

# The Evil of Privatization

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*Note:* This is my contribution to a workshop (held at the University of Warwick on 16 May 2014) about Alon Harel's book *Why Law Matters* (Oxford 2014). Since I co-edit the series in which the book appeared, I do not plan to publish anything arising from this workshop. But I see no problem with posting my talk here more or less as I presented it (adding, at pp 9-10 below, a rejoinder to Alon's oral response).

## I

Alon takes aim at privatization, but also at certain critiques of it, which he thinks too pallid or precarious. He wants an objection that does not 'hinge[ ] ... on contingent factors, ... factors [that] may change from time to time and society to society.'<sup>1</sup>

I am sympathetic. I also want there to be such an objection. I am at least as vigorously opposed to privatization as Alon, and my opposition seemingly has wider scope.<sup>2</sup> In the end Alon limits his opposition, at least in the text we are discussing, to the privatization or 'outsourcing' of warfare and criminal justice.<sup>3</sup> I go much wider: tax inspection and collection, border and immigration control, planning and a great deal of licensing, registration of births and deaths and property interests, welfare benefit assessment and payment, diplomacy and consular services, civil justice, and the work of the intelligence agencies, to name

<sup>1</sup> Alon Harel, *Why Law Matters* (Oxford 2014), 78. Hereafter 'WLM'.

<sup>2</sup> For further discussion, see my 'Criminals in Uniform' in in RA Duff, L Farmer, S Marshall, M Renzo and V Tadros (eds), *The Constitution of Criminal Law* (Oxford 2012)

<sup>3</sup> WLM, 106.

but a few. Wouldn't it be great if I could shake my objection loose from all 'contingent factors' such that it could not possibly 'change from time to time and society to society'?

Yes it would. But I am pessimistic. In my view the only sound arguments against privatization are rife with contingency. The strongest of them, indeed, are what Alon calls 'instrumentalist' arguments,<sup>4</sup> based on the bad consequences of privatization for those of us who have to live with it, and for others. The contingency in such arguments comes mainly of the fact that the consequences of anything vary, depending on what else happens to be the case at the time. So something that has only bad consequences this year could possibly have only good ones next year, the world having moved on in so many other ways meanwhile. That is very unlikely to be the case where privatization is concerned, but the point is that it is conceivable. And Alon finds even its conceivability dispiriting.

So those of us who leave 'instrumentalist' hostages to fortune in arguing against privatization are in Alon's bad books. He thinks that we give up too quickly on the possibility of a more robust non-instrumental case against privatization. He tries to win me and other instrumentalists round with what he calls a 'state-centred' argument,<sup>5</sup> aiming to show that there are 'intrinsically public goods' that can only be provided by the state.<sup>6</sup> This is supposed to hold true independently of what kind of state we are talking about, i.e. whether it is a democracy, an aristocracy, a meritocracy, a theocracy, or whatever.<sup>7</sup>

A preliminary concern I have is that Alon's characterization of 'state-centred' arguments, or at any rate of his particular state-centred argument, seems unstable. So there are 'intrinsically public goods' that can only be provided by the state. Why?

<sup>4</sup> WLM, 78.

<sup>5</sup> WLM 79.

<sup>6</sup> WLM 96.

<sup>7</sup> WLM 86.

Sometimes Alon suggests that it is because certain actions can only be performed by the state. Punishment, for example, is a state action by definition.<sup>8</sup> On other occasions Alon suggests that it is because certain value can only be realized by the state's actions. Private punishment is logically possible, but it is 'inherently defective' in the sense that it fails to bring into the world a certain value that only state punishment can bring.<sup>9</sup>

The second of these lines of thought is the one that I will attribute to Alon here. That's because the first will get him nowhere.<sup>10</sup> Where a certain action cannot by definition be performed by anyone but the state, there is no question of the desirability or undesirability of privatizing its performance. Alon is interested in cases where there is such a question. So I will leave aside the various remarks he makes to the effect that certain actions are state actions by definition. I will read him as attempting to convey in these remarks what he ends up actually conveying in other (I would say more reliable) remarks, namely that when certain actions are performed by non-state operatives, such as the employees of private contractors, they are incapable of realizing some important value that they are capable of realizing when they are performed by state officials, and that the important value in question is not captured by those who merely compare 'the quality of the execution of the enterprise' as between the two classes of potential executors.<sup>11</sup>

<sup>8</sup> WLM 72.

