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WHITHER SOCIALISM?

DANIEL A. FARBER*

*Whither Socialism*¹ is the title of a recent book by Joseph Stiglitz, a Stanford economics professor who is a member of the President's Council of Economic Advisors. His book considers the lessons to be learned from the failure of the planned economies and assesses options for the new transition economies. He argues that the issue of public versus private ownership is relatively unimportant to economic success. If markets functioned as perfectly as some economists believe, the government could have used "market socialism" to mimic the free market.² On the other hand, most of the problems caused by government ownership are quite capable of occurring in a badly structured or poorly regulated private sector.³ Socialism failed as an overall system, but this failure does not mean that privatization is always an improvement. Although some of the economic theory does not make for light reading, his conclusion is quite simple: "We cannot, in general, be assured that private production is necessarily 'better' than public production. Privatization involves costs and benefits, which, as always, must be weighted against each other."⁴

Stiglitz's pragmatism finds strong—and perhaps unexpected—support in Gary Peller's thoughtful contribution to this Symposium, *Public Imperialism and Private Resistance: Progressive Possibilities of the New Private Law*.⁵ Professor Peller begins by describing, perhaps somewhat ruefully, how leftist insights regarding public law have been appropriated by legal centrists. He views the New Private Law as a similar phenomenon, domesticating conservative views such as law and economics into a more palatable centrist form.⁶ Peller concludes, however, "that there is, in fact, no reason for progressives reflexively to oppose many of the various privatization trends that mark the contemporary policy scene."⁷

In Peller's view, the New Private Law "is not premised on the idea that a truly private realm is being protected from the coercive power of the State."⁸ Rather, "privatization is presented as simply one in an array of possible, and concededly regulative, social interventions, bearing no *a priori* claim to legiti-

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1. JOSEPH E. STIGLITZ, *WHITHER SOCIALISM?* (1994).

2. *Id.* at 66.

3. *Id.* at 172.

4. *Id.* at 194.

5. Gary Peller, *Public Imperialism and Private Resistance: Progressive Possibilities of the New Private Law*, 73 *DENV. U. L. REV.* 1001 (1996).

6. *Id.* at 1002.

7. *Id.*

8. *Id.* at 1003.

macy but instead depending on historical and contextualized justification.⁹ Peller applauds this reconceptualization of the issue and argues that progressives should seriously consider privatization as a technique for advancing their agenda. Thus, like Stiglitz, he views the choice between public and private as purely pragmatic rather than ideological.

I too, endorse this pragmatic approach, perhaps not surprisingly.¹⁰ In this brief comment on Professor Peller's article, I will suggest two extensions of his argument. First, in my view, not merely progressives and centrists, but also conservatives, should take a pragmatic view of privatization. Hence, they should resist any reflexive tendency to favor the private over the public sector. Perhaps this might be considered the "big tent" vision of the New Private Law, since it invites scholars across the political spectrum to enter into a common intellectual enterprise. Second, the most important issue is probably not whether an activity is "public" or "private," but instead how to tailor the best mix of regulations and incentives. As Stiglitz puts it, "[T]he question is not just 'how large a role' the government should undertake, but what specific roles? . . . What forms should government intervention take?"¹¹ As the New Private Law matures, the focus will increasingly turn to these questions.

I.

In the flush of the global victory of capitalism, conservatives are understandably tempted to rush headlong into privatizing formerly public institutions. But this would be a mistake. Conservatives should not, I would argue, adopt a reflexive attitude—"private good, public bad"—but instead should engage in the context-specific analysis that Professor Peller advocates. Although they may well disagree with Professor Peller about assessing specific situations, they should utilize the same kind of pragmatic analysis. For conservatives of all stripes, whether social conservatives or libertarians, privatization should be seen as a not-unmixed blessing.

There are several reasons why social conservatives should think twice about plunging into privatization. First, privatization can direct public resources toward activities that social conservatives find disturbing. Consider a few examples. A privatized version of the National Endowment for the Arts might enjoy some kind of public funding, if only in the form of favorable tax treatment, and might well devote resources to works which social conservatives find abhorrent. School vouchers might well support Afrocentric or other programs which conservatives dislike. Conservation easements create tax benefits for anti-development land use decisions.

