one’s agents should do, one can’t monitor everything they do, and enforceability is imperfect. Given all this, one’s agents will have some freedom to serve their own agenda at the expense of the principal’s, whether that agenda involves being lazy or being overzealous or cutting corners.²⁰ Different types of contracts — for instance, flat per-year salary versus flat per-prisoner-day compensation, or civil-service

¹⁹ See BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE 16 (1998); JOHN D. DONAHUE, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS 156-57 (1989); Bruce L. Benson, *Do We Want the Production of Prison Services to Be More “Efficient”?*, in CHANGING THE GUARD: PRIVATE PRISONS AND THE CONTROL OF CRIME 163, 166 (Alexander Tabarrok ed., 2003); Sean McConville, *Aid from Industry? Private Corrections and Prison Crowding*, in AMERICA’S CORRECTIONAL CRISIS: PRISON POPULATIONS AND PUBLIC POLICY 221, 231 (Stephen D. Gottfredson & Sean McConville eds., 1987) (“[T]he state is an abstraction. Powers and delegated and duties assigned to human beings. . . . The symbol becomes flesh and the policy becomes action in much the same way, whether one is dealing wholly with a public bureaucracy, a private corporation, or a combination of the two.”); Malcolm Thorburn, *Reinventing the Night-Watchman State*, 60 U. TORONTO L.J. 425, 442 (2010).

And sometimes the government might choose to accomplish a result in a more decentralized way, by just withdrawing from the activity and letting private individuals do it on their own, perhaps subject to regulation — though this isn’t usually called privatization. One exception is PRIVATIZATION, LAW, AND THE CHALLENGE TO FEMINISM (Brenda Cossman & Judy Fudge eds., 2002), which defines “privatization” as “a broad policy impulse which seeks to change the balance between public and private responsibility in public policy.” Judy Fudge & Brenda Cossman, *Introduction: Privatization, Law, and the Challenge to Feminism*, in PRIVATIZATION, LAW, AND THE CHALLENGE TO FEMINISM, *supra*, at 3, 18 (quoting DONALD MCFETRIDGE, THE ECONOMICS OF PRIVATIZATION 3 (1997) (quoting STEVEN SMITH & MICHAEL LIPSKY, NON PROFITS FOR HIRE: THE WELFARE STATE IN THE AGE OF CONTRACTING 188 (1993))). In Fudge and Cossman’s view, “[p]rivatization includes deregulation of some sectors of economic activity, the marketization (and regulation) of others, and the selling off of government operations . . . , as well as the commercializing of government services. It also involves a fundamental retrenchment of the state in social reproduction, leaving families and charities to shoulder a greater part of the burden of caring for the people.” *Id.* In other words, Fudge and Cossman use “privatization” to describe any market-oriented and private-sector-oriented policy, which is far broader than its usual use (to describe asset sales and contracting out).

²⁰ See, e.g., Oliver Hart et al., *The Proper Scope of Government: Theory and an Application to Prisons*, 112 Q.J. ECON. 1127, 1128 (1997) (noting that critics often argue that private contractors cut corners); Andrei Shleifer, *State Versus Private Ownership*, J. ECON. PERSPECTIVES, Fall 1998, at 133, 138 (noting that in certain circumstances privatization of facilities may cause deleterious effects, such as the abuse of prisoners in private prisons).

employment versus hiring by auction — lead to different incentives;²¹ and different incentives induce different actions.

Thus, one can argue (rightly or wrongly) that private prisons cost no less,²² provide poorer-quality confinement,²³ and are less accountable than public ones.²⁴ One can argue that private prison firms might lobby for stricter criminal justice policies²⁵ or act to

²¹ See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 550 (2000).

²² Compare GEOFFREY F. SEGAL & ADRIAN T. MOORE, REASON PUB. POL'Y INST., WEIGHING THE WATCHMEN: EVALUATING THE COSTS AND BENEFITS OF OUTSOURCING CORRECTIONAL SERVICES, PART II: REVIEWING THE LITERATURE ON COST AND QUALITY COMPARISONS 2-9 (2002) (private prisons save money), with DOUGLAS McDONALD ET AL., PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE 33-46, appx.1 (1998) (private prisons may not save money, and current empirical studies are inadequate to test the proposition), and Brad Lundahl et al., *Prison Privatization: A Meta-Analysis of Cost Effectiveness and Quality of Confinement Indicators*, UTAH CRIM. JUST. CTR., Apr. 26, 2007 (“Cost savings from privatizing prisons are not guaranteed and appear minimal.”).

²³ Compare SEGAL & MOORE, *supra* note 22, at 9-14 (high quality), with Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 500-06 (2005) [hereinafter *State Punishment*] (low quality). But see McDONALD ET AL., *supra* note 22, at 47-56 & appx.2 (current public-private quality comparisons are inadequate). See also Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization*, 8 INT'L J. CONST. L. 690, 697-701 (2010) (critiquing Justices Procaccia and Naor's argument in *Acad. Ctr. for Law & Bus.*, *supra* note 5, for treating as inherent the highly empirical question of whether private prisons pose an enhanced risk of human rights violations).

²⁴ Compare Dolovich, *State Punishment*, *supra* note 23, at 480-500 (limits of private-sector accountability), with *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1879-86 (2002) (discussing private-sector accountability and critiquing public-sector accountability). See also Joseph E. Field, Note, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 670-73 (1987).

²⁵ Compare Dolovich, *supra* note 23, at 523-36 (discussing the possibility of the private prison industry lobbying for harsher sentencing regimes), with Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197 (2008) (arguing that this concern has little empirical basis and ambiguous theoretical foundations). In Volokh, *supra*, I discussed this concern and argued that while it may be valid generally, there's no clear theoretical reason, and virtually no empirical evidence, that it applies in the case of prisons. Nonetheless, the argument is quite common. I collected sources making this argument in the earlier article, *see id.* at 1202 n.31. Sources I have found since then include PAUL ASHTON & AMANDA PETTERUTI, GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES (Just. Pol'y Inst., June 2011); NILS CHRISTIE, CRIME CONTROL AS INDUSTRY: TOWARDS GULAGS, WESTERN STYLE 122 (3d ed. 2000); DONAHUE, *supra* note 19, at 176-77; SI KAHN & ELIZABETH MINNICH, THE FOX IN THE HENHOUSE: HOW PRIVATIZATION THREATENS DEMOCRACY 79, 99-100 (2005); Lucas Anderson, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONTRACT L.J. 113, 127-29 (2009);

prevent their inmates' early release²⁶ or that they might use campaign contributions or other illegitimate means to obtain contracts.²⁷ One can complain that private prison construction can be used to circumvent the requirement that voters approve bond issues²⁸ or that privatization will represent a shift away from union wages and civil-service privileges.²⁹ One can even argue against prison privatization on

Christine Bowditch & Ronald S. Everett, *Private Prisons: Problems Within the Solution*, 4 JUST. Q. 441, 451 (1987); Jan Elvin, *A Civil Liberties View of Private Prisons*, PRISON J., Oct. 1985, at 48, 49-50; Field, *supra* note 24, at 671; Richard L. Lippke, *Thinking About Private Prisons*, CRIM. JUST. ETHICS, Winter/Spring 1997, at 26, 31; Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813, 827-28 (1987) [hereinafter *Privatization of Corrections*]; Mick Ryan & Tony Ward, *Privatization and Penal Politics*, in PRIVATIZING CRIMINAL JUSTICE 53, 60 (Roger Matthews ed., 1989); Max Taylor & Ken Pease, *Private Prisons and Penal Purpose*, in PRIVATIZING CRIMINAL JUSTICE, *supra*, at 186-87 (quoting a letter by Thomas Goodman to *The Guardian* on Oct. 31, 1986); Robert P. Weiss, *Private Prisons and the State*, in PRIVATIZING CRIMINAL JUSTICE, *supra*, at 41 (Roger Matthews ed., 1989); Eric Lotke, *The Prison-Industrial Complex*, MULTINATIONAL MONITOR, Nov. 1996; Martin Tolchin, *Experts Foresee Adverse Effects from Private Control of Prisons*, N.Y. TIMES, Sept. 17, 1985, at A17; L. Waxman, *Private Firms Seek Contracts to Operate Prisons*, MORNING ADVOCATE, Dec. 1, 1984; Andrea Christina Nill, *Private Prisons Spend More to Put More People in Jail*, LAPROGRESSIVE.COM (June 24, 2011), <http://www.laprogressive.com/immigration-reform/immigrants-jail/> [note the misspelling in the URL]; Glenn Greenwald, *Steve Jobs and Drug Policy*, SALON.COM (Oct. 8, 2011), http://politics.salon.com/2011/10/08/steve_jobs_and_drug_policy/; cf. CODY MASON, TOO GOOD TO BE TRUE: PRIVATE PRISONS IN AMERICA 12-16 (Sentencing Project, 2012); Starr, *supra* note 8, at 128 ("Missing from the case for privatization is any clear sense of feedback effects — the reaction back upon the government of the enlarged class of private contractors and other providers dependent on public money."). Interestingly, Taylor and Pease, *supra*, argue that, though private prison contractors will lobby for stricter criminal laws, this effect will be outweighed by an overall decrease in incarceration as the true cost of incarceration becomes more transparent. Taylor & Pease, *supra*, at 186-87.

²⁶ See Dolovich, *State Punishment*, *supra* note 23, at 518-23; Douglas C. McDonald, *When Government Fails: Going Private as a Last Resort*, in PRIVATE PRISONS AND THE PUBLIC INTEREST 179, 187-88 (Douglas C. McDonald ed., 1990).

²⁷ Sigler, *supra* note 3, at 155-56; Robert W. Poole Jr., *Privatization*, CONCISE ENCYCLOPEDIA OF ECONOMICS (2007), <http://www.econlib.org/library/Enc/Privatization.html>.

²⁸ CHRISTIE, *supra* note 25, at 122; DONAHUE, *supra* note 19, at 174-75; Bowditch & Everett, *supra* note 25, at 446-47; Elvin, *supra* note 25, at 51-52; Field, *supra* note 24, at 669-70; Herman B. Leonard, *Private Time: The Political Economy of Private Prison Finance*, in PRIVATE PRISONS AND THE PUBLIC INTEREST, *supra* note 26, at 66, 73-76; McDonald, *supra* note 26, at 196-98; Robbins, *Privatization of Corrections*, *supra* note 25, at 816; AM. BAR ASS'N, REPORT NO. 2 OF THE SECTION OF CRIMINAL JUSTICE 329-30 (1986) [hereinafter REPORT NO. 2]. For a more general discussion of "privatization workarounds," see Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717 (2010).

²⁹ See Joshua Miller, *Worker Rights in Private Prisons*, in CAPITALIST PUNISHMENT:

the ground that it's *too* efficient — so efficient that it (undesirably) results in more incarceration.³⁰

One can make similar arguments against the use of private military companies like (the former) Blackwater.³¹ Perhaps, as some have argued, such contracting alters the balance of power between the President and Congress; perhaps it weakens military justice and battlefield discipline; perhaps it harms the public perception of the American military and “debase[s] the iconography of soldiers as citizen-patriots”; perhaps it undermines international law and harms U.S. diplomatic interests.³² Perhaps oppressive private police forces are more likely than their public counterparts to survive the fall of a

PRISON PRIVATIZATION & HUMAN RIGHTS (Andrew Coyle et al. eds., 2003); Weiss, *supra* note 25, at 33. Of course, people differ over whether this is good or bad. Compare ADRIAN T. MOORE, REASON PUB. POL'Y INST., PRIVATE PRISONS: QUALITY CORRECTIONS AT A LOWER COST 17 (1998) (noting approvingly that private firms, unlike a public facility, can reduce costs because they are not bound by civil-service rules), with ACLU OF OHIO, PRISONS FOR PROFIT: A LOOK AT PRISON PRIVATIZATION 13-14 (2011) (arguing that prison privatization leads to less unionization and worse working conditions). Cf. Risa L. Leiberwitz, *Contingent Labor: Ideology in Practice*, in FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY 324 (Martha Albertson Fineman & Terence Dougherty eds., 2005) (discussing labor conditions).

³⁰ See DAVID SHICHOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS 60-64 (1995); Richard Sparks, *Can Prisons Be Legitimate? Penal Politics, Privatization, and the Timeliness of an Old Idea*, in PRISONS IN CONTEXT 14, 24-25 (Roy D. King & Mike Maguire eds., 1994); Benson, *supra* note 19, *passim*; Bruce L. Benson, *Third Thoughts on Contracting Out*, 11 J. LIBERTARIAN STUD. 44, 45 (1994); Lippke, *supra* note 25, at 31, 33; Robbins, *Privatization of Corrections*, *supra* note 25, at 815; Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 137-38 (2001); cf. RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY 24-27 (1997) (citing authors arguing that prison privatization will increase incarceration); Field, *supra* note 24, at 670 (“Privatization would increase the government’s ability to build more prisons and jails and thus incarcerate more people.”); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377 (2003) (“[I]ncreased privatization often goes hand in hand with expansion rather than contraction in public responsibilities.”). Taylor & Pease, *supra* note 25, at 185-87, argue instead that prison privatization will *decrease* incarceration, as governments become more aware of the true cost of incarceration.

Note also that from a perspective that focuses on private prisons’ increasing incarceration, private policing may be a welcome development, insofar as the private police are less interested in penal solutions. See CHRISTIE, *supra* note 25, at 148-49.

³¹ Later renamed to Xe Services and now renamed again to Academi. See Jason Ukman, *Ex-Blackwater Firm Gets a Name Change, Again*, CHECKPOINT WASHINGTON (Dec. 12, 2011, 9:26 AM), http://www.washingtonpost.com/blogs/checkpoint-washington/post/ex-blackwater-firm-gets-a-name-change-again/2011/12/12/gIQAXf4YpO_blog.html.

³² See Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1048-84, 1111-20 (2004).

totalitarian regime,³³ and perhaps private and community policing even in democratic regimes harmfully blurs public/private boundaries, to the detriment of accountability.³⁴

Similar themes run through the entire literature on privatization: critics argue that privatization can be economically inefficient; it can worsen distributional inequalities in society; it can lead to the underprovision of public goods; it can reduce accountability; it can increase violations of human rights; it can distort the results of the democratic process; it can be plagued with market failures.³⁵

These anti-privatization arguments may be right or wrong. But they all have a few things in common. They're *contingent*, not *inherent*. They're based on the real-world consequences of different modes of contracting, rather than assigning any inherent importance to the employee/contractor distinction per se. These consequences could be monetary, they could relate to the protection of human rights, or they could be based on nothing more than some people's subjective dislike of privatization.³⁶ But they all focus on how privatization affects people or things in the real world. And they're all susceptible to empirical data, or even to theoretically well-informed speculation on how we expect people to act in different institutional settings.

It is therefore not surprising to find that many of these arguments are deeply contested, because they depend on messy data and contingent facts. For instance, before the Israeli Supreme Court, privatization opponents pressed the argument that legislation authorizing private prisons should be struck down because privatization would increase human rights violations. But the Israeli

³³ See CHRISTIE, *supra* note 25, at 149-50 ("If the Gestapo or the KGB had been branches of a private firm, . . . [they would not have been] destroyed when the state [was] destroyed. . . . [The private secret polices would have belonged] to a type of organization where both transnational and national interests see to it that they are allowed to continue. The Gestapo and the SS troops were eliminated after the Second World War, but the firms that provided the equipment for the camps and received the prisoners as slave labourers, are very much alive in Germany today.").

³⁴ See STANLEY COHEN, *VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION* 63-69 (1985). On accountability questions, see *infra* Part I.A.

³⁵ See generally ELLIOTT D. SCLAR, *YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION* (2000) (discussing drawbacks of privatization); Rosky, *supra* note 8, at 937-63. I have left out Rosky's "cultural commodification" category in the list in the text, see *id.* at 963-70, because I discuss it later. See *infra* Part IV.

³⁶ Of course, to a utilitarian, privatization opponents' disutility is just as valid a consequence of privatization as anything else. See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 21-23 (2002) (arguing that policies should be adopted based on their effect on people's utility from any source whatsoever, including ideological utility, which they call "a taste for a notion of fairness").

Supreme Court, in rejecting that line of attack (citing me, among others), wrote that, while these concerns were “not unfounded,” there was “no certainty that this [would] occur” and that “the comparative figures [were] not unambiguous.”³⁷ Similarly, an analysis of the empirical literature on prison privatization by Douglas McDonald and his co-authors — an analysis that was not at all positive about private prisons — concluded, fairly mildly, that there was no strong evidence that private prisons performed better than public ones and, more generally, that the quality of existing studies is generally insufficient to draw strong conclusions about comparative prison quality.³⁸

These arguments are messy, because they depend on facts about the world that could go one way or another; one’s conclusions are always tentative and subject to revision when the next study comes out. Realistically, of course, many empirical questions are “trans-scientific” — “they are unanswerable, at least at an acceptable level of cost or within a useful period of time.”³⁹ So by arguing that the case for or against privatization depends on empirical facts, I’m not saying that we need actual empirical research, or that we must gather more data before proceeding. In the presence of severe empirical uncertainty, we can fall back on various strategies, rules of thumb, or burden-of-proof rules favoring one side or another, or just make educated guesses and speculation informed by theory.⁴⁰ But these are the sorts of messy arguments we should be having, rather than arguments that attach dispositive importance to labels like “the state” and “the private sector.”

In short, both in-house provision (that is, by employees) and contracted-out provision can be said to be “the state acting,”⁴¹ since both employees and contractors are committing to do what the state

³⁷ HCJ 2605/05 Academic Ctr. of Law & Bus., Human Rights Div. v. Minister of Fin., ¶ 19 [2009] (Isr.), available at http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm (citing *Developments*, *supra* note 24).

³⁸ McDONALD ET AL., *supra* note 22, at 47-56, appx. 2.

³⁹ Adrian Vermeule, *Interpretation, Empiricism, and the Closure Problem*, 66 U. CHI. L. REV. 698, 701 (citing ALVIN M. WEINBERG, NUCLEAR REACTIONS: SCIENCE AND TRANS-SCIENCE 4 (1992)); see also ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 158 (2006).

⁴⁰ See Vermeule, *supra* note 39, at 704-08 (discussing how to choose rules under empirical uncertainty, for instance by allocating the burden of uncertainty to one side or another).

⁴¹ Note again that my view that such a formulation is valid shows that I am not committed here to reductionism. See *supra* note 18. Even those who believe that the state can be said to be “acting” must answer why it can act through an employee but can’t do so through a contractor.

tells them to do (subject to a contractual relationship of some sort).⁴² Or both can be said to be “private parties acting,” since both employees and contractors are private people who potentially have their own agendas and often have the discretion to act contrary to the wishes of their principal. But, regardless of whether one favors or opposes privatization,⁴³ what we cannot say is that *one* of them is the state and *the other* is a private party.⁴⁴

⁴² See CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS 54-55 (1990); Samuel Jan Brakel & Kimberly Ingersoll Gaylord, *Prison Privatization and Public Policy*, in CHANGING THE GUARD, *supra* note 19, at 125, 150 (“[I]t might be asked what the critical difference is between rewards paid out in salaries as opposed to dividends (‘profits’), not to mention that all those who work for profit-making companies — in prisons, everyone from the warden on down to the line guards — are virtually salaried employees.”).

⁴³ Most of the arguments addressed here come from *anti*-privatization advocates. But the same fallacy could be committed by *pro*-privatization advocates. David Shichor characterizes the libertarian approach to punishment as making the victim the “owner” of the right of punishment”; therefore, he says, under the libertarian view, the administration of punishment “can be carried out by private entities. . . . [T]he libertarian approach would justify private prisons on the basis of the limited role of the state and the individualistic concept of punishment.” SHICHOR, *supra* note 30, at 51. I haven’t seen libertarians make this sort of natural-rights argument in favor of prison privatization. Libertarians of the anarchist tradition do make such an argument in favor of a private right of punishment or restitution, which may be pursued independently of government. See, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 12, 89 (1974) (discussing people’s ability to delegate their right to punish to protective associations); George H. Smith, *Justice Entrepreneurship in a Free Market*, 3 J. LIBERTARIAN STUD. 405, 407 (1979) (“[A] Victim of invasion has the right to seek restitution from the Invader”); *id.* at 405 (“The quasi-legitimate functions now performed by government, such as the administration of justice, can, the [libertarian] anarchists claim, be provided in the marketplace.”). But this is far removed from private prisons, which are not seeking restitution for the victims (or even exacting their vengeance) but rather imposing a state-determined punishment. In any event, the argument I make here applies equally against Shichor’s imagined libertarian argument: contracting out doesn’t reduce the role of the state; it only changes the precise contractual relationship between the state and its agents.

