

THE INTEGRATIONIST JUSTIFICATION AND PRIVATE PRISONS

THE INTEGRATIONIST JUSTIFICATION AND PRIVATE PRISONS

By

CHRISTINE ALEXANDRA MORANO, B.A.

A Thesis

Submitted to the School of Graduate Studies

in Partial Fulfillment of the Requirements

for the Degree

Master of Arts

McMaster University

© Copyright by Christine Alexandra Morano, December 2010

Master of Arts (2010) McMaster University
(Philosophy) Hamilton, Ontario

TITLE: The Integrationist Justification and Private Prisons
AUTHOR: Christine Alexandra Morano, B.A. (McMaster University)
SUPERVISOR: W.J. Waluchow
NUMBER OF PAGES: vii, 95

ABSTRACT

Many of the arguments surrounding the privatization of prisons are based on pragmatic considerations, while others are based on more controversial moral principles. It is the latter type of argument, which focuses on the legitimacy of private prisons that I am interested in exploring in this thesis. Given the number of practical problems associated with these types of facilities, (i.e. mismanagement, abuse of inmates) establishing that there is something in principle problematic with this delegation of state power would make for a much stronger case.

It appears that most theorists, who are that private prisons are illegitimate, do not establish a strong line of argument. Rather, they simply state that it is offensive to public interests to have profit considerations mix with criminal punishment, or that this is a government power that ought not be delegated or, last but not least, some claim that such a practice weakens the moral integrity of society. The problem with each of these arguments is that their authors tend to state the point, rather than provide a sophisticated philosophical argument for their claims.

In a recent paper by Alon Harel entitled, "Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions," we are given a more sophisticated argument against the privatization of prisons. Harel's argument employs an "Integrationist Justification" of punishment. This thesis is a response to his paper and I argue that despite some of the intuitively appealing premises upon which Harel's argument is based, he fails to show that in principle, private prisons are problematic. Although, I determine that from an integrationist perspective it is likely that these facilities are problematic in practice.

ACKNOWLEDGEMENTS

Thank you to my supervisor Dr. Wil Waluchow, for your support, patience and assistance in making this project come together. It has been such a pleasure to work with you.

Thank you Elisabeth Gedge, I have enjoyed working with you for the last year and I am grateful for our many chats in your office.

I would like to thank the Social Sciences and Research Council for funding my project.

Thank you to my parents for always believing in me and supporting all of my academic endeavours.

Thank you Dune for making the possibilities seem endless. Your laughter, love and positive attitude encouraged me to continue.

DEDICATION

This thesis is dedicated to my mother, without your encouragement, support, and love this project would not have been possible. Thank you for pushing me to continue when I thought I couldn't.

TABLE OF CONTENTS

CHAPTER ONE:

Preliminaries	1
a. Private Prisons and Jails	1
b. The Private Prisons Debate	7
c. Theories of Justified Punishment and Private Prisons	10
d. The Set-Up	21

CHAPTER TWO

The Integrationist Justification and Private Prisons	24
a. Privately Inflicted Sanctions	24
b. The Argument	28
c. Clarifying Remarks	35

CHAPTER THREE

The Plausibility of the Integrationist Justification	39
a. The State Official, the Agent under Contract with the State, and the Vigilante	40
b. A Delegation of Authority from “the people”	43
c. Checks and Powers	45
d. The Moral Responsibilities of State and Private Prison Guards and Moral Agents in General	50

CHAPTER FOUR

Criminal Sanctions and the State’s Judgment	59
a. Justified and Unjustified Parentally-Inflicted Sanctions	62
b. What do these Four Cases Reveal to us About State Punishment?	67
c. Privately-Operated Prisons in Principle	80

d. In Practice: Privately and Publicly-Run Prisons and Jails	85
CONCLUSION	90
REFERENCES	93

1. PRELIMINARIES

a. Private Prisons and Jails

During the 1980s there was a large increase in the incarcerated population in the United States, followed by an increase in the cost of incarceration. The incarceration rate went from 105 for every 100,000 in 1975 to 200 for every 100,000 in 1985.¹ This is partly attributed to the 'law and order politics' of the 1970s, which sought to criminalize where possible and demonize where not, a variety of activities that were considered to challenge the limits of American democracy such as, civil rights movements and anti-war demonstrations, Supreme Court decisions that expanded rights for defendants, African Americans and women.² This was a political strategy employed by Richard Nixon in 1968 to detach Southern White conservatives from the Democratic Party, and it also meant that support could be gained behind a punitive response.³ Another reason for the increase in incarceration rates during this period is a result of the war on drugs,⁴ which began during this time.

¹Susan Dolovich, "State Punishment and Private Prisons," Duke Law Journal 55.3 (2005): 455.

² Phillip J. Wood, "The Rise of the Prison Industrial Complex in the United States," Capitalist Punishment: Prison Privatization and Human Rights, ed. Andrew Coyle et al (London: Zed Book Ltd., 2003) 22-3. Empirical data suggests that the relationship between 1960-1999 the relationship between the incarceration and crime rate is far from direct. The overall crime index fell in fourteen of the 27 years since the incarceration rate began its increase in the early 1970s (21). The author concludes that the incarceration boom is a product of criminal justice legislation that transformed the relationship between crime and punishment in the U.S. (21).

³ Wood 23.

⁴ Phillip J. Wood, "Globalization and Prison Privatization: Why are Most of the World's For-Profit Adult Prisons to Be Found in the American South?" International Political Sociology 1.3 (2007): 224.

Having more prisoners to accommodate than they could at this time, the U.S. turned to the private sector to assist in the incarceration of criminals in prisons and jails⁵ and the modern private prison was created. A private prison is one managed (in some way) by a non-government entity on behalf of the state. The U.K. chief inspector of prisons has said that "... 'Private prisons' are not private sector prisons, but state prisons run on contract for the responsible government department by a private sector company."⁶ This observation holds true in the case of nominal as well as operational prison privatization. In the former case a private firm assists in the capital financing of prison construction and in the latter case, a private firm manages the day-to-day functions of the institution.⁷ There are two main forms of nominal privatization; under the first the private firm is the long-term owner of the facility, renting it under contract to a public agency. Rules that were established by the Economic Tax Recovery of 1981 generated substantial potential cost advantages for this kind of nominal privatization. Because of the favourable federal tax treatment, state and local governments were able to obtain capital inexpensively. This form of privatization was advantageous for state and local

⁵. "Terms and Definitions," Bureau of Justice Statistics, 26 July 2010, U.S. Department of Justice, 10 Nov. 2009 <<http://bjs.ojp.usdoj.gov/index.cfm?ty=tda>>.

From here on I will only refer to prisons, rather than both prisons and jails. The statistics found regarding incarceration include populations in both types of facilities, which is why I mention jails. The remainder of the paper refers to literature that focuses on privatized prisons. A prison is a longer term facilities owned by a state or federal government. Jail inmates usually have a sentence of less than one year or are being held pending trial, awaiting sentence or awaiting transfer

⁶ Richard Harding, "Private Prisons," Crime and Justice 28 (2001): 265.

⁷ Dolovich 457. Also see Herman B. Leonard, "Private Time: The Political Economy of Private Prison Finance," Private Prisons and the Public Interest, ed. Douglas C. McDonald (London: Rutgers University Press, 1990) 66-9.

governments, but more expensive for society. At the time this arrangement was advantageous to investors due to depreciation deductions and investment tax credits.⁸ Under the second kind of nominal privatization, a private entity becomes the owner of the facility and sells it on an installment basis to a public agency through a “lease purchase,” which means that at the end of the lease, the public has the option to buy the facility for well below its market value. The economic advantage of this kind of privatization comes from the fact that the interest on the public’s borrowing of the facility is exempt from federal taxes.⁹ There are four classes of penal institutions that follow from these two types of privatization: those that are operated by public authorities but owned and financed by private firms, those that are owned and operated by public authorities, those that are government-owned facilities and are operated by a private firm and those that are operated and owned by private firms. Under these last two arrangements the private firm sells services of incarceration to a public agency. An operationally privatized prison or jail functions much like a hotel; an inmate as a guest at a hotel, but his or her bill is being paid and the check-out date is set by someone else (states, counties, the Federal Bureau of Prisons, Immigration and Customs Enforcement, the United States Marshals Service).¹⁰ The private prison industry charges its customers a daily rate for each inmate that it houses, so the higher the occupancy rate, the higher the profit margin for the private firm.

⁸ Leonard 70-1.

⁹ Leonard 70-2.

¹⁰ “America’s Leader in Partnership Corrections,” CCA, 19 February 2010 <<http://www.cca.com/home/>>. The analogy of an operationally privatized prison to a hotel comes from Eric Schlosser, “The Prison Industrial Complex,” Political Science 2C03: Force and Fear, ed. Professor Greg McElligott (Hamilton: Custom Publishing Solutions, 2006) 322.

The contractor bears all of the costs of running the prison, so in order to make money they must be able to run the prison for less money than they earn from the state.¹¹

The emergence of private prisons in the 1980s was not solely due to there being market opportunity at the time, but also the fact that the private sector was becoming much more acceptable to the public at the time, a movement which began with Margaret Thatcher in Britain. The incarceration boom also coincided with a long period of economic crisis, middle tax resistance and increasing pressure on public resources.¹² Also, it would not be the first time that the public turned to the private sector for assistance in penal practices. Private, mostly not-for-profit charities played a role in operating facilities for juvenile offenders prior to the 1970s. In the 1970s, halfway houses were being privatized and the Immigration and Naturalization Service began to contract out the detention of illegal immigrants to the private sector. Then, in 1988 the government of Texas announced that it would let contracts for four 500-bed medium-security prisons for adult males. Two of the contracts were won by the Corrections Corporation of America (CCA) and the other two by Wackenhut Corrections Corporation (WCC). The prisons opened in 1989.¹³ The CCA is the nation's largest private prison company, founded in 1983 by Nashville businessmen, Thomas W. Beasley and Doctor R. Crants and was financed in part by some of the investors in Kentucky Fried Chicken.

¹¹ Schlosser 313-33.

¹² Aric Press, "The Good, the Bad, and the Ugly: Private Prisons in the 1980s," Private Prisons and the Public Interest, ed. Douglas C. McDonald (London: Rutgers University Press, 1990) 20. Also see Wood, "The Rise of the Prison Industrial Complex in the United States" 18-9.

¹³ Harding 267.

Over the next decade, the CCA expanded nationwide, winning contracts to more than 40,000 inmates and assembling the sixth largest prison system in the United States.¹⁴ By the mid 1990s both companies together controlled about 75% of the American private prison market.¹⁵

If we fast forward to 2006, the United States was housing over 100,000 state and Federal prisoners in private prisons, while Australia, the United Kingdom, and South Africa had turned over some of their prisons to the private sector with fewer than 17,000 inmates and only 21 private prisons in all.¹⁶ In the U.S. privately operated facilities house minimum, medium and maximum security inmates, but the proportion of maximum security inmates is much less with private facilities accounting for only 4.6% of the inmate population, while maximum security inmates account for 19.8% of the publicly operated facilities.¹⁷ In 2001, Canada experimented with prison privatization when a five year pilot project was conducted in Ontario and the day-to-day operations of the prison in Penetanguishene were contracted out to The Management and Training Corporation. After the study was over the government decided to make the prison publicly-run again, rather than renew the contract with Management and Training Corporation. The decision was due to inadequate security and prisoner healthcare when

¹⁴ Schlosser 70.

¹⁵ Dolovich 459.

¹⁶ Wood, "Globalization and Prison Privatization: Why are Most of the World's Private Prisons to be Found in the American South?" 223. It is not clear whether this statistic includes both of those prisons that are operationally and nominally privatized or only one of the two.

¹⁷ Dolovich 503. Inmate classification systems work differently depending on the state.

the institution was compared to an almost identical mega-jail in Lindsay that was meant to act as the control in the experiment.¹⁸ Active consideration is being given to prison privatization in the remaining Australian states, the Republic of Ireland, Serbia, South Korea, Taiwan, Tanzania, Thailand, the Philippines, Malaysia, Latvia, Jamaica, Costa Rica, Panama, and several South American countries including Columbia.¹⁹

The private prison industry in the United States is just one segment of the multi-billion dollar prison industrial complex,²⁰ which also includes some of the nation's largest architecture and construction firms, Wall Street investment banks that handle prison bond issues, plumbing supply companies, food service companies, health care companies, bed brokers and telephone companies.²¹

It is a standard requirement of state enabling statutes in the U.S. that private prison operators achieve and maintain official accreditation from the American Correctional Association (ACA).²² The ACA is a nongovernmental professional association dating back to 1870 that has considerable influence over corrections policy, because its standards govern most aspects of prison operation including, security and

¹⁸ Dawn Moore and Moffat Kelly Hannah-Moffat, "Correctional Renewal without the Frills: The Politics of "Get Tough" Punishment in Ontario," *Disorderly People*, ed. Joe Hermer and Janet Mosher (Halifax: Fernwood publishing Co., 2002) 105-20.

¹⁹ Harding 269.

²⁰ "The term "Prison Industrial Complex" refers to an American criminal justice system that has been substantially transformed by almost three decades of rapid growth and by the increasing importance of private interests in criminal justice policy." Wood, "The Rise of the Prison Industrial Complex in the United States," 16.

²¹ Schlosser 63.

²² Dolovich 488.

control, food service, sanitation hygiene, medical and health care, inmate rights, work programs, education programs, recreational activities, library services, records and personal issues.²³

b. The Private Prisons Debate

The existence of private prisons raises an interesting question: is it acceptable for the state to issue prison sentences to criminals, but hand over the administration of those punishments to a private firm, whose paramount interest is in profit-making? After all, even in states where private prisons operate, the government, and more specifically, the courts continue to maintain full responsibility over who will be sentenced to time in prison or jail. Also, it is state legislation which determines what behavior is prohibited and will land an individual in prison or jail. Furthermore, there are accountability and regulatory mechanisms in place to ensure that the state ultimately maintains responsibility over the day-to-day operations of the facilities. Of course, whether the state actually actively and effectively regulates private prisons is debatable.

When it comes to the legitimacy of the private infliction of state punishments, some theorists argue on the basis of pragmatic considerations. For example, according to Dolovich, absent effective checks on contractors' profit-seeking motives; they will be tempted to cut corners which could lead to depriving inmates of their basic needs.²⁴ In order for privately- operated prisons to be advantageous for a state the contract price with the private firm must be less than the state would incur if they were operating the facility.

²³ Jody Freeman, "The Contracting State," Florida State University Law Review 28.155 (2000): 205.

²⁴ Dolovich 511.

If the firm is going to turn a profit, it must be able to provide the service for less than the contract cost provides. Dolovich argues that they will cut costs in ways that will lead to mismanagement of the facility, lack of proper food, inadequate health care and a lack of recreational programs with inadequate monitoring by the state. She refers to the example of the Youngstown facility, which opened in 1997. CCA filled the medium-security prison with prisoners from the overburdened Washington, D.C., prison system. The incoming D.C. inmates included a number of violent inmates classified as "maximum-security, high-risk," which CCA "reclassified" as medium security to fill the beds without having to equip the facility to handle maximum-security inmates. Over the next eighteen months, the Youngstown facility saw more than forty-four assaults and two fatal stabbings, including one inmate who was stabbed to death when a shortage of beds in the administrative segregation unit (a prison's protective custody area) led prison officials to house the victim with two men who had been threatening his life. At CCA Youngstown, economizing also took other forms. Former employees of the prison, for example, reported receiving a "rundown" by their employers, "saying two slices of bread per inmate costs this much. If you can cut corners here, it would mean a possible raise for us." At Youngstown, even the "toilet paper was rationed," to the point that "inmates were forced to go without it, using their bed sheets instead."²⁵

Another pragmatic consideration that some base their arguments on is efficiency. On this approach, the decision to privatize prisons turns on which sector, public or

²⁵Dolovich 461.

private, will perform the task more efficiently.²⁶ This approach just like the one mentioned before takes no position on the functions that the state ought to perform. Both approaches are concerned with the practical considerations that go along with privatizing prisons, rather than any relevant normative considerations.

