

# HARVARD LAW REVIEW

© 2003 by The Harvard Law Review Association

## CONTENTS

### SYMPOSIUM: PUBLIC VALUES IN AN ERA OF PRIVATIZATION

Table of Contents .....	1211
Introduction .....	1212
Introduction ..... <i>Mark H. Moore</i> .....	1212
Public and Private Partnerships:	
Accounting for the	
New Religion .....	1229
..... <i>Martha Minow</i> .....	
Response:	
Government by Proxy:	
A Faithful Overview .....	1271
..... <i>John J. DiIulio, Jr.</i> .....	
Extending Public Law Norms	
Through Privatization .....	1285
..... <i>Jody Freeman</i> .....	
Public Accountability and	
Faith-Based Organizations:	
A Problem Best Avoided .....	1353
..... <i>David Saperstein</i> .....	
The New Religion	
and the Constitution .....	1397
..... <i>Kathleen M. Sullivan</i> .....	
Privatization and Accountability .....	1422
..... <i>Michael J. Trebilcock</i>	
and <i>Edward M.</i>	
<i>Iacobucci</i> .....	

## INTRODUCTION

*Mark H. Moore\**

As one reads through the pieces that make up this Symposium, it is hard not to be confused. The confusion arises, I think, from several potent sources.

First, the pieces raise a great many complex issues through the use of words and concepts that are presented as though they had simple, commonly understood meanings, when the reality is that these words and concepts have multiple, confusing meanings. The pieces seem to focus on the increased "privatization" of the public sphere, on the increased reliance on "public/private partnerships" to achieve social goals, and on the issues that arise when certain "private actors" engaged in these governmental efforts are "religiously affiliated" or "religiously saturated." The most common proposal for sustaining important public values even as we rely increasingly on private institutions to express and achieve them is to strengthen "public accountability."

One can (sort of) understand these ideas. But some of the most important concepts here — public versus private, the privatization of government, social goals, social provision, partnerships, religiously affiliated versus religiously saturated, and accountability — are extremely complex ideas. One can enthusiastically support privatization (including even reliance on faith-based organizations) in some senses of the word, yet adamantly oppose it in others.

Second, these ideas have significant ideological valences. Those from the Left who think that the government ought to assume more responsibility for "social provision," and who oppose discrimination in such provision, seem generally threatened by the idea of "privatization." It is as though some important public values that they favor will be sacrificed by the end of the government's monopoly in financing and producing goods and services essential to human welfare and dignity. Those from the Right seem to like the efficiency, the potential for innovation, and the responsiveness that might come from shaking up the current governmental bureaucracies. The Left remains concerned about the loss of public accountability, by which society as a whole has to consider what sorts of human needs will be accepted as a collective responsibility to meet, and develop the political force to insist that those needs be met. Those from the Right prefer public accountability by which individuals who have needs can decide how

---

\* Daniel and Florence Guggenheim Professor of Criminal Justice Policy and Public Management, John F. Kennedy School of Government, Harvard University.

their needs might best be met, and in which no self-interested politician or bureaucrat can get his or her hands on assets intended to meet those needs.

The combination of conceptual complexity and ideological valence makes it extremely difficult to keep one's eye on the ball as one works through these diverse pieces. I do not have the space here to work out all the subtle disagreements in the pieces that follow. What I offer, instead, is something like a program offered at a baseball stadium: a way of identifying particular ideas that take the field at different times so that one can follow the intellectual game a bit more easily. I concentrate on the following: 1) the important issues underlying the idea of "privatization"; 2) the different standards we use to measure the public value of public expenditures and the meaning of words like efficiency and effectiveness (to say nothing of fairness); and 3) the ways to understand and think about accountability in general, and public accountability more specifically.

There are two key ideas I wish to emphasize. The first is that the important difference between the idea of the *public* and the *private* (particularly when we are talking about the use of public funds and other assets for accomplishing public purposes) is the difference between *collectively* defined purposes on one hand (often codified in legal mandates of various kinds), and *individually* defined purposes (often reflected in the exercise of individual choice) on the other. This is the distinction between those aims that a "we" (imperfectly formed) wants for the society as a whole, and those aims that an "I" (either alone, or aggregated with the preferences of others) has for itself (and sometimes for others). The second is that the most neglected issue in this Symposium is a serious consideration of how we, as members of a democratic polity, can create both a politics and a public administration that can more reliably form and execute a public will. The disciplines of economics and law are represented in this Symposium, but there is scant discussion of politics or public administration. That law and economics scholars have moved away from an interest in how individuals can form collective aspirations and pursue common goals makes it increasingly difficult for them to construct methods for protecting public values in the use of public authority and money to pursue publicly defined goals.

## I. PRIVATIZATION

My colleague, John Donahue, has made an important distinction between two different meanings of the concept of privatization. One meaning focuses on shifting the *production* of public goods and ser-

this Symposium, it is  
ses, I think, from sev-

issues through the use  
ough they had simple,  
ty is that these words  
s. The pieces seem to  
blic sphere, on the in-  
ps" to achieve social  
n "private actors" en-  
sly affiliated" or "relig-  
for sustaining impor-  
on private institutions  
blic accountability."