⁴⁴ Cf. *Alamango v. Bd. of Supervisors of Albany Cnty.*, 32 N.Y. Sup. Ct. 551, 552 (1881), *quoted in* *Richardson v. McKnight*, 521 U.S. 399, 417 (1997) (Scalia, J., dissenting) (“The duty of punishing criminals is inherent in the Sovereign power. It may be committed to agencies selected for that purpose, but such agencies, while engaged in that duty, stand so far in the place of the State and exercise its political authority, and do not act in any private capacity.”). Scalia went on to argue in his *Richardson* dissent, which related to the specific question of whether private corrections officials should both be entitled to the same qualified immunity under § 1983 as their public counterparts:

[S]ince there is no apparent reason . . . for making immunity hinge upon the Court’s distinction between public and private guards, the precise nature of that distinction must also remain obscure. Is it privity of contract that

* * *

My goal in this Article is to convince the reader of two things: first, that there is a deep similarity between “employees” and “contractors,” in that both are people who do the state’s bidding for money; and second, that in light of this similarity, the arguments presented for a non-contingent distinction between the two types of agents are unsatisfying. Of course, I can’t rule out the possibility that there is some non-contingent distinction that hasn’t been argued yet or that I haven’t found in the literature; all I can do is point out flaws in existing theories.

Therefore, the following Parts deal with separate families of argument for the illegitimacy of contracted-out provision that have appeared in the literature. Throughout, I will be focusing on prison privatization, where such arguments are frequently made; but I will refer to other areas as needed.

In Part I, I discuss legality-related arguments, either based on general notions of accountability or based on compliance with specific legal commands. In Part II, I discuss the argument that private contractors contaminate the legitimacy of state action by exercising their independent, non-state judgment. In Part III, I discuss arguments that rely on the supposed “private purposes” of the private sector. And in Part IV, I discuss arguments based on public perception, “expressivism,” and “social meaning.”

I. CONCERN FOR LEGALITY

A. *Legal Accountability*

I have already alluded to the argument that private providers are less accountable⁴⁵ — in other words, that contracting out for prison

separates the two categories — so that guards paid directly by the State are “public” prison guards and immune, but those paid by a prison-management company “private” prison guards and not immune? Or is it rather “employee” versus “independent contractor” status — so that even guards whose compensation is paid directly by the State are not immune if they are not also supervised by a state official? Or is perhaps state supervision alone (without direct payment) enough to confer immunity? Or is it . . . the formal designation of the guards, or perhaps of the guards’ employer, as a “state instrumentality” that makes the difference? Since, as I say, I see no sense in the public-private distinction, neither do I see what precisely it consists of.

521 U.S. at 422.

⁴⁵ See, e.g., PAUL VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007); Jody Freeman & Martha Minow, *Reframing the Outsourcing Debates, in GOVERNMENT BY CONTRACT*, *supra* note 9, at 4-5; Poole, *supra* note 27; Sigler, *supra*

management, military services, or other functions violates core commitments of public law.⁴⁶ Mostly, these concerns turn out to be instrumental: accountability is valuable because it ensures that the agent does what the principal wants and is held accountable for any failures. The political accountability that comes from elections, the legal accountability that comes from lawsuits, and the administrative accountability that comes from agency oversight — all these are justified primarily as ways of preventing or punishing abuses. And the instrumental focus implies an empirical analysis. So, right or wrong, accountability-based critiques of privatization seem to be entirely legitimate on my view.

Some accountability-based arguments purport to be tougher on privatization, though, and in fact claim to rule it out on non-instrumental, non-empirical grounds. As Malcolm Thorburn writes: “Surely the bite of these objections remains even if private contractors regularly produce good outcomes; the simple fact that they do so without having to account for their conduct, that their operations are hidden from public scrutiny, and so forth is reason enough to object.”⁴⁷

Let’s explore why, aside from the empirical consequences, one might want accountability and public scrutiny. Thorburn — who is discussing private police services⁴⁸ — argues that without these elements, one can’t be said to be acting in the name of the state. “[L]egitimate policing,” after all, “is necessarily non-partisan” and “bound up with impartiality,”⁴⁹ and only “the state, if properly constructed, can both represent us collectively . . . and yet speak for no private party in particular.”⁵⁰ To “legitimately claim to be acting in the name of the state,” one must “meet the accountability standards set out in public law — roughly, reasonableness and fairness,”⁵¹ as well as “the rights protections set out in constitutional bills of rights,

note 3, at 156; sources cited *supra* notes 24, 34, 35.

⁴⁶ See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1301-10 (2003).

⁴⁷ Thorburn, *supra* note 19, at 439.

⁴⁸ Thorburn primarily discusses private actors who act on their own after the government has withdrawn from the service, not contracting out. He calls this “privatization,” but see *supra* text accompanying note 19.

⁴⁹ Thorburn, *supra* note 19, at 436.

⁵⁰ *Id.* at 441.

⁵¹ *Id.* (citing Malcolm Thorburn, *Criminal Law as Public Law*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW (R.A. Duff & Stuart Green eds., 2011)).

to which private citizens and private action are not similarly subject.”⁵²

So what makes private policing services illegitimate, in Thorburn’s view, is that — at least in the U.S. today — they’re not subject to public law norms or the Bill of Rights,⁵³ and therefore aren’t acting in the name of the state, which is a necessary condition for legitimate policing. Presumably the standard existing private accountability mechanisms, like tort liability, are insufficient.

But this critique isn’t an argument against privatization at all — it’s really just an argument against *unaccountability*. “Privatization” doesn’t have to mean “privatization with the minimum of procedural protections under the current state of U.S. constitutional law.” Conceivably, one could counter Thorburn’s objection by passing an APA- and/or FOIA-like statute to cover private providers,⁵⁴ by increasing judicial scrutiny,⁵⁵ or by changing constitutional doctrine so private providers become “state actors” for constitutional purposes.⁵⁶ To the extent accountability concerns are about individuals “having their day in court,” the statutes can guarantee that as well.⁵⁷ Finally, contracts — with appropriately detailed provisions

⁵² *Id.* at 442-43.

⁵³ See, e.g., David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1236-69 (1999) (noting that private police generally aren’t state actors).

⁵⁴ Cf. Alfred C. Aman, Jr., *Private Prisons and the Democratic Deficit*, in PRIVATE SECURITY, PUBLIC ORDER: THE OUTSOURCING OF PUBLIC SERVICES AND ITS LIMITS 85 (Simon Chesterman & Angelina Fisher eds., 2009) (discussing how administrative law can regulate private prisons); Nicole B. Cásarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249 *passim* (1995) (arguing that Congress should enact legislation subjecting private federal prison records to disclosure under the Freedom of Information Act); Paul R. Verkuil, *Privatizing Due Process*, 57 ADMIN. L. REV. 963 (2005) (proposing Private Administrative Procedure Act).

⁵⁵ Cf. David N. Wecht, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815 *passim* (1987) (arguing that privatized prisons require greater judicial scrutiny to review prison practices and prisoners’ rights).

⁵⁶ Any argument that a private company should be considered a state actor thus isn’t an argument against privatization; it’s just an argument for a more tightly regulated privatization. It could be an argument against privatization *given the law as it currently exists*, but as long as the problem could be fixed with some conceivable change in the law, it’s not an argument against privatization as such, merely an argument against certain forms of privatization.

Incidentally, private prisons already are state actors for constitutional purposes insofar as they interact with prisoners. See Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 OHIO ST. L.J. 983, 1006-10 (2011). The state action doctrine looks to actual function, not to the employee versus contractor distinction. See *West v. Atkins*, 487 U.S. 42, 55-56 (1988).

⁵⁷ The Israeli constitution, for instance, already has a “quasi-public” entities

and adequate monitoring — can be used to extend public law values to private contractors.⁵⁸

It's true that "employee" and "independent contractor" are legal terms of art distinguished in part by the extent of the principal's control rights,⁵⁹ so one could argue that employees are more accountable than contractors *by definition*. But this argument would inappropriately give too much importance to only *one* form of control. One can have significant *de facto* control over one's contractor just by having known reasons for failing to renew the contract, possibly sometimes even more than over public employees protected by qualified immunity⁶⁰ or civil-service rules.⁶¹ Where providers effectively compete with one another, market accountability can also

doctrine," which "subjects any body authorized to employ governmental powers to the norms of public law, most importantly human rights laws, as well as to the jurisdiction of the Israeli administrative courts"; concerns about the accountability of private operators are thus less of an issue in Israel than in the United States. See Medina, *supra* note 23, at 693.

⁵⁸ See Freeman, *supra* note 46, *passim*; see also J. Michael Keating, Jr., *Public over Private: Monitoring the Performance of Privately Operated Prisons and Jails*, in PRIVATE PRISONS AND THE PUBLIC INTEREST, *supra* note 26, at 130 (discussing monitoring mechanisms); Douglas C. McDonald, *Public Imprisonment by Private Means: The Re-emergence of Private Prisons and Jails in the United States, the United Kingdom, and Australia*, 34 BRIT. J. CRIMINOLOGY SPECIAL ISSUE 29, 38-39 (1994), reprinted in PRISONS IN CONTEXT 29 (Roy D. King & Mike Maguire eds., 1994) ("[S]ome government officials who have turned to contractors report that they have done so to increase control and better ensure performance. . . . [T]he Bay County (Florida) commissioners turned to contractors because they were unable to gain assurances from the jail administrator (the sheriff) that the conditions of confinement would be improved."); Taylor & Pease, *supra* note 25, at 192 (arguing that prison privatization can be highly beneficial if accompanied by the proper safeguards, which should be written into statutes and contracts, but that the situation will get worse if those safeguards are absent); cf. Nigel South, *Reconstructing Policing: Differentiation and Contradiction in Post-War Private and Public Policing*, in PRIVATIZING CRIMINAL JUSTICE, *supra* note 25, at 76, 100 (noting concerns raised by private policing and urging the introduction of "a system which ensures the public regulation and accountability of private arrangements for policing and security").

⁵⁹ See, e.g., RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006) ("[A]n employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work"); Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?*, 14 LAB. LAW. 457, 458-60 (1999) ("The right to control . . . test distinguishes an employee from an independent contractor based on the extent of control an employer can exercise over its worker.").

⁶⁰ Compare *Procunier v. Navarette*, 434 U.S. 555 (1978) (holding qualified immunity for public prison guards), with *Richardson v. McKnight*, 521 U.S. 399 (1997) (holding no qualified immunity for private prison guards).

⁶¹ See David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 671 (1986).

be a powerful tool that cuts in favor of private provision,⁶² and the same could be said of legal accountability, if private providers are more amenable to lawsuits.⁶³

So the empirical argument about whether public or private providers are more accountable could go both ways. At the end of the day, given the proper safeguards and bearing in mind the less-than-stellar record of the public sector,⁶⁴ private provision could conceivably be *more* accountable than public provision.⁶⁵

One might still answer that contractual accountability, or other alternative sources of accountability, would never work — that private providers, because of their profit-based incentives, could never act as neutrally as government employees, even if we subjected them to every known procedural and constitutional requirement.⁶⁶ Ahmed White's critique proceeds along roughly these lines. He writes that the rule of law requires the government to be a "legally and politically transparent entity with clearly demarcated boundaries,"⁶⁷ whereas the private prison "thoroughly merges the private and the public and blurs the boundaries of the sovereign."⁶⁸ This blurring "expand[s]" "the coerciveness of the state" because it "conceal[s] the identity of state actors."⁶⁹

While White's critique is sometimes phrased as though it's non-empirical,⁷⁰ it turns out to hinge on empirical predictions — though

⁶² See also *id.* at 670-71.

⁶³ See, e.g., *Minnecci v. Pollard*, 132 S.Ct. 617, 623 (2012) (recognizing that federal private prisons can be sued under state tort law, whereas the absence of such a remedy for federal public prisons required the creation of a *Bivens* remedy in *Carlson v. Green*, 446 U.S. 14 (1980)).

⁶⁴ But see Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, in *GOVERNMENT BY CONTRACT*, *supra* note 9, at 128, 130-33, 143-47 [hereinafter *How Privatization Thinks*] (criticizing this comparative perspective); Dolovich, *State Punishment*, *supra* note 23, at 442-44, 471-72, 506-07, 544-45 (similar).

⁶⁵ See, e.g., Ryan & Ward, *supra* note 25, at 58 ("[T]here is no necessary connection between . . . accountability and public ownership. It would be quite possible . . . to devise legislation under which [prisons] were privatized and simultaneously became much *more* accountable . . .").

⁶⁶ See Freeman, *supra* note 46, at 1335-39.

⁶⁷ White, *supra* note 30, at 119.

⁶⁸ *Id.* at 120.

⁶⁹ *Id.* at 137 (citing COHEN, *supra* note 34, at 56-86); see also SHICHOR, *supra* note 30, at 58-60 ("There is an increasing boundary blurring between the private and the public spheres.").

⁷⁰ See White, *supra* note 31, at 120 ("[T]he private prison cannot help but be antithetical to the rule of law."); *id.* at 121 ("[T]his endemic confusion of public and private ushers the private prison into a state of inevitable illegitimacy."); *id.* at 141 ("[T]he confused juridical structure of the contemporary private prison is intrinsically

ones he believes are fairly solid. The state “*probabl[y]*” reduces its civil-rights litigation expenses when it privatizes⁷¹ (though it’s possible that contractors would simply demand correspondingly high contract payments to cover litigation expenses). The state would “*likely*” be insulated from “a more symbolic, political” accountability.⁷² Less solidly: confusion over jurisdiction (in the case of interstate prisoner transfers) and access (to records and the like) “*perhaps* cannot lend[] itself to any consistent resolution.”⁷³ There is a “*possibility*” that private prison firms will manipulate disciplinary proceedings to “sustain their occupancy rates.”⁷⁴ And so on.

White’s view is that all these results are likely and indeed “predictable,”⁷⁵ and that there are “inherent, structural reasons to suppose that private prisons will always, on the whole, remain more dysfunctional and indeed more socially malignant than public prisons.”⁷⁶ But the important point here is that he doesn’t deny that “aggressive courts, competent legislatures, and zealous reform *theoretically could* resolve” these problems — even if they *probably* won’t.⁷⁷

The accountability critique thus is not an inherent critique of privatization. Instead, it is a critique of unaccountability, sometimes coupled with an empirical prediction that abuses are more likely under privatization.

connected to endemic corruption.”).

⁷¹ *Id.* at 138-39 (emphasis added).

⁷² White, *supra* note 30, at 139 (emphasis added).

⁷³ *Id.* at 140 (emphasis added).

⁷⁴ *Id.* at 141 (emphasis added); see also Dolovich, *State Punishment*, *supra* note 23, at 518-23.

⁷⁵ White, *supra* note 30, at 144.

⁷⁶ *Id.* at 145; see also J. Robert Lilly & Mathieu Deflem, *Profit and Penalty: An Analysis of the Corrections-Commercial Complex*, 42 CRIME & DELINQ. 3, 14 (1996) (warning of “the *monetary colonization of criminal justice*, which points to the fact that when the success-oriented mechanisms of the economic system enter into the corrections domain, concerns for profit, efficiency, competition, and money may radically alter the latter’s normative goals”).

⁷⁷ White, *supra* note 30, at 146. White does state that “private prisons neither can construct nor implement between themselves general, formally equal, predictable, and non-retroactive legal norms,” *id.* at 119, which suggests a view that the unaccountability is *inherent*, not contingent. But it is not clear why this should be true inherently, and the suggestion conflicts with White’s view that these problems could theoretically be resolved.

B. Specific Legal Prohibitions

Let's move on to arguments that privatization violates specific legal provisions. These, too, aren't about privatization as such. Many of these legal provisions actually don't distinguish between public and private providers. As for those that do, one can of course favor following the law for non-instrumental reasons, but such a procedural concern for legality doesn't support the substance of the law and thus doesn't provide any argument against changing the law.

One could argue, for instance, that prison privatization violates the Due Process Clause because government can't "delegate discretionary functions to private entities with a financial stake in the way such discretion would be applied."⁷⁸ But the Due Process Clause itself says nothing about privatization as such. One of the classic cases in this line of doctrine, *Tumey v. Ohio*,⁷⁹ involved not a private contractor at all, but rather a clearly public village mayor/judge who, the Court held, would be unduly swayed to convict defendants because his salary was increased by the amount of the "costs" paid by convicted (but not acquitted) defendants.

Pecuniary self-interest can affect the judgment of both public and private actors. The Due Process argument is thus an argument for neutral compensation rules, not against privatization. As a result, if Due Process doctrine ends up applying with special force to private parties — sometimes it does⁸⁰ and sometimes it doesn't⁸¹ — it's

⁷⁸ Anderson, *supra* note 25, at 122-23.

⁷⁹ *Tumey v. Ohio*, 273 U.S. 510, 520-23 (1927).

⁸⁰ See, e.g., *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973) (finding the Alabama Board of Optometry, a private party, should not conduct licensure revocation hearings because it has substantial pecuniary interest in the legal proceedings); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) ("This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment."); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121-22 (1928) (finding ordinance requiring landowner to seek consent from neighboring landowners to construct a new home violated the Fifth Amendment because the neighboring landowners "are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice"); *Eubank v. City of Richmond*, 226 U.S. 137, 143-44 (1912) ("The statute and ordinance, while conferring the power on some property holders . . . , creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously This . . . makes it . . . an unreasonable exercise of the police power.")

because of an empirical prediction that how private parties exercise their discretion, given how they're compensated, will more often tend to affect their bottom line and that this will more often skew their judgment.⁸²

One could also argue that prison privatization (at least at the federal level) violates the nondelegation doctrine.⁸³ But again, the Nondelegation Clause says nothing about privatization as such — there isn't even a Nondelegation Clause in the Constitution. The doctrine itself derives from Article I's Vesting Clause, which vests all legislative power in Congress and therefore (so the Supreme Court has said) prevents any delegation of such power.⁸⁴ But because the focus is on how much power Congress gives up, it's not clear why it should matter whether the recipient of the delegation is public or private,⁸⁵

⁸¹ See, e.g., *Schweiker v. McClure*, 456 U.S. 188, 195-200 (1982) (holding hearings on disputed Medicare claims may, consistent with due process, be held by private insurance carriers in that context); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 108-09 (1978) ("Appellees and the dissent argue that the California scheme constitutes an impermissible delegation of state power to private citizens because the Franchise Act requires the Board to delay franchise establishments and relocations only when protested by existing franchisees who have unfettered discretion whether or not to protest. The argument has no merit. Almost any system of private or quasi-private law could be subject to the same objection."); *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 194 (1936) (no private delegation in defining prohibited "unfair competition" to include a third party's knowingly selling a trademarked product at a price below that fixed in a contract between two parties); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 530-31 (1917) (property owners may vote to *remove* a restriction on other property owners when the restriction was an exercise of police power); *White v. Lambert*, 370 F.3d 1002, 1013 (9th Cir. 2004) (holding that Due Process analysis proceeds similarly for public and private prisons); cf. *Montez v. McKinna*, 208 F.3d 862, 866 (10th Cir. 2004) (noting it is not a violation of the Constitution or of any federal or state law to transfer an inmate from a state prison to a private prison). The Supreme Court dodged the issue in *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 614 (1937).

⁸² As a very specific example of this concern, consider that while the Due Process Clause may allow the delegation of a limited zoning power to private parties, the Establishment Clause carves out an exception when the recipients of this power are defined by reference to religion, precisely because of the fear that the power will be used for religious purposes. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982).

⁸³ Anderson, *supra* note 25, at 122 (issue mentioned in section title); Field, *supra* note 24, *passim*; Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 915 (1988) [hereinafter *Delegation Doctrine*] (arguing that the case against private prisons on delegation grounds is "extremely close").

⁸⁴ See *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001).

⁸⁵ See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1757 (2002); Lawrence, *supra* note 61, at 667-68. If anything,

and indeed, the federal nondelegation doctrine doesn't distinguish between public and private delegations.⁸⁶ And the doctrine's requirement that any delegation be accompanied by an "intelligible principle"⁸⁷ is motivated by various empirical concerns, including the (debatable) fear that an over-delegating Congress will legislate irresponsibly and that the recipients of broadly delegated power will act unaccountably.⁸⁸

Some states take a stronger view against delegations to private parties,⁸⁹ but even then, the concern (when clearly stated⁹⁰) is often

one might think delegations to private parties might be *more* acceptable than delegation to executive agencies, since delegations to private parties don't aggrandize the Executive Branch at the expense of Congress. See Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 347 (1998); Lawrence, *supra* note 61, at 665.

