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# Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics

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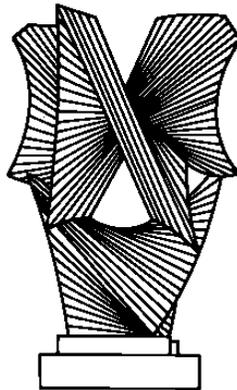
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## COMMENSURABILITY AND AGENCY: TWO YET-TO-BE-MET CHALLENGES FOR LAW AND ECONOMICS

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# ESSAY

## COMMENSURABILITY AND AGENCY: TWO YET-TO-BE-MET CHALLENGES FOR LAW AND ECONOMICS

*Alon Harel & Ariel Porat*†

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### INTRODUCTION

More than fifty years after the inception of “law and economics” (LE), very few scholars deny its vast influence on legal academia. Despite this prominence, however, LE still triggers objections and criticisms. Many people regard it as, at best, capturing only a subset of the relevant concerns and, at worst, irrelevant to the study of law. Some of the most persistent flawed objections include arguments that LE focuses exclusively on wealth maximization and consequently it fails to

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account for other values; that LE assumes (unjustifiably) that individuals are rational, and that LE fails to acknowledge motivations that are not purely self-interested (such as altruism).

In this Essay, we focus our attention on two challenges that—as far as we understand—LE scholars so far have not satisfactorily addressed. The first challenge relates to commensurability, and the second focuses on agency and its significance. Both concerns are central to LE. The first concern questions the dominant method of making substantive decisions—the method founded on cost-benefit analysis. The second concern challenges the assumption that the choice of an agent to perform an act is based solely on instrumental considerations, e.g., considerations such as the agent's accuracy and efficacy in executing the state's decisions.

A central objection to LE is the inaccuracy of one of its presuppositions—that all potential outcomes are commensurable and comparable<sup>1</sup> to one another.<sup>2</sup> Although this objection is not fatal to LE reasoning, we believe that courts and legislatures deliberately avoid making some types of comparisons without explanation. We also maintain that LE does not provide a satisfactory account for this reluctance by courts and legislatures. Part I of the Essay discusses this question and provides three examples that illustrate such reluctance.

In Part II, we turn to agency and discuss the allocation of tasks and powers between the state and private entities. Although LE would argue that only instrumental considerations dictate the division of labor between the state and private entities, we maintain that delegating certain tasks to private agents and contractors raises principled noninstrumental concerns, which play a crucial role in many contemporary legal systems. Thus, Part II explores reasons why such delegation does not typically occur, even when it is efficient to delegate certain tasks and powers to private entities.

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<sup>1</sup> We are aware of the distinction between commensurability and comparability. In this Essay, however, the inability to compare certain values inevitably questions their commensurability. On the distinction between the two, see EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* 112–16 (2010); Ruth Chang, *Introduction to INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* 1–2 (Ruth Chang ed., 1997).

<sup>2</sup> See Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1199 (1997) (arguing that “[a] commitment to the commensurability of all an agent's ends runs very deep in the Law and Economics movement” but that it fails to describe the real world); see also ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 1–16 (1993) (arguing for a pluralist approach to the valuation of goods, based on the idea that goods differ in kind or quality from one another and cannot always be measured by a common criterion); Amartya Sen, *Plural Utility*, 81 PROC. ARISTOTELIAN SOC'Y 193, 193–210 (1981) (arguing that welfare economics should understand utility “primarily as a vector (with several distinct components), and only secondarily as some homogeneous magnitude”).

It is hard to tell whether LE's failure to address these two challenges marks its limits as a comprehensive explanatory and normative enterprise, or whether LE can satisfactorily address these challenges. We leave this question open partly because we find it difficult to reach an agreement about the answer, even between ourselves!

## I

### COMMENSURABILITY AND UNCONVENTIONAL COMPARISONS

In this Part, we present three types of comparisons that courts and legislatures systematically avoid. We then try to explain this tendency toward avoidance, ultimately asking if (and what) LE may tell us about this tendency.

#### A. Trading High Risks to Life and Limb for Money

Courts commonly use the Hand formula to determine the standard of care in tort law.<sup>3</sup> According to this formula, as interpreted by LE, a court considers the injurer negligent and holds him or her liable when the marginal costs of precautions that the injurer could have taken fall short of the marginal reduction in the expected harm.<sup>4</sup> The formula implies that, in principle, an actor should always compare the costs of precautions with the expected harm, regardless of whether the expected harm consists of property damages, bodily injury, or death.<sup>5</sup> Thus, the Hand formula instructs judges and jurors that a certain amount of money is worth spending to save a victim's life, but spending a higher amount of money would not be cost-justified and therefore ought not to be required by law.<sup>6</sup>

It is understandable that one might feel some discomfort when confronted with comparisons between money and the value of life and limb.<sup>7</sup> However, in a world with scarce resources, it is difficult to imagine that we could avoid making such comparisons entirely. Any society—admittedly, any individual—must make decisions that require balancing monetary costs on the one hand and risk to life and

<sup>3</sup> See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

<sup>4</sup> See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 350–51 (2008) (defining the efficient level of care as an equality between the marginal social cost and the marginal social benefit); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 87, 99–100, 102 (1987) (clarifying that the correct economic standard of care requires a consideration of marginal rather than total values of costs and benefits and concluding that courts also use marginal terms when applying the Hand formula).

<sup>5</sup> See COOTER & ULEN, *supra* note 4, at 326–28.

<sup>6</sup> *Cf. id.* at 351 (“Eventually a case will reach the adjudicators in which further precaution is not cost-justified.”).

<sup>7</sup> See Philip E. Tetlock, *Thinking the Unthinkable: Sacred Values and Taboo Cognitions*, 7 *TRENDS COGNITIVE SCI.* 320, 320–23 (2003) (describing lay people's emotional reactions to trade-offs made between sacred values, such as life and limb, and money).

limb on the other.<sup>8</sup> So, for example, a government must choose whether to spend resources on a new promenade or to improve a highway instead, thereby decreasing the number of potential accidents and saving lives of potential future victims. Similarly, many of us balance the extra cost of buying a safer car against the higher risk to ourselves and to our family if we fail to incur those costs. Once we understand that spending money on safety comes at the expense of other concerns, the necessity of ascribing monetary values to risks to life and limb becomes apparent.

Despite their inevitability, such comparisons seem to pose a real challenge to the law in general and to tort law in particular. This challenge is particularly evident when the risks to life or limb are high and most pointed when the risks reach certainty, which implies that failure to take a specific precaution means that a specific individual will die or become seriously injured. This challenge is particularly striking when the victim is identified in advance;<sup>9</sup> however, it exists even when the victim cannot be identified in advance, yet it is nevertheless known that the risk creator exposed a victim to a very high risk of death or severe bodily injury.<sup>10</sup> Unsurprisingly, it is hard to find even a single case in which a court decided that subjecting a specific victim to a certain (or almost certain) risk of death, or severe bodily injury, was reasonable because the monetary precautions necessary to prevent such injury or death were not cost justified.

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<sup>8</sup> See, e.g., Robert Cooter, *Hand Rule Damages for Incompensable Losses*, 40 SAN DIEGO L. REV. 1097, 1098 (2003) ("In general, the need to buy costly precaution in daily life forces people to trade off money and risk."). But see GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 18–19 (1970) (indicating that virtually all societies refrain in some cases from explicitly balancing the monetary value of lives against monetary costs).

<sup>9</sup> See Guido Calabresi, *The Decision For Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 716 (1965) (comparing society's willingness to spend much more than what a person's life is conceivably worth to save an identified individual from certain death with its refusal to bear the same costs where death is almost statistically certain, but the individual in question is unknown).

<sup>10</sup> We should distinguish that latter scenario from a risk to statistical life: a small risk to many individuals that will almost certainly cause the deaths of some of them in the long run. See generally Matthew D. Adler, *Risk, Death and Harm: The Normative Foundations of Risk Regulation*, 87 MINN. L. REV. 1293 (2003) (discussing various theories for assessing risks to life and statistical life). Sometimes public sentiment avoids creating very high risk to statistical life with almost the same intensity as creating a very high risk to a specific person's life. A typical case that illustrates this latter point is *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Ct. App. 1981), known as the "Ford Pinto case," where the court upheld large punitive damages against Ford Motor Company in part because "[u]nlike malicious conduct directed toward a single specific individual, Ford's tortious conduct [in failing to make inexpensive corrections to the Pinto design] endangered the lives of thousands of Pinto purchasers." *Grimshaw*, 174 Cal. Rptr. at 388. Even though design alterations would result in 180 fewer deaths per year, Ford thought it would not be cost-justified because the new design would have cost an additional \$11 per car. See Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1020 (1991).

In real life, doctors and other medical care providers face these kinds of dilemmas on a daily basis. They must decide how much money to spend on saving a specific patient's life or on improving his health. Courts, on the other hand, rarely address these issues.<sup>11</sup>

The stubborn reluctance to consider the possibility that monetary concerns may justify imposing high risks to the life (or bodily integrity) of a person raises a puzzle for LE: Why do courts and legislatures so rarely make such comparisons?<sup>12</sup> Indeed, one should expect LE to encourage courts and legislatures to conduct such comparisons whenever a question of this sort arises. Despite this expectation, however, LE fails to account for the fact that its fundamental principles require uninhibited willingness to translate people's lives and limbs to monetary values.

This failure does not mean that LE entirely ignores the question of how to value people's lives and limbs in monetary terms. Conven-

<sup>11</sup> Cf. SHAI J. LAVI, *THE MODERN ART OF DYING: A HISTORY OF EUTHANASIA IN THE UNITED STATES* 134–37 (2005) (discussing lethal dosing—a practice doctors ostensibly use to help relieve patients' pain and that also hastens death—and indicating that doctors were very rarely prosecuted for using those practices).

With very high risk to property, courts tend to impose liability on the injurer regardless of whether his behavior was reasonable or not. See *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 221–22 (Minn. 1910) (imposing liability on a shipowner for failing to untie his ship from the dock during a storm in order to save the ship, thereby inflicting harm on the dock); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 168–69 (1973) (demonstrating the prevalence of strict liability in those tort cases characterized as *A hit B*).

There are some exceptional cases, where the risk to the patient was very high and the court was willing, in principle, to make some cost-benefit analysis. In Canada, in *Law Estate v. Simice* (1994), 21 C.C.L.T. 2d 228 (Can. B.C.), the Supreme Court of British Columbia found a physician negligent for denying a potentially life-saving CT scan to a patient for financial reasons. The court reasoned that “[t]he severity of the harm that may occur to the patient who is permitted to go undiagnosed is far greater than the financial harm that will occur to the medicare system if one more CT scan procedure only shows the patient is not suffering from a serious medical condition.” *Simice*, 21 C.C.L.T. 2d at para. 28. For a similar approach in the English context, see *Ball v. Wirral Health Authority*, (2003) 73 B.M.L.R. 31 (Eng.). There, the court dismissed a negligence suit against a hospital for lacking the adequate facilities to care for premature babies, which allegedly resulted in the plaintiff's brain damage. The court held: “In the field of medicine where resources are limited and the demands on those resources are many, it may be necessary to make difficult decisions as to how resources are to be allocated. . . . The fact that an area of medicine may be under-funded . . . or that a particular hospital may not have the facilities that another hospital has, may give rise to a concern among the general public and experts in the field; but it does not necessarily provide the basis of a claim in negligence by a patient who may suffer from the effects of the under-funding or the lack of facilities.” *Ball*, 73 B.M.L.R. at para. 32. For another argument along these lines, see also PATRICIA M. DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY* 143 (1985) (arguing that “the fact that social costs exceed expected benefits should be recognized as a defense against failure to take costly precautionary measures”).

<sup>12</sup> This is not a puzzle for corrective justice theorists who argue that negligence should be determined by the risks rather than by the precautions that, if taken, would have mitigated them. See Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107, 116–17, 130–31 (2001).

tional LE endorses Willingness to Pay (WTP) or Willingness to Accept (WTA) as criteria for valuing a person's life and argues that under a risk of certain death the victim's WTA would be infinite.<sup>13</sup> If WTA was the right criterion for valuing the life of a person under a risk of certain death, then the absurd implication would be that any amount of money spent on saving a victim under a risk of certain death is cost justified.<sup>14</sup> Furthermore, under the WTP or WTA criterion, the value of a person's life under a high risk of death is disproportionately higher than the value of his or her life when that person faces lower risks. Put differently, both WTP and WTA imply that saving one individual from a certain death (regardless of whether he or she is an "identified victim"<sup>15</sup>) enhances welfare more than saving, say, ten other individuals from a 25% probability risk of death for each. From a social welfare perspective, this result seems misguided: it ultimately results in many more deaths than a scheme under which low and high risks are treated equally on the basis of their expected costs.<sup>16</sup>

Indeed, some scholars have argued that any application of WTP (or WTA) should be sensitive to the fact that people who face high risks of death may eventually die; once that occurs, they no longer benefit from monetary sums. Therefore, these people discount the payments they are willing to make or accept by the probability of death after they pay or accept money.<sup>17</sup> When people face a *high* risk of death after paying or accepting money—so the argument goes—

<sup>13</sup> WTP will be limited to the individual's wealth. See, e.g., Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 589 & n.159 (2005) (noting income constraints applicable to WTP and that, as the probability of risk nears 100%, WTP approaches 100% of income).