<sup>9</sup> WLM 96.

<sup>10</sup> Recall A.M. Quinton's similar claim about punishment in 'On Punishment', *Analysis* 14 (1954), 133, widely criticized as a red herring and laid to rest by H.L.A. Hart in *Punishment and Responsibility* (Oxford 1968), 4-6, where it is memorably characterized as the 'definitional stop'. As Hart points out, even if Quinton were right to think of punishment as something which could only be exacted by the state, we may still ask: Why do we favour punishments (so understood) to measures that satisfy all the other conditions for being punishments except that they are not exacted by the state?

<sup>11</sup> WLM 69.

## II

This brings me to a more central theme of my comments. It concerns Alon's characterization of the instrumentalist position that he opposes. As just noted, he lands his instrumentalist foes with the view that what matters is 'the quality of the execution of the enterprise.' More precisely, he portrays them as 'attempt[ing] to identify agents who are more capable of performing a state function in the furtherance of the public interest.'<sup>12</sup> But this is surely too narrow. Why should one restrict oneself to comparing a public functionary with a private functionary, having already identified some function that each is expected to perform? Surely an instrumentalist is entitled to say that although a private company is better at detaining or deporting or delivering mail or babies than a public body, nevertheless there are other bad consequences of moving over to a system in which detaining and deporting and delivering are handed over to the private sector which are not reflected in the quality of the detaining or deporting or delivering itself? They are consequences, for example, for our wider system of government and the way we relate to it. The problem of privatization is not restricted, even for us instrumentalists, to whether private forestry, say, is better *qua* forestry than public forestry. It extends to whether Parliament is better at overseeing environmental matters than Forests4U plc. Indeed it extends to whether democracy, rule by the people, is better *qua* overall political system than is plutocracy, rule by the wealthy. For privatization is not only the transformation of detention centres, trains, tax inquiry offices, forestry operations, and so on – considered one service at a time. It is also the creeping transformation of our political system and public culture from one of democratic oversight to one of plutocratic oversight. And

<sup>12</sup> WLM 105.

isn't that a worry even if the detention centres are fabulous and the trains are splendid and the forests are awesome and the mail arrives on time and so on? If so, why couldn't this be an instrumentalist worry – a worry that plutocracy has worse wider consequences for those who live under it than democracy, even if the private detention centres are better at detaining, the private train operators are better at operating trains, and so forth?

Indeed aren't we already giving the plutocrats the edge even by assuming that a system of government should be judged as a provider of various severable services, or clusters of services, to those we are now supposed to describe as its 'customers'? If so, then Alon is surreptitiously stacking the instrumentalist deck in favour of privatization. He is landing instrumentalists with a narrow service-provider picture of government which allows the private sector to compete on quality of service provision, when the real question is: Can they compete on quality of government itself? For government itself is what the private sector is gradually morphing into. In UK plc, as our country is now degradingly branded, investors rule according to the size of their investments. You and me, we are but the human resources.

Alon seems to miss this last point. He talks as if what we currently think of as 'the government' – the apparatus of the broadly Westphalian state – is still essentially the government even after the bulk of its activity has been outsourced. Consider his remark that 'outsourcing [by the state] is inconsistent with the integrative form that a practice must exhibit to count as a practice of the state',<sup>13</sup> where an integrative practice is one that 'does not merely operate among bureaucrats ... but rather includes among its engaging participants both politicians and bureaucrats.'<sup>14</sup> Let's attempt a thought-experimental adaptation of that remark. Instead of thinking about the state outsourcing its

<sup>13</sup> WLM, 91.