⁸⁶ See, e.g., *Curran v. Wallace*, 306 U.S. 1 (1939) (upholding a delegation to tobacco growers without ever mentioning the word "private"); *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 577-78 (1939) (upholding a delegation to private milk producers); Lawrence, *supra* note 61, at 665-66 (arguing that the vesting clause does not limit the scope of private delegations). (In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940), the Court found that there was no delegation to private parties because ultimate authority rested with government actors.) In the related context of delegation of judicial power, see *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985).

The same goes for the more limited area of delegations of power to make regulations respecting federal property under the Property Clause. U.S. CONST. art. IV, § 3; see, e.g., *Butte City Water Co. v. Baker*, 196 U.S. 119, 125-26 (1905) (holding that Congress may delegate to local miners the enactment of minor regulations regarding the disposal of public land).

⁸⁷ See *Am. Trucking*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (internal quotation marks omitted)).

⁸⁸ See *Ind. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 671 (Rehnquist, J., concurring in the judgment). But see Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L., ECON. & ORG. 81 *passim* (1985) (disputing this empirical view); Posner & Vermeule, *supra* note 85, at 1743-54 (same). See generally DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1995) (criticizing the delegation of powers).

⁸⁹ See generally Robbins, *Delegation Doctrine*, *supra* note 83, at 929-50 (highlighting the rules established by state delegation cases); 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.14, at 141-47 (1958) ("The law of state courts on delegation to private parties is likewise unsteady and conflicting."); KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.14, at 73-76 (Supp. Ed. 1970); 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3:12, at 196-98 (2d ed. 1978) ("The first edition of the Treatise and the 1970 Supplement elaborately presented the state law concerning delegation to private parties, but retention of that material in the present edition, along with the updating of it, seems undesirable, because identifiable

empirical. According to the Texas Supreme Court, for instance, private delegations are more problematic than public delegations because of possible “personal or pecuniary interest[s]” and because of the possibility of “public powers [being] abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government.”⁹¹ The ultimate rule for judging private delegations in Texas depends on arguably consequentialist factors like whether the delegate’s actions are “subject to meaningful review,” whether affected persons are “adequately represented in the decision-making process,” whether the Legislature has “provided sufficient standards,” and the like.⁹²

Accordingly, commentators have discussed delegation to private prisons in terms of explicitly empirical criteria, such as the possibility that the profit motive will bias disciplinary decisions⁹³ or grant too much discretion to act arbitrarily.⁹⁴

Similar empirical concerns can be seen to animate other constitutional arguments,⁹⁵ for instance under the Take Care Clause⁹⁶ or the Appointments Clause.⁹⁷

principles do not emerge.”). Some states treat public and private delegations as aspects of a single delegation doctrine, *see* *Tulsa Cnty. Deputy Sheriff’s Fraternal Order of Police, Lodge No. 188 v. Bd. of Cnty. Cmm’rs. of Tulsa Cnty.*, 995 P.2d 1124, 1129 (Okla. 2000) (“Because the Legislature has provided that all county jails are subject to the same standards whether operated by a county or a private company, it is not necessary for the Legislature to create entirely new standards for privately-operated county jails when adequate standards already exist.”); *Schryver v. Schirmer*, 171 N.W.2d 634, 636-37 (S.D. 1969) (striking down a private delegation but without referencing any different test for private than for public delegations).

⁹⁰ Sometimes a rule against private delegations is stated but its basis is not explained. *See, e.g.,* *Parrack v. City of Phoenix*, 340 P.2d 997, 998-99 (Ariz. 1959); *Corning Glass Works v. Ann & Hope, Inc. of Danvers*, 294 N.E.2d 354, 362 (Mass. 1973); *Gen. Elec. Co. v. Wahle*, 296 P.2d 635, 649 (Or. 1956).

⁹¹ *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 469 (Tex. 1997).

⁹² *Id.* at 472. For similar empirical accountability concerns, *see* *Grp. Health Ins. of N.J. v. Howell*, 193 A.2d 103, 108-11 (N.J. 1963); *In re Int’l Serv. Agencies v. O’Shea*, 430 N.Y.S.2d 224, 228-29 (N.Y. Sup. 1980); *Hillman v. N. Wasco Cnty. People’s Util. Dist.*, 323 P.2d 664, 671-75 (Or. 1958), *overruled on other grounds*; *Maulding v. Clackamas Cnty.*, 563 P.2d 731, 734 (Or. 1977).

⁹³ *See, e.g.,* Field, *supra* note 24, at 662-63 (discussing specific ways that the profit motive will bias private prison decisionmaking); Robbins, *Delegation Doctrine*, *supra* note 83, at 949-50 (private interest would bias disciplinary decisions).

⁹⁴ *See, e.g.,* Field, *supra* note 24, at 667 (noting the fear of over-broad discretion); Robbins, *Delegation Doctrine*, *supra* note 83, at 949 (noting that arbitrary establishment of rules by private prisons would be unconstitutional).

⁹⁵ *See, e.g.,* *Pischke v. Litscher*, 178 F.3d 497, 500 (7th Cir. 1999) (“The Thirteenth Amendment [does not forbid private prisons]. Nor are we pointed to or

But even suppose the law is frankly unsympathetic to privatization. Perhaps there is some legal provision that bars private ownership or operation as such. One example might be the prohibition in the Federal Activities Inventory Reform Act of 1998 against contracting out any “inherently governmental function,” which the statute defines as “a function that is so intimately related to the public interest as to require performance by Federal Government employees.”⁹⁸ This definition obviously is not a model of clarity, but suppose it can be fairly interpreted to bar private federal prisons.⁹⁹ As another example, the German constitution provides that “[t]he exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law.”¹⁰⁰ (Even this example is more flexible than it

can think of any other provision of the Constitution that might be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than by a government. . . . The Wisconsin statute authorizing transfers to private prisons requires those prisons to adhere to [the same standards of reasonable and humane care as the prisoners would receive in an appropriate Wisconsin institution,] and no evidence has been presented that this requirement is being or will be flouted. . . . A prisoner has a legally protected interest in the conduct of his keeper, but not in the keeper’s identity.” (citation omitted)).

⁹⁶ U.S. CONST. art. II, § 3, cl. 4; *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 209-10 (2000) (Scalia, J., dissenting) (noting that private attorneys general have “significant discretion in choosing enforcement targets,” operate “without meaningful public control,” have “massive bargaining power,” and can dictate enforcement priorities of public agencies).

⁹⁷ U.S. CONST. art II, § 2; John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 120 (1998) (dismissing the idea that *Buckley v. Valeo* would have come out the other way if private parties were made FCC Commissioners); *id.* at 122 (noting accountability concerns behind Appointments Clause); *id.* at 124 (suggesting power vested in private parties does not always rise to the level of “significant federal authority”). For an argument that separation of powers principles do allow assignment of power to private parties, see Kinkopf, *supra* note 85, at 383-85 (Red Cross); *id.* at 387-90 (*qui tam* provisions); see generally Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989) (arguing that *qui tam* actions — actions where Congress enlists the aid of a private citizen in enforcing federal statutory schemes — are constitutional).

⁹⁸ Federal Activities Inventory Reform Act of 1998 § 5(2)(A), Pub. L. No. 105-270, 112 Stat. 2382, 2384; see generally Aman, *supra* note 54 (discussing whether certain functions are inherently governmental and should be precluded from privatization).

⁹⁹ See, e.g., Anderson, *supra* note 25, at 123-24 (arguing that prison administration falls under the Federal Activities Inventory Reform Act’s provision against contracting out inherently governmental functions).

¹⁰⁰ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGB1.I at 2304 (Ger.) art. 33(4) (“Die Ausübung

may seem: the “as a rule” formulation does allow some leeway, and in January 2012 the German Constitutional Court upheld a state statute delegating to employees of a private psychiatric hospital certain emergency powers to use force against patients.¹⁰¹)

One can certainly believe that — regardless of why the legal provision was enacted or whether it’s a good idea now — compliance with the law is desirable, and not just because compliance is instrumentally useful.¹⁰² I am glad to concede for purposes of this Article that compliance with the law may have non-instrumental value and that empirics thus are irrelevant;¹⁰³ but again, the argument isn’t about privatization as such. A legality-based argument of this sort obviously says nothing about whether the law at issue is a good idea.

hoheitsrechtlicher Befugnisse ist als ständige Aufgabe in der Regel Angehörigen des öffentlichen Dienstes zu übertragen, die in einem öffentlich-rechtlichen Dienst- und Treueverhältnis stehen.”), translated in DEUTSCHER BUNDESTAG, BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY 34 (Oct. 2010), available at <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

¹⁰¹ Bundesverfassungsgericht [Federal Constitutional Court] Jan. 18, 2012, 2 BvR 133/10, available at http://www.bverfg.de/entscheidungen/rs20120118_2bvr013310.html; see also Max Steinbeis, *Outsourcing als Mittel der Haushaltssanierung ist verfassungswidrig*, VERFASSUNGSBLOG (Jan. 18, 2012), <http://verfassungsblog.de/outourcing-als-mittel-der-haushaltssanierung-ist-verfassungswidrig/>.

Another example outside of the prison context would be the Mexican constitutional requirement that the government have “direct dominion” over oil deposits and other natural resources. Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 27, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.), art. 27 (“Corresponde a la Nación el dominio directo . . . de todos los minerales o substancias que . . . constituyan depósitos cuya naturaleza sea distinta de los componentes de los terrenos, tales como . . . el petróleo . . .”). Yet another example would be treaty-based bans on the use of mercenaries. See, e.g., Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) art. 49, June 8, 1977, 16 I.L.M. 1391; Convention for the Elimination of Mercenaries in Africa, O.A.U. Doc. CM/433/Rev.L, Annex 1 (1972); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (1970). See generally Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT’L L. 75 (1998) (discussing such treaties).

¹⁰² See, e.g., Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 15-16, 40 n.104 (arguing that, in genuine liberal democracies, citizens have moral obligations to obey “permissibly dumb but not illiberal” laws).

¹⁰³ But I have my doubts on this score. See A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 31 (1981) (“[T]he simple fact that conduct is required or forbidden by law is irrelevant to that conduct’s moral status, even within decent states; we should decide how best to act on independent grounds.”).

Therefore, it doesn't provide us with any arguments against repealing the law.

II. DEFERENCE AND THE AGENT'S INDEPENDENT JUDGMENT

Can we develop a theory that would ascribe significance to the private nature of the actor as such, even if legality and accountability are taken care of? One possibility would be a novel theory against privatizing the infliction of criminal sanctions, pioneered by Alon Harel, both alone¹⁰⁴ and with co-authors¹⁰⁵: an “argument from moral burdens.”¹⁰⁶

This theory applies both to the delegation of punishment to independent private actors, as is the case with “shaming punishments,”¹⁰⁷ and to the delegation of punishment and other applications of force to corporations by contract, as is the case with private probation service providers¹⁰⁸ and private prisons.¹⁰⁹ The argument also applies to private executioners and mercenaries.¹¹⁰ However, the moral burdens argument turns out to be unable to adequately distinguish between public employees and private contractors, as the terms are commonly understood.

A. *The Invalidity of Independent Judgment*

Suppose the state convicts a criminal defendant and determines his proper sentence. Now suppose the state asks *me* — some random person off the street — to inflict the sanction. May I do so?

¹⁰⁴ See Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Argument from Moral Burdens*, 28 CARDOZO L. REV. 2629 (2007) [hereinafter Harel (2007)]; Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, 14 LEGAL THEORY 113 (2008) [hereinafter Harel (2008)].

¹⁰⁵ See Harel & Porat, *supra* note 2. I'll henceforth attribute this entire theory to Harel alone, since the Harel and Porat version does not seem to differ significantly from Harel's solely authored versions cited *supra* note 104. In Part II.B *infra*, I also discuss a paper developing the same themes and co-authored with Avihay Dorfman. See Avihay Dorfman & Alon Harel, *The Case Against Privatization*, PHIL. & PUB. AFFAIRS (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103365.

¹⁰⁶ See Harel (2007), *supra* note 104 (title).

¹⁰⁷ See *id.* at 2629; Harel (2008), *supra* note 104, at 114; Harel & Porat, *supra* note 2, at 770 n.72.

¹⁰⁸ See Offender Management Bill, 2006, H.C. Bill [9] (U.K.), available at <http://www.publications.parliament.uk/pa/cm200607/cmbills/009/2007009.pdf>; Harel (2008), *supra* note 104, at 114.

¹⁰⁹ See Harel (2008), *supra* note 104, at 114; Harel & Porat, *supra* note 2, at 781.

¹¹⁰ See Harel & Porat, *supra* note 2, at 781 n.116.

Harel argues that I can't morally inflict the sanction without making an independent judgment as to whether this convicted defendant deserves the punishment I'm about to mete out.¹¹¹ (This is the "moral burden" that gives the argument its name.) I shouldn't just trust the state's judgment — "such trust could never be justified."¹¹² But once I've made my own decision and inflicted the punishment, the punishment has now been privately inflicted because of a private exercise of judgment; I'm morally responsible for it; it is "at least partially a private act."¹¹³ It no longer counts as criminal punishment.¹¹⁴ And this is illegitimate because "[i]t is demeaning to subject a person to the normative judgment of another citizen rather than to the normative judgment of the state."¹¹⁵

The result is that, "[t]o the extent that criminal sanctions for violating state-issued prohibitions are justified, they . . . have to be inflicted by the same agent who issues the prohibitions."¹¹⁶ Or, in another formulation: "In order to count as an execution of a sanction whose nature and severity is determined by the state (rather than merely a sanction whose severity happens to converge with the state's decision), it ought to be inflicted by public officials rather than private contractors or, more generally, by individuals who satisfy some formal requirements that affiliate them with the state."¹¹⁷

Harel thus draws a strong distinction between the duties of two types of people. The citizen has to exercise his independent judgment. But the "official" — "[a] judge, a prison guard or even an executioner" — is, within boundaries, "entitled to rely on the state's judgments concerning the appropriateness of the sanctions." Indeed, the official *must* "perform [his] task irrespective of his private convictions"¹¹⁸ and "obey blindly . . . the orders of the state."¹¹⁹

¹¹¹ Since most of the following points appear both in Harel's solely authored articles and in Harel and Porat's article, with apologies to Ariel Porat, I will be using "Harel" generically to refer either to Harel alone or to Harel and Porat.

¹¹² Harel (2007), *supra* note 104, at 2641; *see also* Harel (2008), *supra* note 104, at 129 ("[I]t is doubtful whether such trust could ever be justified."); Harel & Porat, *supra* note 2, at 781-82 ("It seems evident that it is impermissible for you to inflict sanctions unless you are convinced that the sanctions are proportional to the gravity of the offense and that the procedures used are fair.").

¹¹³ Harel & Porat, *supra* note 2, at 783.

¹¹⁴ *See* Harel (2008), *supra* note 104, at 128-29.

¹¹⁵ Harel & Porat, *supra* note 2, at 785-86.

¹¹⁶ Harel (2008), *supra* note 104, at 130.

¹¹⁷ Harel & Porat, *supra* note 2, at 783.

¹¹⁸ Harel (2007), *supra* note 104, at 2642; *see also* Harel (2008), *supra* note 104, at 117 ("To qualify as a state-inflicted sanction, the agent inflicting it must be an agent

All this raises the following questions. First, if the person who inflicts the punishment must be *the same agent* who issued the prohibition, virtually all punishment is immoral: prohibitions are issued by *legislators*, who aren't the same people as prison guards and executioners. Even if we characterized the issuer of the prohibition as *Congress*, usually it's not Congress that locks people up.¹²⁰

So, when Harel says sanctions must be inflicted by the *same agent* that issues the prohibition, he must mean it's *the government as a whole* that must lock people up. But, as we've seen, the government can only act through agents. Harel recognizes as much when he insists on "individuals who satisfy some formal requirements that affiliate them with the state."¹²¹

But then why can't the "formal requirements that affiliate [someone] with the state" include a prison-management contract? Since public prison guards are also private individuals until they sign an employment contract, why is one contract better than another?

The next question follows directly: if public prison guards undergo some transformation that entitles them to suspend their personal moral judgment as to whether particular inmates deserve what they're getting, why can't the state work the same transformation on a private prison firm and its employees? Or, conversely, perhaps this argument establishes a duty of independent moral judgment for *everyone*, including public employees, thus making even public punishment a "private act"?

Harel recognizes this concern and explains why public employees have no such duty of independent moral judgment. He distinguishes between "justifying a practice and justifying a particular action falling under it."¹²² One may become a public executioner if, in one's judgment, the position "is desirable from a moral point of view, i.e., it

that is morally barred from acting on the basis of its own independent judgments, for example, a judge or a prison guard.").

¹¹⁹ Harel & Porat, *supra* note 2, at 784.

¹²⁰ *But see* James Hamilton & John C. Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 HARV. J. ON LEGIS. 145, 149 (1984) (noting that those convicted of contempt of Congress used to be imprisoned in the guard house in the Capitol basement).

Indeed, American federal constitutional doctrine takes it as given that the executive branch, by and large, exercises *delegated* power. *See supra* text accompanying notes 83-88. Moreover, as a matter of American federal constitutional law, Congress is barred from exercising executive power. *See Bowsher v. Synar*, 478 U.S. 714, 722, 726 (1986).

¹²¹ Harel & Porat, *supra* note 2, at 784.

¹²² *Id.* (quoting John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 3 (1955) (internal quotation marks omitted)).

promotes the public good, and consequently, it is morally permissible to perform it.”¹²³ But once one has accepted the position, one should obey any orders that are “within the scope of [the] office.”¹²⁴ There are constraints on the public executioner’s obedience, but these are “much less restrictive than the constraints on the obedience of a private individual.”¹²⁵

Harel’s view that certain functions require putting one’s full independent moral judgment on hold — deferring to someone else’s judgment as long as the position itself is justifiable — is surely sound. Still unexplained, however, is why one can’t sign up for such a position as a contractor as opposed to an employee. If a public warden can legitimately accept prisoners whose crimes he hasn’t examined, and if he can legitimately hire public prison guards who can legitimately discipline prisoners whose crimes *they* haven’t examined, why can’t Corrections Corporation of America and its employees do the same?¹²⁶

B. Two Kinds of Deference

The theory thus seems incomplete. Fortunately, Harel addresses these concerns in a recent paper co-authored with Avihay Dorfman.¹²⁷

Dorfman and Harel adopt the same framework that was on display in the articles discussed above¹²⁸: certain acts (particularly criminal punishment and warrmaking) must be carried out in the name of the state. They’re only legitimate if they’re attributable to the state, regardless of how well they’re done. To the extent they’re not attributable to the state, they become private acts — done *for* the state rather than *by* the state — and thus invalid.¹²⁹ And one factor that can make an act private is the actor’s exercise of his own independent

¹²³ *Id.*

¹²⁴ *Id.* at 785.

¹²⁵ *Id.*

¹²⁶ Moreover, one might generalize this point: if a public employee can sign up for a job where he imposes punishment without exercising his independent moral judgment (because he’s entitled to consider the morality of the overall course of action), why can’t independent private persons also impose shaming punishments on convicted defendants, suppressing their independent judgment based on a consideration of the morality of the overall course of action of trusting the government to convict people correctly?

¹²⁷ Dorfman & Harel, *supra* note 105.

¹²⁸ See *supra* Part II.A.

¹²⁹ Even worse, by permitting what is essentially private punishment, the state is “actively stamp[ing] the moral inferiority of those subject to the rule of private entities with a public seal.” Dorfman & Harel, *supra* note 105, at 25.

judgment. Agents carrying out criminal punishment or war-making must follow the state's orders *because* they're the state's orders (the authors call this "fidelity by deference"), not because they agree with them ("fidelity by reason").

The novel aspect of the Dorfman and Harel article is that they now justify why it is that fidelity by reason characterizes private contractors, while fidelity by deference characterizes public employees. Why, I asked above, can't CCA choose to suppress its own moral judgment in the same way that an employee does? Dorfman and Harel answer:

[T]he government cannot simply make a private citizen its agent by asking him to undertake some government tasks, say, imprisoning convicted criminals. A person cannot merely approach the performance of the task at stake from the point of view of the state — there is no such ready-made perspective lying out there. The reason that the government cannot turn a willing individual into its agent simply by asking the individual to perform "a task" is that, in reality, the tasks dictated by the state are typically underspecified such that they leave broad margins of discretion.¹³⁰

True deference requires two conditions to be met. First, there has to be an "institutional structure," a "community of practice," within which the agent determines what actions deference requires.¹³¹ The point of view of the state "cannot be specified apart from an ongoing practice of executing government decisions. Execution is never mechanical. It requires ongoing practical deliberation on the part of public officials when determining how to proceed with the concrete implementation of government policy."¹³² This collective deliberation "is founded on a joint commitment to support the practice of executing laws by taking the intentions and activities of other officials as [a] guide to their own conduct."¹³³

Of course, the requirement that there be a "community of practice," by itself, is not an argument against privatization, since a group of

¹³⁰ *Id.* at 11-12.