For theorists who make these kinds of pragmatic arguments, private prisons are acceptable provided they achieve certain standards of quality or insofar as they are more efficient than their publicly-run counterparts. But there are those who argue against the privatization of prisons and jails focusing on the intrinsic illegitimacy of these private facilities. This type of argument is much more difficult to pursue than those dealing with the pragmatic concerns, because unlike those arguments, arguments from legitimacy do not largely rest on simple practical concerns. On the contrary, they rest on much more deeply controversial moral and philosophical principles. They argue that imprisonment is an intrinsic or core state function that cannot legitimately be delegated to a non state agency without undermining the notion of the state and its responsibility to and for citizens, even if the facilities function the same way as their publicly- run counterparts.²⁷

²⁶ Dolovich refers to these kinds of arguments as those from “comparative efficiency.” According to Dolovich, these approaches have two defining features: first, they view the motivating question as a choice between public and private. Second, efficiency is the sole guiding value in their analysis. She argues that this approach is problematic because it obscures the troubling features that are common to prisons in general that we ought to be concerned with before we go about determining whether the public or private sector is better equipped to incarcerate. Dolovich also takes issue with the fact that approaching the issue of privatization from the perspective of efficiency serves to subordinate all of the other value considerations that the practice of incarceration raises. Susan Dolovich, “How Privatization Thinks: The Case of Prisons,” Government by Contract, ed. Jody Freeman and Martha Minow (Cambridge: Harvard University Press, 2009) 128-34.

²⁷This way of describing the position comes from Harding 266. See John DiIulio Jr. “The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails,” Private Prisons and the Public Interest, ed. Douglas C. McDonald (New Brunswick: Rutgers University Press, 1990) 155-178.

What a theorist holds to be justified punishment will guide his or her stance in the private prisons and jails debate. In this next section we will explore different accounts of justified punishment and briefly consider each of them in the context of the private prisons debate.

c. Theories of Justified Punishment and Private Prisons

The need to justify punishment stems from the fact that it involves, on almost all views, a prima facie moral wrong, insofar as it is comprised of inflicting unpleasant consequences contrary to the will or consent of the person being punished. On a rights-based view, this activity violates some very basic rights of the subject of punishment, such as personal integrity and liberty. On the other hand, a duty-oriented approach will focus on the idea that the inflictor of punishment should be seen to be violating duties of restraint and non-interference with others. On a goal-based position, the consequence of punishment is the infliction of pain or disadvantage, which is a consequence that is to be avoided in the absence of other compensating goods on almost any conceivable goal-based moral theory.²⁸ The type of justification of punishment that one adopts will shape the kind of argument he or she makes in the private prison and jails debate.

Harding raises a response to this particular kind of argument by drawing on the distinction between the allocation and administration of punishment. He claims that the first of these is non-delegable. "Private criminal justice systems are a contradiction in terms," he says. Administration, on the other hand, is delegable with the appropriate safeguards in place because it is a technically and morally neutral process, according to Harding (275). It follows then that even if imprisonment is a core or intrinsic state function, the state can still legitimately delegate the administration of punishment. Although, it is unlikely that this is all we are going to be delegating when we privatize prisons, because at the very least the prison operator will have to impose minor management sanctions in most facilities in the U.S. By contrast, in the United Kingdom disciplinary charges laid down in the prisons must be laid down by public sector officials, who work on site (276).

²⁸ This way of explaining the need to justify the infliction of punishment comes from Nicola Lacey, *State Punishment* (London: Routledge, 1988) 12-3.

Instrumental justifications are premised on the idea that punishment serves important societal goals, such that punishment can be justified even if the state is not the one to inflict or allocate it, so long as the goals can be realized by the agent inflicting the sanction. For instrumentalists, punishment is justified insofar as it achieves those particular goals. For retributivists, who espouse a type of instrumentalism, it is the goal of ensuring that wrongdoers receive the punishment that they deserve. Proponents of this view who argue for state-inflicted sanctions hold that the state is best positioned to give wrongdoers the punishment that they deserve.²⁹ Deterrence theorists, who are also a type of instrumentalist argue that punishment is justified because the threat of punishment has a generally deterrent effect on potential offenders, such that the saving in pain from reduced crime and additional happiness from increased security outweighs the pains and costs of punishment.³⁰ Punishment, on this account, serves the important goal of preventing crime. In addition to the goal of general deterrence, there are many other forms of utility or sought consequence which punishment may, and has been argued to achieve such as, rehabilitation, social protection, the satisfaction of the victims' or public grievances, reparation or restitution to the victim, moral education of the society at large.³¹ On an instrumentalist account the state ought to be the one to inflict and/or

²⁹ See Lacey for a critical analysis of the notion of 'desert' 16-27. She analyzes different attempts to articulate the notion of desert; that of *lex talionis*, the culpability principle, and the forfeiture of rights, unfair advantages and the restoration of moral equilibrium.

³⁰ Lacey 27.

³¹ Lacey 28.

allocate criminal sanctions insofar as it is the best agent to achieve the particular goals that the theory claims that punishment ought to achieve.

With respect to the private prisons debate, those who approach the issue from an instrumentalist perspective would focus on the goals that are achieved by incarceration in private prisons. They would make arguments based on pragmatic concerns having to do with the facilities either fulfilling or not fulfilling particular goals. On an instrumentalist account, a private prison is only illegitimate insofar as it does not achieve particular goals such as running efficiently and/or treating inmates humanely. Therefore, there is nothing in principle wrong with having non-state agents inflict punishment on this account, so long as they can realize the important goals that punishment achieves. Punishment such as incarceration ought to be performed by the state only insofar as it is best placed to achieve the particular goals that punishment is meant to serve, such as rehabilitation and deterrence, according to instrumentalists.

There are also what Nicola Lacey refers to as mixed theories of punishment or what Harel calls normative-preconditions justifications, which argue that in order for punishment to be justified it must achieve certain goals, but the attainment of those goals is constrained by certain procedural requirements. Some examples of procedural requirements could be that the punishment must be determined on the basis of the democratic process or that we ought to be satisfied that the person we are punishing is responsible for the offence. It is not enough that punishing a person will lead to a greater increase in overall utility than not punishing them, it is also required in order for the punishment to be justified that he or she is reasonably believed to have committed the

offence. Locke argues in this vein; he claims that the infliction of sanctions by the state is justified only when victims consent to transfer their power to inflict sanctions to the state.³² A normative precondition of punishment is that the body punishing must have the consent of the governed, who have delegated their powers to punish. On this account the punishment can function in the same way and be valuable for the same reasons which, for Locke, have to do with ensuring that the punishment is in accordance with the gravity of the offence as mentioned earlier.³³ But if particular procedural requirements are not satisfied then the punishment is considered unjust.

In the context of the private prisons debate, what proponents of mixed theories have to say is going to depend upon what they hold to be normative preconditions under which punishment is justified, as well as the goals that ought to be achieved. For instance, if a normative precondition of justified punishment is that it be determined on the basis of the deliberative democratic process, then it is going to be a matter of whether private prisons have power over the allocation of state punishment and not just its administration. More specifically, if private prisons are regularly participating in the allocation of state punishment this would violate the normative precondition of justified punishment on a mixed account, because the sanction is not determined based on the democratic process. Instead, it is rooted in the judgments of those agents, i.e. prison guards employed by a private firm. The same holds true in the case of public prisons as

³² This particular insight comes from Alon Harel, "Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions," Legal Theory 14 (2008): 120-1.

³³ John Locke, Two Treatises of Government: Second Treatise Section 13, ed. Peter Laslett (New York: Cambridge University Press, 2005) 366-74.

well, such that if prison officers in these institutions are participating in the allocation of state punishment, then the sanction cannot be considered to be determined based on the democratic process. Rather, it would be determined based on the private judgments of the prison officers, and although they are considered to be state officials, these judgments cannot be considered to be those of “the people”.

Joel Feinberg argues that punishment has an expressive function. He argues that “...punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part of either the punishing authority himself or of those ‘in whose name’ the punishment is inflicted.”³⁴ He claims that this feature is absent from penalties such as parking tickets and disqualifications. He says that punishment, “[A]t its best, in civilized and democratic countries, punishment surely expresses the community’s strong disapproval of what the criminal did.”³⁵ According to Feinberg, there are other functions of punishment that presuppose its expressive function and would be impossible without it. These functions include authoritative disavowal, symbolic non-acquiescence, and the vindication of the law.

A theorist who has expressive views about the function of punishment will be interested in the degree to which private prisons are following standards and guidelines laid out by the state. It is going to be a matter of whether private prisons are involved in the allocation and/or administration of state punishment. So long as incarceration by

³⁴ Joel Feinberg, “The Expressive Function of Punishment,” *Monist* 49.3 (1965): 400.

³⁵ Feinberg 402–3.

private facilities expresses the sentiments of the people and that message is expressed through mechanisms of the state, they would be considered legitimate legal punishment according to Feinberg's theory. It is not necessary for the state qua state officials to be inflicting punishment on this account, but in order for it to express the sentiments of the community, provide vindication of the law and be considered authoritative disavowal the infliction of punishment must be under the authority of the state. Whether it is inflicted by state agents or agents under contract with the state is not going to matter on this account. Feinberg's theory is state-centered in the sense that it must be the state making the determinations of punishment in order for it to be able to achieve all of its functions, but those punishments need not be inflicted by the state qua state official.

Alternately, Alon Harel offers a state-centered justification of punishment in a recent paper entitled, "Why only the State may Inflict Criminal Sanctions: The Case against Privately Inflicted Sanctions." Harel's argument is based on what he calls an integrationist justification for state-inflicted sanctions. On his view, criminal punishment is an integral part of successful statehood, because it is interrelated with other duties and powers of the state, and removing this power of the state disrupts its proper functioning. State powers and duties cannot be understood in isolation. More specifically, he argues that the power to inflict criminal sanctions is fundamental to statehood because it is intimately connected to the state's duty to issue prohibitions, which is required for the sake of just governance. Harel claims, "[J]ust governance requires the state to govern its citizens under constraints dictated by justice. Just governance presupposes the guidance of behaviour, and the issuing of prohibitions is necessary for such guidance. Violating

these prohibitions gives rise to sanctions.”³⁶ Harel states, “[G]iven that the state is assigned the power to issue prohibitions (necessary for just governance), it alone ought to make determinations concerning the severity of the sanctions (triggered by violating state-issued prohibitions).”³⁷ It is the state’s judgments alone that can justify inflicting state-issued prohibitions, rather than the private judgments of individuals; this is fundamental to what we think of as a legal system. In order to say that the state is issuing prohibitions, the punishments meted out must be grounded in those very prohibitions or reasons of the state, because punishment involves the infliction of suffering grounded in a particular reason, namely that a wrong has been perpetrated.³⁸ According to the integrationist account, justified punishment is that which is grounded in the state’s judgments regarding the wrongfulness of the action and the appropriateness of the sanction.³⁹ And these powers are inextricably related to the power to inflict sanctions, because it is impermissible for someone to inflict suffering on another without forming a judgment. On the integrationist account, the same agent who is the source of criminal prohibitions must also administer the sanctions for the violation of those prohibitions. Because it is a part of its duty to govern, the state must be the one to issue the sanctions tied to those prohibitions.

³⁶ Harel 127.

³⁷ Harel 127.

³⁸The idea that punishment is grounded in a reason is a common element of all definitions of punishment. See Lacey 4-12. Also see H.L.A. Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968) 4-5.

³⁹ Harel 133.

According to Harel, two intuitive observations can be easily explained within an integrationist justification. The first is that the power to inflict criminal sanctions is a sphere of operation of the state that is considered to be basic and fundamental. The second is that privately-inflicted sanctions are often considered to be incommensurate with state-inflicted sanctions. Harel claims that this is evident based on the fact that it is left up to the discretionary judgment of the judge to decide whether or not he wants to take into account the private sufferings borne by the criminal, but he is not obliged to do so. Harel states that, “[I]f criminal punishment could be inflicted by non-state agents, state-inflicted criminal sanctions should arguably, as a matter of justice, be calculated in a way that takes into consideration the sufferings of the criminal that result from privately inflicted sanctions.”⁴⁰ This indicates that state-inflicted sanctions are not typically viewed as commensurate with private sanctions, because if they were considered in this way judges would be obliged to calculate punishment in a way that takes such sufferings into account. He claims that, “[A] possible explanation for the reluctance to conduct such a calculation is that private sanctions are not imposed by the state, and whatever is not imposed by the state cannot be part of the offender’s punishment.”⁴¹ Harel believes the first observation can easily be explained on his state-centered justification, because on his account stripping the state of its power to inflict sanctions will strip it of its power to issue prohibitions, which weakens the state’s duty to govern justly. With respect to the second intuition, Harel claims that the judgments of private agents are not of the kind that

⁴⁰ Harel 125-6.

⁴¹ Harel 126.

can justify the infliction of state-initiated privately inflicted sanctions, but he does not explain explicitly why that is the case. A possible reason for his claim is that the state is supposed to express the judgment of the community that what the criminal did was wrong, and a private judgment cannot justify inflicting state sanctions, because they are grounded in the judgments of the individual and state prohibitions are grounded in the judgments of the community. As Feinberg claims, punishment is supposed to express the resentment and indignation of the community that what the criminal did was wrong, not that of the individual. It is possible that the judgment of the private agent could be the same as that of the state, such that his or her judgment is reflective of the community's. But Harel argues that this would just be a happy coincidence and would not transform the private infliction of suffering into a state punishment.⁴²

To get a better handle on the integrationist justification let's consider how it compares to the other theories outlined. According to Harel, the infliction of criminal punishment is an integral part of successful statehood.⁴³ His account is state-centered with respect to the determination as well as infliction of punishment. Both the integrationist justification of punishment and Feinberg's expressive theory of punishment hold that there is something about criminal punishment that cannot in principle be realized by non-state agents. For Harel, state inflicted sanctions cannot be grounded in judgments other than those of the state, because other judgments cannot justify the infliction of the sanction, and this requires that the state be the one to inflict the sanction.

⁴² Harel 128-9.

⁴³ Harel 125.

As for Feinberg, it appears that the state must issue punishments, but private agents can carry out the infliction of those punishments, so long as it is under the authority of the state. On instrumentalist accounts, justified punishment does not have any central functions that cannot in principle be realized by agents other than the state. So long as the goals that criminal punishment ought to achieve are being fulfilled it is considered legitimate. For instance, if it is a matter of efficiency, it is possible that bodies other than the state may be better suited to issue and inflict punishments. Mixed justifications for punishment allow for the possibility that privately-inflicted and/or issued sanctions can be legitimate, it all depends upon what the normative preconditions constraining the goals of justified punishment are.⁴⁴ For example, John Locke argues that the consent of the governed to delegate their powers to punish is a necessary procedural requirement of punishment. Given the condition in this case, it will not be possible for anyone other than the state to issue punishments, because the citizens voluntarily transfer their powers to the state.⁴⁵ As for the infliction, it is reasonable to think that if the appropriate checks were in place and so long as the state was responsible for the allocation of punishment, a state or a non-state agent could legitimately inflict the punishment on Locke's account.

Harel believes that his justification of punishment leads us to the conclusion that private prisons are illegitimate in principle. He believes that agents working for private firms, such as prison guards, have a moral duty to form judgments about the wrongfulness of the action and the appropriateness of the sanction before inflicting

⁴⁴ This way of putting the issue comes from Harel 120.

⁴⁵ Locke Section 13.

punishment on someone for his or her actions. No such particular duty exists for a state official, according to Harel, because he or she is justified in abdicating his or her moral responsibility when punishing criminals. As a result, a state official must determine and execute the state's sanctions because then we can say that those sanctions continue to be grounded in the judgments of the state. More specifically, state officials function much like instruments of the state on Harel's account, because they can abdicate moral responsibility and as a result their personal reasons for the infliction will not ground the sanction. He claims that, a state official, such as a judge, a prison guard or an executioner is often entitled or obligated faithfully to execute the state's sentencing decisions.⁴⁶ But the status of a citizen who is called upon by the state to inflict sanctions differs from the status of an official, because the latter is "shielded" from being morally responsible for carrying out his or her job, but a citizen on the other hand who is not shielded from such a role in society bears moral responsibility for the infliction of suffering. For Harel, private prisons are illegitimate on this account because the state can no longer be said to be issuing prohibitions and this is what makes the infliction of criminal punishments legitimate.

Yet, as I will argue later in the paper, the state can still be said to be issuing prohibitions even if it is not the one to inflict them so long as the agents inflicting those sanctions are carrying out the same moral roles as state officials. And whether someone is working for a private firm or the state does not necessarily bear on his or her moral responsibilities. The distinction between the administration and allocation of punishment

⁴⁶ Harel 130.

will be important in making my case, because if private prisons are only involved in the administration of punishment or are involved in the allocation of state punishment, but subject to state checks and balances, then state officials and agents working for private firms can be said to be carrying out the same roles. Whether these roles are representative of the will of the people is debatable. But the point to emphasize is that if the state qua state official is what Harel is concerned with in order to ensure that the state is the one issuing prohibitions, it is a matter of whether the agents are treated as carrying out state roles- not a matter of whether they are labeled as state officials or private agents.

d. The Set-Up

This paper is a response to Harel's justification of punishment and how it applies to the case of private prisons. I will focus on fleshing out what he means and whether his is a plausible view to hold. I choose to focus on Harel's integrationist justification as it applies to the case of private prisons, rather than any of the other theories outlined above, because he has a specific and sophisticated argument that applies to the case of private prisons, which is where my interest lies. He also believes that his justification can, unlike those of the other theories outlined above, explain our intuitions about criminal punishment by showing the indispensability of the state to the infliction of criminal sanctions. In responding to his position, I will have the opportunity to compare his justification to the others as they apply to the case of private prisons.

