WHAT IS WRONG WITH PRIVATIZATION?

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Note to readers: this is an early draft of a paper that brings together different arguments that I plan to develop more extensively in a book-length project, *Privatizing Justice*. I did not write it with the intention of eventually publishing it as a stand-alone piece. Rather, I wrote it as a "workshop paper," with the intention of collecting in one place several arguments (hopefully in a sufficiently coherent form) with the hope of receiving as many comments and suggestions as possible. The result is that it is a long paper and that some of the arguments (especially those in § III. ii) are not fully developed. **Although I would, of course, welcome comments on all parts of the argument, if time is short, I would suggest skipping pp. 5-13**. Thanks for reading my work. I look forward to the discussion!

> "How about saying there's room for a rhetorical left? But the question is: what rhetoric do you use? I think nothing is going to happen until you can get the masses to stop thinking of the bureaucrats as the enemy, and start thinking of the bosses as the enemy." -- Richard Rorty, 2002.[1]

Privatization is a pervasive phenomenon in many countries. In the USA, the private sector has long played a dominant role in discharging public responsibilities, including the delivery of education, welfare, healthcare, and other services.[2] But whereas until recently private actors had provided only particular services, today government increasingly grants them the responsibility of running entire welfare offices.[3] Further, in the last decade, privatization has progressively extended to functions, including defense and criminal justice, which were once (at least in the last century) considered exclusively governmental. For example, the federal and state inmate population housed in private prisons increased by 56% from 2000 to 2013.[4] Notably, privatization can be regarded as one essential component of a broader, evolving phenomenon of institutional transformation,

[1] Richard Rorty, Derek Nystrom and Kent Puckett, *Against Bosses, Against Oligarchies: A Conversation with Richard Rorty* (Prickly Paradigm Press, 2002), p. 33.
[2] As Peter Frumkin explains "the nonprofit sector had become by the late 1970s the principal vehicle for the delivery of government financed human services." Peter Frumkin, "After Partnership: Rethinking Public-Nonprofit Relations." In *Who Will Provide? The Changing Role of Religion in American Social Welfare*, M. J. Bane, B. Coffin and R. Thiemann, eds., (Boulder, Westview Press, 2000): 198-218.
[3] Gillian E. Metzger, "Privatization as Delegation," *Columbia Law Review*, 103, 6 (2003): 1367-1502.
[4] Lauren Galik and Leonard Gilroy, *Annual Privatization Report 2015: Criminal Justice and Corrections*, Reason Foundation (May 2015).

including, on the one hand, the progressive hollowing out of the modern state and its hierarchical bureaucratic structure, and, on the other hand, the consolidation of heterarchical forms of governance. Some go so as far as to claim that we live in "an era of privatization," privatization being a defining feature of governance and sovereignty in our times.[5]

Many express discomfort with the current scale of privatization. But what exactly, if anything, is morally objectionable with such phenomenon is subject to disagreement. Perhaps many of our anxieties about privatization would dissipate if we were presented with clear empirical proof that privatization is the most effective means to achieve socially desirable outcomes such as, say, equality or crime deterrence. I will argue, however, that our discomfort with privatization should not be grounded on merely *instrumental* reasons. Even if privatization could facilitate the achievement of socially desirable goals, there would still be non-instrumental reasons to object to it. Yet, existing *non-instrumental* arguments recently proposed by political philosophers against privatization also fail, as I will show, to explain what is ultimately objectionable with this phenomenon. What is ultimately wrong with privatization, I shall argue, is not primarily that it corrupts the nature of some particular goods or public purposes,[6] or that it makes the provision of certain, intrinsically-public goods impossible.[7] Nor is it the fact that privatization necessarily embodies an objectionable form of neoliberal rationality,[8] or that private actors tend to be motivated by morally objectionable

[5] Symposium "Public Values in an Era of Privatization," *Harvard Law Review*, 116 (2003): 1211.
[6] Michael Walzer, *Spheres of Justice* (Basic Books, 1983); Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Farrar, Straus and Giroux, 2012); Debra Satz, "Markets, Privatization, and Corruption," *Social Research*, 80 (2013.): 993–1008.
[7] Avihay Dorfman and Alon Harel, "The Case against Privatization," *Philosophy* and *Public Affairs*, 41 (2013).
[8] Wendy Brown, *Undoing the Demos* (Mitt Press, 2016).

considerations[9] or unaccountable in the sense of lacking transparency or being irresponsive to the political community for their actions.[10]

The intrinsic wrong of privatization, I will suggest, rather consists in the creation of an institutional arrangement that, by its very constitution, denies those who are subject to it equal freedom. I understand freedom as an interpersonal relationship of reciprocal independence. To be free is not to be subordinated to another person's *unilateral* will. By building on an analytical reconstruction of Kant's *Doctrine of Right*, I will argue that current forms of privatization reproduce (to a different degree) within a civil condition the very same defects that Kant attributes to the state of nature, or to a pre-civil condition, thereby making a rightful condition of reciprocal independence impossible. Importantly, this is so *even if* private actors are publicly authorized through contract and subject to regulations, and *even if* they are committed to reason in accordance with the public good.

The reason for this, as I will explain, derives from the fact that private agents are constitutionally incapable of acting *omnilaterally*, even if their actions are omnilaterally authorized by government through some delegation mechanism, e.g. a voluntary contract. Omnilateralness, I will suggest, must be understood as a function of 1) *rightful judgment* and 2) *unity*. By rightful judgment I mean the capacity to reason publicly and to make universal rules that are valid for everyone, according to a juridical ideal of right, as necessary to solve the problem of the unilateral imposition of private wills on others. By unity I mean the capacity to make rules and decisions that change the normative situation of others, as a part of a unified system of decision-making. The condition of unity is crucial, as I shall later explain, insofar as there might be multiple interpretations compatible with rightful judgment, which would still problematically leave the definition of people's rightful

[9] James Pattison, "Deeper Objections to the Privatisation of Military Force," *Journal of Political Philosophy*, 18, 4 (2010):425-447.

[10] By accountability I mean the failure of political institutions to hold private actors accountable for their actions or to subject them to appropriate scrutiny. See Martha Minow, "Public and Private Partnerships: Accounting for the New Religion," *Harvard Law Rev*iew, 116 (2003): 1229.

entitlements indeterminate. Further, the practical realization of the juridical idea of an omnilateral will, I will contend, requires embeddedness within a *shared* collective practice of decision-making. In practice, rightful judgment can only obtain when certain shared background frameworks that structure practical reasoning and confer unity to that reasoning are in place. The rules of public administration and the authority structure of bureaucracy should be understood as playing this essential function of giving empirical and practical reality to the omnilateral will, as far as the execution of rules and the concrete definition of entitlements are concerned. Together, these two requirements are necessary, (whether they are also sufficient is a different question), to make an action the omnilateral action of a state, which has the moral power to change the normative situation of citizens, by fixing the content of their rights and duties in accordance with the equal freedom of all. The phenomenon of privatization thus raises the fundamental questions of why we need political institutions to begin with, and what makes an action an action *of* the state.

Insofar as private agents make decisions that fundamentally alter the normative situation (the rights and duties) of citizens, and insofar as, *by definition*, private agents are not public officials embedded in that shared collective practice, their decisions, even if well intentioned and authorized through contract, cannot count as omnilateral acts of the state. They rather and necessarily remain unilateral acts of men. Hence, I will conclude, for the very same reasons that we have, following Kant, a duty to exit the state of nature so as to solve the twofold problems of the unilateral imposition of will on others and the indeterminacy of rights, we also have a duty to limit privatization and to support, on normative grounds, a case for the re-bureaucratization of certain functions. Therefore, my paper provides foundational reasons to agree with Richard Rorty's nonfoundational defense of bureaucracy as stated in the opening epigraph, since only agents who are appropriately embedded within a bureaucratic structure, properly understood, are, in many cases, capable of acting omnilaterally. The "bosses" I am here concerned with are not primarily those who

can unilaterally impose their will on us in their capacity as private employers, but rather any private actor who acts unilaterally while in the garb of the state.

This essay is structured as follows. In **Section I**, I assess and reject what I take to be the most powerful non-instrumental arguments against privatization. In **Section II**, through an interpretation of Kant, I explain in what sense the state, defined as an omnilateral system of rules, is a *constitutive* condition of freedom, rather than merely an instrument to promote it. In **Section III**, through an analytical reconstruction, based on a theory of collective action, of the conditions that make a system of rules an *omnilateral system of laws* rather than *an aggregation of unilateral acts of men*, I show that privatization constitutes a regression to the state of nature, understood as a normative condition of unfreedom. I then present some reflections on the broader implications of my argument, as it posits an expansive conception of the juridical order as an appropriate object of analysis for political philosophy.

Before moving to the next section, let me first clarify what I mean by privatization. In a general sense, privatization can be defined as the devolution of public responsibilities to private actors. This however entails a *baseline* against which the idea of public responsibilities must be specified. Here I defend a normative*,* rather than, as is commonly the case, a historical or economic baseline.[11] I will assume that in a just society government ought to bear, on grounds of justice, the primary responsibility to secure not only a fair distribution of general resources, including income and wealth, through tax and transfers, but also an adequate provision of particular in-kind goods, including police protection, defense, criminal justice, education and healthcare.[12] This does not per

[11] Economists define privatization against a baseline set by reference to the idea of market failure. For a philosophical defense of this baseline see Joseph Heath, "Three Normative Models of the Welfare State*," Public Reason*, 3 (2011): 13-44. I reject this baseline in Chapter I.

