

RETHINKING THE NIGHT-WATCHMAN STATE?

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One of the long-standing themes in Michael Trebilcock's scholarship is the achievement of public goals by private means. In both his teaching and his writing, he has addressed questions surrounding the privatization of government services on a number of different occasions.¹ The most sustained treatment he has given to this question is in a book he co-authored with Ron Daniels, *Rethinking the Welfare State: The Prospects for Government by Voucher*. I worked on this project as a research assistant roughly ten years ago when I was a J.D. student at the University of Toronto. I came to this project with a background in philosophy and no real familiarity with the public policy tools that were – and are – Michael's stock-in-trade. Working on that project for a little over a year, I learned a great deal from him (and from his co-author, Ron Daniels) about how serious public policy work is done. I hope that the paper that follows reflects not only my own interest in philosophical issues about the nature and legitimacy of the state, but also some of the lessons I learned from my work with Michael.

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Introduction

After almost thirty years at the top of the political agenda, the privatization of government services remains one of the most highly politically charged topics in the

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¹ See, *inter alia*, Ronald J. Daniels & Michael J. Trebilcock, *Rethinking the Welfare State: The Prospects for Government by Voucher*, (New York: Routledge, 2005), Michael J. Trebilcock, Ron Daniels & Malcolm Thorburn, "Government by Voucher" 80 *B. U. L. Rev.* 205 (2000), Michael J. Trebilcock, "Can Government be Reinvented?" in Jonathan Boston ed. *The State Under Contract* (Wellington: Bridget Williams Books, 1995), Michael J. Trebilcock, Robert Howse and Robert Pritchard, "Smaller or Smarter Government?" 40 *U.T.L.J.* 498 (1990).

English-speaking world² and (more recently) in the rest of the world, as well.³ Unfortunately, the debate over privatization is often treated as a monolithic one, driven largely by ideology: one is either a believer in individual freedom, market efficiency and privatization or one is a believer in equality, the welfare state and the evils of privatization.⁴ But the realities of privatization are a good deal more complex. Although Michael Trebilcock's work as a whole can be seen as largely supportive of the *idea* of privatization,⁵ his scholarship has always been keenly aware of the nuance and subtleties of the debate.⁶

In this paper, I consider the prospects for privatizing police services in what I believe to be the *spirit* of Michael Trebilcock though, as we shall see, in a rather different style. In Michael's spirit, I shall spend most of my efforts disambiguating unclear concepts, setting out the often complex empirical context of the problem and articulating the many values and institutional concerns that this topic raises. But in direct contrast to Michael's style, I shall not proceed as a public policy analyst concerned with efficiency and institutional design. Instead, I shall concentrate my efforts on articulating the nature of one sort of objection to the privatization of policing in order to show how it is different from a number of other, less plausible objections and how it is closely related to key commitments of liberal political

² Most writers point to the election of Margaret Thatcher in 1979 in the United Kingdom and the election of Ronald Reagan in 1980 in the United States as the beginning of the privatization revolution in the English-speaking world. As with most things, this seems to have come a little later to Canada, with the election of Prime Minister Brian Mulroney in 1984.

³ The privatization debate has an even longer history in the United Kingdom. Since the election of Prime Minister Margaret Thatcher in 1979. One interesting recent example is the way that privatization has become one of the core political divides in Israeli politics, arguably supplanting even such questions as the Palestinian peace process and the role of the Jewish religion in the state. See: Alon Harel, "Outsourcing Violence" (unpublished manuscript).

⁴ One notable example is the debate in the Israeli newspaper Ha'aretz this year over privatization. Two recent articles appeared with the titles "Privatization is the Original Sin" (by Ari Shavit August 8, 2009) and "Privatization is Good" (by Nehemia Shtrasler, August 11 2009).

⁵ In one recent article (co-authored with Edward Iacobucci), he is perhaps the most stridently supportive of privatization. See: Trebilcock and Iacobucci, "Privatization and Accountability" 116 *Harv L. Rev.* 1422,1433 (2003). [Hereinafter Trebilcock and Iacobucci.]

⁶ He concludes *Rethinking the Welfare State* by insisting that a key concern is "avoiding the temptation of easy sloganeering and paying close attention to detailed design issues..." but he insists that "voucher systems have the potential to revolutionize – generally for the better – many aspects of the welfare state." (at 232-3).

theory. To privatize certain aspects of policing, I shall argue, is to abandon the normative foundations of our system of government itself.

This paper proceeds in three parts. In part 1, I consider the broader question of privatization in order to see how its application in the policing context relates to the questions that Michael raises about it in the welfare state context. I argue that there are at least three different dimensions of this debate – the nature of the goods and services being privatized, the mode of privatization and the nature of the normative issues at work – and it behoves us to pay careful attention to where different privatization arguments are situated in each of these three dimensions. In part 2, I consider the empirical context of the privatization debate about policing. First, I undertake what David Garland calls “a history of the present”⁷: I consider the many ways in which policing has already been privatized (some of which we see every day but fail to recognise as such) and the sorts of challenges to which this has already given rise. Second, I look back further into common law legal and social history to the origins of public policing. Looking back to the origins of policing, we see that public-private partnerships have an extremely ancient lineage in the common law world as part of what historian Michael Braddick calls the early modern strategy of “government by license.”⁸ In part 3, I set out what I take to be the most important and most powerful objection to the privatization of policing – what I call the “standing” objection. Policing, the argument goes, is something that by its very nature must be provided by the state and not by a private agency. To argue otherwise would require us to abandon one of the most basic assumptions upon which much of our liberal legal order is based.

⁷ This is the title of the first chapter (at p. 1) of his great work on modern strategies of crime control, David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001) [Hereinafter Garland.] By “a history of the present,” he an uncovering of just how controversial and historically contingent are many certain features of daily life that we now take for granted.

⁸ Michael J. Braddick, *State Formation in Early Modern England c. 1550-1700* (Cambridge: Cambridge University Press, 2000).

1. Three Dimensions of Privatization

The debate over the privatization of government services involves an extremely complex set of issues that extend in at least three different dimensions. In the first dimension, we find that there are a variety of different ways in which governments may privatize the provision of goods and services. They may “outsource” the provision of those goods and services by putting them out for public tender; they may simply pull out of the business altogether and leave individuals to buy what they need with their own resources; or they may create a “voucher” system through which they transfer resources to individuals who may then use those resources to buy the goods and services on the open market. In the second dimension, we find that there are a variety of different policy areas in which privatization may take place. The most common policy areas for privatization are probably “welfare state” services such as education, food stamps, public housing, medicare and legal aid. But governments have increasingly attempted to privatize even the core areas of government – what some have called the “night-watchman state”⁹ – such as policing, national defence and prison management. Finally, along a third dimension, there are a number of different ways in which we may analyse the merits and demerits of privatization. Traditionally in law and economics scholarship, the focus is on whether goods and services can be provided more efficiently by privatization than by direct government provision.¹⁰ But there are many other crucial questions to be asked, such as whether it is simply illegitimate to privatize certain services, no matter what efficiencies might result.

