

Private Incarceration – Towards a Philosophical Critique

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Introduction

On November 19, 2009, Israel's High Court of Justice (HCJ) ruled, by an eight to one majority, that Amendment 28 to the Prison Ordinance (2004), which authorized the construction of the first privately-run prison in the country, was unconstitutional. The main reason given by the Court for its globally unprecedented decision was that the very fact of being incarcerated by a private, for-profit corporation, regardless of the quality of service provided by that private institution, was an excessive violation of the prisoners' rights to freedom and to human dignity and thus contradicted the provisions of Basic Law: Human Dignity and Freedom. The main opinion in the case, written by Supreme Court President Dorit Beinisch, has been criticized as incoherent, in that it confused the institutional argument – based on the non-delegation doctrine – with the argument from human rights. Beinisch explicitly stated that the concern that prisoners' rights are more likely to be infringed in a private than in a public prison was not sufficiently strong to warrant the finding that the amendment was unconstitutional. Still, she concluded that the very fact that the power to deprive a person of her liberty rested with a private for-profit entity was, in and of itself, an excessive violation of the prisoners' rights to freedom and to human dignity. She also argued that this finding rendered considering the issue of the delegation of core governmental functions to a private entity superfluous in this case.¹

The Court's liberal critics have pointed out that the president failed to provide a persuasive argument for her decision. An argument from human rights, they claimed, should have been able to show some reason to believe that the prisoners' rights were more likely to be infringed in a private than in a public institution. Alternatively, the president could have argued against the delegation of core governmental functions.² Having declined to take either of these courses, her decision amounted to no more than an unsubstantiated assertion. Moreover, while the Supreme Court spoke its lofty rhetoric, prisoners were languishing in public prisons in awful conditions. To the extent that these prisoners may have preferred to be housed in a more comfortable private prison, the Court could also be said to have violated their rights of free choice and personal autonomy.³

In this paper, we argue that while Beinisch's decision was indeed incoherent and unjustified when viewed from a liberal perspective, which was her avowed perspective, it is perfectly coherent and justified from a civic republican perspective. We further argue that, in general, a coherent moral argument against private incarceration must necessarily rest on civic republican foundations.

The question of the relations between liberalism and civic republicanism, especially between their respective conceptions of freedom, has become salient over the last three decades following the renewal of interest in the civic republican tradition. An argument heard with increasing frequency in recent years, however, claims that the differences between the two conceptions of freedom are minor in reality and that every worthy moral position

taken from within the civic republican tradition can also be sustained by liberal reasoning.⁴ Our main argument in this paper is that, at least with respect to the morality of private incarceration, this is not the case. We contend that liberalism, with its negative conception of freedom and its pre-political understanding of rights, cannot provide a coherent critique of private incarceration. A sound philosophical basis for such a critique can, however, be provided by civic republicanism.

We begin in Part I with a discussion of the non-delegation doctrine, in terms of which the constitutional question of private incarceration is often formulated. We therefore seek to address whether the state's delegation of the function of criminal incarceration to private entities is desirable, or at least tolerable, from the point of view of both liberalism and civic republicanism. In Part II, we turn to liberal arguments concerning private incarceration. Our analysis begins with the utilitarian paradigm, the liberal position most sympathetic to private incarceration. We then deal with the libertarian perspective, which is of two minds on the question of private incarceration. Finally, we examine the limits of the Rawlsian critique of the privatization of incarceration. Part III offers arguments against private incarceration drawn from the civic republican tradition based on a reconstruction of Rousseau's *Social Contract* and on the works of Michael Walzer. The final section analyzes the Israeli High Court's decision in light of the foregoing discussion of liberalism and civic republicanism.

I. The Liberal Social Contract and Non-Delegation

The non-delegation doctrine, which has been developed by the US Supreme Court since 1882, derives from Article 1 of the Constitution: "all legislative powers . . . shall be vested in Congress." On this doctrine, the legislative power was given to Congress and could not be delegated to other branches of government or to private parties. The original use of the doctrine was to limit the ability of Congress to delegate legislative powers to the President.⁵ According to the Supreme Court, the legislative branch may not abdicate its responsibility to resolve "truly fundamental issues" by delegating legislative powers to others or by "failing to provide adequate directions for the implementation of its declared policy." Congress should supply an "intelligible principle" to guide and limit executive discretion.⁶

Protecting the people from abuse of public power is most commonly seen as the underlying objective of the non-delegation doctrine. The doctrine is intended to forestall two possible developments: the delegation of power by Congress to the executive branch and the executive's delegation of governmental powers to private bodies. By requiring public consensus during the policy formation and design stages, the non-delegation principle increases the likelihood that such powers will not be used to harm individual liberty. Additionally, by preventing the delegation of power to non-elected entities, the principle keeps the responsibility for creating public policy in the hands of Congress and hence helps buttress democratic control and the rule of law. This enhances, or at least sustains, governmental accountability.⁷

The US Supreme Court has not articulated a theory of the principles that govern the non-delegation doctrine and has not defined a precise test to distinguish between statutes that properly delegate governmental powers and those that do not. In practice, the non-delegation doctrine has served to restrain neither privatization in general nor the privatization of incarceration in particular. At the federal level, the Supreme Court has not invalidated legislation on non-delegation grounds since the mid-1930s.⁸ Consequently, the doctrine has been used in US debates over private incarceration, but without much success.⁹

Scholars have tended to explain the Supreme Court's limited interpretation of the non-delegation doctrine in functional terms. It is common knowledge that in the modern

administrative state, wide-ranging delegations of legislative authority to executive branch agencies are inevitable. A strict reading of the separation of powers doctrine is but a fiction.¹⁰ Many scholars therefore believe that the non-delegation doctrine is dead or practically useless. For example, Paul Verkuil, an advocate of the doctrine and an opponent of the outsourcing of governmental functions, wrote that “non-delegation alone may not be a sufficient instrument for constraining pervasive outsourcing.”¹¹

The functionalist explanation of the judicial interpretation of the non-delegation doctrine masks the fact that such interpretation is derived from fundamental normative assumptions about the nature of politics and the role of the state in society. In order to argue why certain governmental functions should not be delegated, we need a normative theory that explores the role of the state and political institutions in a just and good society. In the next section, we examine whether a number of liberal normative theories can provide such arguments. As we shall see, without the assumption that our political rights are constituted through public institutions or the belief that social institutions mold our preferences and our behavior in fundamental ways, one cannot provide conclusive arguments as to why certain institutions must remain public or why certain functions should not be delegated to private bodies. Thus commenting on the legitimacy of private incarceration, Judge Richard Posner has remarked, “A prisoner has a legally protected interest in the conduct of his keeper, but not in the keeper’s identity.”¹²

II. Liberalism

1. Utilitarianism

Given the prominence utilitarianism continues to enjoy in western politics and governance, it is unsurprising that much of the debate over private incarceration is couched in utilitarian terms, even when participants adhere to other moral philosophies.¹³

With his Panopticon scheme – “the inspection house” – Jeremy Bentham was the forerunner of the ideology underlying private incarceration.¹⁴ Characteristically, Bentham’s scheme was based on the principle of the conjunction of duty and interest. The Panopticon was to be run by means of private contract management, and the profit motive operative in the process would enhance the public interest by penalizing criminals at a lower cost.¹⁵ The contractor was a key figure in the scheme, and Bentham intended himself to be the contractor of the first prison to be built according to his principles.¹⁶

It is generally agreed that the failure to promote the Panopticon scheme led Bentham to embrace the idea of representative democracy. He concluded that this failure resulted from the influence of sinister interests on members of Parliament¹⁷ and saw representative democracy as a measure with which to counter the influence of these interests and ensure “the greatest happiness for the greatest numbers.”¹⁸ Thus, in the history of utilitarianism, democracy and private incarceration came together into the world.

