

Public Ethics, Legal Accountability, and the New Governance

Laura S. Jensen, University of Massachusetts, Amherst
Sheila S. Kennedy, Indiana University Purdue University Indianapolis

During the past century, American governance has been transformed fundamentally. The scope of government action has increased at all levels of the federal system. Moreover, the means through which government addresses public problems have changed radically. Where public functions originally were performed primarily by state actors, and later delegated to closely related agents of the state, discretion over the day-to-day operation of public programs now routinely rests not with the responsible government agencies, but with a host of nongovernmental, “third-party” surrogates or “proxies” that provide programs under the aegis of loans, loan guarantees, grants, contracts, vouchers, and other new tools of public action. This exercise of core governmental authority by non- and quasi-governmental entities is perhaps the most distinctive feature of America’s “new governance” (Salamon 2002, 1-2; Kettl 1988, 1993).

Many observers are sanguine about this delegation of authority because they expect public problem solving to be enhanced by cross-sectoral partnerships. That private delegation does not comport with long-standing theories of public administration is not troubling, they suggest, for in the increasingly interdependent world of implementation networks, “no entity, including the state, is in a position to enforce its will on others” (Salamon 2002, 15). As Lester Salamon argues, the command and control of the sovereign, once the hallmark of democratic government, has become outmoded, and is being replaced by a new management paradigm that “makes collaboration and negotiation legitimate components of public administrative routine rather than regrettable departures from expected practice” (2002, 15).

We take issue with the notion that the transfer of sovereignty to nongovernmental agents is merely a management problem, because legal restrictions on the use and reach of public authority are fundamental to the United States’ political and constitutional order. Explicit legal standards of right and wrong are a defining feature of American government (Frederickson 1993, 248; see also Rohr 1998). Substituting new forms of collaboration and management for hierarchical, bureaucratic chains of command cannot and should not mean abandoning traditional commitments to the public values of liberty, equality, and fairness. Nor should it obviate public actors’ obligations to meet the standards for government behavior that stem from those values and are incorporated in public law. As Donald Kettl has observed (1993, 40), the government “is not just another principal dealing with another agent.” The skepticism about government performance that has fostered the development of privatized governing arrangements in the United States has not yet been translated into lack of concern over how public authority is deployed.

Nowhere can this be seen more clearly than in the ongoing scandal over the abuse of prison inmates in Iraq, an international relations debacle of some magnitude. Before four contractors were killed in Falluja at the end of March 2004, few Americans were probably aware of the roles played by publicly paid, nongovernmental agents in the U.S. occupation. The April 2004 release of graphic photographs showing the sexual abuse of Iraqi prisoners incarcerated in the Abu Ghraib jail outside

of Baghdad (a facility notorious for torture and execution under the rule of Saddam Hussein) has turned the expanding and largely unregulated role played by private contractors overseas into front-page news (Borger 2004; Miller and Miller 2004). It is now widely known that the U.S. government relies upon private contractors in Iraq not only for such tasks as mail delivery and foreign language interpretation, but also for intelligence gathering, the provision of security services, and the conduct of prison interrogations. As outrage over the events at Abu Ghraib escalates, questions of accountability are being raised in the United States and abroad. Who, precisely, is responsible for what happened? U.S. President George W. Bush? High-level Pentagon officials? The military personnel charged with running the prison? The nominally private employees still involved in operations at Abu Ghraib, who work for contracting U.S. firms CACI International and Titan Corporation?¹

In our view, the incidents at Abu Ghraib and elsewhere demonstrate that the new governance's central challenge is not simply to enhance flexibility in governing partnerships so that innovation and performance may flourish, but to do so *while still assuring legal accountability for the means and ends of public action*. This is not an arcane legal problem, but a challenge that presents policymakers and citizens with a fundamental ethical dilemma. We rely upon our understanding of "the state" and "state action" in order to know when we may expect certain standards to apply to public programs and those who manage them, and when we may ask the courts to intervene and impose restraints upon misconduct or inappropriate uses of public authority. If we don't know what actions we may properly attribute to government, our constitutional rights and freedoms are undermined. Yet, to subject every government vendor to constitutional constraints would effectively eviscerate the concept of "private" and weaken, not strengthen, liberty and creativity (Minow 2002, 30). If we are to maintain a vibrant, pluralistic polity that is governed effectively, efficiently, and accountably, we must be able to draw meaningful distinctions between private actions and actions taken on behalf of the state, and oversee the latter competently.

In this chapter, we describe the principle of legal accountability that is at the heart of U.S. constitutional structure, and demonstrate the difficulties involved in depending upon judicial review as an enforcement mechanism. We do so by analyzing the federal judiciary's "state action" jurisprudence, which was neither consistent nor reliably protective of citizens' rights even before the advent of the highly privatized new governance. Next, we review the record of the City of Indianapolis's privatization efforts to illustrate how the legitimacy of government depends upon our ability to distinguish public from private, and hold public actions and actors to account. We conclude by calling for a refashioned law of state action applicable to the operational realities of contemporary "government by proxy" arrangements.