<sup>14</sup> Notice that this conclusion seems to hold even if the victim is unidentified; as long as the victim *herself* knows about the risk of certain death that she is subject to, her WTA will be infinite and her WTP will be equal to her entire wealth. Cf. Matthew D. Adler, *Against "Individual Risk": A Sympathetic Critique of Risk Assessment*, 153 U. PA. L. REV. 1121, 1198 (2005) (noting that WTP "to avoid certain death" will correspond to individual wealth, while WTA certain death "may well be infinite"); Adler, *supra* note 10, at 1400 (arguing that values of statistical life calculations "produce[ ] a dollar sum very different from the sum of willingness to pay/accept among those actually aware of, or afraid of, the hazard").

<sup>15</sup> Cf. Posner & Sunstein, *supra* note 13, at 589 (discussing nonlinear increases in WTP and WTA as risk probability approaches 100%).

<sup>16</sup> Although some would argue that this is not absurd, even they would agree that there exists a number above which trading would not make sense. See ZAMIR & MEDINA, *supra* note 1, at 90–91, 95–96, for the argument that deontological constraints would sometimes require ascribing a higher social cost to high risks to life and limb than to low risks, more so than what the proportion between the high and low risks requires. Those authors admit, however, that at a certain point the low risks could be considered more socially costly than high risks. *Id.* at 90–91, 95–96 & n.37. Note that the authors discuss situations of deliberate killing, which could differ in many respects from the cases that we discuss in this Essay.

<sup>17</sup> See John W. Pratt & Richard J. Zeckhauser, *Willingness to Pay and the Distribution of Risk and Wealth*, 104 J. POL. ECON. 747, 748 n.2, 752–55 (1996).

the discount rate is high; therefore, the money that people are willing to pay or accept does not represent the true value that they themselves ascribe to their lives.<sup>18</sup> This argument, however, fails to explain the nonlinearity of WTP with respect to the magnitude of the risks reduced in situations where, after paying or accepting money, the risk that the person faces is reduced to zero and the discounting effect is nullified. Thus, it does not explain why most people who face a 50% risk of death are willing to pay more than twice as much to reduce their risk to zero than what they would be willing to pay if they were subject to a 25% risk of death. Risk aversion, cognitive biases, or other considerations may provide other potential explanations for this nonlinearity.<sup>19</sup>

In sum, conventional LE is quite inconsistent in its treatment of high risks to life. On the one hand, conventional LE seems to imply that preventing high risks is more desirable on efficiency grounds than preventing low risks, even if the total number of deaths is identical in both cases. But this implication conflicts with LE's commitment to increasing social welfare because investing more in preventing high risks than in low risks in such cases would result in more people eventually dying. Furthermore, LE fails to explain why courts and legislatures avoid comparisons of monetary costs with risks to life and limb when those risks are high.

## B. Interpersonal Comparisons

LE seemingly dictates that differences among people provide reasons to ascribe different values to their life and limb.<sup>20</sup> However, as we show below, courts are reluctant to compare different people, at least explicitly. In other words, courts are reluctant to concede explicitly that the value of the lives of different people differs.

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<sup>18</sup> Ariel Porat and Avraham Tabbach recently argued that a correct understanding of WTP (and WTA) would yield that only the magnitude of the risk reduced (or increased) should count for social welfare, not the pre-existing risk or the magnitude of the risk after it was reduced (or increased). See Ariel Porat & Avraham Tabbach, *Willingness to Pay, Death, Wealth and Damages*, 13 AM. L. & ECON. REV. (forthcoming 2011) (manuscript at 9–10, 20–25) (on file with authors). It follows from their argument that, from a social perspective, it is better to eliminate a risk of 25% for ten individuals (or, even for five individuals) than a 100% risk for one individual, assuming the individuals are not identified in advance. See *id.* For an earlier exposition of the discounting effect on WTP, see Pratt & Zeckhauser, *supra* note 17. The analysis could change if victims are identified because not saving an identified person who is under risk of certain death typically creates other social costs that are not present to the same extent when risks are lower. *Id.* at 747–48.

<sup>19</sup> See Porat & Tabbach, *supra* note 18, at 23 n.26.

<sup>20</sup> Cf. Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 511 (1980) (mentioning the interpersonal utility comparison problem as one basis for criticizing utilitarianism).

In tort law, lost income is a major factor in awarding damages for bodily injury.<sup>21</sup> That means that high-income victims receive more generous compensation than low-income victims. Justifying this principle from a LE perspective requires one to accept the argument that the social value of a high-income individual's life and limb is higher than that of a low-income individual's life and limb. One possible reason for accepting such an argument is that lost income is a good proxy for productivity and, therefore, for social value.<sup>22</sup>

Interestingly, however, tort law implicitly rejects this argument; in setting the standard of care, courts ignore the potential victims' lost income.<sup>23</sup> Thus, courts would probably refuse to set a different standard of care for driving in an affluent neighborhood (as opposed to a poor neighborhood) simply because people in that former neighborhood, on average, earn a higher income. Similarly, a doctor who must allocate his scarce time between a high-income and a low-income patient will likely be held negligent if she decided to allocate more time to the former than to the latter merely because of the former's income. Courts' reluctance to tailor the standard of care to people's income—and to other personal characteristics, as well—may therefore be explained as a refusal to compare the social value of one person's life to another.<sup>24</sup>

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<sup>21</sup> See DAN B. DOBBS, *THE LAW OF TORTS* 1048–49 (2000); Lloyd Cohen, *Toward an Economic Theory of the Measurement of Damages in a Wrongful Death Action*, 34 *EMORY L.J.* 295, 299–300 (1985) (“All states give great weight to the earning capacity of the decedent in calculating damages.”).

<sup>22</sup> See Erin A. O'Hara, Note, *Hedonic Damages for Wrongful Death: Are Tortfeasors Getting Away with Murder?* 78 *GEO. L.J.* 1687, 1695 (1990) (criticizing the human capital approach, which measures the value of an individual's life based on lost future income discounted to present value but agreeing that “an individual's future income may be a proxy for the value that society placed upon that individual's productive capacity”). For more criticism on the human capital approach, see Andrew Jay McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 *NOTRE DAME L. REV.* 57, 100–02 (1990) (arguing that the human capital approach “undervalues life [as it disregards] variables such as the pleasure of living” and fails to take into account the social and cultural contribution of artists and other influential figures who do not increase the gross national product).

<sup>23</sup> For a distributive justice approach on the matter, see Tsachi Keren-Paz, *An Inquiry into the Merits of Redistribution Through Tort Law: Rejecting the Claim of Randomness*, 16 *CAN. J.L. & JURISPRUDENCE* 91, 95 n.20 (2003) (“Of course, the courts do not explicitly admit that the rich deserve greater protection, but perhaps they do not do so consciously. However, to the extent that courts intuitively follow the Learned Hand formula, a finding of negligence is more likely to be found where potential defendants are rich, given constant prevention costs. Moreover, if it could be proven, empirically, that courts do not apply the Hand formula in a way that affords better protection to the rich, this would be a deviation from the economic model of negligence, due to distributive considerations.”).

<sup>24</sup> The reluctance to compare lives led some philosophers to even more radical conclusions. For instance, John Taurek argued that we ought not to prefer the lives of the many over the lives of the few because we ought not to aggregate the value of different lives. See John M. Taurek, *Should the Numbers Count?*, 6 *PHIL. & PUB. AFF.* 293, 293–94, 303–09 (1977). In 2006, the Federal Constitutional Court of Germany issued a similarly motivated judgment by voiding the German Aviation Security Act, which authorized the air

But courts' reluctance to set different standard of care toward high-income and the low-income victims may conflict with the fact that lost income influences the damage awards given to the plaintiff. This compensatory rule is commonly understood as the inevitable consequence of applying the *restitutio ad integrum* principle.<sup>25</sup> In practice, however, this rule triggers different levels of care, as the differential compensation in accordance with the plaintiff's income provides injurers incentives to exercise a higher level of care toward high-income individuals than toward low-income individuals.<sup>26</sup> Yet courts still avoid any explicit recognition that from a social perspective, some people's life and limb may be worth more than that of others. Consequently, they refuse to impose different standards of care on the basis of the victim's lost income. The differential compensation that courts, in fact, grant to high-income victims is not tantamount to an explicit recognition that the life of a high-income individual is more valuable than the life of a low-income individual.<sup>27</sup>

LE does not respond to the challenge of comparing the values of different people's life and limb to one another. Instead, LE writers who endorse the WTP or WTA criterion acknowledge that a rich person's WTP or WTA is higher than that of a poor person's, and therefore the former's life and limb is worth more than that of the latter.<sup>28</sup> But this conclusion is ill founded; wealth can hardly serve as a reliable

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force to shoot down a civil aircraft if "in the circumstances, it can be assumed' that the aircraft was to be used against human life." Felix Müller & Tobias Richter, *Report on the Bundesverfassungsgericht's (Federal Constitutional Court) Jurisprudence in 2005/2006*, 9 GER. L.J. 161, 186 (2008). The court ruled that killing innocent people in order to save others violates basic human rights to life and human dignity. See *id.* at 185–92; see also Alon Harel & Assaf Sharon, "Necessity Knows No Law": *On Extreme Cases and Un-Codifiable Necessities* U. TORONTO L.J. (forthcoming) (manuscript at 1–5) (on file with authors).

<sup>25</sup> Cf. Tsachi Keren-Paz, *Private Law Redistribution, Predictability, and Liberty*, 50 MCGILL L.J. 327, 336 (2005) (contrasting the *restitutio in integrum* principle with a redistributive rule).

<sup>26</sup> Imagine that courts apply a standard of care tailored to the average victim's income, regardless of the actual victim's characteristics. In the absence of any errors on the part of courts and injurers, the actual level of care that injurers take towards the high-income victims would be equal to the standard of care that courts apply (because injurers will meet the standard of care, be absolved of any liability, and therefore will not invest any more in care). Toward the low-income victims, injurers would take a lower level of care than the standard that courts would apply (because injurers will not invest in care beyond the point where the costs of precaution equal the marginal reduction in the expected harm and since they would reach that point before satisfying the standard of care). Although accounting for courts' and injurers' errors complicates the analysis, the gap between the levels of care that injurers take toward the high-income and the low-income victims still remains. For further analysis, see Ariel Porat, *Misalignments in Tort Law*, 121 YALE L.J. (forthcoming 2011) (manuscript at Part II) (on file with author).

<sup>27</sup> See *supra* note 23.

<sup>28</sup> Cf. Posner & Sunstein, *supra* note 13, at 594–95 (arguing that the value of statistical lives, based on WTP, should be less for the poor than the rich but acknowledging the "intense controversy over valuing the lives of the rich more than the lives of the poor").

proxy for productivity and social value.<sup>29</sup> While there is some correlation between high income (and therefore, productivity) and wealth, the two can hardly be conceived as identical.

In sum, tort law avoids interpersonal comparisons even though such comparisons are dictated by LE basic principles. Furthermore, LE does not provide satisfactory tools for implementing these comparisons.

### C. Trading Human Rights

Should the law offer fewer protections to potential victims of sexual harassment in order to afford better occupational opportunities to women?<sup>30</sup> Should the law permit torturing suspects of crime or terror when such torture can prevent the destruction of valuable property or save money? In both cases, the question centers on whether certain basic human rights should be traded for the sake of preserving other values not categorized as foundational human rights. Similar to high risks to life,<sup>31</sup> the question in this context is also particularly acute when the risk of curtailing basic human rights is very high.

One notable example is sexual harassment. Most jurisdictions treat sexual harassment by a superior at the workplace as a tort;<sup>32</sup> under certain circumstances, some also consider it a crime.<sup>33</sup> The beneficiaries of laws that prohibit sexual harassment are typically (al-

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<sup>29</sup> For a more detailed explanation of why wealth should not be a factor in valuing people's lives, see Porat & Tabbach, *supra* note 18, at 20–31.