I examine Harel's argument as it applies to the case of operationally privatized prisons, rather than those that are nominally privatized, because this is the more

interesting type of privatization.⁴⁷ It involves the government delegating to private firms the power to actually operate the prison and make discretionary judgments that will affect the day-to-day lives of the inmates. Harel does not clarify whether his argument applies to both types of private prisons or only those that are operationally privatized. I choose to focus on private prisons in the United States, because this is where they have gained the most support, with most of the facilities existing in the Southern states. Furthermore, circumstances can vary from country to country regarding the particulars of how private prisons function, and because there is a range of different systems that raise different issues that may not apply to other systems, it is best to pick an example. Although the focus of the paper will be on the experience of the U.S., the issues that arise are those that come with any kind of privatization in other systems. There are common issues of public accountability, who counts as a state official and who does not, and the state's duty to govern. Since the argument will focus specifically on the development and current state of privatized incarceration in the U.S., of course this will affect the particular twists and turns of the argument.

In the next chapter, I explain Harel's argument regarding the illegitimacy of private prisons on his integrationist justification of punishment. I spend some time drawing out the important points of his argument, and I provide some clarificatory remarks. In chapter three, I critically assess the distinction Harel draws between a state official inflicting criminal sanctions and an agent under contract with the state to inflict criminal sanctions, and each of their respective moral responsibilities. I argue that his

⁴⁷ When I refer to private prisons throughout the paper, I am referring to those that are privately operated.

view is not a plausible one to hold, by comparing a state prison guard to a prison guard working for a private firm. I argue that their respective moral responsibilities are the same. In mounting my argument, I draw on Kimberley Brownlee's work on the responsibilities of criminal justice officials. My efforts in chapter four are directed toward fleshing out the features that we must pay close attention to in order to determine if an infliction of punishment is illegitimate on Harel's own integrationist justification. Like Harel, I use the relationship between a parent and a child who must be punished as a testing ground for our intuitions about punishment in the context of the state and criminals. I critically assess those intuitions and then move on to outline the features that we must pay particular attention to, in order to determine whether the infliction of incarceration is founded on the private judgments of correctional officers or on the judgments of the state, as expressed by statute or administrative regulation; this is what ought to be central to the integrationist justification. Given these features, I argue that private prisons are not illegitimate in principle, but that in practice it is quite possible that the practices of privately-operated prisons are illegitimate. Furthermore, we shall see that it is also plausible that the practices of state-operated prisons are illegitimate, based on Harel's integrationist justification.

2. THE INTEGRATIONIST JUSTIFICATION AND PRIVATE PRISONS

a. Privately Inflicted Sanctions

Harel argues that privately inflicted sanctions are, in principle, morally illegitimate, regardless of any practical benefits, economic or otherwise, that might accompany them. A key element of this argument is Harel's "integrationist justification." Harel follows the lead of H.L.A. Hart and claims that criminal sanctions are sanctions involving pain or other consequences normally considered unpleasant, which are inflicted upon an offender in response to his or her supposed offence against legal rules.⁴⁸ Harel adds a further component that is not explicitly mentioned by Hart in his discussion of sanctions, which is that not all punishments involving unpleasant consequences should be considered *criminal* punishments. To illustrate this distinction, Harel refers to the example of U.S. presidents being impeached for wrongful behavior. Without qualifying the definition of sanctions, such an act on behalf of the state would be considered criminal. Another example of non-criminal sanctions are parking tickets, which Joel Feinberg classifies as penalties.

Harel defines privately-inflicted sanctions as those that are inflicted by private entities and state-inflicted sanctions as sanctions administered by state officials in their capacity as state officials.⁴⁹ It is not sufficient that the agent inflicting the sanction be labeled as a state official to classify the sanction as state-inflicted, although it is necessary; he or she must also be acting in ways that conform to law and due process.

⁴⁸ Hart 1, 4-5.

⁴⁹ Harel 116.

This is what it means to be acting in their capacity as state officials. The distinction between private agents and state officials is a bit unclear and I will have occasion to deal with it in detail in chapter three. According to Harel, privately inflicted sanctions are those that are inflicted by private entities. The privately inflicted sanctions that are the target of his critique are those sanctions inflicted by individuals or other private entities at the initiative of the state. Harel does not want to claim that it is impermissible for individuals to ostracize or criticize convicted offenders.⁵⁰ He claims that it is impermissible for the state to hand over the actual infliction of criminal sanctions and by implication on his account,⁵¹ the determination of the severity of criminal sanctions. It is important for the purposes of conceptual clarity to distinguish between the power to inflict a sanction and the power to determine its severity. The former concerns the actual act of carrying out a previously determined punishment: for example, a prison guard who carries out the task of incarcerating a person who has been found guilty by a judge for murder and sentenced to prison for a particular length of time has the power to inflict a sanction. The power to determine the severity of the sanction involves a judgment pertaining to the specifics of the punishment once an individual has been convicted of committing a wrong. To make judgments regarding the severity/appropriateness of particular sanctions, judges consider the facts of the case before them, sentencing

⁵⁰ Harel 116.

⁵¹ Even when the state only transfers the infliction of the sanction, on Harel's account, it has also transferred the power to make determinations regarding the severity of those sanctions. Therefore, it is not only in instances where the state has in actual fact transferred the power to make such determinations.

guidelines, statutory requirements, moral arguments about the severity of the infraction, and precedents set in similar cases involving similar offences, and other relevant factors.

Harel considers recent attempts by states to transfer some of their powers to private entities through practices such as shaming penalties, the recent initiative in Britain to privatize the probationary system, the victims' rights movement and private prisons as instances of privately-inflicted sanctions that are illegitimate.⁵² But he expands most on shaming penalties and private prisons.

According to Harel, shaming penalties are a case where both the power to determine the severity as well as the power to inflict the sanction is transferred to private agents. Shaming penalties are "...punishments that are directed primarily at publicizing an offender's illegal conduct in a way intended to reinforce the prevailing social norms that disapprove of such behavior and thus to induce an unpleasant emotional experience in the offender."⁵³ They involve stigmatizing offenders by identifying them and then disseminating information about their crimes to the public, which leads to the isolation and alienation of the offender from the rest of society. There are different forms that shaming penalties can take. For instance, a judge can require that offenders wear signs in public, which state the crimes that they have committed, offenders may be required to issue public apologies, or crimes can be publicized in local newspapers or television. In all of the circumstances, both the infliction of the sanction and the power to determine the severity of the sanction are transferred from the hands of the state to private citizens; the

⁵² Harel 114.

⁵³ Anonymous, "Shame, Stigma and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law," Harvard Law Review, 116.3(2003): 2187.

degree to which an offender is isolated personally and/or professionally depends upon the active cooperation of private individuals. A concrete example of a shaming penalty in effect took place Hoboken, New Jersey. Not long ago, the city suffered from an increase in instances of public urination. Perhaps surprisingly, it was not the homeless who were responsible for this crime, but the Wall Street stock brokers and the Manhattan professionals who would go to Hoboken's trendy bars. In response, the city put them on display: the offenders were required to mop the city's streets and ads were posted in the offenders' local newspapers.⁵⁴ Shame as a form of punishment is not only used for petty crimes like public urination, but for a variety of other more serious crimes such as drunk driving, burglary and drug possession.

According to Harel, privately-run for-profit prisons are a case where only the infliction of the sanction is privatized, and- not the power to determine the severity of the sanction. This is so because the state maintains authority over the standards that must be followed by prison operators. The ACA sets out standards for security and control, food service, sanitation and hygiene, medical and health care, inmate rights, work programs, educational programs, recreational activities, library services, records and personnel issues.⁵⁵ The ACA's requirements can be quite detailed, for instance, they specify the number of meals that must be served, the caloric intake, time between meals and details

⁵⁴ Dan Kahan and Eric Posner, "Shaming White-Collar Criminals: A Proposal for Reform of Federal Sentencing Guidelines," *Journal of Law and Economics*, 42.1 (1999): 365-368.

⁵⁵ Freeman 205.

regarding the preparation and keeping of food.⁵⁶ Disciplinary actions for breach of prison rules are carried out by private prison operators themselves, yet their standards generally replicate those applicable in the public sector. If they differ, they must be approved by state authorities. When it comes to prisoner classification the principled position in the U.S. has been that the state is responsible for the classification of inmates and state authorities assign and reassign prisoners to and from prisons in the name of the state. In practice, of course, there have been exceptions and in all the matters outlined, private operators have more influence than they are thought to have in principle.

b. The Argument

According to Harel, privately-inflicted sanctions are illegitimate, because they sever the link between the state's judgments⁵⁷ and the infliction of criminal sanctions. The link that is integral to statehood and crucial to the infliction of justified criminal punishments is explained in chapter one. In order to say that the state is issuing

⁵⁶ Dolovich, "State Punishment and Private Prisons" 478.

⁵⁷ According to Leslie Green, when we talk of the state's judgments we are referring to the politically relevant actions of officials. In *The Authority of the State*, he responds to the worry raised with respect to anthropomorphizing the state. In doing so, those who raise this worry claim that we run the risk of committing ourselves to the idea that the state cannot only act, but it also has interests that must be counted when considering questions of political morality. Green provides a response to this objection; the state must act to protect the interests of its citizenry via its officials. While it is true that the state may have interests, it does not follow that we must give consideration to those interests. On occasions when protecting the interests of state officials will be a means to protecting the interests of the citizenry, then the interests of the state do count. Leslie Green, *The Authority of the State* (Oxford: Oxford University Press, 2008) 66.

Green's point has implications for Harel's argument because talk of severing the link between the state's judgment and the infliction of the sanction is really discussion about severing the link between the infliction of the sanction and the judgment of the citizenry. Therefore, in coming to a determination about whether the link is severed we are concerned with accountability to "the people." This point will be particularly important in chapter four. Harel does not explicitly define 'the state,' but at the end of his paper he does state that, "[I]nstituting privately inflicted sanctions would thus challenge fundamental assumptions about the legal system. Under these assumptions criminal sanctions ought to be grounded in societal judgments generated by social and political deliberation" (133). Therefore, by 'the state' he seems to have in mind a definition similar to Green's.

prohibitions, the punishments meted out must be grounded in those very prohibitions or reasons of the state, because punishment involves the infliction of suffering grounded in a particular reason, namely that a wrong has been perpetrated.⁵⁸ Privately-inflicted sanctions are founded on the private judgments of those who inflict them, because citizens cannot abdicate their responsibility for the infliction of suffering in the way that a state official can, according to Harel. These are not the kind of judgments that can justify the infliction of state-initiated sanctions. It follows that, if the infliction of the sanction is to rest on state reasons, it must be carried out by the state officials. But not all of this is perspicuous. Let's consider whether we can construct a clearer case for Harel's claim.

According to Harel, if law-abiding citizen A is asked by the state to inflict sanctions on convicted offenders including B it seems that A's decision to ostracize B could be based on three possible reasons: 1) A's judgment that ostracizing B is a way of fulfilling A's civic obligations. It could be based on 2) A's judgment that B committed an offence that deserves to be punished, and it could be based on 3) A's trust that the state made an accurate determination concerning the wrongfulness of B's behaviour and the appropriateness of the sanction.⁵⁹ Punishment involves the infliction of suffering grounded on a particular reason; that a wrong has been committed. In the first instance, there is no judgment on the part of A that B committed a wrong; therefore it cannot be properly classified as criminal punishment. In the second situation, the infliction of the sanction is grounded in the private judgment of A concerning the wrongfulness of B's

⁵⁸The idea that punishment is grounded in a reason is a common element of all definitions of punishment. See Lacey 4-12 and Hart 4-5.

⁵⁹ Harel 128.

action and the appropriateness of the sanction. As a result, the punishment is best understood as a private suffering, not grounded in the judgments of the state that what the criminal did was wrong. It is a central feature of criminal punishment that it expresses the resentment and condemnation of the people, as Feinberg claims. In the third instance, Harel claims that this kind of trust is not justified, despite the fact that the sanctions can be properly classified as criminal. He believes that the status of a citizen hired by the state and a state official differ in that a state official is required to perform his task irrespective of his private convictions. Since citizens hired by the state to inflict sanctions should not abdicate their moral responsibility, they must form judgments before inflicting sanctions and none of these judgments as we have seen can justify inflicting state-initiated sanctions. Therefore, privately inflicted sanctions are illegitimate according to Harel.

At this point, I want to focus on the idea that a citizen hired by the state to inflict sanctions should not abdicate his or her moral responsibility, but that it is justified for a state official to do so. It is true that a state official does accept a special obligation to serve the interests of his office, and as a result he accepts certain restrictions and limitations on what he may do. He takes on role-defined moral responsibilities that may deviate from his own personal moral responsibilities, and sometimes will be required to act in ways that are incompatible with principles and obligations that he accepts as part of his private morality. By contrast, it is impermissible on the part of a citizen, when not acting in an official capacity, to inflict sanctions without forming an independent judgment concerning the wrongfulness of the alleged wrongful act, according to Harel.

A moral agent understood as citizen is acting in the context of private morality wherein she has not sworn or consented to carrying out the functions of a public office. As a result, he or she ultimately maintains moral responsibility for his or her actions, and must form judgments as a morally responsible agent for her action to inflict suffering. But in the case of a state official, as Thomas Nagel puts the point, “[S]ometimes his responsibility is partly absorbed by the moral defects of the institution through which he acts...”⁶⁰ in a case where he or she inflicts an inappropriate sanction because the state has instructed her to do so. Harel must believe that it is justified for a state official to abdicate his or her moral responsibility in some circumstances, but not in all, because he probably has in mind a reasonably just criminal justice system. It is a controversial claim to make to say that an abdication of responsibility is justifiable even in these instances.⁶¹

So far I have discussed the plausibility of Harel’s claim that a citizen cannot abdicate his or her moral responsibility for the infliction of suffering. But he wants to make a further claim. Even a citizen who has entered into an agreement with the state to inflict criminal sanctions, i.e. has agreed to assume the role of state official, cannot trust

⁶⁰ Thomas Nagel, “Ruthlessness in Public Life,” Public and Private Morality, ed. Stuart Hampshire (London: Cambridge University Press, 1978) 90-1.

⁶¹ For an argument claiming otherwise see Kimberley Brownlee, “Responsibilities of Criminal Justice Officials,” Journal of Applied Philosophy 27.2(2010): 123-39. She argues that criminal justice officials maintain a duty to engage in first-order reasoning, because of the gap that exists between the dictates of one’s office and the special moral responsibilities of the moral roles that underpin that office, even in a reasonably just system. Criminal justice officials will be called upon to engage in morally problematic practices. The thesis underlying Brownlee’s view is that, “[N]o morally legitimate role makes it the general responsibility of the holder to forbear from engaging in first-order moral reasoning about demands made of her. Put more positively, moral roles make it the holder’s responsibility actively to engage in first-order moral reasoning.”(127) I will explain her argument in further detail later in chapter three.

in the state's judgments, but must engage in first-order moral reasoning before inflicting any suffering upon the wrongdoer. He states:

...a citizen cannot act on behalf of the state by entering into an agreement with the state to inflict sanctions that would absolve him from personal responsibility. It is only by becoming an official of the state that such an abdication of responsibility is justifiable... A citizen who is asked by the state to inflict sufferings on a criminal should not rely on the state's judgments when the consequences are so grave. The citizen is required in this situation to form a judgment concerning the appropriateness of the sanction she is to inflict. If she fails to do so and, if, as a result of her unquestioning conformity with the state's judgments, she inflicts an inappropriate sanction, she is accountable for her failure.⁶²

It is not at all obvious why a state official who is asked by the state to inflict sanctions can abdicate his or her responsibility, but a citizen carrying out the same role under the same authority cannot do the same. Moreover, to refer to the acceptance of the judgments of one's formal office as authoritative, as an abdication of responsibility is inaccurate. Rather, contracted agents and officials acting under the authority of the state ought to trust in the judgments of their formal offices in order to act in accordance with right reason. This does not entail a complete abdication of moral responsibility. I will say more about this point in chapter three.

