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PUBLIC IMPERIALISM AND PRIVATE RESISTANCE: PROGRESSIVE POSSIBILITIES OF THE NEW PRIVATE LAW

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In hosting this Symposium on "The New Private Law," the *Denver University Law Review* is to be commended for providing an occasion to reflect on a clearly recognizable but insufficiently conceptualized development in the contemporary legal/political arena. If I understand the topic, the New Private Law is meant to connect various trends in law and social policy as part of a single phenomenon; examples include school voucher programs, privatization of prisons, contracting out traditional municipal functions, the movement from public trial to private mediation and arbitration, curtailment of the state action doctrine and thus limitations on the application of constitutional norms with respect to a range of institutions, and the various ways of delegating lawmaking power to formally private groups. The markers of this transformation are generally: (a) distrust of centralized public administration, (b) commitment to increased choice for individuals, and (c) new faith in the social responsiveness of institutional arrangements based on the profit motive.

Several years ago, my colleague William Eskridge and I described a contemporary jurisprudential phenomenon that we dubbed the New Public Law.[1] Our basic idea was that a cadre of contemporary mainstream legal scholars had coalesced around a "centrist" approach to law in response to the polarizing and ideologically charged character of the legal academy in the 1970s and 1980s. Paralleling in many ways the postwar "legal process"[2] response to the radical possibilities of legal realism, we saw the New Public Law as an implicit attempt to incorporate the intellectual sophistication and general political direction of the Left's critical scholarship (embodied primarily in the work of critical legal studies, radical feminist, and critical race intellectual movements), while nevertheless defending a decidedly centrist, de-radicalized normative vision of an apolitical rule of law. We associated the New Public Law with a pragmatic, republican-oriented, and vaguely reformist attitude toward legal institutions, within which "public" type values of inclusion, participation, and cultural respect were taken as emblematic of a "new normativity."[3]

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1. *See* William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 U. MICH. L. REV. 707 (1991).

2. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Gary Peller, *"Neutral Principles" in the 1950's*, 21 MICH. J.L. REFORM 561 (1988).

3. *See* Eskridge & Peller, *supra* note 1, at 708-09.

In Eskridge's evaluation, this development was to be applauded as a progressive articulation of the legal discursive tradition rooted in *Brown v. Board of Education*[4] and Warren Court activism more generally. In my evaluation, New Public Law scholarship—like the legal process school of the 1950s—represented an attempt to domesticate and defang the critical work that it appropriated, primarily by ignoring the overall point that legal discourse worked to constitute and legitimate status quo power relations. While Eskridge celebrated the emergence of a sophisticated view of law as legitimately resolving social conflict in a just way, by paying proper respect to various viewpoints held by the multiple groups making up American society, I saw a bland form of "post-modern moderation" where the very social conflicts that leftists had argued mainstream legal discourse suppressed were now to be "processed" through an inclusive "good-guyism" blind to its own cultural ethnocentrism.

The New *Private* Law might be taken to be the polar opposite of the New *Public* Law—here the emphasis is on "private" values of individual choice and decentralized decisionmaking where the New Public Law emphasized social inclusion and public deliberation. But the image of opposition misses more important similarities in the two tendencies. The New Private Law represents a slightly conservative *correlate* to the New Public Law. Both are located near the center of legal ideology, rather than at the poles (whatever might constitute the poles these days: perhaps Chicago-style law and economics on the one hand and post-modern cultural critique on the other). While there is a general sense that the New Private Law is slightly right of center (the domestication of law and economics), and New Public Law scholarship appears slightly left of center (the domestication of critical legal scholarship), the fact of the matter is that they both have the feel of being, more simply, depoliticized.

This essay reflects upon the transformation implicit in the emergence of the New Private Law on the contemporary legal scene. My main point is to note the end of the tradition, dating back at least to the the mid-nineteenth century, of delineating political ideologies according to the public/private distinction. The association of advocates of the public arena with *progressive* social reform and advocates of the private realm with *conservative* social ideology is clearly over; the distinction between public and private administrative alternatives has been, for the most part, drained of its ideological significance. Given this development, I conclude that there is, in fact, no reason for progressives reflexively to oppose many of the various privatization trends that mark the contemporary policy scene.

