Globalization(s), privatization(s), constitutionalization, and statization: Icons and experiences of sovereignty in the 21st century

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What can democratic constitutional states offer that multinational corporations and global governance cannot? One answer, coming from recent decisions by courts in Israel and India, is policing and incarcerating, held to be activities that could not be constitutionally outsourced to third-party providers.

The articulation of an anti-privatization right is novel, but the activities it recognizes as belonging to the state have a long track record of distributing benefits across class lines to both public and private sectors. Police and prisons—along with courts as the conduit—are not often listed as "social rights" but ought to be, for they are government-provided services aiming to make both the citizenry and the state secure. The history of these services is a road-map to statization, constitutionalization, privatization, and globalization, for the interactions among citizens, government, and third parties gave content to the roles of police, judge, and prison official. These actors in turn came to personify the state. During the twentieth century, constitutions and international conventions imposed new constraints on police, judges, and prisons when those subject to their authority gained recognition as rights holders.

Yet if institutions of surveillance, confinement, and control are the only obligatory relationships that governments have, democratic constitutional states distinguish themselves

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from corporate and transnational organizations solely through their unique capacity to legitimate the imposition of violence. For constitutional sovereignty to join privatization and globalization as sustaining twenty-first century metanarratives entails offering more than prohibition and punishment. To do so requires translating the great ambitions of the twentieth century—equality and dignity—into legible institutions with the gravitas associated with police, courts, and prisons. Other infrastructure functions need to be elaborated as state-based activities in which citizen and state partake and through which collective norms develop. Exemplary are postal networks, inscribed in some forty constitutions that allocate government responsibilities for or protect the confidentiality of the post. Yet, postal services are now also at risk of losing their identity as state-supported public platforms offering universal services within and across borders.

1. "Ization"

Globalization and privatization encode two grand metanarratives marking a new understanding of the status quo, even as the terms denote processes of change operating across diverse contexts. Because these words are proffered for essays honoring ten years of I-CON, the question turns to the relationship of globalization and privatization to the state—a locus of authority constituted by laws and institutions, by economic and cultural practices, by a territory delineating the parameters of by its power, and by its own imagined community.[1] The development of constitutionalism adds yet another layer, simultaneously authorizing state action while imposing constraints on how the state may govern.

"Ization" has become affixed to so many English words that it has lost the connotations it once had to mobilizing efforts aimed at producing state identity in the wake of colonization.[2] In the twentieth century, "*Indianization*" was used to describe the British policy of "increasing the number of native Indians elected to the legislature in India" so as to achieve a "transfer of authority to native citizens."[3] In the 1950s, the usage was reiterated in "*Egyptianization*" and "*Nigerianization*," followed by "*Vietnamization*" as the United States tried to enlist Vietnamese to continue anti-Communist efforts in Indochina.[4]

"Ization" likewise operates on the "private" and the "global" to capture the directionality of movements of power—acting on the "public" and the "national" to shift sets of activities and capacities away from the state (be it a constitutional government or not) to other venues. Private firms, crossing national borders, undertake some services (such as running prisons, policing, arbitrating, administering ports, supplying combatants, educating, providing housing or health services) that have been identified

[1] The classic reference is Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism (1983).

[2] *See* Robert K. Barnhart, The Barnhart Concise Dictionary of Etymology: The Origins of American English Words 548 (1995).

[3] *Id.*

[4] *Id.*

as activities *of* the state but are now sold *to* states by global enterprises advertising their services as more flexible and competent than those of governments.

Unlike the tidiness of delineated physical boundaries that marked the Westphalian era, privatization and globalization float free from the limits of the material. Their interaction magnifies connectivity through shared operating modes crossing geographic boundaries. But who is sharing what with whom? What identities are made and how are joint ventures formed? In contrast to constitutional states, globalization and privatization make the action anonymous and ambiguous, rendering opaque the mechanisms and outputs of the transfers. The new venues are not fully located, both because of the vagaries of what falls within the "private" and the "global" and the diffuse and sometimes limited access to information in these domains.[5]

Indeed, the large literature offering varying assessments of the novelty, import, utilities, and distributive impacts of privatization and globalization reads them (jointly and severally) as eroding the sovereignty of states while embedded in and produced through states.[6] Privatization and globalization can be law-generated or law-approved (whether by executive order, legislation, treaty, contract, or grant); legal-institution building (producing a proliferating number of transnational organizations, drawing actors from nation states and the private sector[7]); law-drenched (as in the development by private entities of transnational standards incorporated into national obligations[8] and the structuring of transnational constitutional systems[9]), law-elusive (exemplified by enterprises crossing borders to escape regulatory regimes), and lawless (as in global terror and drug networks).[10]

As for the relationship to constitutions, "the global" has come to play a significant role in the discourse. Constitutions are posited to be both object and agent in debates about adaption, isolation, engagement, pluralism, transplantation, homogenization, fragmentation, migration, universalism, and cosmopolitanism.[11] Case law addresses

5 *See, e.g.*, Saskia Sassen, Territory, Authority, Rights: From Medieval to Global Assemblages (2006).

6 *See, e.g.*, Eric Ip, *Globalization and the Future of the Law of the Sovereign State*, 8 Int'l J. Const. L. (I.CON) 636, 637 (2010); Andrea Hamann & Hélène Ruiz Fabri, *Transnational Networks and Constitutionalism*, 6 Int'l J. Const. L. (I.CON) 481 (2008); Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 Int'l J. Const. L. (I.CON) 373 (2008); Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. Int'l L. & Pol. 1 (2006); Barbara Stark, *Women and Globalization: The Failure and Postmodern Possibilities of International Law*, 33 Vand. J. Transnat'l L. 503 (2000).

7 *See* Sabino Cassese, When Legal Orders Collide: The Role of Courts (2010); Paul B. Stephan, *Privatizing International Law* (Va. Law and Econ. Research Paper No. 2011-02), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1780468; Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Governmental Actors (TOGAs)*, 50 Ariz. L. Rev. 709 (2008).

8 *See, e.g.*, Richard Stewart & Michelle Ratton Sanchez Badin, *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, 9 Int'l J. Const. L. (I.CON) 556, 557–558 (2011).

9 *See* Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 Ind. J. Global L. Studies 621 (2009).

10 *See* Kim Scheppele, *The Post-9/11 Globalization of Public Law and the International State of Emergency*, *in* The Migration of Anti-Constitutional Ideas at 347–373 (Sujit Choudhry ed., 2007).

11 *See, e.g.*, Vicki Jackson, Constitutional Engagement in a Transnational Era (2010); Miguel Maduro, *Three Claims of Constitutional Pluralism*, *in* Constitutional Pluralism in the European Union and Beyond 67 (Matej

questions of transnational constitutionalism, exemplified by the founding of I-CON, launched in 2003 "to fill a need created by the recent trend toward globalization of constitutional norms,"[12] and reiterated in 2010 when I-CON's editorial "baton" was passed.[13]

In contrast, privatization has not been much the topic of constitutional exchanges, and occasional efforts to seek judicial review to limit privatization have generally been rebuffed. As one comparativist (enlisted to oppose a constitutional challenge to a private prison in Israel) commented, functions that were "essential components of governance were matters of political, economic and social preference . . . properly, in a democracy, left to the choice of the electorate."[14] Further, he opined, given the history of activities moving between government and the private sector, any essentialist quest into core government functions was ill-advised.[15]

A few decisions break the constitutional silence on privatization. One case, whose name (*Academic Center of Law and Business v. Minister of Finance*) gives no hint that its subject matter is prisons, was issued in 2009 by Israel's Supreme Court.[16] The Israeli Parliament had, in 2004, licenced a single "private" prison with 800 beds, managed

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Avbelj & Jan Komárek eds., 2012); Gunter Frankenberg, *Constitutional Transfer: The Ikea Theory Revisited*, 8 Int'l J. Const. L. (I.CON) 563 (2010); Judith Resnik, *Law's Migration: American Exceptionalism, Dialogues, and Federalism's Multiple Ports of Entry*, 115 Yale L.J. 1564 (2006); Angus Johnston & Edward Powles, *The Kings of the World and Their Dukes' Dilemma: Globalisation, Jurisdiction and the Rule of Law*, *in* Globalisation and Jurisdiction 13 (Piet Jan Slot & Mielle Bulterman eds., 2004); Hans Lindahl, *The Boundaries of Legal Orders in a Postnational Setting: Conceptual, Normative, and Institutional Issues*, *in* The Law of the Future and the Future of Law 355 (Sam Muller, Stavros Zouridis, Morly Frishman & Laura Kistemaker eds., 2011); Michael Rosenfeld, *The Challenges of Constitutional Ordering in a Multilevel Legally Pluralistic and Ideologically Divided Globalized Polity*, *in* The Law of the Future and the Future of Law, *supra* at 109–115.

12 Norman Dorsen & Michel Rosenfeld, *Note to Readers*, 1 Int'l J. Const. L. (I.CON) 1 (2003). One law journal (at least) makes that point with its name. *See* Vik Kanwar & Parbhakar Singh, *The Globalization of Legal Knowledge*, 2 Jindal Global L. Rev. ix (2010).

13 Joseph Weiler, *Passing the Baton: A Manifesto*, 8 Int'l J. Const. L. (I.CON) 1, 2 (2010).

14 Opinion, Jeffrey Jowell, HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance (Isr. Aug. 20, 2006) ¶ 30 [hereinafter Jowell]. The Israeli Supreme Court thereafter decided HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance [2009] (Isr.), http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm [hereinafter *Academic Center*, referenced below to the English translation and with the names of the justices writing and the paragraphs cited].

15 Jowell, *supra* note 14, ¶¶ 29–30. He did note that certain activities, "police and defence" plus "Royal Perogatives" of common law Crown powers, such as treaty making, prosecution, and dissolving Parliament, might well be core government powers. *Id.* ¶ 31.

16 *Academic Center*, *supra* note 14. The Israel Supreme Court also referenced a ruling by the Supreme Court of Costa Rica, which had upheld a "model of a 'partial privatization'" of a prison. *Id.* ¶ 22 (Naor). *See* Sala Constitucional de la Corte Suprema de Costa Rica, Sentencia N. 2004–10492 de fecha 28 de septiembre de 2004, *available at* http://200.91.68.20/pj/scij/busqueda/jurisprudencia /jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=309611&strTipM=T.

A few other courts have dealt with challenges to privatization of services. For example, the German Constitutional Court required judicial oversight of the effects of privatization on workers who had been employees of the state. *See* Bundesverfassungsgericht [BVerfG] 1 BvR 1741/09, Jan. 25, 2011, http://www.bverfg.de/entscheidungen/rs20110125_1bvr174109.html. Other courts have rejected judicial review of privatization related to economic development. *See, e.g.*, Delhi Science Forum v. Union of India and Another, AIR 1996 SC 1356 (rebuffing a challenge to a telecommunication policy permitting private sector entrants).

by a for-profit corporation that was required to report to and comply with government regulations. The litigation entailed a global constitutional exchange among private and state parties comparing the degree of the Israeli privatization to English, French, and American models.[17] The corporation that had won the bid for the contract included investors from various countries,[18] and the opposing parties proffered statements from legal experts about the laws of France, South Africa, the United Kingdom, the United States, and the European Court of Human Rights.[19]

The Israeli Supreme Court, in turn, undertook its own "comparative analysis" to address "the phenomenon of prison privatization around the world."[20] After surveying diverse case law and political theories, the justices concluded that privatization was constitutionally noxious as a domestic matter, because the legislation chartering the prison violated prisoners' human dignity and liberty, expressly protected by one of Israel's Basic Laws. The "novelty" of a constitutional "right against privatization" has already sparked commentary in the pages of I-CON.[21]

What makes the decision worth re-engaging is not only what was banned (private entrepreneurs undertaking an activity that the court defined to be intrinsically violative of detainees' human rights[22]), but what the decision suggests *can be* privatized—which is so much else the state does. The 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

[17] A "private" entity—the Academic Center of Law and Business, "acting as a public petitioner" (joined by a former member of the Israeli Prison Service and later by a prisoner) brought the facial challenge to a 2004 legislative enactment authorizing one private prison. *Academic Center*, *supra* note 14, ¶ 1 (Beinisch). This "private" law school is itself innovative, in that before the founding in 1994 of another such entity (the Interdisciplinary Center), legal education was only available through universities partially funded by the state, which capped tuitions. The litigation's configuration also reflects Israel's welcoming of "private" litigants who have standing to pursue such claims.

[18] A.L.A Management and Operations, an Israeli corporation with non-Israeli investors, "was incorporated for the specific purpose of bidding." That corporation built a new facility near Beer-Sheba for 800 prisoners; after the decision, the building was sold to the Israel Prison Service. *See* Richard Harding, *State Monopoly of "Permitted Violation of Human Rights": The Decision of the Supreme Court of Israel Prohibiting the Private Operation and Management of Prisons*, 14 Punishment & Soc'y 131, 134, 144 n.6 (2012).

[19] Jeffrey Jowell, asked by Israel's Minister of Finance, provided a "comparative perspective" on the "researched jurisdictions" of the United Kingdom, South Africa, the European Union, and the European Convention on Human Rights. *See* Jowell, *supra* note 14. He concluded that privatization of prisons did not, under the laws of those countries, confer a "core executive function on a non-state actor" or constitute an "affront to the human dignity and personal liberty of the prisoners." *Id.* ¶¶ 3, 7–11.

[20] *Academic Center*, *supra* note 14, ¶¶ 57, 61 (Beinisch).

[21] Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization*, 8 Int'l J. Const. L. (I.CON) 690, 691, 696 (2010). Medina called the decision the first in Israeli history to strike an "entire body of legislation" rather than declaring a subset invalid.