According to Harel, when a judgment regarding the wrongfulness of the action and the appropriateness of the sanction has been formed by a private agent, it is impermissible on the part of the state to approve of the infliction of punishment, since such an approval gives undue weight to the private moral convictions of the individual who inflicts the sanction. It does so, because state-initiated sanctions are meant to reflect

⁶² Harel 129-30.

the judgments of the state as it is a part of its duty to govern, and to authorize the judgment of a private individual to ground such a sanction is to give a lot of weight to a private agent's moral convictions, when the weight ought to be given to the judgments of the people. He claims that,

[B]y privatizing the infliction of the sanction, the state effectively not merely transfers the "technical" power to execute the sanction; instead, it strips itself of the power to make binding determinations concerning the wrongfulness of the act and the appropriateness of the sanction. These determinations should instead be attributed to the individual who inflicts the sanction rather than to the state... [T]he individual who inflicts punishment on the basis of reasons he has acquired from the state acts on what she has come to believe and has judged to be a sufficient basis for action. The contribution to the genesis of his action made by the state's invitation to participate in the infliction of sanctions is, so to speak, superseded by the agent's own judgment. The suffering of the criminal is therefore a "private" suffering founded on a citizen's judgments concerning the wrongfulness of the act and the appropriateness of the sanction.⁶³

The idea that the state's invitation is superseded by the agent's own private judgment can be illustrated by the following analogy: A friend gives you the following advice, "you should steal Sarah's new shoes, they are really nice." In this case, your friend is providing you, a rational adult, with advice, and ultimately it is up to you to decide whether or not to steal the shoes, and then to follow through with the action. This situation shows an instance where an agent's judgment should be considered to supersede

⁶³ Harel 130-1. The idea that the state's invitation to participate in the infliction of the sanction is superseded by the agent's own judgment is borrowed from Thomas Scanlon in "A Theory of Freedom of Expression," *Philosophy and Public Affairs*, 1 (1972): 204-26. In this work, Scanlon admits that this can be proven false in the case of a subordinate in an organization (212). This is problematic for Harel's position, because he wishes to apply the same reasoning to the case of the state and a contracted citizen. Furthermore, to claim that a contracted agent's judgment grounds the infliction of criminal sanctions is to treat the orders of the state as advice, rather than authoritative. If the judgments of the state are to be considered as authoritative, then it is not accurate to think of the contracted agent's judgment as superseding the state's own.

that of another, even though the former has been invited by the latter to participate in the action. But let's consider another case. The law instructs prison guards to use 'a reasonable amount of force' when exerting control over prison inmates. This order is vague, and leaves room for the guard to exercise his discretion as to what is reasonable. However, the guard's actions do not entirely ground the infliction of that force. In Harel's terms, the state's invitation to inflict force and determine the appropriate amount of force to use is not superseded by the guard's own judgment about the inmate's wrongdoing and the appropriateness of the force. While the infliction of the force is founded, to a certain degree, on the guard's own judgment, if the state oversees the use of force extensively and provides some guidance as to what is considered to be reasonable, then the sanction ought to be considered as founded on the state's judgments also.

In general, we are happy to consider different government functions as residing in different individuals or groups. Different tasks of the state are carried out by different people; we have judges and legislators on the one hand and then prison guards and police officers on the other. While they are all part of different state institutions, they are all state institutions nonetheless. Why then, can we not classify private prisons in this way? As yet another institution of the state, whose function is carried out by a specific group of people. After all, a state police officer or a state prison guard is really just a citizen who has entered into an agreement with the state to inflict and enforce criminal sanctions. In both cases, a state official and a contracted agent should accept the judgments of the state as authoritative in carrying out his or her professional functions. It is their moral responsibility to accept the judgments of those who are better positioned to make such

decisions, but this does not mean that either a state official or contracted agent can abdicate his or her responsibility. It is his or her duty to continue to deliberate and ensure that the authority deserves his or her continued support.

c. Clarifying Remarks

The main claim of Harel's paper is that a principled argument can be made against privately inflicted sanctions, such that even if privately operated prisons were not motivated by profit, so that concerns such as mismanagement, abuse etc. could be overcome and the facilities could satisfy all political, legal, and other constraints they would still be considered illegitimate. For Harel, these institutions would still be considered illegitimate because under them private entities have a moral duty to make independent judgments concerning the wrongfulness of the action and the severity of the sanction. It follows that prison officers working in private prisons have a duty to make judgments regarding the wrongfulness of the action that landed a criminal in prison, and make judgments about the appropriateness of incarceration and the length of the sentence that he or she ought to serve. These are the private judgments of prison officers that cannot justify the infliction of state-initiated privately inflicted sanctions, according to Harel. Under such circumstances, the sanction will not reflect a judgment on the part of the state concerning the severity of the offence or the appropriateness of the sanction. Harel admits that the person inflicting the sanction could form an opinion that is identical to that of the state, but he says that this would still not transform the private infliction of

suffering into a state punishment.⁶⁴ If a private body forms the same judgment as the state, both incarcerations would reflect a judgment on the part of the people. Why would both not be considered as instances of state punishment?

Harel does not explain what features make someone a state official as opposed to a citizen that has an agreement with the state. He does admit that the distinction between the two is not easy to demarcate, but that the existence of the distinction is what explains the difference in their respective moral responsibilities. Harel claims that a state official "...is typically entitled or even required to perform this task irrespective of his private convictions concerning the appropriateness of the sanction..." whereas a private agent "...bears moral responsibility for what she does irrespective of whether she follows the state's sentencing guidelines."⁶⁵ There are two important distinctions, which I will consider in detail later in the paper; the distinction between an official and a private agent under contract with the government, and the distinction between an official and a citizen. In his argument, Harel conflates the two distinctions and treats them as one. More specifically, he treats a private agent under contract with the government as a regular citizen, which is problematic for his argument because it disguises the fact that he exaggerates the difference in the moral responsibilities of state officials and private agents under contract with the state to inflict criminal sanctions.

Related to Harel's lack of clarity as to who is a state official, is a lack of clarity with respect to the types of prison privatization outlined at the beginning of the paper,

⁶⁴ Harel 130.

⁶⁵ Harel 130.

and whether his argument would apply to prisons that are nominally privatized or only to those facilities that are operationally privatized. If a prison is only nominally privatized, then the private entity only owns the walls, but the prison guards and management are government agents, so the private firm cannot really be considered to be involved in the infliction of the sanction, but only in a trivial sense. Is this a case of a privately inflicted sanction or a state-inflicted sanction for Harel? Would he consider the government agents to be private agents because they are working in a facility that is owned by a private entity? Since Harel is unclear about the type of facility to which his argument will apply, I will focus on the case of operationally privatized prisons and explore how Harel's argument applies to them.

Another integral point to his argument is that private firms inflicting state-initiated sanctions have a duty to make specific judgments regarding the wrongfulness of a particular action that a criminal has committed and the severity of the sanction that ought to be inflicted, because they cannot abdicate moral responsibility. In the context of privately-operated prisons it follows that prison operators such as prison guards have a duty to form a judgment regarding the wrongfulness of the action that landed the offender in prison and the length of the sentence that he or she ought to serve. As a result, the link between the state's judgments and the infliction of the sanction is severed because these are the kinds of judgments that the courts ought to make. If agents working for private entities did not have a duty to make these specific kinds of judgments, then the link between the state and the infliction of punishment could possibly be maintained. For instance, if prison guards were understood as only being responsible for making

judgments about the wrongfulness of particular behaviors that occur in prison and what are suitable punishments or penalties for those actions, i.e. assaulting another inmate or stealing from him, then the state would still be responsible for issuing prohibitions and the judgments of prison guards would ground, what I would call 'the ancillary punishments' that go along with serving a prison term. Of course, these judgments would be made under the state's authority and guidance, so it would be inaccurate to claim that even the ancillary punishments are entirely grounded by the individual prison officer's judgments. This is an important point because as we will see in chapter three Harel seems to have ignored the division of labour, and corresponding ethical division of labour that exists in the criminal justice system.

In the next chapter I will critically assess Harel's argument and look closely at the distinction that he draws between a state official and a private agent under contract with the state in the context privately and state-operated prisons.

3. THE PLAUSIBILITY OF THE INTEGRATIONIST JUSTIFICATION

In the preceding chapter, I explained the details of Harel's integrationist justification. We saw that his argument relies on the distinction between the moral responsibilities of state officials who inflict criminal sanctions and citizens who enter into an agreement with the state to inflict criminal sanctions. In this chapter, I will focus on prisons and compare private prison officers, in particular the prison guards, with state prison guards, and I will show that their moral responsibilities are the same, given the similarity of the moral roles underpinning their offices and the structural and substantive similarity of those offices. It follows from Harel's arguments that a private prison guard and a state prison guard differ in principle because the former has a duty to make independent judgments concerning the wrongfulness of the act that landed a criminal in prison and the appropriateness of the sentence, whereas state officials are justified in trusting in the state's judgments in this respect. Yet, there is difficulty in demarcating the distinguishing features of these two types of prison guards that are morally relevant. As I will argue below, both agents have been delegated authority by the people, are subject to the same kinds of checks, have been granted the same powers and permissions, and have the same moral roles underpinning their formal offices. As a result, the label of one as a private agent and the other as a state official seems quite arbitrary, and to want to base the moral responsibilities of these agents on the basis of this distinction in the way that Harel does is groundless. Before getting into the specifics of the offices of prison guards, I will expand upon a point mentioned in chapter two: Harel's treatment of an agent under contract with the state is like that of a citizen.

a. The State Official, the Agent under Contract with the State, and the Vigilante.

A state official's position is to work on behalf of the state, which in order to be legitimately authoritative, must act in accordance with the interests of its citizenry. An official's formal office may require that he act in ways that conflict with his own private morality, because he has sworn, consented or committed himself to doing so and voluntarily did so by making the choice to apply and accept work for that particular office. A state official takes on a public role to which is attached specific, role related responsibilities, whereas a citizen who does not hold office is different in that they are not under the same kinds of limitations, restrictions and obligations as a state official and are open to the demands of private morality. An individual in her capacity as citizen has no office that she has committed herself to, the judgments of which she accepts as authoritative, that she can trust to figure out what she ought to do. As a result, she must engage in first-order reasoning before carrying out particular actions, because she is her own authority as to what is the morally right course of action and is ultimately responsible for her actions.

In contrast with a state official, a citizen that has an agreement with the state to inflict criminal sanctions has a different status than a citizen who inflicts criminal sanctions without such an agreement, but Harel appears to conflate the two. He claims that citizens who have an agreement with the state to inflict criminal sanctions cannot rely on the state's judgments, they must form a judgment with each infliction of punishment and they are accountable for the inappropriate infliction of sanctions. It

follows from his account that prison guards working in private prisons are in effect morally equivalent to vigilantes (i.e. individuals who take it upon themselves to punish wrongdoers without the state's approval to do so). But this can't be right. A vigilante is not a part of the state chain of command, where public acts are diffused over many different actors and sub-institutions, such as police, judges, etc., nor has she accepted any obligations, restrictions or limitations from the state and so she cannot rely on other institutions to accept any kind of responsibility for her actions. Yet, private prison guards are acting under the authority of the state, as in the case of agents working in state-operated prisons. They have both been granted the same powers, permissions, and are subject to the same checks by the same authorities. In principle, they are both a part of the same chain of command.⁶⁶ Yet, according to Harel, if the state wrongfully convicts a man of murder and sentences him to life in prison the private prison guards that are considered to be a part of the infliction of the sentence are morally responsible for this inappropriate infliction of incarceration. Not only does this treat the private prison guard as morally equivalent to a vigilante, but it also ignores the division of labour at work in the criminal justice system where it is the responsibility of a judge to make determinations about the wrongfulness of the act committed by a criminal and the length of time that he or she ought to serve for his or her crimes. It is not the job of just any agent inflicting sanctions, such as a private prison guard or a state prison guard to make

⁶⁶Empirical studies may be thought to cast doubt on whether individuals working in private prisons are, in actual fact, part of the same chain of command given the fact that corporations are profit-driven, which leads them to cut corners in ways that public prisons do not. This fact will not help Harel's case, because he claims that he is making a principled argument against privately inflicted sanctions that would hold true even if the pragmatic concerns associated with private prisons could be overcome.

these kinds of determinations. But Harel does seem to want to say this, because he claims that privatizing the infliction of the sanction strips the state of these determinations.

Before going any further, it is important to keep in mind that the public/private distinction is not a dichotomous one. It is best to think of the public/private divide in terms of a continuum in the context of prisons. For example, publicly operated prisons routinely obtain such fundamental services as buildings, food, clothing medical care, inmate transportation, and rehabilitative services on contract from the private sector.⁶⁷ This fact may cast some doubt on the notion of a purely privately inflicted sanction versus a purely state-inflicted sanction that Harel uses in his paper. In order to get around this problem, he must spend time outlining who ought to be considered as participating in the 'infliction of the sanction,' which will require defining the boundaries of a sanction. More specifically, does Harel want to claim that rehabilitative and transportation services are a part of the sanction in the case of incarceration? If so, then in the case of a state-operated prison that receives these services from a private entity, the sanction cannot be considered to be purely state-inflicted despite the fact that we are not dealing with a privately-run for profit prison. On the other hand, if the sanction in the case of imprisonment were defined as the actual direct act of enforcing the incarceration, this would exclude, in the context of a state-operated prison, private entities that provide various services and it would be possible to consider the sanction to be state-inflicted. If

⁶⁷ Michael O'Hare, Robert Leone and Marc Zegans, "The Privatization of Imprisonment: A Managerial Perspective," *Private Prisons and the Public Interest*, ed. Douglas C. McDonald (London: Rutgers University Press, 1990) 108. Also see Dolovich, "State Punishment and Private Prisons," 507 and Freeman 186.

we construe more broadly what is encompassed by the sanction then the distinction between publicly versus privately-inflicted sanctions becomes quite muddy, because any infliction of criminal sanctions will include a mix of services provided by both private agents and agents of the state. With these clarificatory remarks in mind it is time to consider the similarities in the formal offices of prison guards in private and state-operated facilities.

b. A Delegation of Authority from “the people”

Both state and private prison guards have been delegated the authority of “the people” to express the community’s disapproval for the criminal actions committed as expressed by law. In both cases, it is the taxpayer’s money being put toward the prison services. The difference lies in the chain leading to the actions of state prison guards compared to private prison guards. The reality, though, is that both have been delegated authority by the people and neither has been directly delegated that authority by the people. In the case of state prison guards the chain of delegated authority by the people runs as follows: the people, to the government, then the prison management, to the prison guards who are considered to be directly employed by the government. In the case of prison guards working for a private firm the chain of delegation runs something like the following: the people, to the government, to the corporate body, to the prison management employed by that company, and then the prison guards. Despite these differences in the chain leading up to the actions, each has a line of authorization beginning with the people, and it is the duty of the prison staff in both cases to further the community’s disapproval of certain actions by incarcerating criminals for those particular

acts. The community itself does not undertake the task of incarceration; rather, it is individuals who have been delegated the authority of the people to carry out the wishes of the people.

Related to this point is an argument that John DiIulio Jr. makes against the private management of prisons and jails. He argues that the authority to govern those behind bars must remain in the hands of government authorities, because delegating such a responsibility is the denial of the community's reality and moral integrity. The message "those who abuse liberty shall live without it" ought to be conveyed by the community through its public agents to the incarcerated individual.⁶⁸ His argument relies on the idea that having private agents inflict correctional sanctions will weaken the sense of moral community. Yet, why ought the message to be conveyed by public agents, when the same message can be expressed by private agents? If the character of the actions is the same despite whether it is a public or private agent carrying out the action, why should it matter if the individuals are clothed in state uniforms? DiIulio puts the critics' point quite nicely, "[S]ince the authority wielded by public administrators is delegated to them by "the people" by what funny metaphysic does the extension of that authority "one more step" to private firms constitute any moral (or constitutional) problem whatsoever?"⁶⁹ They make a strong case because in either situation the coercion exercised in the name of the offended public that has delegated to them the authority to do so, whether it is state agents or contracted agents inflicting the incarceration.

⁶⁸ DiIulio 173-4.

⁶⁹ DiIulio 173.

