Law & Ethics of Human Rights

Volume 5, *Issue* 1 2011 *Article* 3

PRIVATE POWER AND HUMAN RIGHTS

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Abstract

Very little of the expanding debate over private policing has employed the language of human rights. This is notable not just because private policing is a distinctly global phenomenon, and human rights have become, as Michael Ignatieff puts it, "the lingua franca of global moral thought." It is notable as well because a parallel development that seems in many ways related to the spread of private policing—the escalating importance of private military companies—has been debated as a matter of human rights.

This Article asks whether discussions of private policing have been impoverished by their failure to employ the language of human rights. It begins by discussing the dramatic rise, over the past several decades, in the size and significance of private policing. It then summarizes the academic and public policy debates about that development and considers what, if anything, the language of human rights could add to those debates, and whether the addition would be welcome. One strand of the Article compares the debate over private policing with the debate over private military companies. Another strand compares private policing with private prisons, in light of the recent ruling by the Supreme Court of Israel declaring private prisons unconstitutional. The Article concludes that the benefits of introducing the language of human rights into debates about private policing are far from clear—with one exception. Human rights, particularly as codified in international treaties, do seem a promising way to get traction on a particular aspect of police privatization that has received less attention than it deserves: the way in which widespread reliance on private security firms may weaken public commitment to providing everyone with a minimally acceptable degree of protection against private violence.

KEYWORDS: private policing, language of human rights, comparison, private prisons, private military companies

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*Yosef Osheawich Professor of Law, University of California, Berkeley. I received helpful criticism and guidance from Elizabeth Joh, Sarah Song, Rivka Weill, and participants in the December 2009 workshop on "Private Power and Human Rights" at the Academic Center of Law & Business in Ramat Gan, Israel.

Introduction

A half-century ago the performance of law enforcement and order maintenance functions by private employees was widely thought to be an increasingly marginal phenomenon, at least in the developed world. Since then private policing has exploded. There are vastly more private police than there used to be, they perform a much wider array of functions, and the line between public and private policing has blurred considerably. Scholars and policy makers have taken note. A growing literature debates the nature and implications of private policing. What functions does it perform? What threats does it pose? What responses are called for?

One notable feature of this expanding debate over private policing is that very little of this argument has employed the language of human rights. This is notable not just because private policing is a distinctly global phenomenon, and human rights has become, as Michael Ignatieff puts it, "the lingua franca of global moral thought."[1] It is notable as well because a parallel development that seems in many ways related to the spread of private policing—the escalating importance of private military companies—*has* been debated as a matter of human rights.

The questions I pursue here, in a preliminary way, are whether discussions of private policing have been impoverished by their failure to employ the language of human rights and what, if anything, would be added to those discussions by the introduction of human-rights talk. I speculate a bit on *why* the debate over private policing has not been a debate about human rights, but my chief concern is prescriptive, not historical. I focus less on causes than on consequences.

There are two kinds of question one can ask about the relationship between human rights and any particular form of privatization. One set of questions concerns the implications of *human rights for privation*: what, if anything, a respect for human rights entails with regard to the forms of privatization that should be tolerated or promoted. That is the sort of question I pursue in this Article. Another, equally important set of questions concerns the opposite sort of implications, the implications of *privatization for human rights*: whether, for example, human rights claims can be asserted against employees of private organizations to which the government has contracted out work.[2] I touch on those questions here, as they apply to the private police, but only in connection with my principal inquiries.

The Article proceeds as follows. Part I discusses the dramatic rise, over the past several decades, in the size and significance of private policing; it also

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[1] Michael Ignatieff, Human Rights As Politics and Ideology 53 (2001).

[2] *See, e.g.*, Catherine M. Donnelly, *Privatization and Welfare: A Comparative Perspective,* 5(2) L. & Ethics Hum. Rts. (forthcoming, 2011).

summarizes the academic and public policy debates over that development. Part II considers what, if anything, the language of human rights could add to those debates, and whether the addition would be welcome. One strand of this discussion compares the debate over private policing with the debate over private military companies. Another strand compares private policing with private prisons, in light of the recent ruling by the Supreme Court of Israel that a private prison would be unconstitutional. My tentative conclusion is that the benefits of introducing the language of human rights into debates about private policing are far from clear—with one exception. Human rights, particularly as codified in international treaties, do seem a promising way to get traction on a particular aspect of police privatization that has received less attention than it deserves: the way in which widespread reliance on private security firms may weaken public commitment to providing everyone with a minimally acceptable degree of protection against private violence.

I. Private Policing, and How We Talk About It

For most of the twentieth century, private law enforcement and private order maintenance seemed on the way out, at least in the developed world. Even (and perhaps especially) in the United States—home of Pinkerton guards and the sprawling private security industry for which they provided the model—private policing seemed more and more an anachronism. By the end of the 1960s, researchers commissioned by the United States Department of Justice were confidently predicting that public law enforcement would soon dwarf its private counterparts.[3]

They were wrong. At some point in the late 1960s or 1970s, when few people outside the private security industry were watching, the industry entered a period of rapid expansion from it does not yet seem to have emerged. By the early 1980s there were already more private security guards in the United States than uniformed, public law enforcement officers, and since then the gap has widened steadily.[4] By the late 1990s there appeared to be three private guards for every two sworn officers in the United States.[5] Uniformed private guards in the United States now routinely guard and patrol office buildings, factories, warehouses, schools,

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[3] James S. Kakalik & Sorrel Wildhorn, The Private Police Industry: Its Nature and Extent 34 (1971); *see also* David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165, 1220 (1999).

[4] *See* William C. Cunningham & Todd H. Taylor, Private Security and Police in America 108-09, 237, 239 (1985); Clifford D. Shearing & Philip C. Stenning, *Private Security: Implications for Social Control*, 30 Soc. Probs. 493, 494-96 (1983).

[5] *See* Sklansky, *supra* note 3, at 1174.

sports facilities, concert halls, train stations, airports, shipyards, shopping centers, parks, government facilities—and, increasingly, entire commercial districts and residential neighborhoods. On any given day, many Americans—especially those that are not poor—are far more likely to encounter a security guard than a police officer. In the words of one industry executive—testifying before Congress fifteen years ago—"[t]he plain truth is that today much of the protection of our people, their property and their businesses, has been turned over to private security."[6] Since then the truth has grown ever plainer.

This is a global phenomenon in two respects. First, it is not limited to the United States. Private policing has spread with comparable rapidity in Canada, Australia, New Zealand, the United Kingdom, and Israel; Europe and the rest of the developed world do not appear far behind.[7] In Israel, the ratio of private security employees to public police officers was already estimated at 2:1 or 3:1 twenty years ago.[8] Since then, private policing in Israel seems, if anything, to have expanded further; even some municipalities here have begun hiring private firms to provide patrol services.[9] (Much but not all of the growth of private policing in Israel has been fueled by concerns about terrorism; it has been assisted, too, by the ready availability of potential employees with military training.[10]) Second, ownership and operation of private security firms—like ownership and operation of private military companies—is increasingly multinational. Indeed, some of the same multinational corporations are active in both markets, blurring the distinction in some cases between private police and private armies.

Worldwide, as in the United States, private security firms have expanded not just in size but in the variety of services they perform. The stereotype of the private security guard—unarmed, and with a mandate simply to call the police

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[6] *Hearings Regarding Private Security Guards Before the Subcomm. On Human Resources of the House Comm. On Education and Labor*, 103d Cong. 132 (1993) (statement of Ira Lipman, President, Guardsmark, Inc.).