[22] "[I]mprisonment powers . . . involve[] a continuous violation of human rights." *Academic Center*, *supra* note 14, at Introduction, ¶¶ 18, 21–22 (Beinisch). The Chief Justice also noted that, while the issues raised by other forms of privatization were not before the court, various functions, such as the appointment of a private person to prosecute, to enforce court judgments, and to staff facilities for the mentally ill, were "not so closely related to the manifestly sovereign functions of the state . . . [as] that involved in the management and operation of a prison." *Id.* ¶ 32.

enterprises,"[23] even as the decision implicitly identified incarceration as just such a government function.

An explicit identification of another activity—policing—as one of the "essential state functions" that could not be delegated comes from the Supreme Court of India.[24] In 2011, in *Sundar v. Chattisgarh*, that court held that the appointment by the State of Chattisgarh of "Special Police Officers" or "SPOs" (which the court called an "armed civilian vigilante group" dispatched to counter a "Maoist/Naxalite insurgency") infringed the constitutional rights of the individuals appointed, as well as the rights of others in society. Selecting under-educated "youngsters" to be SPOs diminished appointees' dignity, violated their equality by training them less than state-employed police, and deprived them and others of liberty by putting all their lives in jeopardy.[25] The state had thus failed to fulfill its "positive obligations" to "protect the fundamental rights of all citizens, and in some cases even of non-citizens, and achieve for the people of India conditions in which their human dignity is protected and they are enabled to live in conditions of fraternity."[26]

The Indian court chastised Chattisgarh for permitting global corporate development of its natural resources and thereby exacerbating wealth disparities that fueled unrest.[27] Chattisgarh's "policy of privatization" had "incapacitated itself, actually and ideologically, from devoting adequate financial resources in building the capacity to control the social unrest that has been unleashed."[28] The court also expressed its "deepest dismay" that the Union of India had neglected its constitutional duties to oversee state-based policing.[29] India's obligation to secure the safety of its citizenry (by "appropriately trained . . . and properly equipped" professional police) could not be "divested or discharged through the creation of temporary cadres with varying degrees of state control."[30]

What is the appeal of locating services as "governmental"? A central conceptual challenge for centuries past was how to legitimate authority to pursue collective aims.

[23] *Academic Center*, *supra* note 14, ¶ 63 (Beinisch).

[24] Sundar and Others v. Chattisgarh, (2011) 7 S.C.C. 547 ¶ 73 [hereinafter *Sundar*]. The case was filed by "private" parties—a sociologist and historian as well as a former government minister. At issue were the appointments pursuant to Chattisgarh's 2007 law addressing Special Police Officers (SPOs), which the court contrasted with the 1861 Indian Police Act that also authorized supplementing state-based police forces through specially-appointed forces.

[25] *Id.* ¶¶ 23, 41, 60–64 (citing arts. 14, Equality Before Law, and 21, Protection of Life and Personal Liberty and the Preamble of the Indian Constitution).

[26] *Id.* ¶ 41.

[27] *Id.* ¶¶ 9, 12–14.

[28] *Id.* ¶¶ 53, 4–20.

[29] *Id.* ¶ 41.

[30] *Id.* ¶ 73. The court limited the 2007 Chattisgarh Police Act by constraining the role of SPOs. The court also ordered that India stop providing support funds for improper use of SPOs, that the state retrieve the arms issued, and that the state directly provide adequate security. *Id.* ¶ 75.
A distinct question are the requirements the government can impose on those whom it employs. For example, the United States Supreme Court has struck a state law banning non-citizens from becoming members of its bar while upholding a state law requiring public school teachers to be citizens rather than permanent resident aliens. *Compare* In Re Griffiths, 413 U.S. 717 (1973), *with* Ambach v. Norwick, 441 U.S. 68 (1979).

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.

Twentieth-century egalitarian movements, shifting the focus from nationalism to democratic self-governance, embedded another layer by reading obligations into old constitutions and writing new ones to include all persons, regardless of race, ethnicity, and gender, within the circle of rights-holders.[31] Aspirations for states expanded, as constitutions elaborated a range of rights beyond security. India's Constitution, for example, protects rights to education and access to legal aid; several of the constitutions in Central and South America elaborate environmental rights. But challenges of implementation and radical inequalities persist, posing renewed puzzles about how to legitimate collective action and expand opportunities across class lines.

Many tasks that have historically been associated with sovereignty—war-making, imposing taxes, and legislating—can be remote from wide segments of the population, either because the activities occur offshore, involve a small set of participants, are episodic, or are concentrated at a single site such as the one city in which a legislature sits. In contrast, the institutions on which sovereigns have relied to monitor and control—police, courts, and prisons—turn the abstraction of government into a material presence, personifying the state and demonstrating its capacity to provide goods and services—peace and security—that have utilities for the private as well as the public sector. Hence, a portion of this commentary is devoted to mapping how these activities helped to make the state, became artifacts of the state, and provided springboards for the development of norms about the state.[32]

Through millions of exchanges, on street corners and inside courts and prisons, rules have been shaped expressing values about the relationship of governed and government.[33] Practices in these institutions produce norms and ideologies that make words like "the police," "the judge," and the "prison warden" intelligible and laden with behavioral expectations. In many eras, those rules authorized autocratic power; hierarchies of status rendered some individuals abused on the streets, marginalized in courts, and mistreated in prisons, as the personages of police, judge, and custodian embodied inhospitable and often oppressive control.

[31] *Cf.* Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions (Christian Joerges & Navraj Singh Ghaleigh eds., 2003).

[32] This work thus joins others in thickening histories of state funding beyond the fiscal-military paradigm. *See, e.g.*, Steve Pincus & James Robinson, The Rise of the Interventionist State (paper on file with the author, 2012); Steve Hindle, State and Social Change in Early Modern England 1560–1640 (2002).

[33] A comparative overview, permitting a glimpse of the wealth of activity, attention, and regulation of courts, is the essay *Ordinary Proceedings in First Instance* by Ben Kaplan, Kevin M. Clermont, Alphonse Kohl, Hans Schima, Hans Hoyser, Edmund Wengerke, Per Olof Elelöf, Enrique Vescovi, Mauro Cappelletti, and Bryant Garth, *in* Civil Procedure, XVI International Encyclopedia of Comparative Law 250 (1984).

More recently, democratic constitutions have added attributes modeling these state actors as accountable and constrained. Constitutional injunctions now frame the exchanges and require trained officials to treat individuals (suspects, detainees, litigants, witnesses) with dignity. Further, at the subconstitutional level, dense regulations (such as codes of criminal and civil procedure and police manuals) formalize and structure these interactions—even as the content of obligations remains the subject of intense disagreement and failures in practice are commonplace. New modes are also developing, captured by phrases such as "community policing," "therapeutic justice," and "residential correctional centers."

The relationship between policing and state formation that turned the police officer into "the most visible representative of the state" has been charted,[34] as have contemporary trends to privatize and to globalize policing.[35] Here, building on other work[36] and sketching the contributions made by both courts and prisons to state development, I seek to anchor an appreciation both for the longevity of these institutions as sources of experiences of sovereignty and for the novelty of their current constitutional obligations. I then turn to efforts to privatize these services and to the implications of insights that policing, adjudicating, and incarcerating are not constitutionally wholly delegable to the private and not wholly transferable to the global.[37]

The insistence by the Supreme Courts of India and of Israel that private police and prisons violated each country's constitution locates state identity in the discharge of obligations to staff particular institutions. Although not often characterized as "social rights," police, courts, and prisons are government-provided services to be added to a list usually referencing rights to education, health, and work.[38] These older social rights are embedded in the broader effort to generate a secure environment in which political and economic institutions can function and prosper. Police, courts, and prisons have come to seem so natural to government as to go unnoticed as requiring significant state commitments supporting daily services. The infrastructures that legislatures have funded to sustain these functions (with occasional interventions by judiciaries and oversight through executive officials) illuminate the ways in which content could be given to more recently crafted social rights. And these exemplars

[34] Stanley H. Palmer, Police and Protest in England and Ireland 1780–1850 at 6 (1988). Palmer attributed the rise of policing to fear of civil unrest; his account identifies the development of policing as a political effort to provide crowd, as contrasted with crime, control. *Id.* at 7–11; *see also* J.M. Beattie, Policing and Punishment in London 1660–1750 (2001).

[35] *See, e.g.*, David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165 (1999) [hereinafter Sklansky, *Private Police*]; Ethan A. Nadelman, Cops Across Borders (1993).

[36] *See, e.g.*, Hindle, *supra* note 32.

[37] The distinction between global norms of human rights and their instantiation at national and local levels has been well mapped. The "global" may spawn its own police, courts, and prisons, but the scale and realities of material existence locate individuals in time and place and hence states (albeit not necessarily the ones now configured) are likely to endure to provide these functions and (as I argue in this essay) many others. *See generally* Seyla Benhabib, Dignity in Adversity: Human Rights in Troubled Times (2011).

[38] *See generally* Exploring Social Rights: Between Theory and Practice (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

prompt inquiry into what other infrastructure rights ought to be integrated into the political-social welfare activities of democratic states.

My argument is that these forms of identitarian interactions *become* state functions by placing them outside the purview of total third-party provisioning, even when, as the Israeli and Indian Supreme Courts exemplify, the decision to outsource may be the product of democratic decision-making. Other such rights need to be constructed—not essentialized but *made*—to enable individuals to experience democratic states as vital resources facilitating collective debate about the import of state identity and producing inter-generational benefits across class and racialized lines. The building of state and citizen relationships through experiences beyond Michel Foucault's surveillance (even when disciplined by constitutional norms) gives states an identity predicated on more than control and offers individuals roles other than customers.

The challenges are many, including whether one can locate normative criteria to identify services that states must provide. By insisting it was basing its ruling on the personal rights of detainees, the Supreme Court of Israel sought to avoid the difficulties—within a polity, let alone on a global scale—of articulating such criteria.[39] Other constitutional jurists have likewise puzzled about whether to name a function as an "essential attribute" of government.[40] So many activities have been and are a mélange of public and private action that deciding when to apply the label "state action" spawns reams of doctrine. Even as we today speak of the "Dutch" and the "English" as colonial authorities, much of the exercise of that form of "sovereignty"—including policing, jailing, and courts—was undertaken by "private," state-supported corporations, the Dutch and the English East India Companies.[41]

My focus is therefore not on an empirical quest for the timeless "essence" of the state but on the normative question about what it is that we—in democratic constitutional polities—want to make in this century *to be* a function of the state, both transnationally and within a particular government. "Why a constitutional state?"—might well be the retort and is certainly the challenge posed by globalization and privatization. An abbreviated response is that states continue to offer opportunities for self-governance; that, in the last century, democratic constitutional states have produced new rights to equality and dignity for sets of persons that were long excluded, and that constitutional states aspire to fair distributions of opportunity while also continuing commitments

[39] The question of the degree of independence of member states of the EU to shape state identity was at issue in the German Constitutional Court's decision on the Lisbon Treaty. That court listed aspects of a polity—criminal law, police, military fiscal policy, family, religious communities, school and education—as so central to individual member states that they were, absent agreement from the state, insulated from EU overrides. *See* Bundesverfassungsgericht [BVerfG] 2 BvE 2108, June 30, 2009 ¶¶ 251–252, http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

[40] The famous sequence in the United States, growing out of a debate about whether national law can be applied to state governments, is *National League of Cities v. Usery*, 426 U.S. 833 (1976), and *Garcia v. San Antonio Transit Authority*, 469 U.S. 528 (1985). *See generally* Laurence H. Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 Harv. L. Rev. 1065 (1977).

[41] *See, e.g.*, John Keay, The Honorable Company: A History of the English East India Company (1991).

to personal liberty and security. This packet of concerns is not one on which globalization can deliver and in which privatization has any interest.[42]

But this set of aspirations is relatively new and potentially fragile. Because the vitality of globalization and of privatization is now assumed, the burden of justification has shifted toward the state, in need of explaining itself as a desirable organizational form. The issue is whether the "constitutionalization" to which I-CON is devoted can offer a sufficiently robust competing or complementary ideology.[43] To do so (and thereby to join privatization and globalization as twenty-first century metanarratives) requires more than insisting that the uniqueness of the constitutional state resides in prohibition and punishment.

What else is there? Constitutions, transnational conventions, and social practices are the resources to mine for richer accounts. Constitutions specify a host of aspirations and make legal commitments to which a state can be held, even as the content varies over time and implementation comes through "progressive realisation" (to borrow the formulation from the South African Constitution[44]). Thus, responses to the questions—what do/must constitutional states offer that multinational corporations and global governance cannot—come in part through the methods used by the Israeli and the Indian courts, intent on interpreting their respective constitutive laws in the context of transnational precepts and admonitions.

These rare cases on constitutional anti-privatization rights are radically ambitious and yet too sparse. These judgments insist on state provisioning, and hence on judicial implementation of this form of a social right. Because, in many social orders, the affirmative obligation to maintain peace and security through policing and prisons goes unfulfilled and leaves individuals and communities in jeopardy, judicial review (in the context of privatization and otherwise) is admirably innovative. But if policing and prisons, along with courts as the conduit, are the only venues in which state identity is expressed, then constitutional states distinguish themselves from corporate forms solely through their unique capacities to legitimate violence.

Policing, courts, and incarceration ought not to stand as the sole examples of functions so entwined with state identity and so personally experienced by individuals that they alone must be undertaken predominantly or exclusively by the state instead of by private intermediaries. Constitutional states need more collective problems to solve

[42] The aspirations for global citizenship and the distinction between constitutional subjects and subjectivities are explored by Selya Benhabib in her review of Michel Rosenfeld's *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (2010), in 33 Cardozo L. Rev. 1889 (2012). My argument is not that the institutional activities are fixed, as is exemplified by debates about the relationship between member states and Europe, including the decision on the Economic Stability plan. *See, e.g.*, Bundesverfassungsgericht [BVerfG] 2 BvR 1390/12, Sept. 12, 2012, http://www.bverfg.de/entscheidungen/rs20120912_2bvr139012en.html.