Some have argued that the administrative chain of command leading up to the actions of state and private prison guards is not the same in both cases, for reasons having to do with the profit motives of private facilities and the rigidity of contracts governing those facilities. The worry is that absent effective checks profit-seeking firms will cut corners in ways that will affect the inmates adversely, for example cutting back on food or inmate security. It can be difficult to put into contractual terms some of the tasks that prison officers must carry out which allows private firms the opportunity to cut corners, and as a result, they cannot be said to be acting in the name of the offended public. In response to these kinds of arguments I will say two things. The first is that these arguments are based on pragmatic concerns, having to do with private prisons cutting corners in order to make a profit if the government does not keep a careful eye on them. The second point is that if the character of an entity is profit-driven this does not in principle tell us about the way that it is going to act, and Harel wishes to make a principled argument against these kinds of institutions. As we will see, the state expects that the actions of their own facilities and the private facilities that they have contracted with will be carried out on behalf of the community. The fact that a prison is profit-driven does not necessarily make any morally significant difference, because the actions they are undertaking are much the same as state-run prisons despite their differing motives, as we will see in detail in the next section.

c. Checks and Powers

A second possible way that one might consider distinguishing private and state prison guards from one another is based on the structure of their formal offices. But they

are very much alike based on my findings of how the system works in most jurisdictions in the United States. Both private as well as state prison guards are subject to the same kinds of checks: courts, accreditation and monitoring,⁷⁰ and they have discretionary power over the day-to-day experiences of inmates. Prison administrators and guards working in private as well as state-operated prisons exercise discretion over prisoners' daily lives: health care, recreation, cell conditions, work assignments, visitation and parole. They make recommendations to parole boards in jurisdictions that have parole and indeterminate sentencing.⁷¹ This does not mean that prison officers can act arbitrarily. Their discretion is subject to guidelines laid out by the ACA or statute; rather it is best to think of the details regarding these particulars as not completely determined by the state. Therefore, penal officers are required to make decisions without complete and full guidance by the state and have to use their discretion.

For the most part, the courts apply the same substantive and procedural legal standards to private as well as state prison officers in the U.S.⁷² The eighth amendment

⁷⁰ Dolovich "State Punishment and Private Prisons," 508-510. According to Dolovich, private prisons are subjected to one extra kind of check, which she refers to as competition and the threat of replacement. The state, on the other hand, has a monopoly over prison administration and there is no chance that the system will be taken over by an alternate provider (509).

⁷¹Dolovich, "State Punishment and Private Prisons," 518.

⁷²With the exception of a determination made in the U.S. Supreme Court case of *Richardson v. McKnight*, where it was held that private prison inmates filing Section 1983 (the codification of the civil rights act of 1871) actions need not overcome prison officials' claims of qualified immunity. Qualified immunity allows state guards to escape liability on the grounds that the right they violated was not "clearly established" at the time of the violation. According to Dolovich, there is little reason to think that this will make much of a difference for private prison inmates, because it is only advantageous in the event that a right has not been "clearly established." This would mean that judges would have to be willing to add to the list of prisoner's rights that are already recognized and they are unlikely to do this when we look at the attitudes of judges in recent decades (487).

prohibits the infliction of cruel and unusual punishment. Inmates can file lawsuits against prison guards who use excessive force; inmates can file lawsuits against those operating the prison if they are subjected to inadequate medical care for example. For an inmate to have a viable Eighth Amendment claim against a prison official for use of excessive force, he or she must show that the prison official acted "maliciously and sadistically," with the intention to cause harm. So long as the prison official can make a showing that "the use of force could plausibly have been thought necessary," the prisoner's claim will fail.⁷³ Judicial attitudes toward challenges to prison conditions have been marked by considerable deference to the judgment of prison officials. As a consequence, the constitutional rights of inmates have been interpreted extremely narrowly, not because courts regularly show deference to the individual prison officials against whom the suit is brought, but in the crafting of applicable constitutional standards, they defer to the position and expertise of prison officials in general. The view of the courts has been that since prison officers are the ones who make difficult judgments concerning institutional operations, this kind of standard is a necessity.⁷⁴ For this reason, even instances of serious physical harm to inmates may not qualify for legal relief. Both the inmates in privately-operated and state-operated prisons must exhaust all administrative remedies

⁷³Dolovich "State Punishment and Private Prisons," 482-3. See *Hudson v. McMillian* 1992, U.S. Supreme Court.

⁷⁴ Dolovich "State Punishment and Private Prisons," 488.

before filing actions in the courts, required by the Prison Litigation Reform Act of 1995 (PLRA).⁷⁵

The second type of check is accreditation. Prison operators have standards laid out by the American Correctional Association that must be met, and the same standards apply equally to both private and state prisons. The ACA has standards for security and control, food service, sanitation and hygiene, medical and health care, inmate rights, work programs, educational programs, recreational activities, library services, records and personnel issues.⁷⁶ These standards can be quite detailed: for instance, the ACA specifies the number of meals that must be served, the caloric intake, time between meals and details regarding the preparation and keeping of food.⁷⁷ As I will discuss in further detail and have mentioned earlier in the paper, the ACA is a nongovernmental professional group that state and federal governments contract with to deliver accreditation services for publicly and privately-operated prisons, and they also conduct personnel training.

Third, individuals are hired by government agencies as auditors, whose job it is to monitor private and state-operated prisons. The monitoring systems for each type of facility are structured differently. Monitoring schemes are provided by way of contract for private prisons and for state-run facilities they are provided for by statute or administrative regulation. These schemes are inadequate in both cases, which I will say

⁷⁵ Dolovich "State Punishment and Private Prisons," 485.

⁷⁶Freeman 205.

⁷⁷ Dolovich "State Punishment and Private Prisons," 478.

more about in chapter four. Concerns have been raised by those who oppose the existence of private prisons having to do with what are referred to as ‘technocratic concerns’: worries pertaining to the vagueness of contracts, which may impede meaningful oversight of these facilities.⁷⁸ In particular, in the context of private prisons it is difficult to stipulate in contractual terms inmate classification, the use of force, the provision of health care, discipline and inmate safety, making it difficult to police and demonstrate contractor abuses. Yet, state-operated prisons are no different in this respect because statute and administrative regulations act only as a skeletal outline, and it is left up to the prison guards to make determinations in these particular areas.

Prison guards working in state prisons and private prisons are subject to the same kinds of checks, have the same discretionary powers and permissions, and have both been delegated authority by the people, which makes the application of the label ‘state official’ on one prison guard and ‘private agent’ on another misleading. In order to see the point more clearly, consider the analogous case of justification defenses such as self-defense and citizen’s arrest. Malcolm Thorburn argues that the best way to conceive of ordinary citizens in this context is as state officials *pro tempore* of necessity.⁷⁹ Under these circumstances, ordinary citizens exercise state powers. They are also bounded by similar normative constraints when it comes to determining what conduct is justified under similar circumstances for an official, so it is best to conceive of them in this way. Likewise, it makes good sense to conceive of a private prison guard as a state official *pro*

⁷⁸Freeman 172.

⁷⁹ Malcolm Thorburn, “Justification, Powers and Authority,” *Yale Law Journal* 117.6 (2009): 1070-1130.

tempore, because he or she has been granted the same powers and permissions, and is subject to the same limitations when it comes to determining what behavior is justified as prison guards working in state facilities. Now that we have examined the similarities in the formal offices of state and private prison guards, we can move on to consider their moral responsibilities and consider the plausibility of Harel's claim that they differ for each type of agent.

d. The Moral Responsibilities of State and Private Prison Guards and Moral Agents in General.

According to Harel, an abdication of moral responsibility is sometimes justified with respect to state officials such as judges, prison guards, or even executioners, but citizens that have an agreement with the state to inflict sanctions are different in that they cannot abdicate their responsibility for the infliction of suffering.⁸⁰ In this section of the chapter, I argue that this view is not a plausible one to hold. First, it is not accurate to conceive of state officials such as prison guards as abdicating their moral responsibility when performing tasks under the authority of their offices. Instead, it is best to conceive of them as honouring their moral duties as moral agents. As moral agents with human limitations the reasonable and rational thing to do is to accept the judgments of those who are better situated to make them: legitimate authorities. Joseph Raz refers to a legitimate authority as one who will satisfy his *Service Conception*:

[T]he normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply

⁸⁰ Harel 129.

to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, than if he tries to follow the reasons which apply to him directly.⁸¹

In submitting to the judgments of a legitimate authority, an agent is more likely to act in accordance with the reasons, which apply to him or her directly. It is important as moral agents to recognize our responsibility to ensure that the acceptance of the demands of his or her formal office as authoritative is justified; it is not a matter of blind obedience.

A moral agent fulfilling the role of prison guard ought to accept and follow the judgments of his formal office, because these are the judgments of persons better situated to make judgments about how best to honour the moral roles underpinning his office, such as that of protector and rehabilitator, which I will say more about shortly. In following those judgments one is more likely to act in accordance with the right reasons that apply to him in his role as a prison guard; this is the reasonable and rational thing to do given his human limitations. At the same time, both private and state prison guards ought to continue to deliberate and ensure that they are following the demands of a justified authority. For instance, if it is a known fact that the courts are making it a regular habit to command the incarceration of people for extended periods of time for petty crimes as a part of the state's initiative to get more prisoners for the purposes of cheap labor in prison, guards have a responsibility to resist or refuse to act in accordance with the demands of their formal offices, because the demands of those offices are at odds with their moral roles. Judges, prison guards, and executioners must be aware of the

⁸¹ Joseph Raz, "Authority and Justification," *Authority*, ed. Joseph Raz (New York: New York University Press, 1990) 129.

limits to their role-defined moral duties and when those limits are being transgressed, just as they are when in the case of a soldier who is asked to carry out an unjust war, he or she is required to refuse or resist carrying out the action.⁸² The duty of state officials of non-adherence to offices transgressing role-defined duties is recognized by international norms. During the trials following the Second World War, Nazis were put on trial in Nuremberg for war crimes and they used the defense that they were just following orders. The International Military Tribunal which oversaw the proceedings rejected this defense, and argued that the soldiers had a duty to disobey those norms, which violate international law.⁸³

Kimberley Brownlee, who discusses the moral responsibilities of criminal justice officials, argues that

...moral roles make it the holder's responsibility actively to engage in first-order moral reasoning...[A]t all times, officials must reflect upon the moral merits of the demands of their offices and the moral merits of the nature and parameters of any formal discretion they are granted. The police officer must reflect on the merits of the call to use certain interrogation techniques; the prison guard and parole officer must reflect on the merits of the order to incarcerate a given person...⁸⁴

According to Brownlee, criminal justice officials must treat the demands of their formal offices as advice, because "...even in a reasonably just system, both the generalizing and rigidifying nature of formal institutions and the contingencies of practical operations

⁸² Nagel 90. Also see Brownlee for an outline of the various ways that an official might not adhere to her office when it makes demands on her that are at odds with his or her special moral responsibilities (133-5).

⁸³ This is referred to as the 'Nuremberg Defense' in the literature. Hitomi Takemura, "Disobeying Manifestly Illegal Orders, *Peace Review* 18.4 (2006): 537.

⁸⁴ Brownlee 127-8.

create a conceptual gap between the dictates of a formal office and the special moral responsibilities of the moral roles that underpin that office.”⁸⁵ It follows from Brownlee’s account that the prison guard ought to reflect on each demand made upon him or her while in office as they are reasons to be weighed and reflected upon, to be treated in the same way that one would treat the advice of a friend. Conceptually, this is a problematic view to hold because the rules of employment are viewed as advice for those undertaking positions in those offices to take into consideration. For the sake of conceptual clarity, it is better to conceive of the demands of formal offices as reasons for action for officeholders. Yet, all officeholders must continue to be aware of the fact that authorities can make mistakes and blind obedience to an authority is not the appropriate attitude to have in these circumstances. Of course, to require that an officeholder engage in first-order reasoning with respect to each of the demands made on him would be far too demanding, given that we have human limitations and determining role-defined responsibilities is complex, because they take a broad range of considerations into account. Rather, an officeholder is required to maintain an awareness of the fact that authorities can make mistakes or may not always be looking out for their best interests, so as to be aware and notice if clearly immoral demands are being placed upon him or her.

Not only do both state and private prison guards have a duty to not abdicate moral responsibility while carrying out the tasks of their formal offices, but also the content of their respective moral responsibilities are much the same. In order to argue this point I will rely heavily on Brownlee’s work. She asserts that,

⁸⁵ Brownlee 126.

[I]n a reasonably just criminal justice system, the principal offices that comprise that system are structured so as to embody as well as possible within its particular institutional framework and legal tradition the various moral roles that are necessary for both the reasonable prevention of serious wrongdoing and a justifiable response to such wrongdoing... [T]here is a plurality of ways in which a society may endeavor to realize such important roles through the creation of certain professional offices in a formalized web of interlocking expectations. Given the plurality of legitimate ways in which a system may be structured, the chosen structure of a particular system will shape to some extent the special moral responsibilities of its officeholders.⁸⁶

The institutions of a reasonably just criminal justice system are founded on moral roles such as protector, advocator, educator, healer, etc. When we consider prison guards, whether employed by the state or by a private entity, the same moral roles underpin their formal offices including that of protector and rehabilitator.⁸⁷ Because there is a wide array of possibilities as to how society can realize these important moral roles, the rules of his employment will to a great degree shape the prison guard's special moral responsibilities to honour those moral roles. As we saw earlier in the chapter, the formal offices of private and state prison guards are structured in much the same way in terms of the powers and permissions that they are granted, and the checks to which they are subjected. As a result, the special moral responsibilities of the prison guard, whether state or private, are going to be the same, according to Brownlee's account, because the moral responsibilities are heavily fleshed out by the formal offices of prison guards.

⁸⁶ Brownlee 126.

⁸⁷ I am using Brownlee's terminology here when I use the term, "office." It is to refer to an official position, post or employment that is governed by formal rules that may or may not be morally defensible (126).

Furthermore, the formal offices of prison guards will also set the limits of their special moral responsibilities to honour those roles.

In the criminal justice system, there are judges, police officers, lawyers, jurors, who all play different roles. For instance, one of the moral roles underlying the office of a police officer is that of protector, yet the offices of prison guards are also based upon the moral role of protector, because there is a division of labour that is central to the criminal justice system, where there are different roles to undertake different tasks. In order for the prison guard to honour the moral role of protector underpinning his office, he need not arrest people, whereas a police officer ought to. The formal offices of prison guards, as with all officeholders in general, shape the limits of their special moral responsibilities. In his argument, Harel appears to have ignored this fact, because to demand that a judgment be made with respect to every pre-authorized action (for example, whether Smith should be incarcerated) would be impractical and morally too demanding for a prison guard. More specifically, to require that a prison guard under contract with the government make the kind of judgments that Harel is claiming that he or she should, regarding the wrongfulness of a particular action committed by a criminal that landed an offender in prison or the severity of his or her punishment, ignores the institutional division of labour and corresponding ethical division of labour that is integral to the criminal justice system. It is the responsibility of the judge, who has all of the facts of the case before him as well as a vast knowledge of the law to determine the wrongfulness of a criminal's behaviour and the corresponding length of the sentence that he or she ought to serve for his or her crime. As Thomas Nagel points out, "[B]ecause

public agency is itself complex and divided; there is a corresponding ethical division of labour, or ethical specialization. Different aspects of public morality are in the hands of different officials.”⁸⁸ For instance, it is the moral responsibility of the judge to make decisions regarding the wrongfulness of the actions committed by criminals and the appropriate way to go about punishing them, whereas it is the moral responsibility of the prison guard to make some sort of a judgment regarding the appropriate force to use to detain an inmate, or to decide when to suspend work privileges.

Prison guards, whether they are working for a private or a public entity, wield some discretionary power when it comes to the day-to-day lives of the inmates. With this power comes the moral duty to use their authority to make discretionary judgments that are in the best interests of their subjects. As Raz claims, “[A]ll authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives and which bear on the circumstances covered by the directives.”⁸⁹ A kind of discretionary judgment that a prison guard may have to make would be regarding work assignments or the decision to put an inmate in solitary confinement. These are the kinds of specific judgments that a prison guard can make, because they correspond to his or her ethical specialization, based on the corresponding division of labour of the system.

The moral responsibilities outlined thus far are those which are relevant to the office of prison workers and moral agents in general. There are those moral responsibilities that are distinct from the public roles that we serve, that apply to us

⁸⁸ Nagel 85.

⁸⁹ Raz 122.

personally, which include responsibilities to our friends, family, personal commitments. Sometimes the special moral responsibilities that an individual takes on when serving in a public office will conflict with his or her own "private morality." This possible incompatibility can be understood if we consider the distinction that Nagel draws between public and private morality. He claims that some of the agent-centered restrictions on means will be much weaker on public action, allowing for the employment of more manipulative or coercive methods. Public actions also have to be much more impartial than private ones; there is no comparable right of self-indulgence as there tends to be in the case of private morality, such as the favoritism one tends to have for his or her family and friends. As a result of weakened agent -centered restrictions on means, public decisions tend to be a lot more consequentialist in nature.⁹⁰ Personal moral responsibilities and special moral responsibilities that one takes on are distinct from one another, although they may overlap or they may conflict with one another. As Brownlee states,

[W]hen a person comes to hold a given moral role this affects her moral responsibilities in significant ways. Some reasons now apply to her that did not apply to her before. And, some reasons that may have applied to her before as ordinary reasons now apply as categorical mandatory reasons (duties). And some reasons that may have applied to her categorically now apply either only as ordinary reasons or not at all.⁹¹

Personal moral responsibilities vary from individual to individual depending on their environments, personal relationships, etc., regardless of whether or not two people hold the same formal offices.

