

# The Unconvincing Case Against Private Prisons

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*In 2009, the Israeli High Court of Justice held that private prisons are unconstitutional. This was more than a domestic constitutional issue. The court anchored its decision in a carefully reasoned opinion arguing that the state has a monopoly on the administration of punishment, and thus private prisons violate basic principles of modern democratic governance. This position was immediately elaborated upon by a number of leading legal philosophers, and the expanded argument has reverberated among legal philosophers, global constitutionalists, and public officials around the world. Private prisons are a global phenomenon, and this argument now stands as the definitive principled statement opposing them. In this Article, I argue that the state monopoly theory against privatization is fundamentally flawed. The Article challenges the historical record and philosophy of the state on which the theory is based, and then explores two other issues the theory wholly ignores: private custodial arrangements in other settings that are widely regarded as acceptable if not exemplary and third-party state arrangements that are universally hailed as exemplary. The Article presents first-of-its-kind empirical data on private prisons in Australia, discusses the implications of readily available information on juvenile facilities, and explores interstate compacts on prisoner transfers. The Article maintains that the state monopoly theory erroneously asserts that privatization is inconsistent with the modern state, and concludes with a call for policymakers and judges to imbue their future privatization decisions with local knowledge and time-honored pragmatism.*

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## INTRODUCTION

In the early 2000s, Israel's parliament, the Knesset, authorized the establishment of an 800-bed private prison and selected a contractor who immediately began to build the prison. Opponents promptly filed suit with the Supreme Court of Israel, sitting as the High Court of Justice (HCJ), challenging the constitutionality of the legislation. The HCJ took over five years to decide the case, no doubt hoping that the government would get the hint and assume control of the prison so that it would not have to decide the matter. Eventually, however, in *Academic Center of Law and Business v. Minister of Finance*,<sup>1</sup> the court issued a sweeping ruling on the merits, holding that the private prison that had been constructed, but was not yet open, violated provisions in the state's Basic Law: Human Dignity and Liberty.<sup>2</sup>

Punishment, the court reasoned, is a core function of the state and cannot be delegated to agents acting on its behalf.<sup>3</sup> In developing its argument, the court articulated a state monopoly theory of punishment—punishment can only be administered by the state that sentences the offender, so private prisons are impermissible. The court's decision is anchored in provisions in Israeli constitutional law protecting human dignity and liberty,<sup>4</sup> but its opinion proclaimed a theory of universal applicability. The expansive decision has its origins in an unamendable provision in the post-war German Constitution adopted in 1949 in the aftermath of the destruction of the Jews by the Nazi regime.<sup>5</sup> Since then, this provision has influenced constitutional scholars around the world, perhaps most fully in the construction of the 1992 Israeli Basic Law: Human Dignity and Liberty, which provides in part that “[t]here shall be no violation of the life, body or dignity of any person as such.”<sup>6</sup> The concept has also been embraced by courts throughout Europe, especially the European Court of Human Rights,<sup>7</sup> and more recently in American constitutional jurisprudence. In the U.S. Supreme Court, Justice Anthony Kennedy, writing for the majority, has introduced the concept in two same-sex

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1. HCJ 2605/05 Academic Ctr. of Law & Bus., Human Rights Div. v. Minister of Fin., 27, 68–71 [2009] (Isr.) (observing that the “power of imprisonment and the other invasive powers that derive from it are therefore some of the state’s most distinctive powers as the embodiment of government” and concluding that privatization violates “the constitutional right to personal liberty”), available at [http://elyon1.court.gov.il/files\\_eng/05/050/026/n39/05026050.n39.htm](http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm).

2. *Id.* at 58 (quoting Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 p. 60, § 5 (Isr.)).

3. *Id.* at 40 (“[T]he government does not stop acting as ‘the executive branch of the state’ when it carries out its functions through private entities or delegates certain powers to them.”).

4. See Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization*, 8 INT’L J. CONST. L. 690 (2010).

5. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.) (German Basic Law provision that human dignity is “inviolable”).

6. Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 p. 60, § 2 (Isr.).

7. See, e.g., Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103 (1986).

rights landmark cases: *Lawrence v. Texas*<sup>8</sup> and *United States v. Windsor*.<sup>9</sup> Justice Kennedy also squarely invoked the concept of human dignity in *Brown v. Plata*,<sup>10</sup> in which the Court upheld a special three-judge lower-court order to reduce California's prison population by 40,000 inmates in order to reduce unconstitutional levels of overcrowding.<sup>11</sup>

With the 2009 Israeli court decision, the principle of human dignity and the issue of privatization are now firmly linked as global issues. By engaging directly with the themes of human dignity and privatization, which feature prominently in the work of scholars such as Alfred Aman,<sup>12</sup> *Academic Center* energized the emerging global constitutional community, including Judith Resnik<sup>13</sup> and Alexander Volokh.<sup>14</sup> The opinion sheds important critical insight on the theory and practice of prison privatization in the United States and elsewhere.

This Article assesses the state monopoly theory set out by the Israeli high court and elaborated upon by the Israeli legal theorist Alon Harel and colleagues,<sup>15</sup> who were engaged with the issues as the case developed, and whose writings elaborate on the court's theory. As a body, this work—the court's opinion and articles by Harel and colleagues—represents the strongest theoretical statement against private prisons with which I am familiar. Unlike most discussions of privatization, it does not hinge upon a preordained conclusion based upon pretheoretical assumptions, as do some communitarian theories on one hand,<sup>16</sup> and some libertarian theories on the other.<sup>17</sup> Nor is it purely a high rhetorical argument or call to action.<sup>18</sup> Nor is it

8. 539 U.S. 558 (2003) (striking down Texas statute outlawing same sex intercourse).

9. 133 S. Ct. 2675 (2013) (finding a critical section of the Defense of Marriage Act unconstitutional under the Due Process Clause of the Fifth Amendment).

10. 131 S. Ct. 1910, 1928 (2011).

11. See, e.g., Mark A.R. Kleiman & Kelsey R. Hollander, *Reducing Crime by Shrinking the Prison Headcount*, 9 OHIO ST. J. CRIM. L. 89, 90 (2011).

12. See generally ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (2004); Alfred C. Aman, Jr., *A Global Perspective on Current Regulatory Reforms: Rejection, Relocation, or Reinvention?*, 2 IND. J. GLOBAL LEGAL STUD. 429 (1995); Alfred C. Aman, Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477 (2001).

13. See Judith Resnik, *Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century*, 11 INT'L J. CONST. L. 162, 165–67 (2013).

14. See Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133, 136–38 (2012).

15. See, e.g., Avihay Dorfman & Alon Harel, *The Case Against Privatization*, 41 PHIL. & PUB. AFF. 67 (2013); Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, 14 LEGAL THEORY 113 (2008); Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics*, 96 CORNELL L. REV. 749 (2011).

16. See, e.g., MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983) (presenting leading defense of communitarian philosophy); see also Michael Walzer, *Hold the Justice*, NEW REPUBLIC, Apr. 8, 1985, at 10.

17. See Volokh, *supra* note 14.

18. See, e.g., John J. DiIulio, Jr., *The Duty to Govern: A Critical Perspective on the*

simply one more elaborate cost-benefit analysis.<sup>19</sup> Rather, the approach taken in the court's opinion and the articles by Alon Harel and colleagues is securely anchored in a traditional approach in political theory. These arguments operate through the implications of commonly held ideas in modern political theory about the nature of the state and the nature of delegation of state functions.<sup>20</sup>

Thus, *Academic Center* represents a court leveraging a great intellectual tradition in an effort to grapple with a pressing social issue, and the result is a powerful, principled argument in defense of the state's monopoly of punishment. The many issues surrounding private prisons were "in the air" and widely discussed for several years before the court's long-awaited decision was finally handed down, and the opinion's rationale did nothing but further intensify the conversation. Reaction to the court's decision has been swift and immediate, and has influenced scholars working on private prisons in the United States and abroad.<sup>21</sup> Some reaction came, even before the court handed down its opinion, as the parties developed their positions. Hebrew University legal philosopher Alon Harel, who was familiar with the arguments of the parties, wrote two articles, one by himself and another with Tel Aviv University legal theorist Ariel Porat, elaborating on the argument that Chief Justice Dorit Beinisch adopted for the court.<sup>22</sup> This was followed by a third article, coauthored with Avihay Dorfman, *The Case Against Privatization*.<sup>23</sup> The court's opinion, together with the arguments of Harel and his colleagues, now stands as the definitive case against privatization, and anyone wishing to defend private prisons must address it head-on.

The purpose of this Article is to do just that—to challenge the theory head on. I maintain that although this seemingly impregnable argument may establish a strong presumption against privatization, it does not establish a convincing case for the state monopoly theory it advances. Working in the same theoretical tradition as the court and Harel and colleagues, I challenge the argument on its own terms, and uncover far too many unacceptable consequences, anomalies, and inconsistencies in the theory to allow it to stand as an impregnable defense. First, I will set out the court's theory, supplemented by the elaboration offered by Harel and colleagues. Then I will explore the weaknesses in the argument, which require it to be substantially curtailed or abandoned altogether and replaced by a pragmatic assessment of privatization—an alternative I sketch out in the conclusion.

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*Private Management of Prisons and Jails*, in PRIVATE PRISONS AND THE PUBLIC INTEREST 155, 175–76 (Douglas C. McDonald ed., 1990).

19. See Patrick Bayer & David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management*, 48 J.L. & ECON. 549 (2005); Darrin Grimsey & Mervyn K. Lewis, *Are Public Private Partnerships Value for Money? Evaluating Alternative Approaches and Comparing Academic and Practitioner Views*, 29 ACCT. F. 345 (2005); Stephen King & Rohan Pitchford, *Privatisation in Australia: Understanding the Incentives in Public and Private Firms*, 31 AUSTL. ECON. REV. 313 (1998).

20. The approach echoes ideas contained in the work of another serious liberal theorist of prisons, Sharon Dolovich. *E.g.*, Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005).

21. See, e.g., Resnik, *supra* note 13; Volokh, *supra* note 14.

22. Harel, *supra* note 15; Harel & Porat, *supra* note 15.

23. Dorfman & Harel, *supra* note 15.

The centerpiece of *Academic Center* is the declaration that private prisons violate Israel's Basic Law on human dignity and liberty. By making that declaration, the court developed a state monopoly theory that, by extension, is applicable to all liberal democratic governments. The court's decision had immediate impact nationally; the state purchased and now operates the prison. The ruling has also elicited reaction from constitutional law scholars,<sup>24</sup> political theorists,<sup>25</sup> and prison experts<sup>26</sup> around the world, and has rekindled the ongoing debate not only about prison privatization but also about the nature of the state and the nondelegation doctrine.

I review the state monopoly theory below, as advanced by the court and academic articles. To be sure, there are places, primarily around the margins, where the court's and the scholarly arguments diverge. Yet the two approaches are grounded on a common core set of commitments—namely, about the nature of the administration of punishment and the functions of the state. Both commitments, I will show, pay insufficient attention to particularized considerations of history, bureaucratic administration, and contemporary theories of the liberal state. And it is in these commitments that the state monopoly theory goes wrong.

#### I. THE HIGH COURT'S THEORY OF PRIVATIZATION

In her long and carefully constructed opinion, the Court President, Justice Dorit Beinisch raises and rejects various arguments in favor of prison privatization and, in a tour de force analysis that draws on classical liberal political thought, develops an argument that the state—and only the state—must shoulder responsibility for administering the punishments that it orders. Although she anchors her opinion to the concepts of human dignity and liberty, the strength of the opinion is to set out the implications of punishment in light of modern democratic theories of the state. Delegating the administration of prisons to private agents, the court insists, not only violates the dignity of the convicted offender but also inflicts “an additional independent violation of the constitutional right to personal liberty beyond the violation that arises from the imprisonment itself.”<sup>27</sup> The opinion continues:

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24. See, e.g., Medina, *supra* note 4; see also Amnon Reichman, *Judicial Constitution Making in a Divided Society: The Israeli Case*, in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 233 (Diana Kapiszewski et al. eds., 2013); Daphne Barak-Erez, *The Private Prison Controversy and the Privatization Continuum*, 5 LAW & ETHICS HUM. RTS. 138 (2011).

25. See, e.g., Dorfman & Harel, *supra* note 15 (responding indirectly to themes broached in *Academic Center*); Resnik, *supra* note 13; François Tanguay-Renaud, *Criminalizing the State*, 7 CRIM. L. & PHIL. 255 (2013) (responding indirectly to themes broached in *Academic Center*).