[43] *See, e.g*, Jean-Marie Guéhenno, The End of the Nation State (Victoria Elliott trans., 2000); Jean Cohen, *Whose Sovereignty? Empire Versus International Law*, 18.3 Ethics & Int'l Affairs (2004); Claude Karnoouh, *On the Genealogy of Globalization*, 124 Telos 183 (Summer 2002); *see also* Jeffrey C. Alexander, *"Globalization" as Collective Representation: The New Dream of a Cosmopolitan Civil Sphere*, 19 Int. J. Pol. Culture Soc'y 81 (2005).

[44] S. Afr. Const., 1996, § 26(2) (housing); § 27(2) (healthcare, food, water, and social security).

than regulating violence, and more institutional structures than police, courts, and prisons in which to express commitments to their values and to develop reciprocal relationships with their populations. My interest is in identifying other structural facets of governance that can be understood—either within a given nation state or transnationally—as entitlements to be appreciated for their collective utilities in producing identity for and affiliation to the constitutional state.

I seek to unencumber the now-conventional social rights of education, health, and housing from the status of outlier and from debates about whether they are subject to judicial enforcement or reliant on other means of implementation.[45] I do so in part by sketching that state provision of services beyond self-defense is not a novel artifact of twentieth-century constitutions but longstanding. Police, courts, and prisons predate the nomenclature of "social rights" but all are in service of the right to security that contributed to and came to be embedded in state identity. Judicial involvement in these institutions (limited and not always efficacious) has also become commonplace.

A scan of other facets of constitutions locates examples of services such as transportation, public lands, and environmental protection that are also infrastructure activities through which individuals could experience themselves as part of a state, facilitating the growth of both individual and collective capacities. I close with a brief discussion of one, an obligation encoded in some constitutions and not often referenced under the rubric of rights (social or otherwise), to provide universal postal services and other forms of communication. Such services, found in old as well as new constitutions, exemplify state provisioning supportive of private and national agendas and expressive of government obligations to accord equal and respectful assistance.

Above, I added "-ization" to the word constitutional—and thus joined others using the term to capture how constitutional precepts have become endemic within and beyond the state. The term marks the dynamic role of constitutions in identifying and protecting citizen–state relationships.[46] I deploy "statization" as both a reminder of the recent lineage and of the continuing evolution of nation states. These words (awkward until naturalized, tucked into Google searches, and accepted by Microsoft's spellcheck) acknowledge the degree to which the state and its constitutional project are perpetually in motion, shifting understandings of what roles states do and can play in human flourishing.

The term statization is also a reminder that practices that were once private or transnational have become facets of states, either to be turned through political will into activities seen as intrinsic or to become optional. Police forces, courts, and prisons

[45] *See, e.g.*, Katharine G. Young, Constituting Economic and Social Rights (2012); Sandra Fredman, Human Rights Transformed: Positive Rights and Positive Duties 77–79 (2008); Social Rights in Europe (Gráinne de Búrca & Bruno de Witte eds., 2005).

[46] *See, e.g.*, Reva Siegel, *The Constitutionalization of Abortion*, *in* The Oxford Handbook of Comparative Constitutional Law 1057 (Michel Rosenfeld & Andras Sajo eds., 2012) [hereinafter Siegel, *The Constitutionalization of Abortion*]; Jan Klabbers, Anne Peters & Geir Ulfstein, The Constitutionalization of International Law (2009); Berthold Rittberger & Frank Schimmelfennig, The Constitutionalization of the European Union (2007); Deborah Cass, The Constitutionalization of the World Trade Organization (2005).

are central examples that, during the twentieth century, expanded in girth and reach even as they came to be subjected to constitution constraints. Chronicling the invention of these traditions[47] prompts reflections about what other infrastructures could become emblematic so that monitoring and controlling populations will not be the only signatures of the state.

2. Statization: the development of domestic sovereign authority to adjudicate and punish

State coercion—violence—is at the core of the implementation of all judgments. Whether a remedial order puts a person in detention or requires contracts to be performed, money to be paid, assets transferred, families supported, or relationships severed, state-backed authority disrupts lives and businesses.[48] Mapping the institutional expansion of state capacities to judge and to punish is one way to chart the development of the state, just as tracking the constraints imposed on courts and prisons through both national and transnational legal regimes illuminates the path of constitutionalization around the globe.

Adjudication and punishment are ancient artifacts of polities long replaced by new configurations. Rulers in Mesopotamia, Egypt, Palestine, Greece, and Rome all relied on public performance of their adjudicatory powers to generate capacity to impose order.[49] The apparatus of adjudication was the daily counterpart of the more dramatic moments of sovereign creation through acquiring territory by compact or conquest.[50] Early adjudication was not free-form but located in terms of process and place, with roles assigned to disputants, witnesses, and jurists. The acts, performed before an audience, were recorded in clay, stone, and papyrus. These structured, public, interpersonal exchanges embedded fledgling sovereign powers. These interdependent communal activities were a form of what Joseph Manning described as "connective justice," referencing the aim in Egypt to bridge "divine and human worlds."[51] The term can be generalized to reflect dispute resolution functions in anchoring affiliations among individuals and their rulers.

Parallel practices took place in medieval Europe, and some historians identify courts as the "first municipal governments," brought into being to protect markets and territories by deciding disputes and thereafter acquiring additional administrative

[47] *See* The Invention of Tradition (Eric Hobsbawm & Terence Ranger eds., 1983).

[48] The privatization debate about "outsourcing violence" has focused on the privatization of policing, criminal sanctions, and the military. *See, e.g.*, Alon Harel, *Outsourcing Violence?*, 5 Law & Ethics of Hum. Rights 395 (2011); Laura Dickinson, Outsourcing War and Peace: Preserving Public Values in a World of Privatized Foreign Affairs (2010); Sharon Dolovich, *State Punishment and Private Prisons*, 55 Duke L.J. 437 (2005); Sklansky, *Private Police*, supra note 35. That "violence" ought to comprehend broader mechanisms by which the state imposes its authority.

[49] *See, e.g.*, Kathryn E. Slanski, *The Law of Hammurabi and Its Audience*, 24 Yale J.L. & Human. 97 (2012); J.G. Manning, *The Representation of Justice in Ancient Egypt*, 24 Yale J.L. & Human. 111 (2012).

[50] Steven D. Fraade, *Violence and Ancient Public Spheres: A Response*, 24 Yale J.L. & Human. 137 (2012).

[51] Manning, *supra* note 49, at 114 (relying on Jan Assmann, The Mind in Ancient Egypt (2002)).

functions.[52] Material spaces—efforts to schematize those localities—followed, and sovereign adjudication moved indoors. By the end of the twelfth century, European town leaders had constructed civic structures to augment the open-market squares, churches, and private residences used for communal business.[53] A city's existence was marked through this "civic self-fashioning"[54] by a town hall (or a town house, *Rathaus*, or civic palace) "clearly designed to dominate" its environs.[55] Of course, state-based dispute resolution was never the only form; then (as now) private resolutions—through families, religions, and commercial alliances—were commonplace, albeit also dependent for enforcement (aside from self-help) on recognition from sovereigns gaining control over the legitimacy of violence.

Punishment was equally central to sovereigns' developing identities. Historians of medieval England describe "some kind of prison" as a "natural part of the equipment of every town," with such facilities "tucked away in the cellar or attic of every fifteenth century guildhall."[56] But noxious smells, coupled with aspirations that town halls avoid associations with detention (and its metaphysical contamination), resulted in isolating incarceration in discrete structures[57]—jails, built as short-term accommodations to house a variety of marginal people such as criminal defendants and debtors.[58]

Nomenclature mirrors the diversification of sovereign services. Words such as "courthouse," "*palais de justice*," and "prison" were not then in the vocabulary, just as commerce, religion, adjudication, and government were not segregated activities. "Town halls," a term of art, sheltered both rooms for holding court and the set of weights that provided official standards for merchants.[59] Separate, purpose-built structures designed for judges (lay or professional) to decide cases (courthouses) and for detainees to be housed for long terms (prisons) entered the landscape and dictionaries in the centuries thereafter.[60]

[52] David Nicholas, The Growth of the Medieval City: From Late Antiquity to the Early Fourteenth Century 141–145, 235–240 (1997) (surveying the "folkmoot" of London, the "alderman" in Denmark, the "scabini" of the Low Country, the "jurés and échevins" in France, the "rat" or council in Germany, and various other configurations of guilds, citizens, councilors, and assemblies).

[53] Robert Tittler, Architecture and Power: The Town Hall and the English Urban Community, 1500–1640, at 92–93 (1991).

[54] *See* Fabrizio J. Nevola, *Per Ornato Della Città: Siena's Strada Romana and Fifteenth-Century Urban Renewal*, 82 Art Bull. 26, 27 (2000).

[55] 2 Siena, Florence, and Padua: Art, Society and Religion 1280–1400: Case Studies (Diana Norman ed., 1995); Tittler, *supra* note 53, at 32.

[56] *See* Tittler, *supra* note 53, at 123 (quoting R. B. Pugh, Imprisonment in Medieval England (1968)).

[57] *Id.* at 125.

[58] Carl Lounsbury, The Courthouses of Early Virginia: An Architectural History 321 (2005).

[59] The "metrical revolution" came thereafter. *See* James C. Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed 28–33 (1998).

[60] *See* Edward M. Peters, *Prison Before the Prison: The Ancient and Medieval Worlds*, *in* The Oxford History of the Prison: The Practice of Punishment in Western Society 3–47 (Norval Morris & David J. Rothman eds., 1995) [hereinafter Oxford History of the Prison]; *see also* The Emergence of Carceral Institutions: Prisons, Galleys and Lunatic Asylums 1550–1900 (Pieter Spierenburg ed., 1984); John Langbein, *The Historical Origins of the Sanction of Imprisonment for Serious Crime*, 5 J. Legal Studies 35 (1976).

Form follows not only function but also funds, and economic prosperity created opportunities for governments to do more. When communities could finance the building of monumental town halls, multiple-cell prisons, and pay for staff, wooden structures gave way (literally in some cases) to brick, stone, and metal.[61] In the sixteenth century, the English Parliament, which relied more on incarceration than did some of its European counterparts, required houses of correction for every shire.[62] Across the Atlantic and centuries later, the Congress of the United States began, after the Civil War, to fund buildings named "United States Court House" (often also "and Post Office"), and, in 1896, Congress chartered the construction of the first specifically federal prison.[63]

During the eighteenth and nineteenth centuries, the courthouse grew from a single-room building into the grand structures, now taken for granted as signatures of national governments.[64] These buildings represented not only new forms of sovereignty but also the political clout of professionalizing specialists—architects, lawyers, judges, and municipal managers. The rules within courts and prisons reflected ideas about officials' roles and state–citizen relations. Courtrooms elevated the judge to a starring role on a bench, marked the growing authority of lawyers and administrators by situating them in front of a bar, welcomed jurors in jurisdictions authorizing their participation, and relegated the audience to areas in the back.

During the nineteenth century, the term "penitentiary" came into use.[65] In France, Claude Nicolas Ledoux is credited with the "original idea" of building a prison "totally independent of the courthouse."[66] John Howard and Jeremy Bentham pressed England to give convicted criminals solitude and to require hard labor to secure rehabilitation. Bentham proposed a method of implementation—the "Panopticon" (a circular structure with a control module in the middle), designed (but never built)

[61] Lounsbury, *supra* note 58, at 238–256.

[62] Tittler, *supra* note 53, at 126–128. Litigation played a vital role in providing opportunities for individuals to participate in the state and for interaction between local and central authorities. Hindle, *supra* note 32, at 66–145.

[63] *See* Gregory L. Hershberger, *The Development of the Federal Prison System*, 43 Fed. Probation 13, 13–14 (1979).

[64] Glimpsing back two hundred years underscores the changes. In the United States in 1850, no building owned by the federal government had the name "courthouse" on its front door. While local and state governments had by then funded such purpose-built structures, the fewer than forty federal judges dispersed around the country needed no building of their own. In contrast, by 2010, more than 850 federal judges were chartered to sit in hundreds of federal courthouses, so-named, that joined the thousands of state and local courthouses around the country. *See* Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 Ind. L.J. 823 (2012). On the political import of national, regional, and international courthouse building, see generally Judith Resnik & Dennis Curtis, Representing Justice: Invention, Controversy and Rights in City-states and Democratic Courtrooms 193–281 (2011).

[65] Pieter Spierenburg, The Prison Experience: Disciplinary Institutions and Their Inmates in Modern Europe 267 (1991).

[66] *See* Jean-Pierre Pech, *Aix-En-Provence-Le Palais Monclar: construire un palais dans une prison (Aix-En-Provence—the Monclar Courthouse: Building a Courthouse in a Prison)*, *in* La nouvelle architecture judiciaire: Des palais de justice modernes pour une nouvelle image de la justice [New Judicial Architecture: Modern Courthouses and a New Image of Justice] 21, 22 (2000).

so that inmates could be observed, night and day, from the center. The Foucauldian nightmare was that inmates could never know whether or when they were seen—justified by Bentham as promoting self-discipline. ("The more strictly we are watched, the better we behave."[67]) Bentham was also a proponent of prisons run by private parties ("I would do the whole by *contract*"[68]), whether for profit or not.

But Bentham's form of privatization was also emphatically public, predicated on what he termed "publicity" that, in the context of prisons (and "of all public institutions") meant unlimited access to information about the institutions and open account books to enable the "great *open committee* of the tribunal of the world"[69] to assess what transpired. Moreover, Bentham advocated surveillance not only of those subjected to state detention but also of legislators and judges. ("Without publicity all other checks are insufficient: in comparison with publicity, all other checks are of small account."[70]) Bentham therefore provides the bridge to popular sovereignty movements that reformed the practices of policing, courts, and prisons and that prompted the creation of other domestic and international institutions.

3. The constitutionalization of policing, detention, and courts

Just as courthouses are government structures now taken for granted, the attributes of modern adjudication are presumed to be intrinsic, as if courts have always been obliged to be open to the public, to be staffed by independent judges empowered to appraise the fairness of the rules under which they operate, and to offer equal access to all persons. Likewise, today, the idea that police must respect suspects' rights and that prisoners in public or private facilities must be afforded certain minimal conditions as a matter of human dignity seems ordinary, even if not regularly achieved in practice.