⁹⁰ Nagel 82-4.

⁹¹ Brownlee 125.

We have seen two three points in this chapter: 1) Harel treats a citizen inflicting criminal sanctions as interchangeable with individuals who have an agreement with the state to do so, and this is problematic for his argument because he ends up exaggerating the distinction between the latter and state officials; 2) based on the similarities of the formal offices of both private and state correctional officials outlined in this chapter, there is no ground to draw a distinction between state officials and private agents and their respective moral responsibilities in the context of prison guards; 3) it is inaccurate and problematic to claim that state officials are justified in abdicating moral responsibility.

Contrary to Harel's arguments, it follows from the conclusions drawn above that the practice of privatizing prisons is no more likely to sever the link between the state's judgments and the infliction of the sanction than retaining the state-run prison system, since there is no difference in their moral responsibilities. The distinction between a state official and a contracted agent inflicting criminal sanctions is not the relevant distinction for coming to a determination about when the link between the state's judgments and the infliction of the sanction, in this case incarceration, is severed such that the state cannot be said to be issuing prohibitions. In the next chapter, I explore what the relevant features are for coming to this kind of determination and I argue that whether this link is severed will depend upon features that have to do with whether it is the state's judgment that can be said to ground the infliction of incarceration. This is not necessarily connected to whether it is a state official or an agent working for a private firm inflicting the incarceration.

4. CRIMINAL SANCTIONS AND THE STATE'S JUDGMENT

As mentioned earlier in this paper, I made the decision to focus on Harel's Integrationist justification in the context of private prisons because it is the most detailed application of a justification of punishment to the private infliction of criminal sanctions. In chapter three we found that drawing a distinction between the moral responsibilities of state officials or of private agents hired by the government to inflict criminal sanctions is arbitrary and, as a result, does not help Harel's argument. If it were the case that the link between the state's judgments and the infliction of the incarceration were severed when privately inflicted, then it would also be severed in the case of state officials inflicting incarceration, since their moral responsibilities are much the same. This is problematic because if the link were severed even in the case of state officials, under what circumstances it would be possible to say that the state is issuing prohibitions? It appears that this would not be a possibility, yet this is central to the idea of a legal system and according to Harel it is required for the sake of just governance.

In this chapter, I will attempt to re-consider the integrationist justification as it relates to privately-operated prisons with a focus on whether the infliction of the incarceration can be said to express the judgments of the state, which are those of the citizens via state actors.⁹² The application of rules and procedures set out by statute, government contracts, regulatory bodies, monitoring schemes set up by governments and court decisions regarding the infliction of criminal sanctions are all attempts to protect and regulate the interests of the people. If the infliction of punishment is in accordance

⁹² I want to distinguish between 'state actors' and 'state officials.' The former works for the state and so does the latter, but his or her working relationship with the state is not mediated by a private firm.

with these standards, it can be considered to be founded on the judgments of the state. The 'state' is a theoretically useful concept, but it is not a "thing," it is a system of rules and procedures operated by individuals who must act to protect the interests of its citizenry.⁹³ By delineating the judgment of the state in the context of punishment as that of the people, insofar as it is expressed by certain rules and procedures, I am able to intelligibly discuss when the link between the state's judgments and the infliction of a criminal sanction is threatened.

It follows then that, in contrast with Harel's belief, state officials need not be the ones to inflict the sanction, because whether it is a state official or a contracted agent acting as a prison guard, the character of the actions performed can be the same in either case. This leads us to some deep questions about how you go from the idea that the community is entitled to express its condemnation for the acts of criminals by way of rules and procedures, to the fact that particular individuals are empowered to act in such a way to express that condemnation. The relevant issue is how someone acts on behalf of another in carrying out the action, so in the case of criminal sanctions, we are interested in the conditions under which an agent can be considered to be acting on behalf of the state. Let's keep with the idea that the infliction of criminal sanctions ought to be grounded in the state's judgments because it is required for the sake of just governance, as Harel claims. But let's add this further important point: to be grounded in the state's judgments is to be grounded in the judgments of the people insofar as they are expressed

⁹³ Green 66.

by rules and procedures as laid out by statute, regulatory bodies, the courts, government monitoring schemes, and the like.

Dolovich has argued that those who take an explicitly normative approach to the issue of prison privatization, like Harel, are guilty of treating public prisons as an unproblematic baseline for prison conditions, because they claim that incarceration is inherently a public function.⁹⁴ I avoid this criticism by making the relevant issue about whether the state's judgments, as expressed by means of statute, regulatory bodies, government monitoring schemes, and court decisions, are expressed in the infliction of the sanction, rather than whether the person inflicting the sanction is considered to be a state official. This allows for the possibility that state officials may sever the link, because being a state official does not necessarily mean that he or she will act on behalf of the people, in accordance with the rules and procedures set out by the institutions and mechanisms mentioned. Furthermore, it is important to add that I accept incarceration as a legitimate way to punish criminals. I think it is beyond the scope of an argument regarding the legitimacy of prison privatization to require an answer to the question of whether incarceration is a legitimate form of punishment.⁹⁵ The question that I am interested in answering in this paper is, on the assumption that prisons exist and constitute a morally legitimate institution, is privatizing these facilities a legitimate practice?

⁹⁴ Dolovich "state Punishment and Private Prisons," 443.

⁹⁵ For an argument claiming otherwise see Dolovich, "State Punishment and Private Prisons," 441-2.

Harel's argument is appealing because it is premised on some claims that we ought to accept as uncontroversial; for instance, that the infliction of criminal sanctions ought to be a reflection of the state's judgments is a commonly held belief. Also, there is his appealing initial claim namely, that the most fundamental task of the state is governing justly. Just governance requires the guidance of behaviour, and that the issuing of prohibitions is necessary for such guidance and violating those prohibitions should give rise to sanctions.⁹⁶ The issuing of prohibitions and the infliction of sanctions are intimately connected as Harel claims. For these reasons, my goal for the remainder of this chapter is to outline what features are relevant to claiming that the infliction of a sanction is grounded in the state's judgments, and to consider these features in the context of private and state-operated prisons. I will begin by exploring an analogous case. The case I have in mind is one that Harel refers to: that of the parent-child relationship. This is a good testing ground for the state-offender relationship, because in both cases we are dealing with agents who are thought to have the right and duty to discipline and punish, and we are very familiar with the parent-child relationship.

a. Justified and Unjustified Parentally-Inflicted Sanctions

Harel explores the integrationist justification when it comes to parentally inflicted sanctions and admits that his goal is not to establish conclusively the soundness of a parent-centered justification. Instead, he is interested in investigating the structure of such an argument in order to build an analogous one in the political context. He argues

⁹⁶ Harel 127.

that parental duties and powers cannot be understood in isolation from one another. He claims that

...the powers exercised in punishing a child are affected by and in turn reflect on other parental duties, and vice versa. The sentiments, convictions and judgments acquired in the course of inflicting sanctions are conducive to the fulfillment of other parental duties, and the sentiments, convictions and judgments acquired in the course of fulfilling other parental duties are conducive to the rightful infliction of sanctions. It seems, for example, that punishment of children inculcates in parents an awareness that the children's well-being is not to be equated with their immediate short term pleasures."⁹⁷

According to Harel, such an inculcation of knowledge is an essential part of parenthood. It is also this very duty of a parent to know what her child's well-being consists in that makes her best situated to justly punish him or her for wrongdoing. At this point, I would like to point out that even if parental duties and powers come in a package in the way that Harel explains them, it does not necessarily show that the parent ought to be the one to inflict the punishment on his or her child, because the judgments and sentiments of the parent can still be applied in the infliction of the punishment, even if the parent is not the one to inflict it (as we will see shortly). It is going to be a matter of whether the infliction of the punishment expresses the judgments of the parent, not a matter of who is inflicting the punishment. A parent is aware that her child's well-being does not consist in short term pleasures in just issuing the punishment; she need not be the one to inflict it in order for us to say that this kind of awareness is present.

Similar to the case of parenthood and the punishment of children, Harel argues that the power to inflict criminal sanctions is fundamental to statehood because it is

⁹⁷ Harel 124.

intimately connected to the state's duty to issue prohibitions, which is required for the sake of just governance. Furthermore, the state ought to play a fundamental role in justifying the infliction of these sanctions, as the agent in charge of inflicting these sanctions. The state's duty to provide for the guidance of behavior by constraints dictated by justice makes it best situated to justly punish criminals.

I argue that only in cases where a non-parental agent does not have the appropriate authorization to inflict the punishment, or is making determinations regarding the appropriate sanction without the appropriate oversight and/or guidance from the parent, can there be said to be a severing of the link between the parent's duties and powers, such that the individual inflicting the punishment cannot be said to be acting on behalf of the parent. Below, I outline four different cases where the individual inflicting the sanction is a non-parental agent, and I argue that only in some cases, not all, can we say the lack of power to inflict punishment weakens the parent's ability to appreciate what their child's well-being consists in and leads to a severing of the link.

Alice, Dennis and Mrs. Wilson

Thirteen year old Dennis stole his sister Sally's doll and hid it in his room under his bed. Sally searched the house crying out for her doll. The children's mother, Alice, discovers that Dennis hid Sally's doll and decides that he deserves to be punished for what he did. Alice believes that the well-being of the children is promoted, in part, by immediately punishing them when they misbehave, because she believes that this will ensure that the children understand exactly what it is that they are being punished for, as having this knowledge is important for the sake of their well-being. But now let's

suppose that Alice has to take Sally to her ballet lessons after having discovered what Dennis did. Here are four different cases outlining the details of Dennis' punishment:⁹⁸

Case 1: Alice has decided that the best way to punish Dennis is to make him sweep the main floor of the house, but since she has to take Sally to her ballet lesson, she is going to have the next door neighbor Mrs. Wilson babysit Dennis. Alice drops him off at the neighbor's place and says, "Can you please have Dennis sweep the main floors of your home?" and explains to the neighbor why he ought to be punished. Mrs. Wilson hands Dennis a broom and supervises, while he sweeps the floor. Alice tells the neighbor that if he is not cooperative, she ought to make sure that he does not watch any TV. It is plausible to think that this behavior on the part of the mother is perfectly consistent with her parental role-defined responsibilities, so long as she monitors the neighbour's behaviour in some way in order to ensure that Mrs. Wilson does act on her behalf especially given that the neighbor is punishing Dennis in the privacy of her own home, for it is much easier to abuse authority when it is being exercised privately without adequate supervision. I will say more about supervision later in the chapter.

Case 2: In this case, I will alter the details a little bit. Alice drops off Dennis and Sally at Mrs. Wilson's place to babysit. While there, Dennis steals his sister Sally's doll. Mrs. Wilson knows how Alice would normally punish Dennis if she knew about what he had done, because she has been over at Alice's place on numerous occasions when Dennis has taken something from his sister and usually has Dennis sweep the main floors of the house on such occasions. Mrs. Wilson decides to inflict the punishment herself.

⁹⁸ I am grateful to Wil Waluchow for his assistance in developing these cases.

Intuitively, it appears that the neighbor has overstepped her boundaries, despite the fact that she chooses to punish the child in the same way that Alice would.

Case 3: Alice knows that Dennis stole Sally's doll and tells Mrs. Wilson to punish Dennis, and explains to the neighbor why he ought to be punished. Alice is in a hurry to take Sally to ballet lessons and does not tell the neighbor the appropriate punishment for Dennis' misbehavior. She leaves it up to her neighbour's own discretion to punish Dennis in a way that she sees fit, but advises the neighbor, "Don't go too easy or too hard on him. Make him do some kind of house chore and no TV privileges until he completes the chore(s) you decide he must do." Alice does not have any immediate oversight over Mrs. Wilson and thinks it is acceptable to delegate her authority to punish Dennis to the neighbor in a discretionary manner. The neighbor decides to make Dennis sit in the corner of the kitchen for 2 hours. Intuition tells me that Alice has given the neighbor too much power and that the infliction of punishment cannot be considered to reflect Alice's judgments.

Case 4: Alice knows that Dennis stole Sally's doll and she tells Mrs. Wilson that Dennis must be punished as she is leaving to take Sally to her ballet lesson, but doesn't tell the neighbor how to punish Dennis. As in the last case she says, "Don't go too easy or too hard on him." Mrs. Wilson has come over to Alice's home to babysit Dennis until she returns. Alice has cameras installed in her home and the neighbor is aware of this fact. Alice has the cameras streaming live video to her Blackberry to ensure that when Mrs. Wilson (or any other sitter) comes over to babysit, they treat her children in a way that is consistent with her sentiments and convictions as Dennis' and Sally's parent. At any

time, if the neighbor acts inconsistently with Alice's own convictions, beliefs and sentiments about how Dennis ought to be punished, she is willing to intervene and rectify the problem by calling home to inform the neighbor of that. It seems as though the link between Alice's judgments about punishing Dennis and the infliction of his punishment by Mrs. Wilson is well intact, because of such a sophisticated supervision technique.

What these examples seem to rely on is that there is more than one way to maintain ultimate control or authority over a situation- expressly and tacitly, thus maintaining some kind of link between the ultimate authority and the one who acts so as to implement her judgment. I will be examining later in some detail what that distinction amounts to and how it figures in the aforementioned examples and the prison context.

b. What do these Four Cases Reveal to us About State Punishment?

Now that I have detailed four different cases involving the punishment of a child by his parent, and briefly stated my intuitions about those cases, I will critically assess those intuitions beginning with case 1. It is not necessarily the case that Alice does not know what Dennis' well-being consists in simply because she has her neighbor inflict the punishment; she continues to ensure that Dennis learns that stealing is wrong, she is the one who determines the appropriate punishment for him, and she remains aware that Dennis' well-being should not be equated with his immediate short term pleasures. In this case, it is simply more practical and efficient to have Mrs. Wilson enforce the punishment, because Alice has other responsibilities that she must tend to. The sentiments, convictions and judgments that Alice has developed over the course of her experience as a parent are still foundational to what Dennis' punishment is going to be,

despite the fact that Mrs. Wilson is the one enforcing the punishment. Of course, it is important that Alice supervise Mrs. Wilson in some way in order to ensure that the neighbor does what she has asked, especially given the privacy of the environment that the punishment is taking place in. Since Alice's instructions to the neighbor are specific, in order to monitor Mrs. Wilson she will not have to have a sophisticated monitoring regime where she has to think of possible ways that Mrs. Wilson could act illegitimately. All she has to do is assess whether or not Mrs. Wilson is acting in accordance with her instructions.

In case #2, Mrs. Wilson lacks Alice's authorization to inflict the punishment, and this is why the neighbor's actions do not sit well with our intuitions about parent-child relationships. Yet, Alice's convictions, sentiments and judgments are still being indirectly implemented in punishing Dennis, because the neighbor is doing what Alice would have done, and is doing it for the same reasons. Things are actually quite complicated in this scenario, because not only is it the case that Alice has not authorized the infliction of punishment, it can still be said to be founded on her judgment. The 'link' appears to be threatened in this respect, because Alice does not know exactly what is going on and luckily, in the case outlined here, the neighbor ends up punishing Dennis in accordance with his mother's wishes. But this need not have been the case: Alice cannot really be said to know what is going on in this case and this is why it does not sit well with our intuitions.

In the third scenario, Alice's sentiments as a parent are playing a role in the infliction of Dennis' punishment to a degree, but she has left the particulars of Dennis'

punishment to Mrs. Wilson. In this respect the link appears to be threatened. In terms of determining the wrongfulness of Dennis' behaviour, Alice's judgments are being implemented, but her judgments regarding the severity of the sanction are not entirely grounding the infliction of punishment. Not only does Alice grant Mrs. Wilson some discretion, but more importantly it is unsupervised discretion. Therefore, the link appears to be threatened because there is no clear guidance, which makes it more likely that Mrs. Wilson will act in ways that Alice will find unacceptable. Second, Alice is not monitoring the neighbor, which is a problem in general. Supervision by an authority in circumstances of discretion must be even more sophisticated than it needs to be when guided by specific rules. Alice must think about what she considers to be a house chore and how much work she thinks is appropriate.

