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Privatization of Prisons in Israel and Beyond: A *Per Se* Violation of the Human Right to Dignity

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Making a rather ambitious, broad-form decision, the Israeli Supreme Court (ISC) in 2009 ruled that privatization of prisons is a *per se* violation of human rights, in particular the rights to liberty and dignity.¹ The Court ruled that it was not the often deleterious consequences of privatization that violated the rights to liberty and dignity, but that privatization of prisons by itself was a violation.² This decision has been subject to much negative commentary and criticism³ with most analyses focusing on the Court's argument on the right to liberty. Scholars that have dismissed the opinion seemed to have misread it, often grounding their counter-arguments with faulty and wildly abstract premises that misrepresent the human rights issues at stake. This article focuses on the Court's novel argument on the right to human dignity, and especially how privatization of prisons turns inmates into commodities. While this argument may have been under-developed

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1. HCJ 2605/05 Academic Ctr. of Law & Bus. v. Minister of Fin., 63(ii) PD 545 [2009] (Isr.), English translation *available at* http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.pdf [hereinafter Prison Case].
 2. As per the Israeli Basic Law: Human Dignity and Liberty, SH No. 1391, § 8 (Isr.), English translation *available at* https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm [hereinafter Israeli Basic Law: Human Dignity and Liberty]. For an overview of the different problems associated with private prisons, see Uri Timor, *Privatization of Prisons in Israel: Gains and Risks*, 39 ISRAEL L. REV. 81, 82-84 (2006) (noting in particular the problems of oversight over private prisons by governmental agencies, the fact that private prisons are not focused on rehabilitation of prisoners, and challenging the claim that private prisons are actually more efficient); Christine Bowditch & Ronald S. Everett, *Private Prisons: Problems within the Solution*, 4 JUST. Q. 441 (1987) (explaining that efficiency factors are clouded when privatization occurs for the entire infrastructure, plus free market competition is well-nigh impossible for prisons); Rachel Christine Baile Antonuccio, *Prisons for profit: Do the Social and Political Problems Have a Legal Solution?*, 33 J. CORP. L. 577 (2008) (stating that while a non-delegation challenge would be difficult under constitutional standards, problems with private prisons given strive for profit margins and internal staff issues indicate that more regulation is required); Michael Brickner & Shakyra Diaz, *Prisons for Profit: Incarceration for Sale*, 38 HUM. RTS. 13 (2011) (stating that key problems with private prisons include profit maximizing, staffing issues, lack of accountability to state, and overall poor treatment of prisoners); CODY MASON, THE SENTENCING PROJECT, TOO GOOD TO BE TRUE: PRIVATE PRISONS IN AMERICA 17 (Jan. 2012), *available at* http://sentencingproject.org/doc/publications/inc_Too_Good_to_be_True.pdf (noting dubious cost-saving results and inadequate care overall). *But cf.* Malcom M. Feely, *The Unconvincing Case Against Private Prisons*, 89 IND. L. J. 1401, 1418 (2014) (asserting that the key argument against private prisons, *i.e.*, the state as holding the monopoly for punishing its citizens given state sovereignty and the implied social contract, is misplaced since the state may delegate its powers to private entities); *id.* at 1426-28 (noting that privatization of prisons in Australia can be viewed as a successful venture); Kevin A. Wright, *Strange Bedfellows? Reaffirming Rehabilitation and Prison Privatization*, 49 J. OFFENDER REHAB., 74, 74 (2010) (noting that empirical findings concerning private prisons and their affects are ambiguous and that "no clear pattern exists as to whether private prisons outperform public prisons"); Peter H. Kyle, *Contracting for Performance: Restructuring the Private Prison Market*, 54 WM. & MARY L. REV. 2087 (2013) (asserting that instead of criticizing prison privatization, focus should lie on creating adequate performance-based measurements like reduced recidivism and increased employment as a means of ensuring a better private framework).
 3. See discussion *infra* Part II.

in the Court's opinion, teasing out and expanding on the Court's logic could provide an important new avenue to consider when litigating matters that pertain to the fundamental human right to dignity in other forums, both domestic and international.

The Israeli Court decision briefly mentions that similar decisions have not been made in other forums and cited a brief that suggested that "were arguments of this kind to be raised before those courts, they would not be expected to be successful."⁴ This paper argues instead that the logic of the Israeli decision on the human rights to dignity could be successful in other jurisdictions, especially those that have strong case law on the rights of vulnerable populations and the right to human dignity, such as South Africa, the African Commission of Human and Peoples' Rights, and the Inter-American Human Rights system. Indeed, the viable contentions based on the human right to dignity that could be raised before the Inter-American Commission on Human Rights serve as potential grounds for challenging the widespread privatization of prisons in the United States.

This paper begins with an analysis of the Israeli prison privatization case with a focus on the Court's finding of a *per se* violation of the human right to dignity. The second section analyzes two previous commentaries of the Israeli case to show how even those in agreement with the Court's decision have misread the case. This analysis provides a deeper and more nuanced reading of the Israeli Court's logic on the human right to dignity, especially how the commodification of inmates in a private prison inherently is a violation of that right at least in the Israeli context. The third section expands upon the Court's reasoning through a discussion of what has been referred to as "cauterization,"⁵ which involves branding a group as inferior, sealing it off from the social and political sphere, and reducing sympathy for its members. Interestingly, the same logic was also used in a recent groundbreaking mental health decision, *Purohit and Moore v. Gambia*,⁶ a case before the African Commission on Human and Peoples' Rights. The fourth section teases out the key elements of the Israeli decision to show which elements would need to be present to successfully bring such a case in other jurisdictions. These elements are present not only in the Israeli context, but also in the African Commission on Human and Peoples' Rights, the South African Constitutional Court, and the Inter-American Human Rights system.

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4. Prison Case, *supra* note 1, at 60 (referring to an expert opinion authored by UK academic Professor J. Jowett and submitted by the Government, one of the defendants to the case).
 5. See WILLIAM PAUL SIMMONS, HUMAN RIGHTS LAW AND THE MARGINALIZED OTHER 10-12 (2011).
 6. *Purohit and Moore v. The Gambia*, Comm. No. 241/2001, 11 Int'l Hum. Rights Rep. 257 (Afr. Comm'n on Human and Peoples' Rights 2003), available at http://www.achpr.org/files/sessions/33rd/communications/241.01/achpr33_241_01_eng.pdf [hereinafter *Purohit v. Gambia*].

I. The Israeli Case

The Israeli Supreme Court, acting as the High Court of Justice, held in 2009 by an 8-1 margin that the Israeli law creating the country's first privatized prison violated Israel's Basic Law: Human Dignity,⁷ not because of the potential consequences of the privatization, but because privatization inherently violated the human dignity of prisoners.

The Court's opinion, crafted by (then) Supreme Court President Beinisch, has been subject to serious criticism by legal scholars, even by those who agree with the ultimate outcome.⁸ One central ground for rebuking criticism is to recognize the nuances offered in the opinion,⁹ most notably Judge Beinisch's arguments against the commoditization of inmates through prison privatization. As Judge Beinisch writes, "allowing a private concessionaire of a prison to make financial profits, disproportionately violates human rights and the principles required by the democratic nature of the regime."¹⁰ It is the branding of prisoners as "means for the private corporation," or the commodification of prisoners, that is at the heart of

7. The Basic Laws are meant to serve as the framework for an eventual written constitution; they are equivalent to any other law except that in some of the Basic Laws, an entrenchment provision requires a special majority vote by the Knesset (Israeli Parliament) prior to any change. See David Kretzmer, *The New Basic Laws on Human Rights: A Mini-revolution in Israeli Constitutional Law?*, in PUBLIC LAW IN ISRAEL 144-45 (Itzhak Zamir & Allen Zysbaltd eds., 1996); Stephen Goldstein, *Protection of Human Rights by Judges: the Israeli Experience*, 38 ST. LOUIS U. L.J. 605, 606 (1994).

8. The critics can be placed into two distinct groupings. The first group is comprised of those who assert that the court was inherently incorrect in deeming the matter a violation of human dignity since the focus should be on the state as an integrated actor in the market. See Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133 (2012) (arguing that the issue demands a proper empirical accounting of public and private entities) [hereinafter Volokh, *Employee-Contractor Distinction*]; Hila Shamir, *Privatization: The State, the Market and What is Between Them – in Light of the Supreme Court Decision on Prison Privatization*, 35 IYUNEI MISHPAT 747 (2013) (in Hebrew) (asserting that the state is inherently part of the market economy such that the state and market coexist); Daphne Barak-Erez, *The Private Prison Controversy and the Privatization Continuum*, 5 LAW & ETHICS OF HUM. RTS. 138 (2011) (arguing that the Court properly considered human dignity issue, but did not address broader matters concerning privatization).

The second group of critics assert that human dignity is an issue, but the Court erred in its approach and reasoning. See Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization*, 8 I. CON. 690 (2010) (arguing that the preferred focus of the Court should have been on the division of governmental powers); Alon Harel, *On the Limits of Privatization in Light of the Supreme Court Case on Prisons*, 2 MISHPATIM ONLINE 1 (2010) (in Hebrew) (asserting that the issue of human dignity centers on the moral capacity to punish another person, aligning with Procaccia's approach, discussed *infra*); M. Tamir & A. Harel, *On Human Dignity and Privatization in Light of the Supreme Court on Prisons*, 41 MISHPATIM 663 (2012) (in Hebrew) (asserting that the focus of case should be on the human right to free will and choice capacities).