Since the effects of private incarceration (or of anything else for that matter) on the general happiness of humankind, or just on a particular society bound by the borders of a specific sovereign state, are impossible to calculate, the debate over social utility is often reduced to a debate over the comparative economic efficiency of private versus public incarceration, and sometimes even to the simple question of fiscal savings.¹⁹ By contrast, a more sophisticated utilitarian analysis would have to not only consider fiscal savings, but must also be mindful of more intangible factors such as the effects of private incarceration on state capacity and legitimacy, democratic accountability, and so on. As the prominent Princeton University penologist John DiIulio has stated:

Despite a variety of claims to the contrary, there is absolutely nothing. . . that would enable us to speak confidently about how private corrections firms compare with public corrections agencies in terms of costs, protection of inmates' civil rights, reliance on particular management technologies, or any other significant dimension.²⁰

This statement, made in the late 1980s, is no less true today, after a dramatic increase in the number of prisoners incarcerated in private prisons and a plethora of studies on the matter.²¹

Nevertheless, utilitarian analysts, lured by the prospect of cutting government costs, still attempt to find ways of making private incarceration more appealing on utilitarian grounds. Thus, James Gentry has argued that "serious problems may arise in attempting to ensure the fidelity of entrepreneurial jailers to societal preferences," and that "significant factors suggest that private prisons could be inferior to their public counterparts in both quality and efficiency." He also noted the difficulty of even ascertaining what societal preferences would actually be in this particular case. Still, in a truly Benthamite fashion, he proceeded to offer "a set of monitoring devices that . . . [would make it possible] to harness existing private motivations to generate improvements in prison quality."²²

Gentry admits that under present conditions the state is likely to perform better as an administrator of public prisons than as a monitor of private ones. The costs of effective monitoring, he points out, would have to be deducted from the savings to state budgets that justified privatization in the first place. As a result, the state would have an incentive to keep monitoring costs as low as possible, inevitably reducing the quality of its oversight. Coupled with the problems of hidden delivery, entrenchment, the monopolistic tendencies of the private corrections market, and "capture" of the regulatory agency by the industry, this will create a strong incentive for the state to be satisfied with the minimum standards stipulated in legislation or ordered by the courts.²³ (We would add that under these conditions, the state would most likely be satisfied with the *appearance* of meeting such minimum standards.)

Gentry proposes to deal with this problem through a system of pecuniary incentives, both positive and negative, that would make it the private jailer's interest to provide quality service in its prisons. His system consists of fines for any divergence from the standards of service delivery, buttressed by transparency of the prison operation, monitoring by the prisoners themselves, state ownership of the physical prison facilities, short contract terms to avoid entrenchment, and so on. We do not wish to enter into a detailed critique of Gentry's proposals because his approach is one of trying to solve in practical ways the problems of private incarceration and therefore offers little by way of theoretical relevance to our inquiry. Nonetheless, it would seem that in order for Gentry's system to work, he would have to wish away many of the problems he himself identified with private prisons in the first place.

Along with economic efficiency, accountability plays a prominent role in the utilitarian private incarceration discourse.²⁴ Governmental accountability is the key to ensuring that public officials' private interests do not dominate legislation and the policymaking process to the detriment of the public good. It is for this reason that Martha Minow identified governmental accountability as the central issue requiring inventive work and renewed public involvement.²⁵ Although she did not define accountability precisely, she emphasized the role of the public, especially in establishing criteria for successful governmental activity.²⁶ However, she also averred that insisting on public accountability does not require public monopoly over the design and delivery of public services. Privatization could improve quality and accountability, and it has a potential for innovation and increased efficiency. It may also enhance pluralism and stimulate new knowledge and the construction of new infrastructure.²⁷ On the other hand, privatization also risks reduced quality, unequal treatment, and outright

corruption.²⁸ In sum, then, Minow neither supports nor opposes prison privatization in principle, as long as public accountability is kept viable and dynamic.

Gillian Metzger has argued that the case against private prisons is easy to overstate and that we must also confront the widespread problems and deficiencies present in many public prisons. Moreover, she argues that private prisons are in some ways more accountable than public ones. If private prisons lead to improved prison conditions and services, they enhance the human dignity of the prisoners, a consideration that is relevant from a constitutional point of view. The challenge posed by privatization is to determine how to devise the means of preserving governmental accountability without sacrificing regulatory flexibility and its associated benefits. The concrete concern is whether private delegation of governmental power is adequately structured to preserve constitutional accountability.²⁹ In sum, Metzger's discussion clarifies the connection between accountability and utilitarian calculation. It also illustrates that the non-delegation principle cannot provide a conclusive basis for rejecting private incarceration as long as the enhancement of accountability or democratic control of policy is interpreted as the principle's main objective. After all, one cannot dismiss the possibility that private prisons will be more accountable than public ones.

2. *Libertarianism*

Libertarians, in general, face a painful dilemma. In principle, they believe in preserving the state-of-nature right of private enforcement of one's own and everybody else's rights unless such right has expressly been given up. If that right is to be given up in the state of nature, as it must, Robert Nozick posits that it would be given up to private for-profit associations, whose respect for the rights of their non-clients would be ensured by market forces. He further argues that the market for private enforcement agencies would tend toward monopolization, and once a monopolistic all-encompassing protection agency emerges, we are really in the presence of what he calls the "minimal state."³⁰ So Nozick and other libertarian thinkers accept, perhaps reluctantly, the monopoly of the state over law enforcement.

If the state is nothing but a private protective association that has gained monopoly status, there is nothing essential that differentiates it from other private corporations. On this view, there are no inherent state functions that cannot be delegated to others. The state derives its authority from the consent of the governed, expressed through the delegation to it of their right to judge their fellow human beings. If the coercive powers of the state are delegated powers to begin with, there is no principled reason why the state could not delegate them further, to either public or private entities. Barak Medina made a particularly blunt statement of this position in the context of the Israeli debate over private incarceration:

According to the prevailing approach [sic], the private-public distinction is normatively baseless, and is used, if at all, only for descriptive purposes. An activity is "private" if it is free of limitations, such that the actor is free to employ her discretion regardless of the interests of others, and it is "public" if the actor is subject to such limitations. The decision whether an activity should be subject to limitations is based on substantial reasons, rather than on some formal, pre-defined classification as "private" or "public." The classification is the outcome of the substantive consideration, not its source. Consequently, it is difficult to make any meaningful distinction between prisons' staff according to the formal status of their employer, the state or a private corporation.³¹

The only issue that matters to libertarians of this kind is that individual rights be preserved through due process, and they do not see any reason why they should be preserved any better

by public bodies than by private ones. On the contrary, they argue, everything else being equal, due process is more likely to be observed by private bodies because market discipline is more effective than administrative control. Having cleared this hurdle, libertarians proceed to enter the utilitarian arena, where, naturally, they find the market to be much more efficient than the state in providing correctional (and most other) services.³²

Another strand of libertarianism, however, is suspicious of private incarceration, since it does not believe that many of the “clients” of the private corrections companies – those who committed “victimless crimes” such as drug use – should be imprisoned in the first place.³³ Thus, for this brand of libertarianism, private interests should not take part in the illegitimate incarceration of people who have not infringed on anyone else’s rights, the only legitimate reason for interfering with personal liberty. According to Bruce Benson, prison privatization may be seen as a Faustian bargain, resulting in a more efficient way to punish people for victimless crimes or for breaking laws that may be unjust.³⁴ Needless to say, Benson does not view public prisons any more favorably than he does private ones. If anything, he still considers private corrections companies to be a more benign force in society than the interests that surround public correctional institutions such as prison guards’ unions.