26. See, e.g., Richard Harding, *State Monopoly of 'Permitted Violation of Human Rights': The Decision of the Supreme Court of Israel Prohibiting the Private Operation and Management of Prisons*, 14 PUNISHMENT & SOC'Y 131 (2012); Doron Shultziner & Itai Rabinovici, *Human Dignity, Self-Worth, and Humiliation: A Comparative Legal-Psychological Approach*, 18 PSYCHOL. PUB. POL'Y & L. 105 (2012).

27. HCJ 2605/05 Academic Ctr. of Law & Bus., Human Rights Div. v. Minister of Fin. 27, 73 [2009] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/05/050/026/n39/05026050.n39.pdf](http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.pdf).

It can therefore be said that our position is that 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 of an inmate when the entity responsible for his imprisonment is a government authority that is not motivated by those considerations, even if the term of imprisonment that these two inmates serve is identical and even if the violation of the human rights that actually takes place behind the walls of each of the two prisons where they serve their sentences is identical.<sup>28</sup>

This conclusion rests on an elaborate argument about the nature of the modern liberal state. Prison administration is a core state function, the court reasons, and this function cannot be delegated without undermining the democratic contract, state sovereignty, and the dignity and liberty of its citizens. Drawing on theorists ranging from Hobbes to Locke to Michael Walzer, the court develops an elegant pair of arguments that both lead to the same conclusion.<sup>29</sup> To delegate core state functions to third party contractors undermines the integrity and legitimacy—the very sovereignty—of the state. Echoing the categorical language of Kant, the court insists that even if it found that private prison administration was kinder and gentler than public prison administration, such a delegation would still violate an inmate's dignity and liberty and as well subvert the state's sovereignty.<sup>30</sup>

There is another less obvious but nevertheless crucial feature of the court's opinion. In its discussion of the theory of nondelegable core state functions, the court repeatedly characterizes the contractual entity as “a private corporation motivated by economic considerations,” and most importantly those of “profit” and loss.<sup>31</sup> The court maintains that employees of such companies are not able to put concern for prisoners above concern for profits. Yet, a careful reading of the opinion shows that the argument hinges on a related but different factor. While a private for-profit corporation may be a particularly offensive contracting agent, the court's decision rests upon the nature of a state's core responsibilities. Only the state that has the authority to *impose* punishments has the authority to *administer* those punishments. There can be no substitutes, writes Justice Beinisch, since “one

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28. *Id.* (emphasis added).

29. *Id.* at 55–64.

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[W]e are prepared to assume in favour of the state and the concessionaire that the method of operating prisons adopted in amendment 28 will lead to greater economic and administrative efficiency than the methods indicated by the petitioners. But when we balance the violation of the human rights of prison inmates as a result of their being imprisoned in a privately managed prison that operates in the format set out in amendment 28 against the realization of the purpose of improving prison conditions while achieving greater economic and administrative efficiency, the constitutional rights to personal liberty and human dignity are of greater weight.

*Id.* at 95.

31. *Id.* at 72–73, 75–76.

of the main factors that led to the organization of human beings in society, whereby invasive powers—including the power to send convicted offenders to prison—were given to the authorities of that society and especially to the law enforcement authorities . . . .”<sup>32</sup> In effect, the court constructs a strong state monopoly theory.

This position, Justice Beinisch continues, is supported by both the history of the liberal state and major political theorists, including Thomas Hobbes, who maintained that “Publique Ministers are also all those, that have Authority from the Sovereign, to . . . apprehend, and imprison Malefactors . . . .”<sup>33</sup> It is, thus, the “state’s function to administer punishments.”<sup>34</sup> She attributes this same view to John Locke,<sup>35</sup> who argued that “no *Political Society* can be, nor subsist without having in it self the Power to preserve the Property, and in order thereunto, punish the Offences of all those of that society . . . .”<sup>36</sup> Substituting “Community” for Hobbes’s “Sovereign,” Locke continues, asserting that “[m]en having Authority from the Community . . . decide[] all the differences that may happen between any Members of that Society, concerning any matter of right; and punishes those Offences, which any Member hath committed against the Society . . . .”<sup>37</sup> Summing up the lessons of Hobbes and Locke, the court concludes:

Although, naturally, many changes and developments have occurred since the seventeenth century in the way in which the nature and functions of the state are regarded, it would appear that the basic political principle that the state, through the various bodies acting in it, is responsible for public security and the enforcement of the criminal law has remained unchanged throughout all those years, and it is a part of the social contract on which the modern democratic state is also based.<sup>38</sup>

Justice Beinisch reinforces these views of classical political thinkers with those of contemporary legal and political theorists. She cites approvingly from an opinion written by Israeli Supreme Court Justice Itzhak Zamir, who argued in *Conterm Ltd. v. Finance Ministry*, a significant human rights decision in its own right, that “[i]t is desirable, indeed, necessary, that the relationship between the administration and the public [is] a reciprocal relationship of give-and-take.”<sup>39</sup> The court also quotes the view of American political scientist John Dilulio approvingly: “[T]he formulation and administration of criminal laws by recognized public authorities is one of the liberal state’s most central and historic functions; indeed, in some formulations, it is the liberal state’s reason for being.”<sup>40</sup>

32. *Id.* at 61.

33. THOMAS HOBBS, *LEVIATHAN* 169 (Richard Tuck ed., Cambridge Univ. Press rev. student ed.1996) (1651).

34. HCJ 2605/05 Academic Ctr. at 61.

35. *Id.* at 61–62.

36. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT, in TWO TREATISES OF GOVERNMENT* § 87 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

37. *Id.*

38. HCJ 2605/05 Academic Ctr. at 62.

39. HCJ 164/97 *Conterm Ltd v. Fin. Ministry*, 14 Isr. L. Rep. 1, 34 (1998) (Isr.).

40. HCJ 2605/05 Academic Ctr. at 27, 63 (quoting Dilulio, *supra* note 18, at 175).

Chief Justice Beinisch concludes that the state has a monopoly—through the executive branch and its “instrumentalities” (not agents!)—with respect to the use of organized force, including the administration of imprisonment.<sup>41</sup> This monopoly is required for two reasons. First, “[w]ere this force not exercised by the competent organs of the state, in accordance with the powers given to them and in order to further the general public interest rather than a private interest, this use of force would not have democratic legitimacy . . . .”<sup>42</sup> Second,

[t]he fact that the organized force is exercised by a body that acts through the state and 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 is capable of significantly reducing the danger that the considerable power given to those bodies will be abused . . . .<sup>43</sup>

In sum, the state through its instrumentalities and no other institution has exclusive moral authority both to impose and to administer criminal sanctions. To maintain its integrity, it must perform its own difficult chores. Once again Justice Beinisch quotes DiIulio:

[T]o continue to be legitimate and morally significant, the authority to govern those behind bars, to deprive citizens of their liberty, to coerce (and even kill) them, must remain in the hands of government authorities. . . . The administration of prisons and jails involves the legally sanctioned coercion of some citizens by others. This coercion is exercised in the name of the offended public.<sup>44</sup>

Review the language in the last several paragraphs. The court begins by focusing on the indignity of punishments inflicted by corporations concerned with profits and the additional increment of liberty that is lost when this occurs. But then it shifts its concern to the integrity of the state. The state fails in one of its essential duties if it does not through its own organs or instrumentalities perform these core functions. Justice Beinisch’s indignation may have been sparked by the idea of for-profit prisons, but her decision rests squarely on the belief that the state and only the state has the authority to administer punishment to those it has convicted and sentenced. It is a dereliction of the state’s duty to shunt this responsibility off to any other institution. It cannot delegate this responsibility to a for-profit agent, or any other agent. Only the state may sanction. This holds, she insists, even if the agent provides better care and lowers the propensity for inmates to reoffend.<sup>45</sup>

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41. HCJ 2605/05 Academic Ctr. at 61–64.

42. *Id.* at 65.

43. *Id.*

44. *Id.* (quoting DiIulio, *supra* note 18, at 173).

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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



Although she does not address it directly, this holds even if the responsibility, the liability, and the standard of care required of the contracting agent equals or presumably even exceeds that required of the public instrumentality. According to the logic of the opinion, the rights violation that a prisoner in a private facility suffers is entirely independent of the quality of the care he receives; the rights violation stems, rather, from the identity of the prison administrator. It is a strong state monopoly theory that knows no exceptions. To Justice Beinish, this monopoly is required for the “reciprocal relationship” that is essential for citizen and state set forth in Justice Zamir’s observation from *Conterm* quoted above. We will return to this concern shortly.

In his 2008 article, *Why Only the State May Inflict Criminal Sanctions*,<sup>46</sup> Harel anticipates the court’s argument closely, though, as befits a philosopher, with greater formality. He, too, finds private prisons to be undignified, and goes on to argue that the power to administer punishments is one of the state’s core functions that cannot be delegated to an agent. The responsibility for administering the punishment must rest directly on the state. Furthermore, he insists what holds for imprisonment applies equally to other forms of criminal law sanctioning, such as probation, since his argument is aimed at the delegation of *sanctions* as such, whether they be imprisonment, probation, or shaming.<sup>47</sup> Unlike the court, Harel does not rehearse classical political theories in order to explicate the nature of the state, its powers of delegation, and the nature of criminal punishment. Instead, in the tradition of ordinary language philosophy,<sup>48</sup> he appeals to our intuitions about the state and about punishment, and then constructs his theory around them. But Harel’s conclusion is identical with that of the court: under no circumstances may the state delegate its core function of managing and operating prisons to private actors.<sup>49</sup> The state, and no other institution, must administer the punishments it imposes.

To arrive at this conclusion, Harel takes the reader through a set of carefully reasoned arguments in which he considers and rejects several possible forms of

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will suffer worse physical conditions and invasive measures than those in the public prisons.

H CJ 2605/05 Academic Ctr. at 69–71.

46. Harel, *supra* note 15.

47. *Id.* at 114 (“Delegating the power to determine the nature and severity of the criminal sanctions (e.g., by using shaming penalties) or delegating the power to inflict criminal sanctions to private entities (e.g., by establishing private prisons) severs the link between the state’s judgments concerning the wrongfulness of the act and the determination of the severity of the sanction or the infliction of the sanction.”).

48. *See, e.g.*, PHILOSOPHY AND ORDINARY LANGUAGE (Charles E. Caton ed., 1963) (setting out core tenets of the ordinary language approach to philosophical inquiry).

49. Harel, *supra* note 15, at 132–33 (“The infliction of state-initiated privately inflicted sanctions is impermissible. It is impermissible on the part of a citizen to inflict sanctions without forming an independent judgment concerning the wrongfulness of the alleged wrongful act. When such a private judgment has been formed, it is impermissible on the part of the state to approve of the infliction of the punishment, since such an approval gives undue weight to the private moral convictions of the individual who inflicts the sanction.”). Observe that it might seem puzzling at first that Harel focuses on a private judgment, not that of a public court. This is precisely Harel’s point (or, at least one of his points): we tend to think of punishment as involving purely public judgments.

publically administered sanctions, and then seizes on one, which he terms “integrationist state-inflicted sanctions.”<sup>50</sup> He explains it by way of a vivid analogy. In a family, parents stand in a unique relation to their children. One manifestation of this relationship is parents’ unique authority to punish their children in situations that are not criminal, and are distinctly *familial*—for failing to be polite, failing to say their prayers in the evening, failing to do their chores, and the like. It is, Harel argues, difficult to imagine anyone other than parents sanctioning children for such breaches of familial norms.<sup>51</sup> Allowing others such powers, he convinces us, jeopardizes the very idea of the family. In an odd but nevertheless important way, this unique parental authority is one of the features that make a family a family. Delegating this responsibility to third parties undermines the very meaning of family.

Harel argues that an offender’s relationship to the state, at least with respect to punishment, is analogous to that of a child’s relationship to a parent. No other institution can substitute for the state without breaking the bond between offender and state. “To conclude,” he writes,

the integrationist argument maintains that the power to issue prohibitions and the powers to make determinations concerning the severity of the sanctions and to inflict them are inextricably interrelated. . . . By privatizing the infliction of the sanction, the state effectively not merely transfers the ‘technical’ power to execute the sanction; instead, *it strips itself of the power to make binding determinations concerning the wrongfulness of the act and the appropriateness of the sanction.* . . . By delegating this power to private individuals, the state in effect severs the link between the prohibitions it issues and the suffering inflicted on the offender.<sup>52</sup>

In an elaboration on this argument, Avihay Dorfman and Harel argue that in cases involving “inherently public goods,” such as the provision of prisons, “execution by public officials [is] necessary.”<sup>53</sup> Unlike Alexander Volokh, who suggests that there are no “inherent” or normatively relevant distinctions between

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50. *Id.* at 123 (“Under an integrationist justification, . . . [t]he power to inflict criminal sanctions as well as the power to determine their severity is inextricably linked with the power to issue prohibitions whose violations call for punitive measures. The power to inflict sanctions has to be a state power because of the interdependence between the state’s power to issue prohibitions and the power to determine the severity of these sanctions and inflict sanctions triggered by violating these prohibitions.”).