In the final case, it is as if Mrs. Wilson's directives are Alice's own, since the latter can at any moment step in and change the course of punishment, if it is not consistent with her own wishes. Despite the fact that the neighbor has been given discretion, Alice has a great degree of supervision over her actions. In this way, Alice can be said to have tacitly commanded Dennis' punishment, which I will expand upon shortly. Therefore, the punishment can be considered to be founded on Alice's judgments. Very comprehensive monitoring is required in this case, because she has not provided the babysitter with much guidance as to how to go about punishing Dennis. The monitoring must be detailed and she must spend some time thinking about what a reasonable punishment entails in order to monitor Mrs. Wilson appropriately.

Based on the four cases outlined above, there are a few factors that we must pay careful attention to when it comes to making determinations about whether the link between the state's judgments and the infliction of criminal sanctions is severed. First, having authorization from the appropriate authorities to carry out the infliction of sanctions is important. Equally important is the amount of legal guidance that the party authorized to inflict the sanction has been given. In particular, guidance is important to provide agents with the instruction as to how to maintain the link with the judgments of the community, and also to help provide for meaningful oversight by the state. Third, the amount and quality of oversight that the state has over the agents inflicting criminal sanctions is a significant factor. What is considered to be adequate oversight by the state will depend upon the nature of the task delegated to agents, and the quality of oversight required will vary depending upon the type of guidance provided to the agents.

It is also crucial to reiterate that the link between the community's judgments and the infliction of incarceration can be severed in the case of incarceration inflicted by state officials as well as by contracted agents. In both cases the government is delegating the authority and authorization to particular individuals to incarcerate offenders. As a result, the features that I have outlined as important in order to say that private prison officers are acting on behalf of the state are equally applicable to state prison officers. Now that we have identified these significant factors, we can explore the details of each, and how they pertain to the nature of the link between the state's judgments and the infliction of incarceration.

Guidance and "The Circumstances of Rule-Making"

Depending on the context, the amount of guidance required in order to legally control that particular sphere is going to differ. Legal formalists argue that we can and ought to create rules to eliminate uncertainty in order to effectively guide conduct. Yet, variable standards, as Hart refers to them, are going to be the best that the state can do to control certain areas of conduct without sacrificing too much to considerations of certainty, because there are always competing considerations to be weighed. Even in the case of general rules, Wil Waluchow argues that

[F]actors such as ignorance of fact, indeterminacy of aim, evolving technologies, changing social contexts, and so on, combine to create the ever-present possibility that perfectly acceptable general legal rules will lead, upon application to specific cases, to uncertain or otherwise unacceptable results. Let's call the circumstances that create this ever present possibility "the circumstances of rule-making."⁹⁹

One way of dealing with the circumstances of rule-making is to legally control certain spheres of conduct by way of variable standards as opposed to rules. Here, I will invoke Hart's distinction between rules and variable standards. In *The Concept of Law* he claims,

[I]n fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of all social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case...[L]egal theory has in this matter a curious history; for it is apt either to ignore or to exaggerate the indeterminacies of legal rules. To escape this oscillation between extremes we need to remind ourselves that human inability to anticipate the future, which is at the root of this indeterminacy,

⁹⁹ Wil Waluchow, *A Common Law Theory of Judicial Review: The Living tree* (New York: Cambridge University Press, 2007) 194.

varies in degree in different fields of conduct and that legal systems cater for this inability by a corresponding variety of techniques.¹⁰⁰

According to Hart, there are certain spheres to be legally controlled that are recognized from the start as spheres in which the features of individual cases will vary much in socially important but unpredictable respects. As a result, uniform rules to be applied from case to case in such spheres, without further official discretion, cannot usefully be framed by the rule-maker in advance. In order to regulate such areas the rule-making body sets up very general standards and then delegates to an administrative rule-making body the task of adapting more specific rules to their special needs. Hart uses the example of the legislature requiring an industry to maintain certain standards, e.g., to charge a fair rate or to provide safe systems of work.¹⁰¹

A second type of variable standard that can be used is when the sphere to be controlled is one where it is impossible to identify a class of specific actions that are to be uniformly done or forbidden. In such cases, common judgments about what is reasonable can be used by the law. In these cases, individuals are required to conform to a variable standard before it has been officially defined.¹⁰² In such cases you learn from a court *ex post facto* that the standard has been violated. Hart asserts "...it is that we are unable to consider, before particular cases arise, precisely what sacrifice or compromise of interests

¹⁰⁰ H.L.A. Hart, The Concept of Law (New York: Oxford University Press, 1997) 130-1.

¹⁰¹ Hart, The Concept of Law, 131.

¹⁰² Hart, The Concept of Law, 131-4.

or values we wish to make in order to reduce the risk of harm.”¹⁰³ Under these circumstances, the judgments of a court are like those of an administrative body specifying the variable standards, as in the first type of standard laid out above.

Sometimes the sphere to be legally controlled is better done by way of rules with only a fringe of open texture rather than by variable standards, according to Hart. These areas of conduct are controlled successfully *ab initio* by rules. He uses the example of killing as a sphere of conduct that is successfully guided by rules. Instead of laying down a variable standard regarding killing, it is of such practical importance to us that people do not commit murder, that we lay down rules to control such conduct. Although the circumstances in which human beings kill others are various, for example, killing in self-defense, there are very few factors that appear to us or make us revise our estimate of the importance of protecting human life.¹⁰⁴

Therefore, depending on the circumstances of rule-making in a particular area of conduct, that conduct may be best controlled by variable standards or by general rules. As a result, agents holding employment in a public office can be said to be acting more or less on behalf of the state, depending on how much discretion they are afforded. More specifically, if an agent is acting in accordance with variable standards that have not been fleshed out, he can be said to be acting on behalf of the state in a weaker sense than if he were acting in accordance with more specific rules, because no specific direction to follow has been laid out in the case of the former. The type of guidance the state

¹⁰³ Hart, The Concept of Law, 133.

¹⁰⁴ Hart, The Concept of Law, 133.

provides to its officeholders is going to be important in determining what constitutes adequate oversight by the state in order to claim that the state is issuing prohibitions. I will say more about the relationship between guidance and oversight in the next section.

Oversight-The Tacit Command of the State

The state can maintain authority over a situation expressly by way of variable standards and rules, but also tacitly by way of oversight and a lack of interference (though the possibility of interference is always present). This notion of tacit command comes from John Austin's theory of law, where he defines law as the command of the sovereign (or of his subordinate whom he may choose to give orders on his behalf) backed by threat.¹⁰⁵ A problem for Austin's theory is how to go about reconciling custom as a source of law, because custom is not the command of the sovereign, nor has the sovereign given his subordinate judges an explicit judgment to make orders on a particular subject matter. In order to account for custom as law on his theory, Austin claims that the sovereign's orders may be 'tacit', so that he may, without giving an express order, signify his intentions that his subjects should do certain things, by not interfering when his subordinates both give orders to his subjects and punish them for disobedience.¹⁰⁶ The fact that the sovereign does not (but could) interfere with a judge's orders shows that the sovereign has tacitly ordered his subjects to obey the judge's orders, according to Austin.

¹⁰⁵ John Austin, "The Province of Jurisprudence to be Determined," Readings in the Philosophy of Law, ed. Keith Culver (Peterborough: Broadview Press Ltd., 1999) 101.

¹⁰⁶ Hart, The Concept of Law, 45-9.

H.L.A. Hart uses a military example in order to express Austin's point to its fullest. He tells us to think of a sergeant who himself regularly obeys his superiors, orders his men to do certain fatigues and punishes them when they disobey. If the general had ordered the sergeant to stop the fatigues he would have been obeyed and so in these circumstances the general can be said to have tacitly expressed his will that the men should do the fatigues. His non-interference, when he could have interfered, is a silent substitute for the words he would likely have used in ordering the fatigues.¹⁰⁷

Hart raises two criticisms against Austin's account of the legal status of custom; the first has to do with how customs on his theory of law have no status as law until they are used in litigation, because it is the sovereign not interfering with the orders of the judge that gives them the status of law. I do not wish to say anything more about this particular criticism in this paper, but I would like to focus on the second of Hart's criticisms. He argues that,

...it is not a necessary inference from the fact that the general did not interfere with the sergeant's orders that he wished them to be obeyed. He may merely have wished to placate a valued subordinate and hoped that the men would find some way of evading the fatigues... in any modern state, it is rarely possible to ascribe such knowledge, consideration and decision not to interfere to the 'sovereign.'¹⁰⁸

Therefore, it is not enough to say that the wishes of an authority are being carried out simply because there is a lack of interference, because this does not necessarily mean that the sovereign agrees with the commands of his subordinate or is aware of them. Along with non-interference, he also has to be aware of what is going on and his decision not to

¹⁰⁷ Hart, The Concept of Law, 46.

¹⁰⁸ Hart, The Concept of Law, 47.

interfere has to be because he agrees with the directives being issued by his subordinates. If this is in fact the case then it fair to say that the judgments of the authority are being carried out by his subordinate. For instance, Alice's non-interference in the punishment of Dennis by Mrs. Wilson can be considered as an expression of her own wishes. Alice is still is aware of what her son's well-being consists in, because she is intentionally choosing not to interfere in the fourth case, since she agrees with Mrs. Wilson's actions. Therefore, Alice's judgments can still be considered to ultimately ground Dennis' punishment.

After taking into account Austin's arguments, there are two ways that the state can consent to the actions of prison guards, expressly or tacitly. Now that we have explored different ways that the state can be said to ground the actions of its officeholders, we can consider in more detail how state oversight and guidance work together. As mentioned in the previous section the amount of guidance that can be provided in order to legally control a sphere will affect the sophistication of the supervision that is required in order to say that the conduct of an officeholder is on behalf of the state. If an area of conduct is governed by variable standards as opposed to specific rules, there is more discretion afforded to individuals. It is best to conceive of the degree of state guidance and the quality of oversight as on a spectrum. As state guidance increases, the level of sophistication of state oversight can decrease and as the latter increases, the degree of specific guidance can decrease, while still allowing us to say that the agent acting in that particular sphere is acting on behalf of the state. There should always be supervision over the actions of agents working on behalf of the state.

The frequency of monitoring in order to ensure that agents are acting on behalf of the state is going to be dependent upon the character of the actions delegated and the environment they are to occur in. For example, if the acts of the officeholders are hidden from public view then monitoring should be quite frequent. What goes on inside of a prison or jail is well hidden from public view, and private prisons are motivated by profit, which means that if appropriate oversight is not in place it is likely that they may cut corners in ways that will affect inmates unduly. It is also important that monitoring of prisons be frequent because the environment can be quite violent and it is one that is not easily controlled. Furthermore, it is important that monitoring be meaningful when it occurs in such an environment. For example, auditing should occur by surprise, so as not to give prison officials any forewarning.

It follows then that, in circumstances where the agents inflicting criminal sanctions have some discretion over how the sanction will be inflicted, combined with inadequate oversight by the state, it would be an exaggeration to claim that the agents are acting on behalf of the state. Also, in circumstances where agents are not likely to act in accordance with the standards laid out because of a lack of incentive to do so, or in circumstances where the task delegated is well-hidden from public view, it is important that state oversight be more frequent in order to ensure that officeholders are acting on behalf of the state. As we shall see later, empirical data shows that state oversight is inadequate in both private and state-operated prisons.

Authorization

A third factor that is important in order to claim that an agent is acting on behalf of the state in inflicting criminal sanctions has to do with the agent having the appropriate authorization from state authorities, i.e. the state government or the federal government. If criminal sanctions were inflicted on offenders without the state's authorization or awareness, the punishment could not be considered grounded in the state's judgments at all, even if the character of the punishment inflicted is consistent with the state's judgments. A good example is of the vigilante who, without the state's authority to do so, punishes individuals for wrongs that he or she believes the individual to have committed. In these cases, judgments regarding the wrongfulness of the action and the appropriateness of the sanction are carried out by private agents, rather than the state. And, even though they may be consistent with those judgments, it is not the judgments of the state that are being implemented in the infliction of sanctions, because state authorities are not aware of what is going on. The link between the state's judgments and the infliction of the sanction is severed when authorization has not been granted, just as in the case of the neighbor who goes ahead and punishes Dennis without Alice's authorization to do so.

In the case of a privately operated prison, authorization is always granted by the state to a private firm to incarcerate offenders, otherwise the firm could not begin operations. Government agencies must contract with corporate bodies. It is in this respect that prison officers working in the facility can be said to be acting on behalf of the state in performing the task of incarceration, based on the state's determination that what the criminal did was wrong. The state authorizes prison officers to incarcerate criminals that

have been found guilty for particular crimes for a particular period of time. Of course, it is possible to imagine circumstances where due to a contractual clause in the private firm's agreement with the state or federal government that the private firm cannot be considered to be supported by the government, yet the prison continues to be operational. For instance a state government can attempt to end the contract with a private firm because of the prevalence of abuse in its facility and the firm could take the issue to court to be settled. It is possible that a judge could rule in favour of the private firm and allow it to continue to operate. In this kind of scenario, it is not an easy task to determine if the agents working in the facility would still be considered to be acting on behalf of the state, because in this situation the courts support its continued operation but the government does not and both institutions are considered to be part of the state machinery. This possibility is not as far-fetched if we look to history. Convict leasing for the purposes of cheap labour between state and private parties was popular in the southern states after the Civil War. During this time state after state found itself being taken advantage of by the private parties with whom they contracted. Dolovich explains how

[I]n California, for example, the state tried in 1858 to rescind a contract for the labor of inmates at San Quentin when it became known that the contractor, John McCauley, had "blatantly violated" the terms of the contract "to squeeze as much out of the arrangement as possible." McCauley had "ignored the physical needs of the convicts, ignored the orders sent down from Sacramento, ignored the suggestions of his own prison officers, ignored everything but his profit." McCauley fought the rescission in court and won, and the state, which had entered the contract in the first place to save money on the running of San Quentin, had to pay over \$ 200,000 to buy him out.¹⁰⁹

¹⁰⁹ Dolovich, "State Punishment and Private Prisons," 453.

The norms governing contracts with private entities are much more advanced and detailed today in order to prevent such abuses of inmates.¹¹⁰

Based on the parent-child cases outlined earlier in the chapter we have concluded that whether the link between the state's judgments and the infliction of sanctions remains intact depends upon a few different factors. First, whether an agent can be considered to be acting on behalf of the state in inflicting criminal sanctions depends upon having received authorization from the state. Second, the state must have adequate oversight over agents participating in the infliction of criminal sanctions, which will be based on the environment that the sanctions are being inflicted in and whether there is discretion afforded to those responsible for inflicting the sanctions. Furthermore, state authorities should not interfere because they actually agree with the actions being carried out. If each of these conditions is adequately met then the infliction of the sanction in accordance with these conditions is considered to be inflicted on behalf of the state.

c. Privately-Operated Prisons in Principle

Now that I have laid out the factors justifying the claim that the link between the state's judgments and the infliction of the sanction has or has not been severed, I can address the issue of whether private prisons sever the link in principle, as Harel claims that they do. There is no reason why, in principle, you could not have adequate state oversight, guidance and authorization over private prisons. It follows from my analysis that if we want to make private prisons acceptable from the integrationist perspective, authorization, guidance and oversight are the features that ought to be front and center

¹¹⁰Dolovich, "State Punishment and Private Prisons," 454.

when it comes to policy considerations. Since private prisons are not necessarily illegitimate, it is policy considerations that will determine whether private prisons are going to be acceptable institutions. We must bear in mind that we must also consider state-run prisons and their acceptability in terms of the three factors outlined above, which I will discuss shortly.

Privately-operated prisons are difficult to monitor due to the number of inmates they house, yet there is no reason why in principle an adequate monitoring scheme could not be created to ensure contractual compliance. If one takes into account that prisons are busy places and under circumstances of contracts that can be quite rigid, any monitoring regime up to the task would have to be regular, aggressive and costly on the part of the state. Despite these considerations there is nothing in principle about a private prison that makes it impossible for an adequate monitoring system to exist. It has been argued that, in cases like that of private prisons it is difficult for a government to specify in detail the tasks that it wishes to be carried out. For example, it is difficult to explain in detail how much force a guard is authorized to use in order to control an inmate or what constitutes adequate health care, and this makes it difficult to monitor the actions performed in that particular sphere.

There are a number of responses that one might make to this argument. First, it is important to say that if the task is difficult to specify in contractual terms, it will be just as difficult to control that particular area by way of statute or administrative regulation, making it just as difficult for the state to effectively monitor state officials. Second, and in response to the same argument, the fact that contracts may be vague does not make it

impossible to have an effective monitoring regime in place. It just means that more measures must be taken to effectively monitor. For instance, Dolovich discusses the possibility of a comprehensive monitoring system of private prisons that would check for the temptation on behalf of private agents to cut corners in ways that are likely to harm inmates and would make the visits unpredictable and frequent.¹¹¹ The ways in which the discretion afforded to officeholders can be abused would have to be thought through in order to have a comprehensive monitoring system in place.