[12] This assumption needs more extensive justification than I can provide here. Not only libertarians but also 'general' egalitarians argue against the provision of in-kind goods on grounds of efficiency, freedom and anti-paternalism. See, e.g., Ronald Dworkin, *Sovereign Virtue* (Harvard University Press, 2000). For an excellent critique of general egalitarianism see Debra Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (Oxford University Press, 2010). I defend a version of specific egalitarianism in Chapter I.

se entail, however, that government should provide these goods *directly*. Government may fund the production of in-kind goods, while delegating their provision to private actors. I thus define privatization as the implementation of public, justice-based responsibilities *through* private agents.

I. VICIOUS MOTIVES, CORRUPTION AND PUBLIC GOODS

Privatization is most often objected to on instrumental grounds. Many argue that private actors' self-interest is likely to lead to worse social outcomes *compared* to what public actors could achieve, other things being equal. It is on such grounds that the US Justice department has recently expressed a commitment to end the use of private prisons, insofar as they "simply do not provide the same level of correctional services, programs, and resources" as public prisons.[13] Instrumental arguments also run throughout the history of political thought. Machiavelli powerfully expressed an instrumental concern about the privatization of defense: "Mercenary arms…are useless and dangerous; and if one holds his state based on these arms, it will stand neither firm nor safe; for they are disunited, ambitious and without discipline, unfaithful, vigorous before friends, coward before enemies."[14] A different but still (arguably) instrumental concern can be found in Rousseau: "[a]s soon as public service ceases to be the Citizens' principal business, and they prefer to serve with their purse rather than with their person, the State is already close to ruin. Is there a call to battle? they pay troops and stay home…Finally, by dint of laziness and money they have soldiers to enslave the fatherland."[15] In both views, what is wrong with privatization, it seems, is that it compromises the sociological and psychological conditions, i.e. loyalty and civic ethos, that are instrumentally

[13] U.S. Department of Justice, *Memorandum for the Acting Director Federal Bureau of Prisons*, August 2016.
[14] Niccoló Machiavelli, *The Prince*, trans. William Kenaz Marriott (E.P. Dutton & Co.: New York, 1958), Chapter XII [translation amended].
[15] *The Social Contract and Other Later Political Writings*, ed. and trans. Victor Gourevitch (Cambridge University Press, 1997), 3.15.1. See Joshua Cohen's discussion of this passage in his *Rousseau: a Free Community of Equals* (Oxford and New York: Oxford University Press, 2010).

necessary to sustain a legitimate political order, as opposed to being *inherently* incompatible with the legitimacy of this order itself.

Instrumental arguments can provide reasonable grounds to limit privatization. Yet, they are not robust. In possible alternative scenarios where, due to contingent, empirical factors, private actors turn out to be more effective at achieving the relevant goals, there is no reason left to limit privatization.[16] I will thus set aside instrumental, outcomes-centered considerations and concentrate on whether there can be anything wrong with privatization, *regardless of outcomes*.

Political philosophers have recently developed three powerful non-instrumental objections to privatization. The first locates its moral objectionability in the (wrongful) inner motivation of private actors. I shall call this *the motivational argument*. The second contends that privatization is wrong because it commodifies, thereby corrupting, the nature of the goods it privatizes. I shall call this *the corruption* argument. According to the third argument, privatization is inherently wrong because private actors necessarily fail to provide goods the nature of which is intrinsically public. I shall call this *the intrinsically-public goods argument*. In what follows, I argue that each of these arguments fails to provide a compelling diagnosis of the non-instrumental wrong of privatization. I will then provide an alternative account, which positions the question of the moral objectionability of privatization within the broader and more fundamental question of why we need political institutions in the first place, and which actions meet the conditions to qualify as 'public' actions.

A. The Motivational Argument

One reason for why the privatization of certain functions is thought to be wrong independently of outcomes is that it involves wrongful motives by private actors. The "motivational argument" has the following structure:

[16] Dorfman and Harel, "The Case against Privatization."

1. It is morally wrong to be motivated by certain considerations (Cs) when φing, where φing stands for an action that harms others.
2. Private actors are more likely to be motivated by Cs than public actors.
3. There are moral reasons not to delegate to private actors the responsibility to φ.

On these lines, James Pattison has recently argued that: (i) "it is [morally] problematic if individuals are motivated by financial gain *in the context of* military force, given that military force *harms* others." Since, empirically, (ii) "private contractors are more likely to be motivated by financial gains than regular soldiers," it follows that (iii) "we have reasons to object to individuals *being employed* in private military operations and, other things being equal, this means that we should prefer public to private force."[17]

Despite its deceptive plausibility, Premise (1) immediately presents some problems. Indeed, the claim that it is always morally problematic for individuals to be motivated by financial gains in the context of activities that harm others is false. To illustrate, if I open a restaurant that sells better food than yours, and because of this your business loses costumers and eventually fails, I harm you and, in doing so, I am very likely to be motivated by financial gains. But it is far from clear that I have done anything wrong. It is even less clear that the authority who gave me the license to open the restaurant did anything wrong. It could be argued, however, that the case of the mercenary is different because, unlike (ideal) market competition, a war (even if, *ex hypothesi*, just) is not voluntary for many of those who end up harmed (e.g. civilians and conscripted soldiers), and the kind of harm involved is much more severe. The harmful conduct of soldiers should thus be governed by deeper motivational strictures. Let us grant this point. Yet the mere fact that a private agent (A) is motivated by financial gains "in the context" of military force is not sufficient to prove that A does something wrong. One would need to further prove that A is motivated by financial considerations *when carrying*

[17] Pattison, "Deeper Objections," 433-35 (emphasis mine).

out particular activities that are harmful. To see why, consider the case of a school teacher. Whereas it would be (arguably) wrong for the teacher to be motivated by financial gains, rather than by a dedication to her students or an interest for the subject matter when teaching her classes, it might not be wrong for her to accept a teaching job because of financial gains. Indeed, it seems that, as long as the teacher *treats* her students with care and respect, and addresses the subject matter of her class with intellectual integrity, the teacher is doing nothing wrong, whatever her inner motives. What matters in our assessment are the teacher's *attitudes* and *dispositions* when teaching, not her motives for accepting a job as a teacher. Further, motives can mix; a motivation for financial gain does not corrupt all others. Similarly, even if mercenaries are motivated by financial gains in entering particular contracts with the government in the context of (just) military operations, as long as they maintain the right attitudes when using military force, they might not do anything wrong (assuming they abide by the rules of *jus in bello*).

But let us grant Premise (1) and assume that there is something morally wrong with engaging in military operations for financial gains, what kind of wrong, exactly, would that be? As Kant long ago observed, there is a categorical difference between ethical and rightful conduct:

> That lawgiving which makes an action a duty and also makes this duty the incentive is *ethical*. But that lawgiving which does not include the incentive of duty in the law and so admits an incentive other than the Idea of duty itself is *juridical*.[18]

Ethical conduct must be internally motivated by the appropriate maxim. This means that the reasons that justify a given precept must be the same reasons that move the agent to action. In this respect, the conduct of the mercenary who kills the enemy for financial incentives is *unethical*, even if she acts within the limits of *jus in bello*. This is because her motivating reasons are not the same as the reasons that justify (assuming there can be such reasons) killing the enemy. But conduct can be *rightful* even when unethical. As long as the mercenary

[18] Immanuel Kant, *The Metaphysics of Morals* (hereafter *MM*), trans. and ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), 20. (6: 219).

follows just rules, her conduct is rightful, even if the motivating reasons for why the mercenary follows just rules happen to be partly financial, rather than springing exclusively from an internal commitment to respecting the victims of her use of force.[19]

Note that to argue that an agent's inner motivation is irrelevant to determining whether her action is rightful is not to commit oneself to the view that a just society is reducible to *a modus vivendi*, where citizens are obliged to obey the law just because, and insofar as, there is a powerful, coercive authority able to threaten them with sanctions. In other words, an externalist account of political obligations need not presuppose a purely prudential account of the grounds of these obligations. To the contrary, one can argue that motivations should not determine the rightness of an action precisely because other people's valid claims against us bound us to act rightfully, regardless of our idiosyncratic inner motivations or dispositions, including our fear of sanctions. Whether I am a morally virtuous or selfish person, whether I am afraid of punishment or not, I can be rightfully compelled to act in accordance to principles of right, simply because you have a life to live and thus valid claims against me.

With a distinction between ethical and rightful action in mind, we should grant that the mercenary's conduct is unethical. We should also grant (without conceding) Premise (2) and assume that, as a matter of fact, private actors tend to be more unethical than public actors. Does the conclusion of the motivational argument follow from its premises? It seems to me that it does not. If we assume that the mercenaries are committed to act rightfully, why is it morally wrong for a liberal state to hire them? The mere fact that their inner motives to become mercenaries are quite possibly unethical seems to provide insufficient reason to condemn hiring them. This is so at least insofar as we agree, as many do, that it is not the business of a liberal state to enforce morals, as long as people are committed to acting within the bounds of just laws. After all, the state is neither a

[19] In a just society citizens must be committed to abide with just laws for the right kind of reasons. But this is compatible with having *more than one* motives to abide with just laws.

paternal nor a religious authority. Of course, a liberal state is justified in caring about the inner motives of those hired to serve its purposes because and insofar as these motives directly affect the just performance of public duties or their willingness to comply with just laws.[20] Beyond that, there is little reason for why a state, not committed to enforcing morals, should care about its agents' inner motives independently of the outcomes or risks, e.g. of corruption or unlawful action, those motives generate. Yet if just outcomes are the only reasons for why a state could decide to discriminate among its employees depending on their inner motives, then the motivational argument fails to provide intrinsic reasons against privatization and effectively collapses into an instrumental argument. So either the motivational argument provides an intrinsic, but implausible, objection against privatization or it may provide a plausible one but only at the cost of loosing its intrinsic character. I shall now turn to the corruption argument.