<sup>30</sup> Or should employers be able to purchase the right to harass their employees by paying higher wages to those employees who agree to sell their right not to be harassed?

<sup>31</sup> See *supra* Part I.A.

<sup>32</sup> See DOBBS, *supra* note 21, at 1108 (asserting that direct sexual harassment by an employer, as well as an employer's failure to deal with sexual harassment by coemployees, creates "a strong claim for tort liability based on intentional infliction of emotional distress or the like").

<sup>33</sup> A small number of states have criminalized sexual harassment. See, e.g., DEL. CODE ANN. tit. 11, § 763 (2007) (determining that a person is guilty of sexual harassment if he "threatens to engage in conduct likely to result in the commission of a sexual offense against any person" and defining sexual harassment as an "unclassified misdemeanor"); see also TEX. PENAL CODE ANN. § 39.03 (West 1974) (imposing criminal liability on a public servant who "intentionally subjects another to sexual harassment" and defining sexual harassment as "unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature"). Certain forms of sexual harassment are recognized as a violation of Title VII of the Civil Rights Act of 1964, which forbids employers from discriminating against employees, inter alia, on the basis of sex. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65–66 (1986) (ruling that sexual harassment leading to noneconomic injury can be classified as sex discrimination prohibited by Title VII and that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment"); see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) (emphasizing that sexual harassment on the basis of a hostile work environment is a violation of Title VII).

though not exclusively) women.<sup>34</sup> However, the protection offered to future victims of sexual harassment arguably comes at a cost: many employers would prefer to hire a man, rather than a woman, to avoid the risk of being sued for sexual harassment.<sup>35</sup> Could that unintended consequence justify reducing the stringency of sexual harassment legislation below the threshold considered crucial for protecting women's dignity? The answer of most human rights theorists to this question would be negative,<sup>36</sup> and the case law seems to support this view.<sup>37</sup> The answer *may* (but must not) differ if the value balanced against women's dignity was bodily integrity or life.

LE will likely provide a different answer. Because LE postulates that all values are commensurable, one should compare the social cost of lesser protection for women's dignity with the social benefit of

<sup>34</sup> See John J. Donohue, *Antidiscrimination Law*, in 2 HANDBOOK OF LAW AND ECONOMICS 1387, 1455 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (noting the increase in sexual harassment claims brought by men).

<sup>35</sup> See *id.* (“[I]f hiring a woman has some chance of imposing an erroneous large monetary penalty plus the stigma of sex harassment liability, that prospect will serve as another burden associated with hiring American workers in general and women in particular.”); Richard A. Posner, *Employment Discrimination: Age Discrimination and Sexual Harassment*, 19 INT’L REV. L. & ECON. 421, 443 (1999) (“[A] law forbidding sexual harassment may not on balance benefit the protected group. It may make employers more reluctant to hire women in jobs in which sexual harassment is likely . . . .”); see also Alex Kozinski, *Foreword* to BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW, at v, x (1992) (“[A]s sexual harassment litigation becomes more common, male managers may end up presupposing that every time they appoint a woman to a position that brings her into close personal contact, they hand her a loaded gun with which she can blow away their careers.”); Justin P. Smith, *Letting the Master Answer: Employer Liability For Sexual Harassment in the Workplace After Faragher and Burlington Industries*, 74 N.Y.U. L. REV. 1786, 1823 (1999) (“[E]mployers may prefer to hire those who are at less risk of harassment or who have a greater tolerance for it. The result may well be socially unacceptable employment segregation by sex—the very result that Title VII was meant to remedy.”); Margaret Y.K. Woo, *Biology and Equality: Challenge for Feminism in the Socialist and the Liberal State*, 42 EMORY L.J. 143, 175 (1993) (“[A]s demonstrated by the history of American legislation on women and work, protective legislation may also diminish equality of opportunity for women. Indeed, the regulations do not sufficiently address the problems of discriminatory hiring and occupational segregation, and may actually aggravate these problems.” (footnote omitted)).

<sup>36</sup> Cf. Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, 96 CALIF. L. REV. 323, 368 (2008) (“The moral constraint against discrimination dictates that prohibiting discrimination can be justified even if the prohibition imposes a social cost that exceeds its benefit.”). For a more detailed discussion of discrimination and the conditions under which it could be justified, see ZAMIR & MEDINA, *supra* note 1, at 225–56.

<sup>37</sup> See, e.g., *Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So. 2d 1099, 1104 (Fla. 1989) (“While workplace injuries rob a person of resources, sexual harassment robs the person of dignity and self esteem. Workers’ compensation addresses purely economic injury; sexual harassment laws are concerned with a much more intangible injury to personal rights.”); *Weeks v. Baker & McKenzie*, No. 943043, 1994 WL 774633, at \*1 (Cal. Super. Ct. Nov. 28, 1994) (“Sexual harassment strips the victim of dignity and self-respect. Such harassment is degrading and dehumanizing. It cannot be tolerated, and the law does not do so.”).

more professional opportunities for women, ultimately striking a balance between those two social values.<sup>38</sup>

One possible response could be that LE may justify the law's stringent protection on the basis of its long-term effects<sup>39</sup> or on the basis of the conviction that, in the legal arsenal, there are other tools that could satisfactorily address employment discrimination.<sup>40</sup> But LE would resist any a priori assumption that *always* gives priority to women's dignity over their professional opportunities.

The case of torture provides a second illustration. Legal scholars and philosophers have long debated whether we should tolerate coercive interrogations (or, put more bluntly, torture) when it could save lives. Some (but not all) deontologists resist torture regardless of its beneficial consequences,<sup>41</sup> whereas consequentialists typically favor

<sup>38</sup> Cf. Adrian Vermeule, *Libertarian Panics*, 36 RUTGERS L.J. 871, 885 (2005) (relating the conflict between security and liberty and stressing that "[t]he problem from the social point of view is one of optimization: it is to choose the point along the frontier that maximizes the joint benefits of security and liberty . . . . Neither security nor liberty is lexically prior; no claims of the type 'liberty is priceless' or 'security at all costs' will be admitted."); Jonathan Wolff, *Fairness, Respect, and the Egalitarian Ethos*, 27 PHIL. & PUB. AFF. 97, 120–22 (1998) (arguing from an egalitarian perspective that when tension is created between two equally important values, society should generate a "dynamic balance" between them and refrain from treating either one with lexical priority).

<sup>39</sup> Cf. Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1335 (1989) ("It is possible that the economic costs of sex discrimination law are offset by gains not measured in an economic analysis—gains in self-esteem, for example."). However, Judge Posner comments, "it is not clear that, if the canvass is broadened in this fashion, the picture brightens." *Id.*; see also John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337, 1349 (1989) ("[T]he societal pronouncement that women are equal to men, as well as legislated protections against harassment and other indignities, may elevate women's self-esteem and improve life on the job to such a degree that both the demand and the supply curves for female labor shift.").

<sup>40</sup> See Kozinski, *supra* note 35, at xi–xii (discussing means other than litigation for combating sexual harassment, such as "moral suasion," employee training, and effective grievance procedures).

<sup>41</sup> For a deontological approach that strictly rejects torture regardless of the circumstances, see Thomas Nagel, *War and Massacre*, 1 PHIL. & PUB. AFF. 123 (1972), reprinted in *WAR AND MORAL RESPONSIBILITY* 3, 22–23 (Marshall Cohen, Thomas Nagel & Thomas Scanlon eds., 1974) (stating that "the most serious of the prohibited acts, like murder and torture . . . are supposed *never* to be done, because no quantity of resulting benefit is thought capable of *justifying* such treatment of a person"); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1726–39 (2005) (arguing that the prohibition on torture functions as an "archetype" in the legal system, embodying a core principle of nonbrutality); see also Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law"*, 101 MICH. L. REV. 2275, 2316–18 (2003) (arguing that human rights law prohibits torture without exception because "[i]t is trying to make a statement about the moral meaning of human action" and that "[i]t is not in fact terribly interested in anyone's death or suffering" but is instead "[m]ostly . . . concerned with how we live our lives"). A different deontological approach supports strict prohibition on torture, with an exception for "catastrophic harms" cases. See Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1487 (2004) (arguing that torture must be strictly prohibited but may also be morally

torture in “ticking bomb” situations.<sup>42</sup> Interestingly, however, we know of no case law or scholarly writing suggesting that torture should be permitted when it saves money or when it is necessary to protect proprietary interests.

One must arrive at a different result if one adheres to the principle that everything is commensurable: torture should be performed if it could save large amounts of social resources, even besides human life. Moreover, those resources may be used to promote people’s safety, thereby saving human lives. Indeed, one could imagine a consequentialist or a utilitarian argument that supports the absolute prohibition of torture for second-order reasons.<sup>43</sup> But it seems to be no coincidence that no one—to the best of our knowledge—has raised the argument that, under certain circumstances, torture is justified for the sake of saving money or property. LE scholarship does not provide an explanation for what seems to be the principled and insistent reluctance to even consider the possibility of torturing a person for the sake of protecting monetary interests.

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defensible *ex post* in “truly exceptional cases” when public officials act extralegally in order to prevent catastrophic harms; *see also* Sanford Levinson, “Precommitment” and “Postcommitment”: *The Ban on Torture in The Wake of September 11*, 81 *TEX. L. REV.* 2013, 2052 (2003) (“Given the gravity of the terrorist threat, vigorous questioning short of torture—prolonged interrogation, mild sleep deprivation, perhaps the use of truth serum—might be justified in some cases.”) (quoting Editorial, *Is Torture Ever Justified?*, *THE ECONOMIST*, Jan. 11, 2003, at 11).

<sup>42</sup> *See, e.g.*, ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS* 142–63 (2002) (discussing different arguments in favor of and opposing the use of torture “as a last resort to prevent a ticking bomb from exploding”); ERIC A. POSNER & ADRIAN VERMEULE, *Should Coercive Interrogation Be Legal?* 104 *MICH. L. REV.* 671, 681 (2006) (arguing that “the legal system should authorize interrogation in some narrow range of circumstances, suitably defined and regulated *ex ante*”). *See also generally* Symposium on the Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity, 23 *ISR. L. REV.* 141 (1989) (collecting comments and reviews by, among others, Alan M. Dershowitz, Sanford H. Kadish, Michael S. Moore, and Paul H. Robinson concluding torture could be permissible in a narrow, limited range of circumstances).

<sup>43</sup> *See* John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 *U. PITT. L. REV.* 743, 761–62 (2002) (acknowledging that “under extreme ‘ticking time bomb’ circumstances, torture may be the least worse choice,” but arguing that “legalizing torture would create administrative difficulties that would raise further moral issues”); Cass R. Sunstein, *Fear and Liberty*, 71 *SOC. RES.* 967, 989–90 (2004) (“[A] flat prohibition on torture, one that forbids balancing in individual cases, might be justified on the basis of a kind of second-order balancing. It might be concluded not that torture is never justified in principle, but that unless torture is entirely outlawed, government will engage in torture in cases in which it is not justified, that the benefits of torture are rarely significant, and that the permission to torture in extraordinary cases will lead, on balance, to more harm than good.”); *see also* Marcy Strauss, *Torture*, 48 *N.Y.L. SCH. L. REV.* 201, 271–74 (2003) (“If rules are promulgated permitting torture in a ‘ticking bomb scenario,’ torture will become the norm rather than the exception, particularly when dealing with anyone suspected of terrorist ties. . . . Only an absolute ban on torture without exception will enable this nation to resist the impulse to ignore critical core values in favor of an elusive security.”). For negating second-order considerations that support a flat ban on coercive interrogation, *see* Posner & Vermeule, *supra* note 42, at 683–93.

#### D. Lexical Order and Law and Economics

The three categories of cases discussed above illustrate that courts and legislatures either do not (at least explicitly) make certain types of comparisons or that even if they do, they reach different results than what LE's uninhibited commensurability premise dictates. Below, we offer several reasons for the law's reluctance to make such comparisons.

First, the law sometimes implicitly assumes that the two objects (or actions) to be compared are either identical or should be considered equal in value. Second, courts and legislatures sometimes circumvent the need to make comparisons in order to avoid conflicts or controversy.<sup>44</sup> Third, one object may sometimes be considered lexically superior to another, such that a comparison between the two objects results in one object always being more valuable.<sup>45</sup> The premise of commensurability that LE endorses cannot accommodate the two latter explanations, and it particularly fails to fit the third explanation. Let us now investigate how each of these three explanations applies to the three types of cases that we discussed above.

