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RULE OF LAW AND THE LIMITS OF SOVEREIGNTY: THE PRIVATE PRISON IN JURISPRUDENTIAL PERSPECTIVE

Ahmed A. White*

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I. INTRODUCTION

The evolution of the contemporary criminal justice system can be described in terms of two distinct shifts in the relationship between state and society and in the role of law in mediating that relationship. The more obvious of these shifts is the direct expansion of the modern state's sovereignty over the affairs of citizens, as is perhaps best evident in the demise of libertarian interpretations of the Fourth Amendment and attendant increases in state prerogative. The second, less obvious shift involves a dramatic erosion of the state's monopoly of criminal justice functions—that is, the “privatization” of criminal justice. Although evident in the rise of victims' rights regimes, private police forces, and even private financing of criminal prosecutions,¹ this privatization of criminal justice may be most notable in the re-emergence of the private prison.

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1. On the parameters of the victims' rights movement, see, e.g., *NEW DIRECTIONS FROM THE FIELD: VICTIMS RIGHTS AND SERVICES FOR THE 21ST CENTURY* (Dep't of Justice, Office of Victims' Programs 1998); on private policing, see David S. Sklansky, *The Private Police*, 46 *UCLA L. REV.* 1165 (1999); on private prosecutions, see Joseph E. Kennedy, *Private Financing of Criminal Prosecutions: The Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 *HASTINGS CONST. L.Q.* 665 (1997).

At present, about 120,000 men, women, and children are incarcerated in privately managed, for-profit jails, prisons, and detention facilities—in the hands, literally, of an oligopolistic industry with annual revenues of at least \$1 billion and perhaps far more than this. Though these figures are still dwarfed by the two million jail and prison inmates in America today and the huge economic scale of incarceration generally, they also reflect an annual rate of growth in private incarceration that has over the past several years averaged *four* times that of the (already astronomical) overall growth in criminal incarceration.² Perhaps more tellingly, this industry only emerged in its modern form about fifteen years ago.

The straightforward expansion of state sovereignty in the criminal context has garnered substantial criticism from practical, political, and jurisprudential angles.³ But the privatization—or, as one should say, the *semi*-privatization—of criminal justice has escaped comprehensive criticism. Instead, critiques of the private prison tend to focus narrowly on the institution's practical, legal, or general normative failures, and do so to the exclusion of any sustained focus on the private prison's implications for the changing relationship between state and society and the way the law mediates that relationship. In short, there persists a crucial failure to mount a *jurisprudential* critique of the private prison.

In this Article, I argue that a rigorous jurisprudential critique of the private prison shows that the private prison tends to distort dramatically the relationship between state and society in the criminal context, and does so in a way that contradicts the most central of liberal legal precepts: the rule of law. Such a rule of law critique of the private prison sees in that institution a key development: the simultaneous expansion and diffusion of state sovereignty, accompanied by the thorough merger, or interpenetration, of public and private realms. This process renders the private prison utterly inconsistent with the rule of law's central aspiration: the restraint of sovereignty and the concomitant realization of negative freedoms and minimal equality by the mediation of law. From this perspective, and

2. Published sources on the number of persons incarcerated in either public or private institutions are outdated almost as soon as they appear in print. In part for this reason, the most current data on private prisons are available through the website at the Center for Studies in Criminology and Law, the University of Florida, at <http://web.crim.ufl.edu/pcp> (last visited Oct. 27, 2000). This organization is run by Charles Thomas, private prison scholar and proponent (and, as we shall see below, investor). It is also important to note that most statistical data on the scope of private prisons refers to numbers of available beds, as opposed to actual numbers of inmates; at a time of considerable expansion in inmate numbers and overcrowding, these two figures tend to be very close.

On the scope of incarceration generally, see, e.g., JASON ZIEDENBURG & VINCENT SCHIRALDI, *THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE END OF THE MILLENNIUM* (Justice Policy Institute 1999), available at www.cjcj.org/jpi/publications.html (last visited Oct. 27, 2000). See also ALLEN J. BECK & CHRISTOPHER J. MURMOLA, *PRISONERS IN 1999* (Dep't of Justice Bureau of Justice Statistics 2000).

3. For a brief sample of notable monographs in this area, see DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); ELLIOT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* (1998); MARC MAUER, *RACE TO INCARCERATE* (1999); JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* (1997); THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION (Steven R. Donziger ed., 1996).

following Stanley Cohen's more general critique of criminal justice reforms, I argue that the private prison inevitably constitutes an extravagant, but at the same time insidious, aggregation of state power in a context where such power is being deployed in a largely irrational way.⁴ Such a critique reveals with considerable irony that the privatization of prisons, a movement ostensibly based on the ideal of the "minimalist state," is actually the antithesis of such an ideal.

This notion that the rule of law is premised on an aspiration to restrain sovereignty is shared in key respects by such diverse figures as the liberal, Friedrich von Hayek, and the neo-Marxist jurist, Franz Neumann. The rule of law's antithesis to the private prison follows more specifically from the idea that the rule of law's sovereignty-restraining aspiration presupposes the clear demarcation of the sovereign and the transparency of sovereignty, which in turn presupposes the substantial segregation of public and private realms. Although these conditions have never been fully realized in any society,⁵ and in many ways constitute a problematic formulation, the regime implied by the rule of law retains a *contingent* normative value, guaranteeing a baseline of liberty and equality. Inasmuch as the private prison is premised intrinsically on the simultaneous extension and diffusion of sovereignty, and also on the merger of the public and private, it is intrinsically at odds with the rule of law and emerges as a fundamentally illiberal development—far more problematic than the public prison already is.⁶

Of course, the doctrine of the rule of law is not a rule of law in the literal sense: a "violation" of the rule of law does not make something illegal in any positive sense. Still, this Article's critique of the private prison is practically, and perhaps even legally, relevant in several ways. First, it gives general jurisprudential structure to a debate that largely lacks such structure. Second—and perhaps this is part of the basis of its claim to be jurisprudential—this Article's critique of the private prison describes a common link between erstwhile separate normative, practical, and legal critiques of this institution. This Article argues that there are very concrete connections between the private prison's anti-rule of law character and its practical, legal problems. The history of the private prison's antecedents, especially of the convict lease system, shows clearly that the private prison's ubiquitous tendencies to corruption, legal ambiguity, and the augmentation of state

4. See STANLEY COHEN, *VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION* (1985).

5. On the incompleteness with which such conditions have been realized, see, e.g., David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647 (1986). A good example of the degree to which the legal system resists a rigorous interpretation of these injunctions is the jurisprudence arising under the "takings clause" of the Fifth Amendment, where the "public use" requirement is interpreted in an extremely broad way. See, e.g., *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

6. As I will emphasize below, this Article is not a defense of the public prison as such, but rather a critique of the private prison as, in effect, a substantially more problematic version of an always problematic institution.

power are tied organically to its inconsistency with the rule of law.⁷ In other words, history shows that the otherwise abstract antithesis between the private prison and the rule of law seems to be accompanied by inherent tendencies to translate into significant practical and legal problems as well.

In order to develop these arguments, this Article proposes in Part II a definition of the rule of law that transcends conventional ideological positions, that is centered on the concept's sovereignty-restraining aspiration, and that stresses the doctrine's contingent rationality. Such a definition is shown to imply the separation of public and private and the clear demarcation of sovereignty. Here I begin to develop the notion that the rule of law is fundamentally inconsistent with the private prison. Part III tackles the crucial and deceptively complex matter of defining the private prison. Here, I outline the curious history of the private prison and show that the private prison, in some form or another, is the historical norm. Next, Part IV describes the old convict lease system as the contemporary private prison's closest juridical antecedent, as an institution that closely anticipates the contemporary private prison's relationship to the rule of law and the question of sovereignty, and anticipates as well the positive, organic relationship between the private prison's abrogation of the rule of law and its persistent practical and legal failures. In Part V, I describe in more detail the characteristics and origins of the contemporary private prison and expose the shortcomings of existing attempts to critique the phenomenon. This Part also comprises the main critique of the private prison from a rule of law perspective. Here as well I consider the limits of this Article's critique with regard to other modes of privatization. Finally, Part VI offers a cautionary conclusion that considers the implications of the private prison in broader context.

II. RULE OF LAW AND THE RESTRAINT OF SOVEREIGNTY

The question that always greets any scholarly mention of the rule of law is whether the concept actually possesses any real scholarly value, or whether it is merely a vehicle for partisan rhetoric. Certainly the rule of law enjoys a prominent place in contemporary legal, political, and social discourse. A reader need only peruse, for example, contemporary finance magazines, human rights tracts, and international politics journals to encounter a steady stream of arguments and claims couched in rule of law terms. But more often than not, the rule of law operates in these fora as a fuzzy euphemism for a set of institutions that (quite

7. Following a perspective inspired by Georg Rusche and Otto Kirchheimer, this Article likewise attempts to understand the private prison, both genetically and functionally, in terms of its larger socio-historical context—and not simply, for example, in terms of political or ideological debates. *See generally* GEORG RUSCHE & OTTO KIRCHHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* (1968). Rusche and Kirchheimer's approach, it should be noted, can be criticized for its overly functional and economic logic; inasmuch as there is some truth to such criticisms, Rusche and Kirchheimer's approach must be qualified by a sensitivity to other forces. *See generally* DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* (1990).

conspicuously) seems to approximate the aspirations and self-images of contemporary Anglo-American society. In contemporary discourse, the rule of law is variously equated with the legal structure of so-called free-market finance capitalism,⁸ the norms of the western human rights agenda,⁹ or a constitutional order that usually is similar to the American model.¹⁰

While even semi-serious appeals to the rule of law provide some evidence that the concept has not been completely trivialized, there is something rather troubling, or at least grossly inadequate, about the usual manner by which the rule of law is construed. Contemporary perspectives on the rule of law do little justice to the jurisprudential character of the concept. Even in scholarly circles, the concept usually is reduced to its bare functional or instrumental aspects, rhetoric, slogans, and operational figments. Such a move is problematic not simply because the rule of law *can* mean so much more, but also because the jurisprudential themes skipped over by this logic contain the concept's most fundamental, critical components.

At the logical and genetic core of the rule of law is a fundamentally jurisprudential agenda: the restraint of sovereignty by law and the concomitant idea that in a rational society, law aggressively mediates the relationship between the state on the one hand, and civil and domestic realms, on the other. It is this sovereignty-restraining aspiration that underlies and really accounts for the rule of law's more specific and formal claims: generality, universality, and non-retroactivity of legal norms, separation of powers, and so forth. The present critique of the private prison is jurisprudential because its rule of law critique of the private prison is couched squarely in such sovereignty-restraining logic.¹¹

This sovereignty-restraining notion of the rule of law surfaces in the earliest attempt to define the concept. In the Western world, the idea of the supremacy of law over politics emerged in classical society and was entrenched substantially (albeit with limited scope) by the Middle Ages.¹² According to Geoffrey Walker,

8. See, e.g., Owen Lipper, *The Americas: Pirates Plunder Patents: Will the Rule of Law Prevail?*, WALL ST. J., Apr. 17, 1998, at A15; Mary Doyle, *From Russia With Doubts*, LEGAL TIMES, Nov. 26, 1990, at 23.

9. See, e.g., Mehlika Hoodbourn, *Human Rights and the Rule of Law in Hong Kong*, 24 HUMAN RIGHTS 5 (1997); William M. Cohen, *Principles for Establishment of a Rule of Law Criminal Justice System*, 23 GA. J. INT'L & COMP. L. 269 (1993).

10. See, e.g., Mark F. Brzezinski, *Constitutionalism and Post-Communist Polish Politics*, 20 LOY. L.A. INT'L & COMP. L. REV. 433 (1998); *No Rule of Law: Having Rescued Kuwait, the West Now has the Job of Making it a Better Place*, ECONOMIST, June 22, 1991, at 15; Edward Georgian, *Hong Kong Fears Unraveling of Rule of Law*, N.Y. TIMES, May 7, 1997, at A2.

11. By "jurisprudential" critique I mean a critique that focuses generally on the relationship between law and society and that looks somewhat more specifically to the role of law in defining and segregating social realms. I believe that such a perspective is consistent, too, with the one contemplated by Roger Cotterrell. "Jurisprudence is, therefore, probably best defined negatively as encompassing all kinds of general intellectual inquiries about law which are not confined solely to doctrinal exegeses or technical prescriptions." ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE* 1-2 (1989).