[7] *See, e.g.,* Mark Button, Doing Security: Critical Reflections and an Agenda for Change 5-6 (2008); Les Johnston, The Rebirth of Private Policing 78-85 (1992); Sklansky, *supra* note 3, at 1181-82.

[8] *See* Johnston, *supra* note 7, at 81-82; Nachman Ben-Yehuda, *The Social Meaning of Alternative Systems: Some Preliminary Notes*, *in* The Israeli State and Society: Boundaries and Frontiers 152, 157-58 (Baruch Kimmerling ed., 1998).

[9] *See* Doron Teichman, *Decentralizing Crime Control: The Political Economy Perspective*, 104 Mich. L. Rev. 1749, 1757 & n.46 (2006); *cf.* Edo Amin, George Orwell Drives on Road 6, *available at* www.seamless-israel.org/road 6_1.htm (visited Sept. 25, 2009) (discussing private patrolling of the Trans-Israel Highway).

[10] *See, e.g.,* Donald W. Story, *How Should Malls Address Terrorism?*, 47 Security Management 179 (2003).

whenever anything seems suspicious—is increasingly outdated. Private security guards firms provide more than watchmen; one scholar notes that "[i]nternationally there is no security function carried out in the state sector that is not undertaken in the private sector in some form."[11] This includes not only armed response (in many places, but not in the UK), investigating crimes, arresting and interrogating offenders, monitoring for terrorist attacks, and coordinating multi-agency, public-private cooperation in order maintenance and law enforcement.[12]

It is important not to exaggerate. It is easy to get carried away with talk of order maintenance and crime control splintering and "pluralizing," with public police agencies giving way to a dispersed patchwork of public and private "nodes."[13] The New York Police Department is not going away, and neither are its counterparts across the United States and around the world. For the foreseeable future, the business of maintaining order and enforcing the criminal law will remain first and foremost a responsibility of the state. But it is no longer credible to talk as though the state monopolizes either of the functions, even as a rough generalization. We are witnessing a long and ongoing process in which a greater and greater share of police work is being shifted to the private sector.

Indeed, crude numerical comparisons of public and private police personnel almost certainly understate the scale and significance of police privatization. First, private police are hard to count. The private security industry tends toward secrecy, and reliable information about it is difficult to come by.[14] Moreover, statistics on private policing either exclude or undercount employees—such as store clerks, insurance adjusters, and amusement park attendants—who carry out security work but whose principal duties at least ostensibly lie elsewhere.[15] Second, numerical estimates of private policing typically do not include the growing phenomenon of public police charging for their services. Moonlighting by law enforcement officers used to be a fringe practice, grudgingly tolerated where it was not prohibited. But it has escalated sharply over the past few decades, and more and more departments are

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[11] Button, *supra* note 7, at 5.

[12] *See id.*; George Rigakos, The New Parapolice (2002); Elizabeth Joh, *The Paradox of Private Policing*, 95 J. Crim. L. & Criminology 49, 83-95(2004); Sklansky, *supra* note 3, at 1179-80. On the integration of private security with state-controlled antiterrorism work, see, e.g., Marta Roberts, *Training in Israel for Terrorism in the U.S.*, 49 Security Management 36, 36 (2005).

[13] Button, *supra* note 7, at 5. For an influential and suitably cautious exploration of this theme, see David H. Bayley & Clifford D. Shearing, *The Future of Policing*, 30 L. & Soc. Rev. 585 (1996).

[14] *See* Sklansky, *supra* note 3, at 1174.

[15] For the classic account, see Clifford D. Shearing & Philip C. Stenning, *Say "Cheese!": The Disney Order That is Not So Mickey Mouse*, *in* Private Policing 247 (Clifford D. Shearing & Philip C. Stenning eds., 1987).

themselves contracting to supply their officers, for a fee, to commercial facilities, business districts, residential communities, shopping malls, event organizers, transit operators, and so on—acting, that is to say, exactly like a private security firm, but with badges and a public charter.[16] Third and finally, numerical comparisons of public and private police personnel do not capture the ways in which the culture and mindset of private policing have spread to the public sector. As part of the broader trend toward public managerialism, law enforcement agencies worldwide are increasingly copying, intentionally and explicitly, the goals, strategies, language and self-conception of private industry.[17]

In short, private policing has grown dramatically in size and significance throughout the developed world over the past few decades, and the growth shows no signs of slowing. This is a development that needs to be taken seriously by anyone concerned about policing and by anyone concerned about privatization more broadly.

Discussions of private policing by academics and policymakers have also been growing steadily, if not as rapidly as their subject. Debates about private policing are now sufficiently extensive that one can generalize meaningfully about them, and one safe generalization is that the debates rarely employ the language of human rights.

Elizabeth Joh recently summarized scholarship about private policing by noting that virtually all of it has developed one or more of

> the following five themes: (A) private policing is not new; (B) private policing is part of the contemporary trend of privatization; (C) private policing has an 'essential function;' (D) 'policing' is an activity that can be performed either by the public or private sector ('division of labor'); and (E) the same rules of federal constitutional law should apply to the public and private police.[18]

The last of these themes could conceivably be developed using the language of human rights, but for the most part it has not been. Instead, the argument has tended to be about closing a legal loophole. The argument, as Joh aptly summarizes it, is that "private policing is no different than public policing and should be

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[16] *See* Julie Ayeling, Peter Grabosky & Clifford Shearing, Lengthening the Arm of the Law: Enhancing Police Resources in the Twenty-First Century 133-57 (2009); Sklansky, *supra* note 3, at 1176.

[17] Ayeling, Grabosky & Shearing, *supra* note 16, at 24-47; David Alan Sklansky, *Private Police and Democracy*, 43 Am. Crim. L. Rev. 89, 99-101 (2006).

[18] Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 Utah L. Rev. 573, 578-79 (2005).

regulated similarly."[19] Part of the argument is functional (private policing is like public policing), and part of the argument is pragmatic (this is an industry in need of regulation). It happens that the regulatory tool closest at hand, at least in the United States, consists of the restrictions already imposed on public law enforcement agencies pursuant to the procedural rights granted to criminal suspects and defendants in the Federal Constitution, so that is the tool pressed into service. But nothing turns on the fact that the legal mechanisms to be borrowed take the form of "rights"—or that they might, without too much awkwardness, be rephrased as "human rights."[20] It is rare, in fact, for scholars and policymakers concerned about the regulatory gap in private policing to consider alternative ways of closing the gap: expanding tort liability, for example.[21]

Joh was focusing on scholarship in the United States, but the general absence of rights-talk from discussions of private policing is, if anything, even more conspicuous outside the United States. Consider, for example, *Lengthening the Arm of the Law*—a recent, sophisticated analysis of contemporary developments in police management, both public and private, written by three well-informed scholars, two based in Australia and one in South Africa.[22] The book proposes a framework for assessing the merits of policing arrangements that reflect "a mix of public and private interests."[23] Seeking catholicity, the framework incorporates "three fundamental values": "equity, cost-effectiveness, and legitimacy."[24] By "equity," the authors mean distributing police resources "in a manner that attends to objective needs and balances this with attention to subjective needs."[25] By "cost-effectiveness," they mean "value-for-money." And by "legitimacy" they do *not* mean the actual, moral acceptability of a particular form of policing; they mean its *perceived* acceptability: its ability to elicit deference and obedience.[26] The analysis is thoroughly, unremittingly utilitarian. Rights enter the discussion only glancingly,

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[19] *Id.* at 594-95 (emphasis omitted).