In the "high-risk-to-life" situation,<sup>46</sup> the second explanation—circumventing the need to make comparisons—seems to apply. Many may consider assigning monetary value to human life when the risk of deprivation is wrong in principle. Therefore, we would expect that courts and legislatures would try their best to avoid making such a judgment, or if avoidance is impossible, they would try to make such calculations implicitly or in a manner not attracting public attention. We do not judge the desirability of this approach on the part of courts and legislatures but merely note that it may explain why we almost never see courts or legislatures making such explicit comparisons.

The reluctance to compare may take different forms. In tort law, applying strict liability to high-risk situations is one possible solution;

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<sup>44</sup> Cf. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630–34 (1984) (discussing "acoustic separation"—having courts apply decision rules whose contents are not first communicated to the citizens—and the advantages of such a hypothetical system in minimizing conflicts between decision rules and conduct rules).

<sup>45</sup> For a discussion on lexical priority of rights as opposed to utilitarian commensurability, see Jeremy Waldron, *Rights in Conflict*, 99 ETHICS 503, 509–15 (1989). The idea of "lexical order" is explained in JOHN RAWLS, *A THEORY OF JUSTICE* 42–44 (1971). By analogy, Eyal Zamir and Barak Medina's recent book defends the idea of "threshold deontology," which grants deontological constraints priority over law and economics cost-benefit analysis but gives the latter priority over the former when the costs of not following the cost-benefit analysis reaches a certain threshold. See ZAMIR & MEDINA, *supra* note 1, at 1–8, 79–104. The authors apply their theory to several fields of the law. See *id.* at 127–311 (applying threshold deontology to the fight against terrorism, freedom of speech, antidiscrimination law, and contract law).

<sup>46</sup> See *supra* Part I.A.

under strict liability—as opposed to a negligence rule—courts need not determine whether the injurer acted reasonably in creating the high risk because reasonableness has no bearing on the injurer’s liability.<sup>47</sup> Indeed, most jurisdictions unsurprisingly apply a strict liability rule to ultrahazardous activities.<sup>48</sup> One explanation for using strict liability in these cases may be the courts’ uneasiness with comparing high risks to life and limb with money.

The first explanation—implicit assumption of identical values—seems applicable in the “interpersonal comparisons” cases.<sup>49</sup> Courts presumably assume that the social value that the law ascribes to the lives of different people is identical: no person’s life is more valuable than the life of any other person.

This explanation could raise a straightforward objection because courts award different damage amounts to victims in accordance with their lost income, and that in turn leads to variance in the level of care that injurers actually take toward high- and low-income victims.<sup>50</sup> Thus, although the law refuses to explicitly acknowledge differential standards of care toward high- and low-income victims, it triggers such differential standards indirectly. The second explanation—circumventing the need to make comparisons—may justify this apparent inconsistency in the law. The law recognizes that different people’s lives have different values, but instead of recognizing it explicitly (by setting a differential standard of care), it recognizes this difference implicitly (by awarding differential damages).

In the “human rights” situations,<sup>51</sup> the first two explanations cannot provide a satisfactory answer to the law’s reluctance to compare basic human rights with other values. The first explanation—implicit assumption of identical values—does not apply, because the law often reflects a clear preference for protecting basic human rights over other values. The second explanation (circumventing the need to make comparisons) does not hold; courts typically prefer the protection of basic human rights over other values. The third explanation may therefore be the most persuasive: basic human rights may have *lexical priority*. Consequently, these rights always—or almost always—override other values.<sup>52</sup> If this explanation is right, it contradicts the

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<sup>47</sup> See RESTATEMENT (SECOND) OF TORTS § 519 & cmt. d (1977). Nevertheless, recognition of contributory or comparative fault results in the need to estimate the injurer’s fault. See, e.g., *Nat’l Marine Serv., Inc. v. Petroleum Serv. Corp.*, 736 F.2d 272, 276 (5th Cir. 1984) (noting that in applying comparative fault in federal maritime products cases, “the plaintiff’s fault must be compared with the fault of a strictly liable defendant”).

<sup>48</sup> DOBBS, *supra* note 21, at 950.

<sup>49</sup> See *supra* Part I.B.

<sup>50</sup> See *supra* notes 23–29 and accompanying text.

<sup>51</sup> See *supra* Part I.C.

<sup>52</sup> Cf. *supra* note 45 (discussing Zamir and Medina’s threshold deontology theory).

LE assertion that all objects and values have finite values and may be overridden by conflicting considerations.

LE may respond in different ways. One response may be that, in many occasions, what we call lexical priority is just a short cut: on many occasions the social value of basic human rights is so high that it is apparent that it overrides all other values. We suspect that LE would not endorse this response; if basic human rights are comparable with other values, then such an irrefutable presumption does not make sense. This is particularly the case when it is not violations of the right to life or bodily integrity that are at stake but “merely” the right to equality, the right to privacy, or the right to be free from minor forms of sexual harassment. A second response may be that the law avoids such comparisons for second-order reasons: for example, courts may err,<sup>53</sup> or the government may abuse its powers to trump human rights,<sup>54</sup> suggesting that it is therefore sometimes better to have a bright-line rule instead of a vague standard.<sup>55</sup> But again, we do not think that this argument alone addresses the puzzle as it does not explain why courts should adopt an absolutist rule favoring the protection of basic human rights over other values instead of more nuanced rules that take into account the specific context and circumstances.

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<sup>53</sup> See Sunstein, *supra* note 43, at 983 (“Courts are not, to say the least, in a good position to know whether restrictions on civil liberty are defensible. They lack the fact-finding competence that would enable them to make accurate assessments of the dangers. . . . [U]nder the pressure of the moment, courts are likely to . . . favor[ ] the government, even when [they should] not.”).

<sup>54</sup> See *id.* at 977 (“In the context of threats to national security, it is predictable that governments will infringe on civil liberties without adequate justification.”).

Adrian Vermeule discusses the view, often associated with Sunstein, that “decisionmakers who are subject to security panics ought not engage directly in balancing that attempts to strike the optimal tradeoff between liberty and security.” Vermeule, *supra* note 38, at 885. According to Vermeule, “[t]he institutional solution, on this view, is to deny front-line decisionmakers the authority to engage in direct or first-order balancing of liberty and security” in favor of “‘second-order balancing,’ under which civil liberties are overprotected through second-best rules that mitigate the risk of error in the first-order calculus.” *Id.* Vermeule then continues: “[T]he argument for second-order balancing goes beyond an abstract claim that rules may correct for the errors that decisionmakers commit under first-order balancing. In this setting, the argument for second-order balancing is an argument not only for rules, but for rules with a distinctly libertarian slant—a kind of *second-best libertarianism*. The idea is to build into the second-order rules a skew in favor of liberty that will compensate for predictable pressures towards overweighting security—pressures such as security panics.” *Id.* at 886.

<sup>55</sup> See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (arguing that establishing a “clear, general principle of decision” promotes uniformity in judicial decisions and advances predictability); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 543 (1988) (“[I]t is clearly true that rules get in the way, but this need not always be considered a bad thing. . . . [I]t may be an asset to restrict misguided, incompetent, wicked, power-hungry, or simply mistaken decisionmakers whose own sense of the good might diverge from that of the system they serve.”).

In the next section, we argue that lexical priority does not explain the courts' and legislatures' resistance to comparing basic human rights and other values, but their refusal to commodify basic human rights when such commodification can be avoided at reasonable costs. Using a simple exercise in logic, we establish that the law cannot endorse lexical priority; we show that the law allows trading basic human rights for certain values, i.e., it allows for the trading of those latter values for money, but at the same time, it does not allow for trading basic human rights for money. This exercise indicates that the law refuses to make some comparisons simply because those comparisons as such are considered detrimental to some important social values. This phenomenon poses a challenge to LE, which we call "the non-transitivity challenge."<sup>56</sup>

### E. The Nontransitivity Challenge

Consider a legal system that allows coercive interrogation for the sake of saving human lives. In particular, assume that this system permits torturing a suspect who possesses information likely to save the life of an innocent person.<sup>57</sup> Suppose now that, in the same jurisdiction, the government is willing to spend no more than \$2 million to save a life of an individual—for example, the life of a patient in a public hospital who is about to die. Would the conjunction of claims imply that the government is legally permitted—or maybe even under a legal duty—to torture a suspect when such torture will likely save \$2 million? The principle of transitivity suggests that such implication is inevitable.

To see why this might be, think of the choices that the government faces. As illustrated above, suppose that the government values the life of a patient at \$2 million.<sup>58</sup> It is also willing to torture to save the life of a person. It follows that the government values the life of an innocent victim more than the pain that it inflicts on the torture victim. Should it not follow that the government must also be willing to save \$2 million by torturing a person? In algebraic terms, if  $A = B$  (so that torture = saving a life), and  $B = C$  (saving a life = \$2 million), then  $A = C$  (torture = \$2 million). Despite this, no (sane) legal system that allows torture for the purpose of saving life, and is also willing to invest no more than \$2 million in saving a life, would also permit the torture of a person in order to save \$2 million! But why is that?

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<sup>56</sup> Cf. Barak Medina, Shlomo Naeh & Uzi Segal, Ranking Ranking Rules 6–17 (June 20, 2010) (unpublished manuscript) (on file with authors) (discussing nontransitivity both in the Talmud and modern law and its goals).

<sup>57</sup> See *supra* note 42 and accompanying text.

<sup>58</sup> This amount is below regulatory agencies' valuations of human life, which typically range between \$5 million and \$6.5 million per life. See Posner & Sunstein, *supra* note 13, at 549–51.

The reason is—or so we believe—that there are social costs to comparing the harms of torture with monetary savings. Even if we compare money and life saving in other areas, and also compare life saving and the harm that torture causes, it is still pernicious to compare the harms that torture causes to the pecuniary interests that torture promotes. These are not just costs of court errors or possible abuses of power by the government. Instead, they involve the costs of commodifying basic human rights by converting them into money or other tangible interests.<sup>59</sup> Indeed, such conversions are made in the law but only when they are inevitable. Thus, the government must decide how much money, in relation to its scarce resources, to spend on life saving. *It cannot avoid it.* Courts must decide how much an injurer should spend on reducing risks to life. In all those situations, the costs of making the uneasy comparisons are worth incurring because there is no other choice. But sometimes this is not the case: there are sometimes reasonable alternatives that are more advantageous overall than making those costly comparisons.

Let us examine how the inevitability of the comparison could explain the nontransitivity of comparing torture to money saving. The comparison between the harm of torture with the value of the life of an individual who could be saved if torture took place ( $A = B$ ) is sometimes inevitable. Not allowing such comparisons would come at too high a cost. But more importantly, this comparison does not require commodification of human lives because the values that we compare are of the same type. Therefore, these comparisons are sometimes (although, as illustrated above, not always) perceived as permissible.<sup>60</sup>

The comparison between life and money savings in cases when the government must decide how to spend its scarce resources ( $B = C$ ) is also inevitable. Furthermore, one could frame the comparison that

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<sup>59</sup> Our argument resembles a similar argument that others use to justify inalienability rules. That argument explains that society should sometimes avoid commodifications of certain values. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1884–85 (1987). However, although Radin's argument is motivated by the harm done by markets, see *id.* at 1877–87, our argument is motivated by the harm done by the law when it incorporates some types of comparisons, compare Tsilly Dagan, *Commodification Without Money*, 11 THEORETICAL INQ. L. F. 9, 10–14 (2010), available at <http://services.bepress.com/tilforum/vol11/iss1/> (explaining how the commodification objection, which is typically applied to markets, can be applied to regulations, as well, and clarifying that commodification by regulation could take place even without ascribing monetary values to the goods in question). For the argument that valuation of certain goods that are not commodifiable should not be conducted through market mechanisms, but instead by other criteria applied by the state that are also sensitive to the intrinsic values of such goods, see ANDERSON, *supra* note 2, at 190–216.

<sup>60</sup> See Tetlock, *supra* note 7, at 322 (describing experiments which show that lay people are more tolerant to trade-offs between two sacred resources—life of one patient in a hospital versus the life of another patient in the same hospital—than to trade-offs between sacred resources and money, such as the life of a patient in a hospital versus \$1 million dollars).

the government performs in allocating its resources as a comparison between lives of different people, as opposed to life against money. Such framing could mitigate the commodification concern.

But what about the comparison between the harms that torture causes and money savings ( $A = C$ )? Here, the commodification concern is troubling: by engaging in such comparisons, society publicly expresses its limited commitment to the protection of human life. More importantly, however, the comparison is not inevitable: society can do without it. A case in which torture can save a lot of money is rare and having a bright-line rule that prohibits it categorically would not entail prohibitively high costs. Furthermore, avoiding torture to save \$2 million would not really cause a person's death even if, in other contexts, \$2 million could save life.