⁹ Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) at ___.

¹⁰ Sharon Dolovitch cites “comparative efficiency” as one of the central modes of thought in much of the privatization literature. See “How Privatization Thinks” in Jody Freeman and Martha Minow eds., *Government by Contract: Outsourcing and American Democracy* (Cambridge, MA: Harvard University Press, 2009).

One of the most thorough and most rigorous treatments of privatization is to be found in Ron Daniels and Michael Trebilcock's 2005 monograph, *Rethinking the Welfare State*. Daniels and Trebilcock are able to be so thorough and rigorous in their analysis precisely because they restrict themselves to only one small part of the privatization story. Along the first dimension, they leave aside any talk of "contracting out" or of the state simply abandoning the field and leaving it up to individuals to buy those goods and services with their own resources. Instead, they focus squarely on one mode of privatization: the voucher. That said, Daniels and Trebilcock's idea of a voucher is very broad: effectively, it is any demand-side subsidy, whether this is an actual transfer to the consumer or simply a subsidy to suppliers that "follows the consumer."¹¹ The great promise of vouchers (according to their promoters) is that they allow governments to overcome what Arthur Okun called the equality/efficiency trade-off.¹² Unlike "outsourcing," vouchers promise efficiency because they allow individuals to choose their own providers. And unlike simply pulling out and leaving individuals to buy goods and services with their own resources, vouchers promise equality because the voucher provides the resources to everyone (or at least everyone who needs them) to buy the relevant good or service.

Daniels and Trebilcock's treatment of privatization is focused along the second dimension, as well. Perhaps as a reflection of the times in which they were writing, they quite explicitly limit themselves in the title of the book to considering the privatization of the "welfare state." They make their exclusive focus on the welfare state clear on the first page of the book, as follows: "This book is in part a thought experiment. [...] With the exception of a few areas like national defense or policing, governments would discharge their responsibilities by creating, or at least supervising markets in which citizen beneficiaries

¹¹ At 26-7.

¹² Arthur Okun, *Equality and Efficiency: the Big Trade-Off* (New York: Brookings Institution, 1975).

would use publicly financed vouchers to determine their consumption of a range of different services by private actors.”¹³ This limitation in the scope of their study is understandable given the historical context within which Daniels and Trebilcock were working. When they were writing this book, President Clinton and his Vice President and privatization Czar, Al Gore, were focused squarely on the privatization of the welfare state.¹⁴ But this changed with the election of President George W. Bush in 2000. Over the past eight years, the U.S. government has expanded its privatization efforts from the welfare state to the provision of “core” government functions such as national defence, prison management and police services broadly understood.¹⁵ It is this more radical move toward privatization that has attracted the most scholarly attention in recent years.¹⁶

Finally, Daniels and Trebilcock’s work is also tightly focused along the third dimension of privatization. In their examination of the voucherization of the welfare state, their principal concern lies in issues of institutional design. They examine the dynamics of possible markets for education (early childhood education, primary and secondary education, post-secondary education and labour-market training), the provision of basic goods (such as housing and food) and basic services (such as health care and legal aid)¹⁷ in order to

¹³ *Rethinking the Welfare State* at 1 (emphasis added).

¹⁴ *1993 Report: From Red Tape to Results: Creating a Government that Works Better and Costs Less*, available at <http://govinfo.library.unt.edu/npr/library/nprprt/annrpt/redtpe93/index.html> (last accessed on August 13, 2009).

¹⁵ Paul Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What we can do About it* (New York: Cambridge University Press, 2007) at 9: “The administration of President Bush and Vice President Cheney has perfected the art of contracting-out key functions of government.” (Verkuil then goes on to suggest that the idea of privatizing the military was born under President Reagan in the 1980s.)

¹⁶ See, *inter alia*, Paul Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What we can do About it* (New York: Cambridge University Press, 2007), Martha Minow, “Public and Private Partnerships: Accounting for the New Religion” 116 *Hav. L. Rev.* 1129 (2003), Jody Freeman & Martha Minow, eds., *Government by Contract: Outsourcing and American Democracy* (Cambridge, MA: Harvard University Press, 2009).

¹⁷ One area that they do not consider is political campaign contributions. Bruce Ackerman and Ian Ayres fill this lacuna with their fascinating book, *Voting with Dollars: A New Paradigm for Campaign Finance* (New Haven, CT: Yale University Press, 2004). They suggest, in effect, that the benefits of private campaign finance can be combined with the benefits of equal access to political influence by means of a voucher system along the lines discussed by Daniels and Trebilcock.

determine whether it might be possible to create efficient markets for the provision of these goods and services to voucher-holding consumers. Specifically, they consider seven issues of institutional design:

- (1) whether to provide means-tested or universal programs;
- (2) determining the qualifications of suppliers who can compete for voucher-assisted customers;
- (3) determining the value of voucher entitlements;
- (4) permissibility of extra-billing;
- (5) permissibility of cream-skimming;
- (6) information failures;
- (7) concerns about the inadequacy of supply-side market responses to vouchering and the possibility that vouchers, under certain conditions, will simply entrench monopolies, or create new ones.¹⁸

Put another way, the principal object of Daniels and Trebilcock's analysis is the *market* for particular goods and services, rather than the nature of the goods and services themselves. They are not so much concerned with the nature of health care or job training or legal services¹⁹ as they are with the ways in which suppliers and consumers of these goods and services relate to one another: do suppliers in these markets have information that consumers systematically do not? may they charge only a standardized price for their goods and services or may they "extra bill" some consumers who wish to buy a premium product? and so on. All of these questions are relevant to the operation of efficient markets in the particular policy area: if there are persistent information asymmetries, then we should not expect markets to operate efficiently; if extra billing is prohibited, then we will likely find

¹⁸ At 31.

¹⁹ One notable exception is primary and secondary education. Daniels and Trebilcock take great care to distinguish two models of education and the distinct goals each seeks to meet. They write: "There are two broad approaches to the question of the ends of primary and secondary education. The 'skills model' emphasizes the market value of the skills provided by primary and secondary education to the individual student. According to this view, the most important benefits that primary and secondary education confers on students are a range of job-related skills that translate into an increased probability of employment after graduation. [...] The second approach, the 'citizenship model,' is less concerned with the private benefits accruing from education and instead focuses on the solidarity benefits that society derives from having an educated population that can think critically, recognise subtlety and appreciate moral and cultural values." (*Rethinking the Welfare State* at 145-6, emphasis added).

that suppliers will have no incentive to improve (or even maintain) the quality of their product; and so on.