9. That for some, at least, seem to be missed by these commentators.

10. Prison Case, *supra* note 1, ¶ 54, at 94.

the Court's reasoning, and it tips the scale to a violation of human dignity. Far from being an irrational stance, this logic also underpins Judge Beinisch's previous ruling, when she held that corporal punishment is a *per se* violation of human dignity,¹¹ and it is ultimately a strong ground for a potential submission before the Inter-American Commission of Human Rights when considering challenges to Arizona's rampant prison privatization as a *per se* violation of the American Declaration of Human Rights.

A. Factual Background of the Israeli Case

Given a shortage of prison space in Israel, along with poor prison conditions and rising administrative costs, Israel decided to look into the matter of prison privatization in 2003.¹² On March 24, 2004, the Knesset (Israeli Parliament) passed an amendment to the Prison Law.¹³ The amendment provided the means for submitting private bids, the conditions that must be maintained in the prison, the scope of jurisdiction held by the private facility over the prisoners, and the scope of oversight to be maintained by the state over the private concern operating the prison.¹⁴ Choosing from three different privatization models,¹⁵ the Knesset favored the UK model of prison privatization by allowing the private company to ensure order and prevent escapes, yet limited its capacities to actually punish the prisoners.¹⁶ Thus, solitary confinement was to be limited to 48 hours at a time, and the prison guards were considered public employees.¹⁷

After a tender was awarded to ALA Management and Operation Ltd. to build a

11. See discussion *infra* note 48 and accompanying text.

12. Prison Case, *supra* note 1, ¶1, at 34. Justice Proccacia, in her concurrence, wrote that the main purpose of amendment 28, as derived from its legislative background and context, is "to promote the welfare of the prison inmate by reducing the serious overcrowding that currently exists in the prisons, improving the services provided in them and expanding the treatment and rehabilitation programmes available to the inmate." *Id.* at 28. See also Amy Ludlow, *Prison Privatization in Israel: Important Transnational Lessons*, 6 CAMBRIDGE STUDENT L. REV. 326, 326-27 (2010).

13. Prisons Ordinance Law (Amendment No. 28), 5764-2004, SH No. 348 (Isr.) (in Hebrew).

14. Prison Case, *supra* note 1, ¶¶11-12, at 44-48.

15. The French model only allows a private concern to provide specific logistical services like food or medical care, whereas the American model provides complete control to the private concern, including punishment capacity within the prison. The UK model gives the private concern broad administrative control over the prison, but any form of punishment is to be meted out by the state. See Shamir, *supra* note 8, at 756-57. Specifically,

[The Israeli law] is a unique and experimental model, which constitutes a 'pilot' test that is expressly limited to one prison and includes mechanisms to protect the rights of the inmates and effective supervision and intervention mechanisms that are available to the state and will allow it, *inter alia*, to reverse the process at any stage and take back control of the prison because of a breach of the terms of the permit given to the concessionaire.

Prison Case, *supra* note 1, ¶ 5, at 38.

16. Shamir, *supra* note 8, at 756-57 (noting that originally, the French model was favored).

17. *Id.*

prison in the southern part of the country, a challenge was filed in 2005 by the Human Rights Division of the Academic Center of Law and Business in Ramat Gan against the Minister of Finance, Minister of Public Security, ALA Management and Operation Ltd., and the Israeli Parliament.¹⁸ During the time that it took the Court to actually issue its decision, ALA Management had completed building the private prison and was in the midst of hiring personnel to operate the facility.¹⁹

The petitioners contended that privatization of prisons was an inherent violation of the prisoners' rights to liberty and human dignity,²⁰ that under the Basic Law: Government,²¹ the government cannot transfer its responsibilities to a private actor,²² and that private operators would be inclined to undermine prisoners' rights by cutting corners and maintaining their profit margins.²³

B. Privatization as a Per Se Violation of Israeli Prisoners

The Court held that privatization is a *per se* violation, and therefore it did not need to reach a judgment on the consequences of privatization, as a decision on the consequences would be based upon "a future violation of human rights and there is no certainty that this will occur."²⁴ Since the evidence is "ambiguous" as to whether the private prison would be more abusive of inmates than public facilities,²⁵ the Court relied on the *per se* argument that privatization is a violation

18. Prison Case, *supra* note 1, at 27.

19. See Ludlow, *supra* note 12, at 327.

20. Prison Case, *supra* note 1, ¶ 2, at 36.

21. Israeli Basic Law: the Government (Amendment No. 4), 5752-1992, SH No. 1124 of the 24th Elul, 5744 (Sept. 21, 1984), at 220, English translation available at <http://mfa.gov.il/MFA/MFA-Archive/1960-1969/Pages/Basic%20Law-%20The%20Government%20-1968-.aspx>.

22. Prison Case, *supra* note 1, ¶ 3, at 37. The court dismissed this argument, noting that the clause regarding the prohibition of power delegation by the government is only recommended. *Id.* ¶ 63, at 100. Justice E.E. Levy, in his dissent, made a similar point, noting, "The state has not divested itself of its powers but merely exchanged them for supervisory powers. It is hard to see how this conflicts with the constitutional role of the government, and the mechanisms of indirect government should be examined on their merits." *Id.* at 29. See also Medina, *supra* note 8, at 6 (pointing out that: "In line with the prevailing view in other jurisdictions, prison privatization was assumed to meet the non-delegation challenge as long as a public body provides sufficiently detailed guidelines for running the prison, and applies effective supervisory powers.").

23. Prison Case, *supra* note 1, ¶ 4, at 37.

24. *Id.* ¶ 19, at 57. Interestingly, Justice Levy's dissenting opinion also called for the law to be properly played out prior to making a decision on a violation of human dignity. *Id.* at 29 ("It is premature to determine whether a private prison will violate human rights disproportionately. Time will tell. The law should be put to the test before the court reaches any conclusions on this matter.").

25. See Wright, *supra* note 2; Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 946 (2004) (responding to scholars who "suggest that private punishment, policing, and military corporations violate human rights more often than public punishment, policing, and military institutions. But this claim has been

of inmates' rights, particularly the right to liberty and the right to human dignity.

The Israeli Supreme Court starts from the stance that imprisonment is an outlier, that is, it is not a normal state of affairs. The state is already in a tenuous position vis-à-vis an inmate's rights by the very fact of imprisonment, an action that is a violation of a person's personal liberty, although one that is justified.²⁶ This first premise of the Court's argument has been overlooked in many of the case's critiques, where the focus is on the inherent nature of privatization in a neutral and free market, where monies are regularly exchanged for services (equating, for example, the state-contractor relationship and the state-employee relationship).²⁷

Justice Beinisch, however, focuses on a different type of inherence—one where “we examine the extent of the violation of the right to personal liberty inherent in placing a person under lock and key.”²⁸ The focus then is on imprisonment and the lived experience of the inmates and not the exchange of currency for services. According to Justice Beinisch, from this tenuous position regarding the right to liberty, any modification to the accepted form of imprisonment would risk tipping the scales to an abuse of inmates' rights.²⁹

To understand how privatization undermines personal liberty we must ask what added risks to personal liberty are inherent in the privatized prison model, even when following the extensive regulations of the UK model, as adopted in Israel. Despite protective regulations, prison employees must exercise discretion when they “are in control of the managing the lives of the inmates in the prison on a daily basis,”³⁰ including “dealing with unexpected situations in the course of direct contact with the inmates and making quick decisions on an immediate basis, where the supervision and scrutiny of the making of the decisions and the manner

vigorously and carefully contested, and there is very little empirical evidence to support it”).

26. See, e.g., International Covenant on Civil and Political Rights, art. 10, 999 UNTS 171, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A (XXI) (Dec. 16 1966) (treating prisoners with dignity, with a focus on rehabilitation and not punishment); United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611, annex 1, ESC Res. 663C, (XXIV) (1957), U.N. ESCOR, Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), amended by ESC Res. 2076, (LXII) (1977), U.N. ESCOR, Supp. No. 1, at 35, U.N. Doc. E/5988 (1977), available at https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf; Sara A. Rodriguez, *The Impotence of Being Earnest: Status of the United Nations Standard Minimum Rules for the Treatment of Prisoners in Europe and the United States*, 33 CRIM. & CIV. CONFINEMENT 61 (2007) (arguing that the UN Standard Rules still maintain relevance for domestic development of standards for prisons).
27. See, e.g., Volokh, *Employee-Contractor Distinction*, *supra* note 8. See also discussion, *infra* note 54 and accompanying text.
28. Prison Case, *supra* note 1, ¶ 30, at 70.
29. See *id.* ¶33, at 73. See also *id.* ¶ 39, at 78 (extending this argument in the human dignity context).
30. *Id.* ¶ 31, at 71.

of exercising the discretion can only be carried out retrospectively.”³¹ Thus, decisions that go to the heart of personal liberty, a right that is already greatly at risk in the prison context, are made by those working for “a private corporation motivated by economic considerations of profit and loss.”³² Therefore, the risk to personal liberty “is inherently greater than the violation of the same right of an inmate when the entity responsible for his imprisonment is a government authority that is not motivated by those considerations.”³³ However, this is a consequentialist argument that would require, and could be refuted by, empirical evidence.