B. The Corruption Argument

One of the most widespread arguments against privatization is that it commodifies, thereby corrupting, the nature of the goods privatized. In contemporary debates, the origin of this argument may be found in Michael Walzer's pluralistic theory of justice, according to which the social meaning of a good triggers its appropriate distributive principle.[21] For example, health care, given its social meaning, should be distributed according to need rather than according to ability to pay, while friendship should be a non-monetized exchange, rather than a market exchange. Privatization, by changing the principle of distribution from one of need, desert or love to one of market exchange, is unjust simply because it fails to distribute goods according to the appropriate principles. By reducing such goods to fungible commodities, privatization also corrupts their social meaning.

[20] However these considerations are irrelevant if we assume, as Pattison does, that other things remain equal between public and private parties, in spite of their different motives.
[21] Walzer, *Spheres of Justice*.

I will not spend much time on Walzer's argument since it is widely discussed in the literature.[22] I will only highlight some problems with it, *as an argument against privatization*. First, the premise that the social meaning of a good generates clear distributive principles for that good – principles that are then violated by the process of privatization – is problematic. As Joseph Heath provocatively asks, "Why water services delivered to the home through pipes should not be privatized but it is fine to sell water bottles?"[23] The answer cannot refer to the social meaning of water, since water is the same in both cases. Therefore, an analysis of the social meaning of a good cannot per se provide an answer to what forms of privatization are objectionable. Further, even if we assume that goods have clear social meanings that generate clear distributive principles, it remains unclear to what extent privatization necessarily corrupts these meanings, and the ability of people to value those goods accordingly. In the same way many have resisted the Marxist appeal to false consciousness as both underestimating and potentially undermining the emancipatory and creative ability of the exploited to resist oppression by dominant groups, for similar reasons we should, I think, resist the simplistic assumption that people are unable to retain a capacity to value goods and persons appropriately, independently from the institutional mechanisms and forms through which goods are provided or exchanged, and the values those mechanisms express. It seems, for example, that people retained the ability to value life as a sacred, non-fungible good, even after market-based life insurance was introduced.[24]

But suppose that privatization does change the social meaning and valuation of goods (which seems plausible in the case of the systematic privatization of certain goods such as education). We should then ask: Why should we keep the social meaning of a good fixed and then assess the permissibility of privatization against it, rather than assessing the permissibility of current

[22] See, e.g., Joshua Cohen, "Review of Spheres of Justice," *Journal of Philosophy* (1986).
[23] Heath, "Three Normative Models."
[24] See Satz, "Markets, Privatization, and Corruption."

social meanings and modes of valuation, against the consequences of privatization for individuals' welfare or wellbeing or for society at large?[25]

To illustrate, many regard with repulsion the idea of a market for kidneys. Due to cultural norms, often infused with religious values, they object to the buying and selling of body parts, citing the immoral desire to profit from what is sacred, incommensurable or irreducibly personal. But if the death of more than 4,000 people per year in the USA could be avoided by allowing a well-regulated market in organs, without great health risk to the donors, then it seems plausibly worse, morally speaking, to object to the commodification of kidneys simply for the sake of protecting existing social meanings, or restoring lost ones. If this is correct, then, one should be committed to support a weaker version of the corruption argument according to which we have reasons to resist the privatization of certain functions, and the change in social meanings this would (arguably) consist of, *unless this change would lead to better outcomes*. Yet if this is the case, the commodification argument would *de facto* collapse into a consequentialist and instrumental argument against privatization.[26]

C. The Intrinsically-public Goods Argument

Avihay Dorfman and Alon Harel have, in my view, developed the most powerful, non-instrumental argument against privatization.[27] The premise of their argument is that some goods are inherently public. These are goods that, by their very nature, can only be publicly provided. Privatization renders the provision of these goods simply impossible. Punishment is, for Dorfman and Harel, the paradigmatic example of such goods. Unlike other goals of a criminal justice system,

[25] See Jason Brennan and Peter M. Jaworski, "Markets without Symbolic Limits," *Ethics* 125, 4 (2015): 1055-1073.
[26] A further problem with the social meaning argument is that it covers very limited instances of privatization, since the latter need not involve the direct buying and selling of goods in the market.
[27] Dorfman and Harel, "The Case Against Privatization." See also Avihay Dorfman & Alon Harel, "Against Privatization as Such," *Oxford Journal of Legal Studies*, 2016; Alon Harel, *Why Law Matters*, (Oxford University Press, 2014).

which include deterrence, rehabilitation and retribution, punishment consists in the public condemnation for the public wrongs done.[28] On the basis of this *communicative* conception of punishment, Harel and Dorfman argue that, "public condemnation is possible in the first place only if it emanates from the appropriate agent."[29] This agent must be able to speak *in the name of* the political community on whose behalf the condemnation is conveyed. The only appropriate agent capable of performing this communicative act is the state, for only the state is authorized to speak in the name of the political community. Punishment performed by a private actor is not punishment. It is violence.[30]

But why does a private agent – e.g. a private prison – necessarily lack the standing to speak in our name? After all, government authorizes, through contract, private prisons to execute certain functions. Harel and Dorfman answer this question by distinguishing between actions *for* the state and actions *of* the state.[31] Privatization necessarily delegates to private agents the discretion to decide how to perform certain actions and what actions, exactly, to perform. Private actors can try to execute the commands of the legislator or judge impartially, by performing their functions in a way that is in line with the public interest. Harel and Dorfman call this mode of reasoning *fidelity by reason*.[32] The problem with fidelity by reason, however, is that the private parties' judgments necessarily proceed from their own point of view because "even an attempt to decide on these matters impartially implies a value judgment (by the assistant) concerning what impartiality requires."[33] The private agent, therefore, necessarily fails to reason from the sovereign's point of view, which is the public point of view. Therefore, private agents' actions, even if they proceed from fidelity by reason, cannot count as actions *of* the state. They are at most actions *for* the state.

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[28] Dorfman and Harel, "The Case Against Privatization," 94.
[29] Ibid., 93.
[30] Ibid.
[31] Ibid., 70.
[32] Ibid., 74.
[33] Ibid., 75.

If private agents were able to completely defer to the sovereign's judgment in determining, to the last detail, how to perform certain actions, then their actions would count as action *of* the state, rather than for it. This is what Harel and Dorfman call *fidelity by deference*.[34] However, as they rightly point out privatization necessarily entails that private agents adopt a fidelity by reason model, not a deferential one. This is because even if private actors were willing to adopt fidelity by deference, they could not do so in isolation. Their decisions would need to be integrated into a community of practice that brings together, through specific procedures, the political and the bureaucratic.[35] Only in this way could their decisions be regarded as made from the point of view of the public. But this would entail transforming private actors into public officials.

Harel and Dorfman conclude that, since private actors cannot speak *in the name of* the state, when they perform inherently public functions like punishment, they are doomed to fail.[36] When a private agent executes the incarceration of a convicted criminal, this act violates the criminal's *dignity*.[37] This is because, by so acting, the private agent arrogates for himself the privilege of subjecting another private party to her own private judgment of condemnation.

While I share many of Harel and Dorfman's concerns, I believe that ultimately their argument fails to explain *why* privatization is wrong. For one thing, the argument is grounded on a very specific (and contested) interpretation of the *essence* of certain goods as inherently public, e.g. the view that punishment primarily consists in the public communication of public wrongs. This means that the argument is unable to persuade those who do not share this particular understanding. After all why should we understand a communicative act as the essence of punishment, as opposed to other possible criteria?[38] Further, the argument is able to condemn only a very limited category of

[34] Ibid., 73.
[35] Ibid., 88-89.
[36] Ibid., 80.
[37] Ibid., 95-96.
[38] John Gardiner makes a similar point in "The Evil of Privatization" (unpublished).

cases of privatization. As the authors concede, "Our noninstrumental case against privatization…need not apply to…some controversial cases such as education and health," because these are not inherently public goods.[39] After all, it seems that healthcare is healthcare, whether it is privately or publicly provided.

But let us grant the definition of punishment as an inherently public good and limit our attention to it. Still, it remains unclear whether their argument can block a case for privatization. This is so for two reasons. First, in order for A to *communicate* a message *in the name of* B it is not necessary that A's actions be *attributable* to B, as actions *of* B. To illustrate, if I hire someone to write the content of my webpage and grant her full discretion in the choice of words and sentences to communicate my research interests, we would say that the resulting content of the webpage and the messages it contains are communicated *in my name*, even if they are not *stricto sensu my* messages. Similarly, private actors may be able to communicate condemnation *in the name* of the state, even if their actions are not actions *of* the state.

But let us grant that only public actors can perform the communicative act of punishment. Now imagine a case in which private entities are much more efficient in performing all the instrumental goals of punishment (e.g. rehabilitation, deterrence, retribution, etc.) except for the communicative one, and to do so humanely. Why would not privatization be, all things considered, justified? Why should the communicative function trump all other ones? Harel and Dorfman would respond that the privatization of punishment violates dignity, by "subjecting the inmate to the private warden's judgments concerning how to proceed with expressive condemnation."[40] They could then argue that dignity-related concerns are morally prior and ought to trump instrumental concerns. But why should the mere fact that the warden's judgment is private violate the inmate's dignity?

[39] Dorfman and Harel, "The Case Against Privatization," 69.
[40] Ibid.

