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Challenging the Constitutionality of Private Prisons: Insights from Israel

Angela E. Addae

CHALLENGING THE CONSTITUTIONALITY OF PRIVATE PRISONS: INSIGHTS FROM ISRAEL

ANGELA E. ADDAE*

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INTRODUCTION

One man's overcrowding is another man's opportunity for profit—at least that is how private corporations have approached incarceration in the United States. The United States' prison population exploded after 1971 when President Richard Nixon officially declared a "War on Drugs."[1] The War on Drugs initially targeted the increased abuse of controlled substances such as heroin, amphetamines, and mixed barbiturates.[2] However, the Reagan administration escalated the War on Drugs and targeted the crack cocaine epidemic in urban communities—a crisis that critics suggest was more likely a panic induced by sensational news media.[3] As a result, municipalities

* JD/PhD in Sociology, University of Arizona. The author would like to thank Toni Massaro and John Dacey for their unrelenting support of this research. Any errors are the author's own.

1. *See* President Richard Nixon, Remarks to the American People About an Intensified Program for Drug Abuse Prevention and Control (June 17, 1971), *in* AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/ws/index.php?pid=3047 [https://perma.cc/4E5C-4ENZ] (last visited Apr. 5, 2019) (stating "America's public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive.").

2. *See Thirty Years of America's Drug War: A Chronology*, FRONTLINE, https://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron [https://perma.cc/PA6E-2U4G] (last visited Apr. 5, 2019).

3. *See* President Ronald Reagan, Address to the Nation on the Campaign Against Drug Abuse (Sept. 14, 1986), *in* RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM, https://

exponentially increased policing in urban areas, sparking what eventually became a systematic trend toward mass incarceration.[4] The War on Drugs—in combination with the introduction of mandatory minimum sentencing and harsher penalties for repeat offenders—led to drastic conditions of overcrowding in prisons.[5] In response, private corporations seized the opportunity to alleviate overcrowded conditions by bidding for government contracts to construct and manage correctional facilities across the nation.[6]

Just as the private prison industry witnessed broad expansion in the United States, it was coming to a startling halt in Israel.[7] In 2009, the Supreme Court of Israel deemed private prisons constitutionally invalid after the proposal of a single facility.[8] Though the United States and Israel share democratic and constitutional principles, the legal treatment of prison privatization widely diverges. To explain this paradox, this Article begins with a description of the private prison industry in the United States (Part I), followed by pertinent economic and political conflicts of interest (Part II). Part III examines the foundational constitutional principles of the nondelegation doctrine and the social contract in the United States, and Part IV presents a comparative analysis of those principles in the Israeli Supreme Court decision *Academic Center of Law and Business v. Minister of Finance*.[9] The Conclusion provides recommendations for constitutional treatment of liberty interests, particularly as they pertain to social service provision in the private sector.

I. THE PRIVATE PRISON INDUSTRY

Today, the United States boasts the world's highest incarceration rate.[10] The United States contains less than 5% of the world's

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www.reaganlibrary.gov/research/speeches/091486a [https://perma.cc/KTD6-GT8G] (last visited Apr. 5, 2019) ("Today there's a new epidemic: smokable cocaine, otherwise known as crack. It is an explosively destructive and often lethal substance which is crushing its users. It is an uncontrolled fire."). For an extensive critique of the War on Drugs, see generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (The New Press 2010).

4. ALEXANDER, *supra* note 3, at 54–56.

5. Ira P. Robbins, *The Impact of the Nondelegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 911 (1988).

6. *See id.* at 912.

7. HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD, 27, 34 (2009) (Isr.). The case is also available online as part of the Private Corrections Working Group website: http://www.privateci.org/private_pics/Israel_Ruling.pdf.

8. HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD, 27, 34 (2009) (Isr.).

9. *See id.*

10. ROY WALMSLEY, WORLD PRISON POPULATION LIST 3 (International Centre for

population, but it hosts approximately a quarter of the world's prison population.[11] Federal and state governments have been overwhelmed with hazardous conditions of overcrowding while facing a steady influx of offenders. For example, in *Brown v. Plata*, the Supreme Court held that the operation of California state prisons at 200% capacity for over a decade violated the inmates' constitutional rights.[12] Governments responded to the shortage by delegating prison construction and management to for-profit corporations.[13] The privatization of prisons further escalated in 1992, when President George H. W. Bush issued an executive order to promote the privatization of government functions.[14] Executive Order No. 12803 urged agency officials to "[r]eview those procedures affecting the management and disposition of federally financed infrastructure assets owned by State and local governments and modify those procedures to encourage appropriate privatization of such assets."[15] Since 1999, the number of inmates housed in private prisons has grown by 90%,[16] and by 2014, private prisons housed 19% of federal prisoners and about 7% of state inmates.[17] Though the adoption of privately run correctional facilities varies by state, the highest usage is in New Mexico—where approximately two out of five prisoners are housed in private facilities.[18]

According to the Justice Policy Institute, a private prison is defined as "a facility managed by a for-profit organization through a public-private partnership with a government contract."[19] Private corporations either construct new facilities or assume management of existing facilities. In order to profit from prison management, corporations contract with the government and establish a daily fee

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Prison Studies 12th ed.), http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf.

11. Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations*, N.Y. TIMES (Apr. 23, 2008), https://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html [https://perma.cc/SD2Y-LLL2].

12. Brown v. Plata, 131 S. Ct. 1910, 1924 (2011).

13. Lauren Salins & Shepard Simpson, Note, *Efforts to Fix a Broken System:* Brown v. Plata *and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153, 1193–94 (2013).

14. Exec. Order No. 12803, 57 Fed. Reg. 19,063 (Apr. 30, 1992).

15. *Id.* at 12803(3)(a). "Infrastructure asset" is defined as "any asset financed in whole or in part by the Federal Government and needed for the functioning of the economy" such as "roads, tunnels, . . . schools, *prisons*, and hospitals." *Id.* at 12803(1)(b) (emphasis added).

16. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014 13 (Sept. 2015), https://www.bjs.gov/content/pub/pdf/p14.pdf (showing an increase from 69,000 prisoners in 1999 to 131,300 prisoners in 2014).

17. *Id.*

18. *Id.*

19. JUSTICE POLICY INSTITUTE, GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES 4 (June 2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf.

per inmate based on actual or minimum guaranteed occupancy.[20] States have incentive to delegate corrections because the corporations market the privately run facilities as less expensive, more efficient alternatives to state-run facilities.[21] Private prisons have the ability to construct facilities faster and institute innovative incarceration approaches—all while bypassing burdensome governmental bureaucracy.[22]

Two corporations dominate the United States' private prison industry: CoreCivic (formerly the Corrections Corporation of America) and the GEO Group (formerly Wackenhut Corrections Corporations).[23] Together, these publicly traded entities control 75% of the nation's private prisons.[24] In 2017, CoreCivic owned or managed "70 correctional . . . facilities, . . . approximately 78,000 beds in 19 states."[25] CoreCivic generated over a million dollars in revenue and a net income of $178,040 in 2017.[26] While participation in a billion-dollar industry is attractive to savvy investors and businessmen alike, one may be surprised to discover that Thurgood Marshall, Jr.—son of the late Supreme Court Justice and *Brown v. Board of Education* plaintiffs' attorney—has been a member of the CoreCivic Board of Directors since December 2002.[27]

The GEO Group is a transnational corporation that specializes in the "ownership, leasing and management of correctional, detention and reentry facilities," with operations in the United States, Australia, South Africa, the United Kingdom, and Canada.[28] To date, the GEO Group operates or manages 141 facilities (96,000 beds) across the United States.[29] In 2017, the GEO Group generated $2.2 million in revenue and $146,000 in net income.[30] Over 40% of the GEO Group's revenue currently stems from relationships with the Federal Bureau of Prisons, the U.S. Immigrations and Customs Enforcement (ICE), and the U.S. Marshals Service.[31]

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20. *See id.*

21. *See* Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 541 (1989).