As such, Justice Beinisch instead argues that privatization constitutes a *per se* violation of the right to liberty. This would be a violation “even if the term of imprisonment that these two inmates serve is identical and even if the violation of the human rights that actually takes place behind the walls of each of the two prisons where they serve their sentences is identical.”³⁴ Her logic for a *per se* violation of the right to liberty rests on two principles. First, that the right to liberty is already violated by imprisonment, and second, that punishment administered by a private prison has less legitimacy than punishment by a public entity.³⁵ In a liberal state, according to Justice Beinisch, the state monopoly of the criminal justice system is fundamental to the social contract establishing the state,³⁶ in particular the constitutional principles of Israel. He asserts that “the subordination of the various security services to the elected government has always been one of the hallmarks of the State of Israel as a modern democratic state, and it is one of the basic constitutional principles underlying the system of government.”³⁷ Thus, punishment removed from state authorities would reduce its democratic legitimacy and is also more likely to lead to abuses.

The argument for a violation of personal dignity tracks the argument for personal liberty. Section 2 of the Israeli Basic Law: Human Dignity and Liberty states, “One may not harm the life, body or dignity of a person.”³⁸ If the resulting

31. *Id.*

32. *Id.* ¶ 33, at 73.

33. *Id.*

34. Prison Case, *supra* note 1, ¶ 33, at 73 (referring to a comparison between a prisoner in a public prison as opposed to a prisoner in a private prison). *See also* Harel, *supra* note 8 (acknowledging that this is the central reasoning of the case (albeit, Harel is inclined towards Procaccia’s more pragmatic view of focusing on the reasoning of private bodies and their reliance on cost factors)).

35. *See* Prison Case, *supra* note 1, ¶ 39, at 77-78.

36. Prison Case, *supra* note 1, ¶ 23, at 61-63. For an argument concerning the importance of the state monopoly power, see Richard Harding, *State Monopoly of “Permitted Violation of human rights”: The Decision of the Supreme Court of Israel Prohibiting the Private Operation and Management of Prisons*, 14 PUNISHMENT & SOC’Y 131 (2012).

37. Prison Case, *supra* note 1, ¶ 24, at 64.

38. Israeli Basic Law: Human Dignity and Liberty, *supra* note 2, § 2.

circumstances in the private and public domains do not differ, how can privatization be a violation of Section 2? How can Justice Beinisch hold that one of two contexts that potentially provide the same treatment is more violative of personal dignity?

Justice Beinisch's argument begins with the premise that inmates may have lost their "liberty and freedom of movement, as well as additional rights[,] . . . but an inmate of a prison does not lose his constitutional right to human dignity."³⁹ And yet, the prison context must be seen as inherently violating the right to personal dignity, although justifiably so. However, the dignity of inmates in such a special situation is tenuous and must be recognized as such. Quoting Justice Mazza, the dignity of an inmate holds a special place in and for society as a whole:

Moreover, a violation of the human dignity of a prison inmate does not merely affect the inmate, but also the image of society. Humane treatment of prison inmates is a part of a humane-moral norm that a democratic society is required to uphold. A state that violates the dignity of its prison inmates breaches the obligation that it has to all of its citizens and residents to respect basic human rights (referring to 4463/94 *Golan v. Prisons Service* 50(iv) PD 136 (1996)).⁴⁰

Again, this is not an abstract matter of an analogy with the contractor versus employee. Instead, we are in a special context where the "basic human rights" guarantees of the state are already precarious—a context where the state is already prone to violate the right to personal dignity.

With human dignity of inmates so crucial⁴¹ and yet so tenuous, "the question

39. Prison Case, *supra* note 1, ¶ 35, at 74.

40. *Id.* (internal quotations omitted).

41. Judge Beinisch quotes the broad definition of human dignity from previous Israeli court decisions:

Human dignity is based on the autonomy of the individual will, the freedom of choice and the freedom of action of a human being as a free agent. *Human dignity relies on the recognition of the physical and spiritual integrity of a human being, his humanity, his worth as a human being, all of which irrespective of the degree of benefit that others derive from him.*

Id. ¶ 34, at 74 (quoting *Movement for Quality Government in Israel v. Knesset* (unreported decision of May 11, 2006)) (internal quotations omitted) (emphasis added). Note that human dignity under Israeli law is quite broad, with limitations being imposed when conflicting with the public interest, but otherwise serving as a key ground for protecting human rights. See Ariel L. Bendor & Michael Sachs, *Human Dignity as a Constitutional Concept in Israel and Germany*, 44 *ISR. L. REV.* 25 (2011); Doran Shultziner & Itai Rabinovic, *Human Dignity, Self Worth, and Humiliation: A Comparative Legal-Psychological Approach*, 18 *PSYCHOL. PUB. POL'Y & L.* 105 (2012) (explaining that human dignity generally focuses on protecting a person's self worth and calling for a more objective standard of human dignity based on a legal-psychological understanding). See also HCJ 355/79 Katalan v. Prisoner Services 34(iii) PD 294 [1980] (Isr.) (holding that intrusive drug searches, such as enemas, violate the human dignity of prisoners returning from weekend

that we need to decide in this case is whether imprisoning a person in a privately managed prison causes a greater violation of his human dignity than imprisoning him in a public prison.”⁴² To answer this question Justice Beinisch returns to the meaning of human dignity—“no one denies that the right to dignity applies with regard to preventing the denigration of a person and *preventing any violation of his human image and his worth as a human being*.”⁴³

Needless to say, the imprisonment of a person, the very classification of someone as a criminal or an inmate, would *per se* constitute a “violation of his human image.” Of course, countless sources discuss the deleterious real-world effects of branding a person as an inmate or a felon.⁴⁴ However, this denigration would be considered justified in the same way that the violation of personal liberty through imprisonment is justified. The question is whether this branding is any worse in a *private* prison? And here, Justice Beinisch relies on the argument that privatization commodifies inmates—they are treated as a means to an end, the profits of a corporation:

There is therefore an inherent and natural concern that imprisoning inmates in a privately managed prison that is run with a private economic purpose *de facto* turns the prisoners into a means whereby the corporation that manages and operates the prison makes a financial profit. *It should be noted that the very existence of a prison that operates on a profit-making basis reflects a lack of respect for the status of the inmates as human beings*, and this violation of the human dignity of the inmates does not depend on the extent of the violation of human rights that actually occurs behind the prison walls (cf. in this respect the question of employing employees in a prison (HCJ 1163/98 *Sadot v. Israel Prison Service* [55(iv) PD 817 [200]] [21]).⁴⁵

Just as the loss of democratic legitimacy in privatized prisons is enough to move imprisonment from a justifiable deprivation of human liberty to a rights violation,

leave).

42. Prison Case, *supra* note 1, ¶ 36, at 76.

43. *Id.* ¶ 35, a 74. To understand the central role of human dignity and the symbolic significance of expressing disrespect, Beinisch quotes the legal philosopher Meir Dan-Cohen:

Once an action-type has acquired a symbolic significance by virtue of the disrespect it typically displays, its tokens will possess that significance and communicate the same content even if the reason does not apply to them . . . As long as certain actions are generally considered to express disrespect, one cannot knowingly engage in them without offending against the target’s dignity, no matter what one’s motivations and intentions are.

Id. ¶ 38, at 77 (quoting MEIR DAN-COHEN, *HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY* 162 (2002))(internal quotations omitted).

44. See, e.g., Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 71 (2003).

45. Prison Case, *supra* note 1, ¶ 36, at 76 (emphasis added).

the branding of a prisoner as a commodity in private prisons is enough to shift a justifiable deprivation of dignity to a rights violation.

However, Justice Beinisch's arguments for *per se* violations are contextual in several important ways. As noted previously, she begins from the special context of a prison and the special scrutiny that needs to be applied when fundamental human rights of vulnerable individuals are at stake. In addition, the Israeli context is critical for finding violations of both the right to liberty and the right to dignity. "The imprisonment of a person in a privately managed prison is contrary to the basic outlook of Israeli society . . . with regard to the responsibility of the state."⁴⁶ Justice Beinisch notes that such a decision might not apply in other jurisdictions with different views on state power and the privatization of prisons. For instance, "both in the United States and in Britain—unlike in Israel—there is a historical tradition of operating private prisons, which naturally is capable of influencing the manner in which the constitutionality of the privatization of prisons is regarded."⁴⁷

C. Corporal Punishment as a Comparison

Reinforcing this reading of the Prison Case opinion, Justice Beinisch in an earlier controversial ruling, used the same approach to ban corporal punishment in Israel.⁴⁸ The Supreme Court, sitting as the Court of Criminal Appeals, was presented with a case of a mother hitting her children repeatedly over the course of several years. In defense, the accused claimed that the hitting did not rise to the level of abuse, and that corporal punishment should be allowed for educational purposes. Judge Beinisch noted that "we are dealing with cruel behaviour of the mother to her children and humiliating them, regarding them as property that she can do with what she wishes."⁴⁹ However, Justice Beinisch went further, agreeing with the trial judge that corporal punishment is a *per se* violation of human rights. While previous Israeli cases had given wide discretion to parents' techniques for raising their children,⁵⁰ Justice Beinisch examined the issue with an "emphasis on

46. *Id.* ¶ 39, at 78.