Consider a parallel case in which the public communication of *praise* for valuable achievements, rather than the public communication of condemnation for crimes, is at stake. Think, for example, of the practice of honoring war veterans with medals for their outstanding public service. Imagine that government selects the recipients but delegates to a private actor, say, a Hollywood star, the communicative task of conferring the medals to veterans on behalf of the political community. Assume that the private actor's judgment about how, exactly, to confer the medals remains private and that, because of this, the private actor is incapable of communicating praise in the name of the political community. Still it would be odd to say that the imposition of the private actor's judgment on the recipients violates their dignity. Indeed, it is unclear whether there would be anything wrong with this kind of privatization at all. But if this is correct, what explains our unease in the case of punishment cannot simply be the fact that delegating certain functions to a private agent makes the delivery of certain inherently public goods impossible, because that is true of both the case of punishing and the one of medal awarding. Or, in any case, it cannot be the imposition of a private judgment on others *in delivering an inherently public good* that violates dignity, and thus provides a reason against privatization, which trumps instrumental considerations. What violates dignity in the case of conferring punishment, as opposed to the case of conferring honors, is that -- even if they are both inherently public goods -- punishment, and only punishment, entails a restriction of individual's freedom or the curtailment of his rights. No one is entitled to being awarded a medal in a particular way. But if my reasoning is correct, what ultimately supports the case against the privatization of punishment, unlike perhaps against the privatization of honor-conferring practices, is not that the imposition of someone's private judgment on others as such is wrong but rather that the imposition of private judgments on others *in a way that restricts their freedom or compromise their rightful entitlements* is wrong. An account of the wrong of privatization should be able to make sense of this difference. I shall now propose an alternative diagnosis, which hopefully will overcome

all the shortcomings of the accounts I have assessed so far.

II. THE KANTIAN STATE AND THE PROBLEM OF UNILATERALISM

My guiding intuition is that an account of what is intrinsically wrong with privatization, if anything, must ultimately derive from an account of *what political institutions are for*, rather than from an account of the nature of particular goods. This does not mean, as I will later explain, that the kind of goods at stake are irrelevant. But they are only derivatively relevant. At stake in the phenomenon of privatization are foundational questions about the justification of political institutions, their role, and the constitutive features that make an action a "public" one.

If one believes that we need political institutions simply because they are the most effective administrative devises to achieve certain desirable social outcomes that can be defined independently and prior to those institutions, then, it would seem natural to argue that the desirability of privatization should itself depend on purely instrumental considerations.[41] However, I believe there are good reasons to reject a purely instrumentalist view of political institutions. The philosopher who has perhaps most forcefully spelled out such reasons is Immanuel Kant, especially in his *Metaphysics of Morals*. In what follows I will explain how Kant sees the state not as an instrument needed to achieve valuable outcomes but rather as a *constitutive element of* a relationship of freedom between subjects, which, for Kant, lays at the foundation of political legitimacy.[42] I will then explain how this view helps us locate what is ultimately wrong with current phenomena of privatization, before turning, in a later section, to how phenomena of privatization might direct political theorists to the "street-level" juridical-administrative dimension of the state – a dimension rarely considered by theorists. Before turning to Kant, a methodological clarification is in order. My ultimate aim is

[41] For a purely instrumentalist account of political institutions see Robert Goodin, "What is So Special about Our Fellow Countrymen?" *Ethics*, 98, 4 (1988).

[42] My reading of Kant is greatly indebted to Arthur Ripstein's magisterial reconstruction of Kant's political philosophy in his *Force and Freedom*: *Kant's Legal and Political Philosophy* (Harvard University Press, 2009). (Hereafter *FF*).

not interpretative but normative. My purpose is not to provide the most faithful interpretation of Kant's complex text but rather to reconstruct out of it a sound normative argument that can be tested and assessed on its own terms.

As it is well known, according to Kant freedom requires the creation of a single, unified juridical order. This is not because freedom consists of a set of pre-institutional rights, already in place in the state of nature, that a state should help enforce and protect, but rather because freedom itself consists in a reciprocal relation between subjects that can only be constituted through properly designed political institutions. The connection between freedom and the state is, for Kant, not merely empirical but rather *analytical*. Freedom *is* an institutionally constituted relationship of reciprocal independence among subjects. But why, exactly, does freedom need the state?

For Kant, "Freedom…is the only original right belonging to every man by virtue of his humanity."[43] To be free is not to be subordinated to another person's choice. A person is independent if she is able to pursue her own ends, without someone else deciding what ends she will pursue. But independence cannot exist in isolation. It requires specific forms of interdependence. Freedom is not (as for consequentialists) a state of affairs that ought to be promoted, but rather a set of reciprocal, deontological limits on the actions of persons that guarantee each person's independence from other people's choices. Freedom is a *relation* between subjects.

But if freedom is an original, pre-institutional right, how is it possible that there cannot be freedom without a state? It would be tempting to answer by appealing to the many empirical limits or "inconveniences" of a pre-institutional condition, e.g.. individual self-interest, limited knowledge and lack of assurance, and argue that only a state is capable of helping subjects overcome these limits. As is well known, that is the answer that Hobbes and Locke, each in their own way, provide. But for Kant, in the absence of a state there could be no freedom "however well disposed and law-

[43] Kant, *MM*, 30. (6:237).

abiding men might be."[44] The state's *raison d'être* cannot therefore be limited to its capacity to overcome human limitations, or to provide assurances against self-interested behavior.

The answer rather lies in the connection between freedom as independence and acquired rights. The ability to establish purposes for oneself and pursue them, Kant argues, requires rights. At minimum, it requires that a person be able to acquire usable means, according to her own purposes, within the limits imposed on her by the entitlements of others to do the same.[45] Usable means include not only physical objects but also other people's performance of an act, as well as other people's status in relation to oneself.[46]

In the state of nature, Kant argues, there can only be *provisional* rights to usable means, not conclusive ones.[47] As he puts it, "it is possible to have something external as one's own only in a rightful condition, under an authority giving laws publicly."[48] The reason for this rests on what we might call *the problem of unilateralism*.

One aspect of this problem emerges from the obvious fact that acquiring rights over external objects necessarily entails imposing new obligations on others (i.e. to refrain from using those objects), thereby changing their normative situation. Now, for Locke these obligations are justified, as long as, when acquiring property, we respect the proviso that we leave "enough and as good" for others. But for Kant, and rightly in my view, the mere fact that the obligations I impose over you are not too demanding (because you have sufficient property left for your ends) does not mean that they are justified.[49] For if a person, through her own unilateral judgment, could place me under new obligations I did not previously have, just because they are not demanding, this would effectively subject me to her will. It would be incompatible with my "original right" to freedom. Since all

[44]*MM*, 89 (6:312). Ripstein translates "rechtliebend" as "right-loving" rather than "law-abiding." *FF*, 3. Anna Stilz also stresses this point in her *Liberal Loyalty: Freedom, Obligation, and the State* (Princeton University Press, 2009).
[45]*MM*, 41(6: 251).
[46]Ibid., 48 (6:259).
[47] Ibid., 52 (6: 264).
[48] Ibid., 44, (6: 255)
[49] Ripstein, *FF*, 150.

persons are moral equals, no private person has any more right than another to change the normative situation – the entitlements and obligations – of others. *Someone's unilateral will cannot be a binding law for anyone else.*[50]

So we reach a dilemma: while your innate right to freedom gives you provisional rights to exclude me from your acquired possession of usable means and to prevent me from interfering with it (because it is only by having these rights that you can form and pursue your ends), at the same time you cannot, through your own unilateral action, change my normative situation by imposing on me a binding obligation to respect those rights that I previously had not.

The solution of this dilemma rests in an omnilateral system of rules. It is only when your act of appropriation is authorized by a public, omnilateral will -- exercised on behalf of all of us, including myself -- that I can regard myself as bound by it.[51] A unilateral act of yours (of which the act of acquisition is just one example) can only change the normative situation of others -- their entitlements and obligations -- if every one of them has ominilaterally authorized that act, that is, if the act is a "unilateral exercise of an omnilateral power."[52] An omnilateral power is a power exercised *in everyone's name.* It follows that without an omnilateral, public systems of rules people lack conclusive rights to use the "all-purpose means" necessary to act as purposive agents, that is, as independent persons. These rights, and thus freedom itself, can only exist in a state.

It is important to note that even if Kant's notion of omnilateralness clearly recalls Rousseau's idea of the general will, these ideas are fundamentally different. The Kantian idea of omnilateralness is an *a priori* idea, not an empirical one. [53] If for Rousseau the general will arguably consists in the real (hypothetical) convergence of individual wills under appropriate conditions, for Kant

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[50] *MM,* 51 (6:263).
[51] Ibid.
[52] Repstein, *FF*, 157.
[53] For an excellent discussion of the non-empirical nature of the omnilateral will see Katrin Flikschuh, "Elusive Unity: The General Will in Hobbes and Kant," *Hobbesian Studies,* 25, 1 (2012):21-42.

omnilateralness is a ideal *criterion of rightful judgment* – the capacity to make universal laws that take the rightful claims of all equally into account. This opens up, of course, the difficult question of how to confer practical and institutional reality to this idea – I will return to this problem later.