¹ According to Brinkley and Glanz (2004a, 2004b), CACI had roughly 9,400 employees in 2003 and revenues of \$843 million, some 92% of which came from contracts with the Department of Defense and other Federal agencies. Titan has about 12,000 employees and earns approximately \$2 billion per year, largely via contracts with Federal defense and intelligence agencies. The companies claim that their contracts are classified. One of their employees stands accused of raping a young male inmate at Abu Ghraib but has not been charged, apparently because military law has no jurisdiction over him. Another employee involved in the extraction of sensitive information from prisoners via interrogation had no security clearance at all. Former CIA agent Robert Bair calls the free-ranging roles of the CACI and Titan employees at the Iraq facility insane. "These are rank amateurs and there is no legally binding law on these guys as far as I c[an] tell. Why did they let them in the prison?" (Borger 2004).

“State Action” in a Changing State

American governance fundamentally is premised upon the idea that the U.S. Constitution, and public law more generally, places limits upon the actions that government may take. Adherence to the standards established in public law is essentially what transforms governmental rule from an exercise of raw power into a legitimate use of democratic authority. For governance to be accountable,² the limits imposed by public law must apply to all governmental action and be enforceable, whether the tasks of government are accomplished by actors who are officially public or nominally private. This poses major challenges in the United States’ increasingly mixed regime, for the jurisprudence intended to keep exercises of government authority subject to public law’s strictures has not kept pace with the ways in which privatization initiatives have been refashioning the nature of the state and state action (Gilmour and Jensen 1998; Kennedy 2001; Barak-Erez 1995; Metzger 2003).

The legal doctrine of “state action” was first defined by the U.S. Supreme Court shortly after the ratification of the Fourteenth Amendment, when the Court was called upon to define the extent to which that Amendment protected the privileges and immunities of citizenship against inappropriate action by state government. In *Virginia v. Rives* (1879, 318), the Court declared that the Fourteenth Amendment applied “to State action exclusively, and not to any action of private individuals,” adding that all state action counted, whether legislative, executive, or judicial. Similarly, in the landmark 1883 *Civil Rights Cases*, the Court held that the Amendment’s prohibitions applied to “all State legislation, and State action of every kind,” including all “acts done under State authority” (11, 13). The “individual invasion of individual rights,” by contrast, was “not the subject-matter of the amendment” (11).

Over the past century, the Supreme Court repeatedly has reiterated that an “essential dichotomy” exists between state action and private conduct (see, e.g., *Shelley v. Kramer*, 1948; *Jackson v. Metropolitan Edison Co.*, 1978; *National Collegiate Athletic Association v. Tarkanian*, 1988). State action is subject to judicial scrutiny for conformance with the numerous Federal, state, and local rules that apply to government behavior, including the Bill of Rights and the Fourteenth Amendment; a host of general management statutes, such as the Administrative Procedure Act and the Freedom of Information Act; the terms of administrative regulations, executive orders, and budget circulars; anti-discrimination statutes, such as the Civil Rights Act of 1964 and the Americans with Disabilities Act; and importantly, at the state and local levels, Section 1983 of the Civil Rights Act of 1871. Private conduct, no matter how discriminatory, wrongful, or unfair, is not subject to scrutiny under these rules (though legal remedies may otherwise be sought through criminal prosecution, contract or regulatory enforcement, or common law actions).

However fundamental this dichotomy may be in principle, it has been difficult even for the courts asserting its existence to say what, precisely, separates “state” from “private” conduct in practice. Consider, for example, the disparate findings in two cases from the 1980s in which the Supreme Court reviewed the behavior of doctors treating dependent populations under the aegis of government funds and authority. In *West v. Atkins* (1988), an essentially unanimous Court decided

² Our focus in this chapter is on legal accountability, or the means of ensuring that action taken by, or on behalf of, the state comports with the standards set for government behavior in public law. There are, of course, other forms of accountability, including political or electoral accountability; bureaucratic and professional accountability; and marketplace accountability. See Gilmour and Jensen 1998; Cooper 1995; Romzek and Dubnick 1987; Posner, 2002.

that a private physician under contract to provide medical care to state prison inmates was a state actor. Although the doctor was not technically a government employee on the public payroll, the state's control over service delivery in the correctional context was held to render the doctor's conduct attributable to the state. In *Blum v. Yaretsky* (1982), by contrast, a divided Court allowed the State of New York summarily to reduce or eliminate the long-term care benefits of Medicaid patients upon the recommendation of private nursing home personnel. Although the nursing facilities received government funding and the benefit decisions in question were made pursuant to a state cost control policy, the Court held that the deprivation of patient benefits was not state action, because ultimately it resulted from judgments made by private physicians and nursing home administrators "according to professional standards that [we]re not established by the State" (1008).

