

This article raises a principled objection to the privatization of certain core police services. Whereas most of the literature critical of privatizing security services has focused on the negative consequences of doing so (corruption, waste, etc.), the argument here focuses squarely on the standing of private parties to perform police services. According to an important strain of liberal political theory, certain tasks are assigned to the state not because it is deemed to be more efficient at delivering those services but simply because such services must be rendered by a party that acts in the name of the polity as a whole and not in the name of some narrower private interest. The author argues that all those policing functions – such as arrest, search, and detention – that require criminal law justification (because they involve conduct on the part of officers that is generally criminally prohibited) are of this nature. The article also summarizes the different dimensions of the larger privatization debate and traces the development of the debate about legitimate policing in the nineteenth and twentieth centuries.

Keywords: policing/privatization/criminal law/justification/reinventing government/reinventing government

1 Introduction

For more than thirty years, the privatization of government services has been at the top of the political agenda throughout the English-speaking world. More recently, it has taken centre stage in much of the rest of the world, and it remains one of the most politically charged topics almost everywhere.¹ But many of the debates over privatization have been deaf to the complexity, the diversity, and the subtlety of the issues the topic raises. Debates over privatization have often been treated as monolithic, driven largely by ideology: either one is a believer in individual freedom, market efficiency, and privatization in all areas, or one is a

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1 One interesting recent example is the way in which privatization has become one of the core political divides in Israeli politics, arguably supplanting even such questions as the Palestinian peace process and the role of the Jewish religion in the state. See Alon Harel, 'Outsourcing Violence' (23 April 2009) [unpublished, on file with author].

believer in equality, the welfare state, and the evils of all forms of privatization.² But, as Michael Trebilcock has never tired of pointing out,³ the realities of privatization are a good deal more complex.

In order to avoid over-simplification, I do not attempt in this essay to address the merits of privatization *tout court*. Instead, I consider only one set of problems raised by the privatization of one kind of government service by one particular means. My concern here is to put forward one sort of objection to the sort of privatization of policing services that has taken place in much of the English-speaking world over the past thirty years. In putting forward this objection, I distinguish between those policing services that involve conduct that is generally permissible (such as data collection or surveillance) and those that involve conduct that requires special justification (such as the use of force in preventing the commission of an offence or in making an arrest, or the invasion of privacy when performing a search and seizure). The privatization of policing services of the first sort, I argue, does not usually raise the concerns I discuss here. But police services of the second sort may not be privatized without undermining some of the most basic assumptions of the modern liberal political order. This is because the special justification that such conduct requires depends crucially on the standing of the actor who claims the justification: such conduct is legitimate only insofar as it is performed by someone who can plausibly be said to be acting in the name of the polity as a whole, and not in some narrower private interest.⁴ And private police providers, even if they *in fact* promote the interests of the polity as a whole, do not have the standing to act in its name. Their conduct is, in this sense, akin to that of a

2 One notable example is the debate over privatization that took place in the Israeli newspaper *Ha'aretz* in 2009: see, e.g., Ari Shavit, 'Wealth, government and sanity' *Ha'aretz* (8 August 2009), online: *Ha'aretz* <<http://www.haaretz.com/hasen/spages/1105662.html>> Nehemia Shtrasler, 'Privatization is good' *Ha'aretz* (11 August 2009), online: *Ha'aretz* <<http://www.haaretz.com/hasen/spages/1106714.html>>.

3 Although he is perhaps most stridently supportive of privatization in one recent article (Michael Trebilcock & Edward Iacobucci, 'Privatization and Accountability' (2003) 116 *Harv.L.Rev.* 1422 at 1433 [Trebilcock & Iacobucci, 'Privatization']), Trebilcock concludes his major monograph on the subject by insisting that a key concern is 'avoiding the temptation of easy sloganeering and paying close attention to detailed design issues'; but he argues that 'voucher systems have the potential to revolutionize – generally for the better – many aspects of the welfare state.' Ronald J. Daniels & Michael J. Trebilcock, *Rethinking the Welfare State: The Prospects for Government by Voucher* (New York: Routledge, 2005) at 232–3 [Daniels & Trebilcock, *Rethinking the Welfare State*].

4 Thus, as I have argued elsewhere, the use of force by private citizens (in citizen's arrest, self-defence, etc.) is a good deal more controversial than is sometimes recognized. See Malcolm Thorburn, 'Justifications, Powers and Authority' (2008) 117 *Yale L.J.* 1070 [Thorburn, 'Justifications'].

well-intentioned and public-spirited vigilante: no matter how pure their motives, and no matter how effective their results, they simply do not have the legal standing to undertake such activities.

The article proceeds in three stages. In Part II, I situate my concerns about policing in what I take to be the three dimensions of the larger privatization debate: (1) the nature of the goods and services being privatized; (2) the mode of privatization; and (3) the nature of the normative issues at work. I argue that it behoves us to pay careful attention to where different privatization arguments are situated in each of these three dimensions. I also point out that the object of my concern is different from Michael Trebilcock's in all three dimensions of the debate. In Part III, I undertake what criminologist David Garland calls 'a history of the present'⁵: I consider both the historical origins and the diverse contemporary manifestations of policing in the English-speaking world. Paying close attention to the historical progress of policing in the common law world makes my argument more difficult to make. This is because for much of early common law history, policing was almost entirely provided by ordinary (private) citizens, forming part of what historian Michael Braddick calls the early modern strategy of 'government by license.'⁶ Over the past 200 years, however, policing of the sort that interests me here has largely been the preserve of the state; significant moves toward privatization have been relatively recent and often quite controversial. In Part IV, I set out in detail my objection to the privatization of policing – what I call the 'standing' objection. Policing is something that by its very nature must be provided by the state and not by a private agency; to argue otherwise would require us to abandon one of the most basic assumptions upon which much of our liberal legal order is based. In Part V, I conclude with some thoughts on the application of these general principles to the privatization of specific police services today.