But some of the most  
te, the privatization of  
nerships, religiously af-  
ountability — are ex-  
y support privatization  
tions) in some senses of

gical valences. Those  
ought to assume more  
ppose discrimination in  
the idea of "privatiza-  
values that they favor  
t's monopoly in financ-  
l to human welfare and  
efficiency, the potential  
ight come from shaking  
The Left remains con-  
; by which society as a  
eds will be accepted as a  
the political force to in-  
Right prefer public ac-  
needs can decide how

vices from government agencies and publicly paid civil servants to private providers (whether for-profit or nonprofit entities); he calls this "contracting out."<sup>1</sup> The other, more important and subtle meaning focuses on shifting the *financing* of previously defined public enterprises from public sources (primarily taxation) to private sources (primarily voluntary decisions to purchase the particular goods and services provided).<sup>2</sup>

Obviously, the second is a more radical idea of "privatization" than the first. It implies that purposes once considered important enough to the *collective* to grant government authority to tax and regulate individual citizens to ensure their achievement have been removed from the collective sphere and left to private individuals, who in turn decide whether they want these goals for themselves enough to pursue them with their own means. It also means that *individual*, rather than collective, decisions will determine both the aggregate level and distribution of goods and services.

One important reason to retain the distinction between the privatization of the *producing* agents on one hand and the privatization of the means of *financing* on the other is the important connection between these different ideas and the ideas of privatizing government on one hand and making the government smaller on the other. If one is concerned with "reducing the size and scope of government," it is only the privatization of *financing* that can really shrink government. If one understands government to be the doing of things we collectively agreed were important enough to tax and regulate ourselves to accomplish, then it is only the decision *not* to use government's collectively owned assets to accomplish these purposes that really shrinks the claim that public, collective decisions have their own social activity relative to private, individual decisions. The idea of "contracting out" can be seen to shrink government in the sense that there might then be fewer government employees doing the work of government. Yet if we measure the size of government not by the total number of government employees, but instead by the portion of the nation's resources that is gathered under the government's control and directed by collective rather than individual decisions, then the mere decision to contract out government services cannot be said to shrink the government. Or, more precisely, it shrinks government only to the extent that the government's efforts to achieve collectively defined goals are made more efficient by the shift from government employees to government-

<sup>1</sup> JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 131 (1989).

<sup>2</sup> See *id.* at 136.

supervised  
these gain

These  
of privati  
to take so  
both their  
This thir  
from a w  
nanced b  
(politics v  
market m  
aspects of  
tion betw  
even who  
biter of th  
or produc  
process fo  
individual  
or less sel  
see privat  
ments abo

Obvior  
sense of t  
private de  
of value  
done som  
tion of th  
income as  
as the eco  
counts as  
votes than  
and allow  
nents indi  
get as a so  
how effect  
tive activi

It is th  
a particula  
lem of an  
as a whole  
bear and  
some pov

<sup>3</sup> See gene

civil servants to ties); he calls this subtle meaning for public enterprises resources (primarily and services pro-

privatization" than important enough to and regulate individuals removed from who in turn decide to pursue them, rather than collective and distributive-

between the privatization of the privatization of an important connection being government on the other. If one is government," it is only a government. If things we collectively ourselves to accomplish the government's collectively really shrinks the own social activity of "contracting out" there might then be government. Yet if we number of government's resources directed by collective decision to contract shrink the government to the extent that defined goals are made by employees to government-

IC ENDS, PRIVATE MEANS

supervised contractors. And there are many reasons to believe that these gains will be small at best.

These observations suggest that we might imagine a third meaning of privatization that is closely related to the radical idea that we ought to take some purposes out of the public domain altogether, and leave both their financing and their provision to private market mechanisms. This third meaning of privatization is that privatization implies a shift from a world in which the public value of enterprises (even those financed by taxation) shifts from a *collective* decisionmaking process (politics writ broadly) to an *individual* decisionmaking process (the market mechanism, without necessarily invoking all the commercial aspects of the market). In this view, what is important in the distinction between public and private is not who *produces* the results, not even who *finances* the results, but instead what agent becomes the *arbiter* of the value of any good (whether publicly or privately financed or produced). Privatization shifts the arbiter of value from a political process focused on defining collective ambitions and aspirations to an individual deciding whether something is good in his or her own (more or less selfish, hedonistic, and materialistic) terms. In short, we might see privatization most importantly as the individualization of judgments about value that formerly were made collectively.

Obviously, if we privatize a formerly public activity (in the radical sense of transferring the financing and distribution of the activity to private decisionmakers), then we have privileged the individual arbiter of value over the collective arbiter of value. But we have actually done something more. We have also left the actual material production of the values to be determined by the distribution of wealth and income as well as the distribution of individually held values because, as the economists like to say, the willingness to spend money on a good counts as a vote in favor of its production, and some folks have more votes than others. The result of fully privatizing decisions of value, and allowing those values to be weighed by the ability of their proponents individually to command economic resources, is that what we get as a society is a reflection not only of individual desires, but also of how effectively those desires can be translated into claims on productive activity by individuals' income and wealth.

It is this set of observations that leads some economists to propose a particularly radical form of privatization, one untainted by the problem of an "unfair" distribution of income.<sup>3</sup> In this conception, society as a whole should decide how much income or wealth inequality it can bear and then act to ensure that the poorest citizens remain above some poverty line. But the method for accomplishing that result

<sup>3</sup> See generally MILTON FRIEDMAN, CAPITALISM AND FREEDOM 161-76 (1963).

should not be the "inefficient" means of providing the poor with particular goods and services that the rest of the society thinks they ought to have, such as food, shelter, health care, and education. The result should be accomplished simply by providing those whom the society defines as poor with income that they can spend as they see fit. It was this sort of thinking that led Milton Friedman, among others, to the idea that we meet the desire to reduce poverty and unfairness simply by redistributing income from rich to poor.<sup>4</sup> In his view, this would increase "efficiency" because the collective would not substitute its judgment of what poor people should have, as a matter of justice and fairness, for the judgment of the poor individuals themselves concerning what they really wanted.<sup>5</sup> In effect, we would publicly finance a minimum level of income and wealth for everyone in the society (and that would be a collective choice). After that one collective decision, individuals would be free to spend their (publicly provided) income on what they as *individuals* wanted, not what the collective wanted for them.