12. See GEOFFREY DE Q. WALKER, *THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY* 93-97 (1988).

the rule of law, at least in concept, survived the oscillations of royal powers in the Medieval and early modern eras to emerge in modern times as a viable set of claims against the unmeasured administration of power by sovereigns.¹³ But in the final analysis it is only with modern interpretations of the rule of law—at least the serious ones—that a consistent emphasis is placed on the rule of law's sovereignty-limiting character.¹⁴ Montesquieu, especially, offers the notion that the rule of law demands the comprehensive restraint of sovereignty.¹⁵ In such a mode, the concept of the rule of law was eventually able to comprise the juridical ideology, one might say, of bourgeois ascendancy, forming a set of effective challenges to aristocratic prerogative as well as the juridical basis for "free" competition within the structures of the capitalist market.¹⁶

An essentially sovereignty-restraining view of the rule of law to a large degree transcends the political perspectives of its modern exponents. Thus, such a view pervades the work of the archliberal Friedrich von Hayek and the common law parochialist A.V. Dicey, the consummate liberal centrist Max Weber, as well as the Marxist jurists Franz Neumann and Otto Kirchheimer, and the Marxist historian E.P. Thompson.¹⁷ The essential aspects of Hayek's and Dicey's perspectives on the rule of law are fairly well-known and bear little repetition.¹⁸ The same might be said of Weber, who famously draws a complex causal link between the emergence of rule of law norms and the rise of modern capitalism.¹⁹ But for American audiences, the contributions of Thompson and especially Neumann and Kirchheimer to the rule of law debates are rather less familiar. Thompson's detailed analysis of class relations in early modern England prompt him to conclude that "the rule of law itself, the imposing of effective inhibitions upon power and the defence of the

13. See *id.* at 97-127. Cf. FRANZ L. NEUMANN, *THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY* 66-76 (1986).

14. See WALKER, *supra* note 12, at 1-48.

15. On Montesquieu's centrality to the development of rule of law, see, e.g., Judith Sklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 1, 5-6 (Allan C. Hutchinson & Patrick Monohan eds., 1987). Cf. Franz Neumann, *Montesquieu*, in *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 96, 114-43 (Herbert Marcuse ed., 1957).

16. This point is well developed in critical, especially Marxist, discourse. See, e.g., Franz Neumann, *The Change in the Function of Law in Modern Society*, in *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 22 (Herbert Marcuse ed., 1957).

17. See, e.g., A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1961); WILLIAM E. SCHEUERMANN, *THE RULE OF LAW UNDER SIEGE: SELECTED ESSAYS OF FRANZ NEUMANN AND OTTO KIRCHHEIMER* (1996); E.P. THOMPSON, *WHIGS AND HUNTERS* (1977); FRIEDRICH A. VON HAYEK, *THE CONSTITUTION OF LIBERTY* (1960); NEUMANN, *supra* note 16; MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (1947); .

18. On Hayek's rule of law, see, e.g., JOHN GREY, *HAYEK ON LIBERTY* (1986). On Dicey's rule of law, see, e.g., Jeffrey Lowell, *The Rule of Law Today*, in *THE CHANGING CONSTITUTION* (Jeffrey Lowell & Dawn Oliver eds., 1989). See also WALKER, *supra* note 12 *passim*.

19. All key aspects of a rule of law construct are evident in Weber's portrait of "formal-rational" legal thought. On Weber's jurisprudential thought, see, e.g., Max Rheinstein, *Introduction*, in *ON LAW IN ECONOMY AND SOCIETY* xxv-lxxi (1954).

citizen from power's all-intrusive claims, seems to me to be an unqualified human good."²⁰

Neumann's and Kirchheimer's engagements with the concept are rather more extensive and nuanced than Thompson's, but ultimately reach the same conclusion. For Neumann and Kirchheimer, both sovereignty and freedom from sovereignty are essential ideological and functional bases of modern society. The rule of law emerges, they argue, as a means of forging a provisional, workable reconciliation of these fundamentally contradictory dynamics.²¹ Like Thompson, and to some extent Weber, Neumann and Kirchheimer end up with a healthy, but thoroughly contingent, regard for the value of the rule of law vis-à-vis the quest for human freedom and reason.²²

However contingent, such leftist defenses of the rule of law have drawn heavy fire from contemporary critics who stress endemic connections between the rule of law and such evils as class exploitation, patriarchy, and the oppression of minorities.²³ There certainly is good reason to be circumspect about the ultimate value of the rule of law to the quest for a truly rational social world and good reason as well to be aware of the connections between existing rule of law norms and exploitation, patriarchy, and so forth. Yet as Marx himself anticipated, it is probably wrong to draw too tight an association between the rule of law as such and capitalism's (or modernism's) defeat of equality, reason, and human dignity.²⁴ Indeed, perhaps even more to the point are the arguments of Neumann and Kirchheimer, identifying an ugly, intimate connection between anti-rule of law "decisionism" as intellectualized by Carl Schmidt, on the one hand, and the policies and structures of twentieth century fascism, on the other. Neumann and Kirchheimer make clear not only that the rule of law need not be opposed intrinsically to leftist agendas, but also that leftist agendas are usually first to suffer, and leftist gains first to fall, when the rule of law is abrogated by modern regimes.²⁵

20. THOMPSON, *supra* note 17, at 258-69.

21. See Neumann, *supra* note 16, at 22-28; see also NEUMANN, *supra* note 13, at 25-46.

22. See NEUMANN, *supra* note 13, at 32-34.

23. For contemporary leftist attacks on the rule of law and on leftist defenders of rule of law, see, e.g., Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561 (1977) (reviewing DOUGLAS HAY ET AL., *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (1975) and E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975)); Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

24. See, e.g., KARL MARX, *On the Jewish Question*, reprinted in KARL MARX, *EARLY WRITINGS* 211, 221 (Rodney Livingstone & Gregor Benton trans., Penguin Books 1975).

25. For an excellent analysis of the jurisprudential thought of Neumann and Kirchheimer and their relationship to Schmidt and other anti-rule of law figures, see WILLIAM B. SCHEUERMAN, *BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW* (1997). See also Roger Cotterrell, *The Rule of Law in Transition: Revisiting Franz Neumann's Sociology of Legality*, 5 SOC. & LEGAL STUD. 451, 459-62 (1996) (identifying deep "ethical" virtues of Neumann's rule of law concept: equality, individual autonomy, and security).

Whatever the final merits of this debate—I tend to accept Neumann's and Kirchheimer's claims—the point remains clear that for serious advocates of the rule of law, the concepts' sovereignty-limiting function is absolutely key. How, one might wonder, does the rule of law accomplish such an end? On this point, too, there actually is substantial consistency. Serious defenders of the rule of law insist, in the first instance, that the concept, while not a statement of law in its own right, must be understood to possess a minimal amount of legal authority, to operate, as Hayek puts it, as a "meta-legal doctrine," or as Neumann implies, as a secular, quasi-natural law doctrine.²⁶ Beyond this, there is agreement too that the rule of law's sovereignty-restraining function rests on the application of a set of subsidiary principles—in particular: generality, neutrality, universality, non-retroactivity, separation of powers, the insularity of the legal system, and so forth—to the normative structure of the law.²⁷

Such an agenda implies a social system premised on the segregation of political and legal authority, formal equality, and "negative" freedoms vis-à-vis the sovereign.²⁸ This relationship in turn presupposes a mutually exclusive, but at the same time complementary, distinction between the public realm, the home of sovereignty, and the private realm, the negative reflection of sovereignty. The resulting regime is not unproblematic. For example, the public-private distinction tends to sanction the substantial residual sovereignty (in the form of tyranny, really) and inequality of the domestic realm.²⁹ And as both Marxists and Weberians recognize, the rule of law simultaneously facilitates and reflects the exploitative, alienating dimensions of capitalist civil society. Nevertheless, like Marx, Neumann and Kirchheimer, and, to some extent, Weber, I think it is important to embrace the rule of law as the apogee of *legal* rationalization under our existing historical horizon. Even more fundamentally, it may be that some variant of the rule of law will always be preferable to a system in which power knows no restraint; it may be that the rule of law is essential to any rational social order.³⁰

Of course, the key question is then, how does the rule of law relate to the private prison? A number of authorities have emphasized the relevance of rule of law principles in rationalizing the criminal justice system in general. The rule of law is understood as a basis for the critique of discretion, inequality, and unbounded

26. See HAYEK, *supra* note 17, at 205-07; Neumann, *supra* note 16, at 28.

27. See, e.g., Neumann, *supra* note 16, at 29-31. Significantly, Neumann not only posits these norms himself; he locates them overtly and subtly within the contentions of the rule of law's classical exponents. See also HAYEK, *supra* note 17, at 151-53, 209-10.

28. See, e.g., Neumann, *supra* note 16, at 23-26, 31-33.

29. There are numerous salient critiques of the ultimate normative value of the public-private distinction, particularly in feminist discourse. See, e.g., Kenneth M. Casebeer, *Toward a Critical Jurisprudence—A First Step Away from the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379 (1983) (critiquing public-private distinction in constitutional law as defined primarily by Justice Rehnquist); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992) (discussing "internal" and "external" elements of the feminist challenge to public-private distinction).

30. On this debate, see, e.g., SCHEUERMAN, *supra* note 25, at 245-48, *passim*.

expressions of state power in the institutions of criminal law and criminal procedure.³¹ In fact, some commentators contend that the rule of law directly forecloses private criminal justice functions.³² It is indeed possible to say that the rule of law, because it implies the sovereignty *of law*, vitiates private justice simply because private persons neither can construct nor implement between themselves general, formally equal, predictable, and non-retroactive legal norms.³³ It also is possible to argue as well that private law-giving is inconsistent with the insular, self-contained pretensions of the rule of law. There are indeed many ways to draw out antitheses between the rule of law and the privatization of law, especially in the criminal context.

Yet it is in the most fundamental way, I think, that the rule of law speaks critically to the private prison. My main thesis is as follows: The rule of law evidences an essential antipathy to sovereignty and a concomitant ambition to restrain sovereign deeds with subsidiary norms like generality, universality, separation of powers and so forth. The aspiration behind these norms only can be realized if the sovereign is, in the first place, a legally and politically transparent entity with clearly demarcated boundaries. The idea of freedom *from* sovereignty that the rule of law claims, requires that the sovereign have definite limits, that when an institution or person acts, we can know clearly if it or she *is the sovereign*. Who, otherwise, is to be restrained from whom? It is in this manner that rule of law norms presuppose the clear segregation of state from civil and domestic society and of public from private realms.

It is from such a perspective that Hannah Arendt, in her otherwise problematic classic, quite accurately defines the absence of the rule of law as a signature aspect of twentieth century totalitarianism.³⁴ Among others,³⁵ Neumann and Kirchheimer also note how the abrogation of the rule of law provides the legal foundation of fascism; how, for example, the fascist negation of rule of law norms authorized the erosion of legal generality and the public-private distinction, and in turn facilitated a massive interpenetration of public and private realms that featured the state's domination of private life, the frequent resort to individualized and retroactive laws, the complete politicization of legal process, and the domination of the state by private cliques and quasi-public political parties.³⁶

Needless to say, the return of the private prison itself does not *necessarily* imply the advent of totalitarianism or fascism or any other kind of far-reaching reconstruction of our political and legal universe. But inasmuch as the prison is in many

31. See, e.g., FRANCIS A. ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW* (1996); SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* (1980); cf. Ahmed A. White, *Victims' Rights, Rule of Law, and the Threat to Liberal Jurisprudence*, 85 KY. L.J. 357 (1999).

32. See, e.g., WALKER, *supra* note 12, at 24.

33. For a recent encounter with this theme, see, e.g., Cotterrell, *supra* note 25.

34. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM passim* (1966).

35. See, e.g., INGO MUELLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (1991).

36. NEUMANN, *supra* note 13, at 286-98.

respects the quintessence of a state's sovereign function, and inasmuch as the private prison so thoroughly merges the private and the public and blurs the boundaries of the sovereign, the private prison cannot help but be antithetical to the rule of law. Immediately, this exposes the private prison as fundamentally problematic on at least an abstract, normative plane. Perhaps more critically, I shall argue that the private prison's concrete problems have roots in a juridical structure built around the abrogation of the rule of law.

III. LOCATING THE PRIVATE PRISON IN PRACTICE AND IN HISTORY

In order to critique the private prison it is, of course, necessary to define the institution. Neither the term "prison" nor "private prison" has a self-evident meaning. Even outside of its many metaphorical usages, the term prison has long been construed in diverse ways.³⁷ At various points it has contemplated everything from facilities for detaining juveniles and undocumented immigrants, to "halfway" houses, to city and county jails housing misdemeanants and those awaiting trial, to the quintessential "big houses," huge self-contained edifices brimming over with hardened felons, that continue to dominate the prison landscape.