II *Preliminaries: The three dimensions of privatization*

The debate over the privatization of government services involves a complex set of issues that extend in at least three different dimensions. In order to illustrate the significance of each dimension, I shall

5 This is the title of the first chapter of his important monograph on modern strategies of crime control: David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001) [Garland, *Culture of Control*]. By 'a history of the present,' he means an uncovering of just how controversial and historically contingent are many features of daily life that we now take for granted.

6 Michael J. Braddick, *State Formation in Early Modern England, c. 1550–1700* (Cambridge: Cambridge University Press, 2000) [Braddick, *State Formation*].

distinguish the ways in which the present enterprise differs from Ron Daniels and Michael Trebilcock's treatment of privatization in their influential 2005 monograph, *Rethinking the Welfare State*. Along the first dimension, we find a variety of different ways in which governments may privatize the provision of goods and services. First, they may 'outsource' the provision of those goods and services by putting them out for public tender; second, they may retreat from the business altogether and leave individuals to buy what they need with their own resources; or, third, they may create a 'voucher' system through which they transfer resources to individuals, who may then use those resources to buy the goods and services on the open market. Daniels and Trebilcock leave aside any talk of 'contracting out' or of the state simply retreating from the field and leaving it up to individuals to buy those goods and services with their own resources. Instead, they focus squarely on one mode of privatization: the voucher. That said, Daniels and Trebilcock's idea of a voucher is very broad: effectively, it is any demand-side subsidy, whether this is an actual transfer to the consumer or simply a subsidy to suppliers that 'follows the consumer.'⁷ By contrast, my concern here is with the privatization of police services by government retreat. I focus on this mode of privatization for the simple reason that this is how the privatization of police services has taken place in much of the common law world.

Along the second dimension, we find a variety of different policy areas in which privatization may take place. In the 1990s, it was most common to see privatization efforts in the area of 'welfare state' services such as education, food stamps, public housing, medicare, and legal aid. At the time, the Clinton administration in the United States – especially the vice president and privatization czar, Al Gore – was focused squarely on the privatization of these welfare-state services.⁸ Not surprisingly, given the time in which they were writing, Daniels and Trebilcock quite explicitly limit themselves in the title of the book to considering the privatization of the 'welfare state' and make their focus clear on the very first page:

This book is in part a thought experiment . . . *With the exception of a few areas like national defense or policing*, governments would discharge their responsibilities by creating, or at least supervising markets in which citizen beneficiaries would use publicly financed vouchers to determine their consumption of a range of different services by private actors.⁹

7 Daniels & Trebilcock, *Rethinking the Welfare State*, supra note 3 at 26–7.

8 *From Red Tape to Results: Creating a Government that Works Better and Costs Less, Report of the National Performance Review* (7 September 1993), online: University of North Texas CyberCemetery <<http://govinfo.library.unt.edu/npr/library/nprprt/annrpt/redtpe93/index.html>>.

9 Daniels & Trebilcock, *Rethinking the Welfare State*, supra note 3 at 1 [emphasis added].

But things changed with the election of George W. Bush as US president in 2000. Over the past eight years, the US government has expanded its privatization efforts from the welfare state to the provision of ‘core’ government functions such as national defence, prison management, and police services broadly understood¹⁰ – what some have called the ‘night-watchman state.’¹¹ It is this more radical move toward privatization that has attracted the most scholarly attention in recent years.¹² And it is the privatization of policing – a core function of the ‘night-watchman state’ – that is the focus of my concern here.

Finally, along a third dimension, there are a number of different ways in which we can analyse the merits and demerits of privatization. The focus of much law and economics scholarship in this area has been on comparative efficiency: whether goods and services can be provided more efficiently by the private sector than by the government.¹³ And these are primarily the questions that Daniels and Trebilcock set out to address. They examine the dynamics of possible markets for education (early childhood education, primary and secondary education, post-secondary education, and labour-market training) and the provision of basic goods (*e.g.*, housing and food) and basic services (*e.g.*, health care and legal aid)¹⁴ in order to determine whether it might be possible to create efficient markets for the provision of these goods and services to voucher-holding consumers. But there are other crucial questions to be

10 Paul Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It* (New York: Cambridge University Press, 2007) at 9 [Verkuil, *Outsourcing Sovereignty*]: ‘The administration of President Bush and Vice President Cheney has perfected the art of contracting-out key functions of government.’ Verkuil then goes on to suggest that the idea of privatizing the military was born under President Ronald Reagan in the 1980s.

11 Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) at 25ff.

12 See, *inter alia*, Verkuil, *Outsourcing Sovereignty*, supra note 10; Martha Minow, ‘Public and Private Partnerships: Accounting for the New Religion’ (2003) 116 Harv.L.Rev. 1129; Jody Freeman & Martha Minow, eds., *Government by Contract: Outsourcing and American Democracy* (Cambridge, MA: Harvard University Press, 2009) [Freeman & Minow, *Government by Contract*].