In this article, I diverge from Daniels and Trebilcock in all three dimensions of analysis of the privatization debate. Along the first dimension, the sorts of privatization I consider are more often outsourcing and the retreat of the state from the provision of certain goods and services altogether (rather than the creation of voucher programs). Along the second dimension, the policy area I am concerned with (*viz.*, policing) is part of the “night-watchman state” rather than the welfare state. Finally, along the third dimension, I do not deal with the efficiencies that might be gained by one or other modes of market design. Instead, I address the conceptually prior question of whether policing by its nature requires that it be provided by some and not others. If so, then we might find that it is simply impossible to outsource certain aspects of policing at all. We might hire private contractors to do the things that police officers do, but we might find that those private contractors are simply incapable, in virtue of their status as private actors, to provide *policing*. This idea – that some goods and services can only be provided by certain people and not others – is familiar to us from intimate contexts. For example, when a busy corporate executive delegates the job of selecting a gift for his wife to his secretary, the economist might argue that this is an efficient move, for at least two distinct reasons. First, his secretary more expert in what his wife wants than he is, and second, the law of comparative advantage tells us that *ceteris paribus*, the secretary should select the gift because her time is worth a good deal less per hour than is his. So from a purely economic point of view, it seems to make abundantly good sense for the executive to “outsource” the buying of a gift for his wife. But there are strong (non-economic) reasons to object to this sort of thinking: it is simply the husband’s job to buy a gift for his wife and no one else’s.

The point in this example is that only the businessman himself has the standing required to select a gift from him to his wife. In this example, the standing question is relative to the institution of gift-giving. We simply miss the point of gift-giving if we reduce it simply to the provision of goods from A to B.²⁰ The whole *point* of a gift is that it is a token of A's consideration for B – a point captured in the common saying “it's the thought that counts.” The role of gift-giver, therefore, has a certain determinate structure that cannot be disaggregated into discrete tasks without doing violence to the role itself: it consists not simply in paying for the gift and delivering the gift, but in *selecting* it, as well.²¹ To delegate the task of selecting the gift to a third party undermines the very point of the transfer in the first place. It is then no longer a gift at all, but (at best) a sort of tribute.²²

There are other examples where the role of standing is not just relative to a particular transaction in which we are involved, but is called for by a role we occupy for all (or most) of our lives. As parents, for example, it is our assigned role to set the basic terms of our child's upbringing. We may enlist the assistance of others in certain ways and we may even grant custody of our children to others for specific times and purposes (as we do to schools and others who are *in loco parentis*), but we always retain ultimate responsibility for our children until they reach the age of majority. No matter how much more efficiently others might perform the task of rearing our child, it is simply not open to us to delegate that task

²⁰ This, I take it, is the point of some economic discussion of gift-giving. See: Joel Waldfogel, “The Deadweight Loss of Christmas” 83 *The American Economic Review* 1328 (1993).

²¹ Some have argued very persuasively that the role of owner is also of this sort. Contrary to the suggestion of most legal realists and law and economics scholars, we cannot separate out the sticks in the “bundle of rights” that constitute the role of owner. For one of the most thoughtful treatments of this question in recent years, see Larissa Katz, “Exclusion and Exclusivity in Property Law” 58 *U.T.L.J.* 275 (2008).

²² This example should make clear that both the role of husband and the institution of gift-giving are culturally specific. In a different culture, there might be nothing wrong with A asking B to select an item to be given to C – but this practice would be a different one from the gift-giving practice with which we are familiar.

to them. As parents, this is our assigned task, and we are not entitled to delegate it to others.²³

Of course, it is a common trope in Western literature dating back at least to Shakespeare's *The Merchant of Venice* that there is a stark divide between the intimate sphere where nothing is a commodity and the outside world where everything is open to bargaining and contracts.²⁴ But I believe that this stark divide radically over-simplifies matters. In this paper, I shall examine in some detail one task in the "outside world" that only some have the proper standing to perform. Specifically, I shall examine whether certain police services must by their very nature be performed by the state and cannot be outsourced to private actors. I shall argue that before we can even entertain questions about who might provide policing services most *efficiently*, we must first ensure that parties other than the state have the requisite *standing* to provide such services. If the situation is one where only the state has the standing to perform this task (like the busy executive who must buy a the gift for his wife himself), then there is simply no point in moving on to ask whether others might provide the service more efficiently.

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

2. What is Policing?

²³ This raises the question of whether we may leave the position of parent altogether, say, by giving up our child for adoption. But we may concede that it is possible for one person to leave the role of parent and another to take it on while still insisting that the role itself has a certain structure and that *whoever* occupies that role cannot delegate certain aspects of that role to others.

²⁴ One of the dominant themes of this play is that the sorts of hard bargains that take place in Venice between the merchant Antonio and the moneylender Shylock ought not to occur in the intimate sphere of Belmont. See, e.g., Ronald A Sharp, "Gift Exchange and Economics of Spirit in *The Merchant of Venice*" 83 *Modern Philology* 250 (1986); John Russell Brown, "Introduction" in *The Merchant of Venice* (London: Arden Shakespeare, 1955).

In this section, I consider the empirical context of the privatization debate, both the present reality of privatization in this area and its roots in English and American history. One way of casting this empirical investigation is as the solution to the following paradox. On the one hand, the “private police” in the United States have grown exponentially in recent years, first overtaking and now vastly outnumbering the traditional police forces employed by cities, states, and the federal government.²⁵ But on the other hand, courts, legislatures and legal scholars in that country seem to agree that private policing is fundamentally illegitimate. In the 1890s, a U.S. Senate investigating committee held that “the employment of armed bodies of men for private purposes” is an “assumption of the State’s authority by private citizens...”²⁶ In the 1930s, a U.S. Senate sub-committee on civil rights held that “[t]he use of privately paid guards... [is] an anomaly in an orderly democratic society” and they “cannot be viewed as agencies of law and order.”²⁷ More recently, in the 1990s, a New Jersey Superior Court judge held that “the traditional role of government... has always been to provide for the public safety, and that role simply cannot be delegated to a private agency.”²⁸

In this section, I shall examine the privatization of policing that has occurred over the past thirty years in order to determine how it is even possible for there to be such a massive private police in a society where courts and legislatures alike agree that private police are illegitimate. I shall argue that this apparent oddity is largely a result of an equivocation on the expression “private police.” Criminologists and “law and society” scholars talk of policing in purely functional terms: anyone who performs security, investigative or

²⁵ David Sklansky, “The Private Police” 46 *UCLA L. Rev.* 1165 (1999) at 1174. [Hereinafter *Sklansky*].

²⁶ S. Rep. No. 52-1280, at 1, XV (1893) quoted in Sklansky at 1215.

²⁷ S. Rep. No. 76-6, pt 2. At 2 quoted in Sklansky at 1219n 315.