[20] Outside the United States, procedural restrictions on the police are, in fact, sometimes called "human rights." *See, e.g.*, Peter Neyroud & Alan Beckley, Policing, Ethics and Human Rights 54-70 (2001) (addressing police practices in the United Kingdom and internationally); Mandeep Tiwana, Commonwealth Human Rights Initiative, Human Rights and Policing: Landmark Supreme Court Directives & National Human Rights Commission Guidelines (2005) (addressing police practices in India).

[21] *See* Sklansky, *supra* note 3, at 1183-87, 1276-80.

[22] Ayeling, Grabosky & Shearing, *supra* note 16.

[23] *Id.* at 8.

[24] *Id.* at 6.

[25] *Id.* at 7.

[26] *See id.*

as shorthand for legal protections against police misconduct.[27] Neither "rights" nor "human rights" appear in the book's index.

The discussion of private policing in *Lengthening the Arm of the Law* is unusually wide-ranging and sophisticated, but in its thoroughgoing utilitarianism, its focus on "costs and benefits,"[28] it is broadly representative. The problems and issues raised by private policing are almost always treated as problems and issues for "researchers and policy-makers,"[29] not for political philosophers or human rights advocates. The language of human rights is largely absent from this literature.

II. What Would Human Rights Add?

It may seem unsurprising that discussions of private policing rarely employ the language of human rights. That language arose as an apparatus for keeping governments, not private actors, in check,[30] and even today the invocation of human rights against "non-state actors" remains controversial.[31] If the function of rights is to announce "limits on what governments may do to people,"[32] then they would seem to have little to do with private policing, except, of course, in the limited but very important case when governments themselves use private policing to leverage their own power—by, one might say, "lengthening the arm of the law."

The suspicion that governments *are* increasingly acting through private proxies is one of the two main reasons that, outside the context of policing, a good deal of attention has been paid over the past few decades to "the *problèmatique* of the human rights obligations of non-state actors."[33] The other reason for this is the widespread sense that today private power can be as threatening as state power to the underlying values that human rights seek to protect. This latter sense is

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[27] *See, e.g., id.* at 60, 71, 101.

[28] *E.g.*, *id.* at 50.

[29] Mark Button, Security Officers and Policing: Powers, Culture and Control in the Governance of Private Space 187 (2007).

[30] *See, e.g.*, Lynn Hunt, Inventing Human Rights (2007); Ignatieff, *supra* note 1, at 4-5; Gavin W. Anderson, *Social Democracy and the Limits of Rights Constitutionalism*, 17 Canadian J.L. & Jurisprudence 31, 33 (2004); Stephen Gardbaum, *Human Rights and International Constitutionalism, in* Ruling the World? Constitutionalism, International Law and Global Government 233 (Jeff Dunoff & Joel Trachtman eds., 2009).

[31] *See, e.g.,* Laura M. Olson, *Practical Challenges of Implementing the Complimentarity Between International Humanitarian and Human Rights Law—Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict*, 40 Case W. Res. J. Int'l L. 437, 450 (2009); Christine Byron, *A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies*, 47 Va. J. Int'l L. 839, 883 (2007).

[32] Gardbaum, *supra* note 30.

[33] Andrew Clapham, Human Rights Obligations of Non-State Actors 2 (2006).

what drives most of the occasional, limited invocations of human rights, or rights more generally, in discussions of private policing.[34] And both considerations—concerns about governments acting through private proxies, and concerns about private groups as threatening in their own right—have helped spur the much more widespread use of human rights talk in discussions of private military companies.

A. Human Rights, Private Policing and Private Military Companies

Private military companies—"PMCs," in the lingo—seem similar in important ways to private security companies. Both sets of firms sell a service—the use of force—that, following Weber, we tend to think of as the special province of government. In each case, the services provided range well beyond the exercise of force, but force or the threatened use of force is central to what the firms do.[35] Private prisons are in this larger category, too.[36] And many companies operate in all three of these lines of work, or at least two of them: selling private peacekeeping and armed protection in conflict and non-conflict situations, and sometimes also operating jails and prisons.[37] So it is worth examining the increasingly common, and broadly accepted, use of human rights talk in discussing PMCs.

A decade ago the relevance of human rights to the actions of PMCs was a matter of great controversy. In certain ways it is much less controversial now, largely because many of the leading—and most notorious—PMCs have themselves embraced the notion that that they must operate within the confines of international law. The International Peace Operations Association, the industry's leading trade group, has a code of conduct that requires its members to "strictly adhere to all applicable international humanitarian and human rights laws."[38]

In October 2008, 17 nations—including the United States and the UK, home countries to many of the largest PMCs—endorsed "the Montreux Document," a statement of principles about the application of international human rights and

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[34] *See, e.g.*, Neyroud & Beckley, *supra* note 20, at 59; Scott Burbidge, *The Governance Deficit: Reflections on the Future of Public and Private Policing in Canada*, 47 Canadian J. Criminology & Crim. Just. 63 (2006).

[35] *See, e.g.,* Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 Conn. L. Rev. 879 (2004).

[36] *See, e.g., id.*; Sharon Dolovich, *State Punishment and Private Prisons*, 55 Duke L.J. 437 (2005).

[37] *See, e.g.*, Ginger Thompson, *Official Says Contractor in Kabul May be Ousted*, N.Y. Times, Sept. 14, 2009, at A12 (discussing international security conglomerate G4S).

[38] *See* International Peace Operations Association, Code of Conduct, ¶ 1.1, *available at* http://ipoaworld.org/eng/codeofconduct/87-codecodeofconductv12enghtml.html (last visited Oct. 12, 2009).

international humanitarian law to PMCs, negotiated in sessions convened by the Swiss government and the International Committee of the Red Cross.[39] A digression about terminology: Unlike "international human rights law," "international humanitarian law," sometimes called the laws of war, applies only in armed conflict, and has long been thought to bind non-state actors as well as states.[40] The two sets of laws are not always clearly distinguished, and some people think the boundaries between them are blurring.[41] Nonetheless the categories are still usually treated as distinct—as they are in IPOA's Code of Conduct and the Montreux Document.

The Montreux Document disavowed the announcement of any new obligations; it purported simply to clarify existing legal obligations.[42] But it has been praised "as a very public reaffirmation …of the applicability of international humanitarian law … and human rights to contemporary armed conflict."[43] The document provides, in particular, that states that hire PMCs are responsible not only for ensuring, to the extent they can, that the companies respect international humanitarian law but also, and more significantly for present purposes, for ensuring that the companies comply with international human rights law—but only where violations would be "attributable to the Contracting State." The qualifier leaves a good deal of wiggle room, of course, which is one reason why the practical significance of the Document has been questioned. Another reason is the heavy involvement of leading PMCs in the development of the Montreux Document, and their enthusiastic embrace of it once it was finalized.[44] The IPOA's Code of Conduct pledges that its members will be guided by "pertinent" rules of international humanitarian law and international human rights—"including as set forth in," *inter alia*, the Universal Declaration of Human Rights, the Geneva Conventions,

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[39] Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/63/467 (last visited Oct. 12, 2009).