These strictures are, however, not natural but made—produced through political and social movements of the past three centuries. Thus, the sketch provided above of the development of statization through construction of the state apparatus of police stations, courts, and prisons needs to be complemented by a sketch of the global exchanges that transformed the interactions within each institution—*inventing* constitutionally-constrained embodiments of state power.

[67] Jeremy Bentham, 1 Writings on the Poor Laws 277 (Michael Quinn ed., 2001).

[68] Jeremy Bentham, *Panopticon, or, the Inspection-House* (1791), *in* 4 The Works of Jeremy Bentham at 48 (John Bowring ed., Edinburgh, Tait, 1843) [hereinafter Bentham, *Panopticon*] (emphasis in original).

[69] *Id.* at 46 (emphasis in original); Jeremy Bentham, *Constitutional Code* (1832), *in* 9 The Works of Jeremy Bentham 41 (John Bowring ed., Edinburgh, Tait, 1843); *see also* Frederick Rosen, Jeremy Bentham and Representative Democracy: A Study of the *Constitutional Code* 26–27 (1983); Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 Law & Ethics Hum. Rts. 226 (2011).

[70] Jeremy Bentham, *Rationale of Judicial Evidence* (1827), *in* 6 The Works of Jeremy Bentham 355 ("Of Publicity and Privacy, as Applied to Judicature in General, and to the Evidence in Particular") (John Bowring ed., Edinburgh, Tait, 1843) [hereinafter Bentham, *Rationale of Judicial Evidence*].

During the Renaissance, the public was invited to watch spectacles of judgment and punishment. Yet, while witnessing power, the public was not presumed to possess the authority to contradict it. Over time, however, new theories of sovereignty altered the practices of adjudication and punishment. "Rites" turned into "rights," as aspects of adjudication became obligatorily public; judges became independent actors; and—in the last few decades—all persons became eligible participants and detainees gained the status of rights-holders.

The 1676 Charter of the English Colony of West New Jersey provided that "in all publick courts of justice for tryals of causes, civil or criminal, any person or persons . . . may freely come into, and attend."[71] A century later, the new states in North America took this precept to heart, as the words "all courts shall be open,"[72] coupled with clauses promising remedies for harms to property and person, were reiterated in many of their constitutions. Those documents regulated how judges were to be selected, their terms of office, and their procedures, and the publication of opinions. States were required to make the service of dispute resolution readily available in local communities. The utilities were interactive, as courts embedded state identity by welcoming private parties seeking enforcement of agreements and protection of property.

The public's new access rights and authority to sit in judgment of judges and, inferentially, of the government, worked a radical transformation. As spectators became active participants (or "auditors" as Bentham described his goal that when presiding at trial, a judge was "under trial"[73]), courts became one of many venues contributing to what twentieth-century theorists termed the "public sphere"—disseminating information that shaped popular opinion of governments' output.[74] Courts were not only contributors to the public sphere but also become attractive venues when judges, who had been positioned as loyal servants, gained the status of independent actors, authorized to stand in judgment of the very power that endowed them with jurisdiction.

Litigation has long exemplified a substantial popular demand for state services. But it was only in the twentieth century that all persons gained rights to be in all the roles in courts—litigants, witnesses, jurors, lawyers, and (yet more recently) judges. Constitutional principles of equal treatment were read to entitle a host of claimants to be heard and treated with dignity, whatever their race, class, ethnicity, and gender. The public performance of citizen–state interactions served as a platform for conflicts about what rights governments ought to provide and how institutions had to treat individuals. In response, a mix of constitutional and statutory lawmaking

[71] Charter or Fundamental Laws of West New Jersey, Agreed Upon, ch. XXIII (1676), *reprinted in* Sources of Our Liberties 188 (Richard L. Perry ed., 1959).

[72] *See, e.g.*, Conn. Const. of 1818, art. I. § 12. *See generally* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 Harv. L. Rev. 78, 80–81, 104–105 (2011) [hereinafter Resnik, *Fairness in Numbers*].

[73] *See* Bentham, *Rationale of Judicial Evidence*, *supra* note 70, at 355–356.

[74] *See* Jürgen Habermas, The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society (Thomas Burger trans., 1991); Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 97–99 (William Rehg trans., 1996).

restructured family life, responded to household violence, reshaped employee and consumer protections, and recognized indigenous and civil rights.

Constitutional norms, iterated in national documents and going global through transnational conventions, also changed ideas about what courts had to provide. The phrase "a fair hearing" appeared in the twentieth century and became the touchstone for assessments of whether a particular criminal, civil, and administrative process met the demands of justice. The transnational codification of the 1966 United Nations Covenant on Civil and Political Rights summarized the newly egalitarian, and in that sense democratic, aspirations of adjudication: "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[75]

Data on usage rates provide a glimpse of the myriad of exchanges in which people encountered government employees responsive (or impervious) to their needs. Numbers from the United States make the point. In the twenty-first century, state courts deal with some forty million civil and criminal cases (traffic, juvenile, and domestic relations cases aside) annually.[76] Figures from Europe likewise show expanded use, tracking not only filings but also the growing investment of public and private resources in legal systems.[77] High filing rates—often read as problematic—ought to be celebrated as markers of the degree to which governments, individuals, and corporate entities sought to enlist state help and believed they would be heard. Courts have also become channels to social services encompassing more than dispute resolution. The names—"mental health courts," "family courts," "veterans' courts," "drug courts"—capture efforts that build in social workers and mental health professionals so that courts can provide remedies broader than transfers of dollars or persons.

Expanded state capacities are likewise on display in the work of the criminal law—from policing to prosecutions to incarceration. The United States again provides one example.[78] Between the 1930s and 1980, prison populations were relatively stable; by 1983, 440,000 people were incarcerated.[79] But by 1997, the prison population had grown to 1.6 million,[80] and within the decade, included more than 2.3 million people,

[75] International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. Doc. 1/6316 [hereinafter ICCPR].

[76] Nat'l Ctr. for State Courts, Examining the Work of State Courts: An Analysis of 2009 State Court Caseloads 3 (2011), http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf.

[77] Council of Europe, European Judicial Systems—Edition 2010 (Data 2008): Efficiency and Quality of Justice (2010). *See generally* Gillian Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 Fordham Urban L.J. 129 (2010); The Costs and Funding of Civil Litigation: A Comparative Perspective (Christopher Hodges, Magdalena Tulibacka & Stefan Cogenaver eds., 2010).

[78] *See generally* Nicola Lacey, The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies (The Hamlyn Lectures) (2008). *See also* Sandra L. Resodihardjo, Crisis and Change in the British and Dutch Prison Services: Understanding Crisis Reform Processes (2009).

[79] Figures come from the Bureau of Justice Statistics, http://bjs.ojp.usdoj.gov/.

[80] James Kessler, *Prisons in the USA: Cost, Quality and Community in Correctional Design*, *in* Prison Architecture: Policy, Design, and Experience 93 (Leslie Fairweather & Seán McConville eds., 2000) [hereinafter Prison Architecture].

with another 5 million under supervision.[81] In fiscal terms, federal and state governments devoted more than $65 billion per year to the jails and prisons; for states, the amounts were about seven percent of their general fund revenues.[82] California, whose prisons were found in 2011 to be unconstitutionally overcrowded, gave more resources to prisons—about a tenth of its operating budget—than to higher education.[83]

Although the United States has outstripped most countries in incarceration rates, other countries are also expanding their capacity to imprison.[84] The construction business for prisons is "booming,"[85] as professional designers of "justice facilities" transverse national boundaries. The "prison-industrial complex" includes communities relying on correctional facilities for employment, unions of correctional staff seeking to protect jobs, manufacturers looking to market their wares, and entrepreneurs confident that investments in housing inmates can yield profits.

But these activities are circumscribed because the police and prisons, like courts, have been reinvented through the imposition of constitutional norms that, in recognition of human dignity, limit the state's authority to inflict certain forms of punishment. As the Indian Supreme Court explained in its *Sundar* ruling that banned state-designated private police, "modern constitutionalism posits that no wielder of power should be allowed to claim the right to perpetuate state's violence . . . unchecked by law, and notions of innate human dignity of every individual."[86] As that court detailed, these transnational commitments on detention took shape after World War II. The International Covenant on Civil and Political Rights imposed obligations that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[87] The United Nations thereafter promulgated Basic Principles for the Treatment of Prisoners, including rights to health care.[88] South Africa's late twentieth-century constitution imposes specific obligations: "Everyone who is detained, including every sentenced prisoner, has the right . . . to

[81] The Pew Charitable Trusts, One in 100: Behind Bars in America 5 (2008); The Pew Charitable Trusts, One in 31: The Long Reach of American Corrections 1 (2009).

[82] Suzanne M. Kirchhoff, Cong. Research Serv., R411177, Economic Impacts of Prison Growth 2–3 (2010), *available at* http://www.fas.org/sgp/crs/misc/R41177.pdf.

[83] *See* Brown v. Plata, 131 S. Ct. 1910 (2011); James Sterngold, *Prisons' Budget to Trump Colleges'*, S.F. Chronicle, May 21, 2007, at A1.

[84] In France, 13,000 new beds had been built toward the end of the twentieth century. *See* Jean Francois Jodry & Michel Zulberty, *Prisons in Europe: France*, *in* Prison Architecture, *supra* note 80, at 109–117. The Netherlands also experienced expansion, albeit on a smaller scale. *See* Peter Van Hulten, *Prisons in Europe: The Netherlands*, *id.* at 118–122. *See generally* Lacey, *supra* note 78.

[85] *See* Seán McConville, *The Architectural Realization of Penal Ideas*, *in* Prison Architecture, *supra* note 80, at 1. In the United States, more than 770,000 people worked in 2008 for the "correctional sector," in contrast to some 880,000 employed in "the entire U.S. auto manufacturing sector" in 2008. Kirchhoff, *supra* note 82, at 1.

[86] *Sundar*, *supra* note 24, ¶ 3. Many other countries have likewise insisted on prisoners' constitutional rights. *See, e.g.*, Bundesverfassungsgericht [BVerfg] Mar. 14, 1972, 33 Entscheidungen Des Bundesverwaltungsgerichts [BGerfGE] 1 (Ger.).

[87] ICCPR, *supra* note 75, art. 10.

[88] Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111, ¶ 9, U.N. Doc. A/RES/45/111 (Dec. 14, 1990).

conditions of detention . . . consistent with human dignity, including at least exercise and the provision, at the state's expense, of adequate accommodations, nutrition, reading material and medical treatment."[89]

In the United States, constitutional boundaries on incarceration evolved through reinterpretation of older texts. Before the 1960s, courts had held that prison authorities had unlimited discretion. But horrific descriptions of prisoners who were fed flour and water, lashed, and left without medical care prompted judges, pressed by prisoners' rights advocates, to conclude that "prisoners do not shed all constitutional rights at the prison gates."[90] Judges read constitutional requirements of "due process" and prohibitions on "cruel and unusual punishment" to address conditions of confinement, to preclude certain levels of violence, unsanitary conditions, and "deliberate indifference to known medical needs."[91] Judges issued structural injunctions aiming to require a modicum of safety and sanitation. Likewise, the courts revisited protections against unreasonable searches and seizures and rights against self-incrimination, and placed constraints on how police could deal with suspects. The 1966 decision of *Miranda v. Arizona* gained global recognition as the shorthand for insulation from coercive policing.[92]

Yet a progressive constitutional story elaborating criteria for the legitimacy of state action is too simple a narrative, as the erosion of *Miranda* and the "debate" about torture in the wake of 9/11 make plain. Prisons provide another example. At the same time that constitutional injunctions were structuring interactions within prisons to curb certain forms of degradation, the United States pioneered a new kind of facility, "supermax," explained as minimizing risks of escape and violence and designed to impose extreme and prolonged isolation.[93] The United States Supreme Court has not ruled out such confinement, although it has required a modicum of process before such placements.[94] A unanimous United States Supreme Court explained that conditions in Ohio's supermax put inmates into cells that were "7 by 14 feet, for 23 hours per day,"[95] and that the "solid metal doors" ensured the deprivation of "almost any environmental or sensory stimuli and of almost all human contact."[96] Given these "atypical" conditions producing a "significant hardship," the Constitution required

[89] S. Afr. Const., 1996 § 35(2). These rights are non-derogable. *Id.* § 37(5)(c).

[90] Wolff v. McDonnell, 418 U.S. 539, 555 (1974). A parallel comment comes from the Supreme Court of India. "Whenever fundamental rights are flouted . . . to any prisoner's prejudice, the Court's writ will run, breaking through stone walls and iron bars. . . ." Sobhraj v. Superintendent, (1979) 1 S.C.R. 512 (India).

[91] *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976).

[92] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Salduz v. Turkey, 36391/02 Eur. Ct. H.R. (2008), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89893; Ambrose v. Harris (2011) UKSC 43, ¶¶ 50–54 (U.K.).

[93] Norval Morris, *Prisons in the USA: Supermax—the Bad and the Mad*, *in* Prison Architecture, *supra* note 80, at 98–108; *see also* Judith Resnik, *Detention, the War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 Colum. L. Rev. 579 (2010). By 2005, estimates were that more than 25,000 people were house in such units. *Id.* at 644.

[94] *See* Wilkinson v. Austin, 545 U.S. 209 (2005).

[95] *Id.* at 214.

[96] *Id.*

officials to provide an informal hearing that did not include rights to confront or obtain witnesses.[97]

4. The muddle of privatization(s), the impact of globalization, and the market in incarceration

Having sketched statization and constitutionalization, I turn now to globalization and privatization. While extensive public regulation of police, courts, and prisons is new, private forms of these services are not. In the eighteenth century, fee-for-service custodians supplied detention facilities on an as-needed basis; states leased convicts and transported criminals to provide colonial labor; and the British and the Dutch East and West India Companies ran police, jails, and courts.[98] Today, states permit a host of private police services, sometimes hiring "special" private forces as well as retaining private firms to build and run prisons.