²⁸ Quoted in Brian T. Murray, “Private Security Force in Sussex Ruled Illegal, ‘Dangerous’ by Judge,” *Newark Star-Ledger* July 31, 1993 at 1. (Quoted in Elizabeth Joh, “Conceptualizing the Private Police,” 2005 *Utah L. Rev.* 573 (2005) at 614n230.) [Hereinafter Joh.]

surveillance services is categorized as “police,” whether public or private. But when courts and legislatures deal with policing, they are concerned with a concept that plays a particular role in the legal order – one that cannot be captured in purely functional terms. Policing in this strict sense is not simply the provision of security, investigation, surveillance and like services, but the use of power to maintain the peace and to enforce the law. And this function, they insist, must remain in public hands even if private corporations and gated communities hire private security firms to maintain the security on their private property.

I proceed in two stages. First, I survey some of the recent moves toward the privatization of police services that have occurred over the last thirty years in the English-speaking world. Through this discussion, I mean to get a sense of the broad use of the term “policing” as it is used by criminologists and policy analysts. Second, I consider the historical roots of public policing in the English-speaking world. Through this discussion, I mean to clarify the narrower sense of “policing” used by many of the critics of police privatization. But because the historical roots of policing are far from conceptually pure, I also mean to suggest that the confusion about what must be public or private has deep historical roots in the common law tradition.

(a) What is “Private Policing”?

As I mentioned in part 1, there are at least three different ways in which the privatization of government services may occur: the government may contract out performance of the service; the government may allocate vouchers to consumers to allow them to buy the service on the open market; or the government may simply withdraw from the area and leave private citizens to their own devices. In the case of policing, the voucher option has not (to my knowledge) been seriously considered anywhere in North America. The other two strategies, however, have both been considered in a number of different

jurisdictions. Although outsourcing has become an increasingly popular strategy abroad and in response to catastrophes, (*e.g.*, the U.S. government has also contracted out a good deal of security work in occupied Iraq and in New Orleans in the aftermath of Hurricane Katrina²⁹), it has been relatively rare in the ordinary domestic context. Elizabeth Joh, in her study of private police, mentions six American municipalities that have attempted to do so: Kalamazoo, Michigan; Sussex, New Jersey; Oro Valley, Arizona; Indian River, Florida; Reminderville, Ohio; and Buffalo Creek, West Virginia.³⁰ She points out, however, that in several cases, those municipalities have been successfully challenged in court and have been forced to end their outsourcing arrangement with the private provider.³¹ A more common occurrence is the contracting out of specific policing tasks, such as the guarding of nuclear facilities³² and courthouses.³³

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

The attempt to extend the reach of state agencies by linking them up with the practices of actors in the 'private sector' and 'the community' might be described as a *responsibilization strategy*. It involves a way of thinking and a variety of techniques designed to change the manner in which governments act upon crime. [...] The intended result is an enhanced network of more or less directed, more or less informal crime control, complementing and extending the formal controls of the criminal justice state. [...] This is the essence of the new crime prevention approach that has been developed by governments of the USA and (especially) the UK over the past two decades.³⁴

²⁹ Verkuil at 26. See also: Press Release, Blackwater USA, "Blackwater Continues to Support Katrina Devastated Areas."

³⁰ Joh at 614.

³¹ Joh 614n230.

³² Joh 614-5.

³³ Philip E. Fixel & Robert W. Poole, "Can Police Services be Privatized?" in Gary Bowman et al. eds. *Privatizing the United States Justice System* (Jefferson, N.C. : McFarland & Co., 1992) at 32.

³⁴ Garland at 124.

David Sklansky, in his recent comprehensive study of private policing, points to three mechanisms by which the state has retreated from the provision of policing services and private providers have moved in to fill the void.³⁵ First, politicians who have been seized by the apparent efficiencies to be found through the privatization of government services, have been inclined to outsource and delegate as many government tasks as possible. This has meant not only the explicit delegation of public police services but also the retrenchment of police services in the belief that the private sector will be better able to provide security where needed. Second, he points out that there has been a significant growth in what Shearing and Stenning call “mass private property”: places such as shopping malls, theme parks and gated communities where spaces that one would normally expect to be public is in fact privately owned. Planning decisions that led to the creation of these forms of mass private property also led naturally to the massive expansion of private police. The streets of gated communities and theme parks and the “town squares” located inside shopping malls are all private. As a result, we now congregate in places that have the surface feel of shared, public spaces but are in fact private property subject to private control. The third way in which the state has contributed to the growth in private police is its simple failure to provide even basic police services in places where crime is a serious problem. Neighbourhood watches and downtown merchant associations feel obligated to purchase security services because the policing they receive from the state is simply inadequate. Criminologist David Garland sums up this strategy as follows:

Crime control is ‘beyond the state’ inasmuch as the institutions of the criminal justice state... cannot by themselves succeed in the maintenance of ‘law and order.’ [...] The effort to address [this problem]... by mobilizing and harnessing non-state

³⁵ Sklansky at 1221 ff.

mechanisms, has been the basis of the most innovative policies of the recent period.³⁶

The private police that has moved in to take over where the state has retreated is of three sorts. The first sort is often referred to as “protective policing”: these are firms that promise to prevent the loss or destruction of property by monitoring customers and employees. These services mostly involve the use of security guards, but they can also involve security cameras, anti-theft tags on merchandise and other monitoring devices. In addition, both commercial and residential neighbourhood associations are increasingly turning to private policing firms to perform neighbourhood watch duties, as well. Their powers are usually no more than those of the owner of the property under protection: citizen’s arrest and very limited use of force to prevent theft and the destruction of property.

A second sort of private police has become much more common in recent years: what criminologists Clifford Shearing and Philip Stenning call “corporate policing.”³⁷ Corporate policing is distinct from protective police primarily in virtue of the breadth of its mandate. Whereas protective policing is concerned simply to prevent harm to, and loss of property, corporate policing is concerned with every aspect of the corporation’s interests: protecting its commercial image, risk assessment, maintaining an attractive shopping environment, *etc.* Shearing and Stenning’s paradigm of corporate policing is the security department at Disney World. Here, the corporation plans out every aspect of one’s time at the theme park: directing the visitor where to park, how to board the monorail, how one may dress while in the park, where one ought to take photographs, *etc.*³⁸ In this respect, at least, corporate policing is most akin to public police. They are both charged with extremely

³⁶ Garland at 123.

³⁷ Clifford Shearing and Philip Stenning, “Say ‘Cheese!’: The Disney Order that is not so Mickey Mouse” in Clifford Shearing and Philip Stenning eds., *Private Policing* (Newbury Park, CA: Sage Publications, 1987).

³⁸ This phenomenon is described in greater detail in Clifford Shearing and Philip Stenning, “From the Panopticon to Disney World: The Development of Discipline” in Anthony Doob and Edward Greenspan eds., *Perspectives in Criminal Law: Essays in Honour of John L.L. Edwards* (Aurora, ON: Canada Law Book, 1984).

broad mandates framed in terms of the general well-being either of a political community (in the case of public police) or of a corporation (in the case of corporate police).