[40] *See, e.g.,* Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, 31 Am. U. L. Rev. 935, 938, 941 (1982); Olson, *supra* note 31, at 450.

[41] *See, e.g.,* Byron, *supra* note 31.

[42] *See* Montreux Document, *supra* note 39, Preface ¶¶ 2-4, at 5.

[43] James Cockayne, *Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document*, 13 J. Conflict & Security L. 401, 403 (2009).

[44] *See id.* at 426; José L. Gómez del Prado, *Private Military and Security Companies and the UN Working Group on the Use of Mercenaries*, 13 J. Conflict & Security L. 429, 443 (2009). Gómez del Prado also notes that no countries from Latin America or the Caribbean signed the Montreux Document or participated in its preparation; he suggests that "[t]he unbalanced representation of Western European countries denotes the heavy involvement of countries where almost the whole of the industry is located and operates from." *Id.*

and the Montreux Document.[45] Again, note the wiggle room: the IPOA declares that international humanitarian law and international human rights, including the provisions of the Montreux Document themselves, are to be respected to the extent that they are "pertinent" and "applicable." No wonder there are worries that the Montreux Document will function largely as a "seal of legitimacy" for PMCs[46] and "a figleaf to hide the absence of more rigorous efforts to regulate [the] industry, improve its standards, and ensure accountability."[47]

The Montreux Document focuses explicitly on situations of armed conflict, and it reiterates explicitly that these are the only situations to which international humanitarian law applies.[48] Nonetheless it declares that its provisions "may also be instructive for post-conflict situations and for other, comparable situations."[49] Moreover, the Montreux Document does not use the terms "private military company" or PMC; instead, it addresses itself to the operations of "private military and security companies (PMSCs)," which it defines as "private business entities that provide military and/or security services," including "armed guarding and protection of persons and objects."[50] So the Montreux Document provides an obvious template for injecting the language of human rights into discussions of private policing. The question is whether the template is worth using.

B. Two Uses of Human Rights

What might it mean to speak of human rights in connection with private policing? It will be useful to distinguish two different ways to pursue this question. The first examines human rights as general approach to thinking about social and political questions: an approach that treats respect for certain individual claims or interests, held by all people, as either "trumps" or at least strong counterweights to the dictates of utilitarian balancing.[51] The second focuses on particular principles that have been formulated as human rights in existing, international legal instruments. The instruments that are most germane for this purpose are the Universal Declaration of Human Rights,[52] the International Covenant on Civil and Political Rights,[53] and the

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[45] *See* International Peace Operations Association, Code of Conduct, *supra* note 38, Preamble.

[46] Gómez del Prado, *supra* note 44, at 444.

[47] Cockayne, *supra* note 43, at 427.

[48] *See* Montreux Document, *supra* note 39, Preface ¶¶ 1 & 5, at 5.

[49] *Id.* Preface ¶ 5, at 5.

[50] *Id.* Preface ¶¶ 1 & 9(a), at 5-6.

[51] *See, e.g.*, Ronald Dworkin, *Rights as Trumps*, *in* Theories of Rights 153, 153 (Jeremy Waldron ed., 1984); Jeremy Waldron, *Introduction*, *in* Theories of Rights, *supra*, at 1, 14; Amartya Sen, *Elements of a Theory of Human Rights*, 32 Phil. & Pub. Affairs 315 (2004).

[52] G.A. Res. 217, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

[53] G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16 at 52, U.N. Doc. A/6316 (1966).

International Covenant on Economic, Social and Cultural Rights[54]—the instruments that have become known, collectively, as the "international bill of rights."[55]

The distinction I want to draw here is not between the invocation of rights as moral claims or as legal claims, nor does it depend on the audience for the claims. The generalized conception of human rights—the first possibility I described above—could be used to frame *legal* arguments, and those arguments could be addressed to a court, domestic or international; a legislature; particular public officers; or the public at large. Or the generalized conception of human rights could be used to frame *moral* arguments, and those arguments, as well, could be addressed to the public, to government officials, to legislatures, or to domestic or international tribunals. Similarly, the international bill of rights could be relied upon in framing *legal* arguments—arguments about what some person or governmental body is obligated to do under the law. Or it could be used to frame *moral* arguments about what should be done. (How cleanly legal arguments can be distinguished from moral arguments is itself, obviously, a matter of controversy.) And the audience for either kind of argument could be courts (domestic or international), legislatures, public officials, or the citizenry.

There are still other ways, of course, to distinguish among various invocations of the language of human rights in the context of private policing, two of which I want to flag and then, for now, put to one side. One is the distinction based upon what kind of person or entity rights are being claimed *against*: does the obligation to respect the rights rest, in the first instance, on private security firms and their employees, or are we talking about an obligation on the part of the government with regard to private policing? Or both? The other is the familiar distinction between affirmative and negative rights: rights to have the government (or some other entity or person) *do* something, and rights to have the government (or some other entity or person) *not do* something.

With these cross-cutting ways of distinguishing among human rights claims in mind, I want to first consider what, if anything, human rights as a general approach to political morality might bring to discussion of private policing, and then consider what, if anything, that discussion might draw from the principles set forth in the international bill of rights.

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[54] G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16 at 49, U.N. Doc. A/6316 (1966) (entered into force 1976).

[55] *See, e.g.,* Gardbaum, *supra* note 30; Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of the "International Bill of Rights,"* 16 Ind. J. Global Legal Stud. 437, 438 (2009).

C. Human Rights as a General Approach

The most obvious thing that human rights, as a general approach to thinking about social and political questions, has to offer discussions of private policing is a non-utilitarian framework. There is a longstanding and complicated debate about how human rights, and rights more generally, should be understood.[56] But there is broad (although not universal) agreement that rights analysis is non-utilitarian. That is to say, virtually everyone agrees that honoring rights is not simply a matter of maximizing collective well-being. In some set of conditions or another, in one manner or another, honoring rights will require departing from—or at least strongly considering departing from—what might otherwise seem to be the dictates of welfare economics.[57]

Rights-talk and utilitarianism can be made to converge, but only by playing word games. We can say that there is only one fundamental right, the right to well-being (or happiness or utility or pursuing one's preferences), and that the best social policies are the ones that maximize how well that right is honored on the whole, averaging across the population. But surely that uses the word "right" in a cramped and artificial way. Or we can define social utility—the thing utilitarianism says we should maximize—in a way that includes respect for every individual's rights. But that takes utilitarianism so far from Bentham's calculus of pleasures and pains that it no longer seems helpful to call it utilitarianism.

As a practical matter, then, invoking rights is a way of rejecting, or at least strongly qualifying, utilitarianism.[58] And the thoroughgoing utilitarianism of most discussions of private policing today can in fact leave one uneasy. Policing seems, intuitively, to have a lot to do with systems of hierarchy and dominance, with the relationship between the citizen and the state, and with the fair and equitable use of power. Surely we care about more than "objective … and subjective needs," "value-for-money," and eliciting deference and obedience.[59] We care about dignity,

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[56] For introductions to the voluminous literature, see, for example, Ignatieff , *supra* note 1; Theories of Rights, *supra* note 51; Joshua Cohen, *Minimalism About Human Rights: The Most We Can Hope For?*, 12 J. Pol. Phil. 190 (2004); Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 Ga. L. Rev. 343 (1993).