These various activities prompt my suggestion of a plural form so as to disentangle the analytic mélange within privatization(s) that run from limiting public access to changing the meaning of what is the "private" and what "the public" can regulate and do. The privatization of prisons that Foucault named was the sovereign decision to shift from displaying infliction of punishment in city squares to locations outside the purview of the public so as to expand state power while escaping popular oversight.[99] Israel's privatization of one prison permitted a for-profit firm to operate a facility and required oversight by and compliance with government regulation. The privatization of courts, detailed below, relies in part on a parallel movement of judicial activities from courtrooms into offices and judicial chambers, where public access to the processes and outcomes are limited but the mediated settlements gain the force of law. Another form of court privatization is mandatory arbitration, which transfers the job of judging to private actors deputized to impose outcomes that likewise have the force of law.

More generally, during the second half of the twentieth century, a variety of functions shifted from the government to the private sector, posited to be better at management and innovation than the state.[100] In the late 1970s, British Prime Minister

[97] *Id.* at 224. This form of confinement has raised concern transnationally, with questions about whether it constitutes torture or inhumane or degrading treatment under Art. 3 of the European Convention on Human Rights. *See, e.g.*, A.B. v. Russia, 1439/09 Eur. Ct. H.R. (2010), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100964 (holding that three year term of solitary confinement for prisoner violated Art. 3); Amhad v. U.K, 24037/07 11949/08 36742/08 66911/09 67354/09 Eur. Ct. H.R. (2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110267 (concluding that extradition to the United States was not precluded because of the isolation imposed at federal prisons).

[98] *See, e.g.*, Atul Chandra Patra, The Administration of Justice under the East-India Company in Bengal, Bihar and Orissa (1962); Nicholas Parrillo, Against the Profit Motive: The Salary Revolution in American Government, 1780–1940 (forthcoming 2013); Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 Crim. L. Rev. 111 (2001).

[99] *See* Michel Foucault, Discipline and Punish: The Birth of the Prison 7–9 (Alan Sheridan trans., 1977).

[100] *See* Peter Drucker, The Age of Discontinuity: Guidelines to Our Changing Society 223–229 (1969); Paul Starr, *The Meaning of Privatization*, 6 Yale J. L. & Pol'y 6 (1988).

Margaret Thatcher famously pressed for a privatization of (the aptly named) British Petroleum Company through a "public" offering of five percent of the company stock to private investors, and total divestment followed thereafter.[101]

British Petroleum is an ironic exemplar of privatization for it makes plain how intermingled "private" markets and "public" sovereigns are, as "-ization"—nationalization and privatization—go back and forth. Public investments have been essential to British Petroleum's success, as Britain and that corporation ventured across the globe. During the first quarter of the century, the British Government negotiated for the company to obtain exclusive rights to oil in what was then Persia.[102] The result, called the Anglo-Iranian Oil Company, joined in a colonializing competition (and occasionally in alliance) with Royal Dutch-Shell and with Standard Oil, based in the United States.[103] Iran's nationalization of its oil industry in the early 1950s ended that structure, replaced by the entity called the British Petroleum Company, which Thatcher privatized and which now goes under the name BP. The company reciprocated by pouring resources into United Kingdom programs, such as helping to finance both a major expansion of a venerable English museum by augmenting "The Tate" with "Tate Modern." The name of the inaugural show, *RePresenting Britain 1500–2000*,[104] could be read as referencing the mutual entrenchment of the public and the private in Britain's persona.

Thatcher became the "poster" prime minister for government withdrawal from enterprises it had owned—an experience replicated in other European countries. Given that the United States did not have commercial enterprises to divest, its version of privatization entails shifting activities (such as incarceration, courts, education, the maintenance of roads, social benefit programs, and pensions) that during the nineteenth or twentieth century had become duties of local, state, or federal governments to private providers, paid in whole or part from public funds,[105] while maintaining (or not) various degrees of control over policy and implementation.[106]

As the BP example illustrates, the interaction between the public and private can be nuanced, as is the relationship between privatization and the state. An alternative verbiage, "re-privatization," recognizes that some activities, once private, can become

[101] *See* Germà Bel, *The Coining of "Privatization" and Germany's National Socialist Party*, 20 J. Econ. Persp. 187, 188 (2006). Bel traced the term to policies of the Nazi government, which privatized some of what had been government-run activities to obtain support from the business sector. *Id.* at 189.

[102] James Bamberg, The History of the British Petroleum Company, Volume 2: The Anglo-Iranian Years, 1928–1954, at 522 (1994); Ronald W. Ferrier, The History of the British Petroleum Company, Volume 1: The Developing Years, 1901–1932, at 10–13, 538–542 (1982).

[103] James Bamberg, British Petroleum and Global Oil 1950–1975: The Challenge of Nationalism 1–10 (2000).

[104] The company renamed itself BP, and in 2010 became identified with Louisiana as oil rig ruptures disfigured the United States Gulf coast. *See generally*, *Our History*, BP, http://www.bp.com/extendedsectiongenericarticle.do?categoryId=9039337&contentId=7036819.

[105] John D. Donahue, The Privatization Decision: Public Ends, Private Means 7 (1989).

[106] *See, e.g.*, Government by Contract: Outsourcing and American Democracy (Jody Freeman & Martha Minow eds., 2009); Paul R. Verkuil, Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It (2007); Catherine M. Donnelly, Delegation of Governmental Power to Private Parties: A Comparative Perspective (2007).

public and then return to the private sector.[107] "Denationalization" is another term, and one Thatcher reportedly thought had unappealing connotations.[108] Yet privatization can entail denationalization when enterprises are turned over to foreign investors or overseers. Israel's private prison had foreign investors. Similarly, the investment arm of Kuwait tried to buy British Petroleum but was blocked, and a proposal to privatize port services in the United States was derailed when the purchasers were revealed to come from Dubai.[109]

The ability of private entrepreneurs to affect public agendas is a related concern. For example, private providers of prisons have successfully expanded their market, diversified the forms of supervision offered, and lobbied for more detention. England, a "global leader,"[110] initially contracted to have a private provider build one prison; thereafter England turned to the private market for management and ownership of existing prisons and for services before and after sentencing.[111] In the United States, the 1980s mark the emergence of the Corrections Corporation of America (CCA) and the Wackenhut Corrections Corporation, a division of a global security firm that, in 2003, became the GEO Group. Within the decade, the two controlled 75 percent of the private prison market in the United States.[112] In terms of numbers, as of 2011, private prisons detained a small but growing fraction of the population—about 8 percent (more than 125,000 people) of those incarcerated prisons in the country.[113]

By then, the GEO Group described itself as the "world's leading diversified provider in privatized correctional, detention, and treatment services" offering prisons, detention of juveniles and immigrants, private probation, residential treatment, psychiatric facilities, and electronic monitoring under a "*Continuum of Care* model" for its "customers worldwide."[114] GEO illustrates how privatization and globalization are enmeshed; the result of its transnational business in 2011 was an income exceeding $1.6 billion, a "27 percent" increase over the prior year's earnings.[115]

Yet that growth "unfortunately . . . fell short" of the company's goals; a letter to shareholders explained that an "unprecedented political and legal realignment in California of low security offenders from the state down to the counties . . . [had] resulted in the

[107] Bel, *supra* note 101, at 187.

[108] *Id.* at 192.

[109] *See, e.g.*, Deborah Mostaghel, *Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?*, 70 Alb. L. Rev. 583 (2007).

[110] Donnelly, *supra* note 106, at 65 (citation omitted). Jowell had described the English system, dating its contracting out of prisons to the 1991 Criminal Justice Act. Jowell, *supra* note 14, ¶¶ 40–45.

[111] Donnelly, *supra* note 106, at 66.

[112] Dolovich, *supra* note 48, at 459.

[113] Kirchhoff, *supra* note 82, at 22. The federal government was private prisons' "most important single customer." *Id.* at 24.

[114] The GEO Group, Inc., 2011 Annual Report, https://materials.proxyvote.com/Approved/36159R/20120302/AR_120114/document.pdf at 2–3 [hereinafter GEO 2011 Annual Report]; *see also* The Law Office of the Southern Center for Human Rights, Profiting on the Poor: A Report on Predatory Probation Companies in Georgia (2008), http://www.schr.org/files/profit_from_poor.pdf.

[115] GEO 2011 Annual Report, *supra* note 114, at 3. Thirteen percent of its work is "international," *id.* at 1, and it has 65 facilities in the United States, *id.* at 6; four in Australia, one in South Africa, and two in the United Kingdom, *id.* at 10–11.

deactivation of several GEO facilities contracted with the State of California, which we are now actively marketing to county and federal agencies [which] we believe had a significant need for detention and correctional beds."[116] Similarly, CCA reported in 2005, that "[t]he demand for our facilities . . . could be adversely affected by . . . leniency in conviction and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws."[117]

Private prison providers thus join with some public officials and prison staff unions in supporting detention policies including confining immigrants.[118] The 2011 shareholder report from GEO's Chair found solace in the "strong fundamental trends and increasing demand for bed space. . . . At the federal level, initiatives related to border enforcement . . . have continued to create demand for larger-scale, cost efficient facilities."[119] Further, as a significant contributor to certain Florida lawmakers, GEO came close to obtaining a legislative mandate from that state to require private prisons in various areas.[120]

As this example illustrates, privatization often turns to for-profit (as compared with non-profit) entrepreneurs, whereas governments (along with associations such as religions and universities) are animated by other goals. But governments do have budgets, aspire for surpluses, and make or save money.[121] Thus, as illustrated by the Israeli prison litigation, privatization can be less a critique of government than a back-handed compliment, reflecting that the demand for a particular government service outstrips production. Privatization is one way to supplement, and sometimes to expand, public resources that, as matter of politics, can only be made available by shifting the work to

[116] *Id.* at 2.

[117] Corrections Corporation of America, Form 10-K, at 21 (2005), *available at* http://www.sec.gov/Archives/edgar/data/1070985/000095014406001892/g99938e10vk.htm; *see also* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 231 (2010).

[118] *See* Dolovich, *supra* note 48, at 523–532; Associated Press, *Immigrants Prove Big Business for Prison Companies*, USA Today, Aug. 2, 2012, http://usatoday30.usatoday.com/news/nation/story/2012-08-02/immigration-prison/56689394/1. How much private advocacy alters agendas can be difficult to measure; the impact may vary with what institutional actors share the goals of a particular group of entrepreneurs. *See* Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 Stan L. Rev. 1197 (2008); Alexander Volokh, *Privatization, Free-Riding, and Industry-Expanding Lobbying*, 30 Int'l Rev. L. & Econ. 62 (2010).

[119] GEO 2011 Annual Report, *supra* note 114, at 2.

[120] Steve Bousquet, *Prison Privatization Dies in Senate*, Tampa Bay Times, Feb. 15, 2012, http://www.tampabay.com/news/publicsafety/crime/prison-privatization-dies-in-senate-21-19/1215438.

[121] A prominent United States example was the New London, Connecticut's interest as a "distressed municipality" (according to the State of Connecticut) in economic development; the city condemned some land proximate to where Pfizer Inc., a major pharmaceutical corporation, was building a research facility. The goal was to create areas for walking along the waterfront and for restaurants and shopping to revitalize the city. Landowners objected to the condemnation as not for a "public use," as the United States Constitution requires. In 2005, in a five to four decision, the Supreme Court disagreed, ruling that the proposed use was sufficiently for the "general public" for purposes of the federal constitution. Kelo v. City of New London, 545 U.S. 469 (2005). This holding rested in part on deference to state and local assessments of what was a public use. Justice Thomas, in dissent, proposed a narrower definition that relied on what the public owned or could use as its property, such as roads, parks, railroads, and canals. *Id.* at 505, 512 (Thomas, J., dissenting).

private actors. Further, privatizing activities could lift budget burdens to enable state provision of more or different services. Moreover, in various eras, governments have permitted employees to make profits by funding their work through direct charges to recipients/customers rather than by salaries, and sometimes that direct economic relationship prompted providers to be solicitous of the customer-citizenry.[122]

Another set of debates centers on whether a company whose *raison d'être* is profit seeking alters the nature of or the demand for the services provided and whether pricing options for recipients creates distributive injustices—all of which economists might style negative externalities. The Israeli Supreme Court decision objected to the existence of a market in prisons. Commodification, the justices (with one directly invoking Kant[123]) reasoned, engendered an "attitude of disrespect"[124] that reduced prisoners' personhood. Detention could not permissibly be "motivated by economic considerations of profit and loss"[125] because authorizing a private corporation to "keep human beings behind bars while making a financial profit from their imprisonment" was an affront to inmates' dignity.[126]

Enabling some recipients to get better services by permitting shopping is a discrete egalitarian concern. Privatizations can function as a neo-liberal attack on collective action by ceding power to entities that, through differential pricing and access, diminish the welfarist and redistributive aspects of state-provided services.[127] Michel Sandel opened his book *What Money Can't Buy* with an example of a California prison offering nonviolent offenders a "prison cell upgrade: $82 per night" to have a quiet cell.[128] The *Sundar* decision offered parallel distribution arguments against private policing as undercutting the state obligation to ensure that all of its population be equally protected.[129]

Courts offer another template in which to explore the various forms that privatizations take, their impact on policy agendas, and their effect on the images of and expectations about government actors. "Private" disputes are the largest component of many jurisdictions' docket, as millions of people in conflict come to court for "public" dispute resolution.[130] Litigants with resources invest vast sums in lawyers who argue to judges about law's meaning.[131] In some jurisdictions, constitutional obligations of

[122] *See* Parrillo, *supra* note 98.

[123] *Academic Center*, *supra* note 14, ¶ 3 (Arbel) ("As the philosopher Immanuel Kant said, a person should not be treated solely as a means of achieving external goals, since this involves a violation of his dignity . . .").