Finally, a third sort of “private police” is what Joh calls “intelligence police.” These are the descendants of Philip Marlowe, Sherlock Holmes and Hercule Poirot: individuals (or firms) with no special police powers but who take it upon themselves to investigate criminal activity (as well as on-criminal activity that is of interest to the party that has engaged their services). The business of private investigation has grown into a big business in some parts of the world. In the United States, the Pinkerton agency became (in)famous in the nineteenth century for its investigative work. Pinkerton’s not only foiled a plot to assassinate President-elect Lincoln; it also infiltrated burgeoning union movements and eventually became embroiled in violent clashes with union organizers.³⁹ In more recent years, the firm of Kroll and Associates has taken on the para-governmental task of monitoring the internal operations of firms that have been found to be in violation of racketeering and criminal conspiracy laws.⁴⁰ The ruthlessness with which some private firms pursue their assigned task is nicely captured by the following dialogue from Arthur Conan Doyle in his final Sherlock Holmes novel, *Valley of Fear*:

“There is a detective on our trail.”

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

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

“I’ve read of some folk of that name.”

“Well, you can take it from me that you’ve got no show when they are on your trail. It’s not a take-it-or-miss-it Government concern. It’s a dead earnest business proposition that’s out for results, and keeps out till, by hook or by crook, it gets them. If a Pinkerton man is deep in this business, we are all destroyed.”⁴¹

³⁹ Sklansky at ___.

⁴⁰ Joh at ___.

⁴¹ Arthur Conan Doyle, *Valley of Fear* (Oxford: Oxford University Press, 1993). Quoted in David Ricardo Williams, *Call in Pinkerton’s: American Detectives at Work for Canada* (Toronto: Dundurn Press, 1998).

(b) What is Public Policing?

How is public policing different from private policing – apart from the obvious fact that it is provided by the state rather than by a private corporation? One argument that has sometimes been raised is that policing is a public good in the economic sense: i.e., providing policing to A will necessarily mean providing it to A’s neighbours, as well, who will then have an incentive to free-ride on A’s policing. Although this is no doubt true at least in some contexts,⁴² it is not a sufficient reason to insist that it must be provided by the state. As Trebilcock and Iacobucci quite correctly point out, “[p]olice forces and the court system... have a public goods rationale, [but] this does not preclude private provision of security and adjudicative services.”⁴³ No, the stronger rationale for insisting that at least some core policing services must be provided by the state turns on the claim that policing – unlike, say, food or housing – is not indifferent to the party providing it. A well-built apartment is of the same value regardless of whether it owned by the state or by a private landlord; and food tastes the same whether it is provided by the state or a private grocer; and so on. But policing, the argument goes, is different. The nature of the very good itself changes depending on who provides it. Elizabeth Joh sums up the claim in the following terms:

[P]rivate policing is qualitatively different from public policing. Perhaps the most central feature of private policing... is its client-driven mandate. Clients’ particular substantive needs – the kinds of losses and injuries for which they seek policing services – shape the character of the private policing employed. Thus, what counts as deviant or disorderly behaviour for private police is defined not in moral terms but instrumentally, by a client’s particular aims: a pleasant shopping experience, a safe parking area, or an orderly corporate campus.⁴⁴

⁴² One should expect to find that the situation is sometimes the reverse, as well. As potential thieves are chased away from one neighbourhood, they might be *more* likely to target other, less well-policed neighbourhoods.

⁴³ See Trebilcock and Iacobucci at 1433.

⁴⁴ See: Joh; Clifford Shearing & Philip Stenning, *Private Security and Private Justice: The Challenge of the 80s: A Review of the Policy Issues* (Montreal: Institute for Research on Public Policy, 1982); Clifford Shearing & Philip Stenning “Private Security: Implications for Social Control” in K.R.E. McCormick & L.A. Visano eds., *Understanding Policing* (Toronto: Canadian Scholars’ Press, 1992).

This point about the public nature of police services goes beyond simply the free-rider problem that is often identified by economists. In addition to the economically relevant consideration that policing is either present for all or not at all (and therefore it attracts free-riders who try to benefit from policing at another's expense), policing is public in another sense, as well. Policing is necessarily non-partisan. Like the courts, the benefit that the police provide is not mere security. Mere security is something that can be bought and sold by individuals. But private security is quite different from policing. Private security is by its nature highly partial toward those who are paying its fees: my bodyguard is far from impartial in any dispute between me and a third party. But police are – or, at least, ought to be – impartial as between the parties to a dispute. Like a court, the very nature of their task is bound up with impartiality. Of course, the police will favour the innocent over those who are intent on assault them, stealing from them, etc. In this sense they are not impartial as between the guilty and the innocent. But unlike with bodyguards, their task is to protect those who need protection *whoever that might be*, and to prevent people from committing crimes *whoever that might be*.

The connection between the general welfare and policing goes back to the very beginnings of Western history. As Markus Dubber reminds us, the term “police” has its roots in the ancient Greek word for the city (polis) and until quite recently, it referred not only to the keeping of the peace and apprehension of criminals, but to virtually all aspects of government concerned with the promotion of the general welfare (rather than with the protection of individual rights).⁴⁵ Thus, according to Blackstone, the “public police” refers to “the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to

⁴⁵ See generally, Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005).

the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.”⁴⁶ This conception of “police” as everything that is concerned with the general welfare has also deeply influenced the structure of American constitutional law. The “police power,” Dubber reminds us, is the basis for much of the legislative power of the states in the United States. Oliver Wendell Holmes gives some sense of the vast scope of the police power in his famous dissent in *Lochner v. New York*:

[S]tate constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.⁴⁷

It is in this sense of “police” that many European states proudly once called themselves “police states.” Of course, in the twentieth century, the term “police state” is used only as a term of opprobrium, but in the eighteenth century, it was the theory of the police state developed by the Prussian Cameralists that gave rise to much of the modern understanding of bureaucracy and rational planning set out most famously by Max Weber.⁴⁸

Despite the clear connection between “police” in the traditional sense and the public good, the connection between public power and “police” in the modern sense (of “law enforcement agency”) is somewhat murky. This is due at least in part to the traditional common law distaste for a clear distinction between public and private.⁴⁹ It was not until the

⁴⁶ William Blackstone, *Commentaries on the Laws of England* 4 at 162 (1769).

⁴⁷ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes J., dissenting).

⁴⁸ Brian Chapman, *Police State* (London: Macmillan & Co., 1971).