[57] This is not to say that rights analysis cannot be defended, in the abstract, as the best way to promote collective welfare. Some "rule-utilitarians" argue that it can be, although that case has always been controversial. The point here is just that once rights are recognized—on whatever grounds—applying them in particular instances functions to trump, or at least to weigh against, what an *ad hoc* utilitarian calculus might otherwise dictate.

[58] Similarly, Sharon Dolovich has used the conceptual apparatus of rights as a way to introduce deontological considerations into the debate over private prisons. *See* Dolovich, *supra* note 36.

[59] *See supra* text accompanying notes 22-29.

autonomy, and privacy, and we care about democratic self-governance. At least in part, we care about these things for instrumental reasons: they advance, we think, people's happiness. But we may also value them in and of themselves. We may think that it is just *wrong* to treat people in a way that unduly diminishes their dignity, their autonomy, or certain dimensions of their privacy. We may think that democratic self-government has intrinsic value that it is part of a life well lived. And we may want to talk about the privatization of policing in a way that captures these kinds of considerations.

It is not self-evident, of course, that the language of rights is the most helpful tool for thinking about the non-utilitarian considerations raised by private policing. Some plausible intrinsic values implicated by private policing—democracy, in particular—may not lend themselves naturally to elaboration in terms of rights.[60] Concerns about dignity, autonomy, and privacy, on the other hand, do lend themselves to elaboration in terms of rights, but they can also be elaborated in other ways, and the language of rights comes with some baggage. Rights need not be absolute; in fact most rights probably cannot be meaningfully understood as absolute.[61] But there is sometimes a tendency to think of rights as absolute, and that can make the language of rights seem inconsistent with politics and compromise.[62] Politics and compromise themselves may not always be desirable: part of the power of rights-talk is the way it can harness outrage. "[W]e are most certain that a human right is at issue," writes the historian Lynn Hunt, "when we feel horrified by its violation."[63] Horror and outrage, though, may not be the right emotional registers for disentangling many of the issues raised by private policing. And the baggage that comes with the language of human rights is not limited to its valence of inflexibility. To speak of rights is generally to speak of a person's entitlements; it is a rhetoric of individualism, not communitarianism.[64] Indeed it has been suggested that "human rights discourse itself contributes to the protection of private power," because the

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[60] It is nonetheless common to speak of collective self-determination as a "human right," and rights of this kind are included in the "international bill of rights." *See infra* p. 17. And, as we will see, the Supreme Court of Israel appeared to rely on some version of a human right in democratic governance when ruling that a private prison would be unconstitutional.

[61] *See, e.g.*, Gardbaum, *supra* note 30; Sen, *supra* note 51; Waldron, *supra* note 51.

[62] *See, e.g.*, Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1991); Ignatieff, *supra* note 1, at 20.

[63] Hunt, *supra* note 30, at 26.

[64] *See, e.g.,* Glendon, *supra* note 62. This may have been part of what Justice Clarence Thomas of the United States Supreme Court was getting at when he complained to a reporter that "there is too much focus on our rights…. Shouldn't there at least be equal time for our Bill of Obligations and our Bill of Responsibilities?" Adam Liptak, *Rare Glimpse of Thomas, From Bench to Den*, N.Y. Times, Apr. 14, 2009, at A10, A14.

"historical mission of human rights" and the thrust of the "analytic framework" that have developed around them is "the protection of private activities from public power."[65]

Quite possibly the baggage associated with rights talk has had something to do with the general absence of the language of rights from discussions of private policing. To people concerned about the phenomenon, the worldwide proliferation of private security personnel, and the diversification of their functions, may seem like private power run amuck, and the rhetoric of individual rights—especially the right to self-defense and the right to use and protect one's property—may seem like part of the problem, not part of the solution.

It is not even clear how much traction is gained by thinking deontologically about private policing—let alone thinking deontologically in the language of rights. Many of the concerns one might raise about private policing in terms of violations of human rights—concerns about detentions, uses of force, invasions of privacy, and interrogation tactics—can also be expressed in the language of welfare economics; deonotological concerns about dignity, autonomy, and privacy can piggyback, as it were, on more prosaic, utilitarian concerns about police abuse and declines in the perceived legitimacy of the legal order. The main question with regard to these concerns is empirical, not moral or philosophical: to what extent, if at all, are private police more likely than public police to engage in abusive conduct?[66] Adding the language of rights to the discussion does not help answer that question. Things are different with regard to concerns about democratic self-government. These concerns do not easily piggyback on utilitarian considerations. But then, as I have noted, concerns about democratic self-government are not naturally expressed in the language of human rights, either.

So far I have left out what may be, today, the most important practical consequences of invoking the language of human rights: it brings international law and international advocacy into the picture. Saying that something is a matter of human rights means, among other things, that it is no longer a matter that can or should be left entirely to domestic authorities to handle as they see fit.[67] This, surely, was much of the reason that individuals and organizations concerned about PMCs

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[65] Gavin W. Anderson, *Rights and the Art of Boundary Maintenance*, 60 Modern L. Rev. 120, 121-23 (1997); *see also* Anderson, *supra* note 30.

[66] Something similar might be said about private prisons.

[67] As Michael Ignatieff points out, the human rights revolution of the past six decades has had three components: a juridical revolution, recognizing that individuals as well as states have rights under international law, a revolution in advocacy, brought about by the rise of a global, non-governmental network of individuals and groups dedicated to giving teeth to the juridical revolution, and a revolution in enforcement, as regional and international tribunals increasingly are given power to adjudicate and sanction abuses of human rights. *See* Ignatieff, *supra* note 1.

paid so much attention over the past decade to the question whether human rights were applicable to the actions of private military personnel. Asking whether human rights applied to PMCs was a way of asking whether PMCs were accountable to the international community. But the reactions to the Montreux Document—its enthusiastic embrace by industry representatives, and the much more cautious reaction by human rights advocates—serves a reminder that the devil is in the details: accountability for what, and in what manner?[68]

D. Human Rights as a Set of Particular Principles

All of this makes it difficult to say concretely what, if anything, human rights talk in the abstract could bring to debates about private policing. What about a more focused invocation of the particular rights codified in the leading international agreements on human rights—the so-called international bill of rights?

The three instruments generally said to make up the international bill of rights—the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESC)—codify three categories of rights with possible implications for private policing. First, there are provisions that apply directly and obviously to public law enforcement and might be extended to private policing. Second, perhaps counter-intuitively, there are provisions that might be thought to *insulate* private policing against certain forms of restriction or regulation. Third, there are provisions that might be thought violated by governments that cede too much responsibility for policing to the private sector. In ways that will become clear, these categories overlap, but they are sufficiently distinct to be worth considering separately.[69]

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[68] *See supra* text accompanying notes 42-47.