A related issue is that privatization may weaken the central systems of our society for socializing and expressing values. Indeed, this effect seems to be one of the attractions of privatization for Professor Peller. But for social

9. *Id.*

10. See Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the 21st Century*, 1995 U. ILL. L. REV. 163.

11. STIGLITZ, *supra* note 1, at 231.

conservatives this effect should be troubling. Privatizing means more diversity and less homogeneity, and thus a less coherent set of social values. Moreover, social conservatives may be concerned about the corrosive effect of markets on the kind of organic social structure they admire. Privatization further increases the strength of the market and thus may frustrate the desire to reinforce organic social relations.

Libertarian conservatives should have a different set of concerns. First, at least for some libertarians such as Richard Epstein, there are limits on the proper scope of privatization. Epstein is a firm believer in the Public Trust Doctrine, which restricts the ability of government to give away certain kinds of public resources like rivers and lakes.¹² He would find the idea of auctioning off the Mississippi River, for example, to be just as bad as the social regulations that he opposes, and for just the same reasons, because it is economically inefficient and an invitation to "rent seeking" by interest groups.

For libertarians, partial privatization may sometimes be worse than leaving an activity fully public. For example, from a libertarian point of view, when the taxing power or the condemnation power is granted to private groups, the result is at least as bad as having those powers exercised by the public, because we still have an entity with the power to invade property rights and even the check of the ballot box is absent. From a libertarian perspective, this is no improvement and may be worse. Also, libertarians whose concerns focus on economic efficiency should closely scrutinize particular privatization schemes, which may well involve subsidies or tax incentives with distortionary effects. So, a half-government/half-market solution may be less efficient than a purely governmental approach.

Similar concerns arise about giving private groups monopoly power. Regulatory schemes have sometimes been privatized. Under the guise of "rate bureaus," railroads used to get together and agree on rates. Similarly, in a sense, unions serve to privatize government wage controls, which is not appealing to libertarians either.

Libertarians should also be concerned that the form of privatization may be strongly influenced by special interest group pressures. Privatization, after all, is another form of regulation. It involves government legislation affecting private interests, and therefore is potentially subject to all of the kinds of distortions that people like Epstein worry about. As with any government action, privatization could be designed to redistribute wealth, perhaps in directions that cannot be defended. The lesson, in short, is that conservatives need to view privatization through the same pragmatic lens used by centrists and progressives.

II.

I would also like to briefly discuss the question of what happens after privatization. When "going private" does turn out to be the appropriate

12. See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 70-74, 217-18 (1993).

decision, what should be the legal regime for these newly privatized institutions? As Stiglitz explains, the real question is not whether to privatize but instead is defining the role of the state. There is obviously a continuum of answers, ranging from central planning to the "watchdog" state which merely protects property and personal safety.¹³ As we move past the decision to privatize, new issues will arise.

The first set of issues is posed by Professor Peller's imaginative proposal about public schools. Privatization is an experiment. Many seemingly good ideas don't actually work in practice. That is certainly true of policy reform. It's true in life in general. And the more interesting and innovative the idea, the higher the risk. Regarding Peller's proposal, there are any number of ways that things could go sour.¹⁴ On the other hand the Peller scheme might be a wonderful success. What we need to remember is that these are experiments, and we need to plan on that basis.

Consequently, we need to do something that we do poorly even in public law (and that we hardly do at all in private law), which is to monitor the outcomes in some systematic way. It's actually rather shocking how badly we do that in public law. For example, there are huge gaps in what we know about environmental quality that make it very hard to assess programs.¹⁵ This is even more true with monitoring of private law rules. We need to design some mechanisms to monitor what is going on. That may be all the more important with private law because when we privatize things, we make them less visible.