In sum, libertarians are of two minds on the question of private incarceration. Some favor it because they support, in principle, the transfer of as many state functions as possible to the market, independently of the calculus of economic costs and benefits involved. Other libertarians, however, are opposed to private incarceration because they do not think private interests should be involved in what they consider the illegitimate deprivation of liberty from perpetrators of “victimless crimes” and the violators of other unjust laws such as income tax laws.

3. Rawlsian Liberalism

In the context of private incarceration, the human dignity of prisoners is of crucial importance for Rawlsians. When the state incarcerates offenders, it strips them of their freedom and dignity and consigns them to conditions of severe regimentation and physical vulnerability for extended periods. Before seeking to ensure efficient incarceration, therefore, it must first be determined if the particular penal practice at issue is even legitimate. According to Sharon Dolovich, penal policies must conform to two principles: the principle of humanity and the principle of parsimony. The principle of humanity entails a prohibition on gratuitously cruel and unusual punishment, and the principle of parsimony entails a prohibition on sentences that are disproportionately long.³⁵

On Rawlsian principles, inhumane treatment of convicts (which incarceration is by definition) would have to meet two criteria in order not to be considered gratuitous: proportionality vis-à-vis the need to deter evildoers from harming others and efficiency subject to the difference principle, i.e. a reasonable guarantee that resources that could have been invested in making the conditions of incarceration less inhumane will be invested in improving the conditions of the least fortunate free members of society with respect to their most urgent interests. Without such a guarantee, the state is obligated to invest the resources in making the conditions of incarceration less inhumane.³⁶

Dolovich argues, like all critics of private incarceration, that if left to their own devices, private prisons, whose sole motive is the profit motive, would be tempted to cut costs in two major ways: by providing for inmates’ needs at lower than satisfactory levels and by “hiring fewer staff members, paying lower wages, and reducing staff training.” In both cases, cost-cutting would inevitably result in greater violations of the humanity principle. The standard

response to this argument is two-pronged: (1) have the contract specify exactly the kinds, frequency, quality, and so on of the services to be provided to inmates, and the number, qualifications, and training of prison guards; and (2) effective state regulation. However, Dolovich argues that private prison contracts are “incomplete contracts” by their very nature in that these requirements cannot be specified at a level of detail that could guarantee against cost-cutting practices. Moreover, due to the nature of prisons as total, and potentially violent, institutions, these incomplete contracts necessarily accord private prison officials “residual control rights,” that is, the right to diverge from the agreed-upon standards and practices in order to meet unexpected contingencies.³⁷

As for state regulation, four regulatory mechanisms are usually proposed by proponents of private incarceration as effective vehicles of state oversight – the courts, accreditation, monitoring, and competition.³⁸ Dolovich, once again like many other critics of private incarceration, is skeptical of the effectiveness of these oversight mechanisms and provides rich historical evidence in support of her skepticism. She concludes, on the basis of this evidence, “that although much of the available data is inconclusive regarding the overall quality of conditions in private prisons as compared with public facilities, meaningful data do exist showing elevated levels of physical violence in private prisons.” And this is so despite the fact that, in the United States, maximum security prisoners make up about ten per cent of all prisoners in state-run prisons and only about four and a half per cent in privately-run ones.³⁹

In view of all this, Dolovich’s overall conclusion may sound surprising:

Certainly, nothing in the foregoing discussion goes to show that the state’s use of private prisons could *never* satisfy the humanity principle. What it does show is that, when the state looks to privatization to save money on the cost of corrections, there is reason to expect conditions of confinement to fall below even that level of quality and safety that can be reasonably expected of those charged with the difficult task of running the prisons. When the state’s aim is saving money, it will be unwilling to undertake measures that will substantially raise the cost of privatization, even when doing so could arguably ensure more meaningful protections for vulnerable inmates.⁴⁰

Dolovich argues that from a Rawlsian perspective, deficiencies of private incarceration stem from two practices that are widespread in the prison system as a whole: outsourcing of various non-security functions, such as food, laundry, medical care, and so on, in order to cut costs, and the delegation to prison officials of considerable power over their essentially helpless wards.⁴¹ Fully privatized prisons aggravate these problems, but such problems certainly are not unique to them. In principle, if expenditures on prisoners’ needs could meet the standard of Rawls’s difference principle, and if due process could guarantee that prison officials will not abuse their power, Rawlsian liberals, like Dolovich, would find no reason to object to private incarceration.

Indeed, the main point of Dolovich’s essay is to argue that the very institution of incarceration should be revisited, not that there is anything *inherently* unique to private incarceration. From her perspective, private incarceration is merely a “miners’ canary” that illuminates the problems of incarceration in general: “For liberal legitimacy . . . the current [dismal] state of public prisons represents not a rejoinder to the foregoing critique of private prisons, but rather an occasion for asking whether the insights gleaned from that critique help also to explain failings in the public system.”⁴²

More recently, Dolovich has expressed concern with the exclusive focus on efficiency in the privatization discourse. She explained that comparing the efficiency of private and

public prisons operates as a rhetorical device that keeps the debate within particular bounds, excluding some concerns altogether and reframing others in ways consistent with utilitarian priorities. Since this issue is dominant in the debate over private prisons, it is unsurprising that critics concerned with the normative implications of privatization have had “so little success” in influencing the debate.⁴³ However, Dolovich’s major concern is the humanity of penal institutions and the quality of the public and scholarly debate about privatization, and not private prisons as such. She does not take a stand against private incarceration, but uses the debate to point out the issues she believes should be addressed and how the efficiency argument stifles that debate.

If her Rawlsian premises are taken into account, Dolovich’s position is not at all surprising. Firstly, as Michael Sandel has shown, Rawlsians are primarily concerned not with the intrusion of private interests into spheres of social relations that, on the civic-republican view, should be immune from such interests, but rather with the “background conditions” under which such intrusion takes place. If this intrusion could occur under “fair background conditions” that would guarantee respect for individual rights—as might be obtained through sufficiently complete contracts and effective state oversight—Rawlsian liberals would not consider it an act of coercion but rather of consensual contractual relations.⁴⁴

Secondly, Rawls’ difference principle is problematic, not only in its application to concrete social situations, but also in its essence. As Joshua Cohen has pointed out, the principle asserts that no one should be less well-off than anyone “needs to be.” However, the actual meaning of the term “needs to be” is ambiguous in that it is unclear whether people’s attitudes and preferences should be taken into account in determining how well-off a person needs to be. How, for example, should we treat the fact that many people in the US are vehemently opposed to “socialized medicine” in considering that millions of Americans are very badly-off in terms of their access to healthcare (or at least were badly-off prior to the recent reform)? Cohen shows that it is possible (although, according to him, not desirable) to read the difference principle as stating that given the American social ethos regarding publicly-provided healthcare, millions of people are not worse-off than they “need to be.” By the same token, given the American social ethos regarding “law and order” and private enterprise, it may be just to spare the money required to make prison conditions less inhumane, even if that money ends up as profit in the coffers of private incarceration companies rather than being spent to improve the conditions of the least well-off free members of society (by providing them with subsidized health insurance, for example).⁴⁵

Other related aspects of Rawls’ theory that may be relevant to the discussion of private incarceration are his conception of the self and his understanding of moral justification. Like Rousseau, and at least partly under his influence, Rawls believes that social institutions affect the development of human propensities.⁴⁶ He shares with Rousseau the thesis that institutions “make a large difference to ethos”: “the character and interests of individuals themselves. . . are not fixed or given. . . . Now everyone recognizes that the institutional form of society affects its members and determines in large part the kind of persons they are.”⁴⁷

But although Rawls believes that institutions could potentially change the way people perceive of themselves and their society, their interests and the meaning of freedom,⁴⁸ his commitment to a certain type of respect and to personal autonomy as self-direction militates against building social institutions that might curtail individuals’ abilities to form, revise, and pursue individual life plans.⁴⁹ As with other liberals, Rawls does not regard the state, and public institutions in general, as a necessary component to achieving autonomy and liberty.⁵⁰ Thus, although Rawls is aware of the important role institutions play in social relations

and of their constitutive effect on people, his support for political institutions is restrained, and his philosophy does not supply the necessary arguments against delegation of state power.