51. Dorfman & Harel, *supra* note 15, at 92 n.41.

52. Harel, *supra* note 15, at 130 (emphasis added).

53. Dorfman & Harel, *supra* note 15, at 91. It is interesting to contrast Dorfman and Harel’s theory with Rawls’s idea of public reason. Public reason is Rawls’s response to the problem of deep disagreement. Democratic majorities can rightly impose their wills only if their policies can be explicated in terms acceptable to all (even if those terms are not why the majorities themselves endorse the policies). See JOHN RAWLS, *POLITICAL LIBERALISM* 212–54 (1993). If this is the standard by which policy is judged, it might well be that private prisons can be justified in terms that almost everyone can accept or endorse. We might wonder whether such an argument would extend to goods like public schools.

public employees and public contractors,<sup>54</sup> Dorfman and Harel advance a categorical argument that “two conditions . . . must be fulfilled for a person to be a public official . . . .”<sup>55</sup> Together, these conditions boil down to the idea that an agent of the state must make his or her decisions about state policy *only* in light of the general public’s interests, and these decisions must *only* be a product of reasoning conducted among like-minded, public-spirited officials. The private provision of prisons fails to meet these criteria. And, since “the ability to speak and act in the name of the state is crucial for justifying a violent act (say, that of incarcerating a person . . .). It is necessary for the punishment to communicate a judgment of the state . . . .”<sup>56</sup>

In sum, both the state monopoly theory set forth in *Academic Center* and the integrationist theory advanced by Harel and elaborated on by Dorfman and Harel are stated in categorical and universal terms that seem to allow no exception. That is, the state and only the state may impose criminal punishments and that same state and only that state may administer them. This responsibility may not be delegated to agents not employed by the state. It is a theory of state monopoly. As such, it rests upon an ontological argument about the nature of the state, in sharp contrast to the great bulk of other oppositional arguments, which rest upon implicit or explicit utilitarian comparisons, fears that employees of corporations will put profits ahead of persons, or worries that the scope of liability will be less with public contractors than government employees.<sup>57</sup> As Volokh shows, these are certainly legitimate concerns, but there is nothing in the private/public division that would preclude imposing on private actors the same standards that are required of public employees.<sup>58</sup> But to the court and to Harel and his collaborators, while these considerations are important, they are not essential. Even if private actors were held to higher standards and those standards were enforced, the democratic contract would be violated and state sovereignty compromised. As I said, the court and Harel and colleagues have presented a strong state monopoly theory.

## II. THE HISTORY AND SCOPE OF STATE ACTION CONCERNING PUNISHMENT

Now that I have outlined the theory advanced by the court and by the major legal theorists who have addressed the issue, I want to provisionally accept their conclusions, and undertake a form of reverse engineering. Instead of drawing on our pretheoretical intuitions about the nature of punishment and the nature of the modern state in the manner of Harel and colleagues in order to see where they take us with respect to private prisons, I want to examine several common and widely

54. Volokh, *supra* note 14, at 144.

55. Dorfman & Harel, *supra* note 15, at 89.

56. *Id.* at 94.

57. See Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257 (1991); John Hall, *Private Opportunity, Public Benefit?*, 19 FISCAL STUD. 121 (1998). *But cf.* Dolovich, *supra* note 20; Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 128 (Jody Freeman & Martha Minow eds., 2009).

58. Volokh, *supra* note 14, at 156–57.

accepted arrangements that neither the Israeli High Court of Justice nor the philosophers considered when constructing their argument. These practices, I will argue, elicit intuitions that conflict with the state monopolist theory. If this is the case, and I will show that it is, my question is this: What do our intuitions about these other practices tell us about the theory? Which should give way—the theory, or the practices and our intuitions about them?

My discussion addresses four issues that are either incorrectly dealt with or ignored entirely by the court and the philosophers' elaborations. They are: the problem of lawyer's history, the failure to confront contemporary theories of the modern state, the failure to address our intuitions about other prosaic forms of privatization, and the neglect of other state-based forms of punishment that run afoul of the theory. Individually these issues raise significant challenges to the state monopoly theory of punishment. Taken together, they may be devastating.

#### *A. Lawyer's History*

Before turning to an examination of the central concern, there are two preliminary issues to dispense with. First, let's start with easy prey, the "lawyer's history" that informs the court's decision. As noted earlier, the court asserts that an essential feature of the (liberal) state is and has always been (and should always be) that the state and no other institution should exercise the power to administer criminal punishment. The court anchors this view in the writings of Thomas Hobbes and carries it through to the views of Michael Walzer.<sup>59</sup>

As history, this is questionable at best. Sources revealing the contrary are so numerous and the evidence so overwhelming that one does not know where to begin in pointing out the shortcomings of the court's history lesson.<sup>60</sup> At the times that Hobbes and Locke wrote, England lacked even rudimentary administrative capacities.<sup>61</sup> Well into the nineteenth century, the protoliberal English state

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59. HCJ 2605/05 Academic Ctr. of Law & Bus., Human Rights Div. v. Minister of Fin. 27, 55, 61–63 [2009] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/05/050/026/n39/05026050.n39.pdf](http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.pdf) (citing HOBBS, *supra* note 33; Walzer, *Hold the Justice*, *supra* note 16).

60. For a general treatment of the development of the state and its rudimentary capacities, see generally THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE (Charles Tilly ed., 1975); JOHN BREWER, THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688–1783 (1988); GIANFRANCO POGGI, THE DEVELOPMENT OF THE MODERN STATE: A SOCIOLOGICAL INTRODUCTION (1978); V.G. Kiernan, *State and Nation in Western Europe*, 31 PAST & PRESENT 20 (1965).

61. BREWER, *supra* note 60, at 65 (stating that in a "comprehensive study of the Interregnum government service . . . only about 1200 officials of state serving in the eleven years between 1649 and 1660" were identified). Brewer provides detailed figures of the number of administrative employees in the period from 1690 to 1782. *Id.* at 66–67; see also CLIVE HOLMES, SEVENTEENTH-CENTURY LINCOLNSHIRE (Maurice Barley ed., 1980) (detailing the importance of local figures to the English state); Michael Braddick, *State Formation and Social Change in Early Modern England: A Problem Stated and Approaches Suggested*, 16 SOC. HIST. 1, 2 (1991) ("[I]n the case of seventeenth-century England, the state was not bureaucratized. Central government depended on the co-operation of unpaid local officials, and these local brokers of central authority acted as mediators between central government and the locality.").

depended heavily on private contractors to maintain custody of prisoners, and to administer punishments.<sup>62</sup> In fifteenth- to nineteenth-century England, basements in ale houses were used as jails to house prisoners awaiting trial, and their keepers were compensated by a combination of fees paid by the county and payments from families of those accused.<sup>63</sup> Indeed, in early modern England and until much later, the hangman was a contractor who was compensated on a per-neck basis.<sup>64</sup> Beginning in the early seventeenth century and continuing up until the American Revolution, transportation of convicted felons was operated exclusively by contractors who derived their income from auctioning off their human cargo into limited term slavery from the decks of their boats moored in Chesapeake Bay.<sup>65</sup> The Australian version of transportation that emerged after the American War of Independence put an end to North American transportation and combined both state and private actors in a more complicated system of transportation and servitude but remained heavily dependent upon private contractors.<sup>66</sup> Similar arrangements obtained in early modern Europe as well.<sup>67</sup>

A very effective system of probation and what in contemporary terms might be termed pretrial diversion also depended heavily on private parties to oversee offenders in England from the fifteenth century well into the nineteenth century, and in the United States well into the twentieth century.<sup>68</sup> Both recognizance for good behavior and recognizances to keep the peace required private parties not related to the accused to pledge bonds that were to be forfeited if the accused violated the conditions for good behavior or peace specified by the court. In essence, the accused had to arrange for his own parole officers, who, in turn, had substantial powers over him and who stood to lose a great deal of money if the offender violated the agreement.<sup>69</sup>

62. For a digestible treatment of the English administrative state up through the mid-nineteenth century, see David Roberts, *Jeremy Bentham and the Victorian Administrative State*, 2 VICTORIAN STUD. 193 (1959).

63. JOHN HOWARD, *THE STATE OF THE PRISONS IN ENGLAND AND WALES* 270 (1792).

64. See generally Edward J. Henderson, *Liability to Employees of Independent Contractors Engaged in Inherently Dangerous Work: A Workable Workers' Compensation Proposal*, 48 FORDHAM L. REV. 1165 (1980) (showing prevalence of independent contractors in early modern England). And, if further compensation was required, upon the death of the hanged man, the clothes of the dead apparently became property of the hangman, at least according to some historians. See FRANK MCLYNN, *CRIME AND PUNISHMENT IN EIGHTEENTH-CENTURY ENGLAND* 271 (1989).

65. See Malcolm M. Feeley, *The Privatization of Punishment in Historical Perspective*, in *PRIVATIZATION AND ITS ALTERNATIVES* 199, 205–07 (William T. Gormley, Jr. ed., 1991).

66. See ROBERT HUGHES, *THE FATAL SHORE* 61–67 (1986); see also DAVID NEAL, *THE RULE OF LAW IN A PENAL COLONY: LAW AND POWER IN EARLY NEW SOUTH WALES* (1991); Malcolm M. Feeley, *Entrepreneurs of Punishment: The Legacy of Privatization*, 4 PUNISHMENT & SOC'Y 321 (2002).

67. Pieter Spierenburg, *From Amsterdam to Auburn: An Explanation for the Rise of the Prison in Seventeenth-Century Holland and Nineteenth-Century America*, 20 J. SOC. HIST. 439, 440–48 (1987).

68. See, e.g., JOEL SAMAHA, *LAW AND ORDER IN HISTORICAL PERSPECTIVE: THE CASE OF ELIZABETHAN ESSEX* (1974).

69. *Id.* at 76–77.

The idea of the modern prison for mass incarceration was in many respects invented by Jeremy Bentham.<sup>70</sup> His design for Panopticon is well known,<sup>71</sup> what is less well known is that he sought to obtain exclusive rights to operate English prisons from which he expected to reap windfall profits through the use of their labor.<sup>72</sup> Bentham failed in his obsessive effort, but his idea of the profit-based prison took root in America.<sup>73</sup> More generally, the modern liberal Anglo-American criminal justice system has many of its roots in private, for-profit efforts that led to innovations of all sorts: fee-based law enforcement, prosecution societies, legal aid schemes for private prosecutors, and the like.<sup>74</sup>

So, whatever precisely history reveals, it does not teach us that the English and American states have long histories of insisting upon a monopoly of state-administered punishments. Indeed, it reveals the reverse. Historically, Anglo-American countries have depended heavily on the private administration of public punishments, and for many other functions of the modern liberal criminal justice system.

If one goes further afield, but still within the realm of modern democratic states, one can find still other practices that grate upon Western sensibilities. In Japan, for instance, prosecutors regularly drop charges of sexual assault if the accused issues a formal apology accompanied by a substantial sum of money to the victim.<sup>75</sup> This seems inconsistent with Western legal practice and social values; however, Japanese culture and more particularly many victims accept the option because it affords them a modicum of privacy (although the option is at times accepted reluctantly, and results from pressure on the female victim).<sup>76</sup> It is a state-

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70. JEREMY BENTHAM, PANOPTICON (1791); JEREMY BENTHAM, WORKS (John Bowring ed., 1843).

71. See, e.g., MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 200–09 (Alan Sheridan trans., 1977) (1975) (offering detailed account of Bentham's panopticon); Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 185 (2008).

72. GERTRUDE HIMMELFARB, *The Haunted House of Jeremy Bentham*, in VICTORIAN MINDS 32 (1968).

73. RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY (1997); Feeley, *supra* note 65; see also Dolovich, *supra* note 20; Lisa Belkin, *Rise of Private Prisons: How Much of a Bargain?*, N.Y. TIMES, Mar. 27, 1989, at A14.

74. Malcolm M. Feeley, *Privatization and Punishment: Lessons from History*, in SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW 41 (Patricia Ewick et al. eds., 1999); P.J.R. King, *Prosecution Associations and Their Impact in Eighteenth-Century Essex*, in POLICING AND PROSECUTION IN BRITAIN 1750–1850, at 171 (Douglas Hay & Francis Snyder eds., 1989); David Philips, *Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England 1760–1860*, in POLICING AND PROSECUTION IN BRITAIN 1750–1850, *supra*, at 113.

75. DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 206–07 (2002) (observing that “[p]ressure [to settle] is applied most conspicuously on female victims in sex crime cases” and describing a case in which an alleged perpetrator sought settlement by offer of the equivalent of \$333 USD); Setsuo Miyazawa, *The Private Sector and Law Enforcement in Japan*, in PRIVATIZATION AND ITS ALTERNATIVES, *supra* note 65, at 241.

76. JOHNSON, *supra* note 75, at 207.

sanctioned, but not state-administered, type of punishment. Only the most hyperformal advocates of the state monopoly theory against privatization would try to use this distinction to escape this conclusion.

### B. The Disaggregated State

A second concern, on which I will also only briefly touch, is the conception of the state that underlies both the court's opinion and Harel's analyses. Simply put, both the court and these legal theorists advance an early modernist vision of the state, both in its form and functions. The state monopoly theory envisions a *unitary* state, one that contains (or, at a minimum, is capable of containing) all of the parts necessary to carry out the responsibilities with which it has been tasked.<sup>77</sup> Its politics are integrated, and its administrative routines are standardized.<sup>78</sup> The archetype of the unitary state is, perhaps, the Westminster model, with its "parliamentary sovereignty, cabinet government, executive authority, and . . . neutral civil service."<sup>79</sup> This vision of the state's form has implications for its functions. If the state is unitary—if, in other words, it possesses all of the resources required to undertake and fulfill its mission—then it need not *delegate* tasks outside of itself. The function of the unitary state, in other words, is to act, not to delegate.

Such a view as to the form and function of the state can be found in the early modern texts with which Justice Beinish is clearly fluent. Hobbes, Locke, and other protoliberal political theorists insist that the sovereign has ultimate responsibility for maintaining order, establishing crimes, specifying punishments, and overseeing their administration.<sup>80</sup> Indeed, this vision of the *Leviathan* is in all likelihood Hobbes's single greatest contribution to political philosophy. What's more, the state monopolists' implicit theory of delegation—namely, that it is simply not the sort of thing that states, understood in their fullest and most idealized sense, do—is given voice in the writings of Locke. Relying on ideas developed in the law of agency, Locke argued that

[t]he Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others. . . . And when the People have said, We will submit to rules, and be govern'd by Laws made by such Men, and in such Forms, no Body else can say other Men shall make Laws for them; nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen, and Authorised to make Laws for them. The power of the Legislative being derived

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77. The language of unitary and disaggregated state is widely used. For a particularly clear treatment see DAVID HELD, *GLOBAL COVENANT* (2004) (categorizing various forms of contracted-out arrangements).

78. For an intellectual history of approaches to conceptualizing the state see generally MARK BEVIR, *DEMOCRATIC GOVERNANCE* 81–82 (2010).

79. *Id.* at 82.

80. See, e.g., JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* (1986); C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962); BRIAN SKYRMS, *EVOLUTION OF THE SOCIAL CONTRACT* (1996); Russell Hardin, *Hobbesian Political Order*, 19 *POL. THEORY* 156 (1991).

from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands.<sup>81</sup>

Public authority, Locke argues, originates with the governed through the making of a social contract. Unless that contractual arrangement includes a provision that states that the holder of public authority can further delegate the power it has been entrusted, any delegation is, in essence, *ultra vires*. It is not that Locke believes that delegation by officeholders inherently violates some moral ideal; rather, it is simply that the power to delegate is the sort of thing that must be contained in the contract. It is the sort of thing that must be bargained for, not assumed to exist.

We should be clear that Locke, in the above-cited paragraph, is referring to delegations of the *legislative*, not the *executive*, power.<sup>82</sup> Locke is more sanguine about delegations of the executive power, which is the power to “see to the Execution of the Laws that are made.”<sup>83</sup> Apparently of the belief that prison administration is more executive function than it is legislative, Justice E.E. Levy, dissenting in *Academic Center*, cites Locke’s observation that

[o]f other [m]inisterial and subordinate [p]owers in a [c]ommonwealth, we need not speak, they being so multiply’d with infinite variety, . . . that it is impossible to give a particular account of them all. . . . [T]hey have no manner of [a]uthority any of them, beyond what is, by positive [g]rant, and [c]ommission, delegated to them . . . .<sup>84</sup>

Locke here seems to accept if not condone the delegation of nonlegislative powers. If so, there is nothing in Locke’s extensive writings that would support the monopolists’ theory that the state can never delegate its executive powers. Therefore, Justice Levy concludes, “It follows that there is no fundamental impropriety in the idea of assigning sovereign powers under certain conditions.”<sup>85</sup>

The difficulty with this line of thinking, however, is that it holds up only insofar as the power to imprison is, in fact, an executive power. This may be a difficult position to hold. As Michael Lipsky’s classic study, *Street-Level Bureaucracy*, reveals, much of what we might, as a formal matter, characterize as executive action does, in fact, produce new norms.<sup>86</sup> Judith Resnik has suggested a similar point in the context of the privatization debate.<sup>87</sup> Thus, although we might outright reject the court’s invocation of Locke if we were to highlight his position on

81. LOCKE, *supra* note 36, § 141 (emphasis omitted).

82. *Id.*

83. *Id.* at § 144 (emphasis omitted).

84. HCJ 2605/05 *Academic Ctr. of Law & Bus., Human Rights Div. v. Minister of Fin.* 27, 193-94 [2009] (Isr.) (Levy, J., dissenting) (alterations in original) (quoting LOCKE, *supra* note 36, § 152).

85. *Id.* at 194.

86. MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE* (updated ed. 2010).

87. *See* Resnik, *supra* note 13.



delegations of executive power, the safer course is to assume that prison administration will involve some acts that fairly approximate the creation of normative standards of behavior, and thus treat the power being delegated as legislative in nature.

Returning, then, to our bigger picture, we can allow that Locke's argument against delegation of the legislative power is compelling, so long as one assumes the form of the state is unitary. But Locke's argument as to the proper *function* of government—to act, rather than to delegate—loses much of its force if the *form* of government is not unitary. Why? If the state is disaggregated, then it is plausible to assume that the social contract contains a provision empowering officeholders to delegate powers. After all, why would rational individuals delegate power to an entity incapable of performing the tasks they demand if they did *not* believe that the state would redelegate its power to entities capable of fulfilling the citizenry's desires?

If the state was ever properly characterized as unitary, it is certainly not today. In response to the *Academic Center* opinion, Barak Medina questioned the court's distinction between public and private actors, urging instead that we recognize a "continuum" between public and private roles.<sup>88</sup> Medina observes that, under Israeli law, private employees of a corporation running a prison "are formally defined as 'civil servants,'" and legally on par with prison guards employed by the state when it comes to respecting prisoners' rights.<sup>89</sup> Medina's cogent analysis reminds us that the line between "the state" and "private society" is, at best, blurry. More generally, much of contemporary political theory accepts the idea of the *disaggregated* state, and thereby rejects the unitary state model.<sup>90</sup> Conceptions of this disaggregated state vary widely, but they tend to be linked by an approach to the state that views what has traditionally been described as the sovereign will as merely one actor among many. The state, in the traditional Westminster sense, now coexists alongside a plethora of equally significant actors—some drawn from the private and nonprofit sectors,<sup>91</sup> some drawn from the public sector of *foreign* governments<sup>92</sup>—each of them engaged in the policy-making process. On many

88. Medina, *supra* note 4, at 709–10.

89. *Id.* at 710. See generally STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999) (detailing four different uses of the concept of sovereignty).

90. See generally BEVIR, *supra* note 78; Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989).

91. See, e.g., R.A.W. RHODES, UNDERSTANDING GOVERNANCE: POLICY NETWORKS, GOVERNANCE, REFLEXIVITY AND ACCOUNTABILITY 15–17 (1997); Fritz W. Scharpf, *Coordination in Hierarchies and Networks*, in GAMES IN HIERARCHIES AND NETWORKS: ANALYTICAL AND EMPIRICAL APPROACHES TO THE STUDY OF GOVERNANCE INSTITUTIONS 125 (Fritz W. Scharpf ed., 1993); Chris Ansell, *The Networked Polity: Regional Development in Western Europe*, 13 GOVERNANCE 303, 309–11 (2000); Eva Sørensen, *Democratic Theory and Network Governance*, 24 ADMIN. THEORY & PRACTICE 693 (2002).

92. See Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23 (2009). On its face, this idea might sound implausible: After all, how could foreign public entities operate to make policy decisions in the territory of another state? Such situations arise when two or more states are called on to solve problems that

accounts of the disaggregated state, the executive, following the Westminster model, still exerts some control over the direction of policy in a given territorial space. Today, however, the extent of that control is severely limited. Whether seeking to induce administrative agencies that are formally part of the state to act<sup>93</sup> or bargaining with private sector service providers,<sup>94</sup> the power of the executive seems to be akin to trying to push a rope. It is hard to avoid the conclusion that, as Gillian Metzger argues, “[p]rivate entities provide a vast array of social services for the government; administer core aspects of government programs; and perform tasks that appear quintessentially governmental, such as promulgating standards or regulating third-party activities.”<sup>95</sup>

In short, the unitary model of the state can no longer be assumed. Whereas Locke could perhaps rightly assume a unitary state in his analysis of the social contract, today we no longer can. Thus, because the form of the state has arguably shifted, we should be open to the idea that the functions that we assign the state have shifted as well. In particular, we should be open to the idea that the state now possesses something of a dual mandate: both to act, and to delegate. In other words, the monopolist argument concerning inherent functions of the state has failed to grapple with the fact that the theories upon which it relies were constructed in a milieu in which the state was unitary. Applying Locke’s theory to the state as it exists today may very well yield a conclusion different from the one at which the High Court of Justice arrives. This is not to say that we should make public policy today about prisons based on what Locke would have thought. It is, rather, to challenge the monopoly theory’s conclusion that the state has an inherent form and function.

### C. Counterexamples to the State Monopoly Theory

Let me now turn to my main concern with the case against privatization. It emerges from consideration of an array of widely accepted practices that appear to violate the theory. If I properly understand the categorical argument offered by Justice Beinisch and Professors Harel and Dorfman, any exception to their argument would be fatal to their theory. At a minimum, the theory should be tested by hard cases—the apparent exceptions to their theory—to see how it handles them. Below I examine two well-regarded sets of practices that seem to run counter

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impact them both. So, for example, if an American and a Canadian corporation are merging, and both states are interested in the antitrust implications, the American and Canadian antitrust authorities will work together to forge a solution. The relationship between the United States, Cuba, and Guantanamo is equally interesting.

93. For a formal analysis of this problem, see Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008).

94. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1376–1410 (2003).

95. *Id.* at 1369. Whether nontraditional actors should be considered part of “the state” is largely a philosophical question. *See, e.g.*, BEVIR, *supra* note 78, at 17–64. The answer will depend on how one understands the raw materials, or ontological building blocks, of the state. Rational choice theorists argue that the state is built on individuals; institutionalists believe the state is composed of routinized practices and rules that we call institutions; still others argue that the state is built on ideas. *Id.*

to the theory. The existence of these practices and their widespread acceptance, of course, do not imply their moral acceptability. Perhaps upon reflection we will find the theory convincing and these so-called exceptions wanting. Or perhaps there is a way to reconcile what appear to me to be exceptions to their rule. However, since they and others who oppose privatization have, to the best of my knowledge, failed to address these issues at all, these apparent exceptions should give some pause for reflection before we subscribe to the state monopoly theory. If my concern with lawyer's history and an "outmoded conception" of the state are not enough to challenge the theory, perhaps these examples of exceptions will.