[69] This tripartite typology leaves out one very important set of rights, well recognized in international agreements, with direct implications for private policing: the rights relating to terms and conditions of employment. Like public police officers, private security officers are, among other things, employees. Unlike public law enforcement, the private security industry is weakly unionized, and one troubling aspect of police privatization is the implications it may have for the treatment of people who carry out the actual work of policing. I have addressed this issue elsewhere, see Sklansky, *supra* note 17, at 101-04, but do not discuss it here; from a human rights standpoint, it is largely a specific instance of the more general problem of the human-rights obligations of private employers. *See, e.g.*, Shareen Hertel, *Human Rights and the Global Economy: Bringing Labor Rights Back In*, 24 Md. J. Int'l L. 283, 287-95 (2009). But it is worth noting, if only in passing, that there are good reasons to believe that the workplace treatment of police employees—public or private—can powerfully influence their treatment of the people with whom they come into contact. *See* David Alan Sklansky, Democracy and the Police 155-88 (2008). The Montreux Document quite appropriately calls attention to the rights of the employees of PMCs, *see* Montreux Document,

In the first category—rights that apply directly to public policing and might be extended to private policing—are rights to bodily security, to privacy, to freedom from arbitrary arrest, and to immunity from certain forms of physical mistreatment. The UDHR declares that everyone has rights "to life, liberty and security of person" (art. 3), to "freedom of movement" (art. 13), and against "arbitrary arrest" (art. 9), "arbitrary interference with … privacy, family, home or correspondence" (art. 12), and "cruel, inhuman, or degrading treatment" (art. 5). Similarly, the ICCPR gives everyone rights "to liberty and security of person" and against "arbitrary arrest or detention" (art. 9), as well as the right, when deprived of liberty, to be "treated with humanity and with respect for the inherent dignity of the human person" (art. 10).

Although the traditional—and still prevailing—view is that international human rights apply only against governments, not against private parties,[70] the UDHR and ICCPR rights against abusive forms of policing may apply in either of two ways to private policing. First, private security firms may in some instances be deemed sufficiently integrated into the machinery of governance that it makes sense to think of them as arms of the state, and to hold the state accountable for their actions.[71] Second, the UDHR and ICCPR may regulate private security firms "indirectly," by imposing on states "a general duty to enact legislative and other measures necessary to give practical effect" to the rights the instruments codify.[72] Thus, the UDHR declares that "[e]veryone is entitled to a social … order in which the rights and freedoms set forth in this Declaration can be fully realized" (art. 28). More explicitly, the ICCPR requires every state party "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant" (art. 2(2)). These provisions can be read to require signatory states to regulate private firms in order to ensure that the firms honor the substantive rights set forth in the UDHR and ICCPR.

Applying international human rights to private policing in either of these two ways runs into difficulties. Trying to identify private sector activities that are "really" activities of the state is a notoriously difficult enterprise; this is what has made the "state action" doctrine in United States constitutional law such a

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supra note 39, pt. 1 ¶¶ 22-26, pt. 2 ¶¶ 13, 38, 66, and it would be serious mistake, in thinking about the application of human rights to private policing, to neglect those rights governing workplace relations.

[70] *See, e.g.,* Byron, *supra* note 31, at 883; Olson, *supra* note 31, at 450.

[71] *See, e.g.,* Clapham, *supra* note 33, at 2. Regarding efforts in the United States and Canada to extend, on this theory, the domestic constitutional obligations of the police to private security firms, see respectively Sklansky, *supra* note 3, at 1229-75, and Burbidge, *supra* note 34.

[72] Gardbaum, *supra* note 30, at 236; *see also* Clapham, *supra* note 33, at 2.

quagmire.[73] And there is a strong sense in which saying that states are obligated to regulate private firms so that human rights are "fully realized" and given "effect" begs the question: *when*, exactly, does private policing implicate human rights? Actually, there are two questions here, and the answers to both are murky. First, when, if ever, do actions of private firms constitute violations of human rights? Second, are there categories of private action that prevent rights from being "fully realized" or given full "effect" without directly violating those rights—and, if so, how are those categories defined? These are notoriously difficult questions. Unsurprisingly, the Montreux Document dodges both of them in addressing the application of international human rights law to PMCs.[74]

Part of what fueled the efforts that culminated in the Montreux Document, and the broader efforts to subject PMCs to international human rights and international humanitarian law, is the sense that PMCs viewed themselves as operating—and were in fact operating—with little or no legal accountability of *any* kind. Insisting that PMCs must honor human rights was in part a way of insisting that they be placed under *some* kind of legal regime. It was also a way of asserting that the activities of PMCs were of international concern—a matter that cannot and should not be left solely to domestic authorities to regulate or not to regulate as they see fit. The situation with private policing is different. There is little question that these firms operate within legal constraints: a mixture, varying in details from country to country, of the constraints that apply to private individuals in general and the constraints that apply to public police officers. Nor is the case for "internationalizing" the regulation of private police nearly as clear as it is for PMCs. PMCs themselves operate internationally; police departments generally do not. So the gains from invoking this first category of human rights in discussions of private policing are less obvious than in the context of PMCs—and even there, as we have seen, the case has complications.

It may seem odd to suggest that there is a second way that commonly recognized human rights might figure in discussions of private policing—as a shield for the activity rather than a limitation on it. It is rare even for private security companies to assert that restricting them too much would violate human rights. In fact it might, although the case for that proposition, as well, runs into complications. Private policing can be understood as arising naturally from the exercise of three basic rights: the right to self-defense; the right to use and enjoy one's property, in part by placing on conditions on entry; and the right to economic exchange—the

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[73] *See* Stephen Gardbaum, *The "Horizonal Effect" of Constitutional Rights*, 102 Mich. L. Rev. 388, 412-14 (2003); Sklansky, *supra* note 3, at 1236-65.

[74] *See supra* text accompanying notes 42-47; Cockayne, *supra* note 43, at 409.

right, that is to say, to take part in the "free market" by hiring someone else to do what you yourself would have a right to do yourself.[75] Part of what has it so difficult for courts and policymakers in the United States to think about private policing as "state action" is that each of these three rights is widely thought to be fundamental.[76]

It is possible to find recognition of these three rights in international law, as well, but one needs to look hard, and not everyone agrees that it is there. The UDHR guarantees "the right to own property alone as well as in association with others" (art. 17), and some important regional human rights treaties go further, expressly protecting the individual's right to the "use and enjoyment" of his or her property.[77] One can read these provisions to give an individual the right to protect his or her own property, and to sell some of his property and use the proceeds to hire someone else to protect the remainder. But that is reading quite a bit into the documents.[78] Similarly, by guaranteeing rights to "life, liberty, and security of person" (art. 3), the UDHR could be taken to recognize a right to self-defense. So could the ICCPR, which similarly guarantees rights to "life" (art. 6) and to "liberty and security of person" (art. 9). Some commentators have in fact argued for such a reading, as part of a more general case for recognizing an individual right to self-defense under international law.[79] But the mainstream view is that there is no such right under the UDHR, the ICCPR, or international law more broadly.[80]

This second category of rights, therefore, offers even less reason than the first to think that the language of human rights would enrich the global debate about

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[75] *See* Sklansky, *supra* note 3, at 1188-89.

[76] *See id.* The Supreme Court of the United States recently reaffirmed the "inherent" nature of the right to self-defense in the course of interpreting the constitutional right to "keep and bear arms." District of Columbia v. Heller, 128 S. Ct. 2783, 2817 (2008).

[77] American Convention on Human Rights art. 21(1), Nov. 22, 1969, 36 O.A.S.T.S. 1; *see also* Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, E. T.S. No. 9 (entered into force May 18, 1954); *cf.* Sergey Sayapin, *The International Committee of the Red Cross and International Human Rights Law*, 9 Hum. Rts. L. Rev. 95, 125 (2009) (reading art. 17 of the UDHR to protect "[t]he right to lawfully own *and use* property") (emphasis added).