The Supreme Court has reached similarly disparate conclusions in a set of decisions involving organizations governing the conduct of amateur athletics. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee* (1987), a divided Court upheld the U.S. Olympic Committee's decision to exercise its authority under the Amateur Sports Act of 1978 to selectively ban a gay rights organization from using the word "Olympic" in the name of an event it sponsored. Despite USOC's status as a corporation created by Federal law and its extensive authority over international athletic competition, the Committee was not held to be a state actor. Nor was the National Collegiate Athletic Association (NCAA), in a case in which its essential monopoly on rulemaking for college athletics forced a state university to impose disciplinary sanctions upon a tenured employee (*NCAA v. Tarkanian*, 1988). Recently, however, in *Brentwood Academy v. Tennessee Secondary School Athletic Association* (2001), a five-member majority found that the Tennessee nonprofit organization regulating high school interscholastic sports *was* a state actor, and could be held accountable for violations of the Fourteenth Amendment.

As privately operated prisons and detention facilities have become more common, cases challenging their management have begun to work their way through the judicial system. The lower federal courts recently have not hesitated to hold prison contractors accountable for their behavior as state actors, often noting that the power to deprive an individual of liberty is a quintessentially governmental power (*Plain v. Flicker*, 1986). In *Skelton v. Pri-Cor, Inc.* (1991), for example, the U.S. Court of Appeals for the Sixth Circuit found that a private corporation operating a state corrections facility could be held liable as a state actor for violating the civil rights of an inmate. Similarly, in *Blumel v. Mylander* (1996), a U.S. District Court in Florida held that a private contractor detaining a man in a Florida jail for thirty days without a hearing was liable as a state actor for a due process violation. In *Giron v. Corrections Corporation of America* (1998), the New Mexico District Court decided that a private contractor's employee had engaged in state action when he raped an inmate in his capacity as a prison guard.

Even so, the federal courts do not speak with one voice in their decisions concerning the use of delegated authority in situations where plaintiffs are captives of the state, and thereby subject to whatever treatment is meted out in institutional settings. For example, a U.S. District Court in Texas held a private residential youth treatment facility liable as a state actor for the wrongful death of a twelve-year-old boy in *Lemoine v. New Horizons Ranch and Center, Inc.* (1998), but the U.S. Court of Appeals reversed (1989). In *Wade v. Byles* (1995), a U.S. District Court in Illinois held that contractors providing security at a public housing complex were not state actors, despite the fact that the security guards had the authority to carry guns, arrest people, and use deadly force. In a case involving alleged constitutional violations by privately employed prison guards in Tennessee, the

U.S. Supreme Court declined to grant the guards qualified immunity, even though such immunity would clearly have been granted to guards employed directly by the state (*Richardson v. McKnight*, 1997). These cases are difficult to reconcile.³

Little wonder that state action jurisprudence has been termed a “conceptual disaster area” (Black, Jr., 1967, 95). As one commentator wryly has noted, the Supreme Court’s “sifting” and “weighing” of the facts in state action cases differs from Justice Stewart’s famous “I know it when I see it” standard for identifying obscenity “mainly in the comparative precision of the latter” (Brest 1982, 1325). According to federal judge Henry J. Friendly (1982, 1291), what we know about the distinction between public and private action is more “because the Court has pricked out more reference points than because it has elaborated any satisfying theory.” The Court itself acknowledges that its state action decisions “have not been a model of consistency.”⁴

The confusion is not due to lack of effort on the part of the justices. In the same year that Brest and Friendly issued their criticisms of the Court’s state action jurisprudence, the Court articulated a two-prong scheme for determining whether activities are attributable to government in *Lugar v. Edmondson Oil Co.* (1982, 937), a case that capped a series of legal challenges to the state-authorized debt collection procedures of private creditors.⁵ For behavior to be considered attributable to the state, the *Lugar* majority wrote, it must both 1) “be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,” and 2) be undertaken by “a person who may fairly be said to be a state actor . . . because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State” (see also *Rendell-Baker v. Kohn*, 1982, and *Blum v. Yaretsky*, 1982).

The first prong of *Lugar*’s state action formula may often be easily satisfied, as when an individual simply acts “with knowledge of and pursuant to” a state statute (Metzger 2003, 1412 n. 149, citing *American Manufacturers Mutual Insurance Co. v. Sullivan*, 1999). Note, however, that *bona fide* public employees are not automatically considered to be state actors even when they are performing their official duties. For example, a public defender is not a state actor when representing clients, despite her source of income and official position, because she acts as an adversary of the state (*Polk County v. Dodson*, 1982). “No one fact,” not even actual public employment status, “can function as a necessary condition across the board for finding state action” (*Brentwood Academy v. Tennessee Secondary School Athletic Association*, 2001).

Satisfying the second prong of *Lugar*’s scheme is also tricky, since asking whether a nominally private party “may fairly be said to be a state actor” effectively restates, rather than resolves, the

³ Technically, the Court’s decision in *Richardson* was limited to the immunity issue and did not explicitly address the issue of state action, but its implications for the differential treatment of public employees (ostensibly genuine state actors) and private contractors were clear. For a more thorough discussion of cases involving the privatization of corrections, see Trant (1999).

⁴ Justice Scalia writing for the majority in *Lebron v. National Railroad Passenger Corporation* (1995, 378), citing *Edmonson v. Leesville Concrete Co.*, (1991, 632), Justice O’Connor dissenting.