¹³¹ *Id.* at 13-14.

¹³² *Id.* It may seem that Dorfman and Harel, through the use of the words "community" and the plural "officials," require that there be more than one executor for a delegation to be valid. But in fact they do elsewhere grant that "an individual who undertakes to execute government laws" could have "a personal practice" that would qualify. *Id.* at 15.

¹³³ *Id.* at 14.

private individuals could also form such a community. After all, private lawyers and private doctors have developed highly sophisticated codes, and who's to say private prison wardens or corrections officers, or private soldiers, or corporate executives at private prison or military firms, couldn't do the same?

This is where the second condition comes in: "[t]he practice must be able to integrate the political offices into this community."¹³⁴ The community practice can't be limited to bureaucrats but must also include politicians. This inclusion is "necessary to forge a connection between the rules generated by [the practice] and the general interest (as seen from the public point of view)."¹³⁵ The deliberation thus "can span the entire range of governmental hierarchy, which is to say all the way up to the highest political office and all the way down to the lowest-level civil servant who happens to push the proverbial button."¹³⁶

This argument does indeed seem to draw a bright line between public employees and private contractors, since retaining a zone of presumptive freedom for the contractor can be thought to be a defining characteristic of privatization.¹³⁷ Dorfman and Harel write:

[T]he private community of practice is not integrative in the sense that it does not provide politicians adequate opportunity constantly to shape its contours by commanding the unmediated deference of those who are in charge of the execution of the relevant tasks. Privatization, insofar as it cuts political officials off from the community of practice, denies the remaining members of this practice — e.g., employees of a private firm — access to the conception of the general interest as articulated from a point of view shared with the relevant political officials. It is thus implausible to describe their efforts in executing laws or judicial decisions as the doings of the state.¹³⁸

The work of private contractors is thus, in their view, inseparable from the deference of reason — and therefore not attributable to the state, and therefore illegitimate in areas that must be state-run like prisons

¹³⁴ *Id.* at 15.

¹³⁵ *Id.* at 18.

¹³⁶ *Id.*

¹³⁷ See, e.g., Hart et al., *supra* note 20, at 1132 (contractor has residual control rights).

¹³⁸ Dorfman & Harel, *supra* note 105, at 17-18.

and militaries — because politicians can't intervene in it the way they can with public employees.

The Dorfman and Harel article has the virtue of going into much greater detail than the previous articles in this vein. I would nonetheless raise the following concerns.

1. The Functional Definition of “Public” and “Private”

First, Dorfman and Harel's distinction between “public official” and “private employee” is (sensibly enough) not formal. It's not a matter of labeling; it's a matter of whether there's a community of practice that integrates politicians.

Thus, there might be an organization that (almost) everyone would call a private contractor but that is nonetheless public by Dorfman and Harel's definition. Dorfman and Harel dismiss this possibility as “fantastic”¹³⁹ (in a bad way¹⁴⁰), though it's perhaps wrong to dismiss it so strongly. Suppose we contracted out executions to Acme Execution Corp., with the contractual requirements that the corporation would only execute the people the state provided at the times the state mandated, that any lethal-injection drug protocols had to be preapproved (FDA-style) by the state, and that a call from the governor's office at any time would suffice to terminate the execution process. Acme is a publicly traded corporation with executives and non-civil-service employees, which makes its profits by efficiently managing its slim, non-unionized workforce. Most people would call this privatization; and yet there can be a community of practice within the corporation, and there seems to be adequate political input into what seems like a relatively discretionless job. The same would be true if discrete military operations were contracted for one at a time, for instance launching a particular type of missile at a particular address in a hostile country, with the government retaining the ability to abort the operation at any time.

Indeed, elsewhere, Dorfman and Harel grant that there may be a theoretical possibility that the state could provide “comprehensive guidance as to how to proceed with the task in question”; in such cases, “the execution remains the doing of the state” even if the function is outsourced, so the problem doesn't arise.¹⁴¹ (Forgive the ambiguity: “execution” in the last sentence meant “execution of the law,” not “execution of the criminal” as in the previous hypo.)

¹³⁹ *Id.* at 18.

¹⁴⁰ Cf. Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 210 n.305 (1997).

¹⁴¹ Dorfman & Harel, *supra* note 105, at 12 n.22.

Accordingly, it seems that Dorfman and Harel would have no quarrel with such a “privatization,” and in fact would characterize it as no privatization at all.

Similarly, suppose we had a privatization (in the colloquial sense) with the requirement that the activity be under close government supervision. Dorfman and Harel are clear that mere government supervision isn’t enough to make the execution of the task that of the state — it’s still execution *for* the state rather than *by* the state. But suppose the close government supervision required by the contract *literally* took the form of being required to do the state’s bidding whenever relevant political officials disapproved of what they were doing. It seems that then, too, the nominally private officials would become “public” for purposes of Dorfman and Harel’s theory,¹⁴² even though they would still colloquially be called “private” in the sense that they may be employees of a profit-making private firm.

Dorfman and Harel apparently also think that private organizations can choose to be deferential (and thus potentially “public”) even for underspecified tasks, though they believe the opposite is generally true:

[T]he deferential conception is, in principle, available for natural as well as for artificial persons (such as organizations) as long as they are willing to act deferentially. In practice, however, organizations almost always commit themselves to private purposes (either self- or other-regarding) that are likely to conflict with those of the state and those purposes inevitably determine the decisions of its officers.¹⁴³

It is thus apparent that the definition of “public” and “private” in Dorfman and Harel’s theory, being functional instead of formal, doesn’t necessarily correspond to the way the terms are generally used in the privatization debate.¹⁴⁴ I especially like the terms “[i]n practice” and “almost” in the last sentence of the block quote above, as they

¹⁴² See *id.*, at 17.

¹⁴³ *Id.* at 6 n.14.

¹⁴⁴ My own usage in this Article, tracking the privatization debate, is purely colloquial (e.g., any contracting out to a corporation owned by individuals is privatization *per se*); I don’t try to define “public” and “private” in any rigorous way. I do this because I’m responding to views that themselves generally accept the colloquial classification; indeed, the whole agenda of this Article is to question whether there’s any philosophical difference between “public” and “private,” as conventionally understood, in the context of contracting out. In that sense, I’m on the same page as Dorfman and Harel, who deny that the formal distinction is meaningful, though I nonetheless disagree with them as to their alternate distinction.

seem to hold out the possibility that who's more likely to be deferential — individual employees or corporations — may be an empirical question after all, which is what I argue in the next Part of this Article.¹⁴⁵ Perhaps this might pave the way for privatization to nonprofits?¹⁴⁶

2. Legal Versus Actual Government Control

Second, in light of the previous discussion, perhaps Dorfman and Harel's theory should be recast as being not against privatization, but rather against inadequate possibilities for government control of the execution of the task — much like “unitary executive” theories of administrative law.¹⁴⁷ Like the accountability objection discussed earlier in this Article,¹⁴⁸ privatization may often be associated with reduced governmental control, but such control can be provided to a quite large degree even within a privatized context.

Dorfman and Harel themselves wouldn't go that far, though. In their view, the mere *de facto* ability to control someone's conduct through incentives isn't enough to make their doing *the state's doing*, regardless how strong these incentives are. Rather, “what is crucial is the participants' Hohfeldian liability to the power of political officials to place them under a duty to act in certain ways and the willingness to exercise this power whenever they are unsatisfied with the ways in which the practice operates.”¹⁴⁹ Given such a legal right to intervene (and a willingness to use it when necessary), the actual frequency of intervention isn't relevant.¹⁵⁰

But, to the extent one can talk of action by the state, I don't believe that the legal right of control should make that much of a difference. In an employment context, it's customary to talk of the boss as having the right to order his subordinates around rather than having to negotiate with them in market transactions.¹⁵¹ But why does the subordinate do what the boss says? Because he can be fired if he doesn't. But this is the same power that we wield in the marketplace:

¹⁴⁵ See *infra* Part III.

¹⁴⁶ See *infra* note 192 and accompanying text.

¹⁴⁷ See generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008) (discussing the unitary executive theory).

¹⁴⁸ See *supra* Part I.A.

¹⁴⁹ Dorfman & Harel, *supra* note 105, at 18.

¹⁵⁰ *Id.*

¹⁵¹ A classic statement of this view is R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* (n.s.) 386, 387-89 (1937).

“Do what I say, or else I won’t make a contract with you,” or “Do what I say, or else I’ll terminate my existing contractual relationship with you.” As Armen Alchian and Harold Demsetz famously put it in their seminal article on the theory of the firm:

The firm . . . has no power of fiat, no authority, no disciplinary action any different in the slightest degree from ordinary market contracting between any two people. I can “punish” you only by withholding future business or by seeking redress in the courts for any failure to honor our exchange agreement. That is exactly all that any employer can do. He can fire or sue, just as I can fire my grocer by stopping purchases from him or sue him for delivering faulty products. . . . To speak of managing, directing, or assigning workers to various tasks is a deceptive way of noting that the employer continually is involved in renegotiation of contracts on terms that must be acceptable to both parties.¹⁵²

In light of this insight, I believe the mere fact that the state has the right to intervene in an employee’s decisionmaking and is willing to do so isn’t sufficient to make the employee’s act that of the state. Suppose a public prison guard wrongly beats an inmate, perhaps even as a result of having collaboratively decided on this course of action within his community of practice. Because of his public employment, some higher political official presumably would have been able to forbid this act if he had found out about it ahead of time. But the only thing “forcing” the employee to follow the political superior’s view is the knowledge that, if he beat the inmate anyway, he might be fired (or whatever other discipline would be acceptable under his union contract or civil-service rules). How is this different than the government monitoring activity at a private prison (through an on-site monitor) and letting the prison firm know that, if the guard beats the inmate, the contract will be rescinded (or at least not renewed when its term is up)? There are certainly differences between the two forms of organization, but it isn’t clear to me that the public employee’s beating of the inmate was performed “by the state” or “in the name of the state,” while the private employee’s was performed “for the state.”

Once we get onto empirical ground, as (it won’t surprise anyone to know) I believe we should, we find that actual political control is difficult to put into practice. Agencies are complicated places, and politicians’ ability to affect agency decisions may often be illusory. We

¹⁵² Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 777 (1972).

know from watching *Yes Minister* that public officials can have their own agendas and can manipulate their political overlords to prevent effective political control and to implement the policies that they themselves think are appropriate. There is a community of practice, but it doesn't seek deference. There is potential political control, but it usually peters out before becoming effective. This is so even if politicians have nominal control over the agency, but even more so in the case of independent agencies that are strongly insulated from interference by political actors — for instance, the Fed.¹⁵³ Dorfman and Harel mention the Fed,¹⁵⁴ apparently as an example of a practice that's "less integrative" along a spectrum of integration.¹⁵⁵ They don't say so explicitly, but I would think that a Fed-like prison, even if within the public sector, should be considered insufficiently integrative and should therefore count as "private" under their view, since the mechanisms of political control — the appointment power, Congressional hearings, and the like¹⁵⁶ — seem about as strong as what the political process can already manage for private prisons.

The importance of civilian (and, in the United States, presidential) control probably prevents a Fed-like model for the military. But one can readily imagine prisons being managed by agencies that everyone considers public, that are staffed by salaried civil servants, and that are run by officials nominated by the President and confirmed by the Senate — but that Dorfman and Harel's model would (or should) count as "private," that is, characterized by a fidelity of reason rather than a fidelity of deference, because, either *de jure* (as in the Fed example) or *de facto* (as in the more usual case of internal cultures hostile to oversight), it eludes control by the highest political officers.

Conversely, politicians may sometimes have extremely effective *de facto* control over their contractors, even though the contractors are legally protected from explicit interference by their contract. It's conceivable (whether or not it's realistic) that politicians could be closely watching what their private contractors are doing and

¹⁵³ See generally *Humphrey's Executor v. United States*, 295 U.S. 602, 626-32 (upholding the power of Congress to insulate an FTC Commissioner from removal at will by the President); *Morrison v. Olson*, 487 U.S. 654, 685-96 (doing the same in the context of an independent counsel); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S.Ct. 3138, 3151-57 (2010) (holding that this principle has its limits).

¹⁵⁴ See Dorfman & Harel, *supra* note 105, at 15 n.28.

¹⁵⁵ *Id.* at 15-16.

¹⁵⁶ See *id.* at 15 n.28.

constantly threatening the contractors with non-renewal unless they follow the politicians' orders.¹⁵⁷

3. Surreptitious Private Judgment

Third, recall that it's crucial to Dorfman and Harel's theory that public officials *not* exercise the deference of reason — that is, that they not exercise their own judgment but instead retreat from their own point of view and take the sovereign's judgment at face value.¹⁵⁸ If they exercise their own judgment, they're confining prisoners or waging war because *they* think it's right to do so, not because they accept the authority of the state. Only if they situate themselves in a community of practice and are open to continuous political input can we say that they accept the state's authority and thus implement fidelity of deference.

But what if public officials, despite being able to suppress their own judgment, nonetheless don't? A public official might quit at any time if, having exercised his private judgment, he no longer finds it attractive to follow the government's orders. He ends up acting in a way that looks deferential, but it's a reason-based deference, in that every action he takes (supposedly in the name of the state) implies a judgment that the action isn't distasteful enough to make him quit. One can easily find cases of soldiers who left their (public) militaries because they no longer believed their countries were on the right side of a conflict. Likewise, one can find cases of soldiers who are perpetually on the cusp of leaving their militaries because they have substantial misgivings about the rightness of their cause, though never substantial enough to make them quit; and suppose that these soldiers privately form an intent to judge their orders according to their own reason and quit (or disobey) whenever they encounter an order that they find personally objectionable. I'm not sure why, within Dorfman and Harel's theory, these soldiers' constant, though limited, exercise of their personal judgment doesn't make it problematic to say they're acting in the name of the state.

¹⁵⁷ In an extreme case, the government can also rescind the contract; it may need to pay damages if it does so, though some contracts allow for rescission without damages in extreme enough cases. This seems not much different than a government that's forced to remove recalcitrant civil servants from a job but has to keep paying them because of civil-service protections.

¹⁵⁸ Dorfman & Harel, *supra* note 105, at 6-7.

4. Mandatory Private Judgment

Fourth, and relatedly, what about cases where public actors are *required* to use their personal judgment? Dorfman and Harel place a lot of stress on the idea of blind deference (within limits).¹⁵⁹ For instance, soldiers shouldn't kill *because* they believe, according to conventional rules of morality, that the killing is just; if they do so, they adopt the fidelity of reason and act "in their private names, rather than that of the state."¹⁶⁰ Adopting the fidelity of reason "turns the soldiers — including soldiers who are formally drafted and employed by the state — into mercenaries and the war into private acts of killing."¹⁶¹ This may be jarring to some, who might stress the moral duty to disobey immoral commands, which requires officials to exercise their independent judgment.¹⁶²

Dorfman and Harel anticipate this problem: "the deferential conception of fidelity cannot render excusable or justifiable every instance in which public officials suppress their own respective judgments . . ."¹⁶³ "Serving the Nazi regime," they elaborate, "is one obvious example even though less dramatic cases of immorality may be sufficient to count as a compelling reason against displaying the otherwise virtuous commitment to deferential fidelity."¹⁶⁴

This recognition that reason-over-deference is sometimes morally required seems to be more damaging than the authors recognize. Once we recognize that officials sometimes have a moral duty to disobey certain categories of orders based on their independent judgment (a duty that, incidentally, can apply in prisons just as in war), we need to grant that a conscientious official needs to use his independent judgment on an ongoing basis to determine whether an order falls into

¹⁵⁹ Cf. *supra* text accompanying note 119.

¹⁶⁰ Dorfman & Harel, *supra* note 105, at 29.

¹⁶¹ *Id.* Indeed, Dorfman and Harel critique the revisionist approach to military morality — the approach that assimilates military morality into regular morality and asks "what a private individual ought to do under similar circumstances," *id.* at 28, on the ground that such an approach, while nominally very strict on the military, actually gives away the store with respect to military privatization. See *id.* at 28-29.

¹⁶² See, e.g., Tung Yin, *Structural Objections to the Inherent Commander-in-Chief Power Thesis*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 965, 982 n.93 (discussing soldiers' duty to disobey unlawful orders and citing *United States v. Calley*, 46 C.M.A. 1131 (U.S. Ct. Mil. App. 1973) (affirming conviction of U.S. Army lieutenant who carried out alleged orders to murder Vietnamese villagers)); see also Note, *Prior Restraints in the Military*, 73 *COLUM. L. REV.* 1089, 1103 n.110 (characterizing the duty to disobey unlawful orders as stemming from Nuremberg).

¹⁶³ Dorfman & Harel, *supra* note 105, at 19.

¹⁶⁴ *Id.* at 19 n.35.

the disobeyable category. After all, morally problematic cases don't come pre-labeled, especially in morally charged areas like criminal punishment or warmaking. Indeed, *every* action is a potentially immoral one, and so the conscientious official must always be on guard, ready to disobey if necessary.

And because a conscientious official is always scrutinizing potential actions for immorality, that official's decision to proceed anyway reflects, in every case, his personal judgment that the proposed action doesn't merit disobedience. As with the decision not to quit, a decision not to disobey doesn't necessarily reflect the official's full-fledged agreement with the merits of the policy, but it does reflect the official's judgment that the policy passes a minimal morality bar. This is again starting to look awfully close to the deference of reason.

If Dorfman and Harel are right that deference rather than reason is required,¹⁶⁵ it seems that we should seek *actual*, rather than *potential*, deference — in which case we should also avoid government actors who exercise their independent judgment, either surreptitiously or because they're required to. Their theory purports to rule out private contractors in (almost?¹⁶⁶) all cases, but it may also rule out public employees in many cases — perhaps most. If so, perhaps no one is legitimate, and so the theory is of little help in deciding whether to privatize.

III. PRIVATE PURPOSES

So far, we have seen two non-empirical arguments. The first, the argument from accountability, turned out not to be inherently about privatization at all. The second, on the other hand — the argument from moral burdens and fidelity of deference — really was about privatization, but it failed to adequately distinguish between public employees and private contractors, both of whom are private people who do the state's bidding for money.

The argument from moral burdens did not assume anything particular about the private actor. The private actor's moral judgment was "private" in the sense that anyone's judgment is his own, but the argument did not assume that the private actor was motivated by, for instance, a profit-making desire. It was reasonable not to do so, since the argument also covered shaming punishments,¹⁶⁷ which are

¹⁶⁵ I myself have my doubts on this score, but I'm not questioning the basic theory for the purposes of this Article.

¹⁶⁶ See *supra* text accompanying note 141.

¹⁶⁷ See *supra* text accompanying note 107.

designed to be administered by ordinary people like you and me, with no pecuniary expectations in the matter.

But the next set of arguments, which I label “private purposes” arguments, are more specifically targeted at private corporations and their profit motive. As we will see, though, this line of argument, too, fails to distinguish inherently between public employees and private contractors. To the extent that private purposes animate the latter more than the former, this is an empirical question.

A. *Private Purposes and Freedom of Association*

Richard Lippke suggests that private prisons may violate a prisoner’s “freedom of conscience and association, in the sense that offenders will be forced to participate, even if only as passive clients, in certain specific private enterprises.”¹⁶⁸

Obviously we’re not talking about religious prisons; Lippke assumes that no indoctrination is going on,¹⁶⁹ so the problem is merely that the inmate is forced to associate with the organization. But couldn’t one say the same of the state prison? Doesn’t being assigned to *any* prison violate one’s freedom of conscience and association?

Lippke answers this concern:

I am almost persuaded by [this equivalence], but not quite. One could argue that rational contractors [in the social contract], concerned to protect their autonomy, will look for ways to enforce the law that least infringe their freedom of conscience and association should they run afoul of the law. Granted, public prisons may impose on them things that they object to and that restrict their freedom of association. Private prisons do this and something else besides — they force some individuals to be participants in someone else’s profit-making enterprise.

[The] contention that there are individuals who also benefit economically from public prisons is correct but not decisive. There is a difference, however slight and perhaps mostly symbolic, between being incarcerated in a facility overseen by individuals who earn a living doing so and being incarcerated

¹⁶⁸ Lippke, *supra* note 25, at 32.