A. *Conceptualizing the Private Prison*

It is quite difficult to say what is a prison and what is not. It is surely impossible to define the prison in a logically or nominally incontestable fashion. This problem is underscored, it seems, not only by the frequency with which institutions that are, in one respect or another, non-criminal, non-custodial, non-punitive, or not closely related to the state are nonetheless described as prisons, but also by the tangled history of the development of the prison. For legal scholars and social scientists in particular, the only way to box the meaning of the prison is in effect to conceive of it through its function, which is to say, to construe the prison as an institution that, for example, involuntarily confines persons committed by the state to relatively long terms of incarceration (e.g., one year), for violating the public, criminal laws.³⁸ For the most part, and not least for reasons of consistency, the present inquiry adheres to this definition. But much more important to this Article's critique than any such conceptual details is the idea of prisons, including private prisons, as fundamentally coercive and implicitly violent places where the sovereignty of the state over its citizens, as a prerogative of total control, assumes its most extreme form (with the probable exceptions of capital punishment and war-time compulsory military service) and where the hands of the state are always

37. See, e.g., RALPH B. PUGH, IMPRISONMENT IN MEDIEVAL ENGLAND 87 (1968).

38. See, e.g., DOUGLAS McDONALD ET AL., PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE 10 (ABT Associates 1998); PRISON AND JAIL INMATES AT MIDYEAR 1998 (Bureau of Justice Statistics Bulletin 1998).

evident. From this perspective a whole range of prison-like facilities looms equally problematic vis-à-vis the rule of law, in kind if not also degree.

What makes a prison “private”? Michel Foucault famously defines prisons as intrinsically “private” in the sense that they secret from view punishment practices that were heretofore “public” in a parallel sense.³⁹ Whatever the merits of this formulation, this Article is concerned with private prisons in the proprietary sense, as institutions that are managed and sometimes owned by non-state entities. Beyond this, though, the meaning of the private prison remains no more self-evident than that of the prison as such. The limited character of the state in American society complicates this issue. To the extent that the state is not ubiquitous, and that the prison is not entirely hermetic, *some* aspects of every prison are always private. From the labor of its employees, to provisions for inmates’ subsistence needs, to the land and capital that comprise the prison’s physical structure, each exemplifies every prison’s endemically, if partially, private character. In this sense, it is only possible to imagine a fully public prison either in a thoroughly totalitarian society or when the prison itself is (and this would negate its quality as a prison) an *entirely* self-contained society.

At the same time, no prison in the contemporary world can be fully private. Every prison remains intimately connected to the state, incarcerating inmates arrested, prosecuted, and sentenced by the state for violating the (still) very public criminal laws and their analogues (for example, juvenile offender laws). In this sense, the privatization of prisons is much unlike, say, the privatization of steel mills or utilities or even schools, which may be mandatory and relatively coercive in operation, but to a much more limited degree than prisons. Another dynamic that keeps the private prison very public is that private prisons operate exclusively on revenues derived from the state.

The inherently public aspect of private prisons is a crucial point. It is a principle argument of this Article that in the final analysis the private prison comprises the extension and diffusion—and in no way the negation or displacement—of the sovereignty of the state. As we shall see, this endemic confusion of public and private ushers the private prison into a state of inevitable illegitimacy.

As a practical matter, both critics and proponents of the private prison tend to define it as an institution for criminal confinement that is *wholly managed and operated* by a private firm. Such a perspective excludes not only the typical public institutions, but also those that are provisioned in a more extensive but still piecemeal way by private entities (for example, that out-contract food or laundry services), as well as institutions whose physical structures are privately owned but are nonetheless publicly managed or operated.⁴⁰ As with the matter of the defining

39. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 35-38 (1991).

40. See, e.g., CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS 4-5, 238-39 (1990) (comparing private institutions to those that contract some duties to private companies); DAVID SHICOR, PUNISHMENT FOR PROFIT

the prison, I again accept the impossibility of drawing clear, logically incontestable lines around the private prison. As the following analysis makes clear, for this argument it is the *degree* of private involvement that makes the private prison so problematic—and not any particular qualitative aspect.

B. The Private Prison in Historical Perspective

Despite its contemporary ubiquity, the prison is a relatively recent fixture in Western (indeed, every) society. Moreover, from the outset the prison was infused with private ownership and control, and with private functions, in many respects quite similar to the contemporary private prison. Only in the nineteenth century did the prison come to constitute a common mode of criminal sanction in the United States, and only in the twentieth century did the prison come to comprise a primarily publicly managed affair. It is fair to say that the prison was private long before and long after it was, in fact, a prison. This history does much to anticipate the character of the contemporary private prison, its juridical structure and its dysfunctions.

The historical development of the prison is utterly steeped in the interpenetration of the public and private realms in Western society. Although the distinction of public and private realms was long ago introduced to the Western world in a very furtive way—for example, appearing in the attempt of the early Roman law to distinguish public and private wrongs—as a practical, concrete matter the distinction only really took hold in the nineteenth century, and only then (as countless realists and critics have indicated) in a most incomplete fashion.⁴¹ Pre-modern societies, especially ancient ones, are rather uniformly characterized by the confusion of public and private realms and, where law itself had attained articulate form, a confusion of public and private legal norms. Frequently enough, the underdevelopment of the public-private distinction manifested itself in the juxtaposition of civil and criminal legal regimes and, perhaps even more saliently, in the juxtaposition of public and private control of the administration of “criminal” sanctions.⁴² Only recently in Western society did there exist anything even

14-15 (1995) (discussing forms of private involvement in prisons); J.R. Sevick, *Introduction*, in *CONSTRUCTING CORRECTIONAL FACILITIES: IS THERE A ROLE FOR THE PRIVATE SECTOR* 1, 3 (J.R. Sevick & W.I. Cikins eds., 1987).

41. See, e.g., Morton Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1423-24 (1982) (discussing forms of punishment before and during the 19th century) (appearing in a symposium edition on the public-private distinction).

42. Perhaps the most immediate manifestation of this confusion entailed the virtual merger of tort and criminal law, which apparently characterized the whole history of primate and ancient legal regimes. See, e.g., A.S. DIAMOND, *PRIMITIVE LAW, PAST AND PRESENT* 191-95 (1971) (discussing early civilization's concept of offence to all and offence to an individual). The classic (if not overused) example of this dynamic is the Babylonian *Code of Hammurabi*, which is utterly replete with provisions for private prosecutions, private administration of “criminal” punishments, and, in some cases, a private, quasi-contractual method for establishing the criminal law.

approaching a public monopoly of criminal justice functions.⁴³ Of course, state-structured punishments did appear in the pre-modern world, including the European world. But only rarely did this involve any kind of formal, punitive incarceration, which almost always was used for purposes of criminal and civil detention, and not for punishment as such. Much more typical were extra-legal punishments or punishments based on the application of fines and tort-like sanctions, forced labor, banishment and exile, corporeal punishment, and the like.⁴⁴ These practices were consistent not only with the barbarism of the day but, more importantly, with existing structural and material realities: the rigid social relations, the absolute lack of social surplus, and the general shortage of labor in such societies. In this kind of historical context the prison as we know it—and as Georg Rusche and Otto Kirchheimer stress—*could not* assume a central place in the system of social control.⁴⁵

When the practice of punishment by incarceration did appear in pre-modern society, it tended to reflect within itself the prevailing confusion of the public and private in society as a whole. Almost always, early prisons, which in scale, function, and internal structure were more like contemporary jails than anything, either were privately owned or managed, or served transparently private functions, or both. From its very inception in Western society, the prison was used to achieve such private ends as the collection of civil debts, the punishment and secreting away of rivals, and the administration of domestic tyranny.⁴⁶ In medieval Europe, this tradition played out perhaps most conspicuously in the punitive use of prisons to maintain order within the essentially private domains of noblemen and clergy.⁴⁷ In the early modern era, this dynamic prevailed in the use of prisons to detain upper-class delinquents and the insane.⁴⁸

To an equal degree, the early prison almost always was a privately owned or managed affair. Feudal manors maintained prisons that were private in the truest sense: privately functioning, privately managed, and privately owned.⁴⁹ From medieval times through the Industrial Revolution, the maintenance of European jails tended to be the personal responsibility of local sheriffs and their analogues, enterprising minor noblemen, or everyday entrepreneurial “keepers.” Not just an obligation, though, this function remained a “business proposition” until at least the end of the eighteenth century, with the keepers and “franchisees” taking fees

43. See, e.g., MICHAEL R. WEISSER, *CRIME AND PUNISHMENT IN EARLY MODERN EUROPE* 127 (1979) (citing move of criminal law in the 17th century toward public domain).

44. See ANTHONY BABINGTON, *THE POWER TO SILENCE: A HISTORY OF PUNISHMENT IN BRITAIN* 3-6 (1968).

45. See RUSCHE & KIRCHHEIMER, *supra* note 7; WEISSER, *supra* note 43, at 162-63.

46. See, e.g., Edward M. Peters, *The Prison Before the Prison*, in *OXFORD HISTORY OF THE PRISON* 3, *passim* (1995).

47. See *id.* at 28-34. See also ANTHONY BABINGTON, *THE ENGLISH BASTILLE: A HISTORY OF NEWGATE GOAL AND PRISON CONDITIONS IN BRITAIN 1188-1902* (1972).

48. See Pieter Spierenburg, *The Body and the State*, in *OXFORD HISTORY OF THE PRISON* 49, 68-73 (1995).

49. See PUGH, *supra* note 37, at 52-53.

from the state and inmates (or "customers") alike.⁵⁰ In the sixteenth century in Europe, there arose an institution that completely merged private (or at least non-criminal) functions with for-profit management: the so-called "house of correction." The house of correction, which united under private management the functions of poorhouse, jail, and manufactory, also juxtaposed under private management very minimal public safety functions (as we would now think of them) with public welfare and labor-control functions.⁵¹

The private, labor-exploiting character of the house of corrections was not at all unique among early modern punishments. Convict "transportation," especially, closely replicated the early prison's thorough juxtaposition of public and private characteristics. Transportation saw the forced removal of tens of thousands of "criminals" (and the term has to be used advisedly) from Europe to places like Australia, North America, and New Caledonia, where they spent their terms, laboring for private contractors, often in the immediate custody of such contractors.⁵² Other punishment regimes of this time, forced labor on public works and galley slavery, were not exactly private; yet they too operated on a statist, mercantilist logic of public profit-making that once again underscored the confusion of public and private in these times and places.⁵³

In the United States, the confusion of public and private impressed itself into the history of criminal justice generally, and that of the prison more specifically. In colonial America, there were no true prisons and very few jails to start with, and incarceration was rarely resorted to as formal criminal punishment. As in medieval Europe, labor was too precious, social surpluses too short, and culture too backwards to justify such institutions.⁵⁴ Punitive incarceration was not, of course, unknown. However, as elsewhere, it was subordinate to other practices like banishment, fines, corporeal punishment, and, of course, outright vigilantism.⁵⁵ And where there were jails and prisons, they were typically privately run operations—especially, it seems, in that even ostensibly public officials derived their salaries both from fees as well as from charges levied on inmates.⁵⁶ As in Europe, these facilities often took the form of privately-run houses of corrections.⁵⁷

America generally is regarded as the birthplace of the modern prison—the

50. See *id.* at 87-113; RUSCHE & KIRCHHEIMER, *supra* note 7, at 62.

51. RUSCHE & KIRCHHEIMER, *supra* note 7, at 42-44; WEISSER, *supra* note 43, at 164-65. Cf. SHICHOR, *supra* note 40, at 23 (describing workhouses as places to care for and discipline those considered to be dangerous to society).

52. RUSCHE & KIRCHHEIMER, *supra* note 7, at 114-19. Cf. STEPHEN NICHOLS, *CONVICT WORKERS: REINTERPRETING AUSTRALIA'S PAST* (1989).

53. Spierenburg, *supra* note 48, at 67.

54. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 48-49 (1993).

55. See, e.g., *id.* at 74-75, 179-87 (discussing more common forms of punishment such as whipping or vigilantism).

56. SHICHOR, *supra* note 40, at 25-26.

57. FRIEDMAN, *supra* note 54, at 49.

prison, that is, as a place for large-scale, long-term, and punitive incarceration. Indeed, the foundations of the modern prison were set with the inauguration of two rather distinct models of the “penitentiary”: the so-called “Walnut Street” or “Pennsylvania” system, established in the 1780s; and the “Auburn” or “congregate” system, which grew out of the Walnut Street system early in the nineteenth century. Both of these systems were premised on a set of common practices, centered around the segregation of inmates into private cells and the enforcement of stringent rules of inmate silence. The main difference between the two lay in their distinct ways of mobilizing inmate labor. The Walnut Street system, which mandated silence by absolute solitude among inmates, lent itself only to the minimal, inefficient use of labor (for example, in a manufactury mode). The Auburn system retained for a time the Walnut Street system’s rules of silence, but eshewed the institution of absolute solitude in the course of instituting a much more efficient, collective, factory-like system of labor. The Auburn system thus gave rise to a set of practices—most notably the mainly nocturnal use of private or semi-private cells combined with some type of collective labor in the day—which continue to inform the structure of contemporary prisons worldwide.⁵⁸

Though still infused with some private characteristics, each model of the penitentiary marked a significant movement towards the modern, public prison. Both systems also brought about the segregation of criminal inmates from civil detainees (for example, debtors). The inefficient Walnut Street system proved especially incompatible with the profitable employment of inmates, and hence with private management or ownership structures.⁵⁹ And while the Auburn system could profitably employ labor, it was only rarely that this involved direct private control. Sometimes jurisdictions leased out inmates to contractors who installed their capital in the prison and directly managed the inmates’ work; more often this system involved a more subtle reduction of erstwhile public institutions to the logic of private market actors. Under the dominant “piece-price” system, prison administrators assumed the role of factory managers, organizing the (hopefully) profitable production of commodities by their inmates.⁶⁰ The quintessential big house prisons employed this system to quite profitable ends, selling on the commercial market everything from shoes to furniture until the twentieth century.⁶¹

At the same time that the rise of the penitentiary marked a move away from the private prison, other institutions from roughly the same period show just the opposite movement. Most obvious in this regard are the punitive aspects of Southern slavery. In many ways, slave plantations in the antebellum South were

58. For an overview of the development of these prisons, see, e.g., Matthew W. Meskell, Note, *History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839 (1999).