[124] *Id.* ¶ 38 (Beinisch); *see also id.* ¶ 33 (Beinisch); ¶ 1 (Rivlin); ¶ 16 (Procaccia); ¶ 1 (Grunis); ¶ 1 (Naor); ¶ 2 (Arbel); ¶ 1 (Joubran); ¶ 1 (Hayut).

[125] *Id.* ¶ 33 (Beinisch).

[126] *Id.* ¶¶ 37, 39 (Beinisch).

[127] Privatization, Law, and the Challenge to Feminism (Brenda Cossman & Judy Fudge eds., 2002).

[128] Michael Sandel, What Money Can't Buy: The Moral Limits of Markets 3 (2012).

[129] *Sundar*, *supra* note 24, ¶ 12; *see also* David A. Sklansky, *Private Policing and Human Rights*, 5 Law & Ethics Hum. Rts. 112, 136 (2011) [hereinafter Sklansky, *Private Policing and Human Rights*].

[130] Geoffrey C. Hazard, Jr. & Paul D. Scott, *The Public Nature of Private Adjudication*, 6 Yale L. & Pol'y Rev. 42 (1988).

[131] *See* Gillian K. Hadfield, *The Dynamic Quality of Law: The Role of Judicial Incentives and Legal Human Capital in the Adaption of Law*, 79 J. Econ. Behavior & Org. 80 (2011).

open courts and norms of equality have endowed less-resourced litigants with state subsidies (such as "public defenders" for indigent criminal defendants, waivers of filing or transcript fees, and civil legal aid) and produced a sprawling multi-century debate about how to allocate and ration legal and judicial services.

As with prisons, efforts are also underway to convert certain court functions into a service-for-hire and to cut back on state subsidies. During earlier eras, courts "jealously" guarded their "monopoly" on dispute resolution and ruled that the divesture of jurisdiction was against "public policy."[132] Illustrative was the common law doctrine making unenforceable contracts that pre-committed parties to using arbitration if disputes arose. Moreover, encouraging private conciliation was outside the charter of publicly-commissioned jurists.

Today, in contrast, jurisdictions such as the United States enforce obligations to arbitrate, even over protests that they are borne of unfair advantages imposing unbargained-for terms.[133] Statutes authorize paid, private decision makers ("rent-a-judge") to enter binding, enforceable judgments.[134] Many countries embrace "alternative dispute resolution" (ADR), as illustrated by Europe's 2008 directive insisting that its member states develop mediation programs for cross-border disputes—arguably undermining rights to a fair hearing protected by the European Convention on Human Rights.[135]

Various and diverse arguments are made on behalf of the uncoupling of adjudication from the state.[136] One account is that ADR is a second-best response to systemic overload, produced because governments cannot support all those who seek to use their courts. Another analysis stresses both the immediate dollar costs of the public processes and the effects, said to chill productive economic and social exchanges. The claims are that alternative forms of resolution are more accurate, less expensive, more generative, and more congenial. Advocacy for privatization is sometimes linked to movements around restorative justice and community empowerment that are critical of the adversarialism produced by complex procedures, lawyer dependency, and public conflicts. Other support comes from "repeat player" defendants (both private and public) who found the glare of open courts disruptive to business practices and to governance policies and successfully reshaped rules to constrict access.[137]

[132] *See generally* Ian R. Macneil, American Arbitration Law: Reformation, Nationalization, Internationalization (1992).

[133] *See* Resnik, *Fairness in Numbers*, *supra* note 72, at 112–118.

[134] *See, e.g.*, Sheila Nagaraj, *Comment, Marriage of Family Law and Private Judging in California*, 116 Yale L.J. 1615 (2007).

[135] *See* Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008, on certain aspects of mediation in civil and commercial matters, Art. 1, 2008 O.J. (L 136) 3; Shirley Shipman, *Compulsory Mediation: The Elephant in the Room*, 30 Jus. Quart. 163 (2011).

[136] *See, e.g.*, Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System*, 108 Penn St. L. Rev. 165 (2003); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 Ohio St. J. on Disp. Resol. 1 (2000); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 Ohio St. J. on Disp. Resol. 211 (1995).

[137] This concern was forecast in Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974).

In both the United States and the United Kingdom, privatization has reformatted activities inside courthouses by diminishing occasions for public observation of and involvement in adjudication. Many judges work in conference rooms outside public view and function as managers of disputes.[138] The idea of what a judge does has changed. Mediation and conciliation, which were once normatively "extra judicial," have been reassigned to judges, instructed to settle disputes, oftentimes without public access either to process or result.[139] By 2011, the government of the United Kingdom (which had been a global leader in facilitating "paths to justice" through legal aid and administrative tribunals[140]) decried too much "unnecessary litigation," pressed disputants to mediate and settle, dramatically cut legal assistance, and adopted a policy aiming for civil litigants to internalize the costs of litigation (aside from the courthouse infrastructure expenses) under a fee-for-service model.[141] Rates of trials have declined on both sides of the Atlantic. By 2010, in the federal courts in the United States, trials began in only two of a hundred civil cases filed—described by the moniker of the "vanishing trial."[142]

In short, from policing, prosecution, and punishment to civil litigation, ideas about what various government officials do have been built, reformatted, and are now under revision again. Whether it was ever "credible to talk as though the state monopolizes" the functions of maintaining order, enforcing criminal law, and imposing civil liabilities, it is not so today.[143] Privatization of what during the twentieth century became a "public" function of dispute resolution—both criminal and civil—is hence a global phenomenon that limits structured, public interactions between citizen and state, even as the aegis of state power (pace Foucault) can expand.

In addition to affecting the nature of the work that public officials do and their agendas, privatizations can be, but are not intrinsically, a means of eluding public regulation. The degree of oversight is contingent, as terms such as "outsourcing," "devolving," and "delegating" suggest. While the "private" sometimes marks an arena beyond the reach of the state, some privatizations are partial—such as outsourcing infrastructure but maintaining operational control, or operating the infrastructure and delegating service management. At times, privatization can enhance the capacity and authority of government.

[138] *See, e.g.*, Simon Roberts, *"Listing Concentrates the Mind": The English Civil Court as an Arena for Structured Negotiation*, 29 Oxford J. L. Stud. 457 (2009); Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982).

[139] Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War With the Profession and its Values*, 59 Brook. L. Rev. 931 (1993); *see also* Salem Advocate Bar Association v. Union of India (UOI), AIR 2003 SC 189.

[140] *See* Hazel Genn, Paths to Justice: What People Do and Think About Going to Law (1999).

[141] *See* Hazel Genn, *What is Civil Justice For? Reform, ADR and Access to Justice*, 24 Yale J. L. & Hum. 397 (2012).

[142] *See* Resnik & Curtis, Representing Justice, *supra* note 64, at 306–314; Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical L. Stud. 459 (2004).

[143] Sklansky, *Private Policing and Human Rights*, *supra* note 129, at 116–120. Further, "private military companies" (or "PMCs"), like private policing are part of industries that are "increasingly multinational." Sklansky, *Private Police*, *supra* note 35, at 1182.

Thatcher's privatization included the creation of new regulatory agencies.[144] The European Union's reliance on private bodies to set standards is cited as a mechanism to generate cohesion by overcoming member state differences.[145] Health care debates in the United States suggest a variety of models—the government is a bill payer for citizens receiving health care from private providers, a shopper on behalf of consumers and thereby altering market options, or a direct provider of services. In private prisons, owners and staff of such facilities are private contractors, while the prisoners, detained at the behest of the state, are generally supported by the public fisc, supplemented in some jurisdictions by fines and other charges levied directly against inmates.

Israel's 2003 prison legislation, struck down by its Supreme Court, offered another option. The statute "improved" on the "English model" by requiring that private employees and owners use the same procedures to search and discipline inmates[146] and be subjected to the same legal standards as the government.[147] The state maintained the power to appoint staff, to control allocation of prisoners, to monitor the site, and to revoke the contract.[148] And, in addition to ex post regulation, legal systems could impose ex ante constraints (a "public law of privatization") to require that governments contemplating privatizing functions give detailed disclosures of the options and costs and grant rights of participation in decision making to citizens.[149]

Thus, the degree of public oversight depends on how a transfer is structured, how much discretion inheres in the services, and on what accountability mechanisms are put into place. As one expert told the Israeli Supreme Court, under the Human Rights Act (HRA) adopted in the United Kingdom, "any person . . . whose functions are functions of a public nature" must act consistent with HRA; moreover, the HRA determined that prisons were public functions, whoever ran them.[150] He further opined that the European Court of Human Rights had "established that the fundamental rights protected in the Convention" were "enforceable against ostensibly

[144] Starr, *supra* note 100, at 18.

[145] Donnelly, *supra* note 106, at 71.

[146] The legislation also directed the private provider to ensure "the welfare and health of the inmates and taking steps during the imprisonment that will aid their rehabilitation after their release for imprisonment, including employment training and education." Prisons Ordinance Amendment Law (no. 28), 5764-2004, § 128.12.

[147] *Academic Center*, *supra* note 14, ¶ 6 (Beinisch); Prisons Ordinance Amendment Law (no. 28), 5764-2004, § 128.11(3)(1).

[148] *Id.* ¶ 5 (Beinisch) (discussing Prisons Ordinance Amendment Law (no. 28), 5764-2004, §§ 128.32–128.35).

[149] Daphne Barak-Erez, *Three Questions of Privatization*, *in* Comparative Administrative Law 493 (Susan Rose-Ackerman & Peter Lindseth eds., 2010); Daphne Barak-Erez, *The Private Prison Controversy and the Privatization Continuum*, 5 Law & Ethics Hum. Rts. Rev. 138 (2011).

[150] Jowell, *supra* note 14, ¶¶ 52–54 (citing Human Rights Act of 1998, § 6(3)(b) (Eng.)). He described the South African system as similar (and likewise not posing any "constitutional difficulties") because the "legal accountability" for private actors was the same as public actors for this "public function," as provided by the South African Constitution that deemed anyone carrying out a public function to be an organ of the state. *Id.* ¶ 73 (citing S. Afr. Const., 1996, § 239).

private bodies" when the "state has retained a high level of responsibility for their regulation."[151]

Moreover, "public" activity ought not be assumed to ensure obligatory transparency, disclosure, and regulation, as the example of judge-based dispute settlement illustrates. At a more general level, many constitutional polities impose variable levels of constraints on executive and legislative branch action, and sovereign immunity may shield governments from forms of liability to which private actors can be subjected.[152] A particular legal system can—as the Israeli legislation at issue in the private prison case exemplifies—impose the same liability on private actors as public actors. Conversely, as the Supreme Court of the United States concluded in the context of private prisons, private officials and employers need not be liable for violations of rights that federal government actors might be.[153] Indeed, contemporary American legal developments demonstrate the de-constitutionalization of prisons, as judgments increasingly leave decision-making to the discretion of prison authorities, both public and private.

I turn now from the variegated landscape of privatizations to more about the justifications. Enthusiasts generally make claims about utilities. The state is faulted as a failed manager that is too bureaucratic, inflexible, and insufficiently expert to ensure quality across a range of domains. Competition is the antidote, generating efficiencies through creating more options and different formats for the provision of services. A managerial literature further argues the structural advantages of private markets because of a presumed enhanced capacity to monitor agents' loyalty in pursuing the objected of their principals.[154]

As for privatizations' successes, empirical claims are proffered about services, oversight, resource production, and profit.[155] For example, improving efficiencies depends in part on the ability of new providers to access particular markets and thereby generate accountability through competition.[156] But some markets may be difficult to enter; prisons, for example, require large capital investments, and that market has not, thus

[151] Jowell, *supra* note 14, ¶¶ 10, 131–132 (citing Costello-Roberts v. United Kingdom, 19 Eur. H.R. Rep. 112 (1993)); Van der Mussele v. Belgium, 6 Eur. H.R. Rep. 163 (1983); Swedish Engine Drivers' Union v. Sweden, 1 Eur. H.R. Rep. 617 (1976)); *see also* Kotov v. Russia, 54522/00 Eur. Ct. H.R. (2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110023 (discussing when a state can be held responsible under Convention for acts of a company or a private person).

[152] James Pfander, *Government Accountability in Europe: A Comparative Perspective*, 35 Geo. Wash. Int'l L. Rev. 611 (2003).

[153] Federal prisoners detained in private prisons cannot bring suits predicated directly on the United States Constitution against either the companies owning the institutions or individual correction officers but can only seek relief based on claims available under state law. *See* Minneci v. Pollard, 132 S. Ct. 617 (2012); Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001). In this respect, privatization can enhance the authority of the state—holding the initial power of judgment about incarceration—while diffusing the state's accountability. *See* White, *supra* note 98, at 138.

[154] Michael J. Trebilcock & Edward M. Iacubucci, *Privatization and Accountability*, 116 Harv. L. Rev. 1422 (2003).

[155] John J. Dilulio, Jr., *Government by Proxy: A Faithful Overview*, 116 Harv. L. Rev. 1271 (2003).

[156] Donahue, *supra* note 105, at 4, 22.

far, been populated by an array of providers. Further, the debate about the impact of privatization of prisons illustrates the challenges of assessing competing claims about comparative efficiencies. Some argue that private facilities are equal to or better than state facilities in terms of conditions and costs.[157] Others believe that few dollar reductions per prisoner exist and worry that the savings, if any, derive from compromises on safety and programs.[158] Also raised is a different kind of cost—that delegation to the private sector undermines the legitimacy of state sanctions.[159] Debates about private courts entail another metric—about whether requiring disputants to use arbitration and other forms of ADR is less expensive and more generative of successful resolutions.

5. The constitutionalization of privatization(s)

Courts have received few direct challenges to privatizations, and the Israeli Supreme Court "assumed that there is no constitutional impediment to privatization of the vast majority of services provided by the state."[160] As for private prisons, the small number of judicial discussions aside from Israel have generally upheld the practice.[161] As one United States appellate judge opined, a prisoner had only a "legally protected interest in the conduct of his keeper, [and] not in the keeper's identity."[162] Thus, if measured against a transnational constitutional norm on either the meta-claim of privatization

[157] Richard Harding, who was the "autonomous Inspector of Custodial Services in Western Australia from 2000 to 2008," argued that private prisons would have improved Israel's "in house (non-accountability) structure," as had happened, in his view, in the United Kingdom. *See* Harding, *supra* note 18, at 141, 143 n.1.