13 Sharon Dolovich cites ‘comparative efficiency’ as one of the central modes of thought in much of the privatization literature: Sharon Dolovich, ‘How Privatization Thinks: The Case of Prisons’ in Jody Freeman & Martha Minow, eds., *Government by Contract: Outsourcing and American Democracy* (Cambridge, MA: Harvard University Press, 2009) 128.

14 One area that they do not consider is political campaign contributions. Bruce Ackerman and Ian Ayres fill this lacuna with their fascinating book: Bruce Ackerman & Ian Ayres, *Voting with Dollars: A New Paradigm for Campaign Finance* (New Haven, CT: Yale University Press, 2004) (suggesting, in effect, that the benefits of private campaign finance can be combined with the benefits of equal access to political influence by means of a voucher system along the lines discussed by Daniels and Trebilcock).

asked. In this article, I do not deal with the efficiencies that might be gained by one or other modes of market design. Instead, I address the conceptually prior question of whether certain types of policing *by their very nature* require that only people who hold certain offices may carry them out. We might hire private contractors to do the things that police officers do, but we might find that those private contractors are simply not qualified, in virtue of their status as private actors, to provide those services. There are certain things that, if they are to be done legitimately, must be done in the name of all. And among them, I shall argue, are certain forms of policing.

With these preliminaries out of the way, let us turn now to the realities of private policing and the current debate about its legitimacy.

III *What is policing?*

In some cases, the privatization debate can proceed quickly to issues of institutional design and comparative efficiency, because the nature of the good or service is clear and unproblematic. But that is not the case with the privatization of policing. Over time and in different contexts, the term ‘policing’ has been used to refer to a variety of quite different phenomena. As a result, the debate over private police has sometimes taken on a rather surreal cast. For example, it is widely recognized that the ‘private police’ in the United States have grown exponentially in recent years, first overtaking and now vastly outnumbering the traditional police forces employed by cities, states, and the federal government.¹⁵ But at the same time, courts, legislatures, and legal scholars in that country seem to agree that private policing is fundamentally illegitimate. In the 1930s, the US Senate Sub-committee on Education and Labor held that ‘[t]he use of privately paid guards . . . [is] an anomaly in an orderly democratic society’ and that they ‘cannot be viewed as agencies of law and order.’¹⁶ More recently, in the 1990s, a New Jersey Superior Court judge held that ‘the traditional role of government . . . has always been to provide for the public safety, and that role simply cannot be delegated to a private agency.’¹⁷

15 David Sklansky, ‘The Private Police’ (1999) 46 U.C.L.A.L.Rev. 1165 at 1174.

16 U.S., Violations of Free Speech and Rights of Labor: Report of the Committee on Education and Labor pursuant to S. Res. 266 (74th Congress) a resolution to investigate violations of the right of free speech and assembly and interference with right of labor to organize and bargain collectively (S. Rep. No. 76-6) (Washington, DC: US GPO, 1939), Part 2 at 2, cited in Sklansky, ‘The Private Police,’ *supra* note 15 at 1219, n. 315.

17 Brian T. Murray, ‘Private Security Force in Sussex Ruled Illegal, “Dangerous” by Judge’ *Newark Star-Ledger* (31 July 1993) 1, cited in Elizabeth Joh, ‘Conceptualizing the Private Police’ [2005] Utah L.Rev. 573 at 614, n. 230 [Joh, ‘Conceptualizing’].

Although it is possible that a near-ubiquitous phenomenon in the United States is fundamentally illegitimate, it is a good deal more likely that there is an equivocation somewhere in the meaning of 'police.' In order to get a clearer sense of precisely what we are talking about when we talk about policing, I consider two aspects of the practice: first, the historical origins of policing in the common law tradition, particularly the important fact that until relatively recently, most such services were privately provided; and, second, the manner in which police services have become re-privatized in recent years and the kinds of policing services that are now commonly provided privately.

A THE HISTORICAL ORIGINS OF POLICING

The connection between the general welfare and policing goes back to the very beginnings of Western history. As Markus Dubber reminds us, the term 'police' has its roots in the ancient Greek word for the city (*polis*), and until quite recently it referred not only to the keeping of the peace and the apprehension of criminal suspects but to virtually all aspects of government concerned with the promotion of the general welfare (rather than with the protection of individual rights).¹⁸ Thus, for William Blackstone, the term 'public police' referred to

the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.¹⁹

This conception of 'police' as everything that is concerned with the general welfare has also deeply influenced the structure of American constitutional law. The 'police power,' Dubber points out, is the basis for much of the legislative power of the states in the United States.²⁰ Oliver Wendell Holmes gives some sense of the vast scope of the police power in his famous dissent in *Lochner v. New York*:

[S]tate constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of

18 See generally Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005) [Dubber, *The Police Power*].

19 William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1769) Bk. 4 at 162 [Blackstone, *Commentaries*]. See also, generally, Dubber, *The Police Power*, supra note 18 at c. 2 ('Blackstone's Police').