59. See MARK COLVIN, PENITENTIARIES, REFORMATORIES, AND CHAIN GANGS: SOCIAL THEORY AND THE HISTORY OF PUNISHMENT IN NINETEENTH-CENTURY AMERICA 60-61 (1997). Cf. Paul Takaki, *The Walnut Street Jail: A Penal Reform to Centralize the Power of the State*, in PUNISHMENT AND PENAL DISCIPLINE 48 (Tony Platt & Paul Takaki eds., 1980).

60. COLVIN, *supra* note 59, at 96-98.

61. RUSCHE & KIRCHHEIMER, *supra* note 7, at 130-31; SHICHOR, *supra* note 40, at 28-34.

private prisons unto themselves. Masters and mistresses retained wide authority by custom and law to discipline their "properties" for all manner of deed, criminal or otherwise. Of course, slave owners did not entirely monopolize criminal justice functions with respect to their slaves, but they *nearly* did so, and the exceptions—for example, the modest and usually ineffective legal limits on owners' disciplinary prerogatives—mainly prove the rule.⁶² In such a social system, incarceration exacted direct costs in lost labor, fines were utterly inapplicable, and public punishments of all sorts implied a loss of slaves' services and an abrogation of owner's prerogative. Accordingly, the punishment of slaves most often took the form of corporeal punishment, extra work, and punitive resort to the slave auction, all privately administered.⁶³

In the postbellum South, until at least the 1940s, the practice of substituting the plantation for the penitentiary continued in the guise of several different forced labor regimes. Among the more salient examples of these was the so-called "criminal-surety" system, whereby "criminal" offenders (for example, those who were "convicted" of violating very dubious vagrancy, petty larceny, or trespassing laws) typically were afforded the "opportunity" to exchange future labor for payment of their fines and "court costs" by local landowners and capitalists. Sometimes formal, statutorily authorized outcome of convictions, sometimes informal and the result of pretrial plea-bargaining, the result was always the same: reduction to peonage as criminal punishment (or, more accurately, criminal sanction as a source of peonage). The offender usually was bound to remain and labor at his surety's establishment for months or even years earning minimal wages against his debt.⁶⁴

62. FRIEDMAN, *supra* note 54, at 52-53. See also PHILIP J. SCHWARZ, *TWICE CONDEMNED: SLAVES AND CRIMINAL LAWS OF VIRGINIA, 1705-1865* 141-44 (1988).

63. American slavery, it turns out, anticipated the private prison in another key respect: as a formal substitute for the other contemporary punishments levied on erstwhile *free* blacks. Throughout slave-holding states, free blacks who ran afoul of the law (again, criminal or otherwise) were sometimes subject to being sold into private slavery. See, e.g., ROBERT B. SHAW, *A LEGAL HISTORY OF SLAVERY IN THE UNITED STATES* 34, 38-45 (1991); A. Leon Higginbotham & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimation of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 978 (1992). See also *Negro Ann Marie Cornish v. State*, 15 Md. 208 (1860) (free black person guilty of larceny subject to in-state enslavement, but not sale abroad); *Ponder v. Cox*, 26 Ga. 485 (1858) (black person enslaved on criminal conviction not guilty of illegally coming into Georgia when involuntarily brought into the state by owner).

64. William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. S. LEGAL HIST. 31, 53-55 (1976); see generally DANIEL A. NOVAK, *THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY* (1978); *United States v. Reynolds*, 235 U.S. 133 (1914) (finding an Alabama regime of this kind in violation of the Thirteenth Amendment as well as the Anti-Peonage Act). In *Reynolds*, the peon, one Ed Rivers, a black man, had been convicted of petty larceny and fined \$15, plus court costs of \$43.75. One J.A. Reynolds then appeared as surety on behalf of Rivers, paying off the state and getting Rivers out of jail. In exchange for this act, Rivers signed a written contract to work for almost ten months at \$6 a month. After several weeks of this, Rivers quit, only to be rearrested and assessed additional costs of \$87.05 (plus a 1 cent fine), for which he "confessed judgement with G.W. Broughton" and agreed to work for Broughton for over fourteen months at the same rate of \$6 a month. *Id.* at 140. All of this was expressly permitted by Alabama statute.

IV. THE CONVICT LEASE SYSTEM AND THE SOVEREIGNTY QUESTION

The most thorough link between criminal justice and private interests in the American experience is the convict lease system. The most significant of the several postbellum forced labor regimes,⁶⁵ the convict lease system also perhaps best anticipates the juridical structure of the contemporary private prison. Like the contemporary private prison, convict leasing was premised on the simultaneous extension and diffusion of state sovereignty and the interpenetration of public and private realms. Similarly, convict leasing anticipates an organic relationship between this perversion of sovereignty, on the one hand, and the objectively problematic tendencies that seem to inhere in all private prisons, including the contemporary private prison, on the other.

Though, to be sure, tried in some northern and western states, and established in some cases prior to the Civil War, the convict lease system came into its own in postbellum southern states.⁶⁶ Every southern state after the Civil War, except Virginia, eventually instituted the widespread leasing of state inmates to private individuals or firms. The practice continued at the state level into the 1920s (in Alabama and Florida). Apart from this—and probably well into the civil rights era—uncounted local governments in the South (usually sheriffs in some corrupt capacity) resorted to leasing their county prisoners.⁶⁷ In every case, the essence of the institution remained the same: the leasing out of convicted persons to private contractors who then acquired the right to use convicts' labor for commercial purposes. In Louisiana and Kentucky, the whole prison systems were leased out to single parties. Lessees usually assumed complete *de facto* custody of the state's convicts, organizing their work as well as providing for their subsistence, discipline, security, and so forth.⁶⁸ Quite frequently, convicts were even subleased—often illegally and sometimes multiple times.⁶⁹

Apparently only Georgia and Alabama formally sanctioned the criminal-surety system on the state level. However, the practice was quite widespread as an informal and local practice. See Cohen, *supra*, at 55.

Not unrelated to this practice were those that made private plantation labor the end result not so much of criminal sanction, but of criminal deterrence. For example, most postbellum Southern states enacted labor contract enforcement regimes, as well as "anti-enticement" statutes, each of which attempted to criminalize the abrogation of labor contracts and to bind blacks to the soil. In each of these practices the lines between public and private, between criminal and civil, were, to say the least, strained. See *generally id.*

65. MATTHEW MANCINI, ONE DIES, GET ANOTHER 14-15 (1996).

66. Apparently, Massachusetts briefly tried convict leasing in 1798, Kentucky did so in the 1820s, Oregon in 1859, Missouri sporadically from the 1850s through the 1870s, and California over a similar period. Each of these experiments, though, proved disastrous. MANCINI, *supra* note 65, at 5. Apparently, too, convict leasing was also tried in Nebraska, Kansas, and Oklahoma in the years following the civil war. Malcolm M. Feeley, *The Privatization of Prisons in Historical Perspective*, 6 CRIM. JUST. RES. BULL. 1, 5 (1991).

67. See Cohen, *supra* note 64, at 55-57; E. STAGG WHITTIN, PENAL SERVITUDE 33-38 (1912).

68. MANCINI, *supra* note 65, at 15.

69. In fact, it seems that subleasing was the norm and not the exception. Such an arrangement allowed well-placed elites, once they acquired the initial contracts, to multiply their profits, whilst avoiding the direct risks and costs of managing the convicts' labor. See MANCINI, *supra* note 65, *passim*.

A. *The Juridical Structure of Convict Leasing*

Despite its private aura, convict leasing clearly represents the extension of state sovereign functions. The rise of leasing facilitated a massive expansion of criminal authority in the states that practiced it and accounted for massive increases in their incarceration rates. Likewise, even though corruption and outright underpayment of lease obligations were constant drains, leasing states benefited handsomely from their contracts. On average, leasing generated revenues several times the costs. At one point, for example, Alabama derived six to ten percent of its total state revenues from leasing⁷⁰—and this in contrast to the prospect of actually paying for incarceration. Indeed, aside from the generation of revenues, leasing performed several other crucial functions in postbellum Southern society that in the wake of slavery were otherwise devolving to the state, including the political control of blacks and the affirmation of segregation; the re-mobilization as well as the “proletarianization” of black labor; the deflation of wage-rates generally; and the development of public infrastructure.⁷¹

However, leasing did not comprise merely the extension of state sovereignty. Leasing also was based on the direct penetration of private powers, interests, and norms into an erstwhile public mode for the expression of sovereignty. The convict leasing system was, in other words, a means of spreading, or diffusing, the sovereignty of the state. This dynamic is manifest on one level on the institution’s surface: with the fact that lessees themselves simultaneously discharged the state’s penological functions and remained at the same time private actors, profiting directly from the labor of their leased convicts and doing for the most part as they pleased with the convicts. But this is not all. It is important to understand the sovereignty-diffusing aspects of convict leasing in terms of at least three less obvious dynamics: (1) in the legal ambiguity that surrounded the leasing regimes; (2) in the lessees’ extensive control over the political and especially criminal process; and (3) in evidence of the lessees’ own attempts to wield comprehensive, archaic sovereignty over their charges.

Lessees’ manipulation of the political and criminal processes is perhaps most obvious of these dynamics. Across the South, the introduction of convict leasing corresponded with the enactment of substantive criminal laws that clearly appear to have been tailored to increase dramatically the number of young, able-bodied black men available for lease.⁷² The criminal justice systems of leasing states were “systematically geared for the collection of [black] labor.”⁷³ In at least some cases

70. EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH* 196 (1984); MANCINI, *supra* note 65, at 102, 112-13, 179-80.

71. On the various functions of convict leasing, see ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* 82, 87-104, 163-64 (1996). See also AYERS, *supra* note 70, at 191-95, 212-13.

72. LICHTENSTEIN, *supra* note 71, at 85-86.

73. MANCINI, *supra* note 65, at 41.

this result was actually the product of overt lobbying *to change the criminal laws to benefit well-placed lessees*.⁷⁴ Indeed, lessees were also quite able to influence the administration of the criminal law in ways that further guaranteed a healthy supply of “hands”—where convicts labored in agriculture, for example, the enforcement of the criminal law assumed a seasonal character, as it were.⁷⁵ In Mississippi, the lessees were so influential within that state’s political and legal systems that the formal prohibition of leasing in the state constitution not only was circumvented, but also ignored so completely that within several years of its ratification, the number of leased inmates had *doubled*.⁷⁶

To say that the enterprise of convict leasing was corrupt in more traditional ways can only be an understatement. Corruption was utterly intrinsic to the perverse juridical structure of convict leasing, comprising not an isolated aspect of leasing, but the functional essence of the system’s blurring of the line between the public and private. In the words of historian Edward Ayers, “The convict lease system became a sort of mutual aid society for the new breed of capitalists and politicians of the white Democratic regimes of the New South.”⁷⁷ Bribes were quite common and the lease contracts invariably went to well placed firms or individuals—including, remarkably enough, characters who had sometimes already bilked their state under earlier agreements.⁷⁸ Lessees everywhere notoriously underpaid the state under their contracts.⁷⁹ In other cases they aggressively disputed obvious contractual terms.⁸⁰ This is not surprising. According to historian David Oshinsky, in Mississippi, the lease was the “most prized political contract”; and in Georgia, for example, “political office-holding, as opposed to simple influence, became the prerequisite for winning a lease.”⁸¹ As Ayers points out, it was common everywhere that “the same man played the roles of both entrepreneur and officeholder”: governors, senators, party bosses, and the like predominated among lessees. He notes, for example, that:

Although Joseph Emerson Brown had called for the abolition of a centralized penitentiary when he was governor of Georgia in 1865, he made a fortune leasing convicts when he was senator in the 1880s. Jeremiah W. South, lessee

74. In Arkansas, for example, a principal lessee, Zebulon Ward, was able to bribe the state legislature (with barbecues, among other things) into revising the criminal law so as to dramatically increase the number of inmates available for lease. MANCINI, *supra* note 65, at 119-20.