In the remainder of this essay, I situate the emergence of the New Private Law phenomenon in terms of limitations in the ways that progressives have usually understood the public/private distinction. The highly general framework I sketch is intended to be suggestive and evocative rather than definitive; I will simplify what are actually much more complex terms of intellectual and ideological development.

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4. 347 U.S. 483 (1954).

I begin by distinguishing the New Private Law from traditional market ideology. I next consider how many of the ways that progressives understood what "public" and "private" politically meant were intellectually and ideologically impoverished. Our association of the public sphere with justice and equity was blind to the ways that the very conception of a universal, nondiscriminatory equal opportunity could serve to produce colonized institutions from which virtually everyone is alienated. Conversely, our association of the movement from public to private with parochialism or oppression ignored the ways that such social change could signify empowerment and a recovery of liberatory democratic values. I will use the example of public school reform to provide a context within which to evaluate these possibilities.

At the outset, it should be emphasized that the New Private Law phenomenon does not represent a resurgent laissez-faire market ideology. While contemporary privatization reforms do often constitute recognizably conservative or right-wing social interventions, it would mistake the New Private Law simply to associate it with capitalist or libertarian ideology. Instead, the recent privatization interventions should be seen as more centrist, ideologically diluted institutional developments. Defenders use a discourse that is pragmatic and situational, not ideal and universal. Champions of the private realm traditionally sought to defend the market as a truly private, unregulated realm of exchange. Their defense was principled: the market represented the realm of individual free choice and accordingly state intervention threatened not only economic distortion but a form of tyranny. But the ideology of recent social reforms such as school voucher programs or contracted prison administration is not premised on the idea that a truly private realm is being protected from the coercive power of the State. Rather, privatization is presented as simply one in an array of possible, and concededly regulative, social interventions, bearing no *a priori* claim to legitimacy but instead depending on historical and contextualized justification: the New Private Law might see centralized administration of schools, for example, as having produced dysfunctional and often corrupt urban institutions, leading to the impetus for alternative institutional arrangements. From this perspective, then, the New Private Law should be distinguished from neo-conservative revivals of the theories of private property and free exchange.[5]

In addition to the transformed idea of what the private realm represents for contemporary privatization advocates, the identification of recent reforms as evidencing a general movement from public and private should not be exaggerated. Since the realist critique, it has been clear that as an analytic matter, the categories of "public" and "private" do not signify something outside of legal and political discourse itself. The so-called free market, the paradigm of the private realm, is, properly understood, inseparable from the social power implicit in the so-called framework rules defining the boundaries of

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5. The most notable champion of the principled justifications for such a regime in legal academé is Richard Epstein. *See* RICHARD EPSTIEN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). For an extended analysis of the distinction between what is characterized here as the New Private Law and traditional market ideology, see Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POL'Y REV. 6 (1988).

"private property" and the permissible pressure that could be brought to bear in "free exchange." Since terms like "consent," "private property," and "coercion" are not self-defining, any particular choice of their boundaries manifests a political decision and State "intervention"—with distributive consequences for the "market" that is supposed to stand outside governmental power. Thus, for example, the refusal to recognize sexual harassment as a tort does not leave such behavior to an unregulated "private" realm, but instead bears the mark of State intervention in the form of a privilege granted to men. Were women to use "natural" responses of physical force to defend themselves against the injury that sexual harassment causes, the harassers could call on the State to defend *them*. That is, harassed women are not entitled to self-help in the form of a privilege to engage in self-defense because they are not protecting an interest that is officially recognized by the State, and thus they may not use force to prevent its invasion. The resulting form of regulation is a privilege on the part of men to harass and legal exposure on the part of their victims. And there are distributive consequences from these inevitable "framework" decisions: were such harassment to be officially recognized, harassers would be worse off and their victims better off—there is simply no way for the State to stay out of a "private" market because either way it is affecting the distribution of market wealth and power.