Now, the fact that any entitlement to impose new obligations on others must be authorized omnilaterally opens up a further problem in a pre-political condition – the second aspect of the problem of unilateralism. Rights, by conceptual definition, impose reciprocal constraints on freedom and must thus apply equally to all. But rights are indeterminate and their definition necessitates judgment. A general principle – equal freedom – is too general to determine the contours of specific rights. Indeed, multiple schemes of rights could be compatible with that principle. But, as Kant puts it, "the doctrine of right wants to be sure that what belongs to each has been determined (with mathematical exactitude)."[54] For if you and I have different understandings of what our respective rights entail, and cannot find agreement, neither of us can have a right, consistent with the freedom of others, no matter how reasonable our respective understandings are. After all, if, say, my right to property was subjectively determined according to my own understanding of the boundaries of this requirement, your obligations not to interfere with it would entirely depend on my unilateral will. Even if I act in good faith, your ability to pursue your own purposes would still be dependent on my own unilateral choice.[55] Since, again, my judgment and your judgment are equally weighty (for we are moral equals), in case of disagreement neither of us is required to follow the other person's judgment. This means, effectively, that I would have a provisional right to coerce you into respecting my own rights (as subjectively determined through my own unilateral judgment), without however you having any obligation to respect those rights. This system fails to secure freedom as independence, for it systematically makes people subject to the unilateral interpretations of others. To overcome this situation, the boundaries of rights need to be determined not only omnilaterally,

[54] *MM*, 26 (6:233).
[55] For an extensive discussion of the connection between indeterminancy and unfreedom see Stilz, *Liberal Loyalty*.

in the sense of (i) through rightful judgment, but also omnilaterally, in the sense of (ii) through a unified body, an arbiter, that is publicly authorized to determine these boundaries with "mathematical exactitude," by providing a unified interpretation of the boundaries of entitlements and obligations, in the name of everyone.

Regarded from a Kantian perspective, therefore, the state of nature is neither an historical condition nor a thought experiment aimed at clarifying under what conditions it would be rational for the parties to delegate their rights to a common political authority. It is rather a normative condition defined, *analytically*, by the twofold problem of unilateralism, in both its aspects as (i) the impossibility of changing the normative situation of others through unilateral judgment and (ii) the indeterminacy of rights. Given the presence of these problems, the state of nature is necessarily a condition of unfreedom. As such, the state of nature represents a continuous threat, a possibility of regression, for any civil condition that does not depend on the presence of actual conflict in society, and that cannot be prevented by simply inculcating an egalitarian ethos into the citizenry at large. An appropriately constituted state, understood as a unified and omnilateral system of rules is necessary to both exit this condition and prevent its possible recurrence, by constituting as well as maintaining a relationship of equal freedom among subjects. This is because only the state can overcome the problem of unilateralism by establishing through omnilateral judgment and in a unified way the very boundaries of our rights and imposing correlative obligations on all of us. We have thus a duty to exit the state of nature and submit ourselves to a state, because, paradoxically, that is the only possible way to secure our freedom. This is Kant's reinterpretation of Rousseau's (in)famous idea that the state may "force" individuals to be free.

In what follows I wish to demonstrate that privatization, as currently experienced in many liberal-democratic states, is a regression to a condition of unilateralism. Privatization reproduces (at least to some degree), within a civil condition, the very same defects of the state of nature, thereby

making a condition of reciprocal independence impossible. This is so "however well disposed" private actors might be.

To succeed, my argument must demonstrate that (1) under privatized systems, private actors unavoidably make decisions that do not simply affect others by, say, diminishing their options for choices but rather change their normative situation in relevant respects; (2) even if private actors are omnilaterally authorized through government contracts to make these decisions and are kept subject to appropriate oversight, their decisions fail to qualify as "omnilateral" in the relevant sense, therefore, (3) privatization *unavoidably* subjects citizens' moral powers to form and pursue their ends to the unilateral choice of private actors, thereby relegating them to a condition of dependence and unfreedom, which is structurally similar to the one of Kant's state of nature. It follows that (4) the same reasons for why we have a duty to exit the state of nature -- to secure freedom as independence -- are also reasons to limit privatization and to support a re-bureaucratization of public functions, properly conceived.

III. PRIVATIZATION AS UNFREEDOM

Our reconstruction of Kant's argument in the *Doctrine of Right* provides a clear and, in my view, compelling explanation for why, in order to be consistent with freedom, acts or decisions that change the normative situation of others must be omnilateral, in the twofold sense explained above. To assess the extent to which private actors' decisions pose a threat to freedom, it is thus important to be clear about (a) what it means for a decision to change the normative situation of others and (b) what it takes, in practice, for a decision to be omnilateral in a way that renders it compatible with freedom. In the following sub-section I take up the first question, and assess how private actors' decisions fare in this respect.

i. How private actors change the normative situation of citizens

The fact that my decision harms you -- i.e. it sets back some of your interests -- or restricts your options does not mean that it changes your normative situation. Again, if I decide to open a shop next to yours and, due to the better quality of my products, you go out of business, we can say that my decision both restricts your options and harms you.[56] Yet, it does not change your normative situation insofar as it neither establishes your entitlements nor imposes upon you new obligations. Further, even decisions that do impose obligations on others cannot all be regarded as changing their normative situation in a relevant sense[57] For example, my giving you a gift imposes on others obligations, e.g. not to use the object of the gift without your consent, that they did not previously have in that exact form. But my decision to give you a gift already presupposes my right to the object of the gift and thus the correlative obligations of others, given the existence of that right. This decision, we may say, transfers certain entitlements from me to you thereby changing the addressee of other people's obligations, but it does not establish new normative requirements (entitlements or duties) from scratch. Unlike my decision to give you a gift, my decision to acquire property in the state of nature changes your normative situation in a relevant sense for it is meant to create a new entitlement, which thereby imposes on others new obligations. It is meant to transform an object from something others could freely use to something I have the exclusive entitlement to use. It is because of this that my decision to appropriate can only be compatible with your freedom if it is authorized in everyone's name, including your own, while my decision to grant to you as a gift what I already own need not be omnilaterally authorized in order to be compatible with freedom.

With this distinction in mind, we can ask whether and when, in current cases of privatization, private actors make authoritative decisions that change the normative situation of

[56] Ripstein, *FF,* 152.
[57] Ibid.

citizens in the relevant sense. As cases of privatization are often described or justified, this would not seem to be the case. Formally, while private actors are delegated the responsibility to implement or execute state programs (e.g. welfare programs) or functions (e.g. the delivery of healthcare services or the administration of prisons), the lawmaking power to decide and adjudicate what people are entitled to as a matter of right remains in the hands of elected officials or the courts. It follows that while private actors can certainly harm citizens or restrict their options, their decisions are not *entitlements-setting* and do not therefore change the normative situations of others.

Things are, however, more complicated. As legal scholars have shown "delegations of discretion [to private actors] are unavoidable because the power to implement and apply rules is inseparable from the power to set policy."[58] Further, the transfer of discretionary decision-making power to private agents very often cannot be solved through mere monitoring and regulatory oversight. As Gillian Merger puts it, "Close government oversight or specification of policies and procedures can limit the extent of discretionary authority delegated to private actors, but cannot eliminate it."[59] But is this authority of the kind that changes the normative situation of others?

A concrete example might help answer this question. Consider the question of who determines the public entitlements to healthcare (an "all-purpose means") of American citizens. Under the US healthcare system, recipients of publicly *funded* health care services typically enroll in some form of private "managed care organization" (MCO). The government then generally pays to the MCO a set amount for its services.[60] The MCO must often make decisions about what treatments to cover, since, given resource scarcity, it is impossible to cover all requests for treatment. However detailed the directives specified in the contract, the organization may remain with a significant degree of discretion about how to both (a) interpret the meaning of these directives and

[58] Metzger, "Privatization as Delegation," 1395.
[59] Ibid.
[60] For an overview of the role of private actors in healthcare delivery see Jody Freeman, "Extending Public Law Norms Through Privatization," *Harvard Law Review* 116 (2003), 1285-1300.

(b) how to balance competing claims fairly. Even if the organization is motivationally committed to act both fairly and reasonably, both fairness and reasonableness -- and the public reasons these values support -- may be in and of themselves indeterminate. This means that there can be multiple, equally fair and equally reasonable decisions and that the organization must necessarily pick one of them. This indeterminacy, I am asserting, is an inescapable consequence of the fact that general principles of distributive justice are too indeterminate to establish determinate directives for private agents charged with making particular allocative decisions.[61]

To illustrate the indeterminacy of rightful judgment in this case, consider the case of two patients, A and B, who claim access to different kinds of treatments, T1 and T2. Both patients advance reasonable claims and are *prima facie* owed the treatment, but because of the cost only one treatment can be covered. The private organization must decide how to balance their claims. Now government could try to reduce to a minimum the organizational discretion by providing strict ethical guidance. First, it could require the MCO to either adopt a prioritarian principle according to which priority ought to be given to those who are worst off in absolute terms. In this case, however, the MCO would still unavoidably retain discretion in establishing whether A's needs count as more urgent than B's or vice versa. More importantly, providing the MCO with this guidance would seem unreasonable. For it would seem that even if A's need is more urgent than B's, given the particulars of the situation, still if treating B would result in a much higher net health benefit, then B's claim should be given priority. Alternatively, government could require the MCO to adopt a maximizing principle and to prioritize the treatment with the highest chance of producing the greatest health net benefit per dollar spent. In which case the MCO would however have to establish what counts as the greatest net benefit. But, like in the previous case, this guideline would provide

[61] Norman Daniels extensively discusses the normative relevance of indeterminacy in MCO's coverage decisions in "Limits to Health Care: Fair Procedures, Democratic Deliberation, and the Legitimacy Problem for Insurers," *Philosophy and Public Affairs* 4 (1997): 303-350.

unclear, if not unreasonable directives in some cases – e.g. in a case where A's claim is much more urgent and B would only benefit marginally more from the treatment. Government would then have to provide guidelines that specify, exactly, how much net health benefit, exactly, the MCO would have to be willing to sacrifice in order to give priority to worse-off patients. Providing this kind of specification in a way that leaves no discretion to the MCO is simply impossible. The result is that, in the absence of such specification, it will be up to the MCO to *determine whether A or B should be entitled to be treated as a matter of public right*. This, note, is not a decision that simply executes already-determined entitlements. It rather determines the existence of certain entitlements -- precisely in the same way in which for Kant the state does not simply implement pre-institutional entitlements, but rather establishes them to begin with. By de facto establishing what is mine and what is yours when it comes to justice-required, healthcare resources, the MCO changes the normative situation of citizens in a relevant sense. It provides them with entitlements that they previously had only *prima facie* (there is a sense in which both A and B are *prima facie* entitled to be treated but, all things considered, only A turns out to be *de jure* entitled to the treatment). The MCO, simultaneously, determines that A's fellow citizens are under an obligation to pay for A's treatment but not for B's. In sum, due to the unavoidably indeterminate nature of entitlements -- an indeterminacy that remains even *after* a system of general rules is in place -- what people are entitled to is often fixed by the discretional judgment of those administrators who apply general principles to particular cases at the "street level.". Within a privatized system, these tend to be private actors.