20 Dubber, *ibid.* at 190ff.

lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.²¹

It is in this sense of 'police' that many European states once proudly called themselves 'police states.'²²

Despite the clear connection between 'police' in the traditional sense and the public good, the connection between public power and 'police' in the modern sense (of 'law-enforcement agency') is somewhat murky in the common law world. This vagueness is due at least in part to the traditional common law distaste for a clear distinction between public and private.²³ It was not until the late eighteenth and early nineteenth centuries that the term 'police' became closely associated in the English-speaking world with the sorts of public institutions that we refer to as 'police departments.' For much of early modern English history, law enforcement was performed by ordinary people who were both unpaid and untrained. The task of patrolling the streets and preventing breaches of the peace fell to individuals who happened to occupy the role of constable.²⁴ Rather like jury duty today, this was a role that everyone, in principle, was supposed to fill at some point as a part of his civic duty. Its other resemblance to jury duty was that those with the means to do so tried to find ways out of performing their civic duties. Eventually, it could be said that constables were usually individuals who were paid to perform the role in the place of others who had something better to do. As a result, constables were generally viewed as incompetent, and often corrupt as well. Blackstone described the place of constables in eighteenth-century England as follows:

[T]hey are armed with very large powers, of arresting and imprisoning, of breaking open houses, and the like; of the extent of which power, considering what

21 *Lochner v. New York*, 198 U.S. 45 at 75 (1905) (Holmes J., dissenting).

22 Brian Chapman, *Police State* (London: Macmillan, 1971) at 20. Of course, at least since the rise of the 'police states' of Nazi Germany and Fascist Italy and Spain in the 1920s and 1930s, this term has been used almost exclusively as an expression of opprobrium.

23 John W.F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford: Oxford University Press, 1996) at 4: 'The alien origins of the English distinction between public and private law have not always been clearly recognized.'

24 The creation of the role of constable grew out of the even earlier system of Frankpledge, according to which groups of 100 men were responsible for keeping the peace and apprehending fleeing felons in their community. See William A. Morris, *The Medieval English Sheriff to 1300* (Manchester: Manchester University Press, 1927).

manner of men are for the most part put into these offices, it is perhaps very well that they are generally kept in ignorance.²⁵

When England was a largely agrarian society, this state of affairs was not seen as terribly problematic, but over the course of the eighteenth century, as London and other cities grew quickly and industrial expansion progressed, crime rates rose at a ferocious pace.²⁶ The initial response was simply to increase the penalties for various crimes, in the hope that this would deter crime. This policy led to the expansion of what was called the ‘bloody code’ – the criminal law in England that made an enormous number of offences (enormous not only by present-day standards but also by the standards of continental Europe at the time) punishable by death.²⁷ But this strategy was eventually recognized to be a colossal failure. Sir Archibald Macdonald, introducing a bill to create a public police force for metropolitan London in 1785, remarked that there was ‘a growing crop’ of criminals at work in London; even though ‘the gallows groaned,’ the system of the time was unable to control events.²⁸ Despite the failures of the ‘bloody code’ to contain the rising tide of criminality in England,²⁹ it was not until 1829 that Prime Minister William Pitt was able to pass a bill creating the Metropolitan London Police Force – the organization traditionally referred to as the first modern police force in the English-speaking world. This police force was initially charged only with patrolling the streets and keeping the

25 Blackstone, *Commentaries*, supra note 19, Bk. 1 at 344–5.

26 Thomas Critchley, *A History of Police in England and Wales, 900–1966* (London: Constable, 1967) at 18 [Critchley, *History of Police*]. See also Charles Reith, *The Police Idea: Its History and Evolution in England in the Eighteenth Century and After* (Oxford: Oxford University Press, 1938) at 141ff [Reith, *The Police Idea*].

27 In the 1760s, Blackstone wrote, ‘It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by Act of Parliament to be felonious without benefit of clergy; or, in other words, to be worthy of instant death.’ Blackstone, *Commentaries*, supra note 19, Bk. 4 at 18. In the ensuing century, the number of crimes punishable by death would increase to well over 200.

28 U.K., H.C., *Parliamentary History of England*, vol. 25, cols. 888–94 (23 June 1785), 910–13 (29 June 1785), cited in Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750* (London: Stevens & Sons, 1956) vol. 3 at 109, n. 7 [Radzinowicz, *History*].

29 The Gordon riots of 1780 – anti-Catholic riots in reaction to the passage of the *Papists Act 1778* (an act that removed some of the penalties associated with the practice of Roman Catholicism first set in place by the *Papery Act 1698*) – were perhaps only the most extreme example of the chaos in the streets of London at the time. Almost 300 people were killed, the homes of many prominent Catholics were attacked, and many of the major prisons of London – including Newgate and the Clink – were destroyed. For the effects of the Gordon riots on the movement toward public policing see Radzinowicz, *ibid.* at 89ff.

peace; it was not until 1842 that the London Police were also given the task of investigating crimes.³⁰

What is perhaps most remarkable about the creation of the London Metropolitan Police is not that it occurred, or that the force was so successful at reducing criminality in the streets of London,³¹ but that it took Parliament so long to relent and to create a public police force in England. This is especially striking in light of the clear success that many continental regimes had had with public police forces – experience that was well known in England at the time.³² Much of the aversion to public policing in the English-speaking world seems to have come from a common view that any expansion of state power necessarily limits individual liberty. It was this assumption that Robert Peel addressed in introducing the bill creating the London Metropolitan Police, as follows: ‘Liberty does not consist in having your house robbed by organized gangs of thieves, and in leaving the principal streets of London in the nightly possession of drunken women and vagabonds.’³³ The rest of the English-speaking world was just as reluctant to embrace public policing as England, and for largely the same reasons. As Lawrence Friedman points out, the colonial United States relied on the same medieval law-enforcement institutions as England – the constable, the night watch, and the hue and cry – institutions that ‘drew no clear lines between public and private.’³⁴ It was only in the mid- to late nineteenth century that the great cities of the United States established their own public police forces: Boston in 1836, Chicago in 1837, and New York in 1845.³⁵ Cities in Canada created their own police forces at around the same time – Toronto in 1829, Halifax in 1864, and Montreal in 1865.