Finally, Rawls' reasonable decision procedure and his conditions of justification have a limiting effect on our ability to make principled arguments regarding constitutional issues, such as the one we are dealing with in this paper. Already in his first published article, when he was seeking "a reasonable decision procedure which is sufficiently strong... to determine the manner in which competing interests should be adjudicated," Rawls wrote that "it is required that the judgment... should not be determined by a conscious application of principles so far as this may be evidenced by introspection... What is required is that the judgment not be determined by a systematic and conscious use of ethical principles."⁵¹ Later on, the close connection between the way arguments are justified publicly and their political validity became a central tenet of Rawls' political philosophy. From the perspective he developed since the 1980s, the truth claims of public arguments relating to constitutional matters and to basic justice could not be based solely on the fact that they derived from certain comprehensive doctrines which were firmly believed to be true. Such truth claims had to be justified on the basis of beliefs grounded in the prevailing public discourse:

[I]n discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrine – to what we as individuals or members of associations see as whole truth... As far as possible, the knowledge... and ways of reasoning that ground our affirming the principles of justice and their application to constitutional essentials and basic justice are to rest on the plain truths now widely accepted, or available, to citizens generally. Otherwise, the political conception would not provide a public basis of justification.⁵²

Incarceration, which involves the organized use of violence and the infringement of basic rights, is clearly a matter of basic justice and constitutional essentials. Discussions concerning it are therefore subject to these requirements of justification.

More generally, Rawls' theory of justification privileges factual arguments and considerations of public policy over abstract principles: "the feasibility of the basic liberties depends upon circumstances."⁵³ He believes that a decision that contradicts a basic principle could be just if it is supported by the facts and if the reflexive balance counters the abstract principle. A theory of morality should be free to rely on contingent assumptions and on general facts. It is accordingly a mistake to believe that general principles and abstract conceptions always override particular judgments. This is especially true with respect to alternatives having to do with the situation of the less free members of society. We must acknowledge the fact that it might be just to accept an alternative that is bad in itself if it improves the conditions of the less free.

For example, when choosing between supporting or opposing the practice of enslaving prisoners of war, it is not sufficient to consider whether enslavement is or is not just in principle. We should also ask what the alternatives are. If the alternative is the execution of these POWs, we should decide in favor of enslaving them, a practice less unjust in itself and one that leaves the door open for a better future: "There may be transition cases where enslavement is better than current practice." Rawls emphasizes, however, that provisional acceptance of slavery *cannot* "appeal to the necessity or at least to the great advantage of these servile arrangements for the higher forms of culture... the principle of perfection would be rejected in the original position."⁵⁴

In sum, a Rawlsian perspective may provide grounds for supporting private incarceration, at least as a provisional measure, for the following reasons:

1. This issue must not be decided on the basis of one comprehensive doctrine (such as civic republicanism), while ignoring other comprehensive doctrines (such as utilitarianism).
2. The issue cannot be decided solely on the basis of abstract conceptions, such as freedom or human dignity. The decision should consider a whole array of factual matters as well, such as the conditions of incarceration in public prisons, the prisoners' own preferences, the state's ability to regulate the private corrections industry, and so on.
3. Given the existing beliefs and preferences of the public regarding public spending, it might be just to privatize prisons, at least for a while, in order to improve the conditions of the prisoners, who are the least free members of society.

Rawlsian arguments against private incarceration may thus be limited by Rawls' commitment to individualism, by his anti-perfectionist moral philosophy, and by his theory of justification.

III. Civic Republicanism

Michael Walzer, "politically... a liberal but also what Europeans would call a social democrat,"⁵⁵ straddles the line between liberalism and civic republicanism and illustrates in his own work the differences between these two perspectives on the question of private incarceration. In 1985, as prison privatization was getting under way in the US, Walzer wrote an essay criticizing the new trend.⁵⁶ In his essay, submitted later, with small changes, as a brief in support of the plaintiffs in the Israeli prison privatization case,⁵⁷ liberal and republican arguments, or arguments from the perspectives of both coercion and corruption, to use Sandel's terms, were intertwined.

Walzer argued that establishing private prisons was wrong because it "exposes the prisoners to private or corporate purposes, and it sets them at some distance from the protection of the law."⁵⁸ He presented the legitimacy of the law as stemming from a Lockean social contract, complete with tacit consent and the need for an impartial arbiter:

When we agree to the laws... we accept the proposition that if we ever break the law we ought to be punished. Criminals are punished, then, with their own consent. And if this isn't active and explicit consent, then it is constructive and tacit: for the criminal has lived under and enjoyed the benefits of the laws, and could have participated in the making of these laws... But if this is right, then it is crucial that the agents of punishment be agents of the laws and of the people who make them. Though it may sound paradoxical, the criminal is punished by his own agents – who are ours too. That's why private punishment is ruled out. We can't be judges or police or jailers in our own name or for our own purposes. It is only some public purpose, which the criminal could share – which, as a fellow citizen, he does share – that justifies punishment.⁵⁹

Later, Walzer imperceptibly slips into republican arguments: when the uniformed agents of the state enforce the law as an expression of "the general will... they don't oppress us." However, when private or corporate interests interfere in law enforcement, "justice is corrupted."⁶⁰

The corruption of justice by the intrusion of private interests into the public sphere does not seem to Walzer to be a sufficiently strong argument against private incarceration; in the

final part of his essay, he again resorts to liberal arguments – the difficulty of ensuring the accountability of and oversight over private prisons. But these arguments, as we have shown, do not address the essential problem of private incarceration and therefore cannot support a coherent principled position against it. Indeed, Walzer concluded his essay, and his legal brief, with what seems to be a conditional endorsement of private incarceration as long as the corporations charged with the task are not-for-profit. This endorsement, we shall emphasize, is not consistent with the reference he made in the legal brief (but not in the published essay) to non-delegation, arguing that in privatizing law enforcement, “the state gives up on what it cannot give up legitimately, which is its prerogative to punish or use coercive force against violators of the law.”⁶¹ This inconsistency is a symptom of the difficulty faced by liberal theory, which Walzer has remained committed to, in pointing out why private prisons, whether for profit or not, should be forbidden.

However, we can find a theoretical basis for a civic republican critique of private incarceration in Walzer’s own philosophical work, especially in *Spheres of Justice*. We will turn to that book shortly, after first laying out the basic premises of civic republicanism as articulated by Rousseau.

Civic republicans see a moral purpose common to all citizens, not contractual relations among individuals, as the basis of society. Under the assumption that people do not necessarily know what is just and best for them, republicans are not only concerned with the question of what is just and good from each individual’s perspective, but are primarily interested in the question of how to move people to do the good defined pre-institutionally, i.e. is not based on consent but is rather accepted as given—“that is inherited” in Alisdair MacIntyre’s term—by the political community.