47. *Id.* ¶ 62, at 98-99.

48. CrimA 4596/98 A. v. Israel, 54(i) PD 145 (2000) (Isr.), available at <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/A.%20v.%20State%20of%20Israel.pdf> [hereinafter Corporal Punishment Case]. The decision, which applied to corporal punishment within the family, was subsequently applied to such punishment in the school system as well. See, e.g., CA 1730/00 Anon. v. Israel 54(v) PD 433 [2000] (Isr.); CA 3362/02 Israel v. Abu Asbah 56(v) PD 6 [2002] (Isr.).

49. Corporal Punishment Case, *supra* note 48, ¶ 18, at 23.

50. See Benjamin Shmueli, *The Influence of the UN Convention on the Rights of the Child on Corporal Punishment – A Comparative Look*, 10 OR. REV. OF INT'L L. 189, 222-23 (2008) (discussing the development of the case law in Israel).

the child's right of dignity, bodily integrity and mental health,"⁵¹ drawing upon the right to dignity provisions of the Basic Law as well as Israel's ratification of the Convention on the Rights of the Child.⁵² From this framework, Justice Beinisch concluded:

[I]t should be held that corporal punishment of children, or their humiliation and degradation by their parents as an educational method is totally improper, and it is a relic of a socio-educational outlook that is obsolete. The child is not the property of his parent; it is forbidden that he should serve as a punching bag which the parent may hit at will, even when the parent believes in good faith that he is exercising his duty and right to educate his child. The child is dependent upon his parent, needs his love, protection and gentle caress. Inflicting punishment that causes pain and humiliation does not contribute to the character of the child and his education, but violates his rights as a human being. It harms his body, his feelings, his dignity and his proper development.⁵³

This ruling mirrors the prison privatization decision, as it is grounded in a particular context of vulnerability (a child being dependent upon parents for love and protection), and the decision takes a broad view of human dignity, including the expressive harm that is inherent to corporal punishment, in that such punishment harms one's body, feelings, dignity and proper development.

II. Previous Analyses of the Israeli Supreme Court Decision

While several commentaries have been written on the Israeli decision, two stand out and will highlight the broad significance and uniqueness of Justice Beinisch's opinion. The first, written by Alexander Volokh, embraces the prevailing law and economics position on privatization of public services,⁵⁴ that in the abstract privatization is no different from any contractual obligations, including the state-employee relationship found in public services. Therefore, privatization can never be a *per se* violation of human rights as it is just another

51. Corporal Punishment Case, *supra* note 48, ¶22, at 29.

52. See Shmueli, *supra* note 50, at 221-25 (asserting that Convention on the Rights of the Child served as a direct influence on the Supreme Court in holding that corporal punishment was a violation of a child's basic right); Yehiel S. Kaplan, *Corporal Punishment of Children in Israel: A New Trend in Secular and Religious Law*, 14 INT'L J. CHLD. RTS. 363 (2006) (asserting that Justice Beinisch's decision hinged on three key aspects of Israeli law: the best interest's of the child, the Convention on the Rights of the Child, and the Basic Law: Human Dignity, and concluding that the decision is also in line with basic principles of Jewish Law).

53. Corporal Punishment Case, *supra* note 48, ¶29, at 38.

54. See Abdul Paliwala, *Privatisation in Developing Countries: The Governance Issue*, 2000 (1) L. SOC. JUST. & GLOBAL DEV. J. (LGD), available at http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/paliwala/; see also Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197 (2008).

form of the provision of public services. The second commentary, by Barak Medina, is sympathetic to Justice Beinisch's overall argument but misreads the Court's commodification argument, claiming the Court has created a new right, the right to be free from privatized prisons. Instead, we argue that the Court was not creating a new Constitutional right but was further elaborating on the meaning of the right to human dignity, specifically how the expressive meaning of labeling an inmate as a commodity infringes upon that right.

A. *Alexander Volokh and Veils of Ignorance*

Alexander Volokh, in a 2012 article,⁵⁵ presents wide-ranging arguments against privatization as a *per se* violation of human rights that, if followed to their logical conclusion, could support the very expansive position that there can be no *per se* argument against privatization of any public service. Volokh asserts that at the heart of the matter, and in the abstract, there is no distinction between employees of the government and contractors of the government.⁵⁶ For Volokh, the key aspect of privatization is the relationship between the state and the contracted, irrespective of whether the contracted service is sanitation, highway construction, or the managing of people, such as inmates, who are subjected to a violation of personal liberty and dignity. He writes:

The state is an abstract set of relationships; therefore, to act, the state must use agents of some sort. Both employees and private contractors are private individuals; both do things for the state in exchange for money; both have private purposes, as well as the discretion to follow those purposes sometimes, even contrary to the desires of the state.⁵⁷

At this level of abstraction, public employees and employees of private contractors are equivalent. Thus, according to Volokh, any critiques of privatization cannot be made in the abstract, but must rely on the admittedly ambiguous empirical consequences of privatization.

His is a convincing argument *if* we accept the level of abstraction that he insists upon and the playing field that he creates behind his "veil of ignorance." Nonetheless, like any analytical game based on a veil of ignorance, the outcome is dictated by the level of abstraction we are willing to accept. How many veils are we willing to cover ourselves with? How ignorant will we pretend to be about reality? If we are to agree that we are all born free and equal, then a veil of ignorance leading to a Rawlsian account of "justice as fairness" could logically

55. Volokh, *Employee-Contractor Distinction*, *supra* note 8.

56. *Id.* at 133.

57. *Id.*; *see also* Feely, *supra* note 2, at 1418.

follow. However, such an abstract position has no more validity than starting with the premise that we are all interdependent individuals and that many of us experience vulnerability.⁵⁸ Moreover, if we are to change the rules of the game to include some significant facts—facts that are clearly a condition of any real-world circumstances—then the rules and outcomes will change. And, this is the case with the Israeli decision and any discussion of privatization.

First, we must make some assumptions about who is being acted upon. In the criminal justice system, in the nursing home industry, in welfare programs, and in immigration detention and deportation systems, it is vulnerable people who are being acted upon. Surely, the rich and powerful live lives influenced by privatization as well. Their kids attend private schools, they golf at private golf courses, they even drive on private toll roads, and rely on private homeowners' associations for a wealth of services. However, the difference remains that they are rich and powerful with important social connections. Thus, if the services they desire are not provided in a timely, satisfactory manner, they have the means to switch services or to endure the blow of having poorly manicured greens on their favorite course.

Second, we are not living in an abstract world with abstract rules created behind a veil of ignorance.⁵⁹ Treaties, constitutions, and courts around the globe have held that states have extra duties toward vulnerable individuals.⁶⁰ These duties are not just found in international human rights law, but also in the domestic laws of almost all countries, including in Israel's Basic Law. To start off with a more abstract position than that would unnecessarily create an artificial state of affairs.

Perhaps, the clearest signal that Volokh's abstraction has gone too far is when he argues that there is no inherent distinction between private contractors and public employees because they both perform services for money; both groups seek to "earn a profit."⁶¹ In fact, "we're all seeking to earn a profit."⁶² Volokh argues

58. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 6 (2004) ("We do not begin our lives in equal circumstances. We begin in unequal ones."). In such a society, Fineman argues, "the approach to a resolution to this type of inequality is not found in simplistic and hypothetical prescription or ideological placebos of independence, autonomy, and self-sufficiency." *Id.*

59. See, e.g., Jurgen Habermas, *Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism*, 92 J. PHIL. 109, 112 (1995) (offering a critique of Rawls's approach and noting that account must be taken "of the fact that autonomous citizens respect the interests of others on the basis of just principles and not only from self-interest, that they can be obligated to loyalty, that they want to be convinced of the legitimacy of existing arrangements and policies through the public use of their reason, and so forth").

60. See generally ROBERT E. GOODIN, *PROTECTING THE VULNERABLE: A RE-ANALYSIS OF OUR SOCIAL RESPONSIBILITIES* (1985).

61. Volokh, *supra* note 8, at 174.

that even the profit motives of shareholders are not inherently different from public prison guards or their supervisors. While some prison guards might be more public-spirited than some shareholders, “investors might put their money into prison firms . . . because they really care about corrections.”⁶³ Yes, that possibility exists, as does the possibility that shareholders will someday open prisons for purely philanthropic motives. But the mere possibility of a counterexample would water down almost all definitional distinctions (and would even approach Plato’s definitional criteria for the Forms as transcendent, eternal, and unchanging!).⁶⁴ Further, in the shareholder example, courts—at least U.S. courts—have made it abundantly clear that corporations are by nature profit maximizing organizations. For instance, in *eBay Domestic Holdings v. Newmark*,⁶⁵ the Delaware Supreme Court concluded:

Having chosen a for-profit corporate form, the Craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The “Inc.” after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the [poison pill] Rights Plan a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders . . .⁶⁶

Volokh quickly dismisses the arguments that corporations are inherently profit-maximizing entities: “This strikes me as incorrect: firms don’t necessarily act to maximize profit, nor is profit-making any part of their essence.”⁶⁷ At minimum, Volokh seems to be conflating individuals in an abstract state of nature with individuals who have already contracted for some good, in this case profit. It

62. *Id.* at 175

63. *Id.* at 175-76.