Indeed, similar arguments apply to the government's decision to spend no more than \$2 million on saving the life of a patient in a public hospital. Here again, the government could use money that it had allocated for other goals to save a specific patient's life, even if doing so would require more than \$2 million, without sacrificing another person's life. Perhaps comparisons—and commodification of people's lives—can be avoided in this situation as well.<sup>61</sup> But the two situations differ. In the hospital scenario, hospitals make decisions regarding the appropriate investment in patients' health on a daily basis. The government cannot solve each and every case by reallocating resources that it originally allocated for other goals. A decision to spend \$4 million instead of \$2 million per patient is much more costly than a one-time decision not to torture that can save \$4 million, or even \$40 million.<sup>62</sup>

## II

### SELECTING AGENTS TO PERFORM PUBLIC ROLES

The legal system must often select an agent for the sake of performing a certain task. In making such a selection, LE typically identifies the body (or entity) that is most capable of carrying out the particular task at lesser costs.<sup>63</sup> For instance, under this view, the en-

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<sup>61</sup> But notice that reframing the allocation of resources problem in the hospital could mitigate the commodification concern at the outset.

<sup>62</sup> An alternative explanation for the nontransitivity challenge with respect to the torture example is that there is a qualitative difference between "torturing for saving life" and "torturing for saving money"—in other words, that the two "bads" have different intrinsic (negative) values. This alternative explanation is inconsistent with the commensurability premise. See *supra* text accompanying note 43.

<sup>63</sup> See A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105, 107–08 (1980) (comparing monopolistic, competitive, and public methods of enforcement and concluding that "any of the methods of enforcement may be socially preferable, depending on the costs of each method as well as on the magnitude of the external damage").

tity that ought to inflict criminal sanctions is the entity that is most capable of inflicting criminal sanctions at the lowest cost;<sup>64</sup> the entity that ought to provide security is the entity that is most capable of providing security at the lowest cost,<sup>65</sup> etc. Furthermore, the characterization of the task is separable from the identity of the entity in charge of performing it. If the task is to deter criminals, provide health or educational services, protect the environment, or provide defense and security, LE theorists insist that the policymaker ought to select the agent in accordance with the agent's suitability to perform the task when the task is characterized independently of the agent's identity.<sup>66</sup> The agent here is merely an instrument for performing a job; her identity is irrelevant.

This section examines and challenges this central premise. In contrast to the instrumentalist view that LE theorists advocate, we argue that as a matter of fact the legal system cares greatly about the agents' identities and that its choices are guided at least partially by noninstrumental considerations. In particular, as we argue in this

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<sup>64</sup> See John J. DiIulio, Jr., *What's Wrong with Private Prisons*, 92 PUB. INT. 66, 68 (1988) (stressing that "soaring inmate populations and caseloads[,] escalating costs," and public enforcement's inefficiency are the main problems that privatization of prisons can address); Polinsky, *supra* note 63, at 105, 107–08; see also Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J.L. & ECON. 255, 268–69 (1993) (examining criminal enforcement from an economic perspective and finding that public enforcement may be justified in cases where the identity or location of the criminal is not known to any private party and will require effort and expense to determine).

<sup>65</sup> See Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 513–18 (2005) (elaborating on the advantages of outsourcing military security projects to private contractors, which normally reduces costs and increases efficiency); see also Mark Calaguas, *Military Privatization: Efficiency or Anarchy?*, 6 CHI.-KENT J. INT'L & COMP. L. 58, 67 (2006) ("Proponents of private military contracting usually cite cost reduction and efficiency as reasons to outsource a growing number of activities to independent companies."). Calaguas, however, comments that "[n]o definitive study has shown that the practice actually saves the military any money," *id.* at 69 & n.73 (citing Interview with FRONTLINE with Steven Schooner, Law Professor, George Washington Sch. of Law and former Assoc. Adm'r for Procurement Law and Legislation, Office of Federal Procurement Pol'y (May 19, 2005; air date June 21, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/schooner.html>) (last visited March 11, 2010), but then suggests that war is about effectiveness, and that "[n]evertheless, the lines between economy, efficiency, and effectiveness oftentimes are blurry," *id.* at 69. Efficiency in this context ought to be understood broadly to include flexibility and speediness. See Interview with Steven Schooner, *supra.*) ("Many people think about outsourcing primarily as a tool to save money. The other way to think about it is sometimes the government pays more money for greater flexibility or greater capacity or better services or services that could be provided more quickly.")

<sup>66</sup> See, e.g., Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Argument from Moral Burdens*, 28 CARDOZO L. REV. 2629, 2634 (2007) ("If state-inflicted sanctions are justified simply on the grounds that the state is better in calibrating the sanctions or inflicting them, it follows that when circumstances change and private individuals are shown to be able to inflict the sanction as well as the state, the agent who ought to be in charge of inflicting sanctions ought to be changed accordingly."); cf. sources cited *supra* notes 63–65 (discussing suitability of public and private entities to carry out respective tasks).

Part of the Essay, there are certain tasks that must be performed by public officials not because public officials are better at performing them (or can perform them more cheaply) but because the identity of the agent who performs these tasks is considered to have an intrinsic value. We also wish to show that, in addition to being entrenched in existing law, this view is grounded in foundational intuitions concerning political legitimacy. Thus, subjecting the selection of agents exclusively to instrumental considerations (as LE dictates) contradicts foundational contemporary political sensibilities.

Section A presents the dilemma of privatization. Section B provides a brief survey of the doctrinal considerations underlying the selection of public agents to perform certain tasks. Section C provides a normative argument favoring such choices. We do not argue, of course, that there is a complete convergence of legal doctrine and normative considerations. We only maintain that the underlying normative considerations we identify are present not only in the minds of political theorists but also in the minds (and, more importantly, in the decisions) of jurists, judges, and legislators.

### A. The Dilemma of Privatization

Certain functions are generally assigned to public entities, either by the Constitution or through other means. Producing legislation is the job of a public entity—Congress;<sup>67</sup> the infliction of criminal sanctions is the job of another public entity—the courts.<sup>68</sup> Similarly, the execution or the punishment of criminals has also been traditionally assigned to a public entity.<sup>69</sup> This allocation of functions is often gov-

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<sup>67</sup> See U.S. CONST. art. I, §§ 1, 8. *But see* Talia Fisher, *Nomos Without Narrative*, 9 THEORETICAL INQ. L. 473, 474–86, 501–02 (2008) (presenting arguments in favor of privatization of the law, including the “law production power,” and comparing privatization of the law and multiculturalism as two decentralization paradigms that challenge the monopolist concentration of law production power in the hands of the state).

<sup>68</sup> *Cf.* U.S. CONST. art. III, §§ 1, 2 (vesting judicial power of the United States in the courts); *Mistretta v. United States*, 488 U.S. 361, 396 (1989) (noting that the “substantive judgment in the field of sentencing has been and remains appropriate to the Judicial Branch”).

<sup>69</sup> See THOMAS HOBBS, *LEVIATHAN* 183 (Michael Oakeshott ed., Collier Books 1962) (1651) (“Public ministers are also all those, that have authority from the sovereign, to procure the execution of judgments given; to publish the sovereign’s commands; to suppress tumults; to apprehend, and imprison malefactors; and other acts tending to the conservation of the peace. For every act they do by such authority, is the act of the commonwealth; and their service, answerable to that of the hands, in a body natural.”). For a more recent perspective, see John J. DiIulio, Jr., *The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails*, in *PRIVATE PRISONS AND THE PUBLIC INTEREST* 155, 175 (Douglas C. McDonald ed., 1990) (“At a minimum, it can be said that, both in theory and in practice, the formulation and administration of criminal laws by recognized public authorities is one of the liberal state’s most central and historic functions; indeed, in some formulations it is the liberal state’s reason for being.”).

erned by the Constitution or regulated by statutes.<sup>70</sup> However, in recent years, we have witnessed the rise in privatization of traditionally public functions and a greater willingness by private bodies to perform functions that have traditionally been considered public.<sup>71</sup> Such functions include the infliction of sanctions<sup>72</sup> and even the fighting of wars.<sup>73</sup>

Privatization has been severely criticized on instrumental grounds. Some claim that private entities are not capable of performing certain public functions because they are not sufficiently attentive to the promotion of the public good.<sup>74</sup> Echoes of this argument can be found in Locke's famous justification of the state's role in punishing criminals. Locke believed that:

To this strange Doctrine, *viz.* That *in the State of Nature, every one has the Executive Power* of the Law of Nature, I doubt not but it will be objected, That it is unreasonable for Men to be Judges in their own Cases, that Self-love will make Men partial to themselves and their Friends. And on the other side, that Ill Nature, Passion and Revenge will carry them too far in punishing others. And hence nothing but Confusion and Disorder will follow, and that therefore God hath certainly appointed Government to restrain the partiality and violence of Men. I easily grant, that *Civil Government* is the proper Remedy for the Inconveniences of the State of Nature, which must certainly be Great, where Men may be Judges in their own Case . . . .<sup>75</sup>

Under this view, what makes the state a particularly effective tool in promoting civic order is the fact that the state is more capable of

<sup>70</sup> See *supra* notes 67–68 and *infra* Part II.B.

<sup>71</sup> See, e.g., PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* 26–30 (2007) (discussing outsourcing of traditional military functions to private contractors).

<sup>72</sup> There are two evident manifestations of the privatization of punishment: the rise in the use of shaming penalties (which are ultimately private sanctions because they are in effect inflicted by individuals) and the rise of private prisons. With respect to the first, see Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 368–80 (1999), and Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631–49 (1996). For a discussion of private prisons, see CHARLES H. LOGAN, *PRIVATE PRISONS: CONS AND PROS* 4 (1990).

<sup>73</sup> For a discussion of the rise in private militarized firms and their greater role in wars, see generally P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security*, 26 INT'L SECURITY 186 (2001) (discussing the rise and implications of privatized military firms); P.W. Singer, *Wars, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004) (discussing the limited applicability of international law to privatized military firms).

<sup>74</sup> See Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383, 384 (2006) (“While advocates of privatization have generally argued for the practice on efficiency grounds, critics have worried that, even if privatization may cut financial costs, it can threaten important public law values.” (footnote omitted)).

<sup>75</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 13, at 293–94 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

determining the optimal size of the sanctions and/or inflicting them. Opponents of privatization now voice similar instrumental concerns. Opponents of private prisons, for example, raise concerns that private entities assigned with the task of inflicting criminal sanctions will fail to execute them faithfully.<sup>76</sup> Some have argued that such private entities would fail to protect and promote the well-being of prisoners and, furthermore, that they may interfere with the process of determining what the sanctions ought to be.<sup>77</sup> The private entity may also fail to inculcate the spirit underlying the public enterprise.<sup>78</sup> Thus, even if the private entity may comply faithfully with the formal rules dictated by the state, it may fail to exercise its discretion in a way that promotes the goals of the public enterprise when promoting these goals requires the sensitive exercise of discretion. Arguably, running a prison, conducting a war, or interrogating war prisoners are not merely technical tasks; their successful execution requires sensitivity to the public purposes justifying the infliction of punishment or fighting the war or conducting the interrogation.<sup>79</sup>

Yet there is another voice in the literature that condemns privatization on noninstrumental grounds.<sup>80</sup> According to this voice, there are sometimes compelling nonconsequentialist considerations underlying the selection of a public agent over a private one.<sup>81</sup> The rest of this Part of the Essay focuses on these considerations.

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<sup>76</sup> See Alon Harel, *Outsourcing Violence* 8–9 (June 2, 2010) (unpublished manuscript) (on file with author); cf. DiIulio, *supra* note 64, at 71–75 (recounting history of private corrections facilities in the United States and objections to privatization based on historical experience). The Israeli Supreme Court adopted these concerns in *Academic Center of Law & Business v. Minister of Finance* [2009] (Isr.) (Nov. 19, 2009), available at [http://elyon1.court.gov.il/files\\_eng/05/050/026/n39/05026050.n39.htm](http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm). There, the court declared unconstitutional the law authorizing the establishment of a private prison because the establishment of such a prison would be incompatible with human dignity. HCJ 2605/05 *Academic Ctr. of Law & Bus. v. Minister of Fin.* para. 34–39 [2009] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/05/050/026/n39/05026050.n39.htm](http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm).

<sup>77</sup> See sources cited *supra* note 76.

<sup>78</sup> See Harel, *supra* note 76, at 8; see also *supra* note 74.

<sup>79</sup> Harel, *supra* note 76, at 8; see VERKUIL, *supra* note 71, at 1, 40–41 (“A government appointment creates a public servant who, whether through the oath, the security clearance, the desire to achieve public goals, or the psychic income of service, is different from those in the private sector.”).