⁵ *Lugar*’s slim five-to-four majority held that a private party’s participation with state officials in the seizure of disputed property was state action under Section 1983 of the Civil Rights Act of 1871 (42 U.S.C. §1983). Although state action inquiries technically involve constitutional questions, the federal courts typically have seen actions taken “under color of law” as synonymous with the constitutional concept of state action, and mixed constitutional and statutory liability and immunity precedents.

problem of locating the hand of the state in legally suspect conduct. In its efforts to apply this part of the formula, the Court historically has considered three criteria: 1) whether the party committing the conduct did so while performing a government or public function; 2) whether the party's conduct was encouraged, facilitated, or compelled by the government; and 3) whether a symbiotic relationship exists between the government and the party committing the challenged conduct. As Gillian Metzger has observed (2003, 1412), the Court sometimes has adopted a flexible, situational, pragmatic approach in identifying these criteria and applying them to reach an "overall gestalt sense" of whether questioned activities should be held to account under the rules that apply to state behavior. At other times, however, the Court has taken a rigid, restrictive, and highly formalistic stance in applying these criteria, treating them as distinct "tests" that represent exclusive grounds for finding state action and holding it accountable (see also Krotozynski 1995, 317-21; Gilmour and Jensen 1998, 250-52).

The "Public Function" Criterion

Decisions in many state action cases have hinged upon the "public function" criterion, which asks whether private actors or organizations have exercised "powers traditionally exclusively reserved to the State" (*Jackson v. Metropolitan Edison Co.*, 1978, 352) or "exclusive prerogatives of the sovereign" (*Flagg Brothers, Inc. v. Brooks*, 1978, 160). Not surprisingly, the Supreme Court rarely has discerned state action when employing this standard. In *Flagg Brothers*, for example, the Court held that the seizure and sale of personal property by a private storage company was not state action, despite the fact that the procedures in question were both established by state law and enforced in state courts, because "the settlement of disputes between debtors and creditors" has not "traditionally [been] an exclusive public function" (161). Similarly, the Medicaid benefits of elderly patients were terminated in *Blum*, the nursing home case discussed above, in part because the Court was "unable to conclude that nursing homes perform[ed] a function that has been 'traditionally the exclusive prerogative of the State'" (1982, citing *Jackson*, 1978, 353). In *San Francisco Arts & Athletics*, the Court refused to find that the U.S. Olympic Committee had violated the Fifth Amendment due process clause because "[n]either the conduct nor the coordination of amateur sports has been a traditional governmental function" (1987, 545).

By contrast, the lower federal courts have recently found state action when applying the public function criterion in cases involving the incarceration, residential treatment, and involuntary commitment of citizens and the detainment of aliens. Public functions served to identify state action in *Skelton*, *Blumel*, and *Giron* (the prison contractor cases discussed above), and in the district court opinion in *Lemoine* (the case involving the death of a young boy in a privately run, residential treatment facility). Similarly, in *Davenport v. Saint Mary Hospital* (1986), a U.S. District Court in Pennsylvania relied upon the public function criterion to hold that the behavior of a private hospital was state action when it provided care to involuntarily committed patients. The U.S. District Court for the Southern District of Texas also decided in *Medina v. O'Neill* (1984, 1038) that the conduct of a private firm hired by the U.S. Immigration and Naturalization Service to detain aliens was state action, because "the power to expel or exclude aliens' is a fundamental sovereign attribute exercised exclusively by the legislative and executive branches of the United States Government.... Likewise, detention is a power reserved to the government, and is an exclusive prerogative of the state."

The public function criterion aims to ensure accountability by identifying private control over activities that are "essentially" governmental. Unfortunately, this emphasis on "essence" writes off

the vast majority of the tasks performed by contemporary American government. Moreover, it offers no principled guidance on how to define those functions that are the “exclusive” prerogatives of government (Gilmour and Jensen 1998, 250). Looking to history and tradition is suggestive, but hardly dispositive. The Supreme Court has declared that elections, eminent domain, zoning, the exercise of preemptory challenges during jury selection, and municipal functions when private property “has taken on *all* the attributes of a town” are exclusive public functions. It has also asserted that certain functions, including education, fire and police protection, and tax collection, have been *more* exclusively administered by state and local governments than have other functions. Other authorities such as the National Academy of Public Administration and the U.S. General Accounting Office, however, have compiled different lists. It is not difficult to see why federal court decisions employing the public function criterion have reached remarkably different results.

The Significant Government Encouragement (“Close Nexus”) Criterion

As discussed above, there are circumstances in which directly acting, *bona fide* government employees have not been regarded as state actors by the courts because of the jobs they perform in their official capacity. Yet, nominally private actors are sometimes so regarded, either because they have “acted together with or ha[ve] obtained significant aid from state officials, or because [their] conduct is otherwise chargeable to the State” (*Lugar*, 1982, 937). In deciding whether government is ultimately responsibly for inappropriate conduct, the judiciary must “assess the potential impact of official action [to] determine whether the State has significantly involved itself with invidious discriminations” (*Reitman v. Mulkey*, 1967, 380). The “nexus” criterion asks “whether the government exercised coercive power or provided such significant encouragement that the complained-of misconduct ... must be deemed to be the conduct of the government (*Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 1996).