64. *See generally* CHARLES P. BIGGER, PARTICIPATION: A PLATONIC INQUIRY (1968). The discussion in Chapter 2 is particularly relevant.

65. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010), *available at* <http://caselaw.findlaw.com/de-supreme-court/1558886.html>. The case involved the company eBay, which happened to be a minority shareholder in Craigslist, and eBay’s ability to start a company that directly competed with Craigslist, without eBay losing its shareholder rights in Craigslist as well.

66. *Id.* at 34.

67. Volokh, *supra* note 8, at 183. This assumption would be critical in undermining the Israeli Court decision, which held:

[W]hen the power to deny the liberty of the individual is given to a private corporation, the legitimacy of the sanction of imprisonment is undermined, since the sanction is enforced by a party that is motivated first and foremost by economic considerations—considerations that are irrelevant to the realization of the purposes of the sentence, which are public purposes.

Prison Case, *supra* note 1, ¶ 29, at 69.

would seem safe to assume that private prison corporations are not created to provide a service in the best interest of vulnerable people. Once we accept that corporations are inherently more likely to seek profits through a cost-benefit analysis, even when they are implementing public policies, we have to expect the corporation to be involved in social triage,⁶⁸ where they will, within their discretion, take on clients that will offer more benefits (read: profits) for lower costs.⁶⁹ Those most likely to be serviced by the private firm will not be the ones most in need of services, *i.e.*, the most vulnerable.⁷⁰ Of course, the emphasis on helping vulnerable people is often written into law specifically to counter policies that adopt a social triage approach that would leave out those most deserving of protection.

So, the question is not whether there is an inherent wrong to privatization at its most abstract level, but whether there is an inherent wrong in privatization considering the fact that much of privatization disproportionately affects already vulnerable populations, especially where there is already a standard of special duties to such vulnerable individuals. The key to the argument for private prisons then is the lived experience of inmates who are commodified when held by a private corporation.

It must also be stressed that the argument of the Israeli Court is not the consequential argument as Volokh portrays it, that the cost-benefit analysis will lead to greater likelihood of damages to the inmates. The concurrence in the Israeli case relied on the argument of the consequences of privatization on already vulnerable populations, but *that* argument is subject to empirical testing.⁷¹ Instead, Justice Beinisch's argument is that the inmates are denigrated by the very fact of privatization, by the very labeling as a commodity.⁷²

68. See William P. Simmons & Monica Casper, *Culpability, Social Triage, and Structural Violence in the Aftermath of Katrina*, 10 PERSP. ON POL. 675 (2012).

69. This reasoning is most likely behind private prison companies refusing to place bids to purchase Arizona's entire prison system in 2009 and 2010. See discussion *infra* note 122 and accompanying text.

70. CHARLES DERBER, *THE WILDING OF AMERICA: MONEY, MAYHEM, AND THE NEW AMERICAN DREAM* 127 (2006) (noting that social triage entails "a sorting on social grounds," which diverts the goods and services from those found to be most wanting").

71. Compare Justice Levy's dissent in the Prison Case, *supra* note 1, ¶ 1, at 174 (noting that "the question of [privatization's] effect on basic human rights and other protected values, ought to be put to the test before we reach in this matter even those conclusions that the legal tools in our possession allow us to reach"), with Justice Beinisch's majority opinion, *id.* ¶ 38, at 77-78 (asserting that "a violation of human dignity may also be an 'independent' violation, when a certain act that is done or a certain institution that is created do not inherently violate other human rights, but they reflect an attitude of disrespect from a social viewpoint towards the individual").

72. See *id.* ¶ 38, at 77-78.

B. Barak Medina and the Commodification Argument

By contrast, Barak Medina, ultimately agrees with Justice Beinisch's conclusion, but argues that the decision would have more legitimacy if it were not grounded in human rights, but in a "constitutional norm prohibiting the privatization of 'core' governmental powers."⁷³ He reaches this conclusion by reading the Court's decision as creating a new right to be free from punishment by private actors, "a right against privatization."⁷⁴ He writes:

The Israeli Supreme Court's decision . . . holds that an inmate also has an interest, which is classified as a human right, that the discretion what specific measures will be used against him or her (for instance, to maintain order in the prison) will be employed by organs of the state and not by private entities.⁷⁵

As argued above however, instead of creating a new right against privatization, it appears that the Court was fleshing out the already ensconced human right to dignity.

Medina first distinguishes Justice Beinisch's *per se* argument from the consequentialist arguments in two of the concurring opinions. He then, at least in the early part of his paper, separates out how privatization works differently for the right to liberty and the right to dignity; he argues that the loss of democratic legitimacy in the privatization context leads to a violation of the right to liberty, while the right to dignity analysis relies on a symbolic argument about the meaning of privatization. He correctly notes that while many scholars have previously discussed the symbolic meaning of privatization, their arguments are rarely fleshed out adequately, and they have been unable to tie them to a constitutional law analysis. Medina notes that while the Israeli decision aims to create a bridge between cultural and ethical theories and constitutional law, the Court's reasoning is not sufficiently founded because "even if one could establish some kind of such an essential symbolic message or 'social meaning' to punishment, it has not been established that a prison operated by a private corporation necessarily conveys the wrong message."⁷⁶

To better understand the Court's analysis of the symbolic meaning of privatized punishment, Medina lays out two possible analogies (elaborating on the inmates' interests in each example), but it is striking that his examples are founded on the premise that the Court has created a new human right not to be incarcerated in a privatized prison. The first is a classic argument between consequentialists and

73. Medina, *supra* note 8, at 691.

74. *Id.*

75. *Id.* at 707.

76. *Id.* at 702-03.

deontologists on the role of intention in harm.⁷⁷ While the consequentialist would only consider actual harm and disregard intentions, the deontologist sees a difference between intended harm and unintended harm. The second example he lays out is the difference between being harmed by an action of the executive branch or by an action that has included legislative deliberation.⁷⁸ Only in the first example does Medina find the intention to be part of the harm itself, while in the second example, the decision as to who authorized the act does not necessarily have a bearing on the harm suffered.⁷⁹ For some victims it might be better if the authority came from the executive branch instead of a majority of the legislative branch or vice versa.⁸⁰

So, what of the prison privatization example? Medina concludes that the democratic legitimacy argument of privatization, which the Court uses for the right to liberty, is more like his first example.⁸¹ Medina then turns to the symbolic status of the inmate argument, which the Court did use to find a violation of the right to dignity. Here, he agrees with the Court with one important caveat:

An inmate has, at least as an objective matter, a substantial interest in being treated as a human being, not as a mere means for a private corporation to make a profit. *If it can be shown* that prison privatization brings about such a (symbolic) outcome, it is indeed justified to classify it as an independent infringement of inmates' basic liberties.⁸²

However, Medina does not agree with the Court's assumption that "privatization brings about such a (symbolic) outcome," at least not in all cases. First, he argues that the privatization of the prisoner plays a "relatively minor role" in constructing the social meaning of the prisoner and that it was not the profit-maximizing private prisoner who gave the inmate his status, but "public organs."⁸³

Secondly, Medina asserts that there is no clear-cut distinction between private and public actors.⁸⁴ For instance, even in the Israeli case the guards were

77. *Id.* at 707.

78. *Id.* at 708.

79. *Id.*

80. Medina, *supra* note 8, at 708-09.

81. *Id.* However, he then incorrectly tries to read the Court's decision as holding that the democratic legitimacy argument would also be pivotal for the right to dignity argument, and concludes, "It is accordingly questionable to assume that the execution of punishment by a private entity, which thus lacks, arguably, popular legitimacy, expresses some kind of disrespect toward the inmate." *Id.* at 709. However, we must remember that the Court only tangentially relied on the popular legitimacy argument in finding a violation of the right to dignity.

82. *Id.* (emphasis added).

83. *Id.*

84. *Id.* at 709-10.

classified as civil servants according to the law. Thus, if privatization evinces disrespect, it is not clear whether we are dealing with public or private actors. Medina concludes, “I don’t think that we should view incidents of the use of force by a prison-guard against a prisoner as ‘actions [that] are generally considered to express disrespect’ just because the prison staff works for a corporation rather than the state.”⁸⁵ The Court then, Medina argues, should not have made a *per se* constitutional argument against privatization of prisons based on the symbolic meaning of the punishment, as “such a conclusion is not inevitable.”⁸⁶

Medina’s two arguments against a *per se* violation miss the mark in a couple of respects. First, Medina argues that “the social meaning of punishment” is determined by the legitimacy of the institutions that have issued the sentence and not by the entity running the prison. This is probably true, but the Court was not looking at the social meaning of the punishment, but at the image of the inmate, an image that is already reduced by the imprisonment context. For Justice Beinisch, the question is whether treating an inmate as a commodity worsens the “violation of his human image and his worth as a human being.”⁸⁷ Medina’s second criticism tracks Volokh’s arguments discussed above, that there is no categorical distinction between a private employee and a public employee. For Medina, this distinction exists on something of a continuum. One counter to this proposition would be to question why any legislation would ever be labelled “privatization of prisons,” if such a concept has no meaning. Of course it has meaning, specifically because private for-profit companies are *for profit*. As such, the inmates are more likely to be treated as commodities. In Justice Beinisch’s view, this additional dehumanization was enough to rule that privatization of prisons is a *per se* violation of the human right to dignity.