75. *Id.* at 24, 42, 197; *see also* Cohen, *supra* note 64, at 50-51. This aspect of convict leasing is consistent with the criminal law’s assumption of seasonal tendencies in other forced labor contexts. RUSCHE & KIRCHHEIMER, *supra* note 7, *passim*.

76. *See* MANCINI, *supra* note 65, at 17-18.

77. AYERS, *supra* note 70, at 195.

78. *See* MANCINI, *supra* note 65, at 132-33.

79. *See id.* at 88, 100, 137-38.

80. *See* State v. James, 16 So. 751-52 (La. 1895) (holding that the state should collect \$6,000 that the lessee was supposed to pay under the original lease against the salaries of minor officials).

81. DAVID M. OSHINSKY, *WORSE THAN SLAVERY* 63-64 (1996).

of Kentucky convicts from 1869 to his death in 1880, supposedly exercised greater power over Kentucky's government than any other official, controlling a third of the legislators 'as absolutely as he controlled the convicts.' A political dynasty sprang from convict labor in Alabama, where John H. Bankhead ruled.⁸²

It also should be observed that in several cases, at least, public opponents of leasing were assassinated—with predictably minimal consequences for their murderers.⁸³ One opponent—or at least, semi-opponent—of leasing actually was murdered inside the Georgia treasurer's office amidst a quarrel with another "gentleman" over leasing!⁸⁴

A more subtle dynamic—at least less noticeable to historians—is that of the considerable ambiguity surrounding the legal status of convict leasing. The reported cases suggest that Southern courts were rather unclear about the legal standing of leasing and suggest further that the basis of this confusion lay with the relationship between convict leasing and sovereignty. A particular source of confusion for courts in this context was the seemingly simple matter of determining where the state began and ended. This problem was especially salient and vexing with regard to liability issues.⁸⁵ A common matter for appellate courts to resolve was whether leased convicts were employees subject to contemporary master-servant obligations, or whether, instead, they were mere inmates and lessees the functional equivalents of public jailers. Some courts tended to embrace the latter position.⁸⁶ Others, usually to the benefit of the lessees, embraced the former position. To this end, a few lessees were able successfully to argue that, inasmuch a state retained (only) *formal* control of the convicts, this vitiated the *lessees'* control and therefore any tort liability for injury to the convicts.⁸⁷

The exploitation of ambiguity was not confined to cases involving injury to convicts. For example, a lessee who allowed an inmate to escape—an absolute epidemic with leasing—was able to avoid liability to a third party injured by the inmate by successfully invoking the general immunity of jailers.⁸⁸ In another case concerning liability to the state for escapes, the South Carolina Supreme Court was

82. AYERS, *supra* note 70, at 195.

83. See MANCINI, *supra* note 65, at 87, 138-40; OSHINSKY, *supra* note 81, at 49-50.

84. Cox v. State, 64 Ga. 374 (1979) (discovering that the murder occurred because the erstwhile opponent of the leasing was interested in obtaining a lease for himself).

85. See Cunningham & Ellis v. Moore et al., 55 Tex. 373 (1881) (holding lessee not liable for death caused by defective bunk bed where bed supposedly was in control of state's officers).

86. See Chattahoochee Brick Co. v. Braswell, 18 S.E. 1015 (Ga. 1893) (holding inmate not a servant for purpose of tort action against lessee arising out of employment).

87. See Mason v. Hamby & Toomer, 64 S.E. 569 (Ga. Ct. App. 1909) (holding that the primary duty of protecting the convicts was upon the state itself); Cunningham & Ellis, 55 Tex. at 373 (finding that nominal retention of state "control" vitiated lessee liability for injury to inmates). Cf. St. Louis I.M. & S.R. Co. v. Boyle, 83 Ark. 302 (1907) (holding company not liable for tortious act of state convict).

88. Henderson v. Dade Coal Co., 28 S.E. 251 (Ga. 1897) (holding that as a general rule, jailers are not liable in damages for a criminal tort committed by a convict).

compelled to recognize the lease contract—and neither “public policy” nor the “relations of the parties”—as the only determinate of liability.⁸⁹ In one particularly absurd case, a lessee attempting to evade stipulated fines for allowing escapes was reduced to arguing (unsuccessfully) that the escapees should not, legally, have been inmates in the first place!⁹⁰ Almost as absurd, another lessee who had kept an inmate beyond his release date was able successfully to argue that unlike a public jailer, the lessee had no positive duty to release the inmate—the court found the lessee’s only duty to lie in tort.⁹¹ In still another case, the Alabama Supreme Court had to decide a *habeas* petition where the inmate was rearrested by the sheriff after simply being set free by a lessee who no longer needed his labor.⁹²

In numerous other cases, courts were required to engage in the dubious chore of sorting out the obligations of lessees who were themselves either presently or not far removed from major public office. For example, one-time U.S. Senator and Governor Joseph E. Brown (mentioned above by Ayers), as well as Governor John B. Gordon, both of Georgia and both heavily involved in leasing, figure as lessees in the case of *Georgia Penitentiary Companies Nos. 2 & 3 v. Nelms*⁹³—the case principally concerned the legality of leasing as such. The same Governor Gordon appears again in a private capacity in *Gordon v. Mitchell*,⁹⁴ where the issue was specifically the validity of convict subleasing. Of course, courts have always routinely heard cases involving elites—one might even argue that such is the *raison-d’être* of civil justice. What makes this phenomenon important and troubling in these cases is that the underlying issue remains the most extreme kind of restraint and exploitation, with state sanction, of virtually helpless persons.

Certainly on some occasions, lessees’ political influence trumped formal authority at the highest levels of state government. In *Henry v. Mississippi*,⁹⁵ the Mississippi Supreme Court confronted the claim by a district attorney and the Governor’s office that the “Sandy Bayou Plantation” was a lease regime in violation of the state’s 1890 constitution, which on its face prohibited convict leasing. This is the case that ultimately sanctioned the above-mentioned circumven-

89. *Lipscomp v. Seegers*, 22 S.C. 407, 409 (1885) (holding that because convicts were leased under contract required by state, contractor’s liability was fixed and could not be measured by relations of the parties or supposed public policy).

90. *Penitentiary Co. No. 2 v. Gordon*, 11 S.E. 584, 585 (Ga. 1890) (holding that receipt by prison company of inmates from penitentiary created presumption that prisoners were properly convicted and sentenced).

91. *See Chattahoochee Brick Co. v. Goings*, 69 S.E. 865, 868 (Ga. 1910) (holding that lessee who knowingly detained convict beyond term of his sentence committed a tort).

92. *McQueen v. State*, 30 So. 414 (Ala. 1901) (holding that even if it does not appear that criminal is rearrested during escape, the order of the judge denying the discharge is free from error).

93. 71 Ga. 301 (1884) (holding constitutional and valid the governor’s right to lease convicts to penitentiary companies).

94. 68 Ga. 11 (1881) (holding illegal any contract to sublet, sublease or hire out convicts leased from the state). *Cf. Lockett v. Georgia*, 61 Ga. 44 (1878) (rejecting lessee’s claim that he was an “officer” of the state and exempt from jury duty).

95. 39 So. 856 (Miss. 1906).

tion of Mississippi's constitution. The majority of the court ultimately upheld the legality of the operation on the basis of a rather creative—not to mention apparently counterfactual—distinction between a “state farm” (which was legal) and a “convict farm” (which was illegal). The substance of the court's reasoning was that the lessee, H.J. McLaurin, had only leased to the state the *land* on his plantation, and had not himself leased the convicts from the state. One obvious problem with this contention is that McLaurin actually paid the state \$25,000 annually for the labor of the convicts, and then was entitled to pocket the rest of the operation's revenues. McLaurin also was required to furnish, *inter alia*, the necessary mules and teams for working of the said plantation, and feed for same, and also to furnish all wagons and farming implements and planting seeds. Of course, McLaurin was supposed to leave control of the convicts to the state—this, in fact, was the basis of the court's determination in McLaurin's favor that the arrangement was not a lease. But as in so many of these cases, it seems likely that the lessee did not at all abdicate control of the convicts—they lived on his plantation and labored under his ultimate control.⁹⁶

Not unrelated to this legal mess occasioned by the intermixing of public and private was the prevalence of a more mundane and brutal kind of private sovereignty that the states ceded to lessees and then proved unwilling or unable to control. Almost always, leasing meant incredible levels of torture, privation, and overwork that provoked contemporary comparisons to slavery, feudalism, and czarist gulags.⁹⁷ Lessees set their convicts to work at tasks that free laborers not only would not perform as cheaply, but often would not perform at all. Brick-making, coal mining, turpentine gathering, cotton farming, and levee maintenance were favorite applications. Often enough, these operations developed into elaborate potentates. “Major” S.L. James ran the Louisiana penal system for many years at his massive plantation, “Angola,” which eventually became the state penitentiary that retains the name.⁹⁸ “Colonel” James Monroe Smith's “Smithonia” plantation in Georgia, worked by leased convicts, featured no less than six schools, a post office and hotel, sawmill, and a general store.⁹⁹ Rates of injury, illness, and death were consistent with the inherently dangerous nature of these jobs as well as with the utter disposability of the convicts in the eyes of their greedy, racist, and just plain sadistic keepers. Annual death rates under some lessees approached fifty percent,¹⁰⁰ and rates over ten percent seem to have been quite normal.¹⁰¹ Such

96. *Id.* (holding that a contract whereby a penitentiary agreed to staff a plantation with convicts was a lease and not a hiring of the convicts by the owner); *State v. Henry*, 40 So. 152 (Miss. 1906) (same); MANCINI, *supra* note 65, at 142-43.

97. See, e.g., MANCINI, *supra* note 65, at 33-34; WHITIN, *supra* note 67, at 1-3.

98. See MARK T. CARLETON, *POLITICS AND PUNISHMENT: THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM* 135-66 (1971).

99. OSHINSKY, *supra* note 81, at 65-67.

100. See SHICHOR, *supra* note 40, at 36.

101. See MANCINI, *supra* note 65, at 66-67.

mortality rates far exceed those typical of slavery (where even the most barbaric masters retained a direct proprietary interest in the survival of their slaves) as well as those of contemporary northern prisons.¹⁰² These pervasively atrocious conditions speak again to another dimension of the lessee's sovereignty: their extensive control over the political and legal systems. Unless the state or some other elite was affected, lessees and their agents almost never sustained any criminal or civil liability for their gross misdeeds.¹⁰³

B. Rule of Law and Convict Leasing

Convict leasing finally came to an end on the state level in the 1920s, yet it was not until the conclusion of the civil rights era that it was completely abolished on the county level. The reasons for leasing's demise are many, but seem to center around the displacement of the underlying modes of production and the political agitation of free laborers and excluded businessmen.¹⁰⁴

Contrary to the intimations of some commentators, I do not regard leasing as the genetic basis or direct institutional equivalent of the contemporary private prison.¹⁰⁵ In fact, there is a vital structural difference between the contemporary private prison and the convict lease system. Although leasing involved the purchase of inmate labor by the private party, the contemporary private prison involves the state's payment to the private prison in exchange for merely keeping the inmates.¹⁰⁶ Nevertheless, I think it clear that convict leasing does anticipate in a very substantial way the problematic characteristics of the contemporary private prison.

In order to appreciate this association, it is important to emphasize the deep interconnection between the absence of rule of law norms and the signature aspects of convict leasing. The foregoing account makes clear that the problematic characteristics of convict leasing, including the aggregation of state power, corruption, legal ambiguity, and anarchical private sovereignty, were clearly fundamental to convict leasing and to its key *raison d'être*: political repression and proletarianization of blacks, profiteering by local elites, cheap development of state infrastructure, and the like. Also clear is that the perverse, anti-rule of law juridical structure that accompanied convict leasing—the merger of public and private, and the simultaneous extension and diffusion of sovereignty—was equally

102. See Cohen, *supra* note 64, at 56.

103. See MANCINI, *supra* note 65, 59-77.

104. On the demise of convict leasing, see LICHTENSTEIN, *supra* note 71, at 126-87.

105. See W.J. Michael Cody & Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829, 846-849 (1987) (drawing parallels between Tennessee's old convict leasing system and its contemporary experiences).

106. This difference is less consequential in a practical sense: each system holds mutual economic advantages to state and private parties. In the convict leasing system, the state enjoys reduced costs and splits labor-generated profits with the lessees; with the contemporary private prison the state and the proprietor split not labor revenues, but tax revenues.

fundamental to the institution. As we have seen, the absence of rule of law norms provided a juridical climate in which the aggregation of state power, corruption, and the like, could subside in a more or less legally unproblematic fashion. In light of convergence, it seems evident that the relationship between convict leasing and the absence of rule of law norms was not merely accidental, nor even simply functional, but rather of organic proportions.¹⁰⁷ The next section illustrates how the same unfortunate relationship reappears with the modern private prison.