22. *See id.*

23. *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 459 (2005).

24. *Id.*

25. Corr. Corp. of Am., Annual Report (Form 10-K) 5 (Feb. 22, 2018) [hereinafter CoreCivic 2017 Annual Report] (*available at* http://ir.corecivic.com/node/19866/html).

26. *Id.* at 50.

27. *Board of Directors*, CORRECTIONS CORP. AM., http://www.corecivic.com/investors/board-of-directors [https://perma.cc/4Q5X-RC64] (last visited Apr. 5, 2019).

28. The GEO Grp., Annual Report (Form 10-K) 3 (Feb. 26, 2018) [hereinafter GEO Group 2017 Annual Report] (*available at* https://last10k.com/sec-filings/geo).

29. *Id.*

30. *Id.* at 54, 84.

31. *Id.* at 12–19.

The size and expansion of the private prison industry reflects the growing demand for privatized corrections in the United States. In hopes of preserving government resources, many state governments have legitimized prison privatization by enacting statutory provisions that authorize private prison contracts.[32] Despite important governmental interests in administrative and economic efficiency, prison privatization presents conflicting outcomes between economic interests and the pursuit of democracy and justice.

II. ECONOMIC AND POLITICAL CONFLICTS OF INTEREST

Private prison corporations' economic motives clash with social and political goals of inmate rehabilitation, crime reduction, and decreased recidivism.[33] Because prison corporations have economic incentives to maintain high incarceration rates (essentially to 'fill beds'), companies expend substantial resources to encourage favorable political influence. For example, each year, both CoreCivic and the GEO Group report millions of dollars in lobbying expenditures and political contributions.[34] The companies exert pressure on government actors—many at the state and local level—to discourage leniency on crime and dissuade alternatives to incarceration.[35] Furthermore, prison corporations regularly circumvent the political process when acquiring contracts for prison construction. Traditionally, construction plans for correctional facilities are subject to voter approval of a bond

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32. *See, e.g.*, Private Prison Contracting Act of 1986, TENN. CODE ANN. § 41-24-101 (1986); *see also* NEB. REV. STAT. § 47-802 (2001).

33. Karl Marx discussed the nature of private interests as inherently negative and contradictory to societal interests, stating:

> [p]rivate interest, however, is always cowardly, for its heart, its soul, is an external object which can always be wrenched away and injured, and who has not trembled at the danger of losing heart and soul? How could the selfish legislator be human when something inhuman, an alien material essence, is his supreme essence? *'Quand il a peur, il est terrible* [When he is afraid, he is terrible]*,'* says the *National* about Guizot. These words could be inscribed as a motto over all *legislation inspired by self-interest*, and therefore by *cowardice*.

Marx, *infra* note 35, at 236.

34. Suevon Lee, *By the Numbers: The U.S.'s Growing For-Profit Detention Industry*, PROPUBLICA (June 20, 2012, 2:41 PM), https://www.propublica.org/article/by-the-numbers-the-u.s.s-growing-for-profit-detention-industry [https://perma.cc/D2V4-CUHG]. For example, in 2014, the GEO Group reported $2.5 million in direct lobbying expenditures, $2.2 million of which was spent at the state and local levels. THE GEO GROUP, POLITICAL ACTIVITY AND LOBBYING REPORT 4 (2014), http://www.geogroup.com/Portals/0/PREA_Certifications/Political_Activity_Re port_2014.pdf.

35. *See* POLITICAL ACTIVITY & LOBBYING REPORT, *supra* note 34. Marx was especially critical of the relationship between government actors and private actors: "Private interest is no more made capable of legislating by being installed on the throne of the legislator than a mute is made capable of speech by being given an enormously long speaking-trumpet." Karl Marx, *Debates on the Law on Thefts of Wood*, *in* 1 KARL MARX & FREDERICK ENGELS, COLLECTED WORKS 261 (1975).

in a referendum.[36] However, the construction of facilities with private financing does not require voter approval, therefore, "a government entity can contract with a private prison company and force its citizens to pay for the prison through their tax share even if the voters oppose such a move."[37] The unchecked construction of private prison facilities ignores voters' concerns and removes the voters' voices from correctional policies.[38]

Ultimately, prison corporations have transformed into vehicles that perpetuate a regime of mass incarceration while also realizing financial benefits. The longstanding conflict between societal progression and prison privatization is further demonstrated in an annual report filed with the Securities and Exchange Commission, where CoreCivic identifies the company's *risk factors*:

> The demand for our facilities and services could be adversely affected by the *relaxation of enforcement efforts . . . leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by criminal laws*. For instance, any changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional . . . facilities to house them. Immigration reform laws are currently a focus for legislators and politicians at the federal, state, and local level. Legislation has also been proposed in numerous jurisdictions that *could lower minimum sentences for some non-violent crimes* and *make more inmates eligible for early release based on good behavior*. . . . [Also, sentencing alternatives under consideration could put some offenders on probation with electronic monitoring who would otherwise be incarcerated.] Similarly, *reductions in crime rates or resources dedicated to prevent and enforce crime* could lead to reductions in arrests, convictions and sentences requiring incarceration at correctional facilities.[39]

The company's statement highlights its concern that reductions in crime or changes in criminal sentencing may result in empty prison beds. To mitigate the risks of uncertainty and ensure a return on investment, private prison contracts require governments to maintain a minimum occupancy rate.[40] One critic notes that "[n]early two-thirds

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36. Rachel Christine Bailie Antonuccio, *Prisons for Profit: Do the Social and Political Problems Have a Legal Solution?,* 33 IOWA J. CORP. L. 577, 591 (2008).

37. Joseph E. Field, *Making Prisons Private: An Improper Delegation of Governmental Power*, 15 HOFSTRA L. REV. 649, 670 (1987).

38. *See id.*

39. CoreCivic 2017 Annual Report, *supra* note 25, at 30 (emphasis added).

40. Michael Cohen, *How for-Profit Prisons Have Become the Biggest Lobby No One*

of private prison contracts mandate that state and local governments maintain a certain occupancy rate—usually 90 percent—or require taxpayers to pay for empty beds."[41] Although these mandatory minimums are already exceptional, the states of Arizona and Oklahoma represent the most extreme cases. These states entered into three contracts that guaranteed minimum occupancies of 100% and 98%, respectively.[42]

In addition to minimum occupancy clauses, scholars suggest that prison corporations protect their financial interests by reducing operating costs in staffing and training programs.[43] Such concerns may not be frivolous, as parties need not specify a staff-inmate ratio in the contractual agreements.[44] In one instance, North Carolina legislators and residents discovered that the private corporation would have 68 correctional officers supervising 528 inmates, whereas the state would employ 141 correctional officers under similar circumstances.[45] Because an adequate and well-trained staff is fundamental to ensure order in the prison environment, cost-cutting measures in staff employment and training may jeopardize the safety of inmates, employees, and the surrounding community. Indeed, inadequate security mechanisms such as a faulty alarm system and insufficient security personnel were blamed for the escape of three inmates from an Arizona private prison.[46] That escape resulted in the murder of two community residents.[47]

The harms of financial and socio-political conflicts have manifested in reproachful ways. For example, Pennsylvania magistrates Judge Mark Ciavarella, Jr. and Judge Michael Conahan were convicted of engaging in a kickback scheme referred to as "kids-for-cash."[48] Judges Ciavarella and Conahan were sentenced to twenty-eight years and seventeen years in prison, respectively, after they

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Is Talking About, WASH. POST (Apr. 28, 2015), https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about [https://perma.cc/Z9DT-53G6].