Convinced that the bounds of possibility in moral matters are broader than liberals imagined, Rousseau aimed at forging all members of society into a greater whole. This, he claimed, would reduce, not increase, interdependence among citizens, while making everybody dependent upon the collectivity itself. In order to reach that goal, people should give up all their resources in entering the social contract and be given new ones by the state. “Only then, when the voice of duty succeeds physical impulsion and right succeeds appetite, does man, who until then had looked only to himself, see himself forced to act on other principles, and to consult his reason before listening to his inclinations.”⁶²

For Rousseau, law is not a procedure for regulating social relations in a society based on conflicting individual interests. It is, rather, the supreme expression of the moral will of the community. Violating the general will, which expresses the true will of the transgressor himself as a citizen—whether he realizes it or not—means breaching a sacred trust, the solidarity on which the very existence of the community depends. Such a breach endangers the existence of the community and is therefore tantamount to treason.⁶³ Moreover, since freedom, for Rousseau, means living under the law one makes for oneself through one’s membership in a community and through participation in its general will, the criminal already rendered himself unfree in violating the law, since he has allowed his passions to overcome his real interests (that can be perceived by his reason). Reason would also bring him to the realization that the punishment imposed on him by the community is actually an expression of his own free will as a citizen and thus not a deprivation, but an affirmation of his freedom.⁶⁴

It is this bond between the individual – be he a convicted criminal or not – and the community that is corrupted by the introduction of mercenary relations into the criminal justice system. In *Spheres of Justice*, Walzer argues that this bond cannot be conceptualized

through the liberal idea of social contract, based as it is on the notion of the “unencumbered self.” In an obvious allusion to Rawls’s original position, he argues:

Even if they are committed to impartiality, the question most likely to arise in the minds of the members of a political community is not, What would rational individuals choose under universalizing conditions of such-and-such a sort? but rather, What would individuals like us choose, who are situated as we are, who share a culture and are determined to go on sharing it? And this is a question that is readily transformed into, What choices have we *already* made in the course of our common life? What understandings do we really share?⁶⁵

Historically, Walzer argues that an important part of this shared understanding is the idea that each sphere of social activity has its own distinct good, that these goods are not interchangeable, and that by its very nature the good associated with each social sphere determines what is the right distribution of it (hence “spheres of justice”).

Walzer’s “theory of goods” harks back to Karl Marx’s distinction between the *use value* of commodities, which is particular to each commodity and is therefore not interchangeable, and their *exchange value*, which is measured universally by units of labor time, and therefore is interchangeable. Walzer’s theory of goods has six points:

1. All goods are social goods.
2. Human beings draw their identities from the ways in which they relate to goods (as producers, consumers, owners, and so on).
3. There is no single set of “primary goods” (as Rawls avers). Each type of good is, or should be, autonomous of the others.
4. Different social goods possess distributive criteria and arrangements that are intrinsic to them (a particular manifestation of the priority of good over right).
5. The social meanings we attach to goods are historical.
6. Every set of goods constitutes a separate distributive sphere.⁶⁶

For civic republicans, the intrusion of a good that belongs to one social sphere into another constitutes corruption. Liberals would partially agree with that position – they also see corruption in the intrusion of certain kinds of monetary relations into politics or the judicial process as well as in the intrusion of politics into the market (hence their principled opposition to state ownership of economic enterprises, and so on). Liberals, however, have always considered exchange value as the primary good, the good into which all other goods are ultimately reducible. In the words of Thomas Hobbes, “The *value* or WORTH of a man is, as of all other things, his price, that is to say, so much as would be given for the use of his power; and therefore is not absolute, but a thing dependent on the need and judgment of another.”⁶⁷ Later on, liberals added certain individual rights to their definition of primary goods, but the contradiction between exchange value and individual rights makes it difficult for them, as we have argued, to take a principled stand against the intrusion of monetary relations into many social spheres.

Walzer rejects the idea of a primary good, and for him, as for civic republicans more generally, each social good should stay within the confines of its own social sphere. The social good specific to the political sphere is not, as in the liberal view, protection of individual rights that are antecedent to it, but rather citizenship – membership in a solidary community based on a commonality of moral purpose which is prior to any notion of individual rights. This social good determines its own system of distribution – based on desert (or civic virtue) – and this cannot be exchanged for the good of the market, money: “Private trading is ruled out

by virtue of what politics, or democratic politics, is – that is, by virtue of what we did when we constituted the political community and what we still think about what we did.”⁶⁸ This is so because “[t]he market doesn’t recognize desert,” the nature of which stands in tension with the idea of supply and demand.⁶⁹ By the same token, the main legitimating principle of market relations is *free* exchange, in the negative sense of freedom, while political relations, on the civic republican view, are legitimated by a positive notion of freedom, as the capacity to contribute to the promotion of the overriding moral purpose of the community.

Criminal punishment, and above all incarceration (as well as capital punishment, where this institution still exists), is based on coercion. On the civic republican view, this coercion is legitimated by social solidarity, which the offender violated. The good of social solidarity determines its own mode of distribution, from bestowing high rewards to those who possess great civic virtue to dispensing severe punishment to those whose actions undermine the community. The principle of free market exchange is totally foreign to this sphere of social activity, and introducing it would corrupt both spheres: the intrusion of private interest would corrupt the political sphere, where the criminal justice system belongs, while the intrusion of coercion would corrupt market relations, which are legitimately based only on free exchange. (The “clients” of private incarceration are not free to choose their jailers, and so on.)

When placed in a private, for-profit prison, prisoners no longer live under the law they made for themselves, but become subjects to the will of an alien power. In Walzer’s words,

The critical exposure is to profit-taking at the prisoners’ expense, and given the conditions under which they live, they are bound to suspect that they are regularly used and exploited. For aren’t the purposes of their private jailers different from the purposes of the courts that sent them to jail? All the internal rules and regulations of their imprisonment, the system of discipline and reward, the hundreds of small decisions that shape their daily lives, are open now to a single unanswerable question: Is this punishment or economic calculation, the law or the market?⁷⁰

When they lose their autonomy in this way, convicts lose their capacity as moral agents, so that rehabilitation and re-entry into the normal life of the community become impossible. Thus, on the civic republican conception, the corrupt practice of private incarceration is both illegitimate by its very nature and counter-productive in terms of the real interests of the community.

IV. Human Rights Division v. Minister of Finance

To recapitulate, President Beinisch’s opinion dismisses the non-delegation argument as unnecessary for deciding the case because she deems the violation of the prisoners’ rights to freedom and to human dignity attendant upon their very placement in a private prison sufficient for finding Amendment 28 to the Prison Ordinance unconstitutional.⁷¹ And since such violation of the prisoners’ rights was established independently of whether their treatment was likely to be better or worse in a private prison than in a public one, the issues of oversight, accountability, and so on were also found irrelevant to the case. Liberal critics have found her decision incoherent and argued that a persuasive case against the constitutionality of the amendment had to be based either on the non-delegation doctrine or on the claim that the inmates’ rights were more likely to be violated in a private than in a public institution, or on both.⁷²

In this section of the paper, we argue that the president’s decision was correct but that she could have made a more persuasive case for it had she relied explicitly on republican rather

than liberal reasoning. To make this argument, we wish to distinguish between not-for-profit and for-profit private prisons and claim that from a civic-republican perspective, placing prisoners in the former type of institution violates their right to freedom, while placing them in the latter kind violates their right to dignity as well. (Beinisch did not make this distinction because the issue of private not-for-profit prisons was not before the Court.)