But is it not the case that so long as the state judiciary retains the final authority to adjudicate disputes in accordance with the law that the decisions of private actors do not settle, in the end, anyone's entitlement? For one thing, as it stands today, citizens do not always have private rights of action against private providers, and these providers are not bound by constitutional requirements of

due process that apply to state actors.[62] More importantly, even when citizens have a right to sue a private organization for violating a state-provider agreement -- the standards specified in the privatization contract -- our discussion has shown that it is precisely these standards that are necessarily undetermined, in a way that leaves the private actor with lawful (because implied in the state-provider agreement itself) discretion to interpret them in certain ways, by choosing among alternative reasonable interpretations which cannot be fully specified *ex ante*. It follows that, if there are multiple reasonable ways in which A's and B's heath care entitlements could be assigned (who should get what treatment), the fact that an organization authorized to define those entitlements selects one of the available competing interpretations should provide us with a reason to accept that interpretation as final. We would then have no reason to sue the organization in the first place. In order to prove that this is not in fact the case one needs to further show that either (1) the organization in question is not in fact *authorized* to make that interpretation (this, however, cannot be the case at least insofar as the organization is omnilaterally authorized through contract to exercise some discretion) or that (2), even if authorized through contract, whatever interpretation the organization makes necessarily remains unilateral. In this case, were we forced to accept this entitlements-setting decision we would be subjected to the unilateral will of another. In what follows I will argue for option (2), by demonstrating that the fact that a private organization is authorized by government, through contract, to make certain decisions is not sufficient to provide us with reasons to accept those decisions as omnilateral acts of law.

ii. Privatization and the problem of unilateral choice

Can we decide omnilaterally in isolation? Every individual decision, it appears, is necessarily

[62]In *Blum v. Yeretsky*, the US Supreme Court concluded that "privately made decisions which affect individuals' eligibility for government benefits"[62] do not qualify as state action and cannot therefore be subject to judicial review. *Blum v. Yaretsky*, 457 U.S. 991, 102 (1982)

unilateral. Even if I do my best to set aside my private purposes and I reason publicly in my decision, I unavoidably decide according to *my* own interpretation of the public interest or the nature of the public good. It follows that, if the decisions made in the name of the state were simply reducible to the aggregation of decisions made by particular individuals *qua* individuals, these decisions would necessarily remain unilateral.[63] This is why we must distinguish between, on the one hand, publicly constituted *offices*, and, on the other hand, the *individuals* occupying them who might have their own private purposes.[64] We can regard the decisions of an office as omnilateral, and consistent with the right of everyone, only because even if concrete individuals do the ruling, it is the law -- publicly authorized mandates exercised through state offices – that rules, not the unilateral wills of single individuals who might occupy those offices. As Scott Shapiro puts it, "*Impersonal* authority relations allow for the possibility of offices because the normative relations are not tied to any particular holder of offices, but rather to the offices themselves."[65]

So the crucial question becomes: what does it take for laws rather than for individuals to rule, given the fact that necessarily individuals are the ones doing the ruling? It could be argued that so long as the discretion exercised by private agents is authorized through voluntary contracts then discretion is exercised within the boundaries of "a mandate" and on behalf of everyone, for citizens can be regarded as having consented to its delegation.

This is a powerful argument. Indeed, so powerful that those few who have attempted to reject it came across as rather unconvincing. Dorfman and Harel, for example, argue that even if private actors are authorized through contract by the government, as well as committed to reason publicly, they cannot nevertheless act "in the name of" the state, because only acts that are fully *deferential* to the principal can be said to be done in the name of the principal. But, as I have

[63] Rousseau calls this "the will of all," which is distinct from "the general will."
[64] Kant, *MM*, 112 (6: 341). See also discussion in Ripstein, *FF*, 192-193.
[65] Scott Shapiro, "Legal Practices and Massively Shared Agency," unpublished (emphasis mine).

previously explained, it does not seem to be true that an agent's act must be fully deferential to the principal in order to count as being done "in the name of" the principal. Similarly, the mere fact that private actors are not fully *deferential* to public officials does not entail that their action cannot count as done in the name of the state.

And yet, I do agree that authorization through contract is not sufficient to transform a private discretionary decision into an omnilateral one. Notably, this is so even if private actors are committed to exercise their discretion (which they rarely are) by appealing to public reasons or to the public good. In other words, being motivated by the right kinds of reasons is a necessary but not sufficient condition for a decision to count as an omnilateral act of law rather than a unilateral act of man. Recall that omnilateralness has two aspects -- rightful judgment and unity – which are both required to overcome the two-faced problem of unilateralism. Therefore, in order for a decision (that changes the normative situation of others) to count as omnilateral it is not enough that (i) the *reasons* cited in support of it are public, that is, consonant to the juridical idea of right; it must also be (ii) carried out *as a part of a unified practice of law-making*. In order to be consistent with the equal freedom of all, all relevant decisions that change the normative situation of others must fit together so as to establish a scheme of entitlements equally applicable to all, thereby overcoming the indeterminacy problem. They must be regarded as acts of a unified system of law, rather than as the aggregate of separate individual acts, each made in the name of all or according to separate agents' interpretations of what Right requires.

To demonstrate that private actors' contractually-authorized decisions remain unilateral private judgments, we must then explain under what conditions exactly an individual act or decision can be *attributed* to a unified, collective practice of law-making. As several legal theorists have pointed

out, the law can be regarded as a *collective social practice* -- an instance of shared agency.[66] So the question becomes: how can the disparate decisions made by individuals – decisions that affect the normative situation of others – be regarded as instances of a unitary, shared collective practice? In answering this question we need a theory of collective action. Here I will build on Christopher Kutz's theory insofar as, unlike other theories of collective action, his theory can be extended to cases of large-scale and complex instances of shared institutional agency.[67]

Before proceeding, however, a clarification is in order. I will refer to all the parts of law-making that can be categorized as social practices with the term "legal institutions." These institutions include much more than what courts do. As one scholar puts it, "In modern legal institutions, the officials are not only judges and legislators but also are lawyers, police officers, officers of the court, and *bureaucrats in administrative agencies that are created by legislation in order to apply policies* that have been duly legislated."[68] As I understand it, legal activity includes all that activity of "governance," including policy-making and the nitty–gritty implementation of policies, that changes the normative situation of citizens in a relevant sense. Such activity defines entitlements and imposes obligations, by *de facto* fixing their content at the last stage of application. Admittedly, this is a very broad interpretation of what law-making includes, but I believe that my previous section has provided reasons to adopt this expansive account.

To explain how we can *attribute* separate individuals' decisions to a shared, unitary practice of law-making, and thus to the state, I shall draw on Kutz' example of how discrete decisions get to be attributed to an academic department as a whole. Suppose that members of the department are in the process of hiring a new member of faculty, and disagree about the purpose of hiring. Some think

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[66] Christopher Kutz, "The Judicial Community," *Philosophical Issues* (2001): 442; Scott Shapiro, "Laws, Plans, and Practical Reason," *Legal Theory*, 8 (2002), 387; Jules Coleman, *Practice of Principle* (2001); Michael Bratman, *Faces of Intention* (1999), Chs. 5–8. For a skeptical view see Matthew Noah Smith, "The Law as Social Practice," 12 *Legal Theory* (2006), p. 265-292.

[67] Christopher Kutz, "Acting Together," *Philosophy and Phenomenological Research*, 61, 1 (2000), 1-31.

[68] Matthew Noah Smith, "The Law as Social Practice," 12 *Legal Theory* (2006), p. 265-292.

that hiring provides them with the opportunity to increase the number of historically underrepresented groups in their university, while others see in it the opportunity to strengthen their own field of research. Members also disagree about how to approach the process of decision-making in hiring. Some are committed to deliberating or voting according to moral reasons alone, while others will try to strategically predict how their colleagues will vote and will then cast their ballot accordingly. In spite of these differences, we would still attribute the final hiring decision to "the department." Why can we say that "the department," as opposed to its individual members, has hired a new person? Two main conditions, Kutz explains, are essential for this attribution to hold: (C1) the action of the members of the department constitutes an instance of "collective" action (C2) a set of rules and procedures structuring the institution, which assign roles (offices) and mandates to each member, must be in place. [69]

C1 is met when each member of the department acts with a "participatory intention." This is an intention to contribute to a collective end. When there is sufficient overlap among individuals' conceptions of the end -- e.g. all members of the department are committed to make a hiring decision and agree on what hiring is -- and when all members (or the vast majority) share an intention to contribute to that end, the claim of collective authorship of the kind "*we* hired a new person" becomes justified. This can be captured by the following principle (P):

P: "A group intentionally acts (performs joint activity G intentionally) when its members do their parts of intentionally promoting G and overlap in their conception of G."[70]

Yet, P is insufficient to justify the attribution of the hiring choice to the department in a way that enables us to say that "the department" has chosen. This is because P fails to exclude decisions or acts by agents who do have the appropriate intentions but who do not count as members of the department. Imagine an agent, call him Peter, who always accompanies his wife to departmental

[69] Christopher Kutz, "Acting Together."
[70] Ibid., 28

meetings. Peter intentionally participates in the deliberations of the department, has great influence on those deliberations and is fully committed to hiring a good candidate. Because of his evident commitment to departmental life, the members of the department regard him as a colleague and a member. In spite of all this, what Peter does cannot be attributed to the department. The following "identity qualifier" (I) must therefore be added to P.