¹⁶⁹ See *id.* On religious prisons generally, see Alexander Volokh, *Do Faith-Based Prisons Work?*, 63 ALA. L. REV. 43 (2011); Alexander Volokh, Book Review, 25 J.L. & RELIGION 323 (2009-10) (reviewing WINNIFRED FALLERS SULLIVAN, *PRISON RELIGION: FAITH-BASED REFORM AND THE CONSTITUTION* (2009)).

in a facility where not only are there individuals earning a living by overseeing the facility, but where there are other individuals who seek to earn a profit by efficient management of that facility. The latter individuals may be ones that rational contractors would wish to limit forced association with.¹⁷⁰

Lippke draws a distinction between those who “earn a living overseeing the facility” and those who “seek to earn a profit by efficient management of that facility.” Maybe by “earn a living,” Lippke means to include public corrections officers, wardens, and Department of Corrections employees. By “seek to earn a profit,” presumably he means to include the shareholders (and possibly high-level executives?) of the private firm. I suppose he means to put private corrections officers into the “earn a living” category: he characterizes private prisons as places where some people earn a living while *others* seek to make a profit. So presumably the corrections officers are in the first category while the shareholders are in the second. Moreover, we say colloquially that prison guards “earn a living,” since they’re paid a wage — though, since prison firms’ employees’ retirement packages often include company stock,¹⁷¹ one could also say they make a “profit” together with the other shareholders.

But this difference isn’t that important. Everyone who seeks to “earn a living” is also “seek[ing] to earn a profit.” Perhaps this doesn’t conform to the colloquial meaning of “profit,” but it does conform to the (more neutral) economic sense, where anyone profits who earns more than his opportunity cost. No one works in a particular organization unless they expect to be at least as well off as in their next-best alternative. Indeed, no one needs to work *at all* unless they expect to be at least as well off as by not working. For a low enough wage, people (at least those with sufficient assets) wouldn’t bother working; at a certain wage (their so-called “reservation wage”), they’re indifferent between working and not working; above their reservation

¹⁷⁰ Lippke, *supra* note 25, at 32-33 (paragraph break added) (citing LOGAN, *supra* note 42, at 71-75). Lippke also suggests that, since imprisonment falls disproportionately on the economically disadvantaged in capitalist society, prisoners who are forced to associate with private prison firms (or even with private food or laundry contractors in public prisons) aren’t suffering any “new and startling infringement” on their freedom of association, since they were already forced to associate with powerful economic enterprises in the free world. *Id.* at 34.

¹⁷¹ Geoffrey Segal, *Corporate Corrections? Frequently Asked Questions About Prison Privatization*, REASON FOUNDATION (Nov. 1, 2002), <http://reason.org/news/show/corporate-corrections-frequent>.

wage, they strictly prefer to work. Anyone who is paid above his reservation wage (hopefully most of us) can be said to be making a profit, just like we're making a profit as financial investors whenever our money earns more than it could be earning elsewhere. Some of us seek to earn a profit by using our labor, some of us seek to earn a profit by using our previously acquired money (i.e., "capital"), but we're all seeking to earn a profit.¹⁷² Despite some critics' protestations that there is a "fundamental difference"¹⁷³ or "obvious distinction"¹⁷⁴ between profiting from labor and profiting from capital,¹⁷⁵ it is unclear how this distinction, fundamental and obvious though it may be, is relevant.¹⁷⁶

Of course, that we all profit from our work (or investment) doesn't mean we're all mercenarily minded. Investors might put their money into prison firms — or people may work as high-level prison firm executives and buy the company's stock — because they really care

¹⁷² See also Medina, *supra* note 23, at 710; E.S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889, 898 (1987). Herman Leonard makes a related point: "Why [private profit] should be more of a concern when the profit rewards management services than when it comes from producing food services is less than obvious. Private entrepreneurs are more or less deeply involved in every corrections facility, no matter how 'public.' (No state agency makes its own chain link fence or steel reinforcing rods.) It takes a special philosophical twist to separate out managerial profit as particularly inappropriate." Leonard, *supra* note 28, at 78; see also McDonald, *supra* note 28, at 185.

¹⁷³ SHICHOR, *supra* note 30, at 68 ("The privatization proponents' argument fails to distinguish between the employees' motive of self-interest and the profit motive of the corporation. Individual motives are always present regardless of whether the organization is private or public; however, there is a fundamental difference between wages in exchange for labor and profit earned through capital investment." (citing M.J. Gilbert, Paper Presentation: Ethical Considerations About Privatization, Correctional Practice, and the Role of Government at the annual meeting of the Academy of Criminal Justice Sciences, Pittsburgh, Pa. (Mar. 14 1992)).

¹⁷⁴ Ryan & Ward, *supra* note 25, at 61 ("[T]o equate these wage earners with those who wish to exploit the penal system for corporate gain is quite simply wrong for a number of reasons. Most fundamentally, perhaps, it fails to make the obvious distinction between those who sell their labour and those who own and control capital.").

¹⁷⁵ Moreover, the distinction between government provision and privatization is not exactly labor versus capital: what about privatization where the corporation merely provided a bunch of workers without any capital assets? Perhaps the very act of assembling and managing the workers is a form of human capital, but in that case, even employees own their human capital.

¹⁷⁶ Perhaps there is some class-conflict analysis going on here, but I hesitate to supply the missing steps of an argument I don't myself understand. Even if one doesn't want to use the more neutral understanding of profit as surplus over opportunity cost, see *supra* text accompanying note 171, what is the normative relevance between being incarcerated by wage earners and being incarcerated by profit-makers?

about corrections. Likewise, those who work for private military companies may be patriots, humanitarians, gay,¹⁷⁷ or have other (good or bad) ethical motives. A former American soldier working as a contractor in Bosnia in the 1990s said: “If the Serbians were the ones suffering I would have gone with them, but it’s Moslem families who are being slaughtered, so they’re the ones I came to help.”¹⁷⁸

Conversely, one might work as a (public or private) corrections officer or warden, or in the public military or at a private military company, just because it’s a living.¹⁷⁹ And as Bruce Benson points out, high-level public employees may also have bad motivations, like not wanting to “tarnish[] the image of their bureaucracy by revealing abuses by those whom they supervise.”¹⁸⁰ Despite some speculation that public employees care more about their work while private contractors are more rapacious¹⁸¹ — this is an empirical question to which I don’t know the answer¹⁸² — the precise form that the profits take has no necessary relation to one’s attitude toward the work.¹⁸³

¹⁷⁷ And therefore unable to serve in the public military in the days of “Don’t Ask, Don’t Tell.” See, e.g., Anthony Loverde, Op-Ed., “Don’t Ask, Don’t Tell” Ended My Military Career, but Not My Service, WASH. POST, Feb. 7, 2010, at B02; cf. John T. Burke, Jr., GPCs and GMCs, THECENTERLANE.COM (May 18, 2009), <http://www.thecenterlane.com/?p=251> (suggesting that Gay Military Contractors (GMCs) compete with Blackwater under the name “Gaywater”).

¹⁷⁸ Montgomery Sapone, *Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT’L L.J. 1, 14 (1999) (quoting Peter Douglas, *Along Bosnia’s Ho Chi Minh Trail: American SF Vet Advises Moslem Freedom Fighters*, SOLDIER OF FORTUNE, Feb. 1993, at 37); see also *id.* at 15 (mercenaries motivated by racism rather than money); *id.* at 21 (stating that Executive Outcomes refused to work for clients that it believed sponsored terrorism, and loyal to established states).

¹⁷⁹ See Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2235 (2001) (questioning whether “publicly employed prison guards have different and nobler motivations [than private ones] in performing their jobs” (citing TED CONOVER, NEWJACK (2000))).

¹⁸⁰ Benson, *supra* note 19, at 166.

¹⁸¹ Compare Ryan & Ward, *supra* note 25, at 61 (“[M]any of those who engage in the distasteful business of inflicting pain do so partly in order to mitigate the full force of what they see as an unfortunate social necessity. . . . To equate their contribution with that of venture capitalists whose first priority is to make a ‘fast buck’ seems to us to be highly misleading.”), with TED CONOVER, NEWJACK 282 (2000) (describing humiliation at the hands of (public) prison guards).

¹⁸² See Patrick Anderson et al., *Private Corrections: Feast or Fiasco?*, PRISON J., Oct. 1985, at 32, 34 (“[T]he private corrections provider is motivated by varying degrees of financial profit and humanitarianism.”).

¹⁸³ John Dilulio also critiques the focus on profit-making in normative critiques of prison privatization. See John J. Dilulio, Jr., *The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails*, in PRIVATE PRISONS AND THE PUBLIC

Finally, in Lippke's distinction between those who "earn a living overseeing the facility" and those who "seek to earn a profit by efficient management of that facility," I have been stressing the "earn a living"/"earn a profit" distinction. But maybe we should also look into the "overseeing"/"efficient management" distinction. This distinction, too, fails to distinguish between public and private — presumably no one is paid to oversee the facility inefficiently. Any public corrections officer is expected to not waste prison resources, and the same goes for wardens and Department of Corrections officials.

Now there might be a significant difference between "overseeing" and "efficient management," but only if overseeing and efficient management differ as management styles. Certainly, the choice of words suggests a hard-hearted, cost-cutting mentality that may be at odds with sound correctional policy. But if this is so, we're back in the contested empirical territory of how public and private prisons act.

INTEREST, *supra* note 26, at 155, 157, 228 n.8.

There is of course an ethic of public service that differs from the ethic of private industry. For instance, Max Weber refers to the "genuine official" who "engage[s] in impartial 'administration' . . . 'without scorn and bias.'" MAX WEBER, *POLITIK ALS BERUF* 27 (11th ed. 2010) (1919) ("Der echte Beamte . . . soll seinem eigentlichen Beruf nach nicht Politik treiben, sondern: „verwalten“, *unparteiisch* vor allem *Sine ira et studio*, „ohne Zorn und Eingenommenheit“ soll er seines Amtes walten."), *translated and reprinted as* MAX WEBER, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77, 95 (H.H. Gerth & C. Wright Mills trans. & eds., 1958). Weber writes:

[H]e takes pride in preserving his impartiality, overcoming his own inclinations and opinions, so as to execute in a conscientious and meaningful way what is required of him by the general definition of his duties or by some particular institution, even — and particularly — when they do *not* coincide with his own views.

MAX WEBER, *Parlament und Regierung im neugeordneten Deutschland*, in *GESAMMELTE POLITISCHE SCHRIFTEN* 306, 351-52 (UTB für Wissenschaft, 1988) ("Sein Stolz ist es im Gegenteil, die Unparteilichkeit zu hüten und also: seine eigenen Neigungen und Meinungen überwinden zu können, um gewissenhaft und sinnvoll durchzuführen, was allgemeine Vorschrift oder besondere Anweisung von ihm verlangen, auch und gerade dann, wenn sie seinen eigenen politischen Auffassungen *nicht* entsprechen."), *translated and reprinted as* MAX WEBER, *Parliament and Government in Germany Under a New Political Order*, in *POLITICAL WRITINGS* 130, 178 (Peter Lassman & Ronald Speirs eds., 1994).

But Weber was speaking descriptively about the attitudes that actually characterize bureaucrats in his view. We have seen the normative component of the difference above, in the discussion of fidelity of deference, *see supra* Part II.B, but surely the normatively relevant question is surely to what extent the differences in ethic manifest themselves in *actual* differences in attitude or behavior, *see supra* text accompanying notes 152-153.

B. *Private Purposes and Private Motivations*

The previous argument introduced the “private purposes” strand of criticism, where the significance of the private purposes was that they vitiated freedom of association. But private-purposes arguments are in general much broader: public purposes also play a role in more general theories of liberal legitimacy. Thus, Michael Walzer argues that, according to liberal social contract theory, “the agents of punishment [must] be agents of the laws and of the people who make them.”¹⁸⁴ What he means by “agents” here is that punishers must share the public purposes that justified the punishment to begin with.

Certainly this philosophy precludes having *victims* punish criminals; but Walzer also extends this theory to private prison contractors. What is wrong with the private prison, says Walzer, is that “[i]t exposes the prisoners to private or corporate purposes.”¹⁸⁵ By contrast:

Police and prison guards are our representatives, whose activities we have authorized. . . . When [the policeman]¹⁸⁶ puts on his uniform, he strips himself bare, so to speak, of his

¹⁸⁴ Michael Walzer, *At McPrison and Burglar King, It's . . . Hold the Justice*, NEW REPUBLIC, Apr. 8, 1985, at 10, 11.

¹⁸⁵ *Id.*; see also Lippke, *supra* note 25, at 31 (“One concern rational contractors [in the social contract] might have about private prisons is that they introduce an element of private interest into the administration of punishment that might conflict with the demands of justice.”); Andrew Rutherford, *British Penal Policy and the Idea of Prison Privatization*, in PRIVATE PRISONS AND THE PUBLIC INTEREST, *supra* note 26, at 61 (“Private industry cannot be allowed to place the maintenance of profits over and above the protection of the public.” (quoting THIRD REPORT FROM THE HOME AFFAIRS COMMITTEE: STATE AND USE OF PRISONS, PROCEEDINGS, H.C. 35-ii, at 103 (1987))) (position of Prison Officers’ Association, British corrections officers’ union); cf. Robert W. Poole, Jr., *Objections to Privatization*, POL’Y REV., Spr. 1983, at 105, 117-18 (reporting the objection that “public services should be organized for service, not for profit” but characterizing it as “largely . . . emotional . . . , reflecting distaste for the idea that some people should profit by supplying the vital needs of others”). The Supreme Court made a similar point in *Wyatt v. Cole*, 504 U.S. 158 (1992), though in the context of denying qualified immunity under § 1983, not in the context of questioning private actors’ legitimacy: “Unlike school board members, or police officers, or Presidential aides, private parties . . . [are not] principally concerned with enhancing the public good.” *Id.* at 168.

Robert Lekachman extends the same arguments to for-profit hospitals. LEKACHMAN, *supra* note 10, at 106 (“The final and most powerful charge against corrections privatization is ethical Private prisons, like private hospitals, are driven by profit maximization, not sensitivity to the needs or rights of prisoners or patients. . . . Patients in corporate hospitals might raise a similar issue [to prisoners]: is this test, procedure, or medication required for my benefit or that of stockholders and top managers?”).

¹⁸⁶ I suppose Walzer means to include the corrections officer too.

private opinions and motivations. Ideally, at least . . . he treats . . . all criminals in the same way, whatever his personal prejudices.¹⁸⁷

“Ideally,” perhaps. But can’t non-ideal (i.e., actual) public servants also act out of private purposes? (This approach would make the “public purposes” argument strictly empirical and comparative.) Alternatively, why doesn’t the “ideal[]” of a private prison firm include faithfully fulfilling its contractual obligations, acting in the interests of its contractual partner, and shedding its private prejudices? (This approach is non-empirical, but obliterates the theoretical distinction between employees and contractors.)¹⁸⁸ If this is so, why can’t private firms, too, be “our representatives, whose activities we have authorized”?

Walzer admits as much: “[O]ur impersonal representatives turn out to be ordinary persons; they have careers, interests, feelings of their own.”¹⁸⁹ But, he argues, this risk is less than when “corporate motives” are involved, because of “the professional ethic and internal safeguards of the civil service, . . . legislative oversight committees and civilian review boards, and finally . . . the courts, which uphold the law even, or especially, against the agents of the law.”¹⁹⁰ Walzer stresses standard (empirical) reasons to believe the private sector will underperform: opportunistic holdup, cost-cutting, and reduced opportunities for judicial monitoring.¹⁹¹ Walzer even suggests that the private sector

¹⁸⁷ Walzer, *supra* note 184, at 11.

¹⁸⁸ One could argue that, given that corporations have a fiduciary duty to their shareholders, a corporation is *obligated* to breach a contract when doing so would be profit-maximizing; thus, the “ideal” of a corporation can’t include faithfully fulfilling its contractual obligations. Perhaps. But, as I argue below, *see infra* Part III.C, a corporation can overcome these fiduciary duties if it announces some overriding moral concern to its shareholders, and if the shareholders come in with their eyes open. And a government can choose not to contract with any corporation except one that has made such a commitment.

¹⁸⁹ Walzer, *supra* note 184, at 11; *see also* Taylor & Pease, *supra* note 25, at 183 (quoting *PRIVATISATION AND THE WELFARE STATE* 7-8 (J. LeGrand & R. Robinson eds., 1984)).

¹⁹⁰ Walzer, *supra* note 184, at 11; *see also* Lippke, *supra* note 25, at 32 (“[W]e cannot assume that employees and officials of public prisons have as their only motives the impartial administration of justice. They too may have private interests such as career advancement or the carrying out of personal vendettas against inmates . . . Perhaps all we can safely say here is that rational contractors [in the social contract] would seek institutional arrangements . . . that strictly limit the possibility of divergence from the demands of just punishment. Whether or not this precludes the use of private prisons seems to me, at this level of analysis, an open question.”).

¹⁹¹ Walzer, *supra* note 184, at 11-12.

could have a role in prison provision — but only the *nonprofit* sector,¹⁹² since “[t]he incentive system is all wrong”¹⁹³ in private prisons.

It seems, then, that Walzer’s philosophical point is just derivative of his empirical point: if it could be shown that public servants were pervasively self-seeking and that public-sector accountability were low, or that private-sector monitoring were extremely high-quality, private-sector professional norms extremely well developed, and legal accountability extremely effective, Walzer’s argument would have to go the other way.¹⁹⁴ Moreover, as he says, his argument doesn’t apply to private nonprofits.

The Israeli Supreme Court, on the other hand, which relied exclusively on the public purposes argument in ruling that private prisons violated inmates’ liberty rights, purported to be not quite so empirical. The majority opinion recognized the possibility that private prisons might violate human rights more often than public prisons because of profit-making incentives. But it didn’t rely on that argument, because such a mere possibility couldn’t justify invalidating private prisons before they had commenced operation.¹⁹⁵ Instead, the

¹⁹² *Id.* at 12. On nonprofit prisons, see Daniel L. Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1 (2003); Andrew Rutherford, *British Penal Policy and the Idea of Prison Privatization*, in PRIVATE PRISONS AND THE PUBLIC INTEREST, *supra* note 26, at 58-59; Richard Moran, *A Third Option: Nonprofit Prisons*, N.Y. TIMES, Aug. 23, 1997, at 23; *cf.* Anderson et al., *supra* note 182, at 35 (“Human service motives, on the other hand, typically characterize nonprofit programs . . .”).

¹⁹³ Walzer, *supra* note 184, at 11.

¹⁹⁴ See *supra* text accompanying notes 58-62. A similar point to the one I’ve just made appears in a document on prison privatization put out by the British Home Affairs Committee in the 1980s. See Rutherford, *supra* note 192, at 57-58 (“The committee dismissed the argument against the introduction of a profit motive as being ‘bizarre’ and added that ‘people are employed in the prison service to gain the benefit of wages and conditions of service. That is simply another profit motive.’” (quoting CONTRACT PROVISION OF PRISONS, FOURTH REPORT FROM THE HOME AFFAIRS COMMITTEE, H.C. 291, at vii (1987))). Rutherford’s rebuttal to the Committee’s (and my) point has a similar flavor to Walzer’s: “This extraordinary observation not only equates wages and profits but totally fails to acknowledge the need for a disinterested public service.” *Id.* at 58; see also Starr, *supra* note 8, at 133 (identifying “the administration of justice, the exercise of coercive power (as in prisons), the collection of taxes, and other functions” as ones “where the practice of buying and selling may undermine the capacity for disinterested judgment”). Disinterested, yes — but why should we equate “wage-earning” with “disinterested”? Either they’re both necessarily corrupted by the money they make, or neither is necessarily corrupted. I suspect that each falls short of the ideal of disinterestedness to some extent, but to what extent? An interesting — *empirical* — question.

¹⁹⁵ See HCJ 2605/05 Academic Ctr. of Law & Bus., Human Rights Div. v. Minister

Court ruled that prison privatization violated the constitutional right to personal liberty by the mere fact that punishment was being administered by a profit-motivated actor.¹⁹⁶

In the Court's view, "the question whether the party denying the liberty is acting first and foremost in order to further the public interest . . . or whether that party is mainly motivated by a private interest is a critical question."¹⁹⁷ Making inmates "subservient to a private enterprise that is motivated by economic considerations . . . is an independent violation [of the right to personal liberty] that is additional to the violation caused by the actual imprisonment under lock and key."¹⁹⁸ In fact:

the scope of the violation of a prison inmate's constitutional right to personal liberty, when the entity responsible for his imprisonment is a private corporation motivated by economic considerations of profit and loss, is inherently greater than the violation of the same right . . . when the entity . . . is a government authority that is not motivated by those considerations, even if the term of imprisonment . . . is identical and even if the violation of . . . human rights that actually takes place . . . is identical.¹⁹⁹

of Fin., ¶ 19 [2009] (Isr.), available at http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm; see also *id.* ¶ 30 ("The independent violation of the constitutional right to personal liberty of inmates in a privately managed prison exists even if we assume that from a factual-empirical viewpoint it has not been proved that inmates in that prison will suffer worse physical conditions and invasive measures than those in the public prisons."); *id.* ¶ 41.