V. THE CONTEMPORARY PRIVATE PRISON AND THE SOVEREIGNTY QUESTION

For a relatively brief period from about the 1940s through the 1970s, public entities enjoyed a near monopoly in the business of incarceration. This situation came to an end in the mid-1980s on a broader wave of privatization and a surge in American incarceration rates. The first modern county-level privatization contract was established in 1984 and the first state-level contract in 1985. Between three and six percent of inmates nationwide are now incarcerated in privately run facilities, for a total of about 120,000 inmates in about 150 facilities. Several states and the District of Columbia incarcerate at least fifteen percent of their inmates in private prisons. Today the industry is dominated by two corporations, Wackenhut Corrections Corporation and Corrections Corporation of America (CCA); together they control over two-thirds of the market. The industry's annual gross revenues probably exceed \$1 billion.¹⁰⁸

A. *Conventional Critiques of the Private Prison*

At least one recent poll of national scope (albeit commissioned by a union representing public prison employees) claims to demonstrate significant public skepticism about private prisons.¹⁰⁹ General popular sentiment as well as a plethora of editorial pieces seems to confirm this attitude. In fact, from its resurgence in the 1980s, the private prison has been subjected to a number of more or less scholarly critiques. These critiques, which of course transcend the critique of criminal punishment as such, can be grouped in three overlapping categories: (1) those that focus on the private prison's practical or "performance" shortcoming; (2) those that point to the private prison's legally problematic characteristics; and (3) those that deem private prisons inherently problematic on a normative, usually moral or ethical, plane. A review of these perspectives reveals that,

107. See AYERS, *supra* note 70, *passim* (focusing throughout on the pervasiveness of this state of affairs, especially as manifested in the prevalence of extra-legal punishments).

108. On the parameters of this industry, see, e.g., Martin E. Gold, *The Privatization of Prisons*, 28 URB. LAW. 359, 370-72 (1996); McDONALD ET AL., *supra* note 38. As mentioned above, the most current information of this kind is available through the Center for Studies in Criminology and Law, the University of Florida, at <http://web.crim.ufl.edu/pcp> (last visited Nov. 12, 2000).

109. See PRIVATE PRISON SURVEY (American Federation of State, County and Municipal Employees 1999), at <http://www.afscme.org/private/lake.htm> (last visited Jan. 10, 2000).

while each is often quite useful, they remain inadequate to a thorough critique of the private prison.

Practical criticisms of the private prison center on questions of performance—that is, on the ability of these prisons to achieve, for example, greater efficiency than their public counterparts or otherwise to provide adequate services measured in levels of violence and abuse, recidivism, and fiscal costs and relative to public prisons.¹¹⁰ Perhaps the most common variant of this critique focuses on a proposed contradiction between the provision of quality services of any kind and the financial self-interests of private prison contractors.¹¹¹ Though many performance issues remain unresolved, there is more than ample evidence that private prisons are not dramatically more efficient than public institutions¹¹² and have struggled to provide services even equal to that of public prisons.¹¹³ Aside from the underdeveloped state of the debate, the only thing consistently problematic about such critiques is that, whatever the focus, they consistently fail to connect narrow failings to fundamental jurisprudential problems.

Much the same can be said of typical legal critiques of the private prison. These critiques frequently focus on whether the private prison violates constitutional constructs like the so-called non-delegation doctrine, the due process clauses, or the Thirteenth Amendment.¹¹⁴ In other cases, critics confront the private prison's relationship to traditional liability doctrines, both state and federal, statutory and common law.¹¹⁵ Indeed, the 1997 Supreme Court decision, *Richardson v. McKnight*,¹¹⁶ which squarely confronted the question of private prison guards's entitlement to the privilege of qualified immunity in the context of § 1983 actions, apparently accounts for the majority of recent legal commentaries on this topic.¹¹⁷

110. See, e.g., Douglas C. McDonald, *The Costs of Operating Public and Private Correctional Facilities*, in PRIVATE PRISONS AND THE PUBLIC INTEREST 86 (Douglas C. McDonald ed., 1990). Cf. Eric Bates, CCA, *the Sequel: The Largest Private Prison Firm Continues Pattern of Abuse*, NATION, June 7, 1999, at 22-23.

111. See SHICHOR, *supra* note 40, at 135-65 (reviewing the literature on this question); Todd Mason, *For Profit Jails: A Risky Business*, in PRIVATIZING CORRECTIONAL INSTITUTIONS 163 (Gary W. Bowman et al. eds., 1993). But see Charles H. Logan, *The Propriety of Proprietary Prisons*, 51 FED. PROBATION 35, 38 (1987).

112. See PRIVATE AND PUBLIC PRISONS: STUDIES COMPARING OPERATIONAL COSTS AND/OR QUALITY OF SERVICE (General Accounting Office, GPO 1996).

113. See CHRISTIAN PARENTI, LOCKDOWN AMERICA 221-25 (1999).

114. See, e.g., Warren L. Ratliff, *The Due Process Failure of American Prison Privatization Statutes*, 30 SETON HALL L. REV. 371 (1997); Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911 (1988); Joseph E. Field, Note, *Making Prisons Private: An Improper Delegation of Governmental Power*, 15 HOFSTRA L. REV. 649 (1987).

115. See, e.g., IRA P. ROBBINS, THE LEGAL DIMENSIONS OF PRIVATE INCARCERATION (1988); Michael Walzer, *Hold the Justice*, NEW REPUBLIC, Apr. 1985, at 12. Cf. *West Virginia Debates Private Prison Constitutionality*, WEST'S LEGAL NEWS, Dec. 4, 1996, available at 1996 WL 690697.

116. 521 U.S. 399 (1997).

117. See, e.g., Robert Trant, Comment, *Richardson v. McKnight: Are Private Prison Operators Engaged in State Action for Purposes of 42 U.S.C. § 1983?*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 577 (1999); Brett R. Carter, *Civil Rights—Richardson v. McKnight: The Rise and Fall of Prison Guards' Qualified Immunity*, 28 U. MEM. L. REV. 611 (1998); David Lemkemeier, *Withholding Qualified Immunity from Private Prison Guards: A Costly Mistake*, 54 WASH. U. J. URB. & CONTEMP. L. 345 (1998).

Other items of concern in this area include the matter of access to private prison records and the legal issues engendered by intervening- or cross-jurisdictional private prisons.¹¹⁸ Again, the problem with such critiques is not an intrinsic one. As we shall see, the recurrence and relative insolubility of liability questions in the private prison context is an important premise of my own critique. The problem is rather a failure to connect narrow failings to fundamental jurisprudential problems.

More jurisprudential in spirit, if not in execution, are the numerous attempts to paint the private prison as something that is *inherently* obnoxious on general normative grounds. As often as not, the notion that private prisons are intrinsically improper appears in journalistic, usually editorial accounts.¹¹⁹ These efforts are remarkable both for their great conviction and, unfortunately, for their persistent failure to engage legal and therefore jurisprudential issues. The same is true of more sophisticated, scholarly efforts. For example, such arguments by neo-conservative political theorist and penologist John DiIulio (the Princeton scholar who introduced the term "super-predator" to criminological discourse) against privatization are quite intricate and provocative and appear to have wielded some influence, at least in academic circles. Nonetheless, DiIulio's arguments are couched in moral claims that he rigorously separates from practical and legal questions. For this reason, DiIulio's work, too, remains largely inconsistent with a truly effective jurisprudential approach.¹²⁰ Inadequacies of the same kind characterize the few "ethical" critiques that have been raised in this literature, including a notable effort by Richard Lippke,¹²¹ as well as the American Bar Association's policy statement against private prisons.¹²² Of course, in my view the private prison *is* normatively problematic. But once again, I think it deficient not to connect normative claims to objective problems.

In sum, the main problems with the existing critiques of the private prison consist of a failure to deal with the juridical implications of the private prison and thus a failure to couch the private prison's implications in a discussion about the

118. See, e.g., Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 303 (1995) ("Although records promulgated by federal correctional agencies are subject to public disclosure under the FOIA [Freedom of Information Act], documents maintained by private operators are largely inaccessible under the Act. By contrasting with private prison operators, federal correctional agencies shield what otherwise would have been public information from public scrutiny. This frustrates FOIA's purpose of guaranteeing the public the right to monitor government activities.").

For an excellent and relatively up to date review of the legal aspects of private prisons, see McDONALD ET AL., *supra* note 38, at App. 3.

119. See, e.g., *Lock Up Private Prisons: Chronic Problems Demonstrate Why Incarceration Should Be Left to the State*, Editorial, ATLANTA J. CONST., Oct. 6, 1999, at A22; *Keep State's Prison out of Private Hands*, Editorial, ATLANTA J. CONST., Aug. 13, 1998, at A20; *Private Prisons: Whole Concept is Wrong*, Editorial, CHARLESTON GAZETTE & DAILY MAIL, June 4, 1999, at A4.

120. See John J. DiIulio, Jr., *The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails*, in PRIVATE PRISONS AND THE PUBLIC INTEREST 155 (Douglas C. McDonald ed., Rutgers 1990). DiIulio's approach is especially important for stressing the inadequacy of strictly practical and legal approaches.

121. See, e.g., Richard L. Lippke, *Thinking About Private Prisons*, 16 CRIM. JUST. ETHICS 26 (1997).

122. AMERICAN BAR ASSOCIATION, SECTION ON CRIMINAL JUSTICE, REPORT TO THE HOUSE OF DELEGATES ON PRIVATE PRISONS (ABA 1986).

way that the law mediates, or fails to mediate, the relationship between state and society. Likely, it is a consequence of these shortcomings that the existing literature is so fractured, that normative critiques remain disconnected from practical and legal critiques, while practical and legal critiques are disconnected from normative failures. For, as I have mentioned, it is the essence of jurisprudential discourse to draw out the connections among these issues, to see, for example, in the connection between practical and legal dysfunctions and erstwhile abstract normative failings. To eschew jurisprudential critique is therefore to guarantee not only that important questions about the fate of sovereignty are not discussed in the context of the private prison, but also that the fractured character of the debate is not mended into a comprehensive critique.

B. The Contemporary Private Prison and the Perversion of Sovereignty

The key to a thoroughly critical understanding of the private prison lies with its relationship to sovereignty. The private prison represents neither the straightforward retreat of sovereignty, nor its outright expansion. Rather, the private prison is fundamentally premised on a dynamic that combines these tendencies, that seems to represent both the apparent retreat and the advance of the state in the prison context. It is in this sense that private prisons must be understood in terms of the *extension and diffusion* of sovereignty.

Commenting broadly on criminal justice issues, Stanley Cohen argues forcefully that the coerciveness of the state consistently is expanded by apparently progressive reforms that blur spatial boundaries between state and society, obscure channels of ownership and control, and conceal the identity of state actors. For Cohen, even reforms that seem to mark the retreat of the state and its appetite for control (for example, the development of “community controls” and halfway houses, and the extension of parole) almost invariably augment (as opposed to displace) existing mechanisms of punishment and ultimately expand state prerogatives.¹²³ A similar logic inheres in the relationship of the contemporary private prison to sovereignty.

The sovereignty-extending character of the private prison is obvious. The prison, any prison, is an extreme representation of the sovereign prerogative of the state. The private prison is not only a prison, it is (or at least it claims to be) a kind of perfect prison: a more efficient and more effective version of the institution and thus a more efficient and effective articulation of state control. Consistent with this aspect, the rise of the private prison has in no way slowed the rate of incarceration or reduced the scope of the criminal justice system—quite the contrary.¹²⁴ When seen in this light, the private prison immediately appears as a development that

123. COHEN, *supra* note 4, at 56-86.

124. Because the private prison is marked by both the extension and retreat of the state, it is quite inaccurate to paint the institution in libertarian colors. The private prison movement is heavily populated by conservative, right

contradicts the most fundamental ideal behind the rule of law: that of absolutely minimizing the coercive prerogative of the state.