Viewed from this perspective, the idea of publicly financed vouchers for goods and services such as food, shelter, medical care, and (now) education represents a move to continue the public financing of these things (to ensure a certain level and distribution of these services in the society), but a (partial) retreat from the idea that the collective should define the value of, and benefits from, these goods. In this respect, the voucher idea is less radical than the Friedman idea. It is less radical because the collective retains the responsibility for deciding what kinds of goods are to be provided to individual citizens and imposes strings on how the collective's financial contributions to the individual can be spent. (As a matter of law, individual recipients cannot use health care vouchers to go out to restaurants or even to buy a higher quality education.) And we can see in the attached limitations and strings the traces of a collective judgment about what should be valued that survives to constrain the choices of individual citizens. But the point is that claims on the value choices to be made by individuals are much smaller when the collective provides individuals with vouchers than they are when the collective decided on a particular kind of service for individuals, and then offered that to individuals without any competition, or with an obligation to take the service if they wanted any public help at all.

Of course, the idea that society's welfare might be improved by creating more freedom for individuals to pursue their own conceptions of the good is attractive both to libertarians on the Right of the politi-

<sup>4</sup> See *id.* at 191-94.

<sup>5</sup> See *id.* at 192-93, 195.

cal spectrum and emphasize individual spheres. They agree to decide what is valuable at least one important of the individual has an obligation there is enough some collectively among individuals institutions.<sup>6</sup> The rights to be provided of individual freedom collectivization an appropriate concept

Liberals are quick to collective commitments. They would like to see some minimum suit of the good in which individual individualized financial support individual or collective or education).

The worry that the reaction of individuals for essential goods individuals will not be attracted by commercial of paternalism to may well be justified grounds). It is, in about the sense of collective conversation other as a matter could aspire to live make a collective decision give to each individual

<sup>6</sup> Mark H. Moore, *THE BETTER MARKETS* 306, 307.

<sup>7</sup> See *id.* at 323-24.

cal spectrum and to liberals on the Left. Both libertarians and liberals emphasize individual freedom in economic, political, and social spheres. They agree that it should be individuals, not collectives, who decide what is valuable. Nor do they disagree that there ought to be at least one important collective decision about the nature and content of the individual rights that the collective, acting through government, has an obligation to protect and vindicate. They both recognize that there is enough social interdependence among individuals to require some collectively established institution to regulate relationships among individuals, as well as those between individuals and collective institutions.<sup>6</sup> Their crucial disagreement is about the content of the rights to be provided to individuals to secure the appropriate amount of individual freedom and dignity, and more specifically, how much collectivization and redistribution of material assets attaches to the appropriate conception of individual rights.<sup>7</sup>

Liberals are quite happy with the idea of individual choice once a collective commits to a social contract that guarantees to each individual some minimum level of material resources to use in his or her pursuit of the good in question. They might even support a regime in which individual liberty is supported and (lightly) guided by specialized financial support for goods that are considered essential to individual or collective human welfare (such as food, shelter, health care, or education).

The worry that liberals seem to have about shifting as far in the direction of individual valuation to provide publicly supported vouchers for essential goods and services is not just the usual worry that individuals will not be well informed, or that they will be duped and distracted by commercial suppliers (all of which testifies to a certain kind of paternalism toward the beneficiaries of government services that may well be justified empirically but is anathema on ideological grounds). It is, instead, also that something important will change about the sense of interdependence of society, and the nature of the collective conversation we will have about what we owe to one another as a matter of justice and fairness, or the kind of society we could aspire to live in together. The idea is that if all we have to do is make a collective decision about the level of social support we mean to give to each individual as our social contribution to their efforts to live

<sup>6</sup> Mark H. Moore, *The Market Versus the Forum*, in GOVERNANCE AMID BIGGER, BETTER MARKETS 306, 319-23 (John D. Donahue & Joseph S. Nye, Jr. eds., 1988).

<sup>7</sup> See *id.* at 323-24.

good and meaningful lives, our political and collective lives will be diminished.<sup>8</sup>

I think liberals are right to worry on both counts, and it is largely for these reasons that I am against many efforts to privatize the valuation of important public goods whose level and distribution (as well as efficient production) ought to be debated regularly, not only to ensure their just and efficient production, but also to maintain a sense of both interdependence and political competence in dealing with the fact of our interdependence. What I want to insist on, then, is the quite unpopular idea that a liberal political community has to concern itself with the issue of how we can form a collective "we" that can value things as a "we" rather than as a summation of individual preferences. We cannot fully escape the challenge of "forming a more perfect union" or of creating a "unum" from a "pluribus." And it is precisely the desire to avoid the issue of collective valuation that fuels much of the political enthusiasm for the special kind of privatization associated with vouchers: the individualization of judgments about what constitutes public value.