41. *Id.*

42. Alex Friedmann, *Apples-to-Fish: Public and Private Prison Cost Comparisons*, 42 FORDHAM URB. L.J. 503, 540 (2014).

43. *See, e.g.*, Robbins, *supra* note 21, at 718; *see also* Dolovich, *supra* note 23, at 475.

44. Robbins, *supra* note 21, at 695.

45. Antonuccio, *supra* note 36, at 591.

46. Michael Brickner & Shakyra Diaz, *Prisons for Profit: Incarceration for Sale*, 38 HUMAN RTS. 13 (2011).

47. *Id.*

48. Reagan Ali, *Judge Sentenced to 28 Years for Selling 'Kids For Cash' to Prisons*, MINT PRESS NEWS (Aug. 27, 2015), https://www.mintpressnews.com/judge-sentenced-to-28-years-for-selling-kids-for-cash-to-prisons/209013 [https://perma.cc/PQ8H-JE3B]; Jon Schuppe, *Pennsylvania Seeks to Close Books on "Kids for Cash" Scandal*, NBC NEWS (Aug. 12, 2015, 5:42 PM), https://www.nbcnews.com/news/us-news/pennsylvania-seeks-close-books-kids-cash-scandal-n408666 [https://perma.cc/WQT7-TCVU].

were found guilty of accepting $1 million in bribes from the co-owner of two private juvenile facilities.[49] In exchange for kickbacks, the judges granted guilty convictions and imposed harsh sentences to over 2,500 juveniles and assigned them to the private juvenile facility.[50] Ciavarella and Conahan's actions expose the disastrous potential of significant private influence in the criminal justice system.

III. CONSTITUTIONALITY AND PRISON PRIVATIZATION

While the emergence of prison privatization presents unsettling consequences for political and societal interests, it also lends itself to legal questions regarding the constitutionality of such delegations. However, the legality of for-profit prisons is nested in a larger, intricate metanarrative about the relationship between private actors and the state. With the introduction of corporate lobbying, disappearing limits on corporate campaign expenditures, and the growing usage of government contractors, the line between the public and private sectors has been increasingly blurred.[51] The massive regime of contracting and delegation of public services to private actors creates unprecedented complexities for governance and unexpected outcomes. Because the delegation of public services both alters our understanding of roles and duties, and affects organizational behaviors, it has significant implications for accountability, liability, and constitutionality. The emergence of private prisons serves as the quintessential example of this constitutional paradox as the private sector expands into the public realm.

A. The State Action Doctrine

According to the Fourteenth Amendment, "No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[52] The Court has emphasized that the Fourteenth Amendment only guards against the infringement of constitutional rights by state actors.[53] The Court proclaimed that "the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject

49. Schuppe, *supra* note 48.

50. *Id.*

51. *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding that corporations' political speech is protected); H. Brinton Milward & Keith G. Provan, *Governing the Hollow State*, 10 J. PUB. ADMIN. RES. & THEORY 359 (2000).

52. U.S. CONST. amend. XIV (emphasis added).

53. Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974).

to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield."[54]

Despite the phrasing of the Fourteenth Amendment, subsequent jurisprudence has acknowledged that conduct by private actors may be considered state action in limited circumstances.[55] For example, private action may become government action if the task is one that has been traditionally and exclusively conducted by the government.[56] Though the Supreme Court has narrowly interpreted this public function requirement,[57] the Court has recognized the importance of government accountability by suggesting that the government cannot avoid accountability by delegating its tasks to private entities.[58] Also, private action may be considered state action if the actions are sufficiently entangled—meaning the government "affirmatively authorizes, encourages, or facilitates private conduct" in such a way that the private conduct could not have occurred without the government.[59] The Court has found sufficient entanglement in judicial enforcement of private action,[60] extensive government regulation,[61] and government provision of subsidies.[62] For example, in *Burton v. Wilmington Parking Authority*, the Court reviewed a Fourteenth Amendment challenge against the owner of a restaurant located in a public parking garage.[63] The Court held that the owner's refusal to serve a customer based on race violated the Equal Protection Clause.[64] The Court pointed out that the significant use of public funds to construct, operate, and maintain the building constituted joint participation

54. *Id.*

55. *See* cases cited *infra* note 57.

56. *See id.* at 349–50.

57. *See generally* Evans v. Newton, 382 U.S. 296 (1966) (applying public function exception to parks); Terry v. Adams, 354 U.S. 461 (1953) (applying public function exception to voting); Marsh v. Alabama, 326 U.S. 501 (1946) (applying public function exception to company towns).

58. *See* West v. Akins, 487 U.S. 42, 56 (1988).

59. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 539 (4th ed. 2011).

60. *See generally* Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982) (holding that mere state aid to a private actor can be entanglement); Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that a state enforcing a contract is state action); *cf.* Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (ruling that a private entity's actions can be considered state action if the entity is conducting activities similar to those of a state actor).

61. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 723–24 (1961). *But see* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972) (holding that government regulation of liquor licenses was not enough to constitute a private club's conduct as state action).

62. *See* Gilmore v. Montgomery, 417 U.S. 556, 578 (1974) (Brennan, J., concurring); Norwood v. Harrison, 413 U.S. 455, 464–65 (1973).

63. *Burton*, 365 U.S. 715 at 716.

64. *Id.* at 717–18; U.S. CONST. amend. XIV, § 1.

by the state such that the restaurant owner's conduct cannot be "purely private."[65]

If "prisoner[s] [do] not shed . . . basic constitutional rights at the prison gate[s],"[66] then constitutional protections should not hinge on whether those gates are publicly or privately owned. Based on the Court's analysis in *Wilmington Parking Authority*, little doubt exists that the state's extensive interaction with prison corporations is sufficiently deemed state action. Though it is arguable whether corrections is a public function traditionally and exclusively reserved to the government;[67] the services provided by the private prisons are otherwise indistinguishable from those performed by the state.[68] In fact, inmates have no choice in whether they will be assigned to a public or private facility. Furthermore, the economic interdependence that characterized the state's relationship with the restaurant in *Wilmington Parking Authority* is exacerbated in the case of private prisons. Prison corporations would be nonexistent without state actors, for all prison contracts are established with government agencies.[69] For example, in 2017, CoreCivic reported that approximately 52% of its revenue was derived from federal correctional and detention authorities, and management contracts with state correctional authorities represented approximately 38% of total revenue.[70] The significant state funding, in combination with the immense government regulation and substantial judicial involvement, undoubtedly constitutes state action and subjects prison corporations to scrutiny under the United States Constitution.

B. The Nondelegation Doctrine

The Supreme Court of the United States has also acknowledged that there are certain governmental functions that cannot be delegated to private parties,[71] a concept known as the nondelegation doctrine. The nondelegation doctrine is based on the constitutional provision that "[a]ll legislative powers herein granted shall be vested

65. *Burton*, 365 U.S. at 725.

66. Wolff v. McDonnell, 418 U.S. 539, 581 (1974).

67. *Cf.* Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) (describing a private entity as exercising a public function because it performed a duty normally reserved to the state).