First, I will show that for-profit prisons, as viewed by state monopoly theory, are a caricature of prisons—a not-altogether-unfair portrait, but a caricature nonetheless.<sup>96</sup> I will do this by pointing to a number of private institutions that do not conform neatly to the image of private prisons envisioned in the theory. Second, and most important, I will identify several other widely accepted if not exemplary practices that fail to conform to the state monopoly feature of the theory against privatization. My use of comparisons here is to point to instances where our intuitions do not lead us to recoil at the idea of privatization, and where privatization and violations of the state monopoly theory in fact represent real aspirations for higher standards and more humane treatment. Further, I argue, my ideas are not derived from abstract theorizing but from real-world practices whose consequences are observable. Taken together, I maintain these factors reveal that the state monopoly theory against privatization does not hold water.<sup>97</sup>

#### *D. Privatization of Prisons in the United States and Australia*

The contemporary movement for privatization in corrections was initiated in the United States where, in terms of numbers, it has had its greatest impact. Many more adult offenders are confined in private custodial facilities in the United States than in any other country in the world. Yet, no more than ten percent of all adult offenders are held in private prisons in the United States.<sup>98</sup> Several of the states with the smallest prison populations have a quarter or more of their prisoners in private facilities, but among the larger states the figures are below ten percent and

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96. For a much more extensive analysis along similar lines, see Volokh, *supra* note 14. Volokh's carefully argued piece works through a great variety of caricatures of private institutions and then reveals how easily oppositions grounded in such theories can be overcome. *Id.*

97. The counterexamples I adduce are not designed to make utilitarian comparisons of the sort that Sharon Dolovich considers and rejects. See Dolovich, *supra* note 20, at 443 n.11 ("Comparative efficiency, like many cost-benefit approaches, tends to present itself as value neutral, but it too is a normative view. Describing one's aim as identifying the approach that minimizes costs and maximizes benefits is just another way of saying that actors should pursue the course of action that stands to generate the best possible consequences."). Rather, they are designed to present countervailing intuitions and thus suggest that the monopolist theory's absolutist approach is misguided.

98. Gerry Gaes, *Cost, Performance Studies Look at Prison Privatization*, NAT'L INST. JUSTICE (Mar. 17, 2008), <http://www.nij.gov/journals/259/prison-privatization.htm>.

in many instances zero.<sup>99</sup> Figures for jails in the United States vary widely.<sup>100</sup> There are thousands of counties in the United States, and several dozen if not hundreds of them have contracted with private providers, so that in some smaller counties all inmates may be held in private jails.<sup>101</sup> Still, nationwide, only a tiny portion of incarcerated individuals are held in private facilities.

In terms of proportions of inmates in private facilities, Australia leads the world by far. In contrast to the United States, over twenty percent of all offenders in Australia are held in private facilities. Since the late 1990s in the state of Victoria, between forty and fifty percent of its adult offenders have been held in private facilities.<sup>102</sup> In Queensland the comparable figure is around twenty-five percent.<sup>103</sup> In New South Wales, South Australia, and Western Australia, the figures are lower, but growing, especially in the latter.<sup>104</sup>

Although the privatization movement started before the election of neoconservative governments in the United States and England, without doubt the new prison privatization took off with the rise of neoconservative governments in the 1970s with the election of Margaret Thatcher in England, Ronald Reagan in the United States, and Malcolm Fraser in Australia. With the rise of these governments, advocates of prison privatization finally had receptive audiences in high places, which allowed them to make significant inroads. Tellingly, however, privatization did not wither away when liberal governments regained power in the United States, Australia, and the United Kingdom. For the most part, prisons privatized under conservative governments have remained privatized, and although the clamor for privatization has declined and its rhetoric has dampened, privatization continues to expand.

The reason for this is that privatization is driven by a number of factors other than neoconservative ideology. In a survey of worldwide developments in prison privatization, Australian law professor and corrections expert Richard Harding identified six factors that have fueled its growth, especially in the United States, England, and Australia:

- exponential increases in incarcerated populations;

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99. PAUL GUERINO, PAIGE M. HARRISON & WILLIAM J. SABOL, U.S. DEP'T JUSTICE, PRISONERS IN 2010 (2011), available at <http://www.bjs.gov/content/pub/pdf/p10.pdf>.

100. For evidence why this is so, see *id.* at 9–11. State and county level reports of prisoner populations vary widely. In the Department of Justice study, the reporting practices of nearly every state requires qualification of some sort. *Id.*

101. For an example of the relationships between counties and private prisons, see *Private Prisons*, MISS. DEP'T CORR., <http://www.mdoc.state.ms.us/Five%20Private%20Prisons.htm> (last updated Jan. 6, 2014).

102. RICHARD HARDING, AUSTL. INST. OF CRIMINOLOGY, TRENDS & ISSUES IN CRIME & CRIMINAL JUSTICE NO. 84, PRIVATE PRISONS IN AUSTRALIA: THE SECOND PHASE (1999). For yearly quantitative analyses of private prisons in Australia, see AUSTL. GOV'T PRODUCTIVITY COMM'N, REPORT ON GOVERNMENT SERVICES, available at <http://www.pc.gov.au/gsp/rogs>.

103. John Gerard Rynne, *The Regime Impacts of Privatization on Prison Quality in Queensland 1989–2000*, at 113 (June 2004) (unpublished Ph.D. dissertation, Griffith University) (on file with author).

104. *Id.* at 140.

- overcrowding and (in the United States) federal court intervention;
- legal and political inhibitions upon capital expenditure by governments;
- concern about recurrent costs;
- growing impatience with the perceived obstructionism of organized labor; and
- concern with regime improvement.<sup>105</sup>

A version of this list, except the last item, is echoed by nearly all other scholars who have examined the rise of private prisons in the United States, Australia, the United Kingdom, and continental Europe.<sup>106</sup>

### 1. The United States

In the United States the contemporary move to privatize adult facilities has been driven in large part by the dramatic growth in prison populations, rising costs, and problems with overcrowding. Problems are most acute in the southern states—those with the fastest growing prison populations, the worst histories of prison abuse, the smallest tax bases, and in most instances the most backward public services.<sup>107</sup> In many of these states, the entire prison systems have been in receivership because of catastrophic and systemic administrative failures, which have been compounded by exponential growth rates.<sup>108</sup> In some of these states, privatization promised salvation. The situation was ripe for correctional entrepreneurs, and they descended in droves.<sup>109</sup> They promised cheaper financing, faster and cheaper construction, cheaper provision of auxiliary services, and cheaper operating expenses.<sup>110</sup> And of course, all of this was promised with better results. Private contractors made offers (often accompanied by substantial political donations to the right people) that were not refused.<sup>111</sup> Privatization was seized upon by desperate politicians and harried corrections officials. They could give off some of their problems to private contractors. Hardly a recipe for responsible administration of prisons, public or private.<sup>112</sup>

Because of these chaotic conditions under which privatization was embraced, there was (and as of this writing there continues to be) little sustained and serious analysis of prison privatization in the United States.<sup>113</sup> There is no question that

105. Richard Harding, *Private Prisons*, 28 *CRIME & JUST.* 265, 269 (2001).

106. *See, e.g.*, RICHARD W. HARDING, *AUSTRALIAN INST. OF CRIMINOLOGY, TRENDS & ISSUES IN CRIME & CRIMINAL JUSTICE* No. 36, *PRIVATE PRISONS IN AUSTRALIA 2* (1992).

107. *See* Feeley, *supra* note 65, at 199–205; *see also* MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998).

108. FEELEY & RUBIN, *supra* note 107, at 379–80.

109. *See generally* CHARLES H. LOGAN, *PRIVATE PRISONS: CONS AND PROS* (1990); DAVID SHICHOR, *PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS* (1995).

110. SHICHOR, *supra* note 109, at 142–52.

111. Dolovich, *supra* note 20, at 455–62.

112. *See* LOGAN, *supra* note 109, at 7–12.

113. *See* Alexander Volokh, *Prison Accountability and Performance Measures*, 63

privatization has been fraught with problems—back room deals, corruption, incompetence, careless planning, and the like. This, coupled with the history of the convict-lease system in the South (the region in the United States that has the largest number of private prisons<sup>114</sup>) in the late nineteenth and first half of the twentieth century, and the “plantation model” state corporation approach that operated in the South into the 1970s, has given ample ammunition to those who oppose private prisons.<sup>115</sup> Private prisons adopted under such conditions can be opposed on any number of grounds.

## 2. Australia

The Australian experience is a study in contrasts. Prisons in Australia are only a fraction of the size of the mega-institutions in the United States. Prison populations are also much smaller, with around 30,000 prisoners in total.<sup>116</sup> And despite Australia’s own “war on crime,” they have grown much more slowly. Australian officials have not faced the massive problems and the continuing crisis and sense of urgency that has been characteristic of American corrections since the 1970s. There are no judges issuing injunctions. No white papers demanding far-reaching and expensive reforms. No crisis in corrections leadership. No desperate effort to locate beds for prisoners. No cramming prisoners in three-tiered bunk beds in unventilated and unsupervised gymnasiums.

But there are independent state inspectors of prisons whose integrity is unimpeachable, whose reports are thorough, and whose recommendations command attention.<sup>117</sup> Furthermore, Australian state public-service institutions are better staffed and more professionalized than their counterparts in the United States, and especially in those American states in the South which rely most heavily on privatization.<sup>118</sup>

Privatization in Australia was adopted first in Queensland (in 1990), New South Wales, and Victoria, the three most forward-looking states.<sup>119</sup> Private prison contracts continue to be awarded. Most recently, the Wiri Prison in South Auckland, New Zealand, and the Ravenhall Prison in Victoria signed privatizing contracts.<sup>120</sup> Furthermore, public officials, including elected officials, in Australia never abandoned the idea of rehabilitative and training programming within

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Emory L.J. (forthcoming 2014).

114. GUERINO ET AL., *supra* note 99, at 31.

115. SHICHOR, *supra* note 109, at 35.

116. *Prisoners in Australia, 2012*, AUSTRAL. BUREAU OF STATISTICS, (showing that as of June 30, 2012, “there were 29,383 prisoners (sentenced and unsentenced) in Australian prisons, an increase of 1% (277 prisoners) from 30 June 2011”), <http://www.abs.gov.au/ausstats/abs@.nsf/Products/5087123B0CCE48C1CA257B3C000DC7CE?opendocument> (last updated Dec. 4, 2013).

117. *See generally* HARDING, *supra* note 73.

118. *Cf.* M.E. Sharpe, *THE NEW PUBLIC SERVICE: SERVING, NOT STEERING* 16 (3d ed. 2011); Malcolm M. Feeley, *The Significance of Prison Conditions Cases: Budgets and Regions*, 23 L. & SOC’Y REV. 273, 278–80 (1989); William A. Taggart, *Redefining the Power of the Federal Judiciary: The Impact of Court-Ordered Prison Reform on State Expenditures for Corrections*, 23 L. & SOC’Y REV. 241 (1989).

119. HARDING, *supra* note 106, at 1–2.

120. Adam Shand, *Jail Paid to Keep Felons Out*, AUSTRALIAN, Dec. 14, 2012, at 6.

prisons.<sup>121</sup> Legislators did not campaign on “lock ’em up and throw away the keys” platforms. The Australian state parliamentary systems have permanent staffs in the ministries with a deep understanding of correctional matters and a commitment to progressive policies. Throughout the expansion of neoconservative governments in the 1970s and 1980s, they continued to advance ambitious progressive plans for education, vocational training, and rehabilitation.<sup>122</sup>

In addition, in the Australian states in the 1970s and 1980s, plans were afoot to replace a number of outdated Victorian prisons.<sup>123</sup> This development took place just as the wave of neoconservatism swept conservative governments into power in several states.<sup>124</sup> They brought with them new ideas about deregulation and privatization, including the possibility of privatizing the new institutions that were on the drawing boards.

Of course, prison administration is a challenging task. Like prison reformers everywhere, Australian corrections leaders have faced stiff resistance to their ideas from line staff, entrenched in their routines, preoccupied with safety and security, and ensconced in their positions by civil service and union protections.<sup>125</sup> Time and time again, plans for reforms developed by progressive leaders were thwarted by safety and security concerns of entrenched line staffs.<sup>126</sup>

So, when new conservative governments came into power and pressed for privatization of prisons, after an initial impulse to oppose the idea, progressive policy makers decided to turn the development to their advantage. Elected leaders may have been motivated primarily by cost savings, but progressive corrections officials saw this as an opportunity to construct new prisons, and organize and staff them with a new and more flexible workforce amenable to experimentation and reform. This combination of factors in Australia led to careful analysis of the possible benefits of private contractors. Better design could lead to better programming, it was argued, and corrections officials could insist that contractors implement much-needed reforms. Thus the sixth and final point in Richard

121. KAREN HESELTINE, RICK SARRE & ANDREW DAY, TRENDS & ISSUES IN CRIME AND CRIMINAL JUSTICE NO. 412, PRISON-BASED CORRECTIONAL REHABILITATION: AN OVERVIEW OF INTENSIVE INTERVENTIONS FOR MODERATE TO HIGH-RISK OFFENDERS (2011).

122. KEVIN HOWELLS, KAREN HESELTINE, RICK SARRE, LINDA DAVEY & ANDREW DAY, CORRECTIONAL OFFENDER REHABILITATION PROGRAMS: THE NATIONAL PICTURE IN AUSTRALIA (2004), available at <http://www.criminologyresearchcouncil.gov.au/reports/200203-04.pdf>.