## II. STANDARDS OF EFFICIENCY, EFFECTIVENESS, AND SOCIAL WELFARE

These last observations lead inevitably to a second question: what standards do we use in deciding whether a particular use of public resources has been "efficient" or "effective" or has "enhanced social welfare"? Much of the appeal of privatization is based on claims that some form of privatization will increase the efficiency and effectiveness of government. Indeed, there may well be some truth to this claim. It may well be that "contracting out" to private for-profit or nonprofit organizations could deliver more value at lower cost than government employees can produce directly. It may well be that if we forced government to meet market tests by persuading individuals that they ought to spend their own hard-earned money on certain goods and services, then fewer resources would be spent producing things that bureaucrats wanted to supply because they thought they were important than on providing things that individuals wanted for themselves. It may well be that constraining individual choices with collectively established ideas of what would be good for individuals will always be less efficient, in some sense, than allowing individuals to choose for themselves. In short, there seems to be some close nexus between the ideas of "privatization" on one hand and efficiency, effec-

<sup>8</sup> Liberals might also worry that a discussion about the size of the voucher to be provided publicly will tend to drift lower and lower, and therefore assure less and less equity and justice as they define it.

tivene  
that h

Ye  
such a  
those  
cepts.  
valua  
to tak  
ends t  
cial w  
good,  
tion, s  
prove  
conve  
cost.

Gi  
can re  
why c  
in ach  
each i  
tured  
things  
just a  
that s  
goals

Bo  
as the  
in wh  
to acc  
value  
labor.  
coura  
of a g  
idea t  
every  
societ  
one, I  
cal co  
be go  
talk v  
libera  
be. S  
obliga  
for th  
game.  
would

collective lives will be  
 ounts, and it is largely  
 o privatize the valua-  
 istribution (as well as  
 ly, not only to ensure  
 intain a sense of both  
 aling with the fact of  
 then, is the quite un-  
 has to concern itself  
 "we" that can value  
 ndividual preferences.  
 a more perfect union"  
 it is precisely the de-  
 fuels much of the po-  
 zation associated with  
 bout what constitutes

## NESS, AND SOCIAL

second question: what  
 ular use of public re-  
 "enhanced social wel-  
 based on claims that  
 efficiency and effective-  
 be some truth to this  
 o private for-profit or  
 ue at lower cost than  
 may well be that if we  
 ading individuals that  
 oney on certain goods  
 pent producing things  
 thought they were im-  
 als wanted for them-  
 ual choices with collec-  
 od for individuals will  
 ullaowing individuals to  
 o be some close nexus  
 nd and efficiency, effec-

of the voucher to be provided  
 ss and less equity and justice as

tiveness, and social welfare on the other — particularly in a society that has become so infused with private market ideology.

Yet again, I think it is important to be clear about how concepts such as efficiency, effectiveness, and social welfare are being used by those making these claims. All of these words involve normative concepts. We all think efficiency, effectiveness, and social welfare are valuable. If there is an opportunity to achieve these things, we want to take it. These words have normative content because they point to ends that we seek to achieve, without defining those ends. We like social welfare because social welfare is the term we give to the collective good, and we imagine that when social welfare is improved, by definition, so the quality of our individual and collective lives has been improved. We like the ideas of efficiency and effectiveness because they convey that the desired results can be achieved reliably, and at low cost.

Given that these words have "value" as an important element, one can reasonably ask, as we did above, who is the arbiter of value, and why do we think that some social arrangements are better than others in achieving that value? Again, I want to distinguish the idea that each individual is the arbiter of value, and that social welfare is captured by the sum of individual satisfactions, from the idea that some things can best be valued by a collective determining what it thinks is just and fair or attractive and desirable for the society at large, and that social welfare is defined at least in part by the achievement of the goals that the collective (imperfectly and inconsistently) embraces.

Both liberal and libertarian political philosophers view individuals as the important arbiters of value. This is true in the economic realm, in which individuals' voluntary decisions to buy goods and services, or to accept employment, stand largely unchallenged as reflections of the value they attach to those goods and services and their own time and labor. It is also true in the political realm, in which individuals are encouraged to hold, articulate, and support their individual conceptions of a good and just society. There is no necessary contradiction in the idea that I, as an individual, could or should have a view about how everyone ought to behave or how best to create a just and prosperous society. Of course, if my view of these matters is a very idiosyncratic one, I should not necessarily expect my view to carry the day in political contests. Moreover, if no one agrees with my views of what would be good for them, I might imagine that I have a moral obligation to talk with them to discover why my view is wrong, and to use those deliberations to get a clearer view of what a good and just society would be. So, as an individual, I might have both a practical and a moral obligation to align my individually held views of what is just and good for the society and those of others with whom I share a political regime. But I am still entitled to hold an individually held view of what would be publicly desirable and good for the society, as well as an in-

dividually held view of what would be privately and materially valuable to me as an individual.

What is hard for liberal theorists to handle is the fact that we live in a collectively defined political regime that draws material assets and liberty from individuals and uses them to accomplish public purposes. These public purposes have been quite imperfectly constructed and vetted. While we have many avenues for individuals to express their desires and dissatisfactions about these purposes and the means used to achieve them, we have no great confidence that, at any given moment, these purposes represent the settled collective agreements of a democratic polity. Our political, legislative, administrative, and judicial mechanisms are simply too frail, too imperfect, and too vulnerable to corruption and error for each of us to have confidence in the enterprise as a whole.

Yet confidence we must have, or it would prove impossible to achieve any defined purpose of the state or collective — including the idea that the best government is the one that governs least. There must be some confidence in the purposes and capabilities of our governing institutions; otherwise, individual and collective life becomes impossible, as does any idea of effective or efficient public administration of the collective (whether for narrow or broad purposes of the state). We have to believe that when we pass a law, or make an administrative ruling, or simply act in individual cases using the powers and assets of the state, we are producing something that the collective wants to have produced. Otherwise, there can be no appropriate state action.