While offering a generally sympathetic reading of Justice Beinisch’s decision, Medina misses the fundamental premise of the decision, namely, that inmates are already in a very tenuous position vis-à-vis the state, one that already jeopardizes their human dignity. Justice Beinisch does not begin with the stigmatization of inmates as commodities, but with inmates stigmatized as inmates. Thus, the question is not whether inmates in private prisons are stigmatized, but whether

85. Medina, *supra* note 8, at 711.

86. *Id.*

87. Prison Case, *supra* note 1, ¶ 35, at 74 (emphasis added). Human dignity under Israeli law is quite broad, with limitations being imposed when conflicting with the public interest, but otherwise serving as a key ground for protecting human rights. See Bendor & Sachs, *supra* note 41; Shultziner & Rabinovic, *supra* note 41 (explaining that human dignity generally focuses on protecting a person’s self worth and calling for a more objective standard of human dignity based on a legal-psychological understanding). See also *Katalan v. Prisoner Services*, *supra* note 41 (holding that intrusive drug searches, such as enemas, violate the human dignity of prisoners returning from weekend leave).

they are stigmatized in an additional, unnecessary way by privatization. The very fact that a profit-maximizing corporation is involved in the incarceration is enough to make the inmate a commodity, and thus infringes upon the right to dignity. As Justice Beinisch writes, “the very existence of a prison that operates on a profit-making basis reflects a lack of respect for the status of the inmates as human beings.”⁸⁸ In short, Medina’s analysis underestimates the importance of branding in the prison context.

III. Cauterization of Inmates

Nonetheless, Medina is correct to argue that the commodification arguments are not fleshed out adequately, or as Rosky points out, “[o]ddly, critics rarely bother to explain the normative importance of commodification.”⁸⁹ Thus, we need to explore this branding in more detail. To do so, we first look at the recent use of the term “cauterization” in human rights scholarship to demonstrate how the branding process is inherent to most major human rights abuses, particularly when the mere labeling of a person tips the human rights scales. We then briefly examine a recent mental health case from the African Commission on Human and Peoples’ Rights that used analogous logic, *Purohit v. Gambia*, to further clarify the ills of branding in the human rights context.

The term “cauterize” aptly describes the comprehensive way that the “Other” has been excluded. There are three identifiable aspects of cauterization that correspond to the term’s three original inter-related meanings. The first meaning comes from its roots in the Greek verb *kauteriazerein*, which means to burn with a kauter or a branding iron.⁹⁰ Such branding was historically done to physically mark a slave or criminal as rightless, or someone as poor.⁹¹ Second, cauterization refers to a medical procedure in which burning is used to seal off or remove part of

88. Prison Case, *supra* note 1, ¶ 36, at 76.

89. Rosky, *supra* note 25, at 965. Rosky is correct to note that:

Commodification critics rarely trouble themselves to spell out normative conclusions and principles—to explain why the social meaning of punishment, policing, and military force is, or should be, important. . . .

In lieu of such arguments, cultural critics normally proffer canned assumptions and assertions that exercises of punishment, policing, and military force “must” send public messages.

Id. at 965 n.316. Nonetheless, Rosky, in evaluating the commodification argument, does not address the way it is framed by Justice Beinisch.

90. See HENRY G. LIDDELL ET AL., A GREEK-ENGLISH LEXICON (10th ed. 1968).

91. See David P. Tedhams, *The Reincarnation of “Jim Crow”: A Thirteenth Amendment Analysis of Colorado’s Amendment 2*, 4 TEMP. POL. & CIV. RTS. L. REV. 133 (1994); William P. Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73 (1996).

the body. This procedure is most often used to stop bleeding, but it can also seal a wound to stop the spread of infection.⁹² Finally, in its most metaphorical meaning, cauterization means to deaden feelings or make one callous to the suffering of another.⁹³ The “Other” is then branded as beneath humanity, below those who deserve rights. Those deemed inferior (or “rightless”) are sealed off from the polis and its attendant form of protection (like a court), in effect treating the voice of the rightless as an infection that must be stopped from spreading. Finally, those with rights, the full members of the polis, deaden their feelings toward the suffering of those who are branded as rightless.⁹⁴

Of course, this logic lurks behind almost every ideology that has supported genocide, colonization, or slavery. Examples abound. African slaves brought to the Americas were often physically branded on their faces or shoulders.⁹⁵ Even after that practice was banned in much of the U.S., less physical, but very real, legal branding was perpetrated by legislation and legal opinions. African Americans were famously branded as “so far inferior that they had no rights which the white man was bound to respect,” and therefore, they “might justly and lawfully be reduced to slavery for his benefit.”⁹⁶ Once branded as rightless, as beneath rights, those marginalized would no longer be granted access to the courts and could not even testify in the courts in any state, as if their voices, their perspectives, literally did not exist.⁹⁷ Of course, such branding and exclusion contributed in no small part to the brutality suffered at the hands of genteel slave owners and “courageous” captains of death boats, who were deadened to the immense suffering of the rightless. As British seaman James Field Stanfield described one ship captain, “Because of his debility, he ordered anyone to be flogged tied to his bedpost so he could see the victims face-to-face, enjoying their agonizing screams, while their flesh was lacerated without mercy.”⁹⁸

It should be noted that the second and third prongs of cauterization are consequential arguments, but not the type that the Israeli Supreme Court

92. See VICTOR ROBINSON, *THE MODERN HOME PHYSICIAN: A NEW ENCYCLOPEDIA OF MEDICAL KNOWLEDGE* (1939).

93. *Cauterize, v.*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/29200> (last visited May 26, 2015).

94. The notion of cauterization is analogous in many ways to the Roman notion of *infamia*, where a citizen was stripped of his reputation, then could not give testimony, and was generally below consideration as a citizen. See George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1896 (1999).

95. See Leonard J. Hoening, *The Branding of African American Slaves*, 148(2) JAMA DERMATOLOGY 271 (2012).

96. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856).

97. See Neil H. Cogan, “*Standing*” before the Constitution: *Membership in the Community*, 7(1) L. & HIST. REV. 1, 21 (1989).

98. MARCUS REDIKER, *THE SLAVE SHIP: A HUMAN HISTORY* 149 (2007).

eschewed in its decisions. Instead, they are theorized as consequences inherent to the branding process, not to the act that *causes* the branding, such as incarceration in a privatized prison.

At least one regional human rights tribunal has found that the expressive harm caused by such branding is a violation of the human right to dignity. The African Commission, in its pioneering case of *Purohit v. Gambia*, found that that The Gambia's mental health legislation (the outdated Lunatics Detention Act) and its treatment of the mentally ill at its Campana psychiatric unit violated several provisions of the African Charter, such as Article 2 (equal protection), Article 5 (human dignity), and Article 16 (the right to enjoy the best attainable state of physical and mental health).⁹⁹ Among other things, the government was found to have cauterized the mentally ill in the manner described above. The Commission was troubled by the manner in which the mentally ill were labeled or branded by Gambian law as "lunatics" and "idiots," terms, "which without any doubt dehumanise and deny them any form of dignity."¹⁰⁰ Similar to the Israeli Supreme Court decision, this branding by itself was found to be a violation of Article 5 of the African Charter that guarantees "the right to the respect of dignity inherent in a human being."¹⁰¹ Once branded as "lunatics," the mentally ill were sealed off from the polis by internment at Campana, and the patients did not have a voice in the appeals process, as Gambian law contained no "provisions for the review or appeal against an order of detention or any remedy for detention made in error or wrong diagnosis or treatment."¹⁰² Their voice was further cauterized in that all patients at Campana, regardless of the type and extent of their illness, were denied the right to vote in violation of Article 13 of the African Charter.¹⁰³ The Gambia was ordered to repeal the Lunatic Detentions Act and to establish a panel to review previous detention decisions.¹⁰⁴ It was also ordered to provide a voice to the mentally ill through representation in the form of legal aid so that patients could challenge their detention.¹⁰⁵

99. See *Purohit v. Gambia*, *supra* note 6, at 8.

100. *Id.* ¶ 59.

101. *Id.* ¶¶ 56-59.

102. *Id.* ¶¶ 27, 71.

103. *Id.* ¶¶ 73-76.

104. *Id.* at 8.