Here again, the goal is to ensure accountability by recognizing control. The nexus criterion aims to identify situations in which such significant or elaborate links (financial, regulatory, administrative) exist between the government and a private party charged with misconduct that the former effectively controls the latter (*Logiodice v. Maine Central Institute*, 2002, 34). But what, precisely, constitutes a “significant” or “elaborate” link? The nexus criterion offers no principled guidance, and hence is no firmer as a standard for identifying state action than the public function criterion. Courts applying it have sometimes found the government so implicated in misconduct of private actors that actions under challenge have been converted into state action for accountability purposes. This occurred in *Lugar*, where the Supreme Court held that a man’s willful participation with state officials in the seizure of property under a defective state statute converted his conduct into state action. Yet, there are many cases in which consideration of the nexus criterion has not led to judicial recognition of state action. In *Rendell-Baker v. Kohn* (1982), for example, the Supreme Court allowed a private high school summarily to terminate an employee without a hearing, even though the school was subject to extensive regulation, reporting requirements, and budget controls; received the vast majority of its operating budget from public sources; and enrolled its pupils due to referrals from public school officials and state drug rehabilitation agency personnel.

The “Symbiotic Relationship” Criterion

The symbiotic relationship criterion focuses upon the quality of the relationship between the government and the nominally private entity involved in an activity under challenge. State action is found when the degree of interaction between government and the private party renders them

substantially inseparable and their relationship is interdependent or mutually beneficial in nature (“symbiotic”). As with the public function and close nexus criteria, applications of the symbiotic relationship criterion are inevitably fact-sensitive inquiries, and relatively minor factual distinctions have produced very different results.

The leading instance of public-private symbiosis constituting state action is found in *Burton v. Wilmington Parking Authority* (1961), in which the Supreme Court held that the refusal of a privately owned coffee shop to serve a black man was discriminatory state action, largely because the shop was a lessee in a publicly owned garage. An intricate financial and service relationship existed between the restaurant and the state. Moreover, the misconduct had taken place in a facility flying both state and national flags on its roof, and bearing official state signs designating its public character. Accordingly, the Court declared that the state of Delaware “ha[d] so far insinuated itself into a position of interdependence” with the coffee shop that it had to “be recognized as a joint participant in the challenged activity.” The state “ha[d] not only made itself a party to the refusal of service, but [also] elected to place its power, property and prestige behind the admitted discrimination” (725).

A divided Court also converted nominally private behavior into discriminatory state action in *Edmonson v. Leesville Concrete Co.* (1991), a case involving the race-based exclusion of potential jurors by private litigants exercising peremptory challenges. Noting the extent to which the nominally private actor had relied on governmental assistance and benefits to strike potential jurors—action that could not have occurred without the “direct and indispensable participation of the judge, who beyond all question [wa]s a state actor”—the *Edmonson* majority held that the state had not only made itself a party to racial bias in enforcing the peremptory challenge, but also “elected to place its power, property and prestige behind the [alleged] discrimination” (624, citing *Burton*, 1961, 725). The dissenting justices in the case failed to perceive the existence of a symbiotic relationship, and argued that “the government’s involvement in the use of peremptory challenges falls far short of ‘interdependence’ or ‘joint participation’” (636-7). “Whatever the continuing vitality of *Burton* beyond its facts,” they wrote, “it does not support the Court’s conclusion here” (637).

The Supreme Court has not relied heavily upon the symbiotic relationship criterion in its decisions attributing state actor status to private parties. It may be that the Court is only willing to recognize symbiosis in instances when there is a perception that the state is involved in racial discrimination, however peripherally. Or it may be that the relationships between the state and private parties involved in challenged conduct have to involve reciprocity for state action to be identified (see Barak-Erez 1995, 1180). The nature and degree of interrelationship sufficient to establish a symbiotic relationship remains uncertain.⁶

In *Brentwood Academy*, the 2001 case involving the governance of Tennessee high school sports, a five-member majority of the Supreme Court articulated a fourth state action criterion: the “pervasive entwinement” of the government and the party committing the misconduct. Commentators have hailed the case as a “flexible, pragmatic, and situation-specific” inquiry that delved into “background connections” to locate state action (Metzger 2003, 1414-5), but it is too

⁶ As the Third Circuit Court of Appeals recently wrote in *Crissman v. Dover Downs Entertainment Inc.* (2002, 242), “*Burton* has not been overruled, nor its reasoning discredited by the Supreme Court in the text of any opinion, despite numerous opportunities.... [W]e must conclude that, while *Burton* remains good law, it was crafted for the unique set of facts presented, and we will not expand its reach beyond facts that replicate what was before the Court in *Burton*.”

early to tell whether “entwinement” will become a distinct test of state action in practice. Lower federal court judges are actively pondering the *Brentwood* majority’s meaning, with some concluding that the entwinement criterion is either closely related to, or synonymous with, the symbiotic relationship criterion (see, e.g., *Johnson v. Rodrigues*, 2002; *Logiodice v. Trustees of Maine Central Institute*, 2002). Yet, entwinement may set a lower bar than symbiosis, in that it seems to require a high degree of involvement or entanglement but *not* reciprocity or mutual *benefit*. The dissenters in *Brentwood* (Justices Thomas, Rehnquist, Scalia, and Kennedy) clearly saw entwinement as a new criterion by which misconduct can be attributed to the state. In their view, entwinement extends the state action doctrine “beyond its permissible limits” and “encroaches upon the realm of individual freedom that the doctrine was meant to protect” (305).