I: "A group intentionally acts (perform G intentionally) when (a) its members do their parts of intentionally promoting G and overlap in their conception of G," and when (b) *its members satisfy the criteria of the institutions that identify them as members.*[71]

The latter criteria can be both procedural and substantive. Only those who are formally appointed count as members of the department. But formal appointment may not be sufficient in order to qualify as a member of the department in the sense required so that one's actions can be regarded as actions of the department. As Kutz puts it "someone whose behavior was so out of line with institutional norms would also be excluded from the inclusive 'we'."[72] The notion of "being in line with institutional norms" is admittedly vague. Certainly we want to regard as legitimate members of the department people who oppose existing institutional norms because they believe they are unjust or inappropriate. At the same time, however, it is hard to see how the isolated decision of a formal member of the department who never attends meetings, fails to deliberate with his colleagues and fails to act with the identity of the department in mind could fully count as the department's action or decision.

But assume that all those making the hiring decision qualify as members of the department in the relevant sense and that they all share a participatory intention so that the requirements set out by both P and I are met. We can then say that we, as members of the department, have collectively chosen the new faculty members. But how do we get from "we" have chosen to "the department"

[71] Ibid., 28-29.
[72] Kutz, "The Judicial Community," 460

has chosen a new member? Here is where the second condition (C2) becomes essential. Institutional rules define what a department is and prescribes specific "mandates" for their members. They also establish a specific set of normative relations among the members of the collective – e.g. common procedures and shared "background frameworks" – as well as a space of unified, collective action.[73] It is not only the participatory intentions of individuals but also the institutionally-framed relations among them that transform an aggregate of individual actors into a unified collective agent. In order for our acting to count as the department's action, we must, "orient our action within that institutional space," where "this orientation consists in part of agents' acceptance of the norms constitutive of the institution,"[74] as well as in being committed to the overall project of the collective, and *in being related to the other members of the collective in a way that sustains that commitment*. Without a shared institutional space there is no unified collective action that can be attributed to an organization made from different offices and members.

Now, what I have called "law-making" is a form of collective action. Legal institutions, like departments, consist of a set of individuals each having a participatory intention to contribute to the collective project of defining and applying norms in an appropriate way (though rightful judgment). The unity of the legal system is unity through agents' orientation towards a collective goal. This orientation in turn consists of the agents' acceptance of the norms constitutive of the institution, including an acceptance of certain restraints with regards to what kind of reasons (i.e. public vs. private reasons) can be advanced in support of their decisions, as well as the project of determining law qua a collective project. But this shared orientation cannot exist without an institutional space and web of normative relations capable of directing the behavior of different officials through its

[73] Michael Bratman uses the term "background frameworks" to identify shared policies or rules (often embedded in institutional relations) that structure and unify practical reasoning and deliberation by (1) shaping what options are to be considered in a decision or (2) what to count as a relevant consideration. See his Structure of Agency (Oxford University Press, 2007).
[74] Kutz, "The Judicial Community," 461

constitutive norms. Without this space we cannot attribute separate actions of law-making to the collective practice of law-making. It is only when officials share an institutional space that provide them with a shared orientation that their decisions can count as acts of law, rather than of men.[75] They are act of law *because* they result from a collective project.

The relevant question then becomes whether, in the implementation of policies, private actors, within political systems where privatization is widespread, inhabit the same institutional space of "official" members of the law-making community. My contention is that they do not. They are not connected to official members through an appropriate web of relationships that serve to provide the necessary shared institutional orientation. It is because of *this* reason that their decisions, however well intentioned or even deferential, cannot be attributed to that law-making community that is responsible for interpreting and applying norms on behalf of the entire political community. They are not omnilateral acts of law, but rather remain unilateral acts of men.

Let me explain. The law-making community, including the system of public administration, is a sort of "department" whose main purpose is to collectively define and implement a scheme of entitlements and obligations, and, more generally determine norms through rightful judgment. In a representative democracy premised upon a notion of popular sovereignty, however specified, the people are the ultimate head of the department. Elected officials and representatives are chief administrators of the department whose purpose is to represent the public point of view. It is from this point of view that the content of norms and the public interest must be articulated in a unitary way, through a shared social practice of law making. It is the task of elected officials to ensure that all participants in the law making practice maintain the appropriate institutional orientation and commitment. Since the definition and implementation of policies and norms are necessarily

[75] Kutz limits this claim to judges: "When judges do share an institutional orientation, no matter how they disagree in their decisions, their decisions count as conclusion of law, not of men…The normativity of the decisions consist in their being product of the collective *project*" Kutz, "The Judicial Community," 463.

underspecified and always entail some discretion on the part of the people carrying them out, including unelected officials like state bureaucrats and civil servants, in order for these decisions to count as acts of the same "department" they must be made within an institutional authority structure that, through shared background frameworks, structures and unifies practical reasoning and deliberation between individual decision-makers and political offices. This structure must (1) shape what options are to be considered in a decision, (2) determine what count as a relevant consideration, and 3) provide effective mechanisms and channels of communication for the circulation of information and the meshing of individuals' sub-plans.[76] Members of the law-making community must be responsive to one another's participatory intention and must all act with an institutional identity in mind, which orients their action towards a common purpose.

When the administration and implementation of policies is at stake, what are the practical means that secure this unitary institutional space, which provides the possibility of collective agency oriented towards a common purpose? The answer points towards *bureaucracy*, and in particular to those administrative procedures that establish stable relationships between bureaucrats and elected officials.[77] The purpose of administrative procedures is not reducible to securing fairness and *accountability* in decisions made by bureaucrats. Administrative procedures are not simply sanctioning and monitoring mechanisms of effective implementation and accountability through which independently defined rules are applied. They should also be thought as *channels of public practical*

[76] In his discussion of the judicial system, Scott Shapiro points out how certain mechanisms embedded in the authority structure of this system help create a mesh between the sub-plans of participants who disagree about the content of certain decisions. The legal concept of *res judicata* provides one such mechanism. As far as the administration of policies is concerned, the authority structure of bureaucracy also provides (or should provide) background frameworks and mechanisms appropriate to its function.

[77] The normative defense of bureaucracy I provide here leads to a conception of bureaucracy that is different from both the economic and the sociological/Weberian one. While Weber puts much emphasis on the execution of policy, he focuses less on communicative processes of policy formation, interpretation and review. This explains why for Weber the central features of the bureaucratic structure are 1) hierarchy, 2) continuity, 3) impersonality, 4) expertise and 5) superior efficiency. My ideal account of bureaucracy need not include features 2, 4 and 5. Impersonality is, however, important not only to prevent arbitrariness but also for symbolic reasons (as I explain in chapter V). As for hierarchy, although some command and control mechanisms are necessary for accountability and fairness, and although the ultimate authority emanates from "the office," unlike Weber I emphasize the need for an horizontally structured channel of practical reasoning and coordination system, embedded within the bureaucratic authoritative structure.

reasoning that contribute to the very definition and justification of those rules through a collective, shared practice. Through administrative procedures, democratically elected officials retain control over the decisions and deliberations of administrative bureaucracies, so that the latter can orient their decisions according to the actions and decisions made by public officials. In this way, these procedures create that shared institutional space and sustained institutional orientation which are both necessary to *attribute* the actions of unelected actors to the democratic state as a whole.[78]

Through which mechanisms do administrative procedures play this role? Beyond judicial review, as well as monitoring and sanctioning, an important, if neglected, function of administrative procedures is to create integrated deliberative relations between administrators and elected representatives.[79] In many states, including the USA, administrative agencies commonly solicit comments and provide all interested parties with an opportunity to communicate their views, and must allow participation in the decision-making process. Agencies are required to deal with the evidence presented to them and provide reasons, on the basis of that evidence, in justification of their decisions. The entire sequence of decision-making - *notice, comment, deliberation, collection of evidence, and construction of a record in favor of a chosen action* - provides political principals with opportunities to respond when an agency seeks to move in a direction that goes against the judgment of public

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78 One could object that there are other, better means to create and sustain a common institutional space and orientation than a renewed appeal to a unified bureaucracy and administrative procedures. For example, Joshua Cohen and Charles Sabel in "Directly-Deliberative Polyarchy," *European Law Journal* 3 (1997), defend a decentralized system of public provision, by both public and private associations, where independent deliberative and participatory practices within sub-unites are however connected, through institutional links, to the same practices in other sub-units, so as to secure an integrated, if decentralized, institutional space. Although I am sympathetic to many aspects of their model, my concern is that the kind of integration they suggest does not generate a sufficiently unified system of decision-making, for every local unit would ultimately be free to determine, from its own point of view, what the best interpretation of certain requirements, including constitutional values and norms, is. Given the discretion of local actors, this could generate a fragmented and potentially unequal scheme of entitlements.

79 Judicial review of agency decisions includes an assessment of the conformity of an agency's decision to its mandate. The assessment is based not only on the actual legislation, but also on committee reports, floor debates, and other deliberative practices. Since judicial review is meant to apply to state actors only, private actors are often not subject to it. See McCubbins, Mathew, Roger Noll and Barry Weingast "Administrative Procedures as Instruments of Political Control," *Journal of Law, Economics, and Organization* 3, 2 (1987): 243-277.

officials.[80] These procedures also ensure that relevant political information is available to form the basis of the agency's action.