⁴⁹ John W. F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford: Oxford University Press, 1996).

late eighteenth and early nineteenth centuries that the term “police” became closely associated in the English-speaking world with the sorts of public institutions that we refer to as “police departments.” For much of early modern English history, law enforcement was performed by ordinary people who were both unpaid and untrained. The task of patrolling the streets and preventing breaches of the peace fell to individuals who happened to occupy the role of constable.⁵⁰ Rather like jury duty today, this was a role that everyone in principle was supposed to fill at some point as a part of his civic duty. Also like jury duty, those with the means to do so tried to find ways out of performing their civic duties. Eventually, it could be said that constables were almost always those who could be paid by others to perform the role in the place of those who had something better to do. As a result, constables were generally viewed to be incompetent and often corrupt, as well. William Blackstone described the case of constables in the eighteenth century as follows:

[T]hey are armed with very large powers, of arresting and imprisoning, of breaking open houses, and the like; of the extent of which power, considering what manner of men are for the most part put into these offices, it is perhaps very well that they are generally kept in ignorance.⁵¹

When England was a largely agrarian society, this state of affairs was not seen as terribly problematic, but over the course of the eighteenth century, as London and other cities grew quickly and industrial expansion was progressing, crimes rates rose at a ferocious pace.⁵² The initial response was simply to increase the penalties for various crimes, in the hopes that this would deter crime. This policy led to the expansion of what was called the “bloody code” – the criminal law in England that made an enormous number of offences (not only by present

⁵⁰ The creation of the role of constable grew out of an even earlier system on Frankpledge according to which groups of one hundred men were responsible for keeping the peace and apprehending fleeing felons in their community. See: William A. Morris, *The Medieval English Sheriff to 1300* (Manchester: Manchester University Press, 1927).

⁵¹ Blackstone 1 Comm 355.

⁵² Thomas Critchley, *A History of Police in England and Wales, 900-1966* (London: Constable, 1967) at 18. See also Charles Reith, *The Police Idea: Its History and Evolution in England in the Eighteenth Century and After* (Oxford: Oxford University Press, 1938) at 141ff.

day standards but also by the standards of continental Europe of the time) punishable by death.⁵³ But this strategy was eventually seen as a colossal failure. Sir Archibald Macdonald, introducing a bill to create a public police force for metropolitan London in 1785, remarked that there was “a growing crop” of criminals at work in London. Even though “the gallows groaned,” the system of the time was unable to control events.⁵⁴ Despite the failures of the bloody code to contain the rising tide of criminality in England,⁵⁵ it was not until 1829 that Prime Minister William Pitt was able to pass a bill creating the Metropolitan London Police Force – the organization traditionally referred to as the first modern police force in the English-speaking world. That police force was initially tasked only with patrolling the streets and keeping the peace. It was not until much later, in 1842, that the London Police were also given the task of investigating crimes.⁵⁶

What is perhaps most remarkable about the English experience with the creation of the London Metropolitan Police is not that it occurred or that they were as stunningly successful at reducing criminality in the streets of London,⁵⁷ but that it took the British Parliament so long finally to relent and to allow a public police force in England. This is especially striking in light of the clear success that many continental regimes had had with

⁵³ In the 1760s, William Blackstone wrote: “It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by Act of Parliament to be felonious without benefit of clergy; or, in other words, to be worthy of instant death.” *Commentaries on the Laws of England* Book IV, ed. Thomas McIntyre Cooley (Chicago: Callaghan and Company, 1884) p. 17. In the ensuing century, the number of crimes punishable by death would increase to well over two hundred.

⁵⁴ Parl. Hist. (1785-1786), Vol. 25 cols.888-894 and 910-913), cited in Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (London, Stevens & Sons, 1956 at 109n7. [Hereinafter Radzinowicz]

⁵⁵ The Gordon riots of 1780 – anti-Catholic riots in reaction to the passage of the Papists Act of 1778 (an act which removed some of the penalties associated with the practice of Roman Catholicism first set in place by the Popery Act of 1698) – were perhaps only the most extreme example of the chaos in the streets of London at the time. Almost three hundred people were killed, the homes of many prominent Catholics were attacked and many of the major prisons of London – including Newgate and the Clink – were destroyed. For its effects on the movement toward public policing, see Radzinowicz at 89ff.

⁵⁶ Thomas A. Critchley, *A History of Police in England and Wales 900-1966* (London: Constable, 1967) at 160.

⁵⁷ Reith, *The Police Idea* 252: “The menacing force of crime was at last placed under control, and ceased to be a national problems. Against the force of mob disorder the new police made equally steady and successful headway.”

public police forces – experience that was well known in England at the time.⁵⁸ Much of the aversion to public policing in the English-speaking world seems to come from a common view that any expansion of state power necessarily limits individual freedom. It was this assumption that Robert Peel addressed in introducing the bill creating the London Metropolitan Police, as follows: “Liberty does not consist in having your house robbed by organized gangs of thieves, and in leaving the principal streets of London in the nightly possession of drunken women and vagabonds.”⁵⁹ The rest of the English-speaking world was just as reluctant to embrace public policing as England, and for largely the same reasons. Great cities in the United States did not come to have public police forces until the mid to late nineteenth century. As Laurence Friedman points out, the colonial United States relied on the same Medieval law enforcement institutions as the English- the constable, the night watch, and the hue and cry – institutions that “drew no clear lines between public and private.”⁶⁰ It was only in the mid-to-late nineteenth century that the great cities of the United States established their own public police forces: Chicago in 1837, Boston in 1836, and New York in 1845.⁶¹ Cities in Canada created their own police forces at around the same time: Toronto in 1829, Halifax in 1864 and Montreal in 1865.

(c) Conclusion

The nature of policing and its distinctly public role has never been entirely clear in the common law world. In early English history, this was largely attributable to the disregard

⁵⁸ The French public police dates back at least to the regulation of the “cour des miracles” under Louis XIV. See generally: Michel Auboin, Arnaud Teyssier & Jean Tulard, *Histoire et Dictionnaire de la Police, du Moyen-Age à Nos Jours* (Paris: Editions Robert Laffont, 2005). In the debates leading up the creation of the London Metropolitan Police, Lord Shelburne (later the Marquis of Lansdowne) praised the French system in at least some respects. Radzinowicz writes (at 91): he took the surprising and unpopular line of praising the French police system and urging the adoption of a similar organization in England. The French police, he argued, was excellent and indeed ‘wise to the last degree’ in its construction and only abominable in ‘its use and direction.’”

⁵⁹ Quoted in Critchley at 54.

⁶⁰ Laurence M. Friedman, *Crime and Punishment in American History*, (New York: Basic Books, 1993) at 29.

⁶¹ There is one important exception to this nineteenth century trend: the oldest city police department in the United States, the Philadelphia Police Department, was founded almost a century earlier, in 1751.

of common lawyers to the public/private distinction and to the (related) predominant governance strategy of the early modern period: what historians call “government by license.”⁶² Nevertheless, the notion that the police power is an essential part of the tools of government also has long roots, dating back at least to the eighteenth century. But we shall not come to the bottom of the argument against privatizing core police services through an investigation of common law legal history. In order to make clear precisely what is at stake in this debate, we must go further and explore the crucial role of the public-private distinction in the liberal tradition in political theory. It is to this discussion that I turn in the part 3.