A factor complicating state action analysis still further is the tendency of reviewing courts to apply different standards of evaluation depending upon the nature of the constitutional right infringed by alleged misconduct, without articulating the basis for their use of different standards. In cases involving deprivations of First Amendment religious liberties, for example, the Supreme Court has historically been much more willing to find—or even assume—the presence of state action. In a sense, reliance upon Establishment Clause doctrine allows the judiciary to evade state action inquiry by recasting the issues in terms of government support of religion. Yet, decisions finding a violation of the Establishment Clause hinge upon the presence of state action, whether that requirement is articulated or not. If certain liberties protected by establishment and equal protection doctrine are to be accorded greater importance than, say, due process guarantees, the courts arguably should say so explicitly, and explicitly justify such distinctions. But this has not occurred.

The principle at stake is simple: when government acts, mechanisms must be in place that allow us to hold government constitutionally, fiscally, and ethically accountable for that action, and it should not matter whether that action is taken by a public employee or a contractor. If we cannot identify which actions are attributable to government, we cannot enforce that principle. Instead, we create areas of ambiguity within which unethical behavior—real or perceived—can further erode the public’s trust in its governing institutions. That is precisely what occurred in the so-called “Indianapolis Experiment.”

The Indianapolis Experiment: A Cautionary Tale

From 1992 until 1999, the then Mayor of Indianapolis, Indiana, Stephen Goldsmith, was a leading proponent of privatization, which he preferred to call “marketization.” His efforts were widely reported, in glowing terms by the national media (*Washington Post* 1993; Stern 1994) and in somewhat less glowing terms by local commentators (Miller 2001a, 2001b, 2001c; Howey 1998, 1999).

The early days of the Goldsmith administration were marked by a series of press releases touting its efforts to cut middle management (almost invariably referred to as “fat”) and replace “bloated bureaucracy” with “more efficient,” private providers of goods and services (Remondini 1991). As with privatization initiatives elsewhere, the award of major contracts to manage operations previously handled by municipal employees generated persistent allegations that political contributors were being rewarded with lucrative city business, and that privatization was simply

another form of patronage (Ritchie and Kennedy 2001).⁷ It can be argued that such suspicions are an inevitable outgrowth of the “government by expert” privatization model, which gives high priority to *product* or output, and short shrift to *process*. The problem is intimately connected to the issues of political and fiscal accountability that typically arise in the context of ambitious efforts at privatization.

Issues of legal accountability are inextricably intertwined with political and fiscal challenges. Because it is often unclear whether and when the activities of private entities operating under government contracts constitute state action, it is unclear whether and when they must obey laws intended to constrain state actors. Can a municipality avoid compliance with due process requirements, or intentionally infringe citizens’ First Amendment rights, by the simple expedient of employing a nominally private company to provide public services? Are records maintained by city contractors subject to Freedom of Information inquiry? Must contractors comply with statutes prescribing municipal processes? As the foregoing discussion of state action jurisprudence demonstrated, existing law is unclear, offering public officials opportunities to avoid limitations on government behavior by simply *calling* their actions or agents private (Gilmour and Jensen 1998). In Indianapolis, when the contractors managing the City’s Wastewater Treatment Plant were charged with evasion of Indiana bid laws, Mayor Goldsmith claimed that compliance with those laws was unnecessary for a “private” actor (*Indianapolis Star* 1994).

Stability and predictability are vital elements of government legitimacy and a necessary condition of citizen trust. The move to privatization in the form of contracting out, however, is justified by the promise of finding a better deal, a cheaper supplier, and/or a different or more efficient way of delivering public goods and services. It invites—indeed, it celebrates—constant change. In Indianapolis under Goldsmith, change came to be seen as an end in itself, rather than a side effect of necessary improvements; it was equated with progress and efficiency. The names of City departments were changed: the Department of Public Works, for example, became the Department of Capital Asset Management. Personnel changes were frequent: many employees were fired, and many others reassigned (Miller 2001a, 2001b, 2001c). Functions were relocated or contracted out with virtually no prior notice to affected agencies. In many courtrooms during the early months of the Administration, court records piled up in boxes for months, awaiting the choice of a new, private microfilm company (Zore 2000). Not long after Goldsmith’s election, his deputy mayor told previous mayor Bill Hudnut (1999) that the new administration’s motto was “If it ain’t broke, break it and then fix it.” Not surprisingly, morale and employee turnover were persistent problems (O’Laughlin 2000). Moreover, race relations were affected. The local black community viewed privatization as a method of rewarding mostly white political contributors at the expense of the blacks, who previously had been well represented in the city workforce (Ritchie and Kennedy 2001).