¹⁹⁶ The Court also held that private prisons violated the separate constitutional right to human dignity. *Id.* ¶¶ 34-39. I discuss this alternative holding below. See *infra* text accompanying notes 279-288.

¹⁹⁷ *Id.* ¶ 22.

¹⁹⁸ *Id.* ¶ 30.

¹⁹⁹ *Id.* ¶ 33; see also *id.* ¶ 5 (Arbel, J.) ("This conflict of interests does not need to be realized *de facto* or to find any practical expression, but it is not eliminated even if, as the respondents claim, the privatization may achieve its stated goal of benefiting the inmates and improving their condition in certain respects."); *supra* text accompanying note 7. The assertion that private corporations are motivated by profit is reminiscent of Judge Boyce Martin's discussion in *McKnight v. Rees*, 88 F.3d 417, 424 (6th Cir. 1997) ("[W]hile privately employed correctional officers are serving the public interest by maintaining a correctional facility, they are not principally motivated by a desire to further the interests of the public at large. Rather, as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security."), *aff'd sub nom.* *Richardson v. McKnight*, 521 U.S. 399 (1997). But Martin didn't pin any legitimacy argument on this assertion. See

Throughout the opinion, the Court drew a strong distinction between the Israel Prison Service and the prison firm. The Israel Prison Service is a “bod[y] that answer[s] to,”²⁰⁰ “receives its orders from,”²⁰¹ “is subordinate to,”²⁰² “acts through”²⁰³ and “by and on behalf of,”²⁰⁴ and is a “competent organ[] of”²⁰⁵ the state or the government or the executive branch — which, in turn, is “the representative of the public.”²⁰⁶ The prison firm, on the other hand, is “an interested capitalist”²⁰⁷ and “a private interest,”²⁰⁸ “a party that is motivated first and foremost by economic considerations — considerations that are irrelevant to the realization of the purposes of the sentence, which are public purposes.”²⁰⁹ Justice Arbel, in a separate opinion, similarly wrote that the private firm is “an outsider that is not a party to the social contract . . . and does not necessarily seek to realize its goals”²¹⁰ and that its “main purpose is *by definition* the pursuit of profit.”²¹¹

But all this is merely asserted, not justified. The analysis suffers from at least two weaknesses.²¹² First, why can’t a private firm receive its orders from, be subordinate to, act through, and be a competent organ

id. at 424 n.4 (“We do not seek by implication to question the actions or intent of these defendants.”).

²⁰⁰ *Academic Ctr. of Law & Bus., Human Rights Div.*, at ¶ 33 (majority opinion).

²⁰¹ *Id.*

²⁰² *Id.* ¶ 25.

²⁰³ *Id.* ¶ 26.

²⁰⁴ *Id.* ¶¶ 26, 29.

²⁰⁵ *Id.*

²⁰⁶ *Id.* ¶ 23.

²⁰⁷ *Id.*

²⁰⁸ *Id.* ¶ 26.

²⁰⁹ *Id.* ¶ 29; *see also id.* ¶ 30 (“a party that operates in order to further an interest that is essentially a private one,” “a body that is motivated by a set of considerations and interests that is different from the one that motivates the state when it manages and operates the public prisons through the Israel Prison Service”); *id.* ¶ 36 (“[T]he clearly public purposes of the imprisonment are blurred and diluted by irrelevant considerations that arise from a private economic purpose, namely the desire of the private corporation operating the prison to make a financial profit.”).

²¹⁰ *Id.* ¶ 2 (Arbel, J.).

²¹¹ *Id.* ¶ 4 (emphasis added); *see also id.* ¶ 20 (Procaccia, J.) (“motivated by considerations of its own profit”); *id.* (“is not the state”); *id.* ¶ 7 (Naor, J.) (“One might ask how it is possible to deduce from the right to ‘liberty’ that the state has a *duty* to exercise its powers in a certain way, i.e. by itself.”).

²¹² An additional weakness is that the distinction between public and private actors is not always clear-cut; “privateness” is actually a continuum. *See Medina, supra* note 23, at 709-10 (arguing that this is all the more true in Israel, where even private prison employees are subject to public law constraints and formally defined as “civil servants”).

of the state? And second, as I have argued above,²¹³ given that any employee “profits” from his employment, why is a contractor’s profit any different?²¹⁴

It has been argued to me that private purposes are more problematic with private firms, because private firms *necessarily* act to maximize profit, whereas if individual employees act out of private purposes (e.g., putting food on the table or paying for their kids’ education), this is not a *necessary* but an *accidental* feature of their motivations. This strikes me as incorrect: firms don’t necessarily act to maximize profit, nor is profit-making any part of their essence. Without endorsing any form of reductionism,²¹⁵ it’s surely true that a firm only acts to maximize profit if some individual or individuals within the firm have taken such an action. And there’s no inherent reason that individuals within the firm would want to take such action. Indeed, most of corporate law is centered around the insight that corporate self-dealing is a major problem. Agents *may* act in profit-maximizing ways, to the extent the principal is motivated to give them effective incentives to do so, either out of concern for his own profit or if there is sufficient discipline within the product market or capital market (i.e., the firm can lose sales or fall victim to a hostile takeover when profit isn’t maximized). This *might* happen, *approximately, most of the time, in equilibrium*, but certain not in any necessary way. Certainly, employees’ interest in not working too hard or in paying their mortgage seems at least as fundamental as the firm’s interest in maximizing profit.

The Court’s opinion does note a few tangible, non-question-begging differences between the Israel Prison Service and private firms, but these differences are hardly central to the argument. Nor do they succeed in distinguishing public and private prisons as a philosophical matter.

First, the head of the public agency is appointed by the government.²¹⁶ But “[m]ost public employees . . . , including police and corrections officers, are neither politically appointed nor democratically elected.”²¹⁷ Moreover, the private prison firm is also chosen by someone in the government, and it’s not clear what

²¹³ See *supra* text accompanying note 171.

²¹⁴ Or, if one is willing to allow for non-pecuniary motivations among government employees, why can’t contractors have similarly noble motivations?

²¹⁵ See *supra* notes 18 and 41.

²¹⁶ *Academic Ctr. of Law & Bus., Human Rights Div.*, at ¶ 24 (majority opinion).

²¹⁷ LOGAN, *supra* note 42, at 57.

difference these various selection mechanisms make apart from the empirical question of behavior.

Second, the public agency is “subject to the laws and norms that apply to anyone who acts through the organs of the state and also to the civil service ethos in the broad sense of this term,” which “significantly reduc[es] the danger that the considerable power given to those bodies will be abused.”²¹⁸ Perhaps Justice Arbel was getting at something similar when she alluded to the private firm’s not being “bound by the norms inherent” in the social contract,²¹⁹ though it’s hard to say. Certainly she stressed practical concerns like directness of supervision,²²⁰ though she didn’t rely on them.²²¹

But, as I have noted above,²²² this is an argument against unaccountability, not against privatization as such. One can imagine private prisons that are subject to the norms of state actors.²²³ Moreover, that the “civil service ethos” is a stronger force against abuse in the public sector than possible competitive or other market or contractual forces in the private sector is a contested empirical question, which is in tension with the majority’s stated intention to not rest its decision on possible future violations.²²⁴

Third, Justice Arbel notes that the private firm “is chosen and operates on the basis of its ability to maximize income and minimize expenditure.” The point of this argument is not that profit-maximization makes the private firm take harmful actions, but that profit-maximization itself violates human dignity, at least when performed in the prison context.²²⁵ But prison firms needn’t be chosen on a low-bid basis,²²⁶ and efficient management, at least in the sense of not spending more than one’s budget, is valued in the public sector as well.

²¹⁸ *Academic Ctr. of Law & Bus., Human Rights Div.*, at ¶ 26; see also *id.* ¶ 18 (Procaccia, J.); *id.* ¶ 26.

²¹⁹ *Id.* ¶ 2 (Arbel, J.).

²²⁰ *Id.* ¶¶ 2, 4.

²²¹ *Id.* ¶ 5.

²²² See *supra* Part I.A.

²²³ This isn’t too hard to imagine. See *supra* note 56.

²²⁴ See *Academic Ctr. of Law & Bus., Human Rights Div.*, at ¶ 19. See also my brief discussion of Max Weber, see *supra* text accompanying note 186, whose discussion of the civil service ethos is merely descriptive.

²²⁵ *Academic Ctr. of Law & Bus., Human Rights Div.*, at ¶ 5 (Arbel, J.).

²²⁶ See HARDING, *supra* note 30, at 75-78 (noting selection methods that differ from choosing the lowest bidder, though admitting that many systems still “low-ball,” at least as a default).

Finally, Justice Procaccia at least did better in her opinion, where she justified the distinction at least in part based on public perception: the private firm “does not act as a public trustee” because “[i]ts status and actions are not based on a broad social consensus.”²²⁷ I discuss public perception arguments later in this Article.²²⁸

C. *Private Purposes and Fiduciary Duties*

I have argued above that at least some private purposes arguments wrongly treat as inherent what is in fact contingent: the extent to which private actors are motivated by private considerations. In this section, I suggest one possible way around the empirical morass, though this workaround has problems of its own.

Regardless of their motivations, private contractors have a conflict of interest that is absent in the public sector. Public and private employees both have a duty to their employer. But in the public sector, that duty runs all the way up to The People, whereas in the private sector, the employer itself (the corporation) has conflicting duties, one to its contractual partner (the government and The People) and a fiduciary duty to its shareholders (who want their profits maximized).

One can understand this “multiple-principals” problem in a number of ways.

I understand the problem in a purely empirical way: perhaps those with multiple principals are less likely to do a good job serving the government’s purposes because the profit-maximizing purpose gets in the way.²²⁹ Corporations’ fiduciary duty to their shareholders requires them to breach contracts when doing so would maximize profit. Doesn’t that make private contractors inherently less trustworthy than employees, who only have one loyalty?

As with all the other empirical questions discussed here, the answer could go either way. Given enough competitive pressure, oversight, or the right contractual terms, it’s possible that private contractors will

²²⁷ See *Academic Ctr. of Law & Bus., Human Rights Div.*, at ¶ 17 (Procaccia, J.); *id.* ¶¶ 20, 27.

²²⁸ See *infra* Part IV.A.

²²⁹ See JEAN-JACQUES LAFFONT & JEAN TIROLE, A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION 641 (1993) (describing the avoidance of the multiple-principles problem as part of the “conventional wisdom” in favor of government provision, but calling the concern “vague”); SHICHOR, *supra* note 30, at 56, 67 (“[O]rganizations . . . that have to serve multiple and sometimes conflicting goals become problematic and, more often than not, fail to perform any of these goals satisfactorily.”).

maximize profits for their shareholders by doing well for the government. It's at least possible that they'll do better for the government than employees who — even though they only have one duty — don't take that duty seriously because of, say, civil-service protection or private ideological goals. Even within government, there can be different principals with different goals: for example, one's department head may be resisting the President's policy. The number of principals *may* be greater in the private sector, and it *may* result in worse work for the government, but it's something we can discuss empirically.

Alternatively, one can understand the multiple principals problem in a more categorical way. Earlier, I discussed Malcolm Thorburn's view that an activity like policing must be done in the name of the state to be legitimate — and that a precondition of being done in the name of the state is being subject to an accountability regime.²³⁰ I argued above that Thorburn's accountability argument, even if correct, was not, properly speaking, an argument against privatization at all, since private actors too can be made subject to various forms of legal accountability.²³¹

But let's think again about what it takes to act "in the name of the state." One might argue that government employees, who only have one loyalty, are capable of acting in the name of the state, while private contractors, who have multiple loyalties (to shareholders first and the state second), aren't.²³² If this argument works, it would succeed in drawing a bright line of legitimacy between employees (legitimate) and contractors (illegitimate).

One could imagine another variant of this argument. Consider a conscientious actor who takes his various institutional duties seriously, for instance as a matter of role obligation.²³³ And suppose the contractual duty technically allows two actions, A and B. A is more profitable than B, but B is better for the government's policy. (A only turned out to be permissible because of incompleteness in the contract

²³⁰ See *supra* Part I.A.

²³¹ See *supra* text accompanying notes 54-58.

²³² See, e.g., yankee, Comment to *Prisons, Privatization, and the Elusive Employee-Contractor Distinction*, VOLOKH CONSPIRACY (Feb. 2012), <http://volokh.com/2012/02/24/prisons-privatization-and-the-elusive-employee-contractor-distinction/comment-page-1/#comment-522393016>.

²³³ Michael Hardimon discusses his views on "role obligations" and contrasts them with two related concepts: John Rawls's "principle of fairness" and Ronald Dworkin's "associative obligations." Michael O. Hardimon, *Role Obligations*, 91 J. PHIL. 333, 335 (1994) (citing RONALD DWORKIN, *LAW'S EMPIRE* 196 (1986); JOHN RAWLS, *A THEORY OF JUSTICE* 111-14, 342-50 (1971)).

— no contract negotiator can anticipate *everything*.) Then the profit-maximizing duty would require that the firm choose A, but a conscientious public employee would be required to choose B. Thus, a conscientious actor with the two duties would be *required* to take a different action than the one with only the one duty to the state.

Of course, if B is really a better policy, then the problem can be rephrased as an empirical one: multiple principals are bad because they lead to a *worse* action being taken. Since this argument is trying to abstract away from empirical concerns, let's instead suppose that A and B are equally good from the state's point of view, so that the conscientious public employee could choose either A or B, while the conscientious private employee would have to choose the more-profitable A. Should one care? To care, one would need to also hold a belief that the only legitimate punishment is one that stems from no duty other than the one to the state.²³⁴ One with these views could argue that the problem of multiple principals is an inherent moral problem, not just a contingent, empirical one.

However, these are incomplete arguments against privatization. In the first place, they only apply to companies with shareholders. Sole proprietorships, for instance, owe no duties to anyone other than their contractual partner, so there they are not faced with any multiple-principals problem.

In the second place, even in firms with shareholders, the objection could be easily overcome by making it clear to the shareholders — for instance, by including a declaration to this effect in the mission statement — that the firm intends to act as a fiduciary for the government as well, and that the duty to maximize profits is strictly subordinate to the duty to conscientiously fulfill the contract. Government could insist on such a declaration as a condition of doing business with a provider. Nor would this make the private organization public: the source of the overriding duty would be the company founders' own desire to faithfully execute the contract even at the expense of maximizing shareholder profits.²³⁵

²³⁴ This view has a family resemblance to Dorfman and Harel's view of "fidelity by deference," discussed in Part II.B above.

²³⁵ Similarly, any company can choose to do something that its managers feel is "socially responsible" but non-profit-maximizing, and this choice won't violate its duty to its shareholders as long as the shareholders buy stock with this understanding.

IV. SYMBOLISM AND EXPRESSIVE CONCERNS

A. *Public Perception*

Suppose my arguments are correct, and there is no inherent difference between public employees and private contractors. But suppose the public nonetheless feels differently. Of course, because public and private providers can differ in their attitudes or in the actions they take, public attitudes might be molded by these differences. Therefore, to keep the hypothetical clean, let's again assume that public and private providers don't differ empirically.

Suppose, then, that public attitudes against privatization are entirely based either on incorrect beliefs about empirical differences or on a perceived "social meaning" of privatization.²³⁶ Perhaps such attitudes are based on a view among the public that private companies have illegitimate private purposes.²³⁷ For instance, Martha Minow writes that private prisons "may jeopardize the legitimacy of government action because the public may suspect that private profit-making — rather than public purposes — is being served."²³⁸ Justice Arbel of the Israeli Supreme Court strikes a similar note:

[E]ven if it is not possible to point to a specific violation, the transfer of the power to operate a prison to a private enterprise creates the impression that irrelevant considerations are involved . . . , something that undermines the moral authority underlying the activity of that enterprise and public

²³⁶ This section is only about people's subjective perception of privatization. I discuss the argument that privatization has an objective (and objectionable) social meaning in Parts IV.B and IV.C.

²³⁷ Another possible symbolic aspect of privatization is that "it indicates a negative evaluation of the competence and desirability of public provision of services and reinforces the widely held opinion in American society that government agencies cannot perform well." SHICHOR, *supra* note 30, at 74.

²³⁸ See Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1234 (2003); see also Roger Matthews, *Privatization in Perspective*, in PRIVATIZING CRIMINAL JUSTICE, *supra* note 25, at 1, 17 ("In the administration of justice as well as the exercise of coercive power, the symbolic element is of paramount importance."); Uriel Rosenthal & Bob Hoogenboom, *Some Fundamental Questions on Privatisation and Commercialisation of Crime Control, with Special Reference to Developments in the Netherlands*, 27 COLLECTED STUD. IN CRIMINOLOGICAL RES. 17, 39 (1990) ("[P]eople may feel better about the state doing the job [of policing] — irrespective of the relative quality of its performance."); *id.* at 21 ("[I]n many countries on the continent people may have internalised the state as an integrative symbol.").

confidence in it, since even if justice is done, it is not seen to be done.²³⁹

Justice Arbel's view puts it starkly: the absence of actual violations is irrelevant; perceptions of private purposes are enough to ban the practice.

Or the relevant perceiving community may be the inmates themselves rather than the public at large: Richard Lippke writes that “[p]rivate prisons may add insult to injury and thus fuel social discontent, since it may not go unnoticed that such facilities, in effect, turn offenders into raw materials for corporate profit.”²⁴⁰ Similarly, Michael Walzer suggests, “[t]he critical exposure is to profit-taking at the prisoners’ expense, and given the conditions under which they live, they are bound to suspect that they are regularly used and exploited.”²⁴¹

This, in short, is the public perception argument. It appears in non-prison contexts as well. Jon Michaels argues, for instance, that private military companies “may have a different social or symbolic status in the American consciousness,” and thus, “[d]ispatching private contractors may not trouble and worry the American people as profoundly as if their boys and girls in uniform were sent into battle.”²⁴² In the same way, he argues, private military companies don’t represent (as the U.S. military does) American “hegemony and coercion” “in the minds of many.”²⁴³

Although I have rebutted the private purposes argument above²⁴⁴ — public employees, too, are private people with their own purposes — that’s not important for the public perception argument. The public perception argument based on private purposes works even if people are quite wrong to perceive private prisons this way. The public perception might stem from an assessment of the empirical record of public versus private prison management, or a prediction thereof — or it might not. But what’s relevant for this argument is people’s *feelings* about private prisons, not whether these feelings are correct: recall, from the beginning of this section, that we assumed that the feeling has no empirical basis.

²³⁹ HCJ 2605/05 Academic Ctr. of Law & Bus., Human Rights Div. v. Minister of Fin., ¶ 5 [2009] (Isr.), available at http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm.

²⁴⁰ Lippke, *supra* note 25, at 31.

²⁴¹ Walzer, *supra* note 184, at 11; see also REPORT NO. 2, *supra* note 28, at 337.

²⁴² Michaels, *supra* note 32, at 1042.

²⁴³ *Id.*

²⁴⁴ See *supra* Part III.

The difference in public perception may have nothing to do with any dislike of the private sector. Perhaps, as Michael O'Hare and his coauthors write, it's merely a perception that public-sector action equals collective action while private-sector action doesn't:

Public and private production differ in two primary ways. The first is that public actions have the authority, mandate, and consent of society as the consequence of collective choice; they are the concrete manifestation of what we *want to do* as a group. The second is that public actions serve a symbolic purpose; they are what we want to *see ourselves choosing to do* as a group. They are a significant part of what it means to be a political collectivity rather than an atomistic plurality.²⁴⁵

The underlying argument, I've contended, is incorrect: public-sector action isn't uniquely "us" acting because even employees are private agents working under contract. But again, what's important for this argument isn't whether its basis actually is correct but whether people *think it to be* correct.

Whether people's (possibly uninformed or irrational) perceptions should have an independent effect on policy, beyond the effect of any underlying objective facts, is debated in many areas. For instance, in the area of risk regulation: if people systematically think harmless activities are harmful, should policy ignore such mistakes, perhaps because rational regulation should only respond to true risks²⁴⁶ or because it is unjust to regulate people unless they impose true harms?²⁴⁷ Or, instead, should policy accept such "mistakes" as valid because even incorrect fears are real fears?²⁴⁸ Or, in the criminal law

²⁴⁵ Michael O'Hare et al., *The Privatization of Imprisonment: A Managerial Perspective*, in PRIVATE PRISONS AND THE PUBLIC INTEREST 107, 121 (1990).

²⁴⁶ See, e.g., Cass R. Sunstein, *Misfearing: A Reply*, 119 HARV. L. REV. 1110, 1125 (2006) ("[O]fficials should not, in democracy's name, base their decisions on factual mistakes that are products of bounded rationality.").