105. INSTITUTE FOR HUMAN RIGHTS AND DEVELOPMENT IN AFRICA (IHRDA), LEGAL AID IN THE GAMBIA: AN INTRODUCTION TO LAW AND PRACTICE 16 (2012), *available at* <http://www.ihrda.org/wp-content/uploads/2012/04/Legal-Aid-in-The-Gambia-layout-2012-website-download.pdf>. Such arguments closely resemble analyses of expressive harm. Consider Ahmed Haque's discussion of segregation in the U.S.:

The wrongfulness of racial segregation did not lie entirely in the gross material inequality of social conditions maintained for whites and for persons of color, but also in a pervasive message of racial hierarchy and white purity. To say that "separate . . . [is] inherently

Sharon Dolovich's recent impassioned work on the dehumanization of inmates tracks this cauterization logic, arguing that imprisonment, which brands the inmates as inferior, poses special risks for further violations of human dignity. Dolovich asserts that the mass incarceration of the past twenty years has been grounded in what she calls "the exclusionary project." "People in prison are subhuman, and they are polluted and unclean. They must therefore be kept away from society, lest they defile the rest of us."¹⁰⁶

Similar to the Purohit case, attempts at redress are stymied by incarceration:

[W]here a defined minority of the population is stripped of both civil liberties and, often, the right to vote; prisoners are therefore excluded from the bargaining necessary to prevent oppression, and, especially in a privatized context, the general public usually is excluded from regular information about the treatment of inmates at prisons.¹⁰⁷

Dolovich's writings also concur with the Israeli Supreme Court decision, that the consequences of further degradation are exacerbated by the very notion of being placed in a prison, since: "Prisoners facing such conditions are not free just to walk away. They instead must remain locked inside the site of their abuse, often in close proximity to their abuser, in what can only be a permanently traumatized and terrorized state bereft of any peace of mind."¹⁰⁸

Thus, prison privatization is a *per se* violation of prisoner's dignity through the commodification process, with the attendant branding process maintaining empirical effects as well.¹⁰⁹

unequal" is in part to say that when segregation expresses negative evaluations of one group this is itself wrongful wrongful.

Adil Ahmad Haque, *The Harmless Thoughts of Meir Dan-Cohen* 6 (Dec. 10, 2004) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=650463 (footnotes omitted).

106. SHARON DOLOVICH, *LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY* 115 (Charles J. Ogletree et al. eds., 2012).

107. Alfred Aman, *Privatisation, Prisons, Democracy and Human Rights: The Need to Extend the Province of Administrative Law*, in *PRIVATISATION AND HUMAN RIGHTS IN THE AGE OF GLOBALISATION* 91, 110 (Koen Feyte & Felipe Gomez Isa eds., 2005).

108. DOLOVICH, *supra* note 106, at 108.

109. Unfortunately, Rosky's extended essay on privatization of force explicitly cauterizes the views of the inmates in the discussion of commodification. He notes that the commodification critique of privatization:

Often . . . focuses on inmates, suspects, and combatants. But I do not take this argument very seriously. Clearly, we can aspire to communicate certain public messages to inmates, suspects, and combatants, but we cannot seriously concern ourselves over whether these messages actually get across to these victims. Our actions will always speak louder than our words, and our violent actions will always speak loudest of all.

Rosky, *supra* note 25, at 964 n.311.

IV. The Fundamental Elements of a *Per Se* Violation of the Human Rights to Dignity

Could similar violations of the human right to dignity be found in other jurisdictions?¹¹⁰ From the discussions of the Israeli case and cauterization above, there seem to emerge three fundamental elements necessary for a court to find a *per se* violation of human dignity. First, the case would need to involve vulnerable individuals, and the relevant jurisdiction would need to have special protections for vulnerable populations, such as inmates. As Justice Arbel states in concurrence in the Israeli case, privatization “abandons the prison inmate, who is already at the bottom of the social ladder and in a sensitive and vulnerable situation, to his fate.”¹¹¹ Similarly, in *Purohit*, the African Commission had to reiterate that:

[M]entally disabled persons . . . have a right to enjoy a decent life, as normal and full as possible, a right which lies at the heart of the right to human dignity. This right should be zealously guarded and forcefully protected by all States party to the African Charter.¹¹²

Second, there needs to be a special emphasis on the human right to dignity. As Justice Beinisch writes of the Israeli context, “the right to human dignity became a super-legislative constitutional right that every government authority is liable to respect.”¹¹³ The African Commission in *Purohit* also highlighted the special place of human dignity as “an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every

110. The question was considered by the Israel Supreme Court in its decision

It should also be noted that we have not found any consideration by the courts in Britain, South Africa and the European Union, as well as by the European Court of Human Rights, of the question of the constitutionality of the privatization of prisons. From the opinion of Prof. J. Jowell that was filed by the state, it would appear that hitherto no claims have been raised before the aforesaid courts with regard to the constitutionality of the privatization of prisons. Prof. Jowell’s opinion is that were arguments of this kind to be raised before those courts, they would not be expected to be successful, *inter alia* because of the economic character of the issue and the lack of a ground of incompatibility with the provisions of the European Convention on Human Rights.

Prison Case, *supra* note 1, ¶ 60, at 98 (emphasis added). Jowell’s opinion was submitted by the state in support of prison privatization.

111. *Id.* ¶ 4, at 106 (Arbel J., concurring).

112. *Purohit v. Gambia*, *supra* note 6, ¶ 61.

113. Prison Case, *supra* note 1, ¶ 35, at 75. Similarly, Justice Arbel wrote in concurrence, “The value of human dignity on which I will focus, which for a decade and a half has enjoyed a special status of a super-legislative constitutional right in our legal system, recognizes the worth of human beings and regards them as an end in themselves. . . .” *Id.* ¶ 3, at 107-08. For a thorough overview of the meaning of the right to dignity in a variety of jurisdictions, see generally Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19(4) EUR. J. INT’L. L. 655 (2008).

human being to respect this right.”¹¹⁴

Finally, there needs to be a sense that the action of the government, such as prison privatization or labeling of the mentally ill as “lunatics” or “idiots,” serves as a direct assault on the vulnerable populations’ dignity even in a symbolic way, such as an expression of disrespect. Justice Beinisch approvingly quotes the following from Meir Dan-Cohen: “As long as certain actions are generally considered to express disrespect, one cannot knowingly engage in them without offending against the target’s dignity, no matter what one’s motivations and intentions are.”¹¹⁵ Thus, the privatization of prisons in Israel, “both in practice and on an ethical and symbolic level [] expresses a divestment of a significant part of the state’s responsibility for the fate of the inmates.”¹¹⁶

The three key elements also are found in cases before the South African Constitutional Court, as it has stressed the human right to dignity, the rights of vulnerable populations, and the importance of symbolic dehumanization through commodification.¹¹⁷ Most interestingly, the South African Constitutional Court has directly tied commodification to the right to dignity in the prison context. In *S. V. Dodo*, the South African Supreme Court, upon considering life sentences that were primarily intended to serve as a deterrence to others but did not fit the individuals’ crimes, held that:

Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence . . . the offender is being used essentially as a means to another end and the offender’s dignity assailed.¹¹⁸

Just like in Israel, there is little history of privatization in South Africa, with

114. *Purohit v. Gambia*, *supra* note 6, ¶ 57.

115. Prison Case, *supra* note 1, ¶ 38, at 77 (quoting DAN-COHEN, *supra* note 43, at 162) (internal quotations omitted).

116. *Id.* ¶ 39, at 78.

117. Dawood & Another v. Minister of Home Affairs & Others, CCT35/99, ¶ 35, (8) BCLR 837 (CC) (2000) (S. Afr.), available at <http://www.elaw.org/node/5200> (stating that “dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected”). See also, State v. Makwanyane & Another, CCT3/94, ¶ 144, (6) BCLR 665 (1995) (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/1995/3.html> (involving the death penalty) (“The rights to life and dignity were the most important of all human rights, and the source of all other personal rights By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.”).

118. *State v. Dodo*, CCT 1/01, ¶ 38, (5) BCLR 423 (CC) (2001) (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2001/16.html>.

the first private prison, Manguang Maximum Security Prison, the second largest prison in the world, opening in 2000 and coming under intense scrutiny in the past year.¹¹⁹ Furthermore, in October 2013, the South African government announced that it will take over the management of a maximum security prison run by G4S after the private security contractor “lost effective control of the facility.”¹²⁰

Justice Beinisch conjectured that privatization would not hold the same symbolic meaning in countries such as the U.S. and the U.K., where privatization has such a long history. Indeed, in one of the few cases in the U.S. to challenge privatization as a *per se* violation, Judge Posner dismissed the claims on Thirteenth Amendment grounds and warned that to re-file such a case on other constitutional grounds would be “foolish,” noting:

They will merely waste their money and earn a strike. The claims are thoroughly frivolous. The Thirteenth Amendment, which forbids involuntary servitude, has an express exception for persons imprisoned pursuant to conviction for crime. Nor are we pointed to or can think of any other provision of the Constitution that might be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than by a government.¹²¹

Although conditions in privatized U.S. prisons are currently being challenged in a number of suits throughout the country,¹²² a *per se* claim might not be justiciable