I emphasize this point because I want to argue the following: if a collective defines public purposes by acting through political, legislative, executive, and judicial means, then the values, purposes, and goals defined in these processes become a different standard for judging what is publicly valuable than the simple aggregation of the welfare of those affected by the public policies. In an important sense, our legislative, executive, and judicial branches set out what could be described as “public purposes” (or in more economics-oriented language, “social maximands”) when they pass a law, issue an administrative ruling, or make a precedent-setting judicial decision. At each of these moments, a representative governmental institution makes a choice on behalf of a collective about an important public value that is to be protected or advanced through the use of the powers, the assets, and the capacities of the state. It is that choice that becomes the important arbiter of what constitutes public value, not the welfare of the individuals affected by the choice.

Of course, the collective can decide that the welfare of individual citizens affected by public policies and public action matters. Indeed, it was precisely this idea that led Jeremy Bentham to develop utilitarianism as a philosophical tool to guide legislatures in public policy deci-

sionm  
ment  
more  
impor  
courte  
the id  
its wo  
tive o  
shoul  
pier a  
the id  
policie

Yet  
public  
tant.  
client  
ten ha  
ents ou  
abuse  
we wo  
we hop  
But w  
making  
addicti  
crimes  
comes”  
these r  
as imp  
gram v  
dicted  
he felt  
that wa  
welfare  
grams,  
portant  
helps u  
program  
individu  
what w  
We  
seeks to

<sup>9</sup> See generally  
AND LEGISLATION

y and materially valu-  
is the fact that we live  
tws material assets and  
nplish public purposes.  
fectly constructed and  
viduals to express their  
es and the means used  
that, at any given mo-  
lective agreements of a  
lministrative, and judi-  
fect, and too vulnerable  
confidence in the enter-

ld prove impossible to  
llective — including the  
t governs least. There  
capabilities of our gov-  
collective life becomes  
icient public administra-  
r broad purposes of the  
s a law, or make an ad-  
l cases using the powers  
ething that the collective  
n be no appropriate state

argue the following: if a  
through political, legisla-  
ne values, purposes, and  
fferent standard for judg-  
le aggregation of the wel-  
In an important sense, our  
set out what could be de-  
nomics-oriented language,  
ssue an administrative rul-  
ecision. At each of these  
stitution makes a choice on  
blic value that is to be pro-  
powers, the assets, and the  
becomes the important ar-  
he welfare of the individu-

t the welfare of individual  
lic action matters. Indeed,  
entham to develop utilitari-  
atures in public policy deci-

sionmaking.<sup>9</sup> It is also quite natural for those who want the govern-  
ment to provide more assistance to the poor, disabled, and sick, and  
more protection to the oppressed and downtrodden, to believe that an  
important goal of government is to treat governmental clients with  
courtesy and to respect and protect their rights as individuals. And  
the idea that government ought to become more "customer-oriented" in  
its work supports the idea that even though we are acting as a collec-  
tive on behalf of the achievement of social goals, those social goals  
should include the desire to make the individuals we seek to help hap-  
pier and better off on their own terms. All this may seem to vindicate  
the idea that individuals remain the arbiters of the value of public  
policies.

Yet individual welfare becomes important in the implementation of  
public policy only to the extent that the collective says that it is impor-  
tant. And while it is often true that the collective says that individual  
client satisfaction is important, it is equally true that the collective of-  
ten has objectives that reach well beyond the idea that individual cli-  
ents ought to be satisfied. When we use public resources to make drug  
abuse treatment available to heroin addicts, we do so partly because  
we would like to help the addicts recover their health and dignity, and  
we hope that they will find their new lives better on their own terms.  
But we also have purposes that exist alongside or independent of  
making the addict happier. We hope that the addict will give up his  
addiction, find a job, support his wife and kids, and stop committing  
crimes. Indeed, we describe these effects as the "desired social out-  
comes" of a drug abuse treatment program and insist on evidence that  
these results are achieved even if the drug addict does not view them  
as important. If all that we accomplished in the drug treatment pro-  
gram was to give the addict a bit of relief from the rigors of his ad-  
dicted lifestyle, and to earn his consumer loyalty to return to us once  
he felt he needed further relief, we would not have accomplished much  
that was publicly important with our tax dollars. So while individual  
welfare might be one of the collective goals we have for public pro-  
grams, it is often not the only goal and may not even be the most im-  
portant. Indeed, client satisfaction may be a goal only insofar as it  
helps us instrumentally to achieve the desired social outcomes of a  
program. Ideally, those goals would be closely aligned with what the  
individual wants for him or herself. But even if they are not, we know  
what *we want* the individual to be.

We can adopt a similar perspective on the idea that the society  
seeks to protect and vindicate individual rights. Again, insofar as

<sup>9</sup> See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS  
AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Clarendon Press 1996) (1781).

much state action aims at protecting and vindicating individual rights when they are threatened, it might seem that society has embraced individual welfare as its normative standard for judging the value of collectively endorsed and resourced actions. Yet it is important to remember that while individuals might enjoy having rights, the collective — not the individual — defines and protects those rights.