68. *Cf.* Marsh v. Alabama, 326 U.S. 501, 503 (1946) (finding constitutional deprivation in a company town and its shopping district, where "there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.").

69. *See, e.g.*, CoreCivic 2017 Annual Report, *supra* note 25.

70. CoreCivic 2017 Annual Report, *supra* note 25, at 68.

71. *See* Carter v. Carter Coal Co., 298 U.S. 238, 310 (1936).

in a Congress of the United States."[72] However, the Necessary and Proper Clause of the Constitution permits Congress to "delegat[e] . . . authority . . . sufficient to effect its purposes."[73] The nondelegation doctrine represents the notion that certain duties are so closely aligned with sovereignty that they are inherently governmental—responsibilities such as war-making, lawmaking, and imposing taxes.[74] The question then lies as to which other governmental purposes can be properly delegated and which are traditional government functions. Despite the fundamental nature of these tasks, courts in constitutional democratic nations have been eerily silent on issues of privatization and have evaded quests to identify these core governmental functions.[75]

One scholar suggests that the process of identifying core governmental functions is elusive because such functions are fluid; thus, "essential components of governance [are] matters of political, economic and social preference . . . properly, in a democracy, left to the choice of the electorate."[76] Legal scholar Judith Resnik seems to agree, and she proposes that the time is now to address "what it is that we—in democratic constitutional polities—want . . . *to be* a function of the state, both transnationally and within a particular government."[77] At its core, the nondelegation doctrine represents the early ideas that the identification of core governmental functions is necessary and should extend beyond a mere political exercise to serve as a framework for private-public partnerships.[78]

Deprivation of liberty may be one function that is inherently governmental and should not be delegated to private parties. Though the U.S. Supreme Court has never adjudicated this particular issue, strong arguments exist that 1) liberty deprivation should be classified as a solely state function, and 2) the delegation of incarceration to private corporations violates the nondelegation doctrine.[79] The

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72. U.S. CONST. art. I, § 1.

73. Lichter v. United States, 334 U.S. 742, 778 (1948); *see* U.S. CONST. art. I, § 8, cl. 18.

74. *See* Judith Resnik, *Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century*, 11 INT'L J. CONST. L. 162, 168 (2013).

75. *Id.* at 165–67. The "[Israeli] court styled its ruling as predicated on inmates' personal rights rather than on a structural analysis of what constituted the "hard core" of sovereign powers' that could not be delegated 'to private enterprises.'" *Id.* at 166–67.

76. *Id.* at 165 (quoting Opinion, Jeffery Jowell, HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance (Isr. Aug. 20, 2006) ¶ 30).

77. *Id.* at 170. The Supreme Court of India has embarked on this quest, declaring that policing and law and order are state subjects. *See* Sundar v. Chattisgarh, (2011) 7 SCC 547 ¶ 41 (India) (*available at* http://pudr.org/sites/default/files/2019-01/nandini%20sundar%20vs%20chattisgarh_0.pdf).

78. *See* Resnik, *supra* note 74, at 170–71.

79. HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD, 27 (2009) (Isr.); *see generally* Sundar v. Chattisgarh, (2011) 7 SCC 547 ¶ 41 (India).

primary challenge to a nondelegation argument is that the U.S. Supreme Court considers the doctrine moribund.[80] The use of the doctrine has dissipated over time, among the likes of substantive due process and the restrictive commerce clause doctrines of the New Deal Era.[81] The cases that presented successful claims against delegations to private parties under the nondelegation doctrine all occurred during this period.[82] Still, the New Deal era cases primarily dealt with property interests, not liberty interests.[83] Since then, the Court has hinted at the revival of the nondelegation doctrine and has insinuated that delegations interfering with liberty interests may warrant a higher standard.[84] In a concurring opinion in *Industrial Union Dep't v. American Petroleum*,[85] Justice Rehnquist wrote separately on delegation grounds:

> We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre–New Deal era. If the nondelegation doctrine has fallen into the same desuetude as have substantive due process and restrictive interpretations of the *Commerce Clause*, it is, as one writer has phrased it, 'a case of death by association.'[86]

In spite of these subtle hints of the nondelegation doctrine's continued relevance, the Supreme Court has blatantly skirted the delegation issue in recent attempts to review the nondelegation doctrine.[87] For example, in *Department of Transportation v. Association of American*

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80. *See* Fed. Power Comm'n v. New England Power Co., 415 U.S. 345, 352–53 (1974) (Marshall, J., concurring). The Court has not upheld a nondelegation challenge since Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

81. *See Carter Coal Co.*, 298 U.S. at 311.

82. *See id.*; *see generally* Washington *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116 (1928); Eubank v. City of Richmond, 226 U.S. 137 (1912).

83. *See* Panama Refining Co. v. Ryan, 293 U.S. 388, 414 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 543 (1935).

84. *See id.* at 352–53 (Marshall, J., concurring) (stating the delegation doctrine "has been virtually abandoned by the Court for all practical purposes," except where personal liberties are involved); Kent v. Dulles, 357 U.S. 116, 129 (1958) (stating if a citizen's liberty to travel is to be regulated, it must be pursuant to the lawmaking functions of Congress, and any delegation of the power must be subject to adequate standards and delegated authority will be narrowly construed).

85. Indus. Union Dep't v. Am. Petroleum, 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring).

86. *Id.* at 686 (emphasis in original) (citing J. ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW 133 (1980)).

87. Clinton v. City of New York, 524 U.S. 417, 448 (1998) ("The excellent briefs filed by the parties and their *amici curiae* have provided us with valuable historical information that illuminates the delegation issue but does not really bear on the narrow issue that is dispositive of these cases.").

Railroads, the Supreme Court reversed the D.C. Circuit's decision that Amtrak is a private entity and Congress's grant of joint authority to issue metrics and standards that address the performance and scheduling of passenger railroad services violates nondelegation principles.[88] Instead, the Court held that Amtrak is "not an autonomous private enterprise" and acts as "a governmental entity for purposes of the Constitution's separation of powers provisions," so there are no delegation issues at stake.[89] The Court hesitates to reinvigorate the nondelegation doctrine, but exhibits willingness to adopt other rationales for the same result.[90] Perhaps the Court's reluctance stems from the notion that the revival of the nondelegation doctrine may challenge substantial portions of the current administrative state.[91]

If the U.S. Supreme Court were to grant certiorari on a nondelegation issue, three arguments favor a constitutional challenge to prison delegation. First, the Court has deemed delegations unconstitutional when the delegation is in a core legislative field.[92] In *Whalen v. United States*, the Court determined that the power to define criminal offenses and to prescribe punishment resides wholly within Congress.[93] Extending this logic, the power to define criminal offenses and to prescribe punishment may be classified into a broader category of liberty deprivation. These legislative functions act to limit the actions of individual citizens, establishing what one can and cannot do under eyes of the law. Secondly, the Court held that delegations affecting fundamental rights—such as liberty interests—are more likely to be found unconstitutional.[94] In his concurring opinion in *United States v. Robel*, Justice Brennan noted that when fundamental rights are at stake, broad statutory delegations are viewed with heightened scrutiny.[95] Additionally, scholars and state court judges have proposed special conditions for delegations to private entities.[96] For example, the Texas court judge in *Texas Boll Weevil*

88. Ass'n of Am. R.R. v. Dep't of Transp., 865 F. Supp. 2d 22 (D.D.C 2012), *rev'd,* Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1228 (2015).

89. *Dep't of Transp.*, 135 S. Ct. at 1232–33.

90. *See Clinton*, 524 U.S. at 448–49.

91. Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in* Clinton v. City of New York*: More Than 'A Dime's Worth of Difference*,' 49 CATH. U. L. REV. 337, 340 (2000).

92. Whalen v. United States, 445 U.S. 684, 689 (1980).

93. *Id.*

94. United States v. Robel, 389 U.S. 258, 275 (1967) (Brennan, J., concurring).

95. *Id.* at 275 ("This is because the numerous deficiencies connected with vague legislative directives . . . are far more serious when liberty and the exercise of fundamental rights are at stake.") (Brennan, J., concurring).

96. *See* George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 659 (1975) (stating "[w]here a delegation by virtue of its content or breadth calls into question the future operation of the political process, judicial scrutiny seems warranted").

Eradication Foundation v. Lewellen was particularly concerned with the private status of the delegate and suggested that private delegates be held to a higher scrutiny.[97]

On the other hand, when examining statutory delegations, courts review the governing standards of the delegation to determine if the statute has sufficient standards and limitations, and it reserves some decision-making power for the government.[98] A successful claim under the nondelegation doctrine would need to refute the adequacy of governing standards and challenge the effectiveness of government supervision.[99] Though governments have provided clear, explicit standards and regulations for private prisons, recent jurisprudence implies that states may be yielding decision-making power.[100] For example, following the general principles of agency law, authority and control correspond with liability.[101] However, in *Minneci v. Pollard*, the Court shifts liability to private corporations—holding that federal inmates in private prisons cannot bring a *Bivens* action against the government, as the prisons are considered contractors.[102] Thus, inmates' remedies lie solely within civil actions against the corporation, inferring that the government has a limited amount of control in the operations of private prisons.

C. Classical Constitutional Principles

Among other classical thinkers, the ideologies of Jean-Jacques Rousseau and John Locke heavily influenced the moral doctrines of liberal democracy.[103] The Framers of the U.S. Constitution relied on political and philosophical understandings to create strong foundations for self-governance.[104] Core to these understandings is the social contract doctrine, which describes the notion of an implicit agreement between a state and its citizens:

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97. *See* Tex. Boll Weevil Eradication Found. v. Lewellen, 952 S.W.2d 454, 469–70 (Tex. 1997).

98. Yakus v. United States, 321 U.S. 414, 425 (1944).

99. *See* McGautha v. Cal., 402 U.S. 183, 277–78 (1971).

100. *See* Minneci v. Pollard, 132 S. Ct. 617, 623 (2012).

101. *See* Restatement (Second) of Agency § 1 (1957).

102. *See Minneci*, 132 S. Ct. at 620; *see also* Sasha Volokh, *The Surprising Truth About Suing Private Prisons*, WASH. POST (Feb. 19, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/19/the-surprising-truth-about-suing-private-prisons [https://perma.cc/T9V7-4SXF].

103. Nelson Lund, *Rousseau: Radical Philosopher, Political Conservative*, WASH. POST (Jan. 6, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/06/rousseau-radical-philosopher-political-conservative/?noredirect=on&utm_term=.207c0e8a2f1c [https://perma.cc/5W9B-R72H].

104. *See* Jed Rubenfeld, *Of Constitutional Self-Government*, 71 FORDHAM L. REV. 1749, 1761 (2003).

> [that] each one of us puts into the community his [or her] person and all his [or her] powers under the supreme direction of the general will; and as a body, we incorporate every member as an indivisible part of the whole . . . this act of association creates an artificial and corporate body composed of as many members as there are voters in the assembly, and by this same act that body acquires its unity, its common *ego*, its life and its will.[105]

In the metaphorical social contract, citizens agree to abide by laws and sacrifice certain freedoms in exchange for protection from the government.[106] In return, the government is subject to particular restraints and boundaries that it must observe to ensure the cooperation of its constituency.[107] The most rudimentary of these obligations is the government's duty to preserve the natural rights of its citizenry.[108] The rights to life, liberty, and property are *inalienable*—they cannot be delegated, given or taken away.[109] The enumeration of these rights in the Constitution does not indicate that the government grants these rights; rather, enumeration is merely an acknowledgement of an individual's natural rights.[110] Though the state does not grant natural rights and the state cannot revoke natural rights, a government can deprive an individual of his or her natural rights by disabling the exercise of these rights.[111] For example, incarceration is the deprivation of individual liberty as a form of punishment. Even so, governmental deprivation can only occur strictly under the due process of law.[112]

Still, the social contract represents the notion that certain governmental functions cannot be delegated—invoking the aforementioned dilemma[113] of identifying those core governmental functions.[114] Indeed,

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105. Paul Moyle, *Separating the Allocation of Punishment from Its Administration: Theoretical and Empirical Observations*, 41 BRIT. J. CRIMINOLOGY 77, 78 (2001) (quoting JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 61 (1968)) (emphasis in original).

106. *See id.*

107. *Id.* at 79.

108. *See* Slaughter-House Cases, 83 U.S. 36, 105 (1872) (Field, J., dissenting).

109. *Id.*

110. *See id.* at 105 ("[The Fourteenth] amendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes.").

111. *Id.* at 116 (Bradley, J., dissenting).

112. *Id.*

113. This concern is critical to understandings of sovereignty, authority, and legitimacy. Resnik, *supra* note 74, at 168 ("When god and monarchy no longer sufficed, the provision of 'peace and security' became a pillar of sovereignty, manifested through the development of administrative capacities to police, adjudicate, and punish. Democratic regimes offered another basis, popular sovereignty, in which the relationship between citizen and state licensed governments to impose violence on their own populations. Constitutions—democratic and not—codified both that authority and its limits.").

114. Moyle, *supra* note 105, at 79 ("A social contract compels a compact between the

one critic identifies this weakness as evidence that privately contracting the management of corrections does not breach the social contract: "[w]hen criminal justice is broken down into specific activities or into functions and subfunctions, *it is no longer clear that any of these tasks must be the exclusive province of the state*."[115] However, Resnik argues that this approach may be reversed, and instead, these roles *become* governmental functions "by placing them outside the purview of total third-party provisioning."[116]

Nonetheless, certain rights are embedded in the social contract, such as the right to punish individuals who violate societal rules.[117] While citizens may subject themselves to the deprivation of natural rights by the government, they do not yield this same power to private entities:

> When we agree to the laws . . . we accept the proposition that if we ever break the law we ought to be punished. Criminals are punished, then, with their own consent. And if this isn't active and explicit consent, then it is constructive and tacit: for the criminal has lived under and enjoyed the benefits of the laws, and could have participated in the making of these laws. . . . But if this is right, then *it is crucial that the agents of punishment be agents of the laws and of the people who make them*. Though it may sound paradoxical, the criminal is punished by his own agents—who are ours too. That's why private punishment is ruled out. We can't be judges or police or jailers in our own name or for our own purposes. It is only some public purpose, which the criminal could share—which, as a fellow citizen, he does share—that justifies punishment.[118]

Under this interpretation, it is a violation of the social contract for the government to delegate the power to deprive liberty to private corporations—"just as citizens must obey sovereign law, so too must the law be sovereign."[119] Legal scholar Barak Medina aptly summarizes how the delegation of this power is ultimately problematic:

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state and its citizens, and government's authority to divest its powers to private non-government entities therefore is inextricably linked to its reciprocal obligation to maintain these core powers. Core powers are notoriously difficult to identify.") (emphasis omitted).

115. *Id.* at 80 (quoting C. H. LOGAN, PRIVATE PRISONS: CONS AND PROS 58–59 (1990)) (emphasis in original).