<sup>14</sup> WLM, 91.

operations to big corporations like Capita and G4S and Pearson and Serco and Veolia, let's try thinking about those corporations outsourcing their operations to the state. You may say that this makes no sense. I want to suggest that it not only makes sense but is indeed the new political reality, the way we live now.

No doubt these big corporations have their own integrative practices. They have their own equivalents of politicians and bureaucrats – their corporate boards serving as the former and their staff serving as the latter – and the two can and surely often do interact within the corporation just as the politicians and bureaucrats of the state interact. There can be and surely there often is, in Alon's terms, a 'fidelity of deference' as between employees and board.<sup>15</sup> There is a kind of electoral system too, in the form of the shareholder AGM, which elects the board. Not only that, but these corporations – the resulting integration of board and staff – clearly exercise authority over the rest of us. If you doubt it in the case of the wholesale corporations I just mentioned (you're not a detained migrant or a benefit claimant, I guess), then just think about retail corporations like Google, Amazon, Apple, Facebook, and Ebay instead. Their contractual boilerplate empowers them to change your rights and duties in numerous ways, for example by determining when to grant a refund, or when to close your account, or when to disclose your emails, or when to take money from your bank account. They decide what can be said online about whom, and what you can buy and sell, and whether your reputation is to be protected, and how much privacy you get, and so on. Their authority is vast.

You may say that this authority is still only subordinate. It is still constrained by the law of the land. Not only is it constrained by the law, indeed, but it depends on the law – principally the law of contract – for its ability to get its hold over us. And I say yes, it is largely a matter of contract law. But notice that the

<sup>15</sup> WLM 67.

contracts themselves determine *which* contract law – the contract law of which legal system – and when it can be invoked and by whom. Up to a point it is already open to these corporations to choose the law of some offshore anarcho-capitalist haven as the law governing the contract. And up to a point it is already open to them to block the resort that their customers have to the law of even that offshore haven by using compulsory binding arbitration schemes of their own devising, perhaps even in-house schemes, which their chosen anarcho-capitalist offshore haven – surprise, surprise! – declines to supervise very closely.<sup>16</sup>

Here we see pretty much the kind of outsourcing that I have in mind. These corporations increasingly think of it as their prerogative to outsource some narrow functions to a legal system or to a state of their choosing, or not to do so. This is at the root of the huge international tax minimization racket that now threatens to starve our state apparatus of sufficient revenue to continue running adequate public services, and hence drives even faster privatization. The fact is that we have either reached or are very close to reaching the tipping point at which, rather than the question being which services which state is to outsource to which private corporation, the question is instead which services which private corporation is to outsource to which state. And when we reach that tipping point we have literally acquired plutocratic government. Authority is exercised over us primarily by mega-corporations, and by what remains of the state only to the extent that the mega-corporations have need for it as a service-provider, or tolerate it as a niche competitor.

Even if you think I am exaggerating the present situation, the thought-experiment is valuable in assessing Alon's argument. He treats the state, the polity, the government, public officialdom, and the authorities as pretty much synonymous. This enables him

<sup>16</sup> For fine development of these themes, see Margaret Radin's *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton 2012)

to set up the problem that concerns him as if it were a problem of handing over some of the work of these things, what he thinks of as our public sector bodies, to other things, namely what he thinks of as private sector alternatives. But I am not the first to point out that the state is of declining importance in governance, and does not exercise as much of the authority in the world as it used to. There are modes of governance emerging that are post-state, and concentrations of authority that are not dependent on support by state authority for their hold over us. I believe the relevant modes of governance and concentrations of authority are increasingly plutocratic, and that the rise of plutocracy means the inevitable decline of democracy. And although I think that democracy has been a huge disappointment, the most painful part of the disappointment for me lies in the craven stupidity by which we – I mean democratic electorates – have allowed our democratic politics to be enslaved to what the Thatcherites in their Doublespeak called the ‘popular capitalism’ of the ‘share-owning democracy’. This was always, and was always intended to be, a stalking horse for plutocratic domination via the New Leviathan (that ungrateful bastard child of the Old Leviathan) which is the multinational corporation of today.