Through properly functioning administrative procedures, bureaucracy becomes an institutional space for collective public practical reasoning oriented towards shared public goals. Democratically elected representatives can orient and structure the political environment in which an agency operates to adopt the political point of view and interlock its participatory intention with the ones of political officials.[81]

While the broader system of administrative rules secures an appropriate institutional and relational connection between the individual decisions of bureaucrats and the law-making community as a whole, so that we can see their actions as a part of a broader collective practice of governance, that system does not frame the institutional space within which private actors operate.[82] This leaves these actors outside of the collective project of law-making. Stand alone, ad hoc contractual agreements between government and private actors may include accountability requirements but they necessarily fail to establish a systematic, continuous and shared web of appropriate relationships between those actors and the law-making community.[83] Indeed, privatization contracts could be regarded as having the very purpose of separating private actors' decision-making from the institutional constraints imposed by a bureaucratic structure. Only in this

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[80] Ibid.

[81] Dorfman and Harel also emphasize the importance of an integrated practice between the political and the bureaucratic. While they regard this practice as a necessary condition for fidelity of deference I take it to be a necessary condition for the possibility of unitary collective action, and thus of omnilateralness.

[82] As law scholars point out, administrative law is committed to a sharp public-private distinction. "State actors are subject to the full panoply of congressional, executive and judicial oversight mechanisms. They must comply with all constitutional requirements, including procedural due process, and…the procedural demands of APA [Administrative Procedural Act]. Private actors, by contrast remain relatively unregulated by procedural norms." Jody Freeman, *"*Private Parties*,* Public Functions, and the New Administrative Law*,"* 52 *Administrative Law* Review (2000), 813. The APA applies only to entities that constitute an "agency," which it defines as "authorit[ies] of the Government of the United States." 5 U.S.C. § 551(1)(2014).

[83] As Jody Freeman rightly points out, "outsourcing services replaces command and control regulation with a contractual model of regulation in which the agency and private providers negotiate the terms of the contract….The contract…is meant to specify the terms under which the private party will implement the agency's policy decisions, but again, the divide between policy making and implementation is suspect." "Private Parties, Public Functions," 825.

way, defenders of privatization argue, can costs-effectiveness and innovation be achieved. This is why privatization is not merely a problem of *accountability,* but rather of *attributability*. The point is not that private actors' actions lack transparency or fail to follow principles of fairness. The problem is a deeper one. Private actors' decisions do not count as something that the law-making community has done *together*; for there is no shared collective project in which private actors participate. Their actions cannot therefore be *attributed* to the state – "the department" -- as omnilateral acts of law. They unavoidably remain unilateral conclusions of men.

But why cannot we bring private actors within the law-making community by extending to them relevant administrative procedures and requirements? The answer is simple. If private actors were so included, they would cease to be "private" in the relevant sense of the term and would de facto become public bureaucratic agents. This would make privatization a conceptually empty term. Further, this solution would also defeat its practical purpose, which is precisely to bring certain decisions outside of the bureaucratic structure.

iii. Privatization as unfreedom

If I am correct that (1) private actors in many current privatization schemes do not limit themselves to making decisions that restrict citizens' options or harm them, but rather make decisions that change their normative situation, and if it is true that (2) such private actors, no matter if contractually authorized, exercise their decision-making power in a way that unavoidably remains unilateral, it follows that, for the reasons explained in Section II (3) *privatization is a condition of unfreedom*, which fundamentally undermines the very legitimacy of political institutions. No matter how efficient private actors are at achieving desirable social outcomes, privatization, at least insofar as it extends to entitlements-setting decisions, generates a condition in which citizens are unavoidably subject to the unilateral will of others.

When the MCO decides that a patient is not eligible for a certain treatment and cannot be reimbursed for it, the MCO is effectively denying the citizen an entitlement to some of the resources (as well as to other people's performances) necessary to constitute a rightful condition, and it is doing so unilaterally. Similarly, when a guard employed by a private prison forces an inmate to go back to his cell against his will, the guard is constraining the freedom of the inmate by an unilateral act of will. The free pursuit of both the patient's and the inmate's ends and purposes, and the access to the very conditions that make this free pursuit possible, is made dependent on the unilateral will of others, the moral status of which is by no means superior to the ones subject to those restrictions. This is a condition of unfreedom (as well as a violation of relational equality). A system where privatization is widespread cannot therefore be a rightful condition. It is a regression (albeit partial) to the state of nature. It follows that (4) the very same reasons we have to exit the state of nature are also reasons to limit the extent of privatization, and restore a more unified system of public administration. My argument therefore supports policies of non-delegation, as opposed to policies of increased regulation of private agents.

My account shares similarities with Dorfman and Harel's, insofar as they both adopt a non-instrumentalist view of political institutions and point to the inability of private agents to act as true agents of the state. Yet while Dorfman and Harel concentrate on what privatization does to the provision of particular goods (i.e. it renders it impossible), I concentrate on how it compromises the freedom-constituting function of political institutions. More importantly, I believe that my account manages to overcome the limitations of Dorfman and Harel's. First, my argument against privatization is able to cover a much broader range of cases, including the privatization of healthcare services and other welfare programs. This is because, whereas Dorfman and Harel's account focuses on the nature of particular *goods*, my account focuses on the definition of all of the *entitlements* that are constitutive of a rightful condition. Second, my account is better suited to make sense of the fact

that while we intuitively regard the privatization of certain inherently public goods (e.g. punishment) as problematic, we do not really care much about the privatization of other inherently public goods (conferral of public honors). My account is able to do justice to these differing intuitions because it attributes the wrong of privatization not to the inability of private agents to provide certain (inherently public) *goods* or to the imposition of a private judgment on others *per se*, but rather to the precise way in which the imposition of a private judgment on others, *as far as decisions that change their normative situation are at stake*, constitute a violation of freedom. This explains why in my view private honor conferral is not problematic, whereas private punishment is, for only punishment changes the normative situation of others, by restricting their freedom, in a relevant sense. Finally, why Dorfman and Harel regard privatization as a violation of dignity, I regard privatization as a violation of freedom as independence. This difference is important because, it seems, there are cases where an agent's freedom as independence can be violated without this compromising her/his dignity. The fact that the MCO's patient is denied treatment need not violates her dignity. This is so especially if the MCO is willing to provide good reasons to the patient in support of its decisions. Yet, providing good reasons is not sufficient to make the MCO's decision an omnilateral act of law. Therefore, the patient's freedom as independence is violated even if her dignity remains untouched.

iv. The juridical subject expanded

I would like to conclude by highlighting a broader implication that my analysis of the wrong of privatization can have for political theory's object of analysis. Much political theory has focused on the juridical-institutional apparatus of the state as its predominant object of analysis, as well as the primary subject of substantive ethical norms and standards of legitimacy. This juridical focus has in turn generated much opposition from different, even opposite, camps. Michel Foucault sought to

demonstrate that the site of power is not restricted to the juridical state apparatus.[84] Power is diffuse throughout society, within institutions like the prison and the hospital, as well as embodied and performed in discourse and everyday interactions. His non-agential understanding of power puts into question the juridical-institutional apparatus of the state as the object of analysis for political theory. Meanwhile, in a different way, but still guided by an impulse to decenter the site of power, liberal political philosophers have also put emphasis on how political theorizing should not simply focus on the justice or legitimacy of basic rules and political institutions – the basic structure of society, in Rawls' terms – but should develop normative principles and standards to assess and govern informal social norms and individuals' dispositions, as well as the internal organization of non-political associations, including the family and the church, recognizing them as important sites of power and authority.[85]

My analysis of the non-instrumental wrong of privatization seeks to decenter and expand the dominant account of the juridical-institutional edifice *itself*, as an appropriate object of analysis, rather than abandoning it (this however, by no means entails that the juridical-institutional edifice should be the *only* object of analysis). In other words, those who believe that juridical-institutional structures should occupy a central role in political theorizing, must adopt a broader understanding of the 'juridical.' They must move beyond a rigid distinction between basic and secondary rules, between political constitution and the daily administration, between, on the one hand, the courts and the legislature, and on the other, the "street-level" bureaucrat and administrator. They must take seriously the fact that, in many cases and respects, secondary (e.g. administrative) rules and "street-level" forms of decision-making power (including the power exercised by private actors in their daily

[84] Michel Foucault, *Discipline and Punish: the birth of a prison*, London (Penguin, 1991).
[85] G.A. Cohen, *Rescuing Justice and Equality*, Harvard University Press, 2009; Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989); Chiara Cordelli, "Justice Below the State: Civil Society as a Site of Justice," *British Journal of Political Science*, 46, 4 (2016): 915-936; Chiara Cordelli, "Democratizing Organized Religion," *Journal of Politics*, forthcoming.

decisions and interpretation of norms and contracts) can be, in a normative sense, as "basic" as the more grandiose design of a political constitution or of a system of property rights. For, informal, localized and circumscribed decision-making processes may ultimately fill and fix the content of citizens' entitlements and can be, therefore, as consequential for freedom as the design of the so-called "basic structure" of society.

Therefore, the daily *administration* of the state should be an object of concern for political theory, no less than its *authorization* and basic *constitution*. This is an insight that political scientists who study so-called "street-level" bureaucracy have long put forward.[86] Yet political philosophers, often focused on a rather abstract and idealized understanding of the state and of the division of powers within it, have, in my view, rarely grappled with it. As this essay has shown, the division of powers so cherished by liberals is not enough to secure freedom, unless a unity of a certain kind – "a shared institutional space and orientation" -- in the administration of the state and the implementation of decisions at the lowest, "street-level" is also maintained. Privatization breaks this administrative unity, thereby generating a condition of unfreedom.

[86] See Michael Lipsky, *Street-Level Bureaucracy Dilemmas of the Individual in Public Services*, Russell Sage Foundation, 1980.