As is well known, the civic republican tradition understands freedom as living under laws that one has made for oneself as a member of the political community. Being unfree, says Philip Pettit,

does not consist in being restrained; on the contrary, the restraint of a fair system of law – a non-arbitrary regime – does not make you unfree. Being unfree consists rather in being subject to arbitrary sway: being subject to the potentially capricious will or rather potentially idiosyncratic judgment of another.⁷³

Walzer, while maintaining the distinction between for-profit and not-for-profit private prisons, actually provides an argument why any kind of private coercive authority is harmful to freedom:

The policeman's uniform symbolizes his representative character. When he puts on his uniform, he strips himself bare, so to speak, of his private opinions and motivations. . . . When the police behave in this way, impersonally enforcing the *general will*, their coercive powers are justified. They may annoy us or frustrate us and even, sometimes, frighten us, but they don't oppress us.⁷⁴

This representative quality, which enables coercion to be non-oppressive because it stems rightfully from the law that the prisoner has made for himself as a citizen, is lost when the police officer or prison guard is employed by a private corporation on contract to the state, whether or not that corporation seeks to profit from that contract. The very fact that the prisoner is made dependent on a private will that mediates between him and the law makes the prisoner unfree because a free person is a person who is not subordinated to an alien private will. Regulation, oversight, accountability, and so on can mitigate the manifestations of this problem, but they cannot affect its essence.

In the brief he submitted to the HCJ, Walzer limited his argument to the question of freedom, but Beinisch, echoing Walzer's argument, went on to argue that incarceration in a private for-profit prison constituted a violation of the prisoners' right to human dignity as well:

There is . . . an inherent and natural concern that imprisoning inmates in a privately managed prison that is run with a private economic purpose *de facto* turns the prisoners into a means whereby the corporation that manages and operates the prison makes a financial profit. . . the very existence of a prison that operates on a profit-making basis reflects a lack of respect for the status of the inmates as human beings, and this violation of the human dignity of the inmates does not depend on the extent of the violation of human rights that actually occurs behind the prison walls.⁷⁵

Beinisch also emphasized that the violation of the prisoners' right to human dignity in a private prison did not depend on the inmates' subjective feelings. In a plainly non-liberal fashion (that raised the ire of some of her liberal critics),⁷⁶ Beinisch implied that it did not matter whether the prisoners agreed, or even preferred, to be incarcerated in a private prison; the violation of their human dignity was inherent in the very institution of a private for-profit

prison, because they rendered prisoners into a means for someone else's financial gain. According to Beinisch (alluding, perhaps, to Rawls' theory of justification), this was also the common understanding of the notions of freedom and human dignity in Israeli society.⁷⁷ Reformulated in liberal terms, Beinisch's argument was that the rights to freedom and to human dignity necessarily implied the right to be incarcerated only by public power and that such right therefore could not be given up.

Conclusion

Almost two hundred years ago, Alexis de Tocqueville and Gustave de Beaumont wrote that "[w]hile society in the United States gives the example of the most extended liberty, the prisons of the same country offer the spectacle of the most complete despotism."⁷⁸ Until the 1920s, it was common for public prisons in the US to contract prisoners out as workers to the private sector. This practice ended due to the pressure from labor unions, which saw this form of slave labor as a threat to their members' jobs.⁷⁹ The last three decades have seen a change in the opposite direction – against the welfare state and the social costs that are needed, *inter alia*, to sustain a sense of common citizenship in prisoners and their guards. In this paper we have suggested that it is not by mere coincidence that the liberal conceptions of liberty, freedom, and autonomy have led the US in this direction, while in Israel, where the republican conception of citizenship still maintains a hold in the political and legal culture, private incarceration has been declared unconstitutional.⁸⁰

President Beinisch relied on Hobbes, Locke, and the liberal conception of the social contract in order to argue that the state itself must perform law enforcement functions. As we saw, these authors could provide only a weak foundation for this argument, and her reliance on them led her to a correct decision that lacked persuasive power. Theoretically, Beinisch could have presented a clear and explicit non-delegation argument based on the importance of public institutions, particularly in the area of law enforcement, for social solidarity, and on the inherently corrupting influence of private interests when they encroach on the public sphere. Such an argument, however, might have led to the conclusion that public institutions are crucial for citizenship and that, therefore, much of the privatization that has taken place in Israel over the last three decades has been destructive of social solidarity. This would have been a conclusion that few people would have liked to hear, even in semi-republican Israel.

NOTES

This paper originated in a seminar on law and the free market conducted by Prof. (now District Judge) Ofer Grosskopf at the Buchman Faculty of Law, Tel Aviv University. We would like to thank Judge Grosskopf and the members of the seminar for their thoughtful and inspiring comments and suggestions. Earlier versions of the paper were presented at the conference on "Private Power and Human Rights" held at the Academic Center of Law and Business in Ramat Gan, Israel and at the conference on "Nationalism and Human Rights: Law and Politics in the Middle East and Europe" held at Tel Aviv University, both in December of 2009.

1. *Human Rights Division v Ministry of Finance*, H CJ 2605/05, para 19. Two other justices, Procaccia and Naor, based their concurring opinions on the greater potential for abuse inherent in private incarceration.

2. Barak Medina, "Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization", SSRN, accessed August 30, 2010, <http://ssrn.com/abstract=1700190>. Daphne Barak-Erez has offered a slightly different critique. While supporting the Court's decision, she argued, correctly in our view, that "although the justices refrained from directly deciding the question of 'core' executive functions, their view that the very idea of operating imprisonment functions by private actors infringes rights implied they considered these functions to be part of this core." In addition, she argued that the Court's analysis of private imprisonment should have distinguished between three distinct spheres of discussion: the

boundaries of privatization, the privatization process, and the regulation of privatized actions. See Daphne Barak-Erez, "The Private Prison Controversy and the Privatization Continuum," *Law and Ethics of Human Rights* 5 no. 1 (2011): 138, 150.

3. Michal Tamir and Assaf Harel, "On Human Dignity and Privatization," unpublished manuscript (on file with the authors).

4. Alan Patten, "The Republican Critique of Liberalism," *British Journal of Political Science* 26 no. 1 (1996): 25; Melvin Rogers, "Republican Confusion and Liberal Clarification," *Philosophy and Social Criticism* 34 no. 7 (2008): 799; Eric Ghosh, "From Republican to Liberal Liberty," *History of Political Thought* 29 no. 1 (2008): 132; J. Kimpell, "Neo-Republicanism: Machiavelli's Solutions for Tocqueville's Republic," *European Political Science Review* 1 no. 3 (2009): 375.

5. Cass Sunstein emphasizes that the US Constitution grants legislative power to Congress, but that it does not do so in terms that forbid delegation of that power. According to him, there is no evidence that such delegations were originally thought to be out of bounds. See Cass Sunstein, "Nondelegation Canons," *The University of Chicago Law Review* 67 (2000): 315, 322.

6. Ronald Krotoszynski, Jr., "Reconsidering the Non-Delegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine," *Indiana Law Journal* 80 no. 2 (2005): 260; Victor Flatt, "The 'Benefits' of Non-Delegation Doctrine," *William and Mary Bill of Rights Journal* 15 no. 4 (2007): 1092; Joseph E. Field, "Making Prisons Private: an Improper Delegation of a Government Power," *Hofstra Law Review* 15 (1987): 656; Sunstein, "Nondelegation Canons," 318.