²⁴⁷ See, e.g., ELIZABETH PRICE FOLEY, LIBERTY FOR ALL: RECLAIMING INDIVIDUAL PRIVACY IN AN ERA OF PUBLIC MORALITY 55-56, 59-61 (2006) (suggesting it is only a legitimate exercise of governmental powers to impose regulation on smoking if there were true harms to people); Roger Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1245, 1334 (1979) ("[As to] that class of acts or conditions that involve a very low degree of risk to others . . . individuals and corporations have a perfect right to bring [these] about, without permission from or notice to others."). See generally JOHN STUART MILL, ON LIBERTY 16 (Alan Ryan, ed., 2006) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.").

²⁴⁸ See, e.g., Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1097-98 (2006) (reviewing CASS R. SUNSTEIN,

context, should punishment track “the community’s intuitions of justice” rather than “a transcendent truth of justice”?²⁴⁹

One can make the same sorts of arguments about whether privatization is appropriate in a society where people — without any reason grounded in real-world results — believe it to be inappropriate. I don’t need to resolve this question here, because whatever the answer, this class of argument is valid for purposes of this Article: subjective feelings have a real existence and are relevant in the real world.²⁵⁰ Institutions that are believed to be legitimate might be more effective in various ways. Therefore, Michaels’s point about private military contractors’ freedom from the U.S. military’s “symbolic baggage” means that such contractors “may accomplish goals more readily and with less resistance than if U.S. soldiers were actually deployed.”²⁵¹

Whether an institution is public or private affects people’s expectations of service;²⁵² and expectations of service and even “mere” views on legitimacy affect people’s happiness, which is obviously relevant to consequentialists²⁵³ and can play a role in many other theories as well. Though it usually makes sense to assume that the government has access to the same technology as the private sector, in this case it would be as if the government had a special technology of “legitimacy” (in the sociological sense) that couldn’t be fully transferred to the private sector — which would be an independent argument in favor of public provision.²⁵⁴

LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE (2005)).

²⁴⁹ Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145, 149-50, 174 (2008).

²⁵⁰ As Woody Allen puts it in *Love and Death*, “subjectivity is objective.” See WOODY ALLEN, *LOVE AND DEATH* (United Artists 1975), script available at http://www.script-o-rama.com/movie_scripts/l/love-and-death-script-transcript.html. I’m thus not endorsing here the view of John Donahue, who argues that the symbolic argument “makes sense only as the culmination of a series of separate arguments showing that the array of checks, pressures, and incentives associated with for-profit corrections is likely to lead to morally inferior results.” DONAHUE, *supra* note 19, at 157. It’s possible that the symbolic argument makes sense and has force even if it is purely a statement of what people irrationally believe: irrational utility is utility too, and is therefore a necessary component of a utilitarian analysis.

²⁵¹ Michaels, *supra* note 32, at 1042. Public perception can cut both ways; “the deaths of American contractors overseas, as opposed to U.S. soldiers, may be less likely to lead to a public outcry at home.” *Id.* at 1048.

²⁵² See O’Hare et al., *supra* note 245, at 122.

²⁵³ See *supra* note 36 and accompanying text (citing the “welfarist” work of Louis Kaplow and Steven Shavell); Robinson, *supra* note 249, at 153-55.

²⁵⁴ See COX, *supra* note 12, at 53 (“As the visible face of government disappears, with fewer services provided directly or identifiably, there is a danger that people will

At this point, our argument can move onto empirical ground, and we can look, for instance, at data on the importance of feelings of legitimacy for the effectiveness of institutions and data on how unhappy people are about privatization.²⁵⁵ In any event, if we found, hypothetically, that no one actually cares whether a service is privatized, that would presumably be a dispositive argument against a public perception objection. For instance, one can imagine a world where no one cares whether prisons are public or private.²⁵⁶ Perhaps we already live in such a world now, at least to some extent.²⁵⁷ I don't know of any studies testing the proposition as to public attitudes toward prisons,²⁵⁸ though apparently at least some prisoners don't seem to care.²⁵⁹ Perhaps any perceived illegitimacy of private prisons is merely a transitional phenomenon, and people will come to think

stop identifying any function for government.”).

²⁵⁵ See McDonald, *supra* note 28, at 186 (“[T]he issue is not really a moral one but an empirical one: Is the social cohesiveness of the larger community in fact lessened by such delegations of authority?”).

²⁵⁶ See Rosky, *supra* note 8, at 967-68.

²⁵⁷ See Lippke, *supra* note 25, at 35 (“It could be argued that inmates in private facilities might take [the communicative aspect of punishment] less seriously because they lack the direct imprimatur and so authority of the state. But this is only speculative The only remaining question might be whether private facilities, faced with the necessity of making a profit, would be somewhat more inclined to cut corners, thereby somehow diluting or tainting the moral message punishment is supposed to communicate.”); McConville, *supra* note 19, at 230-31 (“How do prisoners now see the badges of their guards? It is probable that few abstract philosophical or political speculations enter their perceptions It is likely that the vast majority of prisoners are completely indifferent to symbolism, and wholly concerned with what happens and with the quality of the officials with whom they come in contact, rather than with the organizational affiliation of such persons.”); McDonald, *supra* note 28, at 186; Medina, *supra* note 23, at 703 (“[I]t has not been established that a prison operated by a private corporation necessarily conveys the wrong message.”); *id.* at 709 (“[T]he position that privatization as such, regardless of its specific nature, inevitably brings about the aforementioned symbolic and cultural consequences[, i]n my view, . . . is not sufficiently founded.”); *cf.* Freeman, *supra* note 46, at 1346 (“[M]y affection for the Fed Ex delivery guy is slightly less than it is for Fred the mailman, though I have friends who feel differently”); O’Hare et al., *supra* note 245, at 121 (“No matter how much of the daily activity of imprisoning is performed by people drawing paychecks from private firms, incarceration that begins with a judge’s sentence will be a public act in the perception of the people it affects.”).

²⁵⁸ See Rosky, *supra* note 8, at 969 n.321 (“In my research, I have not found any commodification arguments that draw upon sociological or anthropological support.”).

²⁵⁹ See, e.g., Samuel Jan Brakel, *Prison Management, Private Enterprise Style: The Inmates’ Evaluation*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 175, 241 (1988) (quoting some inmates who are critical of the private firm running their prison and others who approved of the private firm).

otherwise after enough experience with privatization.²⁶⁰ Possibly the government could “imprint literally private acts with semantically public significance, as it has learned to do with private education (by accreditation, curriculum supervision, and the pledge of allegiance) and the private services of defense lawyers (by making them officers of the court).”²⁶¹ It’s even possible that, if private prisons do an excellent job, people may come to think of private prisons as *more* legitimate.²⁶² Moreover, two can play at the symbol game: “[a] contract itself is a powerful symbol of legally enforceable obligations and responsibilities.”²⁶³

B. *The Expressive Nature of Punishment*

So far, I have discussed arguments based on people’s (whether the general public’s or inmates’) *subjective* views of privatization. These arguments could, hypothetically, be conclusively rebutted by showing that no one cared whether prisons were public or private. Other arguments, though, do not rest on subjective views, but argue that the social meaning of private provision is objective.

Mary Sigler takes this view explicitly. Criminal justice, she writes, is a

“moral dialogue” between citizens and the state as the legal embodiment of the political community. . . . Against the backdrop of the community’s norms and conventions, the social meaning of criminal conduct is objective, conveying disrespect for victims and contempt for community values regardless of the offender’s subjective motive or intent. Likewise, criminal punishment draws its meaning from the values of the community and its conventional forms of condemnatory expression. These reflect “deeply rooted public understandings” of particular modes of punishment that signify the gravity of criminal misconduct.²⁶⁴

²⁶⁰ See Medina, *supra* note 23, at 711; Rosky, *supra* note 8, at 967-68.

²⁶¹ O’Hare et al., *supra* note 245, at 121-22.

²⁶² See LOGAN, *supra* note 42, at 55-56; McConville, *supra* note 19, at 231 (“[S]uch is the stigma of the correctional system that being in the custody of a private rather than a publicly run jail may even be marginally comforting [T]he grossly crowded, malodorous, dangerous, lawless, and unlawful jail or prison far more undermines the dignity of the state and the law than all the jibes of the political purist or any possible theoretical affront that might arise from decent prison conditions being provided under private auspices.”); text accompanying *infra* note 278.

²⁶³ LOGAN, *supra* note 42, at 56.

²⁶⁴ Sigler, *supra* note 3, at 173 (quoting Dan M. Kahan, *What Do Alternative*

Moreover:

Because “certain forms of hard treatment have become the conventional symbols of public reprobation,” it is not enough to attend to the severity of punishment; we must also consider the mode of punishment as well. . . . [W]hat is heard “depends not just on the content of what is said, but on the context in which it is said, and the accent in which it is spoken.” Effective communication thus depends on the identity of the speaker as well as the identity of the listener, lest “some offenders . . . hear its voice, not as the voice of a community to which they belong and are treated as belonging, but as the voice of an alien and oppressive power” It must be “us against us” rather than “us against them.”²⁶⁵

Privatization, then, is wrong because “[b]y privatizing punishment . . . , we terminate the dialogue between offenders and their community in just the same way as if we privatized prosecutors and criminal courts.”²⁶⁶ It can “easily . . . scramble[]” the message of punishment by

interpos[ing] a filter between the community and the offenders whom it calls to account. In particular, by transforming the institutions of punishment into commodities — fungible objects of economic exchange — privatization alters the character of punishment, reducing the punitive enterprise to a question of price point and logistics. It becomes a puzzle to be solved rather than a dialogue to be opened or renewed. For in the same way that “[t]he law and the courts speak and act in the name of the political community,” our conventions establish that our prisons do so as well. “That message ought to be conveyed by the offended community of

Sanctions Mean?, 63 U. CHI. L. REV. 591, 597-98 (1996); Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 744 (1992)).

²⁶⁵ Sigler, *supra* note 3, at 174 (quoting R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 192-93 (2001); Joel Feinberg, *The Expressive Function of Punishment*, in *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 100 (1970); Pillsbury, *supra* note 264, at 752). Compare Sigler’s view with that of Clifford Rosky, who argues that the meaning of punishment for inmates is of limited importance, and that only the meaning for the public at large really matters: “Clearly, we can aspire to communicate certain public messages to . . . inmates, . . . but we cannot seriously concern ourselves over whether these messages actually get across to [them].” Rosky, *supra* note 8, at 964 n.311.

²⁶⁶ Sigler, *supra* note 3, at 176.

law-abiding citizens, through its public agents, to the incarcerated individual.” As we distance ourselves from the condemnatory practice, however, we attenuate its message of censure, alienating offenders and ourselves from the meaning and value that constitute the liberal-democratic community.²⁶⁷

Note, first, Sigler’s idea that private provision “interposes a filter” between the community and offenders by making prisoners into commodities and reduces punishment to a logistical enterprise.²⁶⁸ Here, again, there is a mismatch between this critique and privatization. Perhaps it is wrong to think of punishment in terms of logistics, but this is a critique of a particular way of thinking about prisoners, not a critique of privatization — even if the two might tend to go together.²⁶⁹ I’m sure one can find public Department of Corrections employees who are bean-counters, and private prison firm employees who take their correctional responsibilities seriously. DOCs, after all, deal with budgets, dollars, and accounting, just like private firms, and even if privatization is taken off the table, nothing prevents the appointment of a DOC director committed to efficiency and cost-cutting. This is a variant of the “private purposes” argument that I’ve critiqued already.

But now let’s focus on whether her broader argument is subjective or objective. Despite the remark that “the social meaning of criminal punishment is objective,” note the contingent empirical, and possibly subjective-sounding, statements: “conventional forms of condemnatory expression,” “deeply rooted public understandings,”

²⁶⁷ *Id.* at 176-77 (quoting DUFF, *supra* note 265, at 186; DiIulio, *supra* note 1, at 79); see also Markel, *supra* note 179, at 2234 (describing a potential objection to private prisons by an advocate of the Confrontational Conception of Retribution, based on the idea that the state is no longer effectively communicating with offenders).

²⁶⁸ See Walzer, *supra* note 184, at 11 (“Is this punishment or economic calculation, the law or the market?”); White, *supra* note 30, at 139 (“[T]he private prison converts the problems of prisons . . . into management questions and questions of relative performance, efficiency, contract interpretation, and so forth.”) Sigler finds this objectionable; on the other hand, former New York State Corrections Commissioner Thomas A. Coughlin III agrees that private prisons attenuate the moral condemnation of society, but believes this is an advantage in the case of juvenile facilities, where excessive stigma is inappropriate. See DiIulio, *supra* note 183, at 175 (quoting and paraphrasing Coughlin’s views).

²⁶⁹ See Dolovich, *How Privatization Thinks*, *supra* note 64, at 128-29, 143-44; Sparks, *supra* note 30, at 24 (arguing that the displacement of moral evaluation by scientific understanding “predate[s] the advent of privatization as such, but the ascendancy of consequentialism and quantification in the language of private correctional management decisively shifts the terrain of debate in this direction”).

“conventional symbols,” whether “some offenders . . . hear its voice,” and whether the “message” is “scrambled” or “attenuate[d]” (which one might take to imply the recipient’s subjective failure to understand the true message). Note, especially, the important qualifier “against the backdrop of the community’s norms and conventions.” So what if people just stop reading anything into the private nature of the prison, and start treating the mode of delivery as irrelevant?

One may object to my hypothetical at this point: surely there are facts about the world that are contingent, but so deeply rooted that we can functionally treat them as inherent. Perhaps people’s deep attitudes about criminal punishment are of this nature. I would resist this contention. Even these “deep” contingent facts might be less deeply rooted than we think. Just how deep is a good subject for debate, and even fairly deep attitudes can change over the course of a generation or a century. If we’re going to consider fundamental changes in the public-private balance, we should consider the possibility of attitudinal changes over such timeframes rather than just assuming that such attitudes are fixed.

In any event, Sigler doesn’t fight the hypo. She notes the possibility that people might come to treat the mode of delivery as irrelevant, and clarifies that such “cultural change” should be “resist[ed].” This *is not* a matter of subjective perception, she stresses, but is inherent in liberal ideals:

To the extent that this is the case, it suggests how far we have strayed from the normative path of liberal-democratic meaning . . . [I]t is not a matter of indifference to us what course these changes take . . . [T]he challenge is to make a case for meaning in terms of our liberal-democratic values and to promote or resist cultural change on that basis.²⁷⁰

And how do “liberal-democratic values” support public provision?

[T]he communicative conception of punishment is predicated on precisely those features of the human condition — on our potential and our limitations — that ground our liberal-democratic commitments. There is thus nothing “mysterious” about the idea that it matters who inflicts punishment. For punishment engages fellow citizens in one of the most serious and definitive enterprises of a liberal-democratic community — holding ourselves and one another responsible for our

²⁷⁰ Sigler, *supra* note 3, at 177.

actions — and the voice of the community is clearest when it speaks for itself.²⁷¹

But then we're back to the familiar problem of what it means for the community to speak "for itself." Given that the community needs an agent and that the available agents won't work except by contract, we're just talking about the community speaking through one form of contractor versus another. In light of this, it is apparent that Sigler's argument is really about the virtues of "communicative . . . punishment" — perhaps a worthy correctional goal, but one that is theoretically independent of the question of privatization.²⁷²

Richard Lippke suggests another way in which prison privatization might be thought to run counter to a communicative theory of punishment. Under R.A. Duff's theory, punishment must aim, through moral dialogue with the prisoner, at moral reform.²⁷³ Lippke suggests that "[i]nstead of being concerned about the moral well-being of

²⁷¹ *Id.* (quoting Rosky, *supra* note 8, at 968).

²⁷² For other examples of expressivist critique, see Aric Press, *The Good, the Bad, and the Ugly: Private Prisons in the 1980s*, in PRIVATE PRISONS AND THE PUBLIC INTEREST, *supra* note 26, at 19, 23-24; DiIulio, *supra* note 1, at 79, 81 (The message of punishment should be conveyed to the prison "by the offended community of law-abiding citizens, through its public agents. . . . The badge of the arresting policeman, the robes of the judge, and the state patch on the uniform of the corrections officer are symbols of the inherently public nature of crime and punishment." On the other hand, "employing the force of the community' via private penal management undermines the moral writ of the community itself." (quoting JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, at ch. I, § 3 (1690))); Robbins, *Delegation Doctrine*, *supra* note 83, at 952 ("[T]he inmate should perhaps be obliged to know — day by day, minute by minute — that he is in the custody of the government"); Starr, *supra* note 8, at 134 ("Meting out justice is a communicative act; its public character ought not to be confused. And where the state represents the nation and seeks to speak with one voice, it needs public servants loyal to its highest interests, not private contractors maximizing their own."); REPORT NO. 2, *supra* note 28, at 338 (1986) (same); Robbins, *supra* note 25, at 826-27 (similar).

While DiIulio's critique has been very influential, I don't discuss it at length here because, unlike Sigler, he is unclear on whether the precise basis for the expressivist critique is subjective or objective. Interestingly, though, DiIulio has suggested that "symbolic differences" should not become "the sum and substance of one's normative position on private prison and jail management (or any other issue)," lest one "forsake moral reasoning for a species of mysticism." DiIulio, *supra* note 183, at 175. But while he believes symbolic differences shouldn't be everything, he nonetheless argues that "such differences *may* matter in ways that make privatizing this particular communal function especially problematic and wholly resistant to facile moral judgments of any kind." *Id.* (emphasis added).

²⁷³ See R.A. DUFF, TRIALS AND PUNISHMENTS 7 (1986); R.A. Duff & D. Garland, *Introduction: Thinking About Punishment*, in A READER ON PUNISHMENT 1, 15 (R.A. Duff & David Garland eds., 1994).

offenders, a state that turns them over to private prisons may appear to be washing its hands of them.”²⁷⁴ But Lippke rejects this suggestion: the state could always require private prisons to educate offenders morally and award contracts based on success in meeting this requirement.²⁷⁵ Perhaps inmates might be less morally educable in private prisons because they “may wonder whether what they are compelled to do is for their own good . . . or is calculated to promote the bottom line of the corporations that own the facilities.”²⁷⁶ But Lippke notes (consistent with my argument) that public prison administrators and guards also have their own private interests,²⁷⁷ and in any event this is now an empirical question about prisoners’ subjective views of privatization. Lippke suggests that “inmates in private prisons might quickly lose sight of the profit-making aspect of such enterprises if they are treated well and provided opportunities to improve their lives.”²⁷⁸ Attitudinal change at work!

C. Social Respect and Responsibility

We have seen earlier how the Israeli Supreme Court ruled that private prisons violate the constitutional right of personal liberty.²⁷⁹ The Court also had an alternative holding: that private prisons violate the separate constitutional right to human dignity. The idea of private purposes — which I have rebutted above²⁸⁰ — still made an appearance there, but the flavor was slightly different:

There is . . . an inherent and natural concern that imprisoning inmates in a privately managed prison that is run with a private economic purpose *de facto* turns the prisoners into a means whereby the corporation . . . makes a financial profit. . . . [T]he very existence of a prison that operates on a profit-making basis reflects a lack of respect for the status of the inmates as human beings, and this violation of the human dignity of the inmates does not depend on the extent of the

²⁷⁴ Lippke, *supra* note 25, at 35. I deal specifically with the hand-washing metaphor in Part IV.C below.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ See *supra* text accompanying notes 195-228.

²⁸⁰ See *supra* Part III.

violation of human rights that actually occurs behind the prison walls.²⁸¹

The Court noted that this claim did not depend on the inmate's "subjective feelings"; being a means to a private firm's profit-making is "an objective violation of [one's] constitutional right to human dignity."²⁸²

But the Court went further than a mere private purposes argument. Private prisons, it said, violate human dignity because of "the social and symbolic significance of imprisonment in a privately managed prison."²⁸³ Because there is a "social consensus" that private prisons "express disrespect," the practice violates human dignity — "irrespective of the empirical data . . . (which may be the source of the symbolic significance), and irrespective of the specific intention of the party carrying out an act of that type in specific circumstances."²⁸⁴

The social consensus that supposedly underpins the expression of disrespect could be infinitely variable. Consider, for example, the argument of Geiza Vargas-Vargas, who argues against private prisons on the ground that, given the history of slavery and the prevalence of black men in prison, "[t]he joint venture [of prison privatization] has effectively reintroduced the policy of enslaving black men for profit."²⁸⁵

The Israeli Supreme Court had a different social consensus in mind, though: private imprisonment "expresses a divestment of a significant part of the state's responsibility for the fate of the inmates, by exposing them to a violation of their rights by a private profit-making enterprise."²⁸⁶ I have already questioned the "private purposes"

²⁸¹ HCJ 2605/05 *Academic Ctr. of Law & Bus., Human Rights Div. v. Minister of Fin.*, ¶ 36 [2009] (Isr.), available at http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm.