When we say that a person has a right to education, to health, or to shelter, we hope we are outlining things that individuals would want for themselves and that would allow them to live dignified and full lives. We hope that individuals will take satisfaction in them. But at the same time, we are not prepared to have an individual say "thanks very much for the right to education, but I would prefer the cash value to spend on anything I want." We are not *that* committed to satisfying individual welfare. We have some social purposes that we are trying to pursue through granting particular rights — some notion of justice and some idea about how a democratic community could become just and prosperous — that is different from the goal of making each individual well off on his or her own terms.

Indeed, we feel so strongly about these purposes that there are some rights that are treated as inalienable, even as a kind of obligation. We do not let individuals sell themselves into slavery. We do not let them sell organs. And we do not let them sell their right to vote or waive their right to be represented in criminal trials. In an important sense, then, when we say that something is a right and insist that individuals hold onto it regardless of the value they attach to it, we are actually making a collective judgment about what individuals ought to value.

If one accepts that society, acting through various kinds of representative institutions and processes, forms collective views of what is publicly valuable, then it is quite possible that those standards are the ones we should use in gauging the efficiency and effectiveness of governmental action. The standard to be used in judging the efficiency and effectiveness of a given governmental policy is how well it achieves those collectively defined purposes, not the extent to which it makes individuals happy.

If this is true, it has important implications for the way that we measure social output. Currently, in schools of public policy and public management, we teach two different methods for reckoning the public value of concrete government activities. One is cost-benefit analysis; the other is program evaluation. They are taught as two different methods aiming for the same result: namely, some objective way of determining whether something of public value has been produced with public resources. Generally, because the programs are dominated

cating individual rights  
 ociety has embraced in-  
 udging the value of col-  
 t it is important to re-  
 oy having rights, the  
 protects those rights.  
 ducation, to health, or to  
 individuals would want  
 o live dignified and full  
 sfaction in them. But at  
 n individual say "thanks  
 uld prefer the cash value  
 t committed to satisfying  
 poses that we are trying  
 — some notion of justice  
 nunity could become just  
 goal of making each indi-

purposes that there are  
 even as a kind of obliga-  
 es into slavery. We do not  
 sell their right to vote or  
 al trials. In an important  
 right and insist that indi-  
 ey attach to it, we are ac-  
 what individuals ought to

gh various kinds of repre-  
 collective views of what is  
 at those standards are the  
 y and effectiveness of gov-  
 d in judging the efficiency  
 al policy is how well it  
 , not the extent to which it

tions for the way that we  
 s of public policy and pub-  
 methods for reckoning the  
 vities. One is cost-benefit  
 They are taught as two dif-  
 namely, some objective way  
 ic value has been produced  
 the programs are dominated

by economic thinking, cost-benefit analysis (of a relatively pure type) is considered the gold standard in making such judgments.<sup>10</sup> Under this view, the conceptually right way to measure public value creation is to aggregate the satisfactions of individuals affected by the policy. The only reason we do not routinely do this is that there are practical difficulties both in estimating the positive and negative effects of policies and in getting individuals to give accurate information about how much they value (or disvalue) the results.

Yet if I am right about the precedence of public goals, we ought to think of program evaluation as the best method. The techniques of program evaluation usually begin with an effort to understand the important public purposes that were to be pursued through a given use of public assets. Such purposes are typically identified by reviewing the record of policy deliberation to discover which values were important in the political process that authorized the action. Analysts seek as clear an understanding as possible of the social purposes of the policy. These purposes become the scoring system used in evaluating the impact of the policy. If the collective, acting through governmental institutions, is the arbiter of social value when government deploys resources, then those collective preferences are what should count in evaluating the program, not the views of individuals who are affected by the policy.

One final point about efficiency and effectiveness is worth making. We tend to impute "efficiency" to market mechanisms for two different reasons. First, because free markets allow individuals to choose what to buy and, indeed, to refuse to spend their money at all, we think that producers will have a strong incentive to give individuals what they want — otherwise, producers will fail to earn sufficient revenues to stay in business. This idea — consumer sovereignty — means that markets will be efficient in the sense that they will tend to use resources to produce things that individuals want and need and are willing to buy. Second, because consumers committed to buying a particular product can often choose among many competing firms, firms experience pressure to control their costs so that they can offer potential consumers what they want at the lowest cost, and thereby get more customers than do their competitors. Such competition tends to produce a slightly different kind of efficiency: low cost per unit of output. So we have two different ideas of efficiency when we think about markets: a market gives people what they want, and one that puts pressure on producers to provide the goods and services at the lowest possible cost.

<sup>10</sup> See, e.g., EDITH STOKEY & RICHARD ZECKHAUSER, A PRIMER FOR POLICY ANAL-  
 YSIS (1992).

These ideas about "efficiency" change in important ways when we bring them into the public sector. As noted above, one of the most highly touted virtues of vouchers is that they improve "efficiency" by bringing market-like mechanisms (consumer sovereignty, competitive suppliers) into public sector activity. This observation is true by definition if "efficiency" in the public sector is simply a measure of how well individual demands for services are met. In effect, we increase "efficiency" by changing our idea of what efficiency means from the idea that we ought to find low-cost ways to meet *public* purposes to the idea that we ought to use public resources to satisfy the individual wants and desires of clients.

If we accept the idea that efficiency ought to be measured solely in terms of how effectively we achieve collectively defined purposes, then we might still imagine that efficiency can be enhanced through vouchers. There are several key ideas here. First, the motivation of those who participate in government programs — whether they be housing, education, or drug treatment — goes up when the participants receive something that they choose and value, and this increased motivation is good not only because it makes the clients happy, but also because it increases the likelihood that the clients will act in ways that are consistent with established public purposes. Those who get to choose their housing might take care of the premises differently than those to whom housing is assigned. Those who get to choose the drug treatment program they want might respond more dramatically than those who are assigned.