7. Ira P. Robbins, "The Impact of the Delegation Doctrine on Prison Privatization," *UCLA Law Review* 35 (1988): 915; Sunstein, "Nondelegation Canons," 318; George I. Lovell, "That Sick Chicken Won't Hunt: The Limits of a Judicially Enforced Non-Delegation Doctrine," *Constitutional Commentary* 17 no. 1 (2000): 79. (Sunstein and Lovell criticize what they consider to be the common interpretation of the non-delegation doctrine.)

8. Krotoszynski, Jr., "Reconsidering the Non-Delegation Doctrine," 262, 267.

9. See for example: Joseph E. Field, "Making Prisons Private," 649; Robbins, "The Impact of the Delegation Doctrine on Prison Privatization," 925; Paul Verkuil, "Public Law Limitations of Privatization of Public Functions," *North Carolina Law Review* 84 (2006): 397.

10. Sunstein, "Nondelegation Canons," 318; See also, Flatt, "The 'Benefits' of Non-Delegation Doctrine," 1094. (Flatt is an advocate of the non-delegation doctrine but thinks that the reason for the limited use of the doctrine is related to governmental reality. He does not consider the normative assumptions of the discourse); Krotoszynski, Jr., "Reconsidering the Non-Delegation Doctrine," 267. For the most recent statement of this position see: Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, 2011).

11. Paul Verkuil, "Outsourcing and the Duty to Govern" in *Government by Contract*, ed. Jody Freeman and Martha Minow (Cambridge and London: Harvard University Press, 2009), 317. For a critique, see Sunstein, "Nondelegation Canons," 318 (Sunstein argues that the doctrine is alive and well).

12. *Pischke v. Litscher* [7th Cir. 1999] 178, F. 3D 497, 500, cited in James Blumstein, "A Commentary from an America Constitutional Perspective on HCl 2605/05 *Human Rights Division v Minister of Finance*," unpublished manuscript (on file with the authors), 19.

13. Until the publication of Rawls' *Theory of Justice* (TJ), utilitarianism had been the dominant liberal moral philosophy. Its prominence declined with the publication of TJ, but the rise of neo-liberalism has restored it to a position of honor. According to the *Stanford Encyclopedia of Philosophy*, "the influence of the Classical Utilitarians has been profound — not only within moral philosophy, but within political philosophy and social policy", accessed March 14, 2011, <http://plato.stanford.edu/entries/utilitarianism-history>.

14. James T. Gentry, "The Panopticon Revisited: the Problem of Monitoring Private Prisons," *The Yale Law Journal* 96 (1986): 353; Janet Semple, *Bentham's Prison* (Oxford: Clarendon Press, 1993), 134. For details of the Panopticon, see Semple, *ibid.*, 134. For a shorter description and much more critical evaluation of the Panopticon scheme, see Gertrude Himmelfarb, "The Haunted House of Jeremy Bentham," in *Minds* (New York, Evanston, and London: Harper Torchbooks, 1952), 32.

15. "I would do the whole by contract. I would farm out the profits, the non-profits, or if you please the losses, to him who, being in other respects unexceptionable, offered the best term," wrote Bentham. Himmelfarb, "The Haunted House," 42. See also Semple, *Bentham's Prison*, 134.

16. Gertrude Himmelfarb, "The Haunted House of Jeremy Bentham," 58; L. J. Hume, *Bentham and Bureaucracy* (Cambridge: Cambridge University Press, 1981), 111; Semple, *Bentham's Prison*, 136–137.

17. On the connection between the failure to promote the Panopticon and the development of the concept of sinister interests, see Phillip Schofield, *Utility and Democracy* (Oxford: Oxford University Press, 2006), 111.

18. *Ibid.*, 137–170, 344–346.

19. See for example, James E. Blumstein et al., “Do Government Agencies Respond to Market Pressures? Evidence from Private Prisons,” *Virginia Journal of Social Policy and the Law* 15 (2008): 446.

20. John DiIulio, “The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails,” in *Private Prisons and the Public Interest*, ed. Douglas McDonald, (New Brunswick: Rutgers University Press, 1990), 155, 156. Even Charles Logan, a prominent libertarian advocate of private incarceration, concedes that “a fundamental insight in regard to state capacity and privatization is that it is wrong for the state to divest itself of powers if this action would later prevent the state from playing its role, be it the protection of rights, the advancement of equitable distributions, or the enforcement of democratic accountability,” Charles Logan, *Private Prisons: Pros and Cons* (Oxford: Oxford University Press, 1990), 60.

21. See, for example, Sharon Dolovich, “State Punishment and Private Prisons,” *Duke Law Journal* 55 (2005): 523; Ahmed A. White, “Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective,” *American Criminal Law Review* 38 (2001): 111, 135.

22. Gentry, “The Panopticon Revisited,” 353–355, 356.

23. *Ibid.*, 359–360.

24. For the importance of the concept of accountability in utilitarianism, see David Held, *Models of Democracy*, 3rd ed. (Cambridge: Polity Press, 2006), 75. To illustrate, there are 194 instances of the word “accountability” in 137 pages of Gilian E. Metzger, “Privatization as Delegation,” *Columbia Law Review* 103 (2003) and 63 times in 41 pages of Martha Minow, “Public and Private Partnership: Accounting for the New Religion,” *Harvard Law Review* 116 (2003). For the sake of comparison, in Sharon Dolovich’s article, “How Privatization Thinks,” which we classified as belonging to the Rawlsian perspective, there is only one instance of the word “accountability” (in 24 pages). See in Jody Freeman and Martha Minow, ed., *Government by Contract* (Cambridge and London: Harvard University Press, 2009).

25. Minow, “Public and Private Partnership,” 1237.

26. *Ibid.*, 1259.

27. *Ibid.*, 1242–1246.

28. These dangers are grouped by Minow under three heading: dilution of public values; potential mismatch between competition and social provision; and divisiveness and loss of common institutions (*Ibid.*, 1246–1255).

29. Metzger, “Privatization as Delegation,” 1394, 1410, 1502.

30. Robert Nozick, *Anarchy, State and Utopia* (Oxford: Oxford University Press, 1974).

31. Medina, “Constitutional Limits to Privatization,” 28.

32. Logan, *Private Prisons*, 236–259.

33. According to the Justice Policy Institute, “between 1980 and 2006, the number of people incarcerated for drug offenses in state and federal prisons [in the US] increased 1,412 percent from 23,900 to 361,276. In 2006, 24 percent of the people in state and federal prisons were there because their most serious offense was a drug offense,” accessed April 24, 2011, http://www.justicepolicy.org/uploads/justicepolicy/documents/punitive_response_to_drug_use.pdf.

34. Bruce L. Benson, “Do We Want the Production of Prisons Services to Be More ‘Efficient’?” in *Changing the Guard: Private Prisons and The Control of Crime*, ed. Alexander Tabarrok (Oakland: The Independent Institute, 2003), 163. This volume was published by the libertarian Independent Institute and its general tenor is very favorable towards prison privatization.

35. Dolovich, “State Punishment and Private Prisons,” 441, 463.

36. *Ibid.*, 470–471.

37. *Ibid.*, 475–480; Cf. Avio, “when some outputs are unobservable and contracts are thus necessarily incomplete, the profit motive can have negative implications.” Kenneth L. Avio, “The Economics of Prisons” in *Changing the Guard*.

38. In the US, accreditation is by the American Correctional Association, an independent “organization of correctional professionals dating to 1870.” Dolovich, “State Punishment and Private Prisons,” 488–489.

39. *Ibid.*, 502.