[158] *See, e.g.*, James Blumstein, Mark Cohen & Suman Seth, *Do Government Agencies Respond to Market Pressures? Evidence from Private Prisons*, 15 Va. J. Soc. Pol'y & L. 446 (2008); Uri Timor, *Privatization of Prisons in Israel: Gains and Risks*, 39 Isr. L. Rev. 81, 82–87 (2006).

[159] Dolovich, *supra* note 48, at 462–471.

[160] *Academic Center*, *supra* note 14, ¶ 65 (Beinisch).

[161] Jeffery Jowell opined that the "long history of privatisation of industries and contracting out of governmental functions" in the United Kingdom had not been significantly challenged, and given that prisons had "a minimum of degree of political and legal accountability," any such challenge "would be likely to fail." Jowell, *supra* note 14, ¶ 7. Moreover, in practice, "no criticism" had emerged that a private prison was "any less effective than [a] state run prison." *Id.* Similarly, South Africa had also privatized various activities, including prisons, and the case law to date suggested that contracting out is not "in any way unconstitutional." *Id.* ¶ 8.
James Blumstein, from the United States, likewise averred that in "one context or another, the United States Courts of Appeals for the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have rejected claims that privately-operated prisons violate the United States constitution." Opinion, James Blumstein, HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance (Isr. Aug. 23, 2006) [hereinafter Blumstein, Opinion]. In addition, as noted, the Israel Supreme Court referenced a decision from Costa Rica upholding a form of privatization of prisons. *Academic Center*, *supra* note 14, ¶ 22 (Naor).

[162] Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (Posner, J., for the court). That appellate court described the challenge to private prisons to be "thoroughly frivolous," and noted that it could not "think of any . . . provision of the Constitution that might be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than by a government." *Id.*

or the particular instantiation of private incarceration, Israel's legislation creating a private prison would have been upheld.

After its worldwide sweep, however, the Israeli court read its own Basic Law on Human Dignity and Liberty to license judicial review and to invalidate the statute.[163] To do so, the justices analyzed the state's guarantee of fundamental human rights that permitted violations if "befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required"[164]—a test that invited a proportionality analysis.

The ruling did not turn on an empirical inquiry into whether public prisons were functioning well or—as expert commentators have argued—whether private prisons were better than the baseline provided by the public sector.[165] Indeed, a concurring justice assumed that even if private prisons improved the experience of confinement over that in the public sector, privatization was illegal because private providers inherently harmed inmates' human rights more than public providers did.[166] Further, the lone dissenting justice described prison conditions as "chilling": overcrowding had produced a lack of space, sanitation, ventilation, medical care, and programs that resulted in violations of "basic rights of persons" as a "matter of course."[167]

The Israeli court's decision rested instead on another kind of empirical insight—that the state's decision to punish is *not* complete at sentencing but continues when staff make decisions about whom to search, how to classify, and whether to impose administrative segregation.[168] Thus, distinct from the scholarly claim that

[163] *Academic Center*, *supra* note 14, ¶¶ 35–36 (Beinisch).

[164] Israel Basic Law: Human Dignity and Liberty (1A, 8).

[165] *See* Blumstein, Cohen & Seth, *supra* note 158, at 466 (citing average savings for a state introducing private prisons to be $13 to $15 million); Blumstein, Opinion, *supra* note 161, at 24 (noting cost savings and other economic benefits of private prisons). *But see* Timor, *supra* note 158, at 82–88 (finding little evidence substantiating the benefits or harms of private prisons).

[166] *Academic Center*, *supra* note 14, ¶ 18 (Procaccia). In her view, because "private enterprise" could not have "internalized the doctrine of balances in the exercise of sovereign power," entrusting "sovereign coercive authority to a private concessionaire" would cause more harm to inmates' human dignity. *Id.* ¶ 49.

[167] *Academic Center*, *supra* note 14, ¶ 3 (Levy). He noted that private providers could perhaps do better. *Id.* ¶ 4; *see also* Harding, *supra* note 18, at 142. In his view, Israel's prisons were in "profound and continuous breach of every international standard, of every domestic Israeli standard and of every expectation of decency." In 2012, the German Constitutional Court considered a challenge to a Hessen law that placed involuntarily confined mentally ill criminals in institutions that, while state owned, were corporate entities with private staff. The court upheld the provision in part because it had the potential to improve the "quality of internment." *See* Bundesverfassungsgericht [BVerfG] 2 BvR133/10, Jan. 18, 2012, http://www.bundesverfassungsgericht.de/entscheidungen/rs20120118_2bvr013310.html.

[168] *Academic Center*, *supra* note 14, ¶¶ 2, 12, 26, 37, 67 (Beinisch); ¶¶ 2, 8 (Procaccia). The violation of right to liberty "is inflicted by the party that manages and operates the prison where the inmate is held in custody, and by the employees of that party, whose main purpose is to ensure that the inmate duly serves the term of imprisonment to which he has been sentenced." *Id.* ¶ 25 (Beinisch). Examples included "the power to order an inmate … held in administrative isolation for a maximum of 48 hours," to "approve reasonable force to carry out" a body search, and to prohibit an inmate from meeting with a particular lawyer." *Id.* ¶ 26.

privatization undermines the social legitimacy of punishment,[169] the court's focus was on the lawfulness of private actors continually making punishment decisions at the state's behest.

Some might therefore have concluded that the uncontrollability of those many discretionary judgments rendered the agency/principal relationship inevitably incomplete. The court did not, however, embark on an analysis of agency failure but insisted (with citations to Rousseau and Locke) that creating the agency relationship itself breached the social contract.[170] Giving private enterprise state activities limiting personal liberty resulted in a "violation of the constitutional right to personal liberty beyond the violation that arises from the imprisonment itself."[171] Because custodial detention "necessarily involve[s] a serious violation of human rights,"[172] only state agents could do so.

What kind of constitutional right did the Israeli Supreme Court establish? Given that the decision's predicate was the irrelevancy of quality differences in conditions at public and private prisons, the right does not sound in the equality and distributive concerns that laced India's *Sundar* decision on private police. Further, given that the legislature had retained control to inspect, terminate, and impose rules on the prison, the right is not predicted on due process guarantees against arbitrary decisions. Moreover, by tying its holding to the personal entitlements of detainees, the court did not elaborate a collective commitment to liberty that required parsimony by a polity in its punishment through avoiding creating incentives for private enterprises to profit by seeking increasing numbers of detention beds.[173] Instead, the court reasoned that detainees had the right to have the state itself furnish directly the unique service of depriving people of their liberty and dignity.[174] To borrow an Arendtian formulation, the right to have rights became a right to have only the state take away those rights.

The dissenter disagreed with what he described as the insistence that the "social right" of protecting the dignity of the incarcerated could only be accomplished by the public sector.[175] He argued that the majority was misguided because, while the state had a "central role" in realizing that protection, private as well as public providers could supply "the right to proper prison conditions," and the private sector might well do so

[169] Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 Fla. St. U. L. Rev. 149 (2010). Michael Walzer has also argued that the "democratic defense of the right to punish" depends upon the state insuring that state actors, functioning in their representative capacity, treat citizen-detainees in the same, equal-handed manner. Michael Walzer, *At McPrison and Burglar King It's . . . Hold the Justice*, New Republic, Apr. 8, 1985, at 10–12.

[170] *Academic Center*, *supra* note 14, ¶ 23 (Beinisch); ¶ 2 (Arbel); ¶ 1 (Rivlin); ¶¶ 4, 12 (Procaccia); ¶¶ 1, 2 (Hayut); ¶ 29 (Naor); ¶¶ 12, 13 (Levy).

[171] *Id.* ¶ 33 (Beinisch).

[172] *Id.* ¶ 10 (Beinisch).

[173] Dolovich, *supra* note 48, at 515–518.

[174] Under Israel's Basic Law, dignity is not absolute; infringements are permissible under a proportionality analysis. *See* Basic Law 1 (8). This conception contrasts with the German view, in which dignity is understood as an absolute. *See* Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 59 U. Toronto L.J. 417 (2009).

[175] *Academic Center*, *supra* note 14, ¶ 2 (Levy).

better than the public sector.[176] His understanding that providing adequate conditions to prisoners has "aspects of a social right" reflects the welfarist aspects of prisons (run by public or private actors), which house and support those involuntarily confined.

State-funded dispute resolution—courts—can also be classified as a social right (as well as a political and a civil right, if choosing to use T.H. Marshall's terms[177]) because courts distribute conflict resolution opportunities and today, must do so in a manner respectful of the dignity and equality of the participants. Further, as discussed above, states have come to subsidize both the infrastructures and some of the users, not only to respond to their needs but also to legitimate courts by enhancing their capacity to enforce laws and provide for the security of economic and interpersonal relationships. Moreover, both national regulations and international conventions now organize these functions through imposing requirements such as dignified treatment for detainees, and public hearings before independent and impartial judges for disputants.[178] The Indian Supreme Court's 2011 decision—that citizens had rights to "appropriately trained . . . and properly equipped" state-provided police—adds policing to the list of activities governments have come to supply as a matter of course.[179]

Naming the provisioning by states of police, courts, and prisons as social rights opens up that characterization beyond the strictures of the International Covenant on Economic, Social and Cultural Rights (ICESCR), focused on state obligations to respect, protect, and ensure that their populations have housing, education, a means of a livelihood, social security, and health.[180] Once the rights to security and dispute resolution, implemented through police, courts, and prisons, are put into this mix, even constitutions (such as the United States's) said to be devoid of welfarist obligations can be understood to have distributive obligations, albeit ones that neither prisoners nor defendants (criminal or civil) volunteer to use.[181]

Therefore, in addition to placing the Israeli Court ruling under the rubric of personal entitlements, it belongs within the category of the structural. The Israeli Supreme Court did what it had claimed to have avoided; it identified a facet of the "'hard core' of sovereign powers" that can neither be transferred nor delegated.[182] The Indian Supreme Court expressly acknowledged that it had done so, concluding

[176] *Id.* ¶¶ 2, 4. Further, Justice Levy wrote, because the prison was not yet in operation, the judgment was premature.

[177] T.H. Marshall, *Citizenship and Social Class*, *in* Class Citizenship and Social Development 72 (1949).

[178] *See, e.g.*, ICCPR, supra note 75, art. 9(3); Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Aug. 26–Sept. 6, 1985, U.N. Doc. A/CONF.121/22/Rev.1.

[179] *Sundar*, *supra* note 24.

[180] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

[181] While the Constitution of the United States is generally seen as lacking such rights (see, for example, Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 Int'l J. Const. L. (I.CON) 663 (2008)), some commentators have identified welfarist obligations in the United States Constitution or found the distinctions among kinds of rights unhelpful. *See, e.g.*, Mark Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law (2008); Robin West, Progressive Constitutionalism: Reconstructing the Fourteenth Amendment (1994).

[182] *Academic Center*, *supra* note 14, ¶ 63 (Beinisch).

that policing could not be "divested or discharged through the creation of temporary cadres with varying degrees of state control."[183] Both court-based anti-privatization rights therefore fit within what I called "statization"—the need for polities to create themselves through institutional services entailing relationships between citizen and state that produce identity for both.

Further, these two holdings make actions obligatory not only for the state but also for its citizens, who must reciprocate. The Israeli Supreme Court focused on the unique authority of the state to violate liberty and dignity rights, but it could have also explained that detainees and prisoners are obliged particularly *to* the state rather than to corporate entities to obey police commands and to take the punishment meted out. The interaction (even under conditions such as supermax, isolating prisoners from other humans) requires the state to internalize the punitive tasks and individuals to serve (in the literal sense) the state directly so as to make amends for transgressing collective norms.

These various exchanges could be characterized as a form of "connective justice," the term referenced at the outset for ancient Egyptian adjudication—here redeployed to describe mandates (shared by citizens and state) of compliance with behavioral norms. "Connection" today has a psychological valence that feeds into political theories imagining states in communitarian, democratic, and feminist terms. Applying it to detention makes plain that connections can be complex and harsh. I use the phrase to evoke a dense set of interactions (in these contexts, among police, disputants, judges, government officials, and detainees) in the immediate instance and, when done in public or made transparent, enabling debates about governing norms.[184] On this account, anti-privatization rights become collective entitlements to state and citizen identity (as distinct from the legitimacy or nature of sanctions) forged through the running of institutions such as the police, courts, and prisons. Privatizations therefore not only undermine individuals' personal rights but also dilute opportunities to build affiliations within and to the state.

Scholars puzzle about the intelligibility of sovereignty in the twenty-first century. In the United States, political movements aim to delegitimatize state capacities and disable its welfarist capacities, whereas in Europe, the risk of the failure of its ambitions haunts contemporary exchanges. My view is not that the state sovereignty will rapidly disappear; indeed, forms of nationalism, some of them virulent, are resurgent. More positively, constitutional democratic states have been bases for elaboration of new forms of rights that, only in the last decades, embrace all persons. Thus, the energy devoted to exploring the phenomenology of privatization and globalization needs to be coupled with efforts to build the content of constitutional sovereignty so as to limit its xenophobia and to render it both legible and generative.

The history and practices of policing, courts, and prisons, set forth above, offers insights into some of the attributes that make state-based services

[183] *Sundar*, *supra* note 24.

[184] *See, e.g.*, Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 Harv. Civ. Rights-Civ. Liberties L. Rev. 373 (2007).

recognizable, entrenched, and durable. All three serve the state, while being useful to individuals and to enterprises, made more secure in their persons and transactions through state control. All three create opportunities for encounters that forge identities, both collective and individual (e.g., suspect or victim, litigant, detainee, judge, warden, cop). In closing, I explore a few aspects of constitutional regimes that oblige citizen–state engagements other than police stops, court filings, and serving prison sentences. Some are specific to a given polity and others are found in many constitutions, enabling transnational exchanges about their content.