[78] The ICESCR expressly protects the right of "*peoples*" to "freely dispose of their natural wealth and resources … based upon the principles of mutual benefit" (art. 1) (emphasis added). But there is no similar recognition, in any of the major international human rights treaties, of a *personal* right to dispose of resources through economic exchange.

[79] *See, e.g.*, David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. Pub. L. 43, 134-35 (2007).

[80] *See* Barbara Frey, U.N. Human Rights Council, Prevention of Human Rights Violations Committed with Small Arms and Light Weapons, U.N. Doc. A/HRC/Sub.1/58/27, at 9-10 (2006), *available at* http://www.geneva-forum.org/Reports/20060823.pdf (last visited Nov. 2, 2009); John Cerone, *Is There a Human Right of Self-Defense?*, 21 J.L. Econ. & Pol'y 319 (2006).

private policing. Perhaps that debate would benefit from greater consideration of the connections between private policing and self-defense, defense of property, and economic exchange. But the language of human rights is not a particularly promising way to talk about those connections, given how weakly the rights in question are recognized under international law.

E. Human Rights and Affirmative Obligations of Government

There remains the third category of human rights with possible implications for private policing: rights that might be thought violated when states cede too much responsibility for policing to the private sector. In this category are the rights under the UDHR to "equal protection of the law" (art. 7); to "an effective remedy" in court for "acts violating the fundamental rights granted … by the constitution or by law" (art. 8); to "equal access to public service" (art. 21(1)); and to "a social … order in which the rights and freedoms set forth in [the UDHR] can be fully realized" (art. 28)—including, necessarily, the rights to "liberty," "security of person," "privacy," and "freedom of movement" (arts. 3, 12, 13). These rights might be thought violated when a state fails to provide all of the people within its borders with some basic, minimally acceptable level of police protection against private violence. The category may also include rights to democratic government: the right to "self-determination" recognized in the ICCPR (art. 1(1)) and the ICESC (art. 1(1)); and the UDHR rights to "take part in government … directly or through freely chosen representatives" (art. 21(2)); to "periodic and genuine elections" making "[t]he will of the people … the basis of the authority of government" (art. 21(3)). These rights might be thought violated when a state gives up too much control over the legitimate exercise of coercive force, effectively delegating governance to private parties.

Saying that everyone has a right to democratic self-rule is a way of saying that it is important that states be governed democratically. It is not self-evident what the language of rights adds here. The franchise can be selectively denied; it makes sense to speak of an individual right to vote. But as we generally conceive of it, democratic self-rule is something that the population of a state either has collectively or does not have at all. Desirable as it would be to have debates about private policing take more account of the collective good of democratic self-governance, it is not clear that the language of rights is an especially helpful way to inject those themes into the debate.[81]

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[81] One thing the language of rights *does* accomplish here is to suggest that, when there is disagreement within a national population about the importance of democratic self-rule, those in favor of democracy should not lose simply because they are outnumbered. *See, e.g.,* Charles R. Beitz, *Human Rights as a Common Concern*, 95 Am. Pol. Sci. Rev. 269 (2001). That seems intuitively right, but it is not clear that this because there is something worth protecting in the

The recent decision by the Supreme Court of Israel ruling that private prisons would be unconstitutional, might be thought a strong piece of evidence that the language of rights *is* a helpful way to frame concerns about the impact of privatization on democracy.[82] The Court reasoned that transferring a prison to a profit-making concessionaire would violate the rights to liberty and dignity granted by Israel's Basic Law, because the legitimacy of punishment is undermined when it is carried out by an entity motivated by economic considerations. Constructing a similar argument for policing seems straightforward—at least when the privatization occurs "top down," through government subcontracting, rather than "bottom up," through private efforts to supply services the government fails to provide.[83] But in policing, in contrast to the case with prisons, privatization is usually "bottom up," not "top down."

And even in the context of "top down" privatization, the reasoning of the Israeli Supreme Court's decision raises a number of questions. Is the objection to private prisons really a function of the for-profit form of the concessionaire—or would a non-profit corporation, highly attentive to costs and paying lucrative salaries, raise the issues? And if a non-profit corporation *would* raise the same concerns about legitimacy, if the real problem is allowing prisons to be operated by *any* organization driven by economic considerations, then what is the difference between the state hiring a private organization and hiring private individuals? Employees, after all, usually perform their jobs in large part to make money, and—like a private organization—they have private goals that are typically very different from the goals of the government that hires them.

One way that hiring a private organization *is* different than hiring a private individual is that interposes an additional layer of bureaucracy between the government and the actions being carried out in the government's name, potentially impairing transparency and accountability. Hiring a private prison operator (or a private police force) may obscure lines of responsibility in a way that hiring guards (or police officers) does not. So delegating governmental power to a private *organization* may, in fact, threaten the project of democratic self-government in

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minority's *desire for* or *interest in* democracy; it may be simply that democracy itself is worth protecting, regardless how much or how little people think they want it.

[82] *See* HCJ 2605/05 The Human Rights Division, The Academic Center for Law and Business v. The Minister of Finance [Nov. 19, 2009] (unpublished), an English translation is available at http://elyon1.court.gov.il/files_eng/05/050 /026/n39/05026050.n39.pdf; Tomar Zachin, *International Legal Precedent: No Private Prisons in Israel*, Haaretz.com, Nov. 20, 2009, *available at* http://www.haaretz.com/ hasen/spages/1129516.html.

[83] I borrow this useful distinction from Tally Kritzman-Amir, *Privatization and Delegation of State Authority in Asylum Systems*, 5 L. & Ethics Hum. Rts. 192 (2011). *Cf.* Joh, *supra* note 18, at 613-14 (distinguishing "publicly contracted policing" from other forms of private policing).

ways that entrusting governmental power to private *individuals* does not. Again, though, it is not clear what additional purchase can be gained on this consideration through the language of human rights.

In contrast, the right to minimally adequate protection against private violence really *does* seem like a principle that lends itself to the language of rights. It seems intuitively plausible that states have an obligation—at least moral, and possibly legal—to protect the liberty, security, and privacy of the individuals they govern against private attacks. Such an obligation, moreover, could be fulfilled with respect to some individuals within a state's jurisdiction while being violated with respect to others. So it makes sense to talk about this obligation as a matter of individual rights. Human rights seems the most natural language for expressing the idea that states are legally or morally obligated to provide—or at least try hard to provide—everyone with a minimally adequate degree of protection against private violence.

That is not an idea that gets much attention in debates of police privatization. It should get more. Private security firms sometimes talk as though they simply augment the protection provided by public law enforcement agencies, but the relationship is not that simple. Over the long term, private policing can wind up displacing public law enforcement, rather than just augmenting it, by reducing demand for public police services among the wealthy and politically powerful. Along with private schooling and private medical care, private policing can easily become part of a "secession of the successful," leading not just to unequal protection against private policing, but to a decline, in absolute terms, in the quality of police protection provided to the poor and politically disempowered. [84]

It does not take a stretch to see this as a matter of human rights. It is no accident that both the UDHR and the ICCPR explicitly protect "security of person"; there is broad agreement that even the most minimal, stripped down account of human rights must include a right to physical security.[85] True, a right to protection against private violence is most naturally characterized as an "affirmative" rather than a "negative" right: a right to have the government do something, rather than a right to have the government refrain from doing something. This has proved to be a stumbling block for efforts to establish, within the domestic constitutional law of

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[84] Robert B. Reich, *Secession of the Successful*, N.Y. Times, Jan. 20, 1991, § 6 (Magazine), at 16. For evidence that this has happened in Los Angeles, see Sklansky, *supra* note 3, at 1224 & n.342.