123. For an example of the type of debates in this period, see C.H. LOGAN, PRIVATE PRISONS: CONS AND PROS (1990). For an account of the major political milestones of the period involving prisons, see AUDITOR-GENERAL OF VICTORIA, SPECIAL REPORT NO. 60, VICTORIA’S PRISON SYSTEM: PRISONER PROTECTION AND CONSUMER WELFARE (1999), available at <http://www.audit.vic.gov.au/publications/1999/19990527-Special-Report-60-Victoria's-Prison-System.pdf>. Finally, for a list of the operating prisons today in Victoria, and for a brief history of their opening date, see Victoria Dep’t of Justice, *Prisons, CORRECTIONS, PRISONS & PAROLE*, <http://www.corrections.vic.gov.au/home/prison>.

124. See Ed Kaptein, *Neo-Liberalism and the Dismantling of Corporatism in Australia*, in RESTRUCTURING HEGEMONY IN THE GLOBAL POLITICAL ECONOMY: THE RISE OF TRANSNATIONAL NEO-LIBERALISM IN THE 1980S, at 79, 88–89 (Henk Overbeek ed., 1993).

125. See HARDING, *supra* note 73, at 134–36.

126. See *id.* at 136.

Harding's list above—concern with regime improvement—was much more salient in the process of privatization in Australia than in the United States. It may not have been the initial impulse or the most important factor, but it played a role, especially for corrections leadership, when responding to the mandates to privatize. In assessing the experiment with privatization in Australia, Harding maintains that private prisons have succeeded to such an extent that they can provide the standard against which publicly run prisons should be judged.<sup>127</sup> Recent empirical work on these issues suggests that in fact this is occurring in some Australian states.<sup>128</sup>

### III. CONTRASTING EXPERIENCES IN THE UNITED STATES AND AUSTRALIA

Discussion about prison privatization in the United States is polarized. Private contractors and a handful of researchers they have engaged make claims of both efficiency (less costly) and effectiveness (lower recidivism rates, fewer suicides, less institutional violence, and the like).<sup>129</sup> For reasons noted earlier, critics can easily challenge such claims and are correct often enough to call privatization into serious question. Opponents can point to scandals: suicides, escapes, inmate violence, understaffing, high staff turnover, and the like. Indeed, one professional association of state prison guards maintains an active electronic clipping service that reports on failings in private facilities, and distributes hundreds of such stories a month.<sup>130</sup> Prisons are big operations, and private contractors operate in a competitive atmosphere,<sup>131</sup> so it is not surprising that there are frequent stories of questionable lobbying practices, conflicts of interest, bribery, and the like. So, with good reason, privatization in the United States has come to smell of dirty politics and lax administration. This impression is reinforced by the fact that the states that rely most heavily on privatization are in the South, a region with a long history of plantation model prisons, chain gangs, prisoner lease systems, and forced work, as well as weak traditions in public administration and social welfare.

Privatization in Australia has followed a decidedly different path. Although not without its blemishes, it has emerged more calmly and with greater deliberation. Fewer contracting companies are involved; prison facilities are tiny compared to American facilities. Inmate violence is far less of a problem than in the United States. State review and oversight is more thorough than is typical in the United States. Privatization was pioneered by the two most progressive and wealthiest Australian states.<sup>132</sup> Private prisons are held to high standards and are closely

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127. *See id.* at 143–44.

128. *See generally* Rynne, *supra* note 103. This history has had its dark moments. *See* John Rynne, Richard W. Harding & Richard Wortley, *Market Testing and Prison Riots: How Public-Sector Commercialization Contributed to a Prison Riot*, 7 *CRIMINOLOGY & PUB. POL'Y* 117, 123–34 (2008) (describing riots at Woodford Correction Centre in context of “prison riot theory”).

129. Rynne, *supra* note 103, at 17–20.

130. *Id.* at 23–46.

131. *Id.*

132. *See* PRIVATISATION IN AUSTRALIA, RESERVE BANK OF AUSTRALIA BULLETIN (1997), available at <http://www.rba.gov.au/publications/bulletin/1997/dec/pdf/bu-1297-2.pdf> (highlighting privatization in New South Wales and Victoria).



monitored. Australia's greater success with prison privatization is not because there are no opponents or no scandals—there are both. Nor is it because there are so many proponents among correctional leaders. Few top officials are long-standing or passionate advocates of privatization. Almost everyone involved has a pragmatic view of privatization.<sup>133</sup> Parliamentarians are concerned primarily with cost savings or at least the biggest bang for the buck, but reformers in correctional planning offices see opportunities to develop new and often more expensive treatment and rehabilitative programming. And they consistently have received the green light from these political leaders to pursue their reforms.<sup>134</sup> In their tenders, corrections officials have developed increasingly long lists of expectations so that in many instances the hoped-for cost-savings of privatization have evaporated even before contracts were let.<sup>135</sup> Private prison administration succeeds in Australia because Australian public administration is a success. It may be that the quality of privately provided public services in a jurisdiction is a function of the quality of public services and public administration more generally.<sup>136</sup>

Upon what do I base my views? A near consensus among several dozen knowledgeable people both in and out of government whom I interviewed during winter 2013<sup>137</sup> as well as a small but impressive body of evaluation research on the subject.<sup>138</sup> Those I interviewed included ministers with corrections portfolios, commissioners of corrections, public prison wardens, private prison wardens, staff who have worked in both types of institutions, two independent inspectors of prisons, and a leading representative of the union for public prison guards, who admitted, "I can't say it in the presence of the Commission and Minister, but the private prisons are better."<sup>139</sup>

Had the responses been mixed or inconsistent, I would have had to wait for more research for convincing answers to my questions. But what I found was a high degree of consistency and approval of private prisons, both in the views of the varied and mixed group of informed people with whom I spoke and in the findings

133. Interview by Malcolm Feeley with various corrective services officials in Perth, Austl. (Nov. 1, 2012) [hereinafter Feeley Interview].

134. *Id.*

135. HARDING, *supra* note 106, at 2. *See generally* BUSINESS AND SECURITY: PUBLIC-PRIVATE SECTOR RELATIONSHIPS IN A NEW SECURITY ENVIRONMENT (Alyson J.K. Bailes & Isabel Frommelt eds., 2004) (discussing incentives facing private sector actors).

136. For an assessment of the quality of public services and public administration generally, see Transparency International's Gateway Project, operated in conjunction with the European Commission and the United Nations Development Programme. A variety of quality-of-governance related tools are available. *See Gateway Corruption Assessment Toolbox*, TRANSPARENCY INT'L, <http://gateway.transparency.org/tools>.

137. Feeley Interview, *supra* note 133.

138. *See, e.g.*, DAVID BILES & VICKI DALTON, AUSTL. INST. OF CRIMINOLOGY, TRENDS & ISSUES IN CRIME & CRIMINAL JUSTICE NO. 120, DEATHS IN PRIVATE PRISONS 1990–99: A COMPARATIVE STUDY 6 (1999) (finding that Australian "private prisons generally have rates of deaths from all causes which appear to be lower than the rates of public prisons"); Ben Crewe, Alison Liebling & Susie Hullely, *Staff Culture, Use of Authority and Prisoner Quality of Life in Public and Private Sector Prisons*, 44 AUSTL. & N.Z. J. CRIMINOLOGY 94 (2011) (finding higher quality of life in some private prisons than in some public prisons).

139. Feeley Interview, *supra* note 133.

of the many reports and evaluations of private prisons which I read. Almost all signs pointed in the same direction, and to similar conclusions. Private prisons are successful in comparison to public prisons and in terms of meeting standards set by the states and various international organizations. Of course there are critics, but no hard-nosed, insistent critics.<sup>140</sup> Those who did raise criticisms almost all pointed to the same one or two incidents, which with further elaboration appeared to be more about concern with discrimination against aboriginal peoples in the criminal process generally rather than distinctively private prisons—tragic accounts not distinctive to privatization.<sup>141</sup> Whatever the case, each of the several indicators I examined pointed in the same direction and to the same conclusion.

Almost everyone I spoke with about privatization thought that the new private prisons were on balance better than their public counterparts. Almost everyone agreed that they had more and better programming, and almost everyone agreed that their staffs were more flexible and receptive to new ideas. Of course prisons are prisons, and no one thinks the new private prisons are likely to produce dramatic improvements in the behavior of the inmates either while in custody or after release. Furthermore, new institutions quickly become old and fixed in their ways. But almost everyone I spoke with believed that private prisons were better, and among those who did not, most thought they were about the same. I heard none of the insistent condemnation followed by recitations of documented improprieties that is common among similarly knowledgeable informants in the United States and England.

These impressions by informed observers were supported by the many reports and evaluations I read.<sup>142</sup> A number of these studies assessed private prisons on a variety of dimensions. The private prisons came out looking good: they met the expectations of the state officials who had made the contracts and of national and international organizations that set prison standards.<sup>143</sup>

Furthermore, the competitiveness of private contractors is real, certainly more than a theoretical possibility. Some prisons in Victoria, New South Wales, and Western Australia have changed operators at the end of their contract terms, and with improved results.<sup>144</sup> Of course not all private prisons were spectacular successes—indeed, it is hard to imagine any prison being a spectacular success. In one instance, in Victoria, a private contractor was so ineffective that the state exercised its powers to resume control of the prison.<sup>145</sup> In another instance in Queensland when a contract was about to expire and be rebid, the Department of Corrections itself responded to the tender its contracting division had released. The Department received the contract, and by all accounts the prison is now better than

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140. *Id.*

141. See Don Weatherburn, Jackie Fitzgerald & Jiuzhao Hua, *Reducing Aboriginal Over-Representation in Prison*, 62 AUSTL. J. PUB. ADMIN. 65–73 (2003).

142. See, e.g., Rynne et al., *supra* note 128.

143. See HARDING, *supra* note 73.

144. HARDING, *supra* note 106, at 7; see also Rynne, *supra* note 103, at 52–193.

145. The prison at issue here was quite old, and its facilities outmoded. Even after its reversion to the state, the prison remained problematic and was soon closed, razed, and its inmates dispersed to other prisons until a new facility was built. Feeley, *supra* note 133.

it would have been had it been managed continuously by public officials.<sup>146</sup> In short, there is ample evidence to support Harding's claim that private prisons can generate higher standards of care, which, in turn, can be adopted as system-wide standards, and applied to public prisons. It appears that under at least some conditions, privatization can lead to significant improvements. Of course, both the Israeli High Court of Justice and Harel assert that such findings are irrelevant to their theory. We will return to this shortly.

Because there have been questions about private prisons from the beginning, there is an increasing body of research assessing the operations of private prisons and comparing them with public prisons that has been conducted by academics, corrections officials, and independent researchers.<sup>147</sup> Consistently—not every time and not always, but consistently—these studies reveal that private prisons are among the best prisons in Australia in terms of recidivism rates, inmate violence, rehabilitation programming, guards' assessments of the quality of their work experience, inmate satisfaction, and the like.<sup>148</sup> In all sorts of ways, private prisons come out ahead.

During my interviews in Australia, one push-back question I received from time to time was something like, "Why are you so interested in private prisons?" Such questions suggested to me that private prisons in Australia are now so much a part of the landscape that questioning their existence was a bit surprising. It was as if a foreign observer were to come to the United States and inquire of educators, "Why private schools?" or of doctors, "Why private hospitals?" Although these are perfectly reasonable questions, respondents still might have a difficult time formulating coherent responses. One reason is that they are so taken for granted that we generally do not think about reasons for them, and thus would find skeptical questions about them odd if not off-putting. Certainly Australia's private prisons are not celebrated as great successes, but then what prison—public or private—ever has been? Still, the prevailing question among those involved in the field of corrections is not *whether* to, but *how best* to privatize.

There are any number of factors that may account for the normalization of private prisons in Australia in contrast to the continuing storm of controversy over private prisons in the United States. As suggested earlier, the per capita prison population is low by U.S. figures.<sup>149</sup> Levels of inmate violence are lower and less severe.<sup>150</sup> Australian prisons are only a small fraction of the size of U.S. prisons;

146. *E.g.*, Rynne, *supra* note 103.

147. *Id.* at 10–49 (collecting citations); *see also* Harding, *supra* note 26.

148. Rynne, *supra* note 103, at 10–49. It should be noted that no single statistic, including recidivism rates, accurately paints a picture of the quality of a prison.