30 Critchley, *History of Police*, supra note 26 at 160.

31 Reith, *The Police Idea*, supra note 26 at 252: ‘The menacing force of crime was at last placed under control, and ceased to be a national problem. Against the force of mob disorder the new police made equally steady and successful headway.’

32 The French public police dates back at least to the regulation of the ‘*cour des miracles*’ under Louis XIV: see generally Michel Auboin, Arnaud Teyssier, & Jean Tulard, *Histoire et dictionnaire de la police, du Moyen-âge à nos jours* (Paris: Éditions Robert Laffont, 2005). In the debates leading up the creation of the London Metropolitan Police, Lord Shelburne (later the Marquis of Lansdowne) praised the French system in at least some respects: Radzinowicz, *History*, supra note 28 at 91 (Lord Shelburne ‘took the surprising and unpopular line of praising the French police system and urging the adoption of a similar organization in England. The French police, he argued, was excellent and indeed “wise to the last degree” in its construction and only abominable in “its use and direction”’).

33 Cited in Critchley, *History of Police*, supra note 26 at 54.

34 Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993) at 29.

35 There is one important exception to this nineteenth-century trend: the oldest city police department in the United States, the Philadelphia Police Department, was founded almost a century earlier, in 1751.

B CONTEMPORARY MOVES TO RE-PRIVATIZE POLICE SERVICES

Throughout much of the nineteenth and twentieth centuries, there was a strong trend in the English-speaking world toward the monopolization of police services by the state. But in the 1970s, this trend started to reverse itself. As I mentioned in Part II above, there are at least three different ways in which the privatization of government services may occur: the government may contract out performance of the service, allocate vouchers to consumers to allow them to buy the service on the open market, or simply withdraw from the area and leave private citizens to their own devices. In the case of policing, the voucher option has not been seriously considered anywhere in North America. The other two privatization strategies, however, have both been considered in a number of different jurisdictions. Although outsourcing has become an increasingly popular strategy abroad and in response to catastrophes (*e.g.*, the US government has contracted out a good deal of security work in occupied Iraq, and in New Orleans in the aftermath of Hurricane Katrina³⁶), it has been relatively rare in the ordinary domestic context. Elizabeth Joh, in her study of private police, mentions six American municipalities that have attempted to outsource policing: Kalamazoo, Michigan; Sussex, New Jersey; Oro Valley, Arizona; Indian River, Florida; Reminderville, Ohio; and Buffalo Creek, West Virginia.³⁷ She points out, however, that several of these efforts have been successfully challenged in court, and the municipalities forced to end their outsourcing arrangement with the private provider.³⁸ A more common occurrence is the contracting out of specific policing tasks, such as the guarding of nuclear facilities³⁹ and courthouses.⁴⁰

By far the most common strategy for privatizing policing, however, is state withdrawal. Garland suggests that the state's retreat from the provision of policing services is no mere accident; it is part of a broader policing strategy that he calls 'responsibilization.' Garland writes,

The attempt to extend the reach of state agencies by linking them up with the practices of actors in the 'private sector' and 'the community' might be described as a *responsibilization strategy*. It involves a way of thinking and a variety of techniques designed to change the manner in which governments act upon

36 Verkuil, *Outsourcing Sovereignty*, supra note 10 at 26. See also Blackwater USA 'Blackwater Continues to Support Katrina Devastated Areas' (Press release, 13 September 2005), cited *ibid.* at 17.

37 Joh, 'Conceptualizing,' supra note 17 at 614.

38 *Ibid.* at 614, n. 230.

39 *Ibid.* at 614–5.

40 Philip E. Fixler & Robert W. Poole, 'Can Police Services Be Privatized?' in Gary Bowman *et al.*, eds., *Privatizing the United States Justice System* (Jefferson, NC: McFarland & Co., 1992) 27 at 32.

crime . . . The intended result is an enhanced network of more or less directed, more or less informal crime control, complementing and extending the formal controls of the criminal justice state . . . This is the essence of the new crime prevention approach that has been developed by governments of the USA and (especially) the UK over the past two decades.⁴¹

David Sklansky, in his recent comprehensive study of private policing, points out that government retreat from the provision of police services operates in several different ways. In addition to the obvious – simply failing to provide the police services they once did – the retreat of state police forces is also due in part to the growth of what criminologists Clifford Shearing and Philip Stenning call ‘mass private property’⁴²: places such as shopping malls, theme parks, and gated communities where spaces that one would normally expect to be public are in fact privately owned. The planning decisions that led to the creation of these forms of mass private property also led naturally to the massive expansion of private police. The streets of gated communities and theme parks and the ‘town squares’ located inside shopping malls are all private. As a result, we now congregate in places that have the surface feel of shared, public spaces but are in fact private property, subject to private control.

C THE PRIVATE POLICE TODAY

Three sorts of private police have moved in to take over where the state has retreated. The first sort is often referred to as ‘protective policing’: these are firms that promise to prevent the loss or destruction of property by monitoring customers and employees. These services mostly involve the use of security guards, but they can also involve security cameras, anti-theft tags on merchandise, and other monitoring devices. In addition, both commercial and residential neighbourhood associations are increasingly turning to private policing firms to perform neighbourhood watch duties. Their powers are usually similar to those of the owner of the property under protection: citizen’s arrest and very limited use of force to prevent theft and the destruction of property.