These remarks hint at my largely instrumentalist views about systems of government. The main case for democracy is that, in spite of its disappointing tendency to sow the seeds of its own destruction, while it has lasted it has had better consequences for the human beings who have lived under it, and for others, than any of the alternatives.<sup>17</sup> It has been pretty good for peace,

<sup>17</sup> Some people think that a defence of authority must have two components, one focusing on what the authority gets people to do, and the other focusing on how it gets to be the authority. Joseph Raz’s ‘normal justification thesis’ focuses on what the authority gets people to do. Authority is justified under the Razian thesis to the extent that it gets people to do (more often and/or better) what they should do anyway: Raz, ‘Authority and Justification’, *Philosophy and Public Affairs* 14 (1995), 3. This thesis has attracted criticism



prosperity, the protection of rights, the containment of corruption, the widening of education, and much else besides. It has been, as many have said, the least worst option. Two cheers for it. I am a lot less cheery about the likely consequences of the coming plutocracy. In fact I fear a dark future in which the sad remnants of the democratic state resort to increasingly repressive techniques to buttress the power of global capital, to keep us all suited and booted and avidly consuming more and more corporate products, and to repress the challenges to immediate plutocratic interests that such consumption will increasingly bring (as resource shortage and climate change begin to bite in earnest). This shows that, as a thoroughgoing instrumentalist about the mechanisms of government, I would be derelict to focus my anti-privatization sentiment, as Alon says I must, on whether Sodexo or Virgin or Atos is 'more likely to execute the [outsourced] task [more] efficiently and justly' than the former

from those who say that it omits the importance of norms, such as norms of democratic legitimacy, that distinguish between those entitled to get people to do things and those not so entitled, even where both are equally good at improving what people do: e.g. Scott Hershovitz, 'Legitimacy, Democracy, and Razian Authority', *Legal Theory* 9 (2003), 201, and Stephen Darwall, 'Authority and Second-personal Reasons for Acting', in David Sobel and Steven Wall (eds), *Reasons for Action* (Cambridge 2009), 150. But these critics read Raz's thesis too narrowly. The thesis applies to the democratic system itself – indeed to whatever system exists to determine who has the right to rule. Thus the main case for democracy, as a system for assigning the right to rule, is that it gives less room for misrule, or room for less serious misrule, than do alternative systems (where misrule is understood in terms of the normal justification thesis). The allocation of the right to rule is already covered by the normal justification thesis and an additional thesis is not needed to show the justification for such a right. My argument against Harel in the text is essentially the same. The normal justification thesis is an instrumentalist thesis of exactly the kind that Harel is rejecting. But Harel reads it too narrowly, and invalidates his objection to it, if he assumes that it is concerned only with what service-providers do by way of service-provision, and not with the wider merit of the system under which they come to be the service providers.

public body it is chosen to displace.<sup>18</sup> The outsourced task in itself is usually pretty small beer. What we really have to worry about, as instrumentalists and also as human beings, is the power behind all these tasks, the aggressive rise of globally mobile capital, and the corresponding decline of what Alon rather quaintly calls the ‘polity’ as a unit of organization.<sup>19</sup>

Alon resists<sup>20</sup> my role-reversal thought experiment by denying that the mega-corporations could literally be governing us. For him their power, even if it dwarfs what is left of governmental power, is not itself governmental power. He says that I have overlooked a key point in his argument, the point at which he defines governments as ‘claiming legitimacy to act in the name of the polity’.<sup>21</sup> Thus the ‘integrative form’ of public service, for Alon, is not just any integrative form but an integrative form that at least purports to work, even if it does not always actually work, ‘in the furtherance of the public interest.’<sup>22</sup>