Though troubling, by no means does this straightforward conflict with the rule of law mark the extent of the private prison's problematic character. Perhaps more insidiously, the private prison's characteristic interpenetration of public and private translates into a persistent confusion regarding the legal rules that apply to private prisons. As with convict leasing, clear examples of this kind arise around the question of liability. Section 1983 actions are the primary vehicle for the vindication of prisoners' rights, in particular those concerning conditions of confinement. *McKnight* resolved negatively the then-unanswered question of whether private prison guards could avail themselves of the "qualified immunity" privilege generally available to state actors who reasonably believe their conduct to be lawful.¹²⁵ To some extent, *McKnight* has clarified the issues and generally increased the likelihood that private prison operators and their agents will be subject to viable inmate lawsuits. But key questions remain unclear, for example, whether such causes of action are equally viable in the federal context (i.e., as *Bivens* actions). Also unclear is the extent to which the so-called "good faith" defense is available to private prisons in § 1983 cases.¹²⁶ Although it is rather well-settled that private prisons constitute state action sufficient to form a basis for such causes of action,¹²⁷ it is not at all clear whether any specific deed committed by a private prison or its agents constitutes state action. Although this problem of defining the limits of state action is endemic to civil rights jurisprudence, it seems aggravated in this case by the proliferation of non-state functions and actors in the private prison.¹²⁸

Just as problematic and unclear in the wake of *McKnight* is the scope of *government* liability. There is good reason to anticipate that under present law the private prison has the effect of *insulating* the state from liability and thus legal accountability. This follows not least from the fact that § 1983 generally does not trigger the application of the principle of *respondeat superior*.¹²⁹ In the normal public prison context this situation is problematic enough for its diffusion of

wing figures who frequently identify the privatization of prisons with minimalist-state rhetoric of the privatization movement more generally.

Among libertarian characterizations of the private prison, see CHARLES H. LOGAN, *PRIVATE PRISONS: PROS AND CONS* (Oxford 1990); *Omega Project*, in JUSTICE PROJECT (Adam Smith Institute 1984). Among notable neo-conservatives who have played a hand in the prison privatization movement are former Attorney General Edwin Meese, former advisor to President Reagan, Frank Carlucci, and the late Jorge Mas Conosa of the Cuban exile community. See PARENTI, *supra* note 113, at 219.

125. Richardson v. McKnight, 521 U.S. 399 (1997).

126. See, e.g., McDONALD ET AL., *supra* note 38, App. 3, at 16-18.

127. See, e.g., West v. Atkins, 487 U.S. 42 (1988); Payne v. Monroe County, 779 F. Supp. 1330 (M.D. Fla. 1991). See also Skelton v. Pri-Cor, Inc., 963 F.2d 100 (6th Cir. 1991).

128. See, e.g., Trant, *supra* note 117.

129. See SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION* §3:99 (West 4th ed. 1997). Cf. Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); Miranda v. Munoz, 770 F.2d 255 (1st Cir. 1985). This principle is equally applicable in the private prison context. See, e.g., Street v. Correctional Corp. of America, 102 F.3d 810 (6th Cir. 1996).

liability. In the private prison context, this difficulty is magnified, as the state is one step further removed from exposure to liability (at least to the extent that agents of the state are not “deliberately indifferent” within the meaning of these claims).¹³⁰ Notwithstanding *McKnight*’s clarifying functions, then, the state still seems able to reduce its level of legal responsibility to inmates when it incarcerates them in private prisons. Similarly, it seems probable that the use of private prisons generally limits the litigation expenses of states as well.¹³¹

It also is likely that the juridical structure of the private prison attenuates and ultimately insulates the state from accountability of a more symbolic, political kind. Private prisons tend to distance public officials from responsibility for the way private prisons are run. The most obvious evidence of this is that, when private prisons are the subjects of scandal, corruption, and the like, journalists and regulators focus first and most forcefully on the *private* character of the institution, and only later, if at all, on more general public policy dimensions of criminal incarceration. In similar fashion, the private prison converts the problems of prisons—which are endemic and substantial in every case—into management questions and questions of relative performance, efficiency, contract interpretation, and so forth. Several critics of the private prison have articulated this issue in terms of problems of misaligned “symbolism” and of “intervening” implications of the private prison for the way the public understands the origins and functions of criminal justice policy.¹³²

As if this situation did not sufficiently insulate the sovereign from its deeds, there also are complex jurisdictional problems with contemporary private prisons. In particular, private prisons frequently are established within jurisdictions different from the contracting state (i.e., they house out-of-state inmates) or established under contracting regimes that involve intervening governmental entities between the contractor itself and the incarcerating government. Apparently, in Tennessee alone, CCA houses inmates from Washington, D.C., Hawaii, Montana, and Wisconsin.¹³³ At present, Wisconsin holds the lead with more than 4,000 of its inmates incarcerated in other states.¹³⁴ In Louisiana, a chronically abusive juvenile detention center, housing state offenders, operated under a contracting scheme that, by inserting a municipality, left no direct contractual privity between the state and the facility.¹³⁵

130. See McDONALD ET AL., *supra* note 38, App. 3, at 18-21.

131. See *id.* at 21-24.

132. See, e.g., MARK D. JANUS, BARS ON THE IRON TRIANGLE: PUBLIC POLICY ISSUES IN THE PRIVATIZATION OF CORRECTIONS 75, 76 (Gary W. Bowman et al., eds. 1993); Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813, 826-27 (1987).

133. See PARENTI, *supra* note 113, at 218.

134. See Mary Zahn & Richard P. Jones, *As Top Inmate Exporter, State Creates Prison Debate*, MILWAUKEE J. SENTINEL, Jan. 24, 2000, at A1.

135. See Joanna Weiss, *State Takeover of Tallulah Center May Calm Tension, Tales of Abuse of Inmates*, NEW ORLEANS TIMES-PICAYUNE, Aug. 9, 1998, at A1.

In such situations, there remains a great deal of legal uncertainty, which seems to have benefited the contractors more than the states or the wayward inmates.¹³⁶ In one notable case, two violent sex offenders from Oregon, housed at a CCA "immigrant detention center" outside of Houston, escaped from the facility. This caused the firm, which initially had declared that it had no obligation to notify the local authorities of the institution's presence, to proclaim that it was not their function to capture them. When the local authorities captured the inmates, at their own expense, it turned out that because they escaped from a private facility, the escapees could not be prosecuted under Texas law.¹³⁷ In a manner slightly reminiscent of state attempts to recover stipulated fines for escapes under convict leasing, Texas since has embarked on a campaign to recover costs of recapture from private prison operators.¹³⁸

The merger of the public and private in the private prison inevitably confuses, as well, the issue of *access* to private prisons—to prison grounds, records, and so forth.¹³⁹ The courts and legislatures have long struggled with access issues in the prison context and have long had to balance the advantages of and legal claims to open access against penological (usually security related) concerns. Foucault describes how all prisons refine the punitive authority of the state by cloaking the mechanisms of punishment in a veil of secrecy.¹⁴⁰ By its very nature, the private prison renders the prison all the more insular and the legal questions surrounding access vastly more complicated, for it adds to the mix the proprietary rights of prison contractors. The issue has not lent, and perhaps cannot lend, itself to any consistent resolution and should be understood as one of several ways the private prison exacerbates the irrationalities of the modern prison.¹⁴¹

Yet another area of legal complication centers on the due process rights of inmates incarcerated in private prisons. The law in this area clearly favors the

136. See MCDONALD ET AL., *supra* note 38, at App. 3, pp. 47-48.

137. This story received considerable publicity. The incident prompted the understated observation that the laws had not "caught up" with the private prison phenomenon. *Private Prisons Shackle Texas with Confusion: State Laws Haven't Caught Up with New Phenomenon*, CHI. TRIB., Nov. 7, 1996, at 34.

138. See *State Billing Private Prisons for Hunting Escapes, Riot Aid*, HOUS. CHRON., Sept. 15, 1997, at 15.

139. On this issue, see, e.g., SHICHOR, *supra* note 40, at 121-25; ROBBINS, *supra* note 115, at 345-46.

140. FOUCAULT, *supra* note 39, at 232-56.

141. On the outlines of this issue, see MCDONALD ET AL., *supra* note 38, at 37-38. A recent case from the Montana Supreme Court aptly illustrates the point. Forced to weigh the conflicting claims of a newspaper company's desire for access to a hearing against a private prison contractor's attempts to keep private certain proprietary information, the court had no statutory license or guidance to deal with the question with any nuance whatsoever, and simply threw the hearing open to the public. *Great Falls Tribune Co. v. Day*, 959 P.2d 508 (Mont. 1998).

To the extent that private prisons will remain able to avoid such outcomes—and it seems clear that some deference to their proprietary interests will usually prevail—their resulting ability to limit access suggests the doubly private character of the private prison: a proprietary character combined with a private (i.e., secretive) dimension in Foucault's sense. For Foucault, the essence of the prison is its secretive character. The ability of private prisons to invoke proprietary interests to limit public access reveals a tendency to preserve and extend this tendency. FOUCAULT, *supra* note 39.

promulgation of consistent, predictable rules and procedures—of the kind, as mentioned earlier, that comport with one of the main normative aspirations of the rule of law and that, as a more substantive matter, ensure that states retain ultimate control over decisions affecting basic terms and conditions of incarceration. The existence of even seemingly mundane rules and procedures are particularly important to the extent that they govern internal affairs of prisons—for example, disciplinary proceedings—that can have substantial implications for length and conditions of incarceration. With private prisons, it seems inevitable to some commentators (not to mention being consistent with the reality of the situation) that the private institutions themselves will, notwithstanding the law, be able to retain substantial authority over these matters, particularly the *administration* (as opposed to the making) of rules and procedures.¹⁴² To the extent as well that states are unlikely to enact effective safeguards, the possibility remains that the private prisons may be able cynically to sustain their occupancy rates, and therefore their revenues (as most contracts are per inmate/per diem), by manipulating inmates' terms of incarceration.¹⁴³

Like convict leasing, too, the confused juridical structure of the contemporary private prison is intrinsically connected to endemic corruption. With the private prison, the relevant public and private parties frequently seem to wear the same hat, or live under the same roof, as it were. When, in 1985, CCA attempted to contract with Tennessee for a ninety-nine year management contract covering all the state's facilities, it turned out that the governor's wife and the Speaker of the State House owned stock in the firm.¹⁴⁴ Indeed, CCA was founded by politically connected figures: its principle founder was a former chairman of Tennessee's Republican Party.¹⁴⁵ Similarly, Louisiana's chronically troubled Tallulah Correctional Center for Youth originally was owned by a group of partners intimately connected to former Governor Edwin Edwards, himself a perennial subject of corruption investigations.¹⁴⁶ Somewhat more direct influence over the political process on the part of private prison operatives also is evident. In Arkansas, the founder of a private prison company recently was sentenced to prison for attempting to bribe a correctional official.¹⁴⁷ In Georgia, CCA invested over \$130 million in building 4,500 beds before it had any contracts with the state to house

142. See SHICHOR, *supra* note 40, at 80-85; Eric Bates, *Private Prisons: Over the Next Five Years Analysts Expect the Private Share of the Prison "Market" to More than Double*, NATION, Jan. 5, 1998, at 11.

143. See SHICHOR, *supra* note 40, at 51-52, 81-85.

144. See *id.* at 240-41.

145. See Paulette Thomas, *Making Crime Pay: Triangle of Interests Creates Infrastructure to Fight Lawlessness*, WALL ST. J., May 12, 1994, at A1.

146. See, e.g., Fox Butterfield, *Profits at a Juvenile Prison Come with a Chilling Cost*, N.Y. TIMES, July 15, 1998, at A1; Editorial, *Tallulah Situation is a Wake-Up Call*, BATON ROUGE ADVOC., Aug. 2, 1998, at B8. The firm in question, Trans-American Development Associates, includes among its principals a state department head under the former Governor.

147. See Deborah Yetter, *Official Quits U.S. Corrections After Arkansas Indictment*, LOUISVILLE COURIER-J., Apr. 20, 1996, at A7.

any inmates. Instead, the company had "an understanding" with Georgia's correctional officials and with local politicians—notwithstanding the state's competitive bid laws.¹⁴⁸ In that case, Georgia's Commissioner of Corrections illegally communicated with CCA's lobbyist on the project throughout the bidding process.¹⁴⁹ In Ohio, CCA recently managed, through a "lobbying blitz," to defeat legislative attempts to regulate the state's private prisons.¹⁵⁰ CCA's lobbyists include, on a national level, J. Michael Quinlan, former Bureau of Prisons Chief under President George Bush Sr., and in Tennessee (again) the wife of the Speaker of the State House.¹⁵¹ In California, CCA, Wackenhut, and Cornell Corrections recently were reported to have retained some of the state's "most powerful lobbyists" to expand their market.¹⁵²

While there is not yet any credible evidence of contractors' attempts, as was the case with convict leasing, to manipulate the criminal law to bolster their business prospects, a finance officer at CCA apparently described the 1994 Federal Crime Bill, with its tougher penalties and grants for prison construction, as something "very favorable to us."¹⁵³ Similarly, a recent conference of private prison contractors featured a keynote address (by Charles Thomas, whose scholarly contributions are cited in this Article) entitled, "The market remains quite positive."¹⁵⁴ Suffice to say, there is certainly structural *potential* for this type of conduct—but given current rates of growth in incarceration, such lobbying is for the moment quite unnecessary anyway.¹⁵⁵

As was also the case with convict leasing, many private prisons appear unable to insulate decisions about the quality of penological functions from financial

148. See Editorial, *Private Prison 'Understanding' May Evade Law*, ATLANTA J. CONST., Apr. 11, 1999, at G4.

149. See Ann Hardie, *Spotlight on Private Prisons Contract Bidding: Phone Call to Friend is Still Aboveboard*, ATLANTA J. CONST., Mar. 22, 1999, at B1.