<sup>80</sup> See SARAH PERCY, *MERCENARIES: THE HISTORY OF A NORM IN INTERNATIONAL RELATIONS* 1–2 (2007) (surveying the norm against the use of mercenaries and the privatization of wars). In the contemporary legal context, Paul Verkuil voices such noninstrumental concerns to privatization. See generally Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397 (2006) (discussing limitations and concerns regarding privatization).

<sup>81</sup> We leave for another occasion the task of establishing that sometimes there are nonconsequentialist considerations supporting the selection of a private agent over a public one.

## B. Inherently Governmental Functions in Legal Doctrine

The Constitution, with its enumerated powers and limits on these powers, is the best and most logical starting point for distinguishing between public and commercial functions. The Constitution envisioned certain functions that one branch or other of the federal government must carry out. Article I's legislative function is clearly an inherently governmental function that the Constitution entrusts to Congress.<sup>82</sup> Article II, with equal clarity, entrusts several inherently governmental functions to the President, such as the executive power, the commander-in-chief function, the appointment power, the power to conduct foreign affairs, and the power to grant pardons.<sup>83</sup> Beyond the constitutional considerations, however, lurks the conviction that it is illegitimate rather than merely inefficient to delegate certain powers, e.g., the power to legislate, because that latter power belongs to the people.<sup>84</sup>

The view that some functions ought to remain public is legislatively entrenched, particularly in the concept of an "inherently governmental function," which the Federal Activities Inventory Reform (FAIR) Act of 1998 describes as "a function that is so intimately related to the public interest as to require performance by Federal Government employees."<sup>85</sup> Yet the term "inherently governmental function" remains vague, and many federal agencies use different definitions and interpretations when deciding which functions or activities are "so intimately related to the public interest."<sup>86</sup> Recently, President Barack Obama stated that:

[T]he line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined. As a result, contractors may be performing inherently gov-

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<sup>82</sup> U.S. CONST. art. I, §§ 1, 8.

<sup>83</sup> *Id.* art. II, §§ 1, 2.

<sup>84</sup> *Cf.* LOCKE, *supra* note 75, at § 141, 380–81 (asserting that the legislative power is a delegated power from the people and cannot be transferred).

<sup>85</sup> Federal Activities Inventory Reform Act of 1998, 31 U.S.C. § 501 note (2006).

<sup>86</sup> *Id.* Somewhat different wording can be found in the Office of Management and Budget (OMB) Circular No. A-76, which defines an inherently governmental activity (as opposed to function) as "an activity that is so intimately related to the public interest as to mandate performance by government personnel." OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 REVISED, PERFORMANCE OF COMMERCIAL ACTIVITIES, at B-1(a) (May 29, 2003). Although the FAIR Act provides that the term encompasses activities requiring "the exercise of discretion in applying Federal Government authority," 31 U.S.C. § 501 note, sec. 5(2)(B), OMB Circular A-76's formulation of the term only includes requiring "the exercise of *substantial* discretion," OMB CIRCULAR A-76, *supra* at B-1(b) (emphasis added). Noting this divergence, in 2010 the OMB's Office of Federal Procurement Policy proposed a policy letter that would adopt the FAIR Act formulation "as the single, government-wide definition" of an inherently governmental function. Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16,188, 16,190 (Mar. 31, 2010).

ernmental functions. Agencies and departments must operate under clear rules prescribing when outsourcing is and is not appropriate.<sup>87</sup>

The FAIR Act contains, in addition to the definition of an inherently governmental function, a list of functions that fall under this category:

- (i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (ii) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (iii) to significantly affect the life, liberty, or property of private persons;
- (iv) to commission, appoint, direct, or control officers or employees of the United States; or
- (v) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.<sup>88</sup>

In many cases, federal courts found themselves addressing issues related to the question of whether a specific function is inherently governmental.<sup>89</sup> The courts, however, do not have an independent

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<sup>87</sup> Presidential Memorandum of March 4, 2009: Government Contracting, Memorandum for the Heads of Executive Department and Agencies, 74 Fed. Reg. 9,755, 9,755–56 (Mar. 6, 2009).

<sup>88</sup> FAIR Act § 5(2)(B), 31 U.S.C. § 501 note. Furthermore, the next paragraph—section (C)—describes the “functions excluded” from the definition of inherently governmental functions.

<sup>89</sup> See *Nat'l Air Traffic Controllers Ass'n v. Lahood*, No. 1:99-CV-1152, 2009 U.S. Dist. LEXIS 115449, at \*5 (N.D. Ohio Dec. 11, 2009) (noting that “[i]n 2005, this court held that ‘Level I ATC [air traffic control] is *not* an inherently governmental function’”); see also *Nat'l Air Traffic Controllers Ass'n v. Pena*, No. 95-3016, 1996 U.S. App. LEXIS 8258, at \*12–15 (6th Cir. Mar. 7, 1996) (holding that air traffic controllers had standing to challenge FAA’s privatization of services because the controllers’ interest in ensuring that the FAA did not privatize inherently governmental functions was in zone of interests protected by the Office of Federal Procurement Policy Act Amendments of 1979 and reflected in OMB Circular A-76); *Nat'l Air Traffic Controllers Ass'n v. Slater*, No. 1:99-CV-01152, 2006 U.S. Dist. LEXIS 6869, at \*8–12 (N.D. Ohio Feb. 23, 2006) (concluding that the FAA failed to comply with OMB Circular A-76 because the record lacked any explanation for its determination that *all* ATC work was not inherently governmental, but noting that “it is not the place of the court to make that determination [of inherently governmental or not] in the first instance”).

In a different context, the courts frequently make determinations as to whether something is or is not a governmental function when deciding whether a defendant is entitled to some sort of official immunity. See *Martin v. Halliburton*, 618 F.3d 476, 484 (5th Cir. 2010) (concluding that the court lacked jurisdiction to review the trial court’s denial of defendant’s official immunity defense because the immunity defense is applicable only in the performance of official duties that are discretionary, and the relevant regulations barred the defendants, private contractors, from performing inherently governmental functions, which are by their nature discretionary); *Takle v. Univ. of Wis. Hosp. & Clinics*

definition of an inherently governmental function. Instead, they decide cases under the FAIR Act or Circular A-76<sup>90</sup> using the definitions that these sources provide. Moreover, courts sometimes give considerable deference to the Executive Branch's classification of a function as inherently governmental. Consequently, some scholars have argued that the decision to privatize governmental functions may be construed as implicating the political question doctrine, under which courts decline to hear issues that the Constitution has entrusted to the discretion of another branch of government.<sup>91</sup> For example, in *Arrowhead Metals, Ltd. v. United States*,<sup>92</sup> the court found coinage of money to be inherently governmental,<sup>93</sup> yet it also decided that the U.S. Mint has discretion to determine whether the stamping of blanks constitutes coinage.<sup>94</sup> The court did not provide any definition of an inherently governmental function.<sup>95</sup>

### C. From Legal Doctrine to Political Theory

#### 1. *The Significance of the Public Agent*

As the very brief discussion above demonstrates, it is not only political theorists who are deeply concerned about privatization of public functions. The resistance to such privatization is grounded in the Constitution and in numerous other statutory provisions, judicial decisions, policy papers, and even statements by politicians.<sup>96</sup> We wish to examine only a subset of these concerns: namely, those that relate to the use of violence—criminal punishment and the conduct of wars.

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Auth., 402 F.3d 768, 770–72 (7th Cir. 2005) (determining that “[t]here is nothing inherently governmental about a hospital” and thus that the hospital was not entitled to sovereign immunity).

<sup>90</sup> The FAIR Act and OMB Circular A-76, however, only provide limited bases for judicial review of agency decisions as to whether to privatize certain activities and whether such activities are inherently governmental or commercial. See Verkuil, *supra* note 80, at 452–54. Of course, “[g]eneralized judicial review provisions of the APA [Administrative Procedure Act] are available.” *Id.* at 452 (footnote omitted).

<sup>91</sup> See *id.* at 455 (“[Whether to privatize inherently governmental functions] is a political question that implicates the doctrine of separation of powers.”).

<sup>92</sup> 8 Cl. Ct. 703, 706 (1985).

<sup>93</sup> See *Arrowhead Metals*, 8 Cl. Ct. at 706 (“Article 1, Section 8, clause 5 of the United States Constitution confers on Congress the power ‘To coin money.’ Thus, it is not unreasonable to view broadly the coining of money to be a government function.”).

<sup>94</sup> See *id.* at 714 (holding that “it was rational and within the Mint’s discretion to determine that [the] issue [of whether blanking was an inherently governmental function] deserved further study”).

<sup>95</sup> See *id.* (deferring to the Mint’s classification).

<sup>96</sup> See Verkuil, *supra* note 80, at 421 (“[T]he constitutional theories that might be employed to secure against this threat, such as the nondelegation doctrine, have been around for a long time. In addition, statutory provisions, such as the Subdelegation Act and judicial review provisions of the APA, can also play a role in controlling delegations to private hands.”).

It is evident that certain tasks may only be performed by the public because they are fundamentally public. Legislation is a clear example.<sup>97</sup> It is the prerogative of Congress. Furthermore, any attempt to delegate Congress's legislative powers to private bodies would be considered illegitimate and void.<sup>98</sup> Political legitimacy, rather than economic efficiency, precludes the possibility of delegating such powers.

Indeed, it is plausible that some types of legislation would be delegated to professional nonpublic entities. Even then, however, the

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<sup>97</sup> See *supra* notes 67, 82 and accompanying text. But see Fisher, *supra* note 67, at 474–83 (describing three theoretical law models opposing a state monopoly on law production); Verkuil, *supra* note 80, at 433 n.194 (“The nondelegation doctrine has been concerned with the transfer of legislative power to the executive branch, more than with the transfer of legislative power to private hands.”(internal citation omitted)).

<sup>98</sup> For the roots of this approach, see LOCKE, *supra* note 75, § 141, at 380–81 (asserting that “[t]he *Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others. . . . And when the People have said, We will submit to rules, and be govern'd by Laws made by such Men, and in such Forms, no Body else can say other Men shall make Laws for them; nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen, and Authorised to make Laws for them*”). For a more recent treatment, see David Lanham, *Delegation of Governmental Power to Private Parties*, 6 OTAGO L. REV. 50, 52 (1985) (“One aspect of the rule against delegation is that a rule-making power may not be delegated.”). Several Supreme Court decisions in the 1930s endorsed the nondelegation doctrine in the context of private bodies. In *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), the Supreme Court struck down the Bituminous Coal Conservation Act (also known as the Guffey–Snyder Coal Act). The Act established a commission composed of miners, coal producers, and the public to regulate fair competition, production standards, minimum wages, work hours, and labor relations in the coal industry. *Id.* at 281–83, 310. In finding the act unconstitutional, the Court held that “[t]he power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . . . And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.” *Id.* at 311. In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–42 (1935), the Court unanimously held that the National Industrial Recovery Act, a main component of President Roosevelt's New Deal, which allowed private trade and industrial groups to write local codes for trade, was unconstitutional. In delivering the Court's opinion, Chief Justice Hughes wrote: “The Government urges that the codes will ‘consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems.’ . . . But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? . . . The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.” *Id.* at 537; see also Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1427–28 (2000) (“[T]he new delegation doctrine . . . prevents private parties from effectively assuming lawmaking authority. . . . [P]rivate lawmaking has a tendency to produce regulation that both interferes with individual liberty for suspect public purposes and inadequately reflects a broad public purpose to justify such interference. In this regard, private lawmaking is undemocratic even if it can be said to be efficient or rational on some other grounds.”).

final decision as to whether or not to adopt the specific piece of legislation would always remain with the Legislature.<sup>99</sup> For instance, it would be improper if a private individual could veto congressional legislation. The decision to go to war could not be made by anyone other than the President and Congress,<sup>100</sup> as sharing the powers with private individuals would be considered illegitimate and no private individual could, at least formally, have a vote on the matter. Similarly, the decision to imprison a criminal is a decision that must be made by courts alone<sup>101</sup> and cannot be shared with private individuals.