[85] *See, e.g.,* Joshua Cohen, *Minimalism About Human Rights: The Most We Can Hope For?*, 12 J. Pol. Phil. 190 (2004).

the United States, a right to protection against private violence;[86] rightly or wrongly, the United States Constitution is commonly taken to be "a charter of negative rather than positive liberties."[87] Outside the United States, though, affirmative rights are commonplace.[88] The international bill of rights is full of affirmative rights, and so are the domestic constitutions of many nations.[89] In particular, the right to protection against private violence is explicitly recognized in some domestic constitutions, has been found by courts to be implied in others, and is a growing fixture of international law, especially the case law of the European Court of Human Rights.[90] (Part of what has driven international law to place more emphasis on the right to protection against private violence is increasing concern for the practical concerns of women—what has been called "the feminization of human rights."[91]) So there is a straightforward argument that human rights are violated when a state delegates too much responsibility for policing to private parties and fails to provide a minimally adequate level of protection to everyone, free of charge.

This kind of violation is associated with a particular dimension of privatization: privatizing the payment for, and thereby the allocation of, policing.[92]

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[86] *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989); Sklansky, *supra* note 3, at 1281; David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 Va. L. Rev. 1229, 1229-34 (2002).

[87] DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298, 301 (7th Cir. 1987) (Posner, J.), *aff'd*, 489 U.S. 189 (1989); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.). The classic defense of this view is David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864 (1986). For a more recent and more elaborate defense, see Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. Rev. 857, 864-74 (2001). For challenges, see, for example, Stephen Gardbaum, *The Myth and Reality of American Constitutional Exceptionalism*, 107 Mich. L. Rev. 391, 455-60 (2008); Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 Duke L.J. 507 (1991); David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 Sup. Ct. Rev. 53; Sklansky, *supra* note 86.

[88] *See, e.g.*, Cass Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, *in* American Exceptionalism and Human Rights 90, 92 (Michael Ignatieff ed., 2005).

[89] *See, e.g.*, Gardbaum, *supra* note 88, at 444-61.

[90] *See id.* at 453-54; Heike Krieger, *The Protective Function of the State in the United States and Europe: A Right to State Protection?*, *in* European and US Constitutionalism 153 (Georg Nolte ed., 2005).

[91] Clapham, *supra* note 33, at 3-4 (emphasis omitted); Arvonne S. Fraser, *The Feminization of Human Rights: How the World Conference on Human Rights Brought Women onto the Agenda*, 31 Foreign Service J. 70 (1993).

[92] On the distinction between privatizing demand and privatizing supply (or, stated differently, the distinction between privatizing "payment" and privatizing "provision," or between privatizing the "allocation" of force and privatizing its "exercise"), see Rosky, *supra* note 35, at 914-26.

The "secession of the successful" problem does not arise merely because a state contracts out for policing services rather than supplying those services through a public agency—hiring security firms, complete with their own management systems, rather than hiring individual officers and supervisors and making them part of a public bureaucracy. It does not arise, that is to say, when policing is privatized "top down." It *does* arise, conversely, when police privatization occurs, as it usually does, in "bottom up" manner. In fact, it occurs whenever people who want certain kinds or levels of police protection need to pay for it—even if it is a public agency that performs the policing and charges for it.[93] In theory, there is no reason that private *provision* of policing must go hand in hand with private *allocation* of policing.[94]

As a practical matter, though, the two phenomena tend to reinforce either other. Both reflect a willingness to give the private sector a greater degree of responsibility for, and control over, public safety and order maintenance. And both are on the rise. There is a natural tendency, moreover, to think that people and organizations that hire private security firms should have some control over how they are deployed.[95] The people and organizations doing the hiring are particularly prone to this sentiment,[96] but they are not alone. The worldwide growth of private policing therefore raises real concerns about the commitment to provide all people with a certain minimally adequate level of protection against private violence.

We should have no illusions about the historic strength of that commitment, even before the recent rise in private policing. Public police forces have a long tradition of failing to provide poor neighborhoods the same level of protective services they provide wealthier areas—a disparity that can coincide, notoriously, with a concentration of certain kinds of repressive enforcement activities in poor neighborhoods.[97] But public police forces, unlike private security firms, are at least nominally devoted to the egalitarian project of giving everyone some minimal level of safety and security. Moreover, inequalities in the level of public police protection

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[93] On the increasing prevalence of such arrangements, see Ayeling, Grabosky & Shearing, *supra* note 1616, at 133-57; Sklansky, *supra* note 3, at 1176.

[94] *See* Rosky, *supra* note 35 (stressing this point).

[95] On the "client-driven mandate" of private security, see Joh, *supra* note 12, at 62; Sklansky, *supra* note 17, at 98.

[96] Thus, for example, the leader of a group of business owners employing private security guards to patrol an area downtown Los Angeles brushed off calls for greater public oversight: "If people are saying more accountability, than I say accountability to whom? It's not the city's money; it the property owners' money." William Wan & Erin Ailworth, *Flak Over Downtown Security Guards*, L.A. Times, June 8, 2004, at B1, B10.

[97] On these patterns in the United States, see, e.g., Alexandra Natapoff, *Underenforcement*, 75 Fordham L. Rev. 1715 (2006).

require conscious, explicit decisions, which can make it politically cumbersome for the wealthy to fund only their own protection. Private policing makes it much simpler, maybe even inevitable. The privatization of policing can be fueled by a vicious cycle: the wealthy hire private security firms, so they are less willing to pay for public policing, so public policing deteriorates, and the wealthy increase their reliance on private guards. The ultimate fear is that "[t]he rich will be increasingly policed preventively by commercial security while the poor will be policed reactively by enforcement-oriented public police," with "both the government and the market [protecting] the affluent from the poor—the one by barricading and excluding, the other by repressing and imprisoning."[98]

All of this means that the egalitarian concerns raised by private policing, and more particularly the concerns about providing everyone with a certain minimal level of protection against private violence, are quite real and deserve serious attention, certainly more attention than they generally receive. As we have seen, those concerns also flow in a straightforward way from what may be the most basic and least controversial of the human rights recognized in international agreements. This is one way, therefore, that the language of human rights might in fact enrich and deepen debates of private policing. It strikes me as the most important way.

III. Conclusion

The small role that human-rights talk has played in debates over private police is not hard to explain. Rights have traditionally been understood as safeguards against the abuse of governmental authority, not private power. And private security firms, unlike private military companies, generally are amenable to local regulation; the language of international human rights is not needed in order to bring them within the rule of law. Still, there is reason to think that debates over private policing could be enriched by greater attention to human rights. Not because that language would provide a better way to couch concerns about abusive conduct by the employees of private security companies. It might or it might not. But the language of human rights *does* seem a promising way to focus attention on a different, underappreciated set of concerns raised by the growing importance of private security firms: concerns about the obligation of states to provide everyone within their borders with minimally adequate protection against private violence.

[98] Bayley & Shearing, *supra* note 13, at 594, 602; *see also* Sklansky, *supra* note 3, at 1284-85.