Since the terms of the "private" realm are socially created by the very legal and political judgments that are supposed to follow from the "private" or "public" nature of a social encounter, they are, as the realists taught, simply conclusions attached to judgments reached on other bases. Proponents of the New Public Law as well as the New Private Law understand this at some level, and accordingly both approach the market, as did the legal process school, as simply one administrative alternative to centralized public regulation rather than as principled and normatively dictated. But taking seriously the realist critique suggests that it may be ultimately impossible to delineate administrative options by these labels at all—they are not only relative to a particular baseline, but also arguably analytically incoherent once they have lost their grounding as part of an ideology through which power was translated as choice.

Furthermore, not only is the purportedly private realm arguably public, but the converse may be true as well. The so-called public realm arguably represents simply another form of private power. Think, for example, of the workers' compensation system—perhaps the very paradigm of "publicization" as disputes over workplace injuries were transposed from the former "private" law of torts to a publicly administered, regulated, and rationalized system. The lynchpin of a worker's right to recover under most workers' compensation systems is a disability—ordinarily one that must be identified and documented as such by a medical doctor. Doctors are, in the conventional typography, private actors. The "public" character of workers' compensation schemes depends on taking medical judgment as an objective fact rather than the product of a complex of private power exercised by the medical profession.

Given that the terms "public" and "private" may have no meaning except relative to a pre-conceived baseline, it is nevertheless true that we do

recognize the New Private Law as a phenomenon—and also recognize its slightly more liberal correlate in the New Public Law. I now change focus to consider how the traditional associations that progressives have made—public as liberal and private as conservative—may have suppressed from view the manner in which the public sphere was repressive and alienating, and the move to the relatively private realm arguably a move to a relatively more liberatory form of social relations.

My sense of the contemporary environment is that there is no reason to assume that privatization reforms will necessarily represent conservative rather than progressive social change. The valance provided by the grand debate between capitalism as the ideology of the private sphere and socialism as the ideology of the public sphere now provides only a faint echo in the background of policy debate. Whether a particular form of privatization will be liberatory or repressive depends on the context and the circumstances; it can only be evaluated institution by institution and reform by reform. Consider, for example, the context of public school reform.

Public schools represent a paradigm of publicly administered institutions. Having their genesis in noble aims of egalitarianism, one might expect that they would exist as model institutions of democratic and social progressivism. Moreover, they are administered for the most part by the most local, close-to-the-people of democratic institutions, school boards. And public education is arguably the institutional context in which the republican values of inclusion and social tolerance have had their greatest vitality—the Warren Court activism that New Public Law adherents champion was most visibly directed at reforming public education by ending racial segregation and school prayer.

To my mind, the public education context reveals the deep problems in the traditional liberal ideology regarding the public and the private and associating universalism and objectivity with equity and equal opportunity. Arguments against various privatization reforms of school management and attendance decisions typically center on the risks that private choice will reproduce social stratification. But the "public" character of schools that is defended against the evils of privatization is more or less a total fantasy. Despite the formally decentralized and localized structure of administration by county or municipal governmental units—and thus the expectation of popular sovereignty at its height—American public schools by and large represent the paradigm of alienating, unresponsive, often corrupt, inefficient, and culturally repressive social institutions. Despite their public and democratic character, my guess is that most people who have had occasion to encounter schools boards share my experience of them as arrogant, unresponsive, technocratic entities presenting themselves as educational "experts" concerned with professionalism and disdaining parents and students as constituting the threat of "political pressure" which might interfere with the "educational mission." To the extent that there are exceptions to this image, they are more often than not occasions when cultural right-wingers or religious fundamentalists have managed to take over and inscribe their own value system on their children's education. But progressives have found themselves pitted against such groups, trying to defend public schools against such "parochialism" and "narrowmindedness." What has

been defended is a professional culture that rather blatantly attempts to manage the community they are supposed to serve by channeling community concerns into technocratically understood "inputs"; thus the need for "parental input" is understood as a component of appropriate process and management, but that's it. The ruling ideology is that community intervention represents the threat of local parochialism invading the province of impersonal professionalism.