Obvious examples come from constitutions imposing duties by specifying state provision of what have become standard-bearers in social rights discourse—such as education, health care, and social security—that are given institutional form through public schools, hospitals, health care services, and administrative offices and that turn individuals into students, patients, and recipients. In some jurisdictions, these services have become fixtures of the state ("The National Health" is the shorthand in England) that enable the state to perform its own competence (or lack thereof). Today, these institutions are the subject of privatization efforts that put at risk opportunities to experience the state as providing sustenance.[185]

Another spate of infrastructure rights are the calls in many constitutions for the provision of a "healthy environment."[186] On occasion, those commitments are coupled with obligations to work transnationally for protection of the "global" or the "international" environment.[187] Moving from national to global prescriptions, the ICESCR is the prominent exemplar, but other international conventions also call on states to facilitate the flourishing of their populations. One illustration is the mandate in the Convention on the Elimination of Discrimination Against Women (CEDAW) that state parties enable women and men to be full participants in all facets of "political, social, economic, and cultural" life and to undertake, when necessary,

[185] An oft-cited exemplar is South Africa, which forged its new identity on obligations to "respect, protect, promote and fulfill the rights in the Bill of Rights" (see South Africa v. Grootboom 2001 (1) SA 46 (CC) at 72, ¶ 49, quoting the Housing Act) and to enable individual flourishing by recognizing rights such as to shelter. S. Afr. Const., 1996, ch. 1, § 7(2). These obligations are subject to judicial review that is appreciative of limited resources and reliant on application of the constitutional test of "progressive realisation." South Africa v. Grootboom 2001 (1) SA 46 (CC) at 57, ¶ 13.
Another example, less noted, comes from amendments to the constitutions of Arkansas, California, Colorado, Georgia, and Kansas authorizing states to pay pensions to recognize the service of certain civil service employees and the needs of the elderly. *See* Susan Sterett, *Serving the State: Constitutionalism and Social Spending, 1860s–1920s*, 22 L. & Soc. Inq. 311, 350–51 (1997). One could also group Germany's view about state duties to protect life, which result in counseling and health services (including abortions) for pregnant women, as a kind of social right. *See* Siegel, *The Constitutionalization of Abortion*, supra note 46. *See generally* Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 Tex. L. Rev. 1921 (2004).

[186] *See, e.g.*, Const. of the Republic of Chad art. 47 (1996); Constitución Política de Columbia [C.P.] art. 79; Const. of Finland, § 20 (2000). *See generally* James R. May & Erin Daly, *Vindicating Fundamental Environmental Rights Worldwide*, 11 Or. Rev. Int'l L. 365 (2009).

[187] *See, e.g.*, Const. of the Republic of Gambia, § 215(1) (1996); Const. of the Fourth Republic of Ghana, § 36(9) (1992).

"temporary measures"—forms of what is known as "affirmative action" in constitutional parlance in the United States and "positive discrimination" in Europe—to achieve these goals.[188]

Mechanisms for generating identity and relationships can also come through duties imposed by government on citizens. Compulsory voting offers one template. Australia, along with some twenty other countries, mandates that its citizens come to the polls and register to vote.[189] The Australian rule is statutory, complimented by a constitutional overlay that the franchise, as a matter of structure ("we, the people"), is both a universal entitlement and a duty.[190] If public employees (rather than private companies) greet citizens who are required to vote regularly, the activity produces another opportunity to "see" the state and participate in it. Another obligation engendering relationships is service on a jury, requiring citizens to function as ad hoc judges and work together in efforts to render consensus-based judgments.[191] Taxation could also be reimagined as a practice of reciprocal interactions, built through examples such as governments that post signs announcing that new construction or certain services represent "tax dollars" at work.

The more common (and complex) example is the military; the 1949 German Constitution obliged its citizens perform national service,[192] and many countries have statutory counterparts, although sometimes addressed to a subset (such as the US requirement that men, but not women, register for the draft). Service to one's country is reciprocal, in that the state supplies those who do so with education, health care, and training. National service can thus be an inter-class, inter-ethnic opportunity for forming affiliations among citizens and with the state.

State-subsidized communication networks offer a different kind of opportunity that, instead of the concentrated periods of national or jury service, permit a wide array of individuals to have regular but brief contact—often in public—with government officials helping them to get private and public business done. The eighteenth-century version was the post, an early conduit for globalization that became the subject of path-breaking international treaties in the 1870s—the "Universal Postal Union." The present-day version is a specialized agency of the United Nations coordinating services

[188] Convention on the Elimination of All Forms of Discrimination Against Women arts 3, 4, Sept. 3, 1981, 1249 U.N.T.S. 13; *see also id.* arts. 10, 11, 13; Alice Kessler-Harris, *In Pursuit of Economic Citizenship*, 10 Soc. Pol. 157 (2003).

[189] Note, *The Case for Compulsory Voting in the United States*, 121 Harv. L. Rev. 591, 592 (2007).

[190] Roach v. Electoral Commissioner [2007] HCA 43 (Austl.).

[191] Both state and federal constitutions guarantee rights to jury trials. In contrast, § 125 of the Spanish Constitution permits citizens to "take part in the administration of justice through the institution of the jury." *See* Mar Jimeno-Bulnes, *Jury Selection and Jury Trial in Spain: Between Theory and Practice*, 86 Chi. Kent. L. Rev. 585 (2011). Proposals for "deliberation days" in which citizens are to come together to discuss policies is another example of institution building. *See* Bruce Ackerman & James Fishkin, Deliberation Day (2004).

[192] Grundgesetz Fur Die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, art. 12(a)(2) (Ger.). Though this provision remains in the Constitution, it was rendered ineffective by the Military Law Amendment Act (2011), which eliminated compulsory military service.

worldwide.[193] More than forty constitutions address the post and communications, either to allocate authority in federations between state and national governments or to protect the confidentiality of the exchanges.[194] Yet, like the anti-privatization right, postal services are rarely the subject of constitutional decisions or even of political theory.[195]

But the founders of many countries saw communication networks as central. Illustrative is the Constitution of the United States, which authorized the national Congress to "establish Post Offices and post Roads."[196] Through the Post Office Act of 1792 and many statutes thereafter, Congress expanded the system that Benjamin Franklin had headed prior to the Constitution. The nation-building function was plain; James Madison extolled the post as a vehicle for uncensored and subsidized newspaper circulation that would (he hoped) promote "public opinion."[197] Centuries later, Congress codified that purpose as it also acknowledged the links to commerce. The 1958 Postal Policy Act explained that its subsidy was "to unite more closely the American people, to promote the general welfare, and to advance the national economy."[198] The mandate in the 1970 Postal Reorganization Act called for the provision of "postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people," rendered through "postal services to all communities."[199]

For some two hundred years, the federal government funded post office buildings that served as meeting places in hamlets across the country, created employment opportunities for postmasters (and eventually postmistresses) and clerical staff, invented home delivery services, and subsidized the exchange of information through special rates for certain forms of publication. After the Civil War, the federal government paid for major construction projects outside Washington, DC. These "United States Post Office

[193] *See* Treaty Concerning the Formation of a General Postal Union, Oct. 9, 1874, 19 Stat. 577, as amended by the Universal Postal Union, Mar. 21, 1885, 25 Stat. 1339; http://www.upu.int; *see also* Harrop Freeman, *International Administrative Law: A Functional Approach to Peace*, 57 Yale L.J. 976, 978 (1947). Freeman described the Universal Postal Union as "the first international body whose permanent bureau had more than the power to gather information. It was assigned executive functions in clearing accounts, and was charged with offering opinions on disputes between members."

[194] *See* Oceana Constitutions of the Countries of the World Database, http://www.oceanalaw.com (search terms "post office" and "postal") (last visited July 31, 2012).

[195] In 2009, the Brazilian Supreme Tribunal responded to a declaratory action seeking to hold invalid a law that had been enacted before the constitution of 1988 and that provided a state monopoly over certain forms of mail. A majority, discussing the role of the post as a public service and not only an economic activity, upheld the statute, with Justica Barbosa highlighting that a subsidized postal service in producing national identity. *See* S.T.F., ADPF 46/DF, Relator: Min. Eros Grau, 8.5.2009, http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=608504. The opinion, issued in August of 2009, was published February 26, 2010.

[196] U.S. Const. art. 1, § 8, cl. 7.

[197] James Madison, *Public Opinion*, National Gazette, Dec. 19, 1791, *reprinted in* 14 Papers of James Madison (Robert Rutland & Thomas Mason eds., 1983).

[198] Postal Policy Act of 1958, Pub. L. No. 85–426, § 102, 72 Stat. 134, 134.

[199] Postal Reorganization Act, Pub. L. No. 91–375, § 101(a), 84 Stat. 719, 719 (1970); *see also* Postal Accountability and Enhancement Act, Pub. L. No. 109–435, 120 Stat. 3198 (2006).

and Court House" combinations generated a "federal presence" in cities across the country.[200] Serving as the "nation's oldest and largest public business,"[201] the post was sustained through legislation awarding it a monopoly on government mailing and, in recent decades, expressly obliging it to provide "universal service in all parts of the country."[202] Almost everyone "in every corner of the country" is able to send "at reasonable cost and with reasonable effort" letters and documents that will be delivered "within a reasonable period of time and almost complete security."[203] As of 2008, more than 200 billion items moved annually in the federal postal system.[204]

The universal service obligation is an ambition and a burden. Further, the United States Postal System operated under limits on the kinds of auxiliary services it can provide, and it has expensive obligations to current and past workforce members. The current economic challenges put the longevity of the United States Postal System into question. (As of this writing, post office defaults on pension benefits owed loomed.) Thus, the role of government as the conduit for uncensored and subsidized exchanges is lessening. In 2009, 13,000 fewer post offices existed than had in 1951, with more cutbacks underway.[205] Even as the Postal Service was held by the Supreme Court to be inseparable from the United States for purposes of antitrust laws,[206] some commentators described it as in a "death spiral," explained as caused by a mix of technology and private providers.[207]

The collapse of government postal services undercuts the distributive and communitarian impact provided by the public sector. Those who argue for cutting national subsidies for the Post Office do not couple those proposals with demands for government support to make the internet accessible to every person. Further, even as protests from rural communities and postal employees' unions stemmed some cutbacks, the face of the government through its post offices is fading. The United States relocated "post offices" by opening up stalls selling stamps inside malls and other commercial enterprises.[208] And to the extent the encounter is virtual, users now Google "USPS.com," rather than "USPS.gov."

[200] *See* Lois Craig, A Federal Presence: Architecture, Politics, and Symbols in U.S. Government Building (1984).

[201] United States Postal Serv. v. Flamingo Indus. (USA), Ltd., 540 U.S. 736, 739 (2004) (quotation omitted).

[202] *Id.* at 741 (citing 39 U.S.C. §§ 101, 403).

[203] James I. Campbell, Jr., George Mason Sch. of Pub. Policy, *Universal Service Obligation: History and Development of Laws Relating to the Provision of Universal Postal Services*, *in* Study on Universal Postal Service and the Postal Monopoly app. B at 21 (2008).

[204] Accenture, Postal Universal Service Obligation (USO) International Comparison: International Postal Liberalization—Comparative Study of US and Key Countries 13 (2008). Government goals of universal service are commonplace; many countries and the European Union have similar mandates to ensure affordable exchanges. *Id.*

[205] *Restoring the Financial Stability of the U.S. Postal Service: What Needs to Be Done?: Hearing Before the Subcomm. Fed. Workforce, Postal Service, and the District of Columbia*, 111th Cong. (Mar. 25, 2009), http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg50649/html/CHRG-111hhrg50649.htm (testimony of Dale Goff, Pres., Nat'l Ass'n of Postmasters of the U.S.).

[206] Flamingo Industries, Ltd., 540 U.S. at 746.

[207] Nye Stevens, Cong. Research Serv., RL31069, Postal Service Financial Problems and Stakeholder Proposals i, 11 (2002).

[208] Kevin R. Kosar, Cong. Research Serv., R41950, The U.S. Postal Service: Common Questions About Post Office Closures 4 (2012).

Connectivity is definitional of globalization, and pillars of the private sector—Facebook, Google, and Fed-Ex, *inter alia*—have become famous for providing networks generating identities and profits for those institutions. Many people do not need the state to communicate with each other. But some people need the subsidy. And the state needs people to turn to it—.gov—as a source and as a resource that, under constitutions insistent on equality and dignity, is a redistributive universal provider of some services.

The post is a mix of public and private joint ventures that, like civil and criminal justice services, force interactions that can redound to the benefit of state and individual. The beneficiaries are not one generation nor focused on a single identifiable group. Moreover, in centuries past, implementation of constitutional guarantees for an unobstructed post created new institutions—post offices in every hamlet stood alongside police, courts, and prisons as embodiments of daily state-provided services in which diverse people shared space, practices, and role-obligations. And many of those transactions took place (per Bentham's injunctions) in venues open to the public.

These institutions require state resources but are not independent of the form (capitalist, socialist, and communist) that a country's economic system takes. All offer opportunities for the state to work with its citizenry. If not completely outsourced, all enable the state to be understood, seen, experienced, engaged, criticized, and reformed. These institutions are the product of constitutional imagination, shaping icons of sovereignty when monarchies fell. And the public identities of police, courts, prisons, and of the gentler postal services, are all tottering.

The vulnerabilities of the public post system, like the shift to private policing, the declining public nature of courts, and profit-seeking prisons, undercut a progressive narrative from statization to constitutionalization installing durable criteria of government legitimacy and insisting on accountability and egalitarian treatment that is insistently redistributive. When celebrating a decade of I-CON, the forward-looking constitutional questions are what institutions (old and new) will, in the decades to come, mark the utilities, commitments, and generativity of democratic states.