If careful consideration was given to the legal responsibilities attending these dislocations, it was not evident. Yet, it was precisely the legal and fiscal accountability issues that gave rise to persistent charges of unethical behavior. Much of what pundits excoriate as bureaucratic and

⁷ Cutting middle management had consequences for Indianapolis party politics as well as government. Howey and Shoeff (1998) have observed that when Goldsmith “sacked the mid-level bureaucracy that had accumulated during the Republican Lugar and Hudnut administrations, he essentially disemboweled one of the most prolific and successful political machines of Midwest history.” Afterwards, the beleaguered Marion County GOP floundered as declining manpower and enthusiasm translated into an inability to get out the vote.

governmental inefficiency, or “red tape,” are really precautions against corruption. If trust in government requires accountability, lack of accountability contributes to distrust and even cynicism about government and those who are engaged in it (Hardin 1998). The political system requires structural safeguards that recognize the differences between government and private enterprise, and protect against abuse. When public and private are understood to be interchangeable, those safeguards are seen as expendable impediments to efficiency rather than prudential mechanisms necessary to operational integrity.

The Indianapolis approach to privatization undercut legal and political accountability in several important ways:

- It had a marked and troubling effect on public criticism of the Goldsmith administration. Reporters investigating allegations of misfeasance told similar stories of sources unwilling to be quoted or even to talk to the media (Krull 1999; Ullmann 1999). The implicit (and sometimes explicit) threat of losing business also quieted companies contracting with the City, and exerted a discernable “chilling effect” on relatives, business associates, and those who hoped to do business with the City in the future.
- Charges of misfeasance could be—and were—dismissed as unfounded complaints by disgruntled public employees. When an Indianapolis Parks Department engineer alleged improprieties by the contractor that had displaced him from his position, the Administration dismissed his charges on precisely that basis. The City eventually settled the case for \$300,000 after local media investigated and confirmed the allegations. The widely reported episode, together with a prolonged expose by the *Indianapolis Star* of financial improprieties involving privatization of the City’s golf courses and still other reports over irregularities involving the contract to manage the City’s wastewater treatment plant, left many citizens uneasy and raised questions about the adequacy of the City’s capacity to monitor contractors’ performance (Howey 1998, 1999).
- Open books and records, regular audits, and other proofs of financial regularity are an essential element of accountability. In an increasingly privatized Indianapolis, it became more and more difficult to get a complete picture of city expenditures. As Kettl (1993) points out, a company doing business with the city does not thereby bargain to open its books to the world. If onerous reporting restrictions are imposed, the costs of complying with those restrictions will become part of the overhead charged against the contract—reducing the financial benefits privatization is supposed to provide. On the other hand, when public money is being spent, the public has a right to ensure that it is being spent in accordance with both the contract and the law.

The conflict between a private company’s right to keep proprietary information private and the public’s “right to know” where public funds are going was a subject of constant debate during the Goldsmith years. Midway through its administration, the City took a bill to the Indiana General Assembly aimed at “expediting” the contracting out process. One of the changes it proposed would have removed from the definition of “public money” all sums paid to a private contractor pursuant to a legally binding and enforceable contract. Had that provision been enacted, no public audit of a

contract could have occurred once payment to the private contractor had been made. Once the check had been written, the funds would be deemed private. Whatever the merits of this proposal, it generated quite a negative public reaction (Miller 2001a, 2001b, 2001c).

Unfortunately for the administration, as accusations mounted, most of the financial reports available to rebut the persistent charges of impropriety came from still other private contractors, who faced questions about their own independence. That the City's financial statements were prepared by a large accounting firm that had contributed over \$30,000 to Goldsmith's political campaigns during the period in which it held the city contract raised conflict of interest charges (Howey 1999). Internal bookkeeping and audit capacities were contracted out, leaving the City without the management depth needed for good internal documentation and fiscal controls. At least partially as a result, nearly 30% of the contracts inherited by the subsequent administration were determined to be legally inadequate (Ritchie and Kennedy 2001). An audit by the State Board of Accounts in response to a taxpayer petition in 1999 found rampant and pervasive noncompliance with statutory requirements: lack of required documentation, acceptance of bids without statutorily required engineering estimates, incorrect cost codes, awards made to legally non-responsive bidders, notices to proceed issued 100 days after the expiration of the allowable statutory period, change orders executed after the issuance of a certificate of substantial completion, contracts awarded despite the fact that fewer than the required three bids were received, and even mathematical errors in the computation of city payments due (State of Indiana 1999a, 1999b).

Indianapolis is certainly not the only city to experience irregularities of this sort, and not all of the problems of the Goldsmith Administration can be attributed to privatization initiatives. However, the Administration's failure to recognize the importance of the public-private distinction, and to address the vital issues of legal and constitutional accountability that depend upon that distinction, was a substantial contributor to its problems. Goldsmith and other Administration officials apparently believed that once a contract had been executed with a private proxy to deliver a service on behalf of the City government, the service became "private" for most, if not all, legal purposes. By contrast, the public and the media took the view that if municipal government was paying for the service with tax dollars and choosing the provider, the service should be subject to the same rules that govern other public actions. This disconnect became increasingly obvious, as the Administration and its critics essentially talked past each other.