The elitism of the school board is part and parcel of a wider progressive ideology about public education that, ironically, connects this form of elitism with egalitarianism. The culture of public education today actually represents the victory of progressive forces against repressive ones—the direction of reform over the last three or four decades has been away from the private and local and toward the public and universal, understood to be part of instituting public values of inclusion, equal opportunity and respect, and deliberative procedure. From this perspective, it is no simple litigation accident that school prayer was banned at roughly the same time as racial segregation. Both were understood as part of a single project to transform public schools into truly democratic institutions open to all and free of local parochialism and prejudice. Hence the links between ideas of universalism, centralism, and the public realm in contemporary liberal ideology. As schools come to be managed centrally, in the sense that they institute *national* standards for curriculum and teacher training and methodology, the reigning ideology sees each child being given an equal opportunity to compete in American life and to develop themselves as individuals. The more aloof from local prejudice and influence, the more "federal" and "public" the day-to-day administration of the schools, the more egalitarian they are supposed to be. The overarching symbol of these links between universalism, centralism, and egalitarianism is the number two pencil marking totally impersonal, anonymous, standardized test answers.

The actual governing structure of public schools is, in terms of the day-to-day life of teachers and students, a mockery of democratic self-determination. Schools across the country are in fact amazingly similar: they are all by and large governed by distant ideological and cultural assumptions that stand opposed to the "distortion" of local community control. As teachers across the country mouth scripts they learned in graduate schools and administrators institute uniform national management techniques, it is no wonder that students and parents experience teachers and administrators as "not there," as ruled by distant forces that are never themselves visible but always "out there" somewhere, maybe located wherever the standardized tests are devised. In other words, as public education has been made ever more public, objective, and impersonal, it has become ever more alienating and disempowering—like a form of colonization or podification by the pseudo-scientific standardized test regime with its own bases for sorting students in hierarchies of worth. And, of course, this alienating otherness is not from nowhere—it is located in a specific ideology of what the right-wing calls secular humanism or pointy-headed elitism, a culture emanating vaguely from the northeast, white, protestant, upper-middle class.

From the perspective of alienation, I find it difficult to disdain even right wing cultural interventions—like school prayer movements or advocacy of the teaching of creationism or values education. They strike me as liberatory moments of disalienating energy seemingly struggling to subvert the hold of unseen colonizers over their local schools.

And, as I see it, it's not that the attempt to make schools truly "public" was just done incorrectly. In retrospect, the whole idea that animated liberal public school reform during the past several decades of making schools culturally neutral and thus open to all was seriously misguided, as is the wider attempt to neutralize the public sphere more generally by banning religion, for example. The connection between the "public" and the "universal" as a means for achieving social justice in institutional form is a recipe for the alienation of all of us who live, work, and study in such institutions.

Against this backdrop, various school privatization reforms can be evaluated for their potential to break the hold of the "public" culture of professional, scientific expertise over public schools. And, to the extent they contribute to the recovery of real democratic empowerment, they may reveal that there is no essential connection between privatization and conservative regression.

Various school reform proposals constitute a range of privatization options. The leading reform to date, the hiring of a private corporation to administer schools, hardly seems like a qualitative transformation at all. To the extent the school board retains ultimate control over the schools and sets the terms of the contract with the private corporate entity, there is no particular reason to think that such an administrative form is much different from the school board hiring particular principals, superintendents, and other administrators to run the schools. In fact, such an alternative highlights a dimension in which "full" public control is always to a certain degree management by private entities, since school policies depend for their implementation day-to-day on individuals—the personnel of the school system—who are "private" people, just like everyone else, except for the formal status of their employer. Contracting out management may be good or bad from the viewpoint of a progressive approach to education; it depends on the specific context. A private company may be fairer and more evenhanded in administration, fearing that student or parent discontent will endanger its contract. The result may be, oddly enough, that the arrogance and unresponsiveness of current public school administration in most places would be replaced by a caring, loving, and responsive staff. If "pleasing the consumer" would mean not acting as if parents and students represent impediments to the smooth running of schools, this form of privatization might be a progressive improvement in the day to day school life.