149. *See* Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1; CARLOS CARCACH & ANNA GRANT, AUSTL. INST. OF CRIMINOLOGY, TRENDS & ISSUES IN CRIME & CRIMINAL JUSTICE NO. 150, AUSTRALIAN CORRECTIONS: MAIN DEMOGRAPHIC CHARACTERISTICS OF PRISON POPULATIONS (2000); DON WEATHERBURN, GARY FROYLAND, STEVE MOFFATT & SIMON CORBEN, NSW BUREAU OF CRIME STATISTICS & RESEARCH, CRIME & JUSTICE BULLETIN NO. 138, PRISON POPULATIONS AND CORRECTIONAL OUTLAYS: THE EFFECT OF REDUCING RE-IMPRISONMENT I (2009) (finding that between 1998 and 2008, the Australian "imprisonment rate (per capita) rose 20 per cent").

150. *See* PRISONERS AS CITIZENS: HUMAN RIGHTS IN AUSTRALIAN PRISONS (David Brown

large Australian prisons hold five or six hundred inmates, in contrast to many American prisons which house several thousand inmates.<sup>151</sup> In Australia staff move back and forth between private and public prisons; except for the recruitment of wardens from among retired public prison officials, staff do not move in the United States.<sup>152</sup> In Australia private prisons are held to the same standard of care as public prisons and closely monitored—probably more closely monitored for violations than public prisons. Monitoring is meaningful; violations are detected, changes are made.<sup>153</sup> Staff in private prisons are represented by unions, and while these unions are not as powerful as the unions for the public employees, they are bona fide unions that provide meaningful collective benefits.<sup>154</sup> This is not to say that private prisons in Australia do not have their share of problems with staffs, inmate aggressiveness, contraband, and the like, but only to say they are structured to offer more programming and services, organized to try to provide these additional benefits, and subjected to oversight and review to try to secure them. And they are familiar with enhanced expectations about what public prisons can do.<sup>155</sup>

Given the volumes that have been written about the sad history and continuing state of affairs of American prisons, both public and private, it is perhaps not surprising that opponents of private prisons would seize upon some of this work in fashioning a case against private prisons (though one might reasonably ask, “Why, given two hundred years of near constant failure of publicly administered prisons, aren’t you interested in experimenting with private prisons?”). Still, it is not difficult on any number of grounds to make a case against private prisons in the United States. However, the Australian experience suggests the need to pause and reflect. If our intuitions are formed by our experiences, it may be that we should expand our horizons and reflect on experiences in Australia. Also, no doubt different cultures have different and deep understandings of the divide between public and private. As recent scholarship has confirmed, the private/public divide is infinitely plastic.<sup>156</sup> All this suggests that differences in history, experience, and effectiveness may lead to different conclusions about the legitimate private/public boundary with respect to prisons and any number of other state-mandated services such as education, parks, highways, health care, organ transplants, and the like. Certainly in Australia, private prisons are now part of the landscape, like eucalyptus trees and kangaroos.

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& Meredith Wilkie eds., 2002).

151. See *State and Federal Prisoners and Prison Facilities*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=tp&tid=13> (last revised Jan. 26, 2014); see also Liptak, *supra* note 149.

152. Feeley Interview, *supra* note 133. For a general overview of staffing issues in private/public partnerships, see Linda M. English, *Performance Audit of Australian Public Private Partnerships: Legitimising Government Policies or Providing Independent Oversight?*, 23 FIN. ACCOUNTABILITY & MGMT. 313 (2007).

153. Feeley Interview, *supra* note 133.

154. *Id.*

155. KAREN HASELTINE, RICK SARRE & ANDREW DAY, PRISON-BASED CORRECTIONAL OFFENDER REHABILITATION PROGRAMS: THE 2009 NATIONAL PICTURE IN AUSTRALIA (2010), available at <http://www.criminologyresearchcouncil.gov.au/reports/05-0809.pdf>.

156. See generally Freeman, *supra* note 90; Metzger *supra* note 94; Edward Rubin, *The Regulatizing Process and the Boundaries of New Public Governance*, 2010 WIS. L. REV. 535.

IV. OTHER FORMS OF DELEGATED CORRECTIONAL  
RESPONSIBILITIES IN THE UNITED STATES

The taken-for-granted acceptance of prison privatization in Australia led me to look beyond private prisons to other related institutions, including private facilities for juveniles, inter-jurisdictional prison transfer compacts, and international prison transfer treaties. But these, too, are taken-for-granted institutions that seem to run counter to the theory against privatization. They have aroused no substantial interest among theorists opposed to delegating state functions to third parties. Indeed, I know of no sustained discussion by opponents of privatization that has addressed them. Below, I briefly address each of these practices, emphasizing how they seem to violate core principles of the state monopoly theory of prison management discussed above but nevertheless do not appear to violate our intuitions or our sense of dignity. I then draw on them to question the state monopoly theory.

*A. Private Juvenile Facilities*

Opponents of corrections privatization have focused exclusively on adult corrections, and wholly ignored private facilities for juveniles. This is strange, since in the United States only a small proportion of adults are held in private institutions but well over one-half of all juveniles are held in for-profit and nonprofit institutions. As of 2012, over thirty percent of all juveniles in custodial institutions are held in some form of private facility, and in several states the figure is close to one hundred percent.<sup>157</sup>

Of course there are differences between juvenile and adult facilities. Many juvenile facilities are minimum-security institutions or are open institutions, and few are staffed by gun-carrying officers.<sup>158</sup> Juvenile facilities emphasize education, treatment, and rehabilitation.<sup>159</sup> Most are small, at least compared to adult prisons; typically they house from a dozen to fifty or so, and few hold over two or three hundred.<sup>160</sup> In addition, many juvenile facilities are run by nonprofit organizations rather than for-profit contractors.<sup>161</sup> Furthermore, in a formal and important sense, juveniles in custody are not imprisoned or being punished. They have been “adjudicated” delinquent and placed in custody for their own well-being.<sup>162</sup> The list

157. See OFFICE OF JUVENILE JUSTICE, & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, HOW OJJDP IS WORKING FOR YOUTH SAFETY (2012), available at <http://www.ojjdp.gov/pubs/238638.pdf>. For the 2008 numbers, which are substantially similar, see Sarah Hockenberry, Melissa Sickmund & Anthony Sladky, *Juvenile Residential Facility Census, 2008: Selected Findings*, in JUVENILE OFFENDERS AND VICTIMS: NATIONAL REPORT SERIES 2 (2011), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/231683.pdf>.

158. See INTERNATIONAL HANDBOOK ON JUVENILE JUSTICE 63 (Donald J. Shoemaker ed., 1996).

159. *Id.* at 260, 283.

160. See Hockenberry et al., *supra* note 157, at 2.

161. *Id.* at 68, 248.

162. THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE 49, 54–55 (1992); Crystal Knoll & Melissa Sickmund, *Delinquency Cases in Juvenile Court, 2009*, in JUVENILE

of other important differences between juvenile and adult offenders and institutions could be expanded indefinitely.

Still, in light of the theory against privatization, such differences would seem to be irrelevant.<sup>163</sup> Both adults and juveniles in private facilities are confined against their wills and must submit to authority that is not an “instrumentality” of the state. Programming for juveniles involves a range of invasive activities. In fact, juveniles are subject to more discretionary treatment than adults in more regimented prisons. Furthermore, privatization opponents might reasonably argue that because of their vulnerability, young people in custody require more state protection and involvement than adult inmates—not less. Thus a powerful case can be made that it is even more important that juvenile detention should fall within the scope of the theory against privatization.

Despite this, opponents of privatization have not addressed private juvenile facilities in theoretical terms at all. Neither the Israeli Supreme Court’s three hundred pages of opinions nor the dozens of pages of articles by Harel and colleagues, nor any other theoretical discussions opposing prison privatization that I have read, even mentions juvenile facilities, let alone works through the state monopoly theory’s implications for them.<sup>164</sup> So how should we view juvenile facilities in light of the theory that covers but nevertheless ignores them?

Certainly private juvenile facilities generate their share of scandals. In the late 2000s, two judges in Harrisburg, Pennsylvania, were removed from office and convicted for receiving kickbacks from the operator of a private facility to whom they sent kids in droves.<sup>165</sup> But then there are plenty of scandals about public juvenile institutions, perhaps even at a higher rate. What is most striking in light of our concerns here, however, is the total lack of attention from privatization opponents to the widespread involvement of private contractors in juvenile corrections and the blank looks I got when I raised the issue of privatization with juvenile justice officials, juvenile justice experts, and opponents of privatizations. Private juvenile facilities appear to be so well institutionalized that juvenile justice officials don’t pause to question the idea (though they certainly think “internally” about them constantly), and they have simply not been on the radar of theorists against privatization. They are, theoretically speaking, invisible.

Perhaps they are invisible for good reason. Perhaps they perform satisfactorily, and what little we know about them informs our intuitions that they can provide benefits not so easily replicated in state-run institutions such as small size, home-like settings, greater flexibility, less coercive environments, and more treatment and rehabilitative programming. Certainly this has been conventional

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OFFENDERS AND VICTIMS: NATIONAL REPORT SERIES 2–3 (2012).

163. Harel’s theory extends to adult probationary services. Harel, *supra* note 15, at 114.

164. Interestingly, of the fifty-eight facilities for juvenile offenders in Israel, fifty of them are run by private nongovernmental organizations, seven by the government, and one by a private entity. The court does not address these fifty-one private juvenile facilities at all. E-mail from Mimi Ajzenstadt, Mildred and Benjamin Berger Professor of Criminology, Faculty of Law and Soc. Work, Hebrew Univ. (Aug. 2, 2013) (on file with author).

165. Ian Urbina, *Despite Red Flags About Judges, A Kickback Scheme Flourished*, N.Y. TIMES, Mar. 28, 2009, at A1.

wisdom about community corrections among juvenile justice professionals for the past sixty years or so.<sup>166</sup>

One of the great triumphs in the lore of contemporary American juvenile corrections took place in 1971. In one fell swoop over the Christmas holidays, the Commissioner of the Massachusetts Department of Youth Services, Jerome Miller, dramatically removed every kid from that state's juvenile "training schools."<sup>167</sup> He collected the kids in yellow school buses, and deposited them in not-yet-opened dorms on the state university campus in Amherst. Over the course of the next few months, he found placements for virtually all of them. His actions were a desperate act of the governor who had appointed him. Faced with mounting evidence of barbaric conditions in the state-run training schools and an implacable staff that undermined every effort at reform, the governor had appointed Miller to devise and carry out a bold plan. By all accounts the change was a stunning achievement. It has become the stuff of legend and has paved the way for a new beginning in American juvenile corrections.<sup>168</sup>

This story of triumphant removal is an oft-told tale.<sup>169</sup> What is not so well known is its aftermath. Miller eventually placed most of the kids in private for-profit and nonprofit facilities—group homes, foster family-like settings, and other types of small facilities. This had unanticipated consequences that some might not like, but there is little doubt that the new arrangements were—and forty-five years later remain—far superior to the state training schools they replaced,<sup>170</sup> first in Massachusetts and then, as the movement for community corrections gained strength, in other states.

Here too, low visibility of the vast network of privately run juvenile facilities and the cult-like response to Miller (I confess, I'm a fan) seem to suggest that our intuitions about who can successfully administer juvenile institutions may include private contractors as well as public agencies. Perhaps juveniles are different, but if anything, the theory against privatization should apply even more strongly to more vulnerable children who are subjected to more discretionary treatment. However, our now-long-standing acceptance of privately run juvenile facilities suggests that our intuitions about dealing with delinquency include the embrace of private institutions. Indeed, it is now the new conventional wisdom that small-scale housing units with family-like and less threatening forms of control are preferable to larger institutions, and it is generally conceded that private operators are more able to administer such facilities. This is not only true for the United States but for juvenile institutions around the world, including Israel.<sup>171</sup> Despite this, the justices

166. Paul Lerman, *Child Welfare, the Private Sector, Community-Based Corrections*, 30 CRIME & DELINQ. 5 (1984).

167. ALDEN D. MILLER & LLOYD E. OHLIN, DELINQUENCY AND COMMUNITY 23 (1985); Robert D. Behn, *Closing the Massachusetts Public Training Schools*, 7 POL'Y SCI. 151 (1976) (recounting event).

168. See Behn, *supra* note 167, at 151 (observing that Miller was "able to accomplish what so few others have").

169. See Sarah Armstrong, *Punishing Not-for-Profit: Implications of Nonprofit Privatization in Juvenile Punishment*, 4 PUNISHMENT & SOC'Y 345, 347–51 (2002).