We also need to consider whether we can reverse these privatization experiments if they fail. There may be constitutional problems in reversing some experiments, such as takings and contract clause issues. There may also be political issues. Given the political culture of American society, it may be easier to move from public to private than it is to move back again. If changes are difficult to reverse, we may want to do them anyway, but we probably need to have a stronger case. That is, in the cost-benefit analysis, the benefits had better be substantially greater than the costs for irreversible decisions. In fact, there is some economic theory to that effect.¹⁶ There are some situations—and perhaps inner-city schools may be one—where the situation just couldn't get much worse, so there is little downside risk. But that's not always going to be true. Indeed, it may turn out that as bad as our inner-city schools are today, that they could get worse if we privatize badly. We want to leave ourselves in a position to unravel the situation. Privatization is an experiment, let's watch it closely, and let's be prepared to pull the plug. And where we can't pull the plug, let's be very careful about starting the experiment.

Another issue is what legal regime will govern for privatized ventures. Once we say something has been "privatized," a certain vision of the private

13. STIGLITZ, *supra* note 1, at 231.

14. Localized control seems to have been a resounding failure in the New York City schools. See James Dao, *Albany in Accord*, N.Y. TIMES, Dec. 18, 1996, at B10.

15. See Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 LOYOLA L.A. L. REV. 791, 892 (1994).

16. *Id.* at 803-04 (discussing economic theory of hysteresis effects).

sector clicks into place. We tend to assume as a very strong baseline that the new private entity will be treated like IBM or like the owner of Blackacre or whatever, and we therefore may rather unthinkingly apply Old Private Law to new areas. The risk is that we won't end up with a New Private Law but merely with a bigger Old Private Law. That would be a serious mistake. Not only intellectual inertia but broader cultural norms may exert a pressure in that direction, and we need to be very much aware of this temptation to assimilate new institutions into old legal regimes.

One obvious question is the extent to which constitutional norms apply to these privatized ventures. If, for example, we spin off these schools and they have the taxing power, will they be state actors?¹⁷ Even if the Court would hold that they are not state actors, should courts or legislatures impose similar norms on these privatized enterprises? This question requires us to move beyond the technicalities of the state action doctrine. Instead, we need to consider why some norms apply to government institutions but not to traditional firms, and to analyze how these reasons apply to these new forms of privatized enterprise. Until now, most discussion of the state action issue has been very doctrinal, with little thought about whether (for example) there are special reasons for requiring due process hearings in public institutions as opposed to privatized ones.

A related question is what kinds of governance norms should apply to these institutions. For example, how would boundaries be set for schools in Peller's scheme? Who selects the management? Should we worry about the kind of districting issues that have been so important in voting rights law? We have already encountered governance issues in the private sector in corporate law, but we have worried about them to a much greater degree in the public sector. It's not clear that the corporate model of shareholder control is best for these different kinds of ventures.¹⁸

What about the need for government regulation of the privatized sector? One might ask, for example, how conservation easements will connect with other kinds of environmental regulation and zoning, or what procedures will be mandated in arbitration as we privatize litigation. As we move past the initial decision of *what* to privatize and toward the issue of *how* to privatize, these questions are going to come to the forefront.

The New Private Law raises the same question posed on a much larger scale in transition economies: what is the proper role of public institutions versus private ones? As Stiglitz says, we now know that at least one answer (traditional socialism) is plainly wrong. In that sense, socialism is as dead as any movement can be. But socialism, he explains, also had a broader message:

The answer that socialism provided to the age-old question of the proper balance between the public and the private can now, from our

17. See *Rendell v. Kohn*, 457 U.S. 830 (1982) (holding that a private school was not a state actor, even though almost all of its students were referred by public institutions, it was heavily regulated by public authorities, and virtually all of its budget came from public funds).

18. For a discussion of some of these issues of control and accountability, see A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543.

current historical perspective, be seen to have been wrong. But if it was based on wrong, or at least incomplete economic theories, theories that are quickly passing into history, it was also based on ideals and values many of which are eternal. It represented a quest for a more humane and a more egalitarian society.¹⁹

Indeed, these egalitarian and humanist ideals are not limited to "progressives," though others may conceptualize them differently.

The lesson of the New Private Law is that these idealistic goals can be pursued in many guises, not just through the traditional public sector. In that sense, as Professor Peller's essay reminds us, the spirit of socialism is very much alive.

19. STIGLITZ, *supra* note 1, at 279. Perhaps he would have done better to say that "at its best" socialism reflected these ideals; at its worst, it had quite another face.