

The Zeal of Our Age

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- Avihay Dorfman & Alon Harel, *Against Privatization as Such* (Hebrew Univ. of Jerusalem Legal Research Paper No. 15-29, 2015), available at [SSRN](#).
- Avihay Dorfman & Alon Harel, *The Case Against Privatization*, **Philosophy & Public Affairs** 41(1), 67-102 (2013), available at [SSRN](#).
- John Gardner, *The Evil of Privatization*, Univ. of Oxford (2014), available at [SSRN](#).

Privatization is a phenomenon that legal theorists and legal philosophers have begun to notice and to stake out positions on, for and against. Privatization is defined with reference to the (too?) familiar distinction between public and private actors. Privatization happens when a good, service, or a function that is typically supplied by state government, through the efforts of its officials and personnel, comes to be provided by private actors, perhaps still at state expense. In a pair of recent articles, [Avihay Dorfman](#) and [Alon Harel](#) have singled out private prisons and mercenary armies as paradigm examples of privatized public goods. Dorfman and Harel lament the fact that both advocates and opponents of privatization conceive the normative issue in purely “instrumentalist” terms. Which type of actor, public or private, can provide a given good or service more efficiently? Discussions therefore deal in contingencies, and at retail level. Dorfman and Harel argue in their 2013 article that this sort of approach fails to engage the intuitive sense that there is something intrinsically worrisome about privatization that pervades it wholesale. It isn’t centrally a question whether private prisons, say, are more or less likely to do the job efficiently (without compromising prisoner rights). It is rather a conceptual question whether there is a category of goods—“intrinsically public goods”—that can only be provided by the state, directly, by its officials; and, for instance, whether criminal punishment is among them. The answer to conceptual question, and the answer’s retail application might allow the possibility of privatization: in which case, but only then, they say, it is proper to go on to the contingent question about the relative efficiency of public and of private delivery.

[John Gardner](#) warns of the futility of erecting a “conceptual stop,” and distills from Dorfman and Harel a more promising proposal, in these terms:

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. (P. 3.)

But for Gardner it is still unhelpful to frame the issue this way, for it is

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? (P. 4.)

What Gardner is awake to is the threat of creeping . . . —what I would call creeping *de*-socialism.

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. (P. 4.)

By way of clarifying why privatization is equally a move away from public governance (of any kind) and toward governance by corporate behemoths, Gardner points out the

complementary and in some ways continuous ... 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.... The zeal of our age is a zeal for the ever-increasing transfer of power, including political power, to the money industry. (P. 15.)

The wholesale problem is therefore not a conceptual one, but a matter implicating both political philosophy and a normative theory of political institutions (what Jeremy Waldron calls “*political* political theory”). Framing the issue as narrowly as Dorfman and Harel do has consequences.

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 [Dorfman and Harel are] surreptitiously stacking the instrumentalist deck in favour of privatization ... 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. (P. 5.)

Gardner's remarks were made in Harel's presence, at a workshop on his book, *Why Law Matters?* of which his and Dorfman's analysis made up a chapter. The two respond accommodatingly in their 2015 article. (Oral argument can make a difference.) But Gardner's closing remarks are, to me, a disappointment.

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. (Pp. 16-17.)

Not fifty years ago, John Rawls offered a detailed answer to the question, how we should be eternally organized, “we” meaning, we citizens of modern constitutional democracies. “Eternally” meaning, as a scheme of cooperation for mutual benefit, intended to stably reproduce itself from generation to generation. It has become fashionable to dismiss this as mere “ideal theory,” as Gardner seems to do while hurriedly invoking both Benthamite utilitarianism and Judith Shklar’s liberalism of fear. A careful (re-)reading of Rawls, particularly his *Justice as Fairness: a Restatement* (2001), offers a more coherent and practical way of thinking how to respond to “the coming plutocracy” (P. 9) that, in Rawls’s view, had long ago arrived and rested its boots on the common table. At least by 2001, Rawls was explicit that achieving justice as fairness requires democratic socialism or something very like it. It isn’t clear who Gardner has in mind, in admonishing “progressives who are bewitched by memories of a class war fought in a different era” (P. 16); but, which era is this? The *war* sounds awfully familiar.

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