In such cases, it seems plausible that the reasoning underlying the insistence on the exclusive powers of public bodies is grounded in the concern for political legitimacy. It is not merely that Congress is better at legislation, or that the President is better at deciding when to go to war, or that courts are better at determining the optimal size of sanctions. It is that Congress and the President are the representatives of the people and guard the public interest and that the courts are state organs. Therefore, their pronouncements are the only legitimate pronouncements on wars or sentencing.<sup>102</sup>

This basic conviction becomes less clear when we speak not about fundamental decisions of this type but about the execution of such decisions. Although the decision to go to war is public, some may believe that executing a war can be better performed by private bodies and that, if it can be done better by such bodies, it ought to be done by them. Similarly, although the decision to imprison a person for a certain period of time is public, establishing a private prison may be permissible. Yet close scrutiny indicates that, even in these contexts, there are strong convictions against privatization. Some compelling examples include the historical and contemporary opposition to the use of mercenaries; the opposition to Blackwater (now Xe Services) and its privatized war-related activities; and the deeply engrained opposition to private prisons and shame penalties (which are also a form of privatizing violence).<sup>103</sup> As many commentators that examine the history of these institutions note, the opposition to these practices is

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<sup>99</sup> See generally Verkuil, *supra* note 80, at 425–26 & n.52 (discussing nondelegable duties, including the legislature's duty to vote on bills).

<sup>100</sup> See *id.* at 425–26, 449; see also U.S. CONST. art. I, § 8; art. II, § 2.

<sup>101</sup> Of course, this decision is made in conjunction with the legislature, which has sole authority to define criminal offenses and prescribe punishment. See *Whalen v. United States*, 445 U.S. 684, 689 (1980).

<sup>102</sup> We do not deny that legitimacy-based considerations are sometimes parasitic on the efficacy of the institution to make the right decisions. Yet we think that at least some legitimacy-based considerations are not parasitic. In particular, we establish the existence of nonparasitic legitimacy-based considerations in the context of the infliction of criminal sanctions.

<sup>103</sup> See James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1087–92 (1998).

not merely instrumental; it is based on the belief that there are legitimacy-based considerations that preclude the use of private bodies in conducting certain tasks, particularly tasks involving the infliction of violence, such as criminal sanctions or war-related activities.<sup>104</sup> In the rest of this Essay, we focus our attention on the reasons for the opposition to the privatization of prisons.

The case of inherently governmental functions may be understood as one example of a broader category in which the identity of an agent that executes an enterprise or a task has a distinctive noncontingent significance. To better understand such cases, it is useful to draw a distinction between two types of criteria to identify the most appropriate agents to carry out a particular enterprise. Some agents are chosen to execute an enterprise only because of their expected excellence in doing so when excellence in executing an enterprise is understood and evaluated independently of the agent's specific identity.<sup>105</sup> At other times, excellence (or even competence) in executing an enterprise is inseparable from the identity of the agent. In the latter cases, the quality of the execution of the enterprise cannot be measured independently of the agent's identity.

Let us start with a historical example: blood feuds.<sup>106</sup> Blood feuds are ritualized ways of seeking vengeance for a wrong by killing or punishing a person who belongs to the tribe or clan of the original perpetrator who committed the wrong. Although some (presumably, all) readers may share our dislike of the practice, blood feud is an important social practice that deserves attention. Assume, therefore, that you believe that blood feud is necessary to maintain order in a particular society and you wish to examine who the person charged with performing the blood feud ought to be.

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<sup>104</sup> See *supra* notes 74–80, 96–99; see also HCJ 2605/05 Academic Ctr. of Law & Bus. v. Minister of Fin. [2009] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/05/050/026/n39/05026050.n39.htm](http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm) (“[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.”); DiIulio, Jr., *supra* note 64, at 79 (“In my judgment, to remain legitimate and morally significant, the authority to govern behind bars, to deprive citizens of their liberty, to coerce (and even kill) them, must remain in the hands of government authorities. . . . [T]he message that ‘those who abuse liberty shall live without it’ is the philosophical brick and mortar of every correctional facility. That message ought to be conveyed by the offended community of law-abiding citizens, through its public agents, to the incarcerated individual.”).

<sup>105</sup> See Eyal Benvenisti & Ariel Porat, *Implementing the Law by Impartial Agents: An Exercise in Tort Law and International Law*, 6 THEORETICAL INQ. L. 1, 4–8 (2005) (discussing the characteristics of an instrumentally good agent).

<sup>106</sup> We borrow this example from Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, 14 LEGAL THEORY 113, 121 (2008) [hereinafter Harel, *Privately Inflicted Sanctions*].

One would arguably want to say that the agent selected to perform the killing ought to be the best agent—namely that agent who is most capable of performing the blood feud. Yet it is interesting to observe that, as a matter of fact, this is not the case. The identity of the agent who performs the blood feud is essential to its successful completion, and the identity of the agent is not parasitic upon its capacity to perform the murder. The tradition is that only a male relative of the person wronged may avenge the wrong. A killing by the wrong agent is not merely an inappropriate or an impermissible blood feud, but it does not even count as a blood feud and cannot redress the injustice.<sup>107</sup> The power to perform a killing properly classified as a blood feud is an agent-dependent power—a power that can be successfully exercised only by the proper agent, whose identity is not simply dependent on physical capability. We maintain that this is so because the agent involved in the blood feud “is not perceived as a means to perform the (allegedly just) act of killing; instead it is the act of killing that provides an opportunity for the appropriate agent [—a male relative of the deceased—] to act in order to redress the injustice.”<sup>108</sup>

The punishing of a child is another example where it seems that the identity of the agent does not just matter instrumentally. To illustrate, think of the common law rule that dictates that parents and educators are legally justified in spanking their children.<sup>109</sup> It is not at all evident that third parties could assist the parents in fulfilling their educational tasks.<sup>110</sup> Even if one disagrees with this view and believes that third parties could assist parents in disciplining their children, delegating the powers to spank their children to others does not seem

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<sup>107</sup> See PAMELA BARMASH, *HOMICIDE IN THE BIBLICAL WORLD* 24 (2005).

<sup>108</sup> Harel, *Privately Inflicted Sanctions*, *supra* note 106, at 121; see William Ian Miller, *Choosing the Avenger: Some Aspects of the Bloodfeud in Medieval Iceland and England*, 1 *LAW & HIST. REV.* 159, 162–68 (1983) (stressing that in medieval England and Iceland, “[t]he duty to take up the feud or the liability to suffer its consequences was largely a function of kinship,” and elaborating on the kinship conditions which constitute a right to perform the killing).

<sup>109</sup> This privilege of “moderate” chastisement is mentioned by William Blackstone in his *Commentaries on the Laws of England*. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*452–53. Anne McGillivray, *‘He’ll Learn It on His Body’: Disciplining Childhood in Canadian Law*, 5 *INT’L J. CHILD. RTS.* 193, 202 (1997). For a short description of the common law rules concerning physical disciplining of children, see *id.* at 201–06.

<sup>110</sup> Justice Wilson stressed a similar point in her concurring opinion in the leading Canadian case on necessity. See *Perka v. The Queen*, [1984] 2 S.C.R. 232, 276 (Can.) (Wilson, J., concurring). Justice Wilson argued that justified necessity can apply in cases in which “it is necessary to rescue someone to whom one owes a positive duty of rescue.” *Id.* (Wilson, J., concurring). In Justice Wilson’s view, such a justification would not apply to strangers to whom one does not owe such a duty. *Id.* (Wilson, J., concurring). It is unclear from the decision, however, whether the reason for not allowing strangers to invoke the defense of necessity is grounded, according to the Justice’s view, in instrumental or noninstrumental grounds.

appropriate.<sup>111</sup> It is one thing for parents to punish, and yet another if, for example, a neighbor inflicts such punishment, even if he or she is guided by and does so at the parents' request. Although one could ground such a view on instrumental reasoning, many would believe that the genuine reason for this rule is noninstrumental.

Joel Feinberg's expressive theory of punishment provides a more contemporary example for agents whose identity has special noninstrumental significance in carrying out an enterprise. Under Feinberg's famous formulation of the expressive theory of punishment, "punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgements of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted."<sup>112</sup> This function can only be performed by the state "[because] punishment expresses the *judgment* . . . of the community that what the criminal did was wrong."<sup>113</sup> In contemporary societies it is the state (and the state alone) that is understood to speak in the name of the community. Punishment of criminals performed by agents other than the state may, of course, deter wrongdoers, satisfy retributive concerns, and serve other important functions but it does not have the same symbolic expressive significance that Feinberg believes punishment ought to have.<sup>114</sup> The identity of the agent is therefore inseparable from the successful performance of the punishment.

One way to present this argument is simply by noting that the exercise of physical force by the state resembles, in some respects, a blood feud. The power to inflict criminal sanctions is an agent-dependent power—a power that can successfully be exercised only by the appropriate agent, the state. This is because, in order to be legitimate, it is not sufficient that the agent inflicting the punishment carries out its mission faithfully. Further, to count as a legitimate criminal punishment inflicted by the state, it is not sufficient that the nature and severity of the sanctions that the state determines be car-

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<sup>111</sup> Cf. *Ingraham v. Wright*, 430 U.S. 651, 662 (1977) ("Although the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view—more consonant with compulsory education laws—that the State itself may impose such corporal punishment as is reasonably necessary for the proper education of the child and for the maintenance of group discipline." (footnote and internal quotation marks omitted)); *Johnson v. Dep't of Soc. Servs.*, 177 Cal. Rptr. 49, 53 (Ct. App. 1981) (acknowledging the right of parents to discipline children but distinguishing it from "the delegation by the parents to third parties . . . of the rights of discipline by corporal punishment" in upholding a regulation prohibiting corporal punishment by daycare centers).

<sup>112</sup> Joel Feinberg, *The Expressive Function of Punishment*, in *A READER ON PUNISHMENT* 73, 74 (R.A. Duff & David Garland eds., 1994).

<sup>113</sup> See *id.* at 76.

<sup>114</sup> See Harel, *Privately Inflicted Sanctions*, *supra* note 106, at 121.

ried out faithfully. In addition, it ought to count as an execution or implementation of the will of the state. There is a fundamental difference between state-inflicted criminal sanctions and suffering inflicted on the guilty in accordance with the will or intention of the state.

But why is it the case that the infliction of sanctions ought to be performed by the state and the state alone? Before we defend this claim, let us follow the conventional terminology and label those functions that ought to be conducted by the state as inherently governmental functions.

In our view, inherently governmental functions involve fundamental societal decisions or choices, and the execution or implementation of these decisions or choices. Deciding the appropriate sanction for a crime is a fundamental societal decision. It is a decision that must be made by the government to be legitimate. This is an intuition so deeply grounded in our practices that we believe it needs no justification. Yet our focus here is not on these fundamental societal decisions but on the more controversial cases that involve the actual execution or implementation of these societal decisions, e.g., the act of inflicting a criminal sanction. The mere fact that the nature of the sanction and its severity ought to be determined by a court does not imply that the sanction ought to be inflicted only by the state. Our task is to explain why some fundamental societal decisions ought not merely to be made by the state, but also ought to be executed or implemented directly by public officials rather than private contractors.

Ultimately, the answer to this question relies on fundamental values. In the case of criminal sanctions, the relevant value is dignity. Execution or implementation of publically determined sanctions by the “wrong” agent is detrimental to dignity.<sup>115</sup> More generally, the execution of a fundamental societal decision by private agents violates fundamental values because, although the state may perhaps control these agents as a matter of fact, as a normative matter the private agents assigned with the performance of fundamental societal decisions, e.g., prison wardens, are accountable for the fundamental societal decisions. We show below that such accountability on their part may (in the case of private prisons) be detrimental to the value of dignity.

## 2. *Accountability and Dignity*

The first challenge is to establish why a decision of the state, carried out by a faithful agent who operates in accordance with the state’s

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<sup>115</sup> See HCJ 2605/05 Academic Ctr. of Law & Bus. v. Minister of Fin. [2009] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/05/050/026/n39/05026050.n39.htm](http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm).

directives, would ever not count as an execution or an implementation of the state's decision. Should an effective state's control over how its fundamental choices are carried out be sufficient to guarantee that these actions are performed in the name of the state and count as execution or implementation of the state's decisions? Even if we concede that the act to be carried out by an official ought to count as an execution or implementation of the state's fundamental decisions, we are left with a second challenge. Why should we care whether a decision is implemented by the state rather than merely carried out in the way that the state determined?

In our view, the opposition to private criminal sanctions, mercenaries, and other forms of publically-initiated, privately-executed violence is grounded in the conviction that the identity of the agent who carries out the state's decisions is crucial. In some cases, operating on the basis of a private judgment violates fundamental values as it is, in effect, the exertion of power of one person against another, rather than the legitimate use of state power. Being imprisoned by a private person is oppressive and demeaning (as it subjects the will of one person to that of another), while being imprisoned by a state is a means to hold people publicly responsible for their misdeeds.