116. Resnik, *supra* note 74, at 170.

117. *See* Joycelyn M. Pollock, *The Rationale for Imprisonment*, *in* PRISONS TODAY AND TOMORROW 4 (3d ed. 2014).

118. Yoav Peled & Doron Navot, *Private Incarceration—Towards a Philosophical Critique*, 19 CONSTELLATIONS 216, 225 (2012) (quoting Brief for Michael Walzer as Supporting Plaintiffs, HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD, 27, (2009) (Isr.) (emphasis in original)).

119. Moyle, *supra* note 105, at 79.

"The principle that the state should decide not only on the sanction but also execute it, to ensure that it 'discharges its basic responsibility as sovereign for enforcing the criminal law and furthering the general public interest,' is a principle that deals with the public interest in general."[120] The notion that delegation of corrections is fundamentally contradictory to public interests, without needing to show actual harm, is further exemplified in the Israel Supreme Court's decision banning private prisons.

IV. INSIGHTS FROM ISRAEL'S *ACADEMIC CENTER* DECISION

In 2009, Israel's highest court recognized the discrepancy between public and private interests.[121] The Supreme Court of Israel declared private prisons unconstitutional and held that the delegation of prisons to private parties is a violation of basic human rights.[122] Through a critical review of *Academic Center of Law and Business v. Minister of Finance*,[123] the landmark decision that created an international precedent, this Article examines how the reasoning behind the Israeli decision reflects American democratic values and proposes potential arguments for stronger protections of liberty interests. *Academic Center* suggests that the delegation of prisons to private corporations morally and legally infringes on dogmas that are central to the core foundations of American democracy.[124]

In 2004, the enactment of the Prisons Ordinance Amendment Law (Amendment 28) authorized the establishment of private prisons in Israel.[125] By contracting corrections to private companies, the state agreed to pay a fixed cost per inmate to avoid the costs of constructing additional facilities.[126] The petition, filed by the Academic College of Law in Ramat Gan, presented a two-pronged challenge to the law.[127] First, they argued that the transfer of prison powers to private parties is fundamentally a violation of the rights to liberty and dignity.[128] Secondly, the motivations to maximize shareholder wealth

120. Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization*, 8 INT'L J. CONST. L. 690, 709 (2010) (footnote omitted).

121. *See* HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD, 27, 27 (2009) (Isr.).

122. *Id.* at 27–28.

123. *Id.* at 27.

124. *Id.* at 126–27.

125. Prison Ordinance (Amendment No. 28), SEFER HA-HUKIM [official gazette], No. 1935, at 348 (5764-2004) [hereinafter Amendment 28].

126. *See* HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD, 27, 128–29, 163 (2009) (Isr.).

127. *Id.* at 34–37.

128. *Id.* at 28.

provide strong incentives for private corporations to cut costs in facility management and staff wages, thereby violating prisoners' rights.[129] The Court found private prisons unconstitutional based on the transfer of powers alone, and therefore, did not address the second argument.[130]

Israeli law states that while imprisonment is inherently a loss of liberty, one's incarceration does not justify additional violations of human rights.[131] In *Academic Center*, one issue was whether the transfer of power to a private corporation alone violated inmates' constitutional rights to personal liberty and dignity.[132] Secondly, could the state give the authority to deny liberty to a party that operated to advance private interests?[133] Ultimately, the Court concluded that to transfer authority for managing the prison to a private contractor whose aim is monetary profit would severely violate the prisoners' basic human rights to dignity and freedom.[134]

Though the ruling appears to be solely based on principles of human rights, heightened protections for liberty interests in the social contract theory and the nondelegation doctrine consistently re-emerge throughout the Court's reasoning. Writing for the majority, President Dorit Beinisch[135] determined that Amendment 28 grants invasive powers to a private party.[136] The Court opined, *inter alia*, that the ability of private corporations to subject inmates to solitary confinement for up to forty-eight hours, to order invasive inspections of naked bodies, and to use reasonable force constituted a "serious violation of the rights to personal liberty and human dignity."[137]

A. The State Action Doctrine

In many ways, the onslaught of privatization in Israel mirrors that of the United States. The private sector finances and produces goods and services formerly provided by the state, and the state

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129. *Id.* at 27–28.
130. *Id.* at 27–28.
131. *Id.* at 56.
132. HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD, 27, 56–57, 163 (2009) (Isr.).
133. *Id.* at 70.
134. *Id.* at 28.
135. For the Supreme Court of Israel, the President is the presiding judge, similar to the role of the United States Chief Justice. The Supreme Court of Israel is composed of the President, the Deputy President, and thirteen Justices. For more information on the current organization of the court, see http://elyon1.court.gov.il/eng/judges/judges.html#12 [https://perma.cc/55LA-7FZN].
136. HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD, 27, 48 (2009) (Isr.).
137. *Id.*

increasingly delegates powers to the private sector.[138] While Israeli law mandates public funding in areas such as education, health care, and services pertaining to "social" rights, no such restrictions exist for corrections.[139] Moreover, the United States' public function doctrine for state action parallels Israel's "quasi-public" entities doctrine, which "subjects any body authorized to employ governmental powers to the norms of public law, most importantly human rights laws, as well as to the jurisdiction of the Israeli administrative courts, including the High Court of Justice."[140] Whereas the protections of the United States' Constitution typically only extend to private actors in specific circumstances, private contractors with delegated governmental powers are subject to judicial enforcement of the Israeli Constitution.[141] The Israeli Supreme Court operated under the assumption that prison privatization constitutes state action, and the Court did not engage in a separate analysis.[142]

However, the discussion of the public-private distinction is much more nuanced in the Israel Court's decision.[143] Despite the innate complexities of the interactions between the sectors, the Court proceeded based on key assumptions about characteristics of the private and public sectors, adopting a hard-line distinction and ignoring the intricacies of the relationship:

> [i]t assumed that the market has a single stable content: it operates only for-profit and is both uncontrollable and unsupervisable, thus undermining attempts at effective regulation. It further assumed that the state always operates to promote the public interest and its actions are transparent to the public and effectively controlled by courts, despite evidence to the contrary in many areas, including the publicly run prisons in Israel.[144]

The Court emphasized the underlying motivations as the distinguishing factor for public and private interests, as evidenced in claim that "the inmate of a privately managed prison is exposed to a violation of his rights by a body that is motivated by a set of considerations

138. Medina, *supra* note 120, at 691–92.

139. *Id.* at 692; *see also* HCJ 366/03 Commitment to Peace and Social Justice Society et al. v. Minister of Finance ¶ 15 (2005) (Isr.).

140. Medina, *supra* note 120, at 693 (footnote omitted).

141. *Id.* ("The private exercising of government power is subject not only to (the required) effective supervision by the Executive Branch, but also to the judicially enforced duties set forth by public law norms. Under Israeli law, the delegation of governmental powers to private persons hardly changes the formal norms to which the power holder is subject.").

142. *Id.*

143. *See* Hila Shamir, *The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State*, 15 THEORETICAL INQUIRIES L. 1, 4 (2014).