3. What is Wrong with Private Policing?

(a) Practical Problems: Corruption, Accountability, and Incompetence

In the introduction to a new collection on outsourcing in American government, Jody Freeman and Martha Minow point to five basic problems with privatization: fraud and waste; insufficient oversight; illegal and abusive conduct by private actors outside public sanction; undermining democratic norms of transparency, rationality and accountability; and diminished government capacity.⁶³ All of these objections can be grouped together as “practical” problems. That is, the major concern in each case is that private contractors will bring about outcomes that are less desirable from a public policy perspective than will government employees. The major ground for objection, then, is the poorer outcomes (in all these five dimensions) generated by private contractors. Paul Verkuil, too, in his important new monograph on privatization, focuses on the ways in which the privatization of government functions leads to corruption, lack of transparency and accountability, *etc.* and how these virtues may be brought into the privatized system through the introduction of

⁶² Braddick.

⁶³ *Government by Contract: Outsourcing and American Democracy* at 4-5.

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

It might seem counter-intuitive to suggest that objections concerned with accountability, oversight, transparency, *etc.* as practical concerns rather than as structural ones. Surely the bite of these objections remains even if private contractors in fact regularly produce good outcomes. The simple fact that they do so without having to account for their conduct, that their operations are hidden from public scrutiny, *etc.* is reason enough to object. Nevertheless, even these “process” objections to outsourcing are the sorts of things that, in principle, could be addressed by a carefully structured institutional design. As Trebilcock and Iacobucci point out, private providers might in fact be held accountable more effectively by the market than they have ever been by public law regulations.⁶⁴ Further, insofar as private actors are not subject to the same public law standards of publicity accountability and the like as government actors, this does not preclude the creation of new legislation that could impose the same standards on private providers where this is deemed necessary. In short, although we might find that present privatization schemes fail to address these concerns adequately, these critiques may be addressed by careful work on institutional design and the creation proper incentives and institutional safeguard. If we are interested in objections to privatization – in the policing context or anywhere else – that cannot be addressed by careful institutional design, we must look elsewhere.

(b) Commodification

Perhaps the best known objection to privatization – and, indeed, of market systems more generally – is the claim of “commodification.” This is a problem that Michael

⁶⁴ Trebilcock and Iacobucci.

Trebilcock has already spent a good deal of time considering in his other writings.⁶⁵ Commodification is often raised as a distinctly *moral* objection to certain legal institutions.⁶⁶ The point of most⁶⁷ of these objections, inspired by writers in the German idealist tradition of Kant and Hegel, is that we bear a different kind of relationship to our bodies than we do to “external” objects.⁶⁸ A person’s blood, her internal organs and her embryos (so the argument goes) are quite literally a part of her; to remove them and sell them on the open market would alienate us from ourselves – it would desecrate the sanctity of the human person.⁶⁹ At the core of this argument against commodification is a moral commitment to the sanctity and the integrity of the human person. This argument is a wholesale attack on the alienation of a person from parts of her body by *any* means, whether it is sale on the open market, gift or any other way. Its concern with markets enters only as an afterthought: if one ought never to alienate parts of one’s body, then *a fortiori* one ought not alienate them to total strangers on the open market. The most famous such critique – which extends this argument even to human labour – is surely that of Marx and Engels from *The Communist Manifesto*. They write:

⁶⁵ The most important and most thorough discussion is in chapter two of his book, *The Limits of Freedom of Contract* (Cambridge, MA: Harvard University Press, 1993), entitled “Commodification.”

⁶⁶ There is, of course, one crucial exception to this. Karl Marx was famous both for identifying the tendency of bourgeois capitalism to commodify everything *and* his insistence that no moral objection could be made to that. This was because morality, according to Marx, is relative to the mode of production – and there is nothing wrong with bourgeois commodification according to bourgeois morality. But some of the most convincing recent commentaries on Marx suggest that this position might be untenable. See: G.A. Cohen, *Karl Marx’s Theory of History: A Defence*, 2nd edition, (Oxford: Oxford University Press, 2001).

⁶⁷ Of course, not all objections to commodification arise from this concern with the self. Many communitarian critics of liberalism see the problem as the promoting of economic relations over social and other relationships. See: Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); Alastair MacIntyre, *After Virtue: A Study in Moral Theory* (London: Duckworth 1984); Charles Taylor, “Atomism” in *Philosophical Papers Volume 2: Philosophy and the Human Sciences* (Cambridge, Cambridge University Press, 1986). The most elaborate statement of this critique in the economics literature is Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 1944).

⁶⁸ Cite to Immanuel Kant, *The Metaphysics of Morals*, G.W.F. Hegel, *The Philosophy of Right*.

⁶⁹ Two of the most celebrated modern example of this sort of thinking are Margaret Radin, “Market Inalienability” 100 *Harr. L. Rev.* 1849 (1989) and Susan Rose Ackermann, “Inalienability and the Theory of Property Rights” 85 *Columbia Law Review* 931 (1985).

[T]he bourgeoisie, wherever it has got the upper hand, has put an end to all feudal, patriarchal, idyllic relations. It... has left remaining no other nexus between man and man than naked self-interest, than callous “cash payment”... for exploitation, veiled by religious and political illusions, it has substituted naked, shameless, direct, brutal exploitation... Constant revolutionizing of production, uninterrupted disturbance of all social conditions, everlasting uncertainty and agitation distinguish the bourgeois epoch from all earlier ones... All that is solid melts into air, all that is holy is profaned...⁷⁰

Stirring as these words might be, this is not my argument. I am not concerned about the sanctity of the human person and the special relationship that one might have to one's body as a result. Instead, as I suggested in the examples I set out in part 1 above, my concern is with the issue of *standing*: there are some things that only some people have the standing to do. Just as one cannot delegate the job of selecting a gift for one's wife to a third party without undermining the very status of the object as a gift, I shall argue that governments cannot delegate the job of policing to a private firm without undermining the status of the services performed as policing. For policing, like gifts, has a certain internal structure that makes essential reference to the relationship between the parties who are giving and receiving it. Let me now turn to that argument and its roots in the liberal tradition of political philosophy.

(c) Political Liberalism and the Public/Private Divide

The roots of my argument about standing lie in the ancient legal distinction between public and private. As Norberto Bobbio points out,⁷¹ the distinction is one of the most basic distinctions in the Western legal tradition, dating back at least to the time of Justinian's *Institutes* in the sixth century, C.E. The aspect of the public/private distinction that is of interest to me here, however, is its importance for much of the modern liberal tradition in

⁷⁰ Karl Marx & Friedrich Engels, *The Communist Manifesto* tr. Samuel Moore (New York: Washington Square Press, 1964) at 61-2. There are also hints of the “standing” objection in this passage. However, since the claim of standing alluded to here is based on the feudal hierarchy, it is unlike that Marx and Engels saw that as a stinging objection to bourgeois capitalism.