150. See Mark Tatge, *Prison Control Bill Dies in Senate; Private Operator Blocks Attempt at Regulation*, CLEVELAND PLAIN DEALER, Nov. 25, 1997, at B6.

151. See Bates, *supra* note 142. One of CCA's board members, Joseph Johnson, is former executive director of the Rainbow Coalition; according to Bates, Johnson recently used his political influence to win a contract to buy outright a District of Columbia prison—structure and all.

152. See Niel Brinkerhoff, *Field of . . . Dreams?*, CAL. J., Feb. 1, 1999, at 14.

153. Thomas, *supra* note 145, at A6.

154. Bruce Shapiro, *Portfolio Prisons: A Private Prison Management Conference Focuses on Accountability to a Corporate Board Rather than to the Public, and Profit Motive the Push Rather than Inmate Concerns*, NATION, Oct. 20, 1997, at 4.

155. See Bates, *supra* note 142, at 17-18 (stating that private prison corporations have the financial incentive and influence to lobby for harsher criminal penalties, but that there is no current need to do so).

Professor Thomas seems to personify yet another dimension of the corruption that runs with private prisons: the corruption of academic discourse. Thomas, an otherwise respected and competent scholar at the University of Florida and a major contributor to the discussion of private prisons, also turns out to be, in essence, the corporate ideologist of CCA and of the private prison industry in general. At the same time that Thomas was extolling the merits of private prisons with such detached objectivity, he and his "public" organization maintained over \$1 million in direct interests in CCA; and Thomas himself served on boards connected to the company. See Gilbert Geis et al., *Private Prisons, Criminological Research, and Conflict of Interest: A Case Study*, 45 CRIME & DELINQ. 373, 373-75 (1999) (describing Thomas's conflict of interest in the private prison context).

considerations. Critics of private prisons continually identify horrendous examples of avaricious, sometimes downright mercenary conduct by prison operators—including underpayment and under-training of guards and other employees, overcrowding, improper classification of inmates, and patently inadequate security structures.¹⁵⁶ When, in 1994, Human Rights Watch investigated the Tallulah juvenile facility described above, it found not only questionable physical structures and inadequate services, but also that offenders were short of food and provided with grossly inadequate clothing.¹⁵⁷ Company officials there successfully resisted for several years attempts to amend these and other abominable conditions, prompting *four* temporary takeovers by the state (the last one permanent) as well as extensive litigation.¹⁵⁸ When recently denied a unilateral demand for increased *per diem* compensation, the facility's owners (who had just obtained a lucrative and discretionary buy out in the face of a final take-over) simply cut back again on the provision of basic necessities.¹⁵⁹ A newer private juvenile facility in Louisiana, operated by Wackenhut, was also recently made the object of a Justice Department lawsuit alleging, among other outrages, inadequate health care and education, shortages of food, shoes, and bedding.¹⁶⁰

Indeed, the intrusion of profit motives into management decisions is a pervasive problem with private prisons. The most salient expression of this is that private prison officials inevitably find themselves having to balance separate, often competing interests and sort out competing loyalties. Much of the supposed competitive advantage of private prisons derives from their ability to sidestep the civil service wages required with public prison guards. This dynamic encourages not only the employment of under-trained and disinterested employees but aggregate reductions in staffing—practices which in turn account in part for elevated levels of abuse, inmate-on-inmate violence, and so forth.¹⁶¹ At each of the private juveniles facilities just mentioned, the Justice Department cited inadequate training, retention, and compensation as contributing causes of abuse.

156. See, e.g., PARENTI, *supra* note 113, at 221-25; SHICHOR, *supra* note 40 (describing quality, management and personnel issues in private prisons).

157. See HUMAN RIGHTS WATCH, *CHILDREN IN CONFINEMENT IN LOUISIANA* (1995). Human Rights Watch found that conditions at Louisiana's three public secure facilities for juveniles were abysmal, but nonetheless paled in comparison to those at the private prison. Both the Justice Department and private advocates have since filed suit against the state and the prison operators for conditions at Louisiana's juvenile facilities. Fox Butterfield, *U.S. Suing Louisiana on Prison Ills*, N.Y. TIMES, Nov. 6, 1998, at A6.

158. See Vicki Ferstel, *State Takes Control of Center in Tallulah*, BATON ROUGE ADVOC., Sept. 22, 1999, at 1A.

159. See Vicki Ferstel, *Official Defends Action on Prison: Fee Hike Decision Cited in Center Crisis*, BATON ROUGE ADVOC., Dec. 4, 1999, at 1B. The buy out took the form of discretionary tax rebates supposedly reserved for businesses that advance the state's economic development agenda; the total amount in this case was over \$700,000.

160. See Fox Butterfield, *Justice Department Sues to Alter Conditions at a Prison*, N.Y. TIMES, Mar. 31, 2000, at A16.

161. See Bates, *supra* note 142 (stating that CCA under-staffs its prison, and hires personnel with records of inmate abuse).

In a manner also reminiscent of convict leasing, other methods sometimes are employed to make money in private prisons besides simply economizing on services. CCA was recently sued by an advocacy group claiming that the corporation and its telephone carriers are earning super-profits by charging exorbitant rates for inmate phone calls.¹⁶² Though apparently not yet pervasive, some private prisons replicate the convict lease system's signature practice of setting their inmates to work at for-profit tasks.¹⁶³ This practice is accompanied by a more common variant, which entails the leasing-out of inmate labor, but not actual custody of the inmates, to private contractors—a system that replicates the exploitation of early penitentiary inmates and is being sold to the public with the same logic of fiscal efficiency.¹⁶⁴

My point in recounting these dysfunctions is not to rehash the claims of more empirically and practically minded critics of private prisons. Instead, I wish to emphasize that such dysfunctions are neither accidental nor episodic, but instead are intimately related to the absence of rule of law norms. Put another way, these dysfunctions are the predictable companions of a system premised on legal confusion, on divided obligation and interests, on the stealthy extension of the state—premiered in short on the thoroughgoing abrogation of rule of law norms and their sovereignty-restraining functions.

C. The Limits of Privatization Versus the Limits of the Prison

To a certain degree, this Article's critique might seem more an indictment of privatization as such. Indeed, I am admittedly skeptical about most instances of privatization. But because my arguments against the privatization of prisons focus on the sovereignty-restraining ambition of the rule of law and on the perversion of this ambition by the diffusion and extension of sovereignty, my claims in this Article are primarily applicable to privatization where two factors are present: (1) where the institution in question discharges extreme—that is, especially coercive or violent—sovereign functions; and (2) where the privatized institution retains an especially close connection to the state, the state's interests and its functions. Such characteristics are, as we have seen, especially evident with the private prison.

To some extent, of course, virtually all institutions that can be privatized are

162. See Bill Miller, *Prison Firm Sued over Phone Rates: High Costs Deter Contact, Families Say*, WASH. POST, Feb. 17, 2000, at B2.

163. See, e.g., Kristin Bloomer et al., *America's Newest Growth Industry*, IN THESE TIMES, Mar. 17, 1997, No. 9, at 14 (describing private prisons' practice of putting prisoners to work at for-profit tasks); Randy Gragg, *A High-Security, Low-Risk Investment: Private Prisons Make Crime Pay*, HARPER'S, Aug. 1996, at 50 (describing Wackenhut Corporation's practice of contracting out inmate labor). See also Gordon Lafer, *America's Prisoners as Corporate Workforce*, AMERICAN PROSPECT, Sept.-Oct. 1999, at 66 (describing anticipation of private prison contractors and investors at prospect of setting private prison inmates to work).

164. See, e.g., Christian Parenti, *Pay Now, Pay Later: States Impose Prison Peonage*, PROGRESSIVE, July 1996, No. 7, at 26 (describing the leasing-out of inmate labor). Parenti doubts that this practice will become pervasive. PARENTI, *supra* note 113, at 230-35.

coercive and entail the exercise of sovereign-like functions and functions which otherwise could be performed by the state. To some extent, one also might argue, virtually all privatizations remain connected to the state. Such statements parallel the truth, so well exposed by critical legal scholars, that the public-private distinction never is complete in any given direction anyway.¹⁶⁵ Accordingly, it is quite impossible to rigidly circumscribe the limits of this Article's critique. Nevertheless, significant quantitative differences prevail between the levels of coercion, of sovereignty, and of state presence evident with prisons versus, for example, schools and utilities. In other words, the prison is unquestionably extraordinary in its level of coerciveness and in its extreme representation of sovereignty. Therefore, whether or not other types of privatization are problematic (and again I think that they usually are), there are specific reasons why the private prison is especially problematic from a rule of law standpoint.¹⁶⁶

As is the case in all contexts where the fate of liberal legal norms are at stake, the benefits accorded by adhering to the rule of law where prisons are concerned are relative and contingent. The public prison remains intensely problematic and in many ways inherently irrational. Rather than offering some romanticized defense of the public prison, I conceive of this critique as a way of suggesting that there are inherent, structural reasons to suppose that private prisons will always, on the whole, remain more dysfunctional and indeed more socially malignant than public prisons. But perhaps more fundamental from a rule of law standpoint is the idea that at least the public prison is transparently problematic and irrational, and at least it requires the state to face directly the political, legal, and fiscal costs of pursuing a criminal justice policy that has brought about almost exponential increases in the rate and the aggregate number of people incarcerated. Indeed, in a society that claims a basis in rule of law norms, it is probably always a good thing for the state to wage its own wars against its citizens and to do so in an obvious and maximally costly way.¹⁶⁷

165. See, e.g., Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 836 (1985) (stating that there is no meaningful way to label a court's decision intervention or *laissez faire*—there is always a measure of state intervention in *laissez faire*).

166. There are, of course, other trends toward privatizations in the criminal justice system that more closely approximate the private prison's coerciveness and intrinsic connection to the state. Notably in this regard are phenomena like the expanding use of private police forces, the attempt, as through victims' rights, to reestablish private control over criminal prosecutions, the privatization of parole and probation functions, and so forth, that seem relatively close to the private prison in their juridical structure. Clearly these and similar developments deserve the same kind of scrutiny as the private prison.

167. What does this Article finally say about the public-private distinction? Again, my own faith in the doctrine is quite contingent. I welcome its constructive abrogation in constructive contexts (for example, in the domestic violence context, where the erosion of the public-private distinction *may* expand the enjoyment of rule of law norms). And I absolutely welcome the day that the march of history negates the public-private distinction, or even for that matter, the rule of law, entirely—provided, of course, that the outcome is rational in the deepest sense of that word. But what I reject—and what I believe is evident with the private prison—is an abrogation of the public-private distinction that is not only irrational, but also does nothing to resolve the social, political, and legal conflicts that underlie the existence of this divide in the first place.

VI. RULE OF LAW, THE PRIVATE PRISON, AND THE INEVITABLE SPECTER OF ILLEGITIMACY

In the end, it may be that the problem of privatization is no more than a reflection of the irrationality of contemporary society and a reflection, too, of what Roger Cotterrell, following Neumann, has called the "largely unfavorable conditions in which the idea of Rule of Law seems to exist today."¹⁶⁸ Such seems certainly true of the private prison, which is at root a sub-species of an institution that is, in the final analysis, fundamentally irrational. Put another way, we might think of the private prison and convict leasing as together demonstrating the inability of the legal structure of the liberal state to retain its coherence in the context of fundamentally illiberal practices in punishment. But as always, there are real choices between unattainable ideals and the brutal reality of the status quo. From this standpoint, the private prison emerges as something worthy of great concern precisely because of the inherent irrationality of prison as such.

Finally, I do not deny that aggressive courts, competent legislatures, and zealous reformers *theoretically could* resolve all the diverse problems that plague private prisons: the uncertainty about liability and the line between the state and the contractor, the problems of accountability and public perception, the jurisdictional problems, and so forth. But if convict leasing suggests anything about private prisons it is first that juridical structure is relevant to the prospects of reform, and second that the possibility of reform must not be confused with its probability. Of course, for those who approach this issue in a more principled, or at least more skeptical way, this is all beside the point anyway, since it is clear that reforming and clarifying the legal and political character of an institution premised on the merger of the public and private only can be accomplished by legalizing the interpenetration of public and private and by affirming the normative dysfunctions that come with the private prison. For, while the institutions' various dysfunctions—corruption, abuse, confusion about liability—seem quite logically related to a lack of state regulation and control, increasing the involvement of the state in the operation of private prisons, short of abolishing private prisons as such, can only have the effect of more deeply entrenching the juridical dynamics—the interpenetration of public and private and the diffusion and extension of sovereignty—that underlay the private prison's problematic character in the first place. From a rule of law standpoint, the private prison seems a hopelessly problematic institution.

168. Cotterrell, *supra* note 25, at 464.