I worry that some of the British-Empire civil-servant lingo here serves, in spite of Alon’s efforts, to narrow our attention down to just some particular extant systems of government, which Alon committed himself not to do. But be that as it may, Alon’s criteria for governmenthood fail to exclude some of the largest and most insidious multinational corporate players of today. Alon has perhaps not been paying much attention to the swaggering techno-ideologues of Silicon Valley. It would be hard to outdo them for self-congratulatory self-deception (or is it just plain deception?) on the subject of what serves the public interest. It would also be hard to outdo them for fanciful claims to act legitimately in the name of a wider population – netizens of the world unite! – purportedly freeing us all from the detritus

<sup>18</sup> WLM, 67.

<sup>19</sup> WLM 69.

<sup>20</sup> In his oral reply at Warwick.

<sup>21</sup> WLM 86.

<sup>22</sup> WLM 105.

of the old world (oh, you know, laws, taxes, popular elections, responsibility for our actions, etc.) with their brave new global alternative, namely rule by hedge funds and ratings agencies, coupled with unfettered public political participation via amateur porn sites, clickthrough adverts for miracle hair loss remedies, and 140-character tributes to an awesome lunch at Subway.

If these techno-ideologues do not quite yet constitute a branch of world government (our Ministry of Truth, perhaps?), that is surely not because they fail to make grand enough claims for themselves.<sup>23</sup> And even if they do, why is that not exactly what Alon would call a ‘contingency’, soon perhaps to be overtaken by events? In which case, why is Alon’s argument not itself afflicted by exactly the kind of vulnerability to ‘change from time to time and society to society’<sup>24</sup> that he regards as fatal to all instrumental arguments against privatization?

### III

Reflecting on the role-reversing way in which large corporations choose among rival legal systems (to be their regulators and adjudicators) also alerts us to a different curiosity of Alon’s position. He thinks of the ‘services’ which are picked out for privatization as primarily executive government services, in which the civil servants (‘bureaucrats’) are plausibly represented as working hand in hand with political appointees (‘politicians’) who set the direction of policy. He plausibly worries about the consequences of disintegration of this relationship, with its very particular demarcations and dependencies famously portrayed in (for example) ‘Yes Minister’ and ‘The West Wing’.

<sup>23</sup> If you doubt me, consider at your leisure the sanctimonious bullshit at <https://www.google.com/intl/en-GB/about/company/philosophy/>

<sup>24</sup> WLM, 78.

You may already worry that the very particular aspects of governmental life portrayed in such shows are too particular, each reflecting only one possible system of government. But whatever you think about that, you may wonder where the independent arms of the state, notably the courts of law, are supposed to fit in. The judges, the barristers, the solicitors, the court clerks, the prosecutors, and so on are in their ways state bureaucrats too, even though not all are on the public payroll. Is it really part of Alon's picture that they too are working hand-in-hand with the politicians, so that they too are characterized by a 'fidelity of deference'?<sup>25</sup> They will try to tell you, in many countries, that they defer to nobody but the law, least of all to some here-today, gone-tomorrow minister of state or political apparatchik. Their work is surely characterized, if any is, by what Alon calls a 'fidelity of reason', even though some of the reasons in question are of course supplied by the law, and hence indirectly by ordinary politics.<sup>26</sup> Therein lies is the independence of the courts. They answer to the politicians and their policies only inasmuch as their answering to the law requires it. So I am not sure, but I suspect, that by the criteria of public service provision that Alon sets up, the courts in this country and some others are already outsourced. They are not outsourced to beyond the state, or not entirely. But they are outsourced to a body of people beyond the easy reach of executive governments, and usually beyond the easy reach of ordinary politics.