A second sort of private police has become much more common in recent years: what Shearing and Stenning call ‘corporate policing.’⁴³ Corporate policing is distinct from protective policing primarily in virtue of the breadth of its mandate. Whereas protective policing is concerned merely with preventing harm to, and the loss of, property,

41 Garland, *Culture of Control*, supra note 5 at 124.

42 Clifford Shearing & Philip Stenning, ‘Say “Cheese!”: The Disney Order That Is Not So Mickey Mouse’ in Clifford Shearing & Philip Stenning, eds., *Private Policing* (Newbury Park, CA: Sage, 1987) 317.

43 Ibid.

corporate policing is concerned with every aspect of the corporation's interests: protecting its commercial image, risk assessment, maintaining an attractive shopping environment, and so on. Shearing and Stenning's paradigm of corporate policing is the security department at Disney World. Here, the corporation plans out every aspect of one's time at the theme park: directing visitors where to park, how to board the monorail, how they may dress while in the park, where they ought to take photographs, and so forth.⁴⁴ In this respect, at least, corporate policing is most akin to public police. Both are charged with extremely broad mandates framed in terms of the general well-being either of a political community (in the case of public police) or of a corporation (in the case of corporate police).

Finally, a third sort of 'private police' is what Elizabeth Joh calls 'intelligence police.' These are the descendants of Philip Marlowe, Sherlock Holmes, and Hercule Poirot: individuals (or firms) who have no special police powers but who take it upon themselves to investigate criminal activity (as well as non-criminal activity that is of interest to the party that has engaged their services). Private investigation has grown into a big business in some parts of the world. In the United States, the Pinkerton agency became (in)famous in the nineteenth century for its investigative work. Pinkerton's not only foiled a plot to assassinate president-elect Abraham Lincoln but also infiltrated burgeoning union movements and eventually became embroiled in violent clashes with union organizers.⁴⁵ In more recent years, the firm of Kroll and Associates has taken on the para-governmental task of monitoring the internal operations of firms that have been found to be in violation of racketeering and criminal conspiracy laws.⁴⁶ The ruthlessness with which some private firms pursue their assigned task is nicely captured by the following dialogue from Sir Arthur Conan Doyle's final Sherlock Holmes novel, *The Valley of Fear*:

'There is a detective on our trail.'

'Why, man, you're crazy . . . Isn't this place full of police and detectives, and what harm do they ever do us?'

'No, no; it's no man of the district. As you say, we know them, and it is little that they can do. But you've heard of Pinkerton's?'

'I've read of some folk of that name.'

44 This phenomenon is described in greater detail in Shearing & Stenning, *ibid*.

45 Sklansky, 'The Private Police,' *supra* note 15 at 1213.

46 Joh, 'Conceptualizing,' *supra* note 17 at 612-3.

'Well, you can take it from me that you've got no show when they are on your trail. It's not a take-it-or-miss-it Government concern. It's a dead earnest business proposition that's out for results, and keeps out till, by hook or by crook, it gets them. If a Pinkerton man is deep in this business, we are all destroyed.'⁴⁷

D CONCLUSION

The nature of policing and its distinctly public role has never been entirely clear in the common law world. In early English history, this was largely attributable to common lawyers' disregard of the public/private distinction and to the (related) predominant governance strategy of the early modern period: what some historians have called 'government by license.'⁴⁸ Nevertheless, the notion that the police power is an essential part of the tools of government also has long roots, dating back at least to the eighteenth century. But we shall not come to the bottom of the argument against privatizing core police services through an investigation of common law legal history alone. In order to make clear precisely what is at stake in this debate, we must go further and explore the crucial role of the public-private distinction in the liberal tradition in political theory. It is to this discussion that I turn in Part IV.

IV *What is wrong with private policing?*

A 'PRACTICAL' PROBLEMS: CORRUPTION, ACCOUNTABILITY, AND INCOMPETENCE

In the introduction to a new collection on outsourcing in American government, Jody Freeman and Martha Minow point to five basic problems with privatization: fraud and waste; insufficient oversight; illegal and abusive conduct by private actors outside public sanction; undermining democratic norms of transparency, rationality, and accountability; and diminished government capacity.⁴⁹ All of these objections can be grouped together as 'practical' problems; that is, the major concern in each case is that private contractors will bring about outcomes that are less desirable from a public policy perspective than the outcomes brought about by government employees. Paul Verkuil, too, in his important new monograph on privatization, focuses on the ways in which the privatization of government functions leads to corruption, lack of transparency and accountability, and so on, and how these virtues may be brought into the privatized system through the introduction of new

47 Sir Arthur Conan Doyle, *The Valley of Fear* (1915; reprint, Oxford: Oxford University Press, 1993), cited in David Ricardo Williams, *Call in Pinkerton's: American Detectives at Work for Canada* (Toronto: Dundurn Press, 1998) at 6.

48 See, e.g., Braddick, *State Formation*, supra note 6 at 40.

49 Freeman & Minnow, *Government by Contract*, supra note 12 at 4-5.

oversight legislation, new accountability mechanisms, and the creation of public–private partnerships rather than wholesale outsourcing.⁵⁰

It might seem counter-intuitive to suggest that objections concerned with accountability, oversight, transparency, and so on are practical concerns rather than structural ones. Surely the bite of these objections remains even if private contractors regularly produce good outcomes: the simple fact that they do so without having to account for their conduct, that their operations are hidden from public scrutiny, and so forth is reason enough to object. Nevertheless, even these ‘process’ objections to outsourcing are the sorts of things that, in principle, could be addressed by a carefully structured institutional design. As Trebilcock and Iacobucci point out, private providers might in fact be held accountable more effectively by the market than they have ever been by public law regulations.⁵¹ Further, although private actors are not subject to the same public law standards of publicity accountability as government actors, this does not preclude the creation of new legislation that could impose the same standards on private providers where this is deemed necessary. In short, although we might find that present privatization schemes fail to address these concerns adequately, these critiques may be addressed by careful institutional design and the creation of proper incentives and institutional safeguards. If we are interested in objections to privatization – in the policing context or anywhere else – that cannot be addressed by careful institutional design, we must look elsewhere.