144. *Id.* at 20–21 (footnote omitted).

and interests that is *different* from the one that motivates the state when it manages and operates the public prisons."[145] The motivations, presumably the public sector's alignment with societal interests and the private sector's alignment with shareholder interests, are distinct enough to merit acceptable behavior in one and constitutional invalidity in the other. According to the Israeli Supreme Court,

> the scope of the violation of a prison inmate's constitutional right to personal liberty, when the entity responsible for his imprisonment is a private corporation motivated by economic considerations of profit and loss, is *inherently greater* than the violation of the same right of an inmate when the entity responsible for his imprisonment is a government authority that is not motivated by those considerations.[146]

Thus, it is not necessarily the classification of public versus private that results in determinative outcomes for privatization. Rather, theoretical institutional allegiances dictate the moral placement of service provision, regardless of where the actual organization falls on the public-private continuum. This idea is particularly interesting in Israel's case, as the state prisons failed to meet the minimum legal requirements "especially with regard to the problem of overcrowding and overpopulation and the lack of sufficient living space for each person, sleeping on the floor without a bed, the lack of cleanliness and sanitary rules and the lack of sufficient ventilation."[147] The irony here is that the private prisons proposed to significantly improve inmate conditions through

> more formal education, an increase in the scope of the employment of inmates in various jobs, . . . an increase in the physical living space far beyond the essential minimum, an improvement in the food, an increase in the number of family visiting days, an increase in the educational staff, [and] an improvement in medical treatment.[148]

So though the private concessionaire petitioned to provide prisons that were better than the poorly managed state prisons, the actor's fiduciary obligations to shareholders alone result in automatic assumptions about the immoral nature of delegating corrections to private corporations.

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145. HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD, 27, 70 (2009) (Isr.) (emphasis added).

146. *Id.* at 73 (emphasis added).

147. *Id.* at 176 (quoting Crim A 7053/01 A v. State of Israel [62] 511).

148. *Id.* at 135.

B. Principles of the Nondelegation Doctrine in Academic Center

Prior to *Academic Center*, delegations to private entities in Israel were only required to meet procedural safeguards such as "setting sufficient guidelines by the relevant public entity, taking steps to prevent potential conflicts of interests in the specific context, and implementing supervisory powers."[149] However, in *Academic Center*, the Court applied the nondelegation doctrine's concept of core governmental functions to review the constitutionality of prison privatization. Writing for the majority, President Beinisch emphasized that punishment and law enforcement is exclusively a state function:

> [the power to punish], as well as the powers of the other security services, is an expression of a broader principle of the system of government in Israel, according to which the state . . . has *exclusive authority* to resort to the use of organized force in general, and to enforce the criminal law in particular.[150]

The Court then restated the principles of the nondelegation doctrine, framing the issue to emphasize both the exclusivity of the government power and the preservation of fundamental rights: "[t]he constitutional issue . . . is whether and to what extent the state . . . may transfer to private enterprises the responsibility for carrying out certain tasks that for years have been its *exclusive* concern, . . . when those tasks involve a significant and fundamental violation of human rights."[151]

On the other hand, the Court appeared fully aware of the complexities involved in identifying core governmental functions. Though the Court acknowledges that imprisonment and the use of organized force are within a "hard core" of government functions, the majority refuses to articulate a criteria for determining which functions are inherently governmental[152]:

> the Government in a manner that enshrines on a constitutional level the existence of a 'hard core' of sovereign powers that the government as the executive branch is liable to exercise itself and that it may not transfer or delegate to private enterprises. . . . [T]he powers involved in the imprisonment of offenders and in the use of organized force on behalf of the state are indeed included within this 'hard core.' Naturally, adopting an interpretation of

149. Medina, *supra* note 120, at 692 (footnote omitted).

150. HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD, 27, 65 (2009) (Isr.) (emphasis added).

151. *Id.* at 55 (emphasis added).

152. *See* Resnik, *supra* note 74, at 170.

> this kind will require us to define clearly the limits of that 'hard core,' since it may be assumed that there is no constitutional impediment to privatization of the vast majority of services provided by the state, and this matter lies mainly within the scope of the discretion of the legislative and executive branches.[153]

Still, in a concurring opinion, Justice Arbel included the broader function of liberty deprivation in the scope of the state's core governmental functions: the "power [to deny liberties and make use of coercive force] that was entrusted to the state as the agent of the political community lies at the very heart of the government's sovereign functions, alongside the power to maintain an army, a police force and courts."[154] Justice Arbel supports this reasoning by pointing to the complex nature of the right to liberty.[155] Liberty is a natural right, he explains, so it is fundamental in and of itself, but it is also tightly coupled with the exercise of other fundamental rights:

> The right to personal liberty is without doubt one of the most central and important basic rights in any democracy, and it was recognized in our legal system before it was enshrined in the Basic Law. Denying this right is one of the most severe violations possible in a democratic state that upholds the rule of law and protects human rights. A violation of the right to personal liberty is especially serious because it inherently involves a violation of a series of other human rights, whose potential realization is restricted physically, mentally and ethically.[156]

The government argued that it was only seeking the assistance of the private sector, not delegating or transferring its power to deprive liberty and use force.[157] The Court rejected this argument, pointing to the fact that private prisons have broad discretion to manage the daily lives of the inmates as indicative of a complete transfer of power.[158] The government also argued that the Court should defer to the government's purposes unless the delegation was such an egregious violation that it "shakes the foundations of democracy and the fundamental principles of the system of government."[159] However, because of the delicate nature of the right to

153. HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD 27, 100 (2009) (Isr.).

154. *Id.* at 106.

155. *See id.* at 106–07.

156. *Id.* at 58–59.

157. *See id.* at 71.

158. *Id.*

159. HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD 27, 41 (2009) (Isr.).

liberty, the Court articulated a heightened standard for liberty deprivation by a private entity:

> The denial of personal liberty is justified only if it is done in order to further or protect an essential public interest, and therefore the question whether the party denying the liberty is acting in order to further the public interest (whatever it may be) or is mainly motivated by a private interest is a critical question that lies at the very heart of the right to personal liberty.[160]

President Beinisch concluded that even if economic and administrative efficiency are legitimate public purposes, they do not trump the interests of liberty.[161] The Court acknowledged that delegation to private parties is an integral part of administrative law, but the Court distinguished imprisonment powers as unique because they involve the power to deprive individuals of human rights.[162] Ultimately, the majority in *Academic Center* emphasized that because punishment is a core governmental function that involves fundamental rights to liberty, delegations to private entities should be viewed with heightened scrutiny.[163]

C. Social Contract Principles in Academic Center

In *Academic Center*, President Beinisch underscored the Court's reliance on moral principles of state governance. Not surprisingly, the Court situates the foundations of the opinion within modern political philosophy.[164] For example, the Court cited Thomas Hobbes to define the role of public ministers.[165] Also, the Court looked to John Locke to establish that punishment is a jurisdiction reserved for society as a whole, not the individuals within.[166] The Court summarized these two notions and concluded that even though Hobbes and Locke were seventeenth century thinkers, their messages are integral to understanding contemporary liberal democracies:

> [I]t would appear that the basic political principle that the state, through the various bodies acting in it, is responsible for public

160. *Id.* at 27, 28.

161. *Id.* at 95.

162. *See id.* at 110.

163. *See id.* at 59 (stating the right to personal liberty has "exalted constitutional status").

164. *Id.* at 61.

165. HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD, 61 (2009) (Isr.) (citing THOMAS HOBBES, LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMON WEALTH ECCLESIASTICALL AND CIVIL (1651), at chap. XXIII).

166. *Id.* at 27, 61–62 (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 87 (1690)).