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119. See Ruth Hopkins, *Privatisation of Prisons Has Failed*, MAIL & GUARDIAN (Nov. 8, 2013), available at <http://witsjusticeproject.com/2013/11/08/privatisation-of-prisons-has-failed/> (“Correctional Services Minister Sbu Ndebele told Parliament on Tuesday that the privatisation of prisons in South Africa has failed. Manguang prison, which was being run by global security firm G4S, was not delivering the required results . . .”).
120. Ruth Hopkins, *South Africa Takes Over G4S Prison After Concerns*, THE GUARDIAN (Oct. 9, 2013, 15:16 EDT), <http://www.theguardian.com/world/2013/oct/09/g4s-sacked-south-africa-prison-manguang>.
121. *Pischke v. E Litscher*, 178 F.3d 497, 500 (7th Cir. 1999).
122. NGOs and private individuals have brought several high-profile lawsuits charging that the effects of the privatization of prisons and detention facilities are violations of fundamental civil rights. See *Parsons v. Ryan*, 754 F.3d 657, 662 (9th Cir. 2014) (class action challenge by private prison inmates concerning health care practices and isolation units; the appellate court upholding the injunction and declaratory judgment of the district court); *Am. Friends Serv. Comm. v. Brewer*, No. CV 2011-017119 (Ariz. Sup. Ct. 2011), available at https://afsc.org/sites/afsc.civicactions.net/files/documents/private_prison_Arizona_Injunction_Decision_102711.pdf (dismissing the case due to plaintiffs’ lack of standing). Significantly, courts have held that worsened conditions traced to prison privatization constitute a violation of basic human rights. See, e.g., *Depriest v. Epps*, No. 3:10-cv-00663-CWR-FKB, Order Approving Settlement, at 4-6 (S.D. Miss. 2012), available at <https://www.aclu.org/files/assets/order.pdf> (finding severe violations at private youth prison facility, including sexual and physical abuse). Further, many NGOs have extensively documented the abuses that seem endemic to private prisons and detention facilities. See, e.g., AMERICAN FRIENDS SERVICE COMMITTEE, PRISON PRIVATIZATION IN ARIZONA 11-12 (Oct. 2010), available at http://www.afsc.org/sites/afsc.civicactions.net/files/documents/AZ_Prison_Privatization_White_Pa

in U.S. Courts but arguably could succeed in the Inter-American Human Rights system. Indeed, the Inter-American system is an especially fruitful jurisdiction for applying the logic of the Israeli Supreme Court decision. The human right to dignity plays a significant role in the Inter-American system,¹²³ and this clearly applies to those incarcerated under Article 5 of the American Convention on Human Rights, which state that “all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”¹²⁴

The Inter-American Court of Human Rights has ruled that the human right to dignity is especially tenuous in a detention setting and that “the State has an ineluctable obligation to provide those persons with the minimum conditions befitting their dignity as human beings, for as long as they are interned in a detention facility.”¹²⁵ The Court even expanded the dignity standard for prisoners to what we call a *proyecto de la vida* standard, calling on the state to not only

per.pdf; AMERICAN FRIENDS SERVICE COMMITTEE, PRIVATE PRISONS: THE PUBLIC’S PROBLEM—A QUALITY ASSESSMENT OF ARIZONA’S PRIVATE PRISONS 40-47 (Feb. 2012), *available at* afsc.org/sites/afsc.civicaactions.net/files/documents/AFSC_Arizona_Prison_Report.pdf; AMERICAN CIVIL LIBERTIES UNION, BANKING ON BONDAGE—PRIVATE PRISONS AND MASS INCARCERATION 24-27 (Nov. 2011), *available at* http://www.aclu.org/files/assets/bankingonbondage_20111102.pdf; AMERICAN CIVIL LIBERTIES UNION, IN THEIR OWN WORDS—ENDURING ABUSE IN ARIZONA IMMIGRATION DETENTION CENTERS (June 2011), *available at* www.aclu.org/sites/default/files/documents/detention_report_2011.pdf. Even the state of Colorado has found similar problems. *See generally* Colorado State Auditor, Rep. of the State Auditor, *Private Prisons, Department of Corrections Performance Audit* (Apr. 29, 2005), *available at* http://www.ccjrc.org/pdf/DOC_Audit_04-2005.pdf (noting inadequate medical services, accountability issues between the facility and the state, faulty hiring practices, and non-compliance with agreed-to facility standards). *See also* United Nations Human Rights Comm., *Concluding Observations on the Fourth Report of the United States of America*, at 8, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014), *available at* <http://justsecurity.org/wp-content/uploads/2014/03/UN-ICCPR-Concluding-Observations-USA.pdf> (recommending that “[t]he State party should monitor the conditions of detention in prisons, including private detention facilities, with a view to ensuring that persons deprived of their liberty be treated in accordance with the requirements of articles 7 and 10 of the Covenant and the Standard Minimum Rules for the Treatment of Prisoners”). The U.S. Supreme Court, however, rejected a federal cause of action against a privately-operated prison involving inadequate medical services to inmates, holding that the case should be submitted to a state court under state tort law rather than to a federal court. *Minnecci v. Pollard*, 132 S.Ct. 617, 620 (2012).

123. *See generally* Jo M. Pasqualucci, *The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System*, 31 HASTINGS INT’L & COMP. L. REV. 1 (2008).
124. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *available at* http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf.
125. *Juvenile Reeducation Institute v. Paraguay*, Preliminary Objections, Merits, Reparations and Costs, Int-Am. Ct. H.R. (ser. C) No. 112, ¶ 159 (Sept. 2, 2004), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_112_ing.pdf. *See also* *Minors in Detention v. Honduras*, Merits, Int-Am. Comm’n H.R. No. 11.491, Rep. No. 41/99 (Mar. 10, 1999), OEA/Ser.L/V/II.95, doc 14 rev. 573 (1998), *available at* www.cidh.oas.org/annualrep/98eng/Merits/Honduras_11491.htm.

ensure the right to dignity, but also to provide inmates with the opportunity to build their *proyecto de la vida* by holding that “the Court must establish whether the State, in fulfillment of its role of guarantor, took measures to ensure to all inmates at the Center—adults and children alike—the right to live with dignity and thus help them build their life plan, even while incarcerated.”¹²⁶ The Inter-American system has been quite sensitive to vulnerable persons in prison, ruling that they are entitled to special protection and oversight,¹²⁷ and holding that the state maintains an affirmative duty to protect the many facets of an inmate’s human dignity, including “protecting him from possible circumstances that could imperil his life, health and personal integrity, among other rights.”¹²⁸

Similarly, in a mental disabilities case, the Inter-American Court plainly stated, “any person who is in a vulnerable condition is entitled to special protection, which must be provided by the States if they are to comply with their general duties to respect and guarantee human rights.”¹²⁹

V. Conclusion

We find ourselves in an age where prisoners’ “very bodies now represent profits.”¹³⁰ Indeed, private prison companies can warn shareholders that reduced incarceration levels could hurt the bottom line by saying that “[t]he demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by criminal laws.”¹³¹ In light of this reality, it is imperative to look at the real world consequences of privatized prisons. The rulings of the Israeli Supreme Court and the African Commission in *Purohit* took seriously the pre-existing vulnerability of the inmates and patients, as well as the consequences of further cauterization. These decisions stand in sharp contrast to legal scholars whose arguments abstract from the real world.

It may be possible that private prisons could enhance the dignity of prisoners by

126. *Juvenile Reeducation Institute v. Paraguay*, *supra* note 125, ¶164.

127. *Persons Deprived of Freedom at Urso Branco Prison, Rondonia v. Brazil*, Int-Am. Comm’n H.R., No. 394-02, Rep. No. 81/06, OEA/Ser.L.V/II.127, ¶ 6 (2006), *available at* <https://www.cidh.oas.org/annualrep/2006eng/BRAZIL.394.02eng.htm>.

128. *Minors in Detention v. Honduras*, *supra* note 125, ¶ 135.

129. *Ximenes-Lopes v. Brazil*, Judgment, Int-Am. Ct. H.R. No. 12.237, Rep. No. 38/02, Doc. 5 rev. 1 at 174, ¶ 103 (July 4, 2006), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_149_ing/pdf (involving treatment of mental health patients in both public and private facilities).

130. Cassandra Shaylor, “*It’s Like Living in a Black Hole*”: *Women of Color and Solitary Confinement in the Prison Industrial Complex*, NEW ENG. J. ON CRIM. & CIV. CONFINEMENT, 385, 409 (1998).

131. MASON, *supra* note 2, at 12 (footnote omitted).

improving prison conditions,¹³² but in many contexts that seems like a fantasy. If improving the dignity of prisoners is the goal, and incarceration is inherently degrading, then turning to a for-private corporation seems troubling. Humanizing prisoners does not require privatization, it requires a changed mindset about prisoners and concrete actions that reduce violence, improve rehabilitation efforts, and lower incarceration rates. It calls for the reversal of the cauterization process. As Dolovich writes,

Consider what would have to change if prisoners were widely understood to be fellow human beings and fellow citizens: Prison conditions would necessarily be humane and the opportunities for human development meaningful, notwithstanding the (temporary) deprivation of freedom. Parole applications would be seriously scrutinized, and, perhaps after some period of confinement proportionate to the crime, those individuals found to pose no future public safety risk would be released. And once released, people with felony convictions would not be burdened with gratuitous civil disabilities and might even be assisted by the state with the enterprise of reentry.¹³³

132. See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

133. DOLOVICH, *supra* note 106, at 121.