B THE ‘STANDING’ OBJECTION AND THE PUBLIC/PRIVATE DIVIDE

How is public policing different from private policing – apart from the obvious fact that it is provided by the state rather than by a private corporation? One argument that has sometimes been raised is that policing is a public good in the economist’s sense⁵² – that is, providing policing to A will necessarily mean also providing it to A’s neighbours, who will then have an incentive to free-ride on A’s policing. Although this is no doubt true in at least some contexts,⁵³ it is not a sufficient reason to insist that policing must be provided by the state. As Trebilcock and Iacobucci quite correctly point out, ‘[p]olice forces and the court system ... have

50 Verkuil, *Outsourcing Sovereignty*, supra note 10.

51 Trebilcock & Iacobucci, ‘Privatization,’ supra note 3 at 1447ff.

52 Usually, the economic definition of a public good states that a public good is non-rivalrous (*i.e.*, consumption by one does not deprive others of access to it) and non-excludable (*i.e.*, providing it to one necessarily means making it accessible to all). For a classic discussion of public goods see Ronald Coase, ‘The Lighthouse in Economics’ (1974) 17 *J.L. & Econ.* 357.

53 One should expect to find that the situation is sometimes the reverse, as well. As potential thieves are chased away from one neighbourhood, they may be *more* likely to target other, less well-policed neighbourhoods.

a public goods rationale, [but] this does not preclude private provision of security and adjudicative services.⁵⁴ No, the stronger rationale for insisting that at least some core policing services must be provided by the state turns on the claim that policing – unlike, say, food or housing – is not indifferent to the party providing it. A well-built apartment is of the same value regardless of whether it is owned by the state or by a private landlord, food tastes the same whether it is provided by the state or by a private grocer, and so on. But policing, the argument goes, is different. The nature very of the good itself changes depending on who provides it. Joh sums up this claim in the following terms:

[P]rivate policing is qualitatively different from public policing. Perhaps the most central feature of private policing ... is its client-driven mandate. Clients' particular substantive needs – the kinds of losses and injuries for which they seek policing services – shape the character of the private policing employed. Thus, what counts as deviant or disorderly behaviour for private police is defined not in moral terms but instrumentally, by a client's particular aims: a pleasant shopping experience, a safe parking area, or an orderly corporate campus.⁵⁵

This point about the public nature of police services goes beyond the free-rider problem that is often identified by economists. The point here is that legitimate policing is necessarily non-partisan. Like the courts, the benefit that the police provide is not mere security. Mere security is something that can be bought and sold by private individuals. But private security is quite different from policing. Private security is by its nature highly partial toward those who are paying its fees: my body-guard is far from impartial in any dispute between me and a third party. But police are – or, at least, ought to be – impartial as between the parties to a dispute. The very nature of their task – like that of a court – is bound up with impartiality.

The roots of this argument about impartiality lie in the ancient legal distinction between public and private. As Norberto Bobbio points out,⁵⁶ this distinction is one of the most basic in the Western legal tradition, dating back at least to the time of Justinian's *Institutes* in the sixth century CE. The aspect of the public/private distinction that is of interest to us here, however, is its importance for much of the modern liberal tradition in political theory. The state, according to a dominant

54 Trebilcock & Iacobucci, 'Privatization,' supra note 3 at 1433.

55 See Joh, 'Conceptualizing,' supra note 17; Clifford Shearing & Philip Stenning, *Private Security and Private Justice: The Challenge of the 80s: A Review of the Policy Issues* (Montreal: Institute for Research on Public Policy, 1982); Clifford D. Shearing & Philip C. Stenning, 'Private Security: Implications for Social Control' (1983) 30 *Social Problems* 498.

56 Norberto Bobbio, *Democracy and Dictatorship: The Nature and Limits of State Power*, trans. by Peter Kennealy (Oxford: Polity, 1989) at 1.

strain in the liberal tradition, is a different sort of entity from private actors in two crucial ways: it has greater powers than those of ordinary citizens, and it ought to be more accountable for its actions than ordinary citizens. To see why, we need to digress briefly into the foundations of this liberal picture of the state. For Locke, Rousseau, Kant, and many others in the liberal tradition, the most basic value in political life is individual freedom, understood as independence from the arbitrary will of others. This idea of freedom is most clear when it is contrasted with slavery: whereas the slave's fate is entirely dependent on the whim of his master, the free person is not dependent on anyone else's arbitrary discretion. The puzzle for these writers, then, is how to ensure that everyone is able to enjoy maximal liberty of this sort. The answer, all too briefly, is that each of us can maintain exclusive dominion over his own person and over his own property. What we may do with our bodies and with our property is subject only to the constraint that it must not undermine others' ability to be free to do the same. For this reason, it is not the law's business if an individual chooses to engage in conduct that the rest of us deem to be unwise or even immoral, so long as this conduct does not infringe others' freedom to use their bodies and property as they see fit in the same way.⁵⁷