To establish this claim, let us first share an anecdote. We were surprised to learn recently that, historically, many executioners were not state employees but actually freelance agents.<sup>116</sup> They were often paid for each execution that they performed.<sup>117</sup> This small and arguably insignificant historical detail may illustrate the moral significance of the distinction between public and private exertion of violence. Assume a public official approaches you and asks you to participate in the infliction of criminal sanctions on a convicted criminal. Presumably, your first reaction would (and should) be to investigate the nature of the crime and the procedures used to convict him or her. Then you ought to make a judgement whether, given the gravity of the crime and the procedures used in the trial, the infliction of the sanction is justified. It seems evident that it is impermissible for you to

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<sup>116</sup> See SYD DERNLY WITH DAVID NEWMAN, *THE HANGMAN'S TALE: MEMOIRS OF A PUBLIC EXECUTIONER* 48–51 (1989). Cf. Jennifer Gonnerman, *The Last Executioner*, *VILLAGE VOICE* (Jan. 18, 2005), <http://www.villagevoice.com/content/printVersion/188926/> (noting that although he was an employee of New York State, “[i]t had become common practice for Sing Sing’s executioner to freelance elsewhere” and to oversee executions in other states requesting his services); see also Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 *YALE L. & POL’Y REV.* 259, 304–05 (2009) (discussing Missouri’s former lethal injection protocol, whereby neither politicians nor Department of Corrections officials designed the lethal injection procedure and instead delegated the responsibility to “an independent contractor . . . [who] had complete discretion to change the procedure at a moment’s notice” (internal quotation marks omitted)).

<sup>117</sup> On the methods of payment of executioners in England, see Gerald D. Robin, *The Executioner: His Place in English Society*, 15 *BRIT. J. SOC.* 234, 238–40 (1964).

inflict sanctions unless you are convinced that the sanctions are proportional to the gravity of the offense and that the procedures used are fair. It is a moral duty on the part of the citizen to scrutinize the appropriateness of the sanction, and, if convinced that the sanction is inappropriate, to refuse to inflict it.

Assume now that, after thorough investigation, you are persuaded that the criminal sentence is justified: the person was charged for having performed an offense, he benefitted from a fair trial, and the sentence is proportional to the gravity of the offense. You decide, therefore, to inflict the sanction.

Given that it was necessary for you to consider the justness of the infliction of the sanction in order to permissibly inflict the sanction, it follows that the sanction you inflicted cannot be regarded as a mere execution of a publically mandated decision. After all, the infliction of the sanction required moral judgment on your part—a judgment that you made as a private citizen. The mere fact that your judgment in this case converged with that of the state is a happy coincidence. Your judgment concerning the appropriateness of the infliction of the sanction in this case is critical. The contribution to the genesis of your action—the infliction of the sanction—made by the court's decision to inflict a sanction is, so to speak, superseded by your own judgment that the sanction is appropriate. In short, the infliction of the sanction ought not be regarded exclusively as an execution of the state's will; it is your will that is also responsible for it, and it is you as a private individual that is also accountable for it. Such accountability on your part, however, grants your judgment privileges that it ought not to have. Normatively speaking, you ought to be regarded as having a veto right over the decision as it could not have been executed permissibly without the actual or presumed exercise of your judgment.

The analysis does not depend on whether the agents, as a matter of fact, scrutinized the state's decision. It is possible of course that, as a matter of fact, some agents fail to scrutinize the state's decision concerning the infliction of the sanction and are willing to carry it out blindly. This fact, however, does not negate the private agent's accountability. Irrespective of what the agents asked to inflict the sanction do or think and irrespective of how such agents reason, their acts are attributable to themselves rather than (exclusively) to the state.

Before we pursue the moral implications of this view, let us add an important qualification. By asserting that the infliction ought not to be regarded exclusively as the state's responsibility, we do not argue that the state is not responsible for it. Responsibility could lie among several agents. What we argue is merely that it is not exclusively the

state's responsibility; the act ought to be attributed at least partially to the agent performing it.

This assertion is founded on fundamental liberal presuppositions. It is founded on the belief that individuals ought not to blindly follow the state's dictates, i.e., that they are accountable for acts that they perform. Under normal conditions, the state cannot be trusted; its decisions, in particular decisions concerning the use of violence, ought to be scrutinized. This is particularly true in cases of the type we discuss here: namely, cases in which the state's decision involves the infliction of violence.

The duty to scrutinize the state's decisions in such cases has important normative ramifications. The most obvious of these is that an agent who carried out the state's decisions without first scrutinizing the decision is morally accountable. A decision to inflict a sanction of a certain nature and magnitude is as attributable to the private agent executing it as it is to the state. The agent's decision to inflict the sanction indicates his or her concurrence with the state's judgment that the sanction is just or necessary, or at least, permissible. The sanction is as attributable to the private convictions of the person who inflicts it as it is to the public judgment of the state.

So far, we have established that when a private agent carries out the state's orders, her action ought not to be normatively understood as a faithful execution or implementation of the state's fundamental choices or decisions. Instead, it ought to be regarded at least partially as a private act—an act for which the private entity is accountable. In order to count as an execution of a sanction whose nature and severity is determined by the state (rather than merely a sanction whose severity happens to converge with the state's decision), it ought to be inflicted by public officials rather than private contractors or, more generally, by individuals who satisfy some formal requirements that affiliate them with the state.

But perhaps the argument is too strong. Perhaps this argument applies to everybody; in particular, perhaps it applies also to public officials. Perhaps, the so-called public executioner is as obliged to scrutinize the state's judgments as the private executioner. If so, no action of the state is purely public. Every act of the state is equally tainted because every act is subject to scrutiny by the entity who executes it. After all, the state always needs an agent to execute its will; its will is never self-executing.

In addressing this objection, let us use the words of the French official executioner, Mr. Sanson, in an imaginary dialogue where he must justify his behavior. Sanson, who was both the king's official executioner and, later on, served the leaders of the French revolution with an equal degree of enthusiasm maintains:

I have already explained to you why I believe that the role of executioner is worthy of a person's commitment, and you half-believe it yourself. Having made such a commitment to the role, I cannot then reject the reasons for action the role provides. Only if the overall justification fails is any particular performance no longer an "execution," but a murder. As I said, I am not an instrument. I must judge my role. But the judgment is of a life in a role, not the particular acts the role requires me to perform.<sup>118</sup>

An analogous argument is common in liberal political theory. The famous distinction that John Rawls drew "between justifying a practice and justifying a particular action falling under it" is analogous (but not identical) to the distinction drawn by Sanson.<sup>119</sup> Rawls believes that the question of what justifies the institution of punishment is separate from the question of what justifies the infliction of a particular punishment on a particular offender within a particular system.<sup>120</sup> Similarly, Sanson maintains that his decision to serve as a public executioner is separate from the decision to execute a particular individual.<sup>121</sup> He believes that it is morally permissible to become a public executioner. However, once a public executioner is in office, she is barred from exercising discretion as to whom she executes because as Sanson says, "If I were to act on reasons that the role requires the executioner to ignore, I would cease to be the executioner."<sup>122</sup>

Sanson's assertion is also founded on liberal presuppositions. An executioner is a servant of justice as understood by the state but not of justice as understood by the executioner. To count as an act of the state, an executioner must obey blindly—within certain boundaries—the orders of the state. It is this blind conformity that makes an executioner a public official in the first place and that also justifies labeling of the executioner's acts as acts of state.

The term blind conformity inevitably raises resistance. Does it imply that the public official is obliged to conform to any command? Should we not resist the notion of blind conformity because it provides a license for performing atrocities? Does history not teach us the grave dangers of blind obedience? To address this concern, let us point out the limits of this "blind" conformity. In performing his job, Sanson ought to make two moral judgments. First, he ought to judge that the position of an executioner is desirable from a moral point of view, i.e., it promotes the public good, and consequently, it is morally permissible to perform it. Second, he ought to judge that the order

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<sup>118</sup> ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 40 (1999).

<sup>119</sup> John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 3 (1955) (footnote omitted).

<sup>120</sup> *See id.* at 6–7, 10–13.

<sup>121</sup> APPLBAUM, *supra* note 118, at 39–41.

<sup>122</sup> *Id.* at 41.

that he conforms to is an order that is within the scope of his office. For instance, if Sanson is asked to kill people who were not properly sentenced to death by a court that has the authority to do so and that operates in accordance with the principles of the rule of law, such an order presumably does not fall within the boundaries of his office, and he ought therefore to refuse to comply with it. Yet while this constraint on the public officer's obedience to the parties is a meaningful one, it is much less restrictive than the constraints on the obedience of a private individual. Private individuals are obliged to use their discretion in cases where public officers ought not to use such discretion. It is this difference that explains why the act of the latter can be properly considered an act of the state while the act of the former cannot be described as such.

We have explained that when a public officer commits an act in accordance with the state's orders (and which satisfies the conditions set above), the officer (unlike the private citizen) is not accountable in the same way for his act as a citizen. This is so because we can attribute the decision to the state rather than to the person performing it. Should this be a conclusive reason against privatizing certain functions?

We briefly stated earlier why this should be relevant; the actions performed by private agents in such cases are detrimental to fundamental values, e.g., dignity. The concept of dignity will be used to explain the opposition to private agents' infliction of criminal sanctions. Although we realize that instrumental arguments could also be raised against privately inflicted sanctions, we focus here on noninstrumental arguments.

As a citizen—or more broadly, as a member of a society—a convicted criminal is a participant in the social contract and is thus a participant in the public judgment leading to his conviction and to his sentence. This consideration justifies inflicting the sentence when the infliction of the sentence is a public act; it does not apply when the sanction is a private one, as in such a case the criminal is not a participant in the normative judgment of the individual inflicting the sanction.<sup>123</sup> It is demeaning to subject a person to the normative judgment of another citizen rather than to the normative judgment of

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<sup>123</sup> See JEAN-JACQUES ROUSSEAU, DISCOURSE ON POLITICAL ECONOMY AND THE SOCIAL CONTRACT 71 (Christopher Betts trans., Oxford Univ. Press 1994) (1762) ("The purpose of the social treaty is the preservation of the contracting parties. He who wills an end wills the means to that end: and the means in this case necessarily involves some risk, and even some loss. He who wills that his life may be preserved at the expense of others must also, when necessary, give his life for their sake. . . . [A]nd when the ruler has said: 'It is in the state's interest that you should die', he must die, because it is only on this condition that he has hitherto lived in safety, his life being no longer only a benefit due to nature, but a conditional gift of the state.")

the state. Dignity requires that a public authority dictate and execute judgments concerning criminality because the criminal takes part in the public authority's choices. If private persons enforce these judgments, such enforcement is a simple violation of the autonomy of those against whom violence is used.<sup>124</sup> It is ultimately therefore the dignity of prisoners that explains the significance attributed to the identity of the agents inflicting the sanction.

We wish to extend this argument to the case of mercenaries and speculate here that one could use a similar argument to justify the traditional opposition to them. Wars can be legitimate only when they are conducted by a state.<sup>125</sup> It is the will of the state that could justify the military violence. But to count as an act of the state, the acts of violence need to be performed by an agent who is an organ of the state—an agent who is barred from engaging in normative deliberation independent of the ends of the state. Only soldiers, and not mercenaries, satisfy this condition because only soldiers can be regarded as organs of the state.<sup>126</sup> Their violence is therefore a violence of a state struggling to maintain the public good rather than the violence of individuals promoting their own sectarian interests.

We conclude therefore that there are strong noninstrumental arguments supporting the view that the infliction of criminal sanctions, as well as the conducting of wars, ought to be implemented exclusively by the state and that only public officials (public employees or soldiers) are capable of implementing decisions in the name of the state. It seems that these considerations conflict with the overarching premise underlying LE that the choice of agents should be governed exclusively by instrumental considerations. Furthermore, LE does not provide instrumental rationales general enough to explain why inflicting criminal sanctions or fighting wars should never be delegated to private entities.

#### CONCLUSION

In this Essay, we challenged LE's uncompromised insistence that all values and objects are commensurable and that performing public tasks should always be delegated to private bodies when the latter are—instrumentally speaking—better at performing such tasks. We realize that some of the solutions we offer to the examples discussed

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<sup>124</sup> Cf. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 154 (1986) ("A person who forces another to act in a certain way, and therefore one who coerces another, makes him act against his will. He subjects the will of another to his own and thereby invades that person's autonomy.")

<sup>125</sup> This is the general rule in international law. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 5 (Cambridge Univ. Press 3d ed. 2001) (1988).

<sup>126</sup> Among the doctrinal implications of this view is the hostile attitude towards mercenaries. See L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 111–14 (1993).

in the Essay may be explained in instrumental terms and can even be accommodated with the basic premises of LE. We still maintain that LE should do more work either by modifying its basic premises or by “biting the bullet,” so to speak. The most important starting point, however, is that LE scholars acknowledge that irrespective of whether these concerns should be set aside eventually, they constitute “a bullet,” and this bullet deserves attention.



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