⁷¹ Norberto Bobbio, “The Great Dichotomy: Public/Private” in *Democracy and Dictatorship: The Nature and Limits of State Power* (Minneapolis: University of Minnesota Press, 1989).

political theory. The state, according to a dominant strain in the liberal tradition, is a different sort of entity from private actors in two crucial ways: it has greater powers than ordinary citizens and it ought to be more accountable for its actions than ordinary citizens. To see why, we need to digress briefly into the foundations of this liberal picture of the state. For Locke, Rousseau, Kant and many others in the liberal tradition, the most basic value in political life is individual freedom, understood in a particular way. The idea of freedom that was of greatest concern to them is best understood in opposition to slavery. Whereas the slave's fate is dependent entirely on the whim of his master, the free person is not dependent on anyone else's discretion. The puzzle for these writers, then, is how to ensure that everyone is able to enjoy maximal liberty of this sort. The answer, all too briefly, is that each of us can maintain exclusive dominion over his own person and over his own property. What we may do with our bodies and with our property is subject only to the constraint that it must not undermine others' ability to be free to do the same. For this reason, it is not the law's business if an individual chooses to engage in conduct that the rest of us deem to be unwise or even immoral so long as it does not infringe others' freedom to use their bodies and property as they see fit in the same way.⁷²

But, by the very terms according to which it was constructed, this private order cannot regulate itself. For this system requires someone to specify precise limits to each person's sphere of liberty, to adjudicate disputes about these questions where they arise and to enforce these rules where this is required.⁷³ But it would undermine the very purpose of the system if some private party took it upon himself to do any of this – for this would simply make the rest of us dependent on that person's exercise of discretion in doing all of

⁷² See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997); and Arthur Ripstein, "Authority and Coercion" 32 *Philosophy and Public Affairs* 1 (2004) for an explanation of how this sort of freedom is at work in the work of Kant and Locke.

⁷³ These are what Locke calls the "inconveniences of the state of nature." *Second Treatise of Government* §124.

these things. Instead, there must be some entity that is both impartial (because it has no stake in these private disputes) and yet qualified to impose its decisions on individuals on all these questions. It is in order to fulfil these demands that we must have a state. For, if properly constructed, the state can both represent us collectively (and thus speak in the name of all when determining the precise contours of our rights, adjudicating disputes and enforcing the law) and yet speak for no private party in particular. The justification for the state's existence – and for its special powers – rests on our need for someone to perform the tasks that only the state can perform and on the state's ability to perform those tasks moderately well.

But, of course, the state has no bodily existence of its own; it can only act through the agency of individuals. So the legal question about state action that is most important is: under what terms and conditions can an individual legitimately claim to be acting in the name of the state? In order to answer this question, we must establish not only that the individual either had some sort of special authorization to act in the name of the state or (in extreme situations) that it was appropriate for that person to have assumed state authority even in the absence of explicit authorisation. But second, we must also establish the terms under which the state may exercise its powers at all. In order to be state power (rather than just the power of an individual merely *claiming* to act in the name of the state), the individual must meet the accountability standards set out in public law – roughly, reasonableness and fairness – in the exercise of his discretionary powers.⁷⁴ This is because state power (unlike private power) is always answerable to the individuals over whom it is exercised. Individual freedom to do as one would like is a basic value, so individuals should be left free to act

⁷⁴ For a more detailed treatment of some of these issues, see Malcolm Thorburn, "Criminal Law as Public Law: Police Powers and Justifications" in *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, forthcoming).

largely as they would like; but the justification for state power's turns on its ability to act impartially in the name of all. If it fails to do so, then it undermines its own legitimacy.

This basic argument from liberal political theory is reflected in many of the legal doctrines with which we are familiar in Canada, the United States and other common law constitutional democracies: public law requirements of fairness and reasonableness apply to all those who perform an inherent state function – but not to those who are acting in a private capacity.⁷⁵ Thus, the individual rights constraints set out in the constitution apply only to state actors and not to private actors; and those private individuals who take it upon themselves to perform inherently public functions are not treated as though they are doing a public service – instead, they are treated as the vigilantes they are.

Policing is, along with legislation and adjudication, one of the core state functions, according to standard liberal accounts. But in order to determine what, precisely, ought to be included under the head of “policing” in this context, we ought to look to the criteria according to which we categorized certain functions as inherently public or private in the first place. Of course, the most obviously problematic sort of “private police” are those firms that are hired by cities and other public bodies to perform their basic policing functions. In cases such as these, the most basic exercises of discretion involving individual liberty – arrests, searches, and the like – are left in private hands. The problem here is not simply that such private firms are not actually held accountable in a number of cases. Rather, the problem is that private parties ought not to be entitled to wield this sort of discretionary power over others under any circumstances. As private contractors, they simply do not have the proper standing to make such decisions. As Alon Harel makes clear, this sort of policing

⁷⁵ The most thorough treatment of the ancient public/private distinction in contemporary common law doctrine is Peter Cane, “Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept” in J. Eekelaar and J. Bell (eds.), *Oxford Essays in Jurisprudence (Third Series)* (Oxford 1987), ch. 3, p. 65.

is crucial to the effectiveness of law itself – and the effectiveness of laws must not be left in private hands. If it is, then we have undermined the ability of the state to set down rules for the whole community. Instead, the state is reliant on the discretion of a private agency to see to it that its rules are enforced.⁷⁶

A case that is more controversial is corporate policing. Increasingly, spaces that seem to be public – malls, corporate campuses, the streets of gated communities, the “public” areas of theme parks, and so on – are in fact privately owned and policed. Although traditional liberal political theory would recognise that private property owners should be entitled to direct and to supervise the conduct of invited visitors to their property, it is not clear that this model is appropriate to such quasi-public spaces. Indeed, it seems that many of these spaces are taking over the traditional role of public roads and public squares – places that have been subject to public regulation for many years. Insofar as some of these quasi-public spaces have taken over the role of public squares and public roads as necessary conditions for our ability to interact with one another, the case could be made that the policing of these areas, too, ought to be undertaken by impartial public officials rather than by corporate security departments that are looking out only for the interests of their employers.

Conclusion

The debate over privatization usually turns on broad ideological claims – whether one is in favour of markets and individual freedom or in favour of government provision and equality – and all too often fails to pay close attention to the conceptual and empirical context of particular privatization debates. In this brief article, I have endeavoured to show

⁷⁶ Alon Harel, “Outsourcing Violence” (unpublished manuscript on file with the author)

that there are a variety of important issues at stake in privatization debates, extending in at least three different dimensions. In the context of policing, the complex history and policy context introduces further complexities into the discussion. Finally, a number of important objections to privatization are really critiques of particular privatization efforts, rather than arguments against privatization as such. The most powerful argument against the privatization of policing, I believe, is the “standing” argument, which ties core police services to the very definition of the state that lies at the foundation of much of the western liberal tradition. Although the strict division between public and private that the liberal tradition requires is at odds with the intermingling of public and private that we see throughout the history of the common law world, it is this distinction that provides the basis for the broadest and most powerful critique of privatization.