There is nothing in principle about private prisons that make them impossible to legally control. As explained in detail above legal controls must, in many instances, take the form of variable standards rather than specific rules, and this is appropriate in the context of private prisons given the variety of cases that arise and their unpredictability. It may be difficult to specify in contractual terms the powers of prison guards, but federal and state governments can turn to a regulatory body such as the ACA to set up more specific standards and can provide further specific guidance by way of the courts. The privatization of a prison does not make it impossible for the state to guide the behavior of the prison officers; it is just a matter of having measures in place that go beyond the contract in order to provide adequate guidance to prison officers. Legal controls need not be specific, but they should guide the officeholders in some sense, so that the decision to be made is limited by restrictions provided by the state.

Private prisons act under the authorization of the state by way of government contracts. On the other hand, to be a vigilante is to punish criminals without the

¹¹¹ Dolovich, "State Punishment and Private Prisons," 492.

authorization of the state; this is part of what it means to be a vigilante. In general, private prisons receive authorization from the state to incarcerate, yet it is possible for a contract to allow private prisons to continue to operate with the authority of the courts and not have the continued authorization of the government, as mentioned earlier. But this is only a practical possibility arising from the particulars of a contract; there is nothing particular to the nature of the institution that makes it such that it functions without the government's authority.

It is statute, standards set by regulative bodies such as the ACA, and the type of monitoring conducted by government agencies, as well as court decisions that are all going to determine together whether the link between the judgments of the state and the incarceration of criminals is going to be severed or threatened. More specifically, the ultimate power to ensure that the link is not severed rests with these institutions external to the operations of the prison. It has to do with the amount of supervision government auditors have over prisons, how strict or flexible the rules are that the state has in place over such institutions, and whether contracts prevent prisons from acting without the authorization of the state that determine whether it is plausible to claim that the link between the state's judgments and the infliction of the incarceration is severed. If it is severed, it is mostly due to what McDonald refers to as "government failure."¹¹² It follows then that there is nothing in principle about the public or private nature of the institution itself that makes it such that it does not remain in the hands of the "the people"

¹¹² Douglas C. McDonald, "When Government Fails: Going Private as a Last Resort," Private Prisons and the Public Interested. Douglas C. McDonald (London: Rutgers University Press, 1990) 188-90.

by way of the various institutions and mechanisms outlined. State institutions have control over such matters and it is ultimately within their power to monitor private prisons and ensure that prison officers are not abusing their state-delegated powers, just as it is within their power to do the same with respect to public prisons.

There are many examples of private firms cutting costs in ways that affect inmates unduly in order to make a profit, but it is important to consider that it is not necessarily the case that it will cut costs in a way that will affect inmates adversely. Some theorists argue that the private sector has the incentive to find ways to improve productivity because of competition in the marketplace and the threat of losing money. Therefore, a cut in costs is owed to the fact that the private sector has developed more efficient techniques than those belonging to the public sector;¹¹³ it is not owed to a cut in the quality of the services provided by the facility. The public sector, on the other hand, is shielded from such imperatives and has less of a motivation to implement ways of improving productivity. There is also no reason why, in principle, private institutions that are able to cut operational and administrative costs may not use this excess money to improve the living conditions of the inmates. Of course one would have to show what kind of incentive prison administrators would have to fold some of the savings back into the institution, but there is no reason why in principle this option must be excluded. If this were in fact true, prisoners may be better off in private facilities.¹¹⁴ In fact, some

¹¹³ McDonald 86.

¹¹⁴ I thank Wil Waluchow for raising this as a possibility.

private prisons offer programs such as drug treatment and vocational training, which a number of state systems have had to cut back on.¹¹⁵

d. In Practice: Privately and Publicly-Run Prisons and Jails

Now, I will consider public and private prisons in practice and whether the link between the state's judgment and the infliction of incarceration in either type of institution is threatened. The discretion of the prison staff in both public and private prisons and jails is much the same with respect to the day-to-day experiences of inmates as was discussed in chapter two. Prison officers have discretion with respect to the inmates in terms of labour, health care, recreation, determining when infractions have occurred and meting out the appropriate punishments, and the length of sentences served by inmates in states that have retained parole or indeterminate sentencing. Of course, this discretion, as mentioned earlier, is guided by the ACA, statute and court decisions. The checks over both types of facilities are much the same: the substantive and procedural legal standards applied by the courts are almost the same for state and private prisons and jails, the ACA does not distinguish between public and private institutions for the standards that must be met in order to receive accreditation, and both are subject to monitoring. The monitoring mechanisms over state-operated prisons differ in terms of their structure, but there is monitoring set up for publicly as well as privately operated prisons.

Empirical evidence shows the checks over both state and private prisons to be inadequate in the U.S. Judges tend to show deference to the judgment of prison officials

¹¹⁵ Schlosser 322.

and, as a result, the constitutional rights of inmates have been interpreted in a very narrow fashion. For example, the eighth amendment standard for prisoners alleging inadequate health care requires that

...prison officials must be shown to have acted with "deliberate indifference to serious medical needs." To satisfy this standard, prisoners must show that prison officials actually knew of the health risk and failed to take reasonable steps to address the problem. It is not enough for the inmate to have told an official of pain or other physical distress; he or she must also show that the official actually "drew the inference" from these facts of "an excessive risk to inmate health or safety."¹¹⁶

Furthermore, the PLRA act enacted discussed in chapter three makes it much more difficult for inmates to get a hearing at a federal court; instead, the act states that all administrative remedies must be shown to have been exhausted before inmates can be heard in a federal court.¹¹⁷

Accreditation tends to be inadequate given that visits from the ACA tend to be highly structured such that prison administrators are aware of when they are coming, and they tend to monitor the procedural processes of the facilities and merely ensure that they are laid down within the facility, rather than actually observing how these processes are followed in operation. According to Richard Harding, "[A]n ACA accreditation audit could in principle take place 80 percent in the warden's office and only 20 percent in the prison itself; contact with staff and inmates is something of an afterthought."¹¹⁸ Despite

¹¹⁶ Dolovich "State Punishment and Private Prisons," 484. See *Estelle v. Gamble* 1976, U.S. Supreme Court.

¹¹⁷ Dolovich "State Punishment and Private Prisons," 485.

¹¹⁸ Harding 316.

its inadequacies at least almost every private prison has or will soon have accreditation which is more than can be said for the public sector prisons.

Some state agencies contracting with private entities have no monitoring scheme in place to ensure contractual compliance. Some state agencies report having monitors on site every day, others report having them on site weekly, monthly, quarterly, and some contractors conduct all of their monitoring off-site.¹¹⁹ In the case of state prisons, the stipulated requirements for monitoring set out by statute and administrative regulation also tend to be minimal. In California, for example, Dolovich found that the office of the Inspector General is required to audit a prison each year within a new warden's appointment and all facilities once every four years. Aside from the appointment of a new warden, auditing of facilities is done once every four years, which is quite rare, especially given the nature of the institution and the severity of the tasks that are being carried out. Part of the reason why monitoring on behalf of the state is inadequate has to do with the fact that it is very costly in the case of prisons, because of their size and the amount of man-power required in order to conduct the task effectively.

Given the discretion that prison officers have over the day-to-day lives of inmates, the fact that what goes on inside of prisons is well hidden from public view, and the profit motivation of private prisons, it is fair to say that state oversight ought to fall to the more frequent and comprehensive end of the spectrum. Based on the empirical data gathered, it is plausible that in practice the link between the state's judgments and the infliction of incarceration in state as well as privately operated prisons is threatened, maybe even

¹¹⁹ Dolovich "State Punishment and Private Prisons," 491.

severed. Although state prisons are not considered to be motivated by profit, the prison guards still have discretion over the lives of the inmates and the task they are carrying out is well hidden from the public. It is the job of the social scientist to determine exactly at what point there is considered to be enough guidance and oversight by the state over a facility. It is also the job of the social scientist to determine in greater detail whether in fact we can say that the link is actually severed. My purpose in this paper has been to determine what features are relevant in coming to a determination about when the link between the state's judgments and the infliction of punishment is or is not severed, and how these factors interact with one another. The key features that will determine whether the link is considered to be intact have to do with the infliction of the sanction being grounded in rules and procedures set out by statute, regulatory bodies, having the approval of the courts. Also important is that the state has adequate oversight over and authorizes the infliction of the sanction. My analysis is from the perspective of just governance like Harel's and it requires fleshing out the conditions under which the link between the state's judgments and the infliction of the sanction is maintained and severed. This need not have anything to do with whether state officials or contracted agents inflict the sanction, as Harel claims it does. The link must be maintained in either case because it is important for the state to be the one issuing the prohibitions, because it is required for the sake of just governance that the state provide for the guidance of behaviour by way of issuing prohibitions. In addition to Harel's reason, the link between the state's judgments and the infliction of the sanction must be maintained because

punishment is supposed to be an expression of the community's disapproval of criminal actions.

CONCLUSION

If private and state-operated prisons are subject to the same kinds of rules and regulations, and the guards working in each facility have the same discretionary powers over the inmates, they ought to function in the same way as one another. Although corporate bodies are profit-driven entities, this does not necessarily tell us anything about the character of their actions in principle. As a result, to attempt to argue against privately-operated prisons in principle, in the way that Harel does, is going to be a very difficult task because aside from the problems that arise in practice, they can function just like other state-operated prisons. In most U.S. jurisdictions they are subject to the same check which shows that state authorities recognize the ability of these kinds of facilities to function in the same way as those of the state.

Principled arguments raised against private prisons that are sociological in character make their case by arguing that they weaken the sense of moral community by having private agents inflict sanctions, or that it is offensive to have profit interests mixed up with criminal punishment, or that the task of incarceration is an “inherent public function.” But unlike Harel’s argument they do not provide moral argumentation for their point, it seems that they just simply state their claims. After putting Harel’s argument to the test, I am confident that the best strategy for one to take in order to be successful in arguing against private prisons and jails is going to have to be based on the pragmatic concerns having to do with the operations of these facilities, such as efficiency, the quality of prison staff, inmate care, public accountability and the level of violence present. In order to avoid overlooking the conditions of prisons for inmates, it is

important to not just look at how efficiently the facility functions when compared to its public counterpart, but to consider a range of different factors as outlined above. It is important to look at the employment conditions for the prison staff and ensure that they are also being treated fairly; that their wages and benefits are adequate and that private entities are not cutting corners in this respect. Prison officers have discretionary power over inmates who are vulnerable to their discretion, and as such it is important that they are not frustrated with the conditions of their employment. Furthermore, the job of a prison guard can be quite dangerous and as such, it is important that private contractors recognize this fact and compensate them properly.

This paper has been an examination of the factors that we must take into account in order to make a determination about whether we can say that a private prison or jail is accountable to the people. Having the appropriate authorization from state authorities, acting in accordance with state guidance and there being adequate state oversight over the facility are central to arguing that private prison officers are acting on behalf of the state. It is important that private entities can be said to be acting in accordance with rules and procedures as laid out by courts, statute, regulatory bodies and auditors because these are the means by which the state protects the interests of its citizenry. Punishment, as Feinberg claims, is supposed to be an expression of the judgments of disapproval and reprobation on the part of the punishing authority or those 'in whose name' the

punishment is inflicted,¹²⁰ and the mechanisms above are a means to expressing the community's judgments with respect to punishment.

Last, I would like to return to the justifications of punishment outlined in chapter one and how Harel's integrationist justification compares to those accounts. Recall specifically what distinguished his justification from the instrumentalist, pre-normative conditions and expressive justifications for punishment. On the integrationist account criminal punishments are justified only insofar as they are inflicted and issued by state agents. Although, as we have discovered, to say that a sanction is grounded in the judgments of the state does not actually require that state officials be the ones to inflict it. All that is required is that the inflicted sanction reflects the state's judgments. It follows then that Harel's theory is limited, like Feinberg's, to explaining only why the state ought to be the one to issue prohibitions, and as in the case of the rest of the justifications outlined, he cannot explain why the state must be the one to inflict the sanctions resulting from violation of those prohibitions.

¹²⁰ Feinberg 400.

REFERENCES

- Anonymous. "Shame, Stigma and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law." Harvard Law Review. 116.3(2003): 2186.
- Austin, John. "The Province of Jurisprudence Determined." Culver, Keith ed. Readings in the Philosophy of Law. Peterborough: Broadview Press LTD., 1999. 96-115.
- Brownlee, Kimberley. "Responsibilities of Criminal Justice Officials." Journal of Applied Philosophy 27.2 (2010): 123.
- Dilulio, John J. "The Duty to Govern- A Critical Perspective on the Private Management of Prisons and Jails." Private Prisons and the Public Interest. Ed. Douglas C. McDonald. London: Rutgers University Press, 1990. 155-178.
- Dolovich, Susan. "How Privatization Thinks: The Case of Private Prisons." Government by Contract: Outsourcing and American Democracy. Ed. Jody Freeman and Martha Minow. Cambridge: Harvard University Press, 2009. 128-147.
- Dolovich, Susan. "State Punishment and Private Prisons." Duke Law Journal 55.3 (2005): 437.
- Feinberg, Joel. "The Expressive Function of Punishment." Monist 49.3 (1965): 397.
- Freeman, Jody. "The Contracting State." Florida State University Law Review 28.155 (2000): 155.
- Green, Leslie. The Authority of The State. Oxford: Oxford University Press, 2008.
- Green, Leslie. "The Duty to Govern." Legal Theory 13 (2007): 165.
- Harel, Alon. "Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions." Legal Theory 14 (2008): 113.
- Hart, H.L.A. Punishment and Responsibility. New York: Oxford University Press, 1968.
- Hart, H.L.A. The Concept of Law, Second Edition. New York: Oxford University Press, 1997.

- Kahan, Dan and Eric Posner. "Shaming White-Collar Criminals: A Proposal for Reform of Federal Sentencing Guidelines." Journal of Law and Economics. 42.1 (1999): 365.
- Lacey, Nicola. State Punishment. London: Routledge, 1988.
- Laslett, Peter, ed. Locke: Two Treatises of Government. New York: Cambridge University Press, 2005.
- Leonard, Herman B. "Private Time: The Political Economy of Private Prison Finance." Private Prisons and the Public Interest. Ed. Douglas C. McDonald. London: Rutgers University Press, 1990. 66-85.
- McDonald, Douglas, C. "When Government Fails: Going Private as a Last Resort." Private Prisons and the Public Interest. Ed. Douglas C. McDonald. London: Rutgers University Press, 1990. 179-200.
- Moore, Dawn, Moffat Kelly, and Hannah-Moffat. "Correctional Renewal without the Frills: The Politics of "Get Tough" Punishment in Ontario." Disorderly People. Ed. Joe Hermer and Janet Mosher. Halifax: Fernwood publishing Co., 2002: 105-20.
- Nagel, Thomas. "Ruthlessness in Public Life." Public and Private Morality. Ed. Hampshire, Stuart. London: Cambridge University Press, 1978. 75-92.
- O'Hare, Michael, Robert Leone, and Marc Zegans. "The Privatization of Imprisonment: A Managerial Perspective." Private Prisons and the Public Interest. Ed. Douglas C. McDonald. London: Rutgers University Press, 1990. 107-129.
- Press, Aric. "The Good, the Bad, and the Ugly: Private Prisons in the 1980's." Private Prisons and the Public Interest. Ed. Douglas C. McDonald. London: Rutgers University Press, 1990. 19-41.
- Raz, Joseph. "Authority and Justification." Authority. Ed. Raz, Joseph. New York: New York University Press, 1990. 115 – 141.
- Scanlon, Thomas. "A Theory of Freedom of Expression." Philosophy and Public Affairs 1.2 (1972): 204.
- Schlosser, Eric. "The Prison Industrial Complex." Political Science 2C03: Force

and Fear, Ed. Professor Greg McElligott. Hamilton: Custom Publishing Solutions, 2006. 313-333.

Takemura, Hitomi. "Disobeying Manifestly Illegal Orders." Peace Review 18.4 (2006): 537.

Thorburn, Malcolm. "Justification, Powers and Authority." Yale Law Journal 117.6 (2008): 1070.

Waluchow, Wil. A Common Law Theory of Judicial Review: The Living Tree. New York: Cambridge University Press, 2007.

Wood, Phillip, J. "Globalization and Prison Privatization: Why are Most of the World's For-Profit Adult Prisons to Be Found in the American South?" International Political Sociology 1.3 (2007): 224.

Wood, Phillip J. "The Rise of the Prison Industrial Complex in the United States," Capitalist Punishment: Prison Privatization and Human Rights. Ed. Andrew Coyle et al. London: Zed Book Ltd., 2003. 16-29.