School voucher programs, in which schools competed for students in a market atmosphere, similarly might result in more democratic and responsive schools. There is little doubt that school diversity would be increased; the risk of particular schools failing to accomplish what everyone might consider a minimum might be real and call for supervision and regulation—but given the current state of schools in many urban settings, it hardly seems that the current system avoids the possibility of failure to educate many at a bare minimum

either. And given the possibility that vouchers might include private schools, the scope of public regulation might actually increase in such a regime.[6]

At the opposite pole of merely contracting out management of schools as currently constituted might be a more radical form of privatization: the auctioning off of public schools to the highest bidder. Thinking through how such radical privatization might be accomplished reveals the "public" nature of any private market, and the manner in which, at some analytic point, the terms public and private seem to lose virtually all their evocative and descriptive power.

To be sure, various measures would have to be taken to ensure against simple looting of physical resources. One can imagine an auction proceeding on the basis of the school commodity being defined in holistic terms—as each school more or less in its current physical state. Moreover, to the extent that a tuition-based school commodity would unfairly allocate educational resources on the simple basis of family wealth, one could imagine the school commodity structured so that it would include the power to raise funds by assessments on the surrounding community—a municipal rather than private sort of power to be sure, but one that could be justified within the discourse of privatization as necessary for the schools to be able to recoup external benefits that a functioning school would provide to the local area.

The point of this thought experiment, as unrealistic as it might seem, is that there is no essential character to how privatization might proceed. In contrast to the image of turning schools over to the greed of the profit motive and a market in which only those able to pay the highest tuition would be truly served (ironically, the result of *public* financing as currently practiced in most places), the auction model might result in neighborhoods coming together and pooling resources in syndicates to buy and then manage their local schools. By decentralizing administration to the school level, a true community control over schools, and a living connection between the school and the community, might arise. Poorer communities might be able to trade less desirable neighborhood living conditions—the location of industrial and business areas within the school zone—for a higher tax base from which to raise money for superior schools. Privatization thus, ironically, could lead to a more authentic form of "local control" than the supposedly local, democratic character of the school board governing structure.[7]

There are all kinds of problems with this kind of approach to school management, and all kinds of complexities that are beyond the scope of this essay. My point is that as one imagines even extreme forms of privatization, it is apparent that the results do not follow any *a priori* logic; such a plan might be a disaster for egalitarian values, or it might finally allow poor people a degree of control over their own destinies that would be successful and empowering. Additionally, as one imagines in this context a way to structure a private market to permit recoupment of external benefits by the private enterprise, it is

6. *See* Starr, *supra* note 5, at 14 n.16.

7. *See* Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148-59 (1977).

striking that we seem to come full circle: private schools serving neighborhoods and assessing costs based on benefits provided are a form of radically decentralized, reconceived municipalities with the sovereign power to tax, just as profit in traditional capitalist markets were seen, by realist and progressive thinkers, as a form of taxation over a social product. A radical democracy, the goal of "public" oriented values—might be achieved by the most radical forms of "privatization."

I believe that this paradoxical result is possible because, in contrast to the traditional ways that progressives have understood the political direction of the "private" and "public" character of social institutions, we have tended, incorrectly, to associate justice with centralization, universalism, and neutrality. To the extent that the movement toward the private represents a move toward decentralization, it is not surprising that it also holds possibilities for radical forms of democratic and popular control. The reason is that the private sphere need not be composed of serial individuals competing in an impersonal market, but instead might consist of organic community units striving to determine their own destinies.

Despite the above thought experiment, the school context nevertheless seems to reveal the intractability of institutional reform in the context of severe wealth disparity—the possibility of school privatization simply increasing the extent to which the wealthy are favored in the distribution of educational resources is just far more plausible than the utopian images I have suggested. It seems piecemeal socialist reform has always faced the flight of capital problem—so long as wealth could move to a more favorable climate. Reform in any particular place has the inevitable potential to backfire and just make things worse. The only conclusion that seems to me to follow is that, whether the reform goes in the public or the private direction, a massive redistribution of wealth is a precondition to truly just institutional arrangements. But you didn't need me to tell you that.