170. *Id.*

171. See Yoel Elizur, *Involvement, Collaboration, and Empowerment: A Model for*

on the high court spent three hundred pages assessing the implications of private facilities for adults, but did not have a word to say about that country's private facilities for juveniles. One wonders why the complaints about private prisons for adults have not spilled over to juvenile facilities where private facilities are the overwhelming norm. The answer, I believe, is the taken-for-granted acceptance of smaller, flexible private arrangements for juveniles, and the widespread belief that they are relatively successful and superior to most public facilities.

### *B. Jurisdictional Overlaps*

The rejectionist theory of privatization reviewed above dwells on the evils of for-profit corporations, but ultimately both the Israeli court's and Professor Harel and colleagues' versions of the theory rest on the belief that only a unitary sovereign state that prescribes punishment has the moral authority to administer it. That is, in order to maintain the bond between offender and state, only the state that has created the crime and convicted and sentenced the offender possesses the moral authority to administer punishments to that offender. This raises issues far beyond privatization.

### *C. Interjurisdiction Compacts*

Consider a hypothetical case: A person is duly tried and convicted of a crime in one jurisdiction and is sentenced to prison in that jurisdiction. But it happens that the prison is some distance from that offender's home and family in another state. So after a successful request authorized under well-institutionalized interstate compacts, the prisoner is relocated to a prison in his home state nearer to his family.

In the United States, this arrangement is institutionalized between a number of states.<sup>172</sup> Keep in mind that in the United States each state has its own criminal laws, system for administering criminal justice, and prison system. These are regarded as core features of semi-sovereign states in the American federal system. By contrast, Canada, although a federal system, has a single, national criminal system (actually, responsibility is shared with the provinces under the 1867 Constitution, but the provinces have very limited responsibility).<sup>173</sup>

There are also variations on this interjurisdiction arrangement. Foreign nationals convicted in one country are at times relocated to serve their prison terms in their home countries.<sup>174</sup> This is fraught with all sorts of difficulties, and the international

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*Consultation with Human-Service Agencies and the Development of Family-Oriented Care*, 35 FAM. PROCESS 191 (1996).

172. BARBARA. B. KNIGHT & STEPHEN T. EARLY, JR., PRISONERS' RIGHTS IN AMERICA 151–53 (1986); Douglas W. Dunham, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475, 1491–93 (1986) (describing process by which private prisons can transfer prisoners).

173. See generally Peter H. Russell, Rainer Knopff & Ted Morton, FEDERALISM AND THE CHARTER (1989) (setting out relationship between federal government and provinces).

174. See U.N. OFF. OF DRUGS & CRIME, THE HANDBOOK ON INTERNATIONAL TRANSFER OF SENTENCED PERSONS (2012), available at [https://www.unodc.org/documents/justice-and-prison-reform/11-88322\\_ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/11-88322_ebook.pdf).



agreements that permit it are detailed and circumscribed.<sup>175</sup> Still, at times these arrangements work, and offenders can be sent to their home countries so they can be near their families, speak their native language, and eat their native food. When this works, everyone but the Grinch celebrates.

Perhaps theory should instruct us otherwise, but my intuition leads me—and I suspect most of those reading this Essay—to accept such arrangements as sensible and humane, and to believe that they do not violate the dignity of offenders or undermine the moral authority of the punishing state. Indeed, such arrangements are likely to be viewed as enhancing the dignity of prisoners and the moral stature of the participating states. This is smart, practical, and sensitive correctional administration, as well as exemplary public policy. Of course, one can easily imagine how it could be abused—sending California prisoners who are Mexican nationals to dismal prisons in Mexico, or inmates in Iowa prisons to Alabama, for example—but it is a good idea if administered with care, particularly if inmates themselves approve of the transfers.

#### *D. Interjurisdiction Transfers*

Variations on this theme abound. In the United States, jails in some jurisdictions are heavily impacted, and inmates—both those awaiting trial and those serving misdemeanor sentences—are often sent out of state to be held in custody. Big cities often contract with any number of jails around the state and the country. Conversely, smaller counties in the United States often contract with larger counties to provide jail space, sometimes within the same state and sometimes across state lines. Occasionally smaller counties build oversized jails in order to contract with larger counties with crowded jails to hold some of their inmates at a profit. All of this can lead, and certainly has led, to conflicts of interest, corruption, and hardships for inmates.<sup>176</sup> But it can also be effective and efficient public administration in a hyperdecentralized country. Similarly, at times states may contract with other states for space in their prisons, and then send their prisoners out of state. This too can lead to abuses. Sending ethnic Samoan prisoners from Hawaii to prisons in New Mexico, for example, approaches abuse.<sup>177</sup> But at times interjurisdiction transfers might help both New Hampshire and Vermont as well as prison inmates and their families.<sup>178</sup> There are still other issues that reach beyond the scope of this Essay. When offenders are sentenced by an international criminal court, where should they serve their prison terms? Is it proper for the U.S. Immigration and Naturalization Service to house detainees on a contract basis in a state prison or local jail?

These issues may loom larger in the United States than other countries, owing to its vast size and intense localism. But the state monopoly theory of prison administration does not convince me that all interjurisdictional arrangements

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175. *See id.* at 25–42.

176. J. Fred Giertz & Peter F. Nardulli, *Prison Overcrowding*, 46 PUB. CHOICE 71 (1985).

177. SUSAN EASTON, *PRISONERS' RIGHTS: PRINCIPLES AND PRACTICE* 186 (2011).

178. *See* Elizur, *supra* note 171.

should be barred as a matter of principle. The theory may sound a useful warning, but it is not dispositive of the issue.

Society's ready acceptance of interjurisdictional compacts and transfers may be based upon the fact that safeguards are built into the best of them and that many of them are voluntary. Of course there may be conditions where adequate precautions are not taken, and the arrangement raises serious questions. Yet neither safeguards nor voluntariness satisfy the state monopoly theory. Certainly it would make a mockery of the theory on its own terms if states could simply opt out of their duties by obtaining inmate waivers. The theory, after all, emphatically rejects any institution other than the sanctioning state to administer punishments. The theory rests on the nature of the obligation of the sentencing state, not the offender's wishes. It holds that only the state that imposes the punishment can administer that punishment. No other institution! Neither the standard of care, nor the quality of care, nor the assumption by the state for full responsibility, nor voluntariness can undo this obligation. As long as that entity that administers the punishment is not an instrumentality of the state that prescribed the punishment, the arrangement is unacceptable. The reciprocal bond between the punished and the punisher is broken. At least that is what the theory asserts. It is rigidly statist.<sup>179</sup>

Still, with respect to interjurisdictional compacts, defense attorneys, judges, human rights workers, and civil liberties advocates of all sorts who are sensitive to loss of dignity and liberty celebrate when they hear of such arrangements, and are at the forefront in the campaign for more such opportunities. Perhaps their sensibilities, and hence their intuitions, are under-developed. I tend to think that their intuitions are correct and the practices justifiable, and that it is the theory that is wrong.

#### CONCLUSION

A categorical principle imposing on states the duty to respect the dignity and minimize the deprivation of liberty of criminal offenders under its authority has obvious appeal. Attaching it to a flat prohibition that does not allow delegation of the administration of punishments to third parties under any circumstances may also appear to be compelling. It gives us clear and unambiguous instruction as to how to construct one of society's most fundamental institutions and deals with one of its most vulnerable groups. But our intuitions can vary widely and invariably are culturally shaped, and unexpected facts can emerge that complicate our intuitions. Variable circumstances appear that lead us to want to make distinctions that a categorical theory disallows. After reflection on the history of punishment, a brief consideration of the contested theories of sovereignty, a grounded tour of some ignored forms of privatization in both adult and juvenile institutions, and a review of some other long-standing and well-regarded arrangements for administering punishments, the idea of a general theory against privatization begins to lose some

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179. In their 2013 article, Dorfman and Harel make substantially the same point as the court, but express the point in terms of "communities" rather than states. Dorfman & Harel, *supra* note 15. So, I suppose it could be said that their version is "rigidly communitarian." In both instances, however, the result is the same.

of its appeal. Furthermore, as I have shown, the anti-privatization theory is in fact a state monopoly theory, and an unnecessarily restrictive theory at that. It does not even allow many arrangements that are widely regarded as sensible and dignity enhancing, or even exemplary, by human-rights groups. It might be that a highly contextualized theory that applies under certain conditions makes sense, but a general and categorical theory that admits to no exceptions, such as the one proffered by the Israeli High Court of Justice and by Professor Harel and colleagues, leads to too many unpalatable conclusions.

Of course a rejection of such a sweeping statist theory need not lead to an enthusiastic embrace of private prisons. On various policy grounds, many private prisons in the United States and England do not pass with flying colors, if any of them pass at all. But in Australia, at least some of them seem to pass the intuition test. Certainly the experience in that highly developed liberal democracy does not lead to any pervasive sense of abuse. Similarly, private juvenile facilities in a great many places in the United States and elsewhere are probably better on balance than public adult facilities and most of their public juvenile counterparts. It is frankly difficult to imagine any government providing in its own institutions the wide array of arrangements commonly available to juveniles throughout the world, including the United States, Australia, and Israel. Furthermore, those interjurisdictional compacts for inmate transfers I am familiar with are widely praised, and there is constant pressure from the good guys to expand them. This is not to deny that some of these arrangements are no doubt failures on just about any criteria we can imagine.

So, the picture is mixed. The theory examined here raises a good many important considerations—beware of private corporations putting profits before people, beware of lack of oversight and clear operating standards, and the like. But the range of experiences with private prisons and non-sanctioning state actors suggests that there are enough significant exceptions to call the theory into serious question. Upon reflection, I suspect that this is what most informed observers would conclude.

Admittedly, it is possible that those of us who hold this view are all like Don Herzog's "happy slaves," blissfully unaware of the indignities of the various institutional arrangements to which we have consented.<sup>180</sup> (Think of the fifty percent of the adult offenders in Victoria in private prisons, the vast numbers of juvenile offenders in non-state run facilities, or the Wisconsin offender housed in a Minnesota prison.) Because these arrangements are so pervasive in contemporary American life, we may simply fail to see their illegitimacy in the same way that Marx found that the working class was confounded and immobilized by false consciousness.<sup>181</sup>

If so, a powerful theory of state-only(!) administered sanctions, such as the one examined here, should rouse us to slough off our chains. But as I continue to grasp for the intuitive truths behind the theoretical edifice, I confess they do not lead me to rip off my blinders. But I may remain lost in the fog of false consciousness.

180. DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* (1989).

181. For an accessible overview, see ALLEN W. WOOD, *KARL MARX* (1981).

Or am I? In the midst of an intense conflict during the Vietnam War, a Marine Corps colonel was said to have observed, “We must destroy the village in order to save it.” Must we do something of the same for some of our custodial institutions? Is the experiment in the majority of Australian states so large and pervasive a fraud that it has become the new normal without anyone realizing the moral havoc it wreaks? Once relocated in private placements, were Jerome Miller’s kids subjected to a diminished increment of dignity and liberty? Are the by-now taken for granted fifty-plus percent of juvenile offenders in the United States currently housed in private, community-based facilities so degrading that we should take emergency measures to relocate them into public facilities—“scaling the wall” in the opposite direction?<sup>182</sup> Should the resident of St. Paul who was sentenced for a crime committed in Dresser, Wisconsin, and now serving his time in Stillwater, Minnesota, fifteen miles from his wife and children, be returned to the Wisconsin State Prison in Baraboo, two hundred miles from his family?

The theory reviewed in this chapter would appear to respond to these questions in a forceful affirmative. But my answer is a less forceful, “no,” and a follow up qualification, “It all depends.” Upon what does it depend? I am unable to draw up a comprehensive list. But certainly, it does not turn on even more rigorous abstract theorizing that seeks even greater universality. It may require more unpacking in order to show me the error of my own intuitions. But I don’t think so. I’m familiar with the facts. I have done due diligence. The examples I have rehearsed above are not farfetched, and oddball exceptions that can easily be dismissed. They represent major institutional arrangements that affect a huge portion of the custodial population in the United States, England, Australia, Israel, and the elsewhere. They cannot be dismissed.

It is not that I reject theorizing. The theory reviewed here raises obvious and important issues; and, if properly reworked and modestly presented, might even establish strong presumptions against privatization. But it does not provide a convincing categorical answer to the question it asks. I think the matter requires more facts, more history, more experience, more nuance, more appreciation for the ways of the modern administrative state, more humility, and more concrete concern with the conditions in which institutionalized persons of all types exist. In short, it requires more wisdom.

To my mind, the response to the question, “Should we house prisoners in non-state run facilities?” must be: “It all depends.” This is hardly a satisfactory answer, but it may be the first step toward wisdom on this complicated subject.

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182. MILLER & OHLIN, *supra* note 167.