Second, the populations that governments seek to serve are often heterogeneous: one size may not fit all, and the overall effectiveness of government efforts might be increased if government programs were targeted differentially to different market niches. Again, the standard remains the collectively defined purpose. But in determining how to achieve that purpose, the government might be able to recognize important differences among the clients it seeks to serve and adapt its operations to the individual circumstances of small groups or individual clients. The improvement to heterogeneous clients from recognizing and responding would be partially offset by concerns that clients were being treated differently (therefore, potentially unfairly) in government programs. But if efficiency and effectiveness in achieving mandated goals were the primary objective, and if concerns about justice and fairness in the differential treatment were assessed, it would be desirable overall for government to create conditions that would allow it to respond to client heterogeneity.

Third, the innovation that is fostered by allowing or encouraging different ways of delivering public services may, over time, increase effectiveness by encouraging the exploration of new, more robust methods. In short, by experimenting with responding to clients and meeting heterogeneous demand, we might find a programmatic technology

important ways when we  
above, one of the most  
improve "efficiency" by  
sovereignty, competitive  
ervation is true by defi-  
mply a measure of how  
. In effect, we increase  
efficiency means from the  
meet *public* purposes to  
s to satisfy the individual

to be measured solely in  
ly defined purposes, then  
enhanced through vouch-  
, the motivation of those  
whether they be housing,  
n the participants receive  
is increased motivation is  
appy, but also because it  
t in ways that are consis-  
e who get to choose their  
differently than those to  
to choose the drug treat-  
e dramatically than those

s seek to serve are often  
he overall effectiveness of  
overnment programs were  
hes. Again, the standard  
ut in determining how to  
be able to recognize im-  
ks to serve and adapt its  
f small groups or individ-  
ous clients from recogniz-  
t by concerns that clients  
entially unfairly) in gov-  
effectiveness in achieving  
and if concerns about jus-  
nt were assessed, it would  
e conditions that would al-

y allowing or encouraging  
nay, over time, increase ef-  
of new, more robust meth-  
nding to clients and meet-  
programmatically technology

that is better in achieving many different objectives for large segments of the client population than those upon which we currently rely.

These are all promising ideas about how efficiency and effectiveness in achieving social goals could be enhanced through the use of voucher systems. The problem, however, is that the effects of these ideas have to be demonstrated, not assumed. Further, the demonstration must take the form that would consist of empirical information about the effects of vouchers on a systemwide effort to achieve social goals, rather than simply showing that individuals liked it better. Finally, in order to do any of this, we have to have some effective political means for defining our social purposes and some objective, technical means for determining whether those results have been achieved. This means that we have to, once again, figure out how to form collective goals and evaluate our ability to achieve them — a problem that those who advocate vouchers as a solution to public problems would prefer to avoid.

### III. THE CONSTRUCTION OF PUBLIC ACCOUNTABILITY AS AN OCCASION FOR THE FORMATION OF PUBLIC PURPOSE

If we are interested in efficient and effective social services, regardless of whether we include meeting individual demand in the measure of a program's efficiency, then a necessary condition for success is a form of accountability that allows a collective to define its purposes and then to develop the technical means for determining the degree to which those purposes have been achieved. We have to create a kind of accountability that articulates what is collectively desired. We have to keep enough pressure on the producing enterprises to ensure that they perform well. And we have to be flexible enough to allow the producing enterprises to recognize differences in the client population and to experiment with alternative ways of achieving our goals.

Competitive markets, populated by profit-maximizing firms, provide one institutional framework for achieving a kind of accountability. In this framework, there are two important structures of accountability. The first is accountability of the managers and employees of firms to the owners of the firm (whether publicly or privately held), who have the legal right to the "residual value" that the firm generates. That accountability is created through employment contracts of various kinds. Because the owners of the firm are presumably interested in maximizing profits, they exert some pressure on their managers and employees to produce more with fewer resources. They also put pressure on managers and employees to keep wages tight, thus controlling for labor costs as well as other costs of production.

The second accountability structure concerns the relationship between the firm and its customers. Because the firm cannot force customers to buy its product (assuming competitive markets), the firm

must appeal to customers. It does so by offering products and services that customers want, at prices that are lower than the competition charges. This (along with various kinds of promises and warranties) creates a kind of (prudential) accountability of the firm to the consumer.

To some degree, there is a tension between the accountability to the owner (who wants profits) and accountability to the customer (who wants quality goods and services at a low price). An important part of the challenge of managing a private, for-profit enterprise lies in balancing these conflicting accountabilities over the long run. It is important to recognize, however, that an important part of the political-social argument for the value of competitive markets is that, in a perfectly competitive market, this tension will be resolved decisively in favor of meeting consumers' needs. This happens simply because competition in the market gradually drives out any special profits (called "rents") that the company can earn. All the value of the firm's imaginative ideas about valuable products and efficient production processes eventually is delivered to the consumer. The capitalist owner is lured into serving the interests of the customer by a hope that he can profit by doing so, but then finds that the best he can do is nothing more than to cover his costs. He becomes, in an important sense, a nonprofit enterprise producing things that are valued by customers at nothing more than cost. It is in this sense that private markets are supposed to produce a particular public good: the maximum satisfaction of consumers. That, at least, is the story.