Does Alon regard this as a problem? If so his case against outsourcing of public services threatens to become equally a case against the rule of law, which requires a relative *disintegration* of public service, with some bureaucrats working in the courts who are not civil servants even when they are on the state payroll, and whose independence is sometimes secured by keeping them off

<sup>25</sup> WLM, 83.

<sup>26</sup> WLM, 83.

the state payroll, as in the case of independent self-employed barristers in this country. (They may well earn public money on a case-by-case basis via legal aid or by acting for a public authority, but they are bound by the cab-rank principle not to prioritize any class of clients in the taking on of new cases, including by preferring a larger fee to a smaller one.<sup>27</sup> So a barrister acting for a government department today may be required by her professional code to act against it tomorrow. Likewise a barrister acting for McDonalds today may find herself acting for the McLibel Two tomorrow.<sup>28</sup> Or vice versa.)

Perhaps Alon did not say much about the courts and their workforce in his chapter on privatization simply because he did not imagine that they are a likely target for privatization. But there he would be wrong. Here I am not thinking so much of the way in which large multinationals already regard the courts of any given legal system as optional, by choosing which legal system to use or selectively eliminating legal systems in favour of their own alternative modes of adjudication. I am thinking rather of the way in which state governments respond to this multinational mendacity by starting to think of the court system itself as a service provided on a competitive basis to client groups, particularly multinational corporations – or in other words as a service to plutocracy. This makes governments and their investor clients think of the courts themselves as ripe for plutocratic plunder. The courts should pay for themselves on a free market basis, maybe even making a profit in the global competition for

<sup>27</sup> There is a complex system of clerking that prevents independent Barristers from negotiating their own fees, and hence from being swayed by the fee offers of those with deeper pockets. However, barristers obviously do have fees, and access to them does depend, for many clients, on adequate provision of legal aid. So a government that hates the cab rank principle and hates what it represents can erode its impact by eating away at legal aid payments.

<sup>28</sup> The McLibel Two are the heroes of the story nicely told in *McDonald's Corporation v Steel & Morris* [1997] EWHC QB 366.

law work. (Ironic selling point: ‘We have the rule of law here!’) The court buildings and court offices should be operated by contractors. Legal aid should be phased out to free up expensive judicial time for more remunerative (hence: high-priority) work. Where the courts are not doing remunerative work – where they are a ‘drain on the public purse’, as (say) in family law or immigration law – they should be sidelined in favour of arbitrators and mediators, or other kinds of ADR, or hybrids such as lay tribunals, or even just executive agencies – at any rate a cheap-and-cheerful, juridically minimal level of service suitable for the less profitable abused spouse or detained asylum seeker. The independent lawyers who traditionally served the courts and the law should instead become service providers – I mean providers of services to their ‘customers’, the lay clients – and then they too can be absorbed into the plutocracy. Goodbye independent barrister, jobbing on the cab-rank. Goodbye high-street solicitor, cross-subsidising her social-work caseload from her conveyancing income. Goodbye mouthy lawyer-agitator, stirring up trouble for big business or its friends in government. Hello HSBC Platinum Law, at the service of the more discerning fat-cat. And for the rest of us, hello Tesco Law Express, Eddie Stobart Public Defenders, Co-op Legal Loans, Pearson Online Law School, Geodis Mobile Court Managers, EasyLaw Arbitration, Counsel-u-Like, and so on.<sup>29</sup>

This shows something interesting about privatization as we are currently reflecting on it. One may worry simply, as Alon

<sup>29</sup> I emphasise that these organisations are so far only apocryphal. However this one is not: <http://www.cedr.com/solve/courtsofappeal/> Think about it: if you have less than £250,000 at stake you are not entitled to insist on your legal rights in court without being challenged on why you didn’t waive them, with a potential penalty in costs if your reasons do not satisfy the court. See *Faidi v Elliot Corporation* [2012] EWCA Civ 287 for a shocking and craven judicial endorsement of this proposition, showing the rise even in the English judiciary of the plutocratic service-provider model of the legal system.