²⁸² *Id.* at ¶ 37; see also Tolchin, *supra* note 25 ("Justice is not a service, it's a condition, an idea,' [Michael E.] Smith[, executive director of the Vera Institute of Justice,] said. 'It's not like garbage collection. Prisoners are not garbage.'"); Weiss, *supra* note 25, at 43 ("There is a potent symbolic issue in penal privatization: an action so daring as entrusting penal power to profit-makers says something about what the State thinks of prisoners politically.").

²⁸³ *Academic Ctr. of Law & Bus., Human Rights Div.*, at ¶ 38.

²⁸⁴ *Id.* at ¶ 38; see also *id.* ¶ 39 ("[T]he imprisonment of a person in a privately managed prison is contrary to the basic outlook of Israeli society . . .").

²⁸⁵ Geiza Vargas-Vargas, *White Investment in Black Bondage*, 27 W. NEW ENG. L. REV. 41, 91 (2005).

²⁸⁶ *Academic Ctr. of Law & Bus., Human Rights Div.*, at ¶ 39. Justice Arbel, in a separate opinion, struck a similar note, writing that prison privatization "amounts to a refusal by the state, albeit only a partial one, to play 'its part' in the social contract" and "makes the state a bystander that does not seek to realize independent goals of its

argument above,²⁸⁷ but I have also granted that people's views of the private sector can be legitimate to consider, even if those views are irrational.²⁸⁸ Even if the actor's motivations are irrelevant, the perception of the meaning of private incarceration by members of the public is relevant.

Joseph Field also takes a divestment line:

Prison privatization represents the government's abdication of one of its most basic responsibilities to its people. . . . [It] can be viewed as a move by the government to detach itself from this responsibility for the sake of private values, including the profit motive. . . . Transferring the provision of corrections to the private sector is tantamount to transferring an important element of government responsibility. . . . Not only is corrections one of the government's most basic responsibilities, it is probably the most sobering.²⁸⁹

The theme is that the government must recognize the gravity of what it is doing to the prisoner and respect him as a person, and that privatization is an impermissible distancing.²⁹⁰ Ira Robbins writes that "the government should be obliged to know . . . that it is its brother's keeper, even with all of its flaws."²⁹¹ Michael Walzer writes: "It is in part because prisoners can't form unions that we, who put them in prison, must accept responsibility for their treatment. How can we

own." *Id.* ¶ 2 (Arbel, J.); see also *id.* ¶ 4.

²⁸⁷ See *supra* text accompanying note 171.

²⁸⁸ See *supra* text accompanying notes 244-248.

²⁸⁹ Field, *supra* note 24, at 668-69.

²⁹⁰ Cf. CHRISTIE, *supra* note 25, at 145 ("[W]here the state exists, the prison officer is my man. . . . He might be a bad officer. And I might be bad. . . . But I would have known I was a responsible part of the arrangement."); Anderson et al., *supra* note 182, at 37 ("The government agent should not perceive the private provider as a means to an 'out of sight-out of mind' correctional philosophy."); Michael Janus, *Bars on the Iron Triangle: Public Policy Issues in the Privatization of Corrections*, in *PRIVATIZING CORRECTIONAL INSTITUTIONS* 75, 76 (Gary W. Bowman et al. eds., 1993) ("Private involvement in corrections . . . can serve to distance the state from the inmate (and vice versa), by introducing an intervening actor."); Medina, *supra* note 23, at 702 (noting the argument that privatization creates distance that conveys "a social meaning of disrespect to the prisoners"); White, *supra* note 30, at 139 ("Private prisons tend to distance public officials from responsibility for the way private prisons are run. . . . [W]hen private prisons are the subjects of scandal, . . . journalists and regulators focus first and most forcefully on the *private* character of the institution . . .").

²⁹¹ Robbins, *Delegation Doctrine*, *supra* note 83, at 952.

teach them their own responsibilities if we evade ours, leaving them to endure what is bound to feel like one more racket?"²⁹²

Critics make similar points as to privatization in areas far removed from prisons, such as education or Social Security.²⁹³ An analogous argument in the military context would be that private military companies' actions aren't attributed to the U.S. government. When people observe mercenaries' misdeeds, they're more inclined to blame them on bad apples than on the government. This implies a distancing of the government from what is done by its agents, which may make the U.S. public more callous as to the resulting damage and (less empirically) reduces the legitimacy of the military intervention.²⁹⁴

I read most of these social meaning arguments as falling within the subjective category, which means that they're amenable to (and can conceivably be disproven by) anthropological research regarding people's actual views. But not all the authors who take this approach are clear about whether the moral distancing is a subjective or objective matter. To the extent these views purport to be objectively based, it's hard to see why going from one contract to another should be taken to imply moral distancing. Perhaps many past instances of contracting have in fact been motivated by a desire to not be involved anymore, or perhaps just by a desire to save money.²⁹⁵ But that desire can exist in the public sector too: I have already suggested the prospect of DOC directors and prison wardens who are committed to cutting costs.²⁹⁶ Moreover, many privatization advocates pin their case on the proposition that privatization will (or may) improve prison conditions,²⁹⁷ and various pro-privatization politicians have echoed

²⁹² Walzer, *supra* note 184, at 11.

²⁹³ See Starr, *supra* note 8, at 135.

²⁹⁴ Cf. Stephen Lathrop, Comment to *Prisons, Privatization, and the Elusive Employee-Contractor Distinction*, VOLOKH CONSPIRACY (Feb. 24, 2012, 11:08 AM), <http://volokh.com/2012/02/24/prisons-privatization-and-the-elusive-employee-contractor-distinction/comment-page-1/#comment-522392993>.

²⁹⁵ See Dolovich, *How Privatization Thinks*, *supra* note 64, at 139 (arguing that the prison privatization debate is driven by efficiency and cost-minimization concerns); Brian David, *Firm Offers Savings Running Jail: Beaver County Officials Hope Success in Ohio Can Be Duplicated*, PITTS. POST-GAZ., July 14, 2005, at W6.

²⁹⁶ See *supra* text accompanying note 268.

²⁹⁷ See e.g., CHANGING THE GUARD, *supra* note 19; DONAHUE, *supra* note 19, at 154-55; PAUL GUPPY, WASH. POLICY CTR., PRIVATE PRISONS AND THE PUBLIC INTEREST: IMPROVING QUALITY AND REDUCING COST THROUGH COMPETITION (2003); LOGAN, *supra* note 42; MOORE, *supra* note 29; SEGAL & MOORE, *supra* note 22; GEOFFREY F. SEGAL & ADRIAN T. MOORE, REASON PUB. POL'Y INST., WEIGHING THE WATCHMEN: EVALUATING THE COSTS AND BENEFITS OF OUTSOURCING CORRECTIONAL SERVICES, PART I: EMPLOYING A BEST-VALUE APPROACH TO PROCUREMENT (2002); Savas, *supra* note 172, at 897-98;

these views.²⁹⁸ For them, the desire to privatize is precisely the opposite of moral distancing, at least if we take their claims at face value.

True, the Israeli Supreme Court has stated that the actor's motivation is irrelevant given a social consensus in place, but at least the presence of contrary motivations in public discourse might make us think twice before *asserting* the existence of the consensus without having survey data in hand — much less striking down a statute on that basis!

CONCLUSION

Throughout, I have focused on private prisons. But, as I mentioned in the Introduction, these non-empirical arguments are often used to oppose privatization in other areas as well — from the military, policing, and air transport security (which, like prisons, raise “privatization of force” concerns) to social services like water provision, education, health care, and Social Security.²⁹⁹ The emphasis on prisons is useful for illustrative purposes, but the employee-contractor distinction is similarly problematic in these other areas.

It should be clear, though, that I'm not making a general argument in favor of privatization. I'm only arguing against the use of certain non-empirical arguments related to the employee-contractor distinction.³⁰⁰ My goal here is merely to discipline the debate and clear away arguments that I believe are unproductive.

On empirical grounds alone, there are plenty of possible reasons to oppose privatization. I have already mentioned many of them in the Introduction: critiques based on factors like cost, quality, democratic

Peter Duitsman, Comment, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C. L. REV. 2209 (title) (1998); Geoffrey F. Segal & Alexander McCobin, *Making Prisons Compete: How Private Prisons Enhance Public Safety and Performance*, ENGAGE, Oct. 2007, at 71.

²⁹⁸ See, e.g., Press Release, U.K. Ministry of Justice, Prisons Competition Outcome (Mar. 31, 2011), available at <http://www.justice.gov.uk/news/press-releases/moj/press-release-310311b.htm> (quoting British chancellor and Secretary of State for Justice Kenneth Clarke as saying that competition in prison provision “can deliver . . . better value for money . . . without compromising standards” and can also further rehabilitation).

²⁹⁹ See *supra* text accompanying notes 8-11, 31-34, 47-53, 174-175, 189, 285, and Part II.

³⁰⁰ And only in privatization discourse: I have no problem with non-empirical arguments elsewhere, and indeed, I frequently use them. The arguments here, which relate to what it means to be someone's “agent,” have little relevance to areas other than privatization.

influence, accountability, and penal policy, to name just a few.³⁰¹ Privatization critics have been vocal about the “[f]raud and waste,” “[i]nsufficient oversight,” and reductions in “transparency” and “accountability” that, in their view, have accompanied private contracting.³⁰² One can complain that private firms will use anticompetitive tactics,³⁰³ opportunistically hold out for favorable contract renegotiations when circumstances change,³⁰⁴ use their position of incumbency to outbid competitors in later bidding (or even avoid later bidding altogether),³⁰⁵ fail to develop institutional norms of professional service,³⁰⁶ or go bust and leave an unprepared government holding the bag.³⁰⁷

I’m not taking a position here on whether these empirical critiques are justified. I’ve argued, in other work, that at least some of these empirical critiques are overblown.³⁰⁸ But enough respectable people have made enough respectable empirical arguments strongly opposing privatization that an entirely empirical case against privatization in particular spheres may well be fully adequate.

Moreover, adopting an empirical perspective doesn’t imply any sort of utilitarian law-and-economics efficiency model.³⁰⁹ Sharon Dolovich, for instance — a strong critic of prison privatization — simultaneously argues both *against* the efficiency framework and *in favor of* empirical reasoning (while acknowledging the temptation of non-fact-based arguments):

³⁰¹ See *supra* text accompanying notes 22-35.

³⁰² Jody Freeman & Martha Minow, *Reframing the Outsourcing Debates, in* GOVERNMENT BY CONTRACT, *supra* note 9, at 4-5; see also PAUL VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT (title) (2007); Sigler, *supra* note 3, at 156; Poole, *supra* note 27.

³⁰³ Sigler, *supra* note 3, at 155.

³⁰⁴ Poole, *supra* note 27. See generally OLIVER HART, FIRMS, CONTRACTS AND FINANCIAL STRUCTURE (1995) (discussing opportunistic behavior in contract relationships).

³⁰⁵ Sigler, *supra* note 3, at 155; Poole, *supra* note 27.

³⁰⁶ Freeman, *supra* note 21, at 574.

³⁰⁷ Sigler, *supra* note 3, at 155.

³⁰⁸ See generally *Developments*, *supra* note 24 (my student note, taking a cautiously optimistic view of private prisons); Volokh, *supra* note 25 (arguing that the private prison industry shouldn’t necessarily be expected to lobby for greater incarceration); Alexander Volokh, *Privatization, Free Riding, and Industry-Expanding Lobbying*, 30 INT’L REV. L. & ECON. 62 (2010) (same).

³⁰⁹ I myself have argued against a normative efficiency model in a different context. See generally Alexander Volokh, *Rationality or Rationalism? The Positive and Normative Flaws of Cost-Benefit Analysis*, 48 HOUS. L. REV. 79 (2011).

The insistence of the inherent-public-function approach on the irrelevance of the practical consequences of prison privatization likely stems from the desire of these critics to escape the powerful force field of comparative efficiency, which operates to crowd out all considerations *except* practical consequences. Yet understandable though this resistance is, to the extent that it denies the moral relevance of actual conditions of confinement, it will necessarily operate with a conception of legitimacy that is only partially satisfying at best. It will, moreover, appear wholly insensitive to the needs and interests of the prisoners themselves and thus be vulnerable to charges of “intellectual indulgence” or “moral or ideological fundamentalism.”³¹⁰

Perhaps non-empirical arguments are correlated with anti-privatization views, but if so, this is only as an empirical (!) matter. The bottom line is that one can be convinced by this Article, abjure non-empirical argumentation on privatization matters, and still be just as anti-privatization as one was before reading it.³¹¹

In this Article, I also haven't sought to promote or dispute any substantive theory of punishment. I've questioned the distinction between public employees and private contractors, but I haven't questioned any of the underlying theories that the distinction supposedly served (though I do privately have doubts about many of them).

Thus: I haven't questioned that accountability is important for non-instrumental reasons, but I have suggested that there's no necessary connection between public status and accountability. I haven't questioned that certain tasks should be undertaken in the name of the state — nor have I questioned that the state is capable of acting³¹² — but I have expressed dissatisfaction with a theory that would allow public employees the ability to act in the name of the state while denying that ability to private contractors. I haven't questioned that private purposes are undesirable, but I have suggested that there's no necessary connection between private status and private purposes. I haven't questioned that institutions should be subjectively legitimate, or that punishment should be communicative, or that people should

³¹⁰ Dolovich, *State Punishment*, *supra* note 23, at 443 n.12 (citing HARDING, *supra* note 30, at 23-24).

³¹¹ And recall the discussion in *supra* note 300: one can still use non-empirical reasoning outside of the privatization context.

³¹² See *supra* notes 18 and 41.

respect prisoners as real people and care about their well-being. But I have expressed doubts as to whether people really consider private contractors to be less legitimate, whether privatization makes communicative punishment harder, and whether privatization implies moral distancing.

Perhaps all this is true, but let's investigate it empirically. Of course, I don't demand concrete survey data — where real data collection is impossible, theoretical argument as to which way the data might point is acceptable.³¹³ But we have to start from the premise that the data, if it exists, could go either way. Mere assertion, backed up by essentialist statements about the supposed nature of the public and private sectors, won't do.

It should be apparent from the last few paragraphs that I'm not generally arguing for consequentialism. After all, for purposes of this Article, I've endorsed all sorts of non-consequential, non-instrumental claims, like the inherent importance of accountability or public purposes or communicative punishment. I'm sympathetic to non-consequentialist arguments generally, but I don't think those arguments adequately distinguish between employees and contractors.

Finally, this isn't an argument against the public-private distinction, either in political theory or in constitutional law. I'm fully committed to the idea, basic to modern liberal political philosophy, that there is an important difference between the public and private sectors, even if there are cases that are hard to classify.³¹⁴ Locking people up on your own initiative is different from public prisons in a way that private contract prisons aren't: the former is "people doing the state's bidding for money" while the latter isn't.³¹⁵

And I have no problem with the general idea of the state action doctrine, even if one may quarrel with some of the individual cases. The state action doctrine crops up in some areas that have nothing to

³¹³ See *supra* text accompanying note 39.

³¹⁴ For articles discussing the problems of the state action doctrine in a privatization context, see Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYR. L. REV. 1169 (1995); Sheila S. Kennedy, *When Is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON U. CIV. RTS. L.J. 203 (2001); Metzger, *supra* note 30.

³¹⁵ Cf. Markel, *supra* note 179, at 2238 ("Ultimately the [private] prison guard will be trained according to the dictates of the state and the source of funds will be the public fisc. (By contrast, there is no evidence that when the state orders a shaming punishment, a similar claim of agency can be made by the state about the crowd.)"). Though nothing that I say here should foreclose the possibility that even a (regulated) private market — in incarceration or anything else — might be legitimate. See, e.g., MASS. GEN. LAWS ANN. ch. 231, § 94B (West 1985) (shopkeeper's privilege).

do with contracting out,³¹⁶ the arguments I've presented here don't apply in those cases. Where there is contracting out, sometimes state action does indeed treat employees and contractors identically.³¹⁷ In other cases, as a general matter, there are enough empirical differences, between employees and contractors, that treating them differently may make eminent sense.³¹⁸

The same goes for any other doctrine that distinguishes between employees and contractors, like whether an agent can make the principal liable in tort.³¹⁹ My argument here should merely be taken as an attack on the non-empirical lines of argument — at least, those I've encountered in the literature — that might support a distinction between employees and contractors.³²⁰

Contractors, just like employees, are flesh and blood. They're private people like you and me, who lived a quiet life in the private sector until they felt the call of duty, or were conscripted, or wanted to make money, or any combination of the above, and became, in one way or another, agents of the government.

Contractors and employees have their own views, their own ideologies, and their own agendas. If they work voluntarily, they "profit" from government work, insofar as they're being paid more than the bare minimum it would take to induce them to do the work. They're not completely controlled in every single action, so they have

³¹⁶ See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001) (holding that an organization regulating high school sports is a state actor); *Blum v. Yaretsky*, 457 U.S. 991 (1982) (holding that a private nursing home is not a state actor); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that state enforcement of a discriminatory covenant is state action that violates the Equal Protection Clause); *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding that private discrimination is not state action).

³¹⁷ As with private prisons. See *supra* note 57.

³¹⁸ As with schools. For examples of state action cases involving schools, see *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22 (1st Cir. 2002).

³¹⁹ See, e.g., RESTATEMENT (THIRD) OF AGENCY § 2.04 (respondeat superior for employee torts).

³²⁰ Cf. *Barak-Erez*, *supra* note 314, at 1187 (criticizing state action doctrine for its "unjustified differentiation between state contracting with individuals and state contracting with a project (usually run by a corporation). . . . [P]ublic employees are identified with the state due to their contractual relations with it [Therefore] close contractual relations . . . should equally suffice with regard to corporations operating public institutions or public services."); *Metzger*, *supra* note 30, at 1466-67 ("State action doctrine, with its emphasis on actual exercises of control, ends up privileging the independent contractor relationship for constitutional purposes compared to the employee relationship, but from an agency perspective little reason exists for drawing such a categorical line.").

some discretion, within limits, to follow their own preferences rather than the voters' or the legislators' or their immediate bosses' commands. Some of them file W-2s and are called "employees." Some of them file 1099s and are called "contractors." But this is an administrative distinction, not necessarily a philosophical one: they all have contracts, so they're all contractors of one sort or another. To limit the state a priori to the "employee" category of contractor is to let a Human Resources category channel one's moral thinking.

Of course employees and contractors differ systematically, because different contracts have different terms and remedies and encourage different actions. Predictably, employees and contractors will act differently, so it makes sense for us to be for or against privatization under particular conditions. This is the empirical approach to privatization.

I understand the temptation to seek out non-contingent, non-empirical grounds to favor or oppose privatization, especially when one opposes privatization for reasons that sound like "justice" reasons. Of course, justice and empiricism can live together just fine: one could just say "I predict (possibly based on past experience) that private prisons will violate prisoners' rights more often, and this is unjust; therefore, we shouldn't privatize prisons." But now we're vulnerable to the vagaries of data and empirical inference. Surely it's nice to have a more solid, less fact-intensive ground of argument.

I appreciate the impulse in general, and so, as I've said, this Article shouldn't be understood to say that *everything* is contingent. Nor is the argument here opposed to "soft" concerns like symbolism,³²¹ nor do I believe, as Richard Harding does, that "the purist moral argument" (which includes accountability concerns) "is something of an intellectual indulgence."³²²

What I'm essentially attacking is the failure to think clearly about what it means for the state to act. Liberal political philosophy gives us many reasons to think that certain realms — many would include at least the police, prisons, military, and courts in this category — belong exclusively to "the state." And, colloquially, one often talks about privatization, including contracting out, as being a retreat of "the state."³²³ But this is a sloppiness of terminology. Between favoring state

³²¹ My argument here is thus more inclusive than that of Logan, who argues that "[t]he great concern with symbolism on the part of those who question the propriety of private prisons indicates that their argument is not substantive. Essentially, it is theological, or rather, theocratic." LOGAN, *supra* note 42, at 57.

³²² HARDING, *supra* note 30, at 23.

³²³ See, e.g., Hart et al., *supra* note 20 (note the title: *The Proper Scope of*

action and opposing outsourcing — between recognizing areas of public authority, and insisting that the state be limited to one specific standard-form contract — falls the shadow. Contracting out is merely a retreat of state *employment* in favor of other forms of state contracting. There are plenty of differences between different kinds of contracting, but they all relate to how these contract forms play out in the real world. The a priori philosophical distinction between public and private provision is tempting but ultimately illusory.