But by the very terms according to which it was constructed, this private order cannot regulate itself. This system requires someone to specify precise limits to each person's sphere of liberty, to adjudicate disputes about these questions where they arise, and to enforce these rules where this is required.⁵⁸ But it would undermine the very purpose of the system if some private party took it upon himself to do any of this – for that would simply make the rest of us dependent on that person's exercise of discretion in doing all of these things. Instead, there must be some entity that is both impartial (because it has no stake in these private disputes) and qualified to impose its decisions on individuals on all these questions. It is in order to fulfil these demands that we must have a state. For the state, if properly constructed, can both represent us collectively (and thus speak in the name of all when determining the precise contours of our rights, adjudicating disputes, and enforcing the law) and yet speak for no private party in particular. The justification for the state's existence – and for its special powers – rests

57 For an explanation of this sort of freedom in the work of Kant and Locke see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997); Arthur Ripstein, 'Authority and Coercion' (2004) 32 *Phil.& Pub.Aff.* 1.

58 These are what Locke calls the 'inconveniences of the state of nature.' John Locke, 'Second Treatise' in Peter Laslett, ed., *Two Treatises of Government* (Cambridge: Cambridge University Press, 1960) §§124–6 at 351.

on our need for someone to perform the tasks that only the state can perform and on the state's ability to perform those tasks moderately well.

Of course, the state has no bodily existence of its own; it can act only through the agency of individuals. So the legal question about state action that is most important is this: Under what terms and conditions can an individual legitimately claim to be acting in the name of the state? In order to answer this question, we must establish not only that the individual either had some sort of special authorization to act in the name of the state, or (in extreme situations) that it was appropriate for that person to have assumed state authority even in the absence of explicit authorization, but also the terms under which the state may exercise its powers at all. In order for an individual to successfully claim to be exercising a state power, he must meet the accountability standards set out in public law – roughly, reasonableness and fairness – in the exercise of his discretionary powers.⁵⁹ This is because state power (unlike private power) is always answerable to the individuals over whom it is exercised. Individual freedom to do as one would like is a basic value, so individuals should be left free to act largely as they would like; but the justification for the state's power turns on its ability to act impartially in the name of all. If it fails to do so, then it undermines its own legitimacy.

C THE IMPLICATIONS OF THE 'STANDING' OBJECTION FOR THE LEGITIMACY OF PRIVATE POLICE

This basic argument from liberal political theory is reflected in many of the criminal law doctrines with which we are familiar in Canada, the United States, and other common law constitutional democracies. Those who are acting in the name of the polity as a whole are entitled to do things (such as using force when making an arrest, when executing a search, and in many other contexts) that private citizens may not, and they have the power to decide questions (such as the setting of pollution standards or the allocation of public housing or taxi licences) that private citizens do not; but in all this, they are answerable to others for their conduct and their decisions in a way that private citizens are not.⁶⁰ They are subject to public law requirements of fairness and reasonableness, as well as to the rights protections set out in constitutional bills of

59 For a more detailed treatment of some of these issues see Malcolm Thorburn, 'Criminal Law as Public Law: Police Powers and Justifications' in Antony Duff & Stuart Green, eds., *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press) [forthcoming 2010].

60 The most thorough treatment of the ancient public/private distinction in contemporary common law doctrine is Peter Cane, 'Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept' in J. Eekelaar & J. Bell, eds., *Oxford Essays in Jurisprudence (Third Series)* (Oxford: Oxford University Press, 1987) 57 at 65.

rights, to which private citizens and private action are not similarly subject. All of these rules are concerned not merely with the quality of an individual's acts but, first and foremost, with her legal standing to undertake it in the first place. When private individuals take it upon themselves to perform inherently public functions, the criminal law does not treat them as though they were doing a public service. Rather, it treats them as the vigilantes – and, therefore, the criminals – that they are.⁶¹

V *Conclusion*

So where does this leave us in our analysis of the private police in contemporary common law jurisdictions? First, we should make clear that the force of the standing objection should in no way be seen as taking away from other, distinct objections to the privatization of police services. If we find that certain police services are more cheaply provided by the state, or if we find that corruption and lack of accountability is endemic to certain aspects of private policing, then these are reason enough to resist privatization in those areas. The argument presented here is set out as a supplement to these more common objections to private policing. My point is to make clear that even if private providers of police services can work efficiently and uncorrupted, and even if they can be held accountable for their conduct, we might still have reason to object to their private provision of police services.

But the 'standing' objection does not apply to all forms of policing. Rather, it applies only to those forms of conduct that are of the sort that require that they be performed in the name of the whole polity, because they must be performed by someone who does not have a particular vested interest in any particular dispute yet who has the authority over all the parties in the dispute. In criminal law, those forms of conduct are (generally) those that are generally prohibited and that may be performed only with special justification, such as the use of force when making an arrest or preventing the commission of an offence, search and seizure, and the like. Although the law permits private citizens to undertake these actions under circumstances of emergency where recourse to the police is impracticable (under the law of self-defence, defence of property, citizen's arrest, etc.) these powers must be seen as – and must remain – exceptional. If standing groups of private police take over the powers of arrest, search, crime prevention, and so on by exercising these exceptional powers as a matter of routine, then this has the potential to undermine the claim that such powers belong to the state as the servant of the polity as a whole.

61 For a more detailed treatment of justifications and the vigilantism problem see Thorburn, 'Justifications,' supra note 4.