does, about the transfer of power out of the public sector and into the private sector. But a complementary and in some ways continuous worry is about the transfer of power away from relatively independent professionals such as teachers, lawyers, architects, and doctors, and into the hands of large corporations, with their elaborate schemes of patronage and discipline and bureaucratic repression, replacing professionalism with 'customer service' and 'performance management'. The contemporary zeal for privatization is not a zeal for independent-minded people who are only erratically susceptible to official or corporate patronage. Such people are often marginalized, comically, as 'vested interests' ('BMW-driving lawyers', 'cossetted teachers', 'the protectionists of the BMA', etc.) getting in the way of the thrusting asset-stripping efficiency of the good folks at Barclays, Goldman Sachs, RBS, and so forth, whose interests are presumably entirely unvested, and who are presumably not cossetted protectionists in BMWs (LOL). The contrast in mainstream political rhetoric here shows that the zeal of our age is not a zeal for enterprise or professionalism or innovation or service or any of the other noble-sounding humanistic ideals that are now daily invoked to disguise it. The zeal of our age is a zeal for the ever-increasing transfer of power, including political power, to the money industry. The legal system itself is not immune from this zeal. So once again the live threat to the rule of law and to civilization is plutocracy, not privatization as such. Privatization is partly a symptom. But it is also partly a distraction from another symptom, which is the gradual elimination of zones of human independence from corporate control, all the way down to you and me and our little worlds of production and consumption, now brought to you courtesy of Behemoth Capital plc, backed by the grinning sock-puppet at No. 10.

This point gives another boost to the instrumentalist. In working out what the solution is we need to begin by working out what the problem is. As I have tried to explain, the main problem is not the decline of the state as such, but the rise of the

large corporation that replaces it, which means that we are all enslaved to the investment industry. How to obstruct or retard this rise? Resisting the outsourcing of state operations to large corporations may be one way, while we still have enough democratic power left to do it. But standing up for those who are independent of both state operations and large corporations is another, too easily forgotten by progressives who are bewitched by memories of a class war fought in a different era. We should be standing up not only against privatization of state institutions and outsourcing of state services but against mergers and acquisitions of non-state operations that gradually turn everyone, in one way or another, into the serfs of ever larger corporations. We should be particularly concerned to see nationalizations of formerly independent or devolved operations (such as the one currently underway in the British public defender system, and the one that skewered the British higher education sector in 1992) that have reprivatization into corporate hands as their ultimate objective or effect. Likewise ostensibly progressive social programmes that rest on the contribution, and hence consolidate the power, of the money industry (think Obamacare, or PFI building programmes in the NHS). These examples show that, depending on the circumstances, nationalization (or more generally augmentation of the public sector) may not be the right cause to support. For it may be but a roundabout way of giving extra windfalls and levers of power to future asset-strippers.

As these examples also show, it would be a huge mistake to search, as Alon does, for a way of negotiating such problems of social organization that is free of contingency. In politics and policy, by and large, what we should currently do depends on what we have most cause to fear, and how we can best undermine it in advance of its arrival. The problems of social organization are themselves contingent and contingency is therefore an unthreatening feature of the solutions.

The question, then, is not that of how we should eternally be organized, of which public sector pursuits are 'essentially' public



and which are not, but, as Bentham saw most clearly, of how to protect ourselves most effectively against the most egregious forms of misrule.<sup>30</sup> It is a virtue of instrumental thinking about the public-private divide, at least the kind of instrumental thinking that I have been doing here, that it exhibits exactly that kind of contingency – or (I would rather say) exactly that kind of responsiveness to reasons that actually exist. And I ask you: What other kind of reasons should we be responsive to? Reasons are facts, and the facts of social life are in a constant state of flux.

<sup>30</sup> I am thinking particularly of Bentham, *Securities against Misrule and other Constitutional Writings for Tripoli and Greece* (ed Schofield, Oxford 1990).