Presumably, if the best structure of accountability consists of granting individual clients the power of choice (what Albert Hirschman called the "exit option"<sup>11</sup>) and encourages the development of competition among potential suppliers, then something like this accountability could be created in a publicly financed and publicly produced system. A version of such a system is described as "school choice," in which individual parents and students are not assigned to schools on the basis of geography, but are instead allowed to choose the public schools they would like to attend. Assuming that there are some benefits to managers and employees of schools that attract a larger share of students, this system should, in principle, work about as well as a voucher system. This is because it applies the same principles of accountability in hopes of delivering more efficient results to empowered consumers.

The question is whether a different model of accountability can work, and whether we would like that one better than the private market, the redistributed private market, or the voucher-guided pri-

<sup>11</sup> ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 4 (1970).

vate mar  
one such  
prise. Th  
would lik  
profits, b  
services o  
through t  
lic collect  
Having d  
mand and  
in perform  
dia; prof  
high-qual  
countabili  
tem. Citi  
make thei  
improve o  
lic account

This p  
received a  
good reas  
things: 1)  
flects man  
appointed  
to measur  
collectivel  
incentives  
the workin  
and adapt  
public val

Unfort  
been unde  
discount t  
told that i  
body to fo  
aspirations  
that gover  
economic  
who work  
and if it is  
one has no  
stitutions a  
kets as po  
structure i  
that publi  
This conce

ing products and services  
er than the competition  
promises and warranties)  
of the firm to the con-

the accountability to the  
ty to the customer (who  
ce). An important part of  
profit enterprise lies in  
over the long run. It is  
important part of the politi-  
tive markets is that, in a  
l be resolved decisively in  
happens simply because  
s out any special profits  
All the value of the firm's  
and efficient production  
consumer. The capitalist  
e customer by a hope that  
that the best he can do is  
becomes, in an important  
gs that are valued by cus-  
his sense that private mar-  
public good: the maximum  
he story.

ntability consists of grant-  
(what Albert Hirschman  
e development of competi-  
ing like this accountability  
publicly produced system.  
"school choice," in which  
gned to schools on the ba-  
choose the public schools  
there are some benefits to  
tract a larger share of stu-  
about as well as a voucher  
principles of accountability  
to empowered consumers.  
odel of accountability can  
ne better than the private  
or the voucher-guided pri-

ALTY: RESPONSES TO DECLINE IN

vate market. The political and bureaucratic model of accountability is one such model. In this model, the public is the owner of the enterprise. The owner acts through established processes to specify what it would like the entity to produce. In general, the desired output is not profits, because the government is generally planning to provide the services on a free or highly subsidized basis, making up the difference through taxes. The goal is the production of the public value the (public collective) owner has specified as the purpose of the enterprise. Having decided what it wants to produce, the collective can then demand and review information about performance. It might be helped in performance assessment by reviews from outsiders such as the media; professional associations with standards of what constitutes a high-quality, cost-effective program; or those clients who demand accountability through "voice" and protest rather than "exiting" the system. Citizens could complain to elected representatives. They could make their own suggestions in administrative hearings about how to improve operations. They could file suits in courts. This is what public accountability looks like.

This particular form of public accountability for performance has received a very bad rap over the last several decades, and perhaps for good reason. The success of such accountability depends on three things: 1) the ability to form a coherent collective aspiration that reflects many voices and ambitions, and to help make those who are disappointed understand why they have been disappointed; 2) the ability to measure activity and results in ways that assure us that goals we collectively agreed upon were reached; and 3) the capacity to provide incentives for those who are doing the inventing, the managing, and the working — incentives both to work hard and to remain creative and adaptable. Perhaps this was all possible when we took the idea of public values and public spirit more seriously.

Unfortunately, the concepts of public value and public spirit have been under persistent assault for several decades. Consistent messages discount the capacity of collective institutions in our society. We are told that it is analytically and practically impossible for a deliberative body to form a collective will that reliably reflects the interests and aspirations of the individuals within that collective. And we are told that government agencies inevitably become a tool for advancing the economic interests and idiosyncratic policy ideas of the individuals who work for them. If it is impossible to form a reliable public will, and if it is impossible to run an organization to achieve its goals, then one has no choice but to leave as little as possible to these collective institutions and to make the few that remain as much like private markets as possible. If one does not believe in these things, or fails to structure institutions to encourage and rely on them, it may well be that public institutions will fail to do their important social work. This concern seems to be the ultimate and most important concern of

those who are reacting vociferously against privatization, and it is that chorus that I would like to join.

I share Professor Minow's concern that the shift toward privatization will radically change the processes through which the collective discusses what it is trying to accomplish, and in so doing will cause the destruction of some connective tissue — some social capital — that the society needs in order to find the best path to collective and individual satisfaction.<sup>12</sup> If we abandon the need to discuss collective goals and aspirations, we will give up the capacity to discover what things we want to do, could do, and ought to do, in ways that strengthen rather than weaken our sense of interdependence and our common cause. The idea of "privatization" as it has emerged as a challenge to conventional ways of doing the public's work is, to me, less scary as a march in the direction of *commercialism* than it is as a further step in the direction of a radical kind of *individualism*. Indeed, it seems incredibly paradoxical to me that at a time when our lives are in fact becoming much more interdependent, we are embracing an ideology and a set of institutional mechanisms that act to deny this interdependence and allow us to pursue important social goals only through individual market mechanisms rather than the mechanisms of collective discussion and action. It is this, and the threat it poses to our collective capacity to think and act, rather than any question about efficiency and effectiveness, that should be the focus of our discussion of privatization.

---

<sup>12</sup> See Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1253-55 (2003).