> security and the enforcement of the criminal law has remained unchanged throughout all those years, and it is a part of the *social contract* on which the modern democratic state is also based.[167]

Though the court attempted to evade explicitly defining criteria for identifying core governmental powers, Justice Procaccia suggested that the social contract does serve as a guiding framework for this conceptualization:

> The social contract, which gave the sovereign the responsibility to define norms of conduct in society, is what also gave it the responsibility for enforcing them. It delineates, in accordance with the principles of the system of government, the limits of the exercise of institutional power, the limits whereof are defined by the duty of respecting rights of the individual as a human being.[168]

Justice Arbel reaffirms that liberty deprivation is a core governmental function, asserting that the social contract is the authority that grants a sovereign the power to deprive individual liberty:

> [The power to] deny or restrict liberty is given to the state by virtue of a metaphorical 'social contract' that is made between it and the citizens living in it, in which the citizens voluntarily given the state the power to deny liberties and to make use of coercive force, *inter alia* in order to guarantee their protection and security and to protect their property.[169]

The social contract grants the sovereign the right to punish only to further public interests, not private interests.[170] Just as the Texas court conveyed in *Texas Boll Weevil*,[171] the Israeli Court expressed concern about the differing motives of public and private entities when liberty deprivation is involved.[172] The public-private distinction is critical because public actions and private actions are treated differently under the law. Put simply, there are certain instances in which a legitimate government action may be unlawful in the private arena. President Beinisch highlighted this paradox through the example of the use of force: "[w]ere this force not exercised by the

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167. *Id.* at 62 (emphasis added).
168. *Id.* at 120.
169. *Id.* at 106 (citation omitted).
170. *See id.* at 107.
171. Tex. Boll Weevil Eradication Found. v. Lewellen, 952 S.W.2d 454, 469–70 (Tex. 1997).
172. HCJ 2606/05 Academic Center of Law and Business v. Minister of Finance PD, 27, 128 (2009) (Isr.).

competent organs of the state, . . . in order to further the general public interest rather than a private interest, this use of force would not have democratic legitimacy, and it would constitute *de facto* an improper and arbitrary use of violence."[173] The opposite is also true. The state's legitimacy is what allows the state to exercise its powers,[174] "since [state representatives] act within the framework of the democratic political mechanism and are subject to its rules, their legitimacy is enhanced."[175] Because the power to deprive rights belongs to the state, and the state must implement these powers, failure to implement these powers jeopardizes the state's legitimacy.[176] In a concurring opinion, Justice Arbel suggests that the power to deprive rights of liberty interests are distinctive, and the transfer of these powers

> erodes to some extent the concept of justice, which no longer stands on its own as a goal in itself, and it may weaken the authority of the organs of state, the integrity with which they are regarded, public confidence in government and the nature of democratic government in its widest sense. In such circumstances, depriving the prison inmates of their *liberty* loses a significant element of the justification for it.[177]

Ultimately, the provisions of the social contract shape the framework for the legitimate authority of the state. The state's power to deprive liberty is legitimate only because it is "exercised by and on behalf of the state, after the person with regard to whom they are exercised has been tried and convicted by the legal system of the state."[178] The transfer of liberty deprivation powers to private actors disrupts the state's role in liberty deprivation and jeopardizes the state's legitimacy:

> the violation of the right to personal liberty resulting from giving a private enterprise the power to deny liberty within the context of the enforcement of criminal law derives *ipso facto* from the fact that the state is giving that party one of its most basic and invasive powers, and by doing so the exercise of that power loses a significant part of its legitimacy.[179]

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173. *Id.* at 65.
174. *Id.* at 65–66.
175. *Id.* at 66.
176. *See id.* at 106–07.
177. *Id.* at 107 (emphasis added).
178. HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD, 27, 68 (2009) (Isr.).
179. *Id.* at 60.

The transfer of liberty deprivation powers to actors that are not parties to the social contract undermines the state's legitimacy and is problematic for the "moral standing of the state vis-à-vis the public in general."[180] On a macro level, this breach of the social contract erodes the concept of justice, weakens the authority of the organs of the state, and diminishes public confidence in the nature of democratic government.[181] *Academic Center* represents the paradoxical notion that allowing private actors to deprive inmates of their liberty interests on behalf of the government "loses a significant element of the justification for it."[182]

CONCLUSION

Explaining Karl Marx, John Sutton once stated, "[i]f law is inevitably the servant of capitalism, reform efforts are, at best, a waste of effort and, at worst, they contribute to the strengthening of capitalism."[183] Private prisons are a quintessential illustration of the problematic relationship between law, capitalism, and the private sector; but it is necessary to situate the discussion of private prisons in the broader context of the role of punishment. Punishment should correspond with a society's political and social ideologies, and not present moral dilemmas. The social contract serves as a guideline for these core societal principles, and the Constitution merely institutionalizes these common values. According to Emile Durkheim, punishment is imposed on those who violate the collective consciousness, and in return, punishment simultaneously affirms social values.[184] Yet, the criminal justice system can and does contradict societal values of fairness and equality, particularly on the basis of class and race.[185] Still, moral cohesion is important in identifying and upholding societal values.[186]

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180. *Id.* at 107.

181. *See id.*

182. *Id.*

183. JOHN R. SUTTON, LAW/SOCIETY: ORIGINS, INTERACTIONS, AND CHANGE 59 (Pine Forge Press 2000).

184. Cyndi Banks, *The Purpose of Criminal Punishment*, *in* CRIMINAL JUSTICE ETHICS: THEORY AND PRACTICE 120 (2004).

185. *See generally* Nekima Levy-Pounds, *Justice for All? How the Fallout from the War on Drugs Has Led to the Highest Incarceration Rate in the World*, COVENANT COMPANION 13 (July 1, 2012), https://covenantcompanion.com/2012/07/01/justice-for-all [https://perma.cc/93TC-3924].

186. In a study about public support for the California initiative that imposes a mandatory life sentence for repeat felons (the "three strikes" law), sociologists found that public punitiveness is linked most strongly to judgments about social conditions and to underlying social values, not concerns about crime or the courts. Tom R. Tyler & Robert

Though societal values fluctuate over time, the commitment to fundamental rights remains constant. The right to liberty has been deemed fundamental since time immemorial, for it is unquestionably designated as an inalienable right that cannot be infringed upon by the state. Nonetheless, the fundamental character of the right to liberty is not adequately reflected in American legal jurisprudence. Because of the vital nature of the right to liberty, courts should review liberty deprivations with the most exacting scrutiny. The authority to deprive liberty is one of the state's most powerful yet sensitive functions, and any delegation of that function should reflect the fragility of that power. The transfer of the power to deprive liberty should be approached with caution, and the government should refrain from allowing private actors to abuse that power. The previous discussion shows that the delegation of liberty deprivation powers to private corporations infringes on the foundational principles of a democratic society. The nondelegation doctrine reinforces the separation of powers that ensures governmental accountability, and the social contract establishes the parameters of the relationship between a sovereign and its citizenry.

Though the private actors often provide social services, in the case of private prisons, governmental interests in administrative and economic efficiency are not compelling enough to outweigh societal interests in liberty and state legitimacy. *Academic Center* serves as an international precedent in privatization litigation, and the decision reinforces the notion that certain functions are inherently governmental. The Supreme Court of Israel's ruling is insightful because the case emerged just after Israel proposed to build a single private prison. The decision came about prior to any actual operations of a private facility. At the time of the ruling, neither the potential harms nor the benefits of private prisons were yet realized. The Israel Supreme Court immediately recognized the conflicting motivations that would inhibit private entities from serving public interests for financial gain. While it is possible that private prisons could adequately perform the tasks, the liberty interests at stake are too delicate to be placed in private hands.

J. Boeckmann, *Three Strikes and You Are Out, but Why—The Psychology of Public Support for Punishing Rule Breakers*, 31 L. & SOC'Y REV. 237, 256 (1997).