40. *Ibid.*, 505 (emphasis added). Dolovich believes, however, that it is well-nigh impossible that private prisons will ever stand up to the principle of humanity. See *ibid.*, 505–506.

41. *Ibid.* We have summarized Dolovich’s argument regarding the humanity principle only. She offers a similar analysis with regard to her other principle, the parsimony principle, and reaches the same conclusions: the profit interests of private prison contractors lead them to lobby (effectively) for harsher sentencing policies in order to avail themselves of a larger pool of “clients” for longer periods of time. However, she points to similar practices by interests connected to the public prison system as well, such

as prison guards' unions. For our purposes in this paper, there is no need to analyze in detail both parts of Dolovich's argument.

42. *Ibid.*, 507.

43. Sharon Dolovich, "How Privatization Thinks," in *Government by Contract*, ed. Jody Freeman and Martha Minow (Cambridge: Harvard University Press, 2009), 129.

44. Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets (The Tanner Lectures on Human Values)* (Oxford: Oxford University Press, 1998), 94.

45. Joshua Cohen, "Taking People as They Are?" *Philosophy and Public Affairs* 30 no. 4 (2001): 366. For another criticism of the difference principle, see G.A. Cohen, *Rescuing Justice & Equality* (Cambridge: Harvard University Press, 2008), 315.

46. John Rawls, *Lectures on the History of Political Philosophy* (Cambridge and London: The Belknap Press of Harvard University Press, 2007), 207, 214; John Rawls, *The Law of Peoples* (Cambridge and London: Harvard University Press, 1999), 7.

47. John Rawls, *Political Liberalism: Expanded Edition* (New York: Columbia University Press, 2005), 269, cited in Joshua Cohen, "Taking People as They Are?" 381. See also Cohen, *Rescuing Justice & Equality*, 376.

48. "No doubt even the concepts that we use to describe our plans and situation, and even to give voice to our personal wants and purposes, often presuppose a social setting as well as a system of belief and thought that are the outcome of the collective efforts of a long tradition. . . human beings have in fact shared final ends and they value their common institutions and activities as good in themselves." John Rawls, *A Theory of Justice: Revised Edition* (Cambridge and London: The Belknap Press of Harvard University Press, 1999), 458.

49. Michael Titelbaum, "What Would a Rawlsian Ethos of Justice Look Like?" *Philosophy and Public Affairs* 36 no. 3 (2008): 289, 310. (Respect for religious belief forbids public policy and institutions that seriously curtail individuals' abilities to form, revise, and pursue it.) See also: Stephen Mulhall and Adam Swift, "Rawls and Communitarianism" in *Rawls*, ed. Samuel Freeman (Cambridge and London: Cambridge University Press, 2007), 476.

50. For self-transformation and liberal theory, see Mark Warren, "Democratic Theory and Self-Transformation," *American Political Science Review* 86 no. 1 (1992): 8.

51. John Rawls, "Outline of a Decision Procedure for Ethics" in *John Rawls' Collected Papers*, ed. Samuel Freeman (Cambridge and London: Harvard University Press, 1991), 1, 6.

52. Rawls, *A Theory of Justice*, 224–225. For the suggestion that the requirement of justification by appeal to political values applies only to questions regarding constitutional essentials and matters of basic justice, see T. M. Scanlon, "Rawls on Justification" in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003), 162–163. (We should emphasize that Scanlon did not refer to the privatization of prisons in this essay.) We agree with Freeman's explanation that "[I]t is because of the failure of the argument for stability of a well-ordered society as defined in *A Theory of Justice*, and within Kantian constructivism that Rawls is driven to make the revisions in the justification of justice as fairness that result in *Political Liberalism*." Samuel Freeman, *Justice and the Social Contract* (Oxford: Oxford University Press, 2007), 6.

53. Rawls, *A Theory of Justice*, 217–218.

54. *Ibid.*, 218. See also, A. John Simmons, "Ideal and Non Ideal Theory," *Philosophy and Public Affairs* 38 no. 1 (2010): 23.

55. David Miller, *introduction to Thinking Politically* by Michael Walzer (New Haven and London: Yale University Press, 2007) xi; cf. Seyla Benhabib, "Walzer . . . represents the civic-republican voice in debates around citizenship and immigration," *Transformations of Citizenship: Dilemmas of the Nation State in the Era of Globalization* (Van Gorcum, 2001), 56.

56. Michael Walzer, "Hold the Justice," *New Republic*, April 1985, 12.

57. A copy of the brief Walzer submitted in support of the plaintiffs in the Israeli prison privatization case (HCJ 2605/05) is on file with the authors.

58. Walzer, "Hold the Justice," 12.

59. Walzer, "HCJ 2605/05 Brief," 3.

60. Walzer, "Hold the Justice," 11.

61. Walzer, "HCJ 2605/05 Brief," 4.

62. Jean Jacques Rousseau, "The Social Contract" in *The Social Contract and Other Later Political Writings*, ed. Victor Gourevitch (Cambridge, Cambridge University Press, 1997), 52.

63. *Ibid.*, 64–65.

64. *Ibid.*, 122–126.

65. Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983) 5 (emphasis added).

66. *Ibid.*, 6–10, 18–19; Cf. Sandel, *What Money Can't Buy*, 101.
 67. Thomas Hobbes, *Leviathan* (Indianapolis: Hackett, 1994), 51 (emphasis in the original).
 68. Walzer, *Spheres of Justice*, 22.
 69. *Ibid.*, 108–109.
 70. Walzer, "HCJ 2605/05 Brief," 11.
 71. HCJ 2605/05, Beinisch Opinion, para 10, 18, 19, 63.

72. Alon Harel has criticized Beinisch's arguments, although not her decision, based on an interesting liberal variation of the non-delegation doctrine. He argued that (1) as autonomous human beings, the employees of a private corrections company must exercise their own moral judgment before they can carry out the sentence determined by the state; (2) public servants are forbidden to make such independent judgments and are bound by the moral considerations of the state; (3) therefore only public servants should be entrusted with carrying out judicial decisions. Alon Harel, "On the Limitations of Privatization," *Mishpatim al Atar 2* (2010): 12–13. See also his "Why Only the State May Inflict Criminal Sanctions: The Vices of Privately-Inflicted Criminal Sanctions," *Legal Theory 14* (2008): 113

73. Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997), 5.

74. Walzer, "Hold the Justice," 11 (emphasis added); cf. HCJ 2605/05, Beinisch Opinion, para 26, citing DiIulio: "The badge of the arresting police officer, the robes of the judge, and the state patch of the corrections officer are symbols of the inherently public nature of crime and punishment."

75. HCJ 2605/05, Beinisch Opinion, para 36.

76. See, for example, Tamir and Harel, "On Human Dignity and Privatization".

77. HCJ 2605/05, Beinisch Opinion, para 24–27, 37, 39.

78. Cited by Marie Gottschalk, "Hiding in Plain Sight: American Politics and the Carceral State," *Annual Review of Political Science* 11 no. 1 (2008): 236.

79. Field, "Making Prisons Private," 652.

80. Ethno-republicanism had been the dominant element within Israeli political culture for many years, but its power has seriously eroded since the 1980s. The Supreme Court, on the other hand, has always been a bastion of liberal thinking; Gershon Shafir and Yoav Peled, *Being Israeli* (Cambridge: Cambridge University Press, 2002).

Yoav Peled is Professor of Political Science at Tel Aviv University. His most recent book, co-authored with Gershon Shafir, is *Being Israeli: The Dynamics of Multiple Citizenship* (Cambridge: Cambridge University Press, 2002), which won the 2002 Albert Hourani Award of the Middle East Studies Association of North America.

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