Conclusion

There is nothing inherently wrong with the new governance's search for increased efficiency and cost effectiveness in the performance of public functions. However, it remains to be seen how the new governance can achieve efficiency and effectiveness without sacrificing the democratic norms of equity, accountability, and due process that are fundamental to our political order and constitutional culture. The muddled state of the law and jurisprudence related to state action enables and even encourages the kinds of abuses that have occurred in Indianapolis, Iraq, and a host of jurisdictions in between. Since we are unlikely to see the abandonment of government by proxy, the issue before us is what sort of new direction public law might provide so that governance can be simultaneously efficient, effective, equitable, and ethical.

A solution to this dilemma is beyond the scope of this chapter, but we can report that scholars are actively puzzling over ways to overcome the new governance-legal accountability impasse.

Noting that an agency relationship is created whenever the government authorizes a private entity to act on its behalf, Sheila Kennedy (2001) has suggested that the laws of agency and partnership should apply, either directly or by analogy, and either prospectively (in contract negotiations) or retrospectively (in judicial review). Under the laws of agency, when government cloaks a contractor with real or apparent authority to act on its behalf, the ensuing action is deemed governmental. Widely utilized jury instructions, for example, define an “agent” as “a person who at a give time is authorized to act for or in place of another person,” and specify that the conduct of the agent need not be expressly authorized by the principal for it to be “within the scope” of the agent’s authority. If the conduct is “incidental to, customarily connected with, or reasonably necessary for” the performance of an authorized act, it has occurred within the scope of authority and, if wrongful, can give rise to liability.

In a similar vein, Gillian Metzger (2003, 1456) has urged us to rethink state action in private delegation terms. Under such an approach, the key question would not be whether private entities wield government power, but rather, whether grants of government power to nominally private entities are adequately structured to preserve legal accountability. As in Kennedy’s formulation, the central criterion for singling out particular private delegations for enhanced judicial scrutiny would be whether they authorize private entities to act on the government’s behalf—that is, whether they meet the legal requirements of agency.

Finally, a more holistic approach has been proposed by Jody Freeman (2003), who somewhat counterintuitively suggests that privatization can serve as a means of “publicization,” or a mechanism for expanding government’s reach into realms traditionally thought private. Her point is not that we should use public law to force time-consuming and expensive standards and processes upon private entities (which contribute to some of the very problems of governance that efficiency-minded privatization advocates seek to solve). Rather, she argues, we might more creatively use vehicles such as conditional government spending, regulation, tort liability, and contract negotiation to motivate private actors to commit themselves to democratic norms of accountability, due process, and equality.

As Freeman has observed (2003, 1329-30), and as the aforementioned events in Iraq and Indianapolis have demonstrated, citizens may be complacent when the privatized arrangements of the new governance run smoothly, but expect government to step back in and “do something” when things go awry. Citizens rely upon government to ensure accountability for action taken on behalf of the public, no matter who the state’s agents might be. As privatization initiatives have begun to affect vital and politically contentious public goods, services, and activities, the public has appeared increasingly inclined to demand greater accountability from, and increased governmental supervision of, contractors. As discussed above, the private management of U.S. prisons has resulted in a steady stream of litigation in the federal courts, as well as a deluge of scholarly commentary. Reactions to voucher programs and the private management of public elementary and secondary schools have also generated a flood of studies, academic and popular commentary, and litigation. Citizen outrage over perceived abuses by Health Maintenance Organizations (HMOs) has led to litigation and state and federal reform legislation (Freeman 2003, 1330). Most recently, the behavior of the public and private agents charged with conducting the “war on terrorism” has come under fire. Although it remains to be seen whether, and to what extent, private contractors employed at the Abu Ghraib prison will be held to account for the abuses that took place there, there can be no doubt that members of the media, government officials, and citizens alike are outraged by the

unethical and inhumane acts that were enabled by, and committed under, the authority of the United States. The rise of the new governance has not lessened concern over how state power is deployed. The challenge at hand lies not in finding the will to ensure that privatized governing arrangements are appropriately accountable, but rather, in finding the way.

References

- Barak-Erez, Daphne. 1995. "A State Action Doctrine for an Age of Privatization." *Syracuse Law Review* 45: 1169-92.
- Black, Charles L., Jr. 1967. "The Supreme Court, 1966 Term—Forward: 'State Action,' Equal Protection, and California's Proposition 14." *Harvard Law Review* 81: 69-109.
- Borger, Julian. 2004. "U.S. Military in Torture Scandal." *The Guardian* online, 30 April; article retrieved 6 May 2004. <http://www.guardian.co.uk/Iraq/Story/0,2763,1206725,00.html>
- Brest, Paul. 1982. "State Action and Liberal Theory: A Casenote on *Flagg Brothers v. Brooks*." *University of Pennsylvania Law Review* 130: 1296-1330.
- Brinkley, Joel, and Glanz, James. 2004a. "Contractors Implicated in Prison Abuse Remain on the Job." *New York Times* online, 4 May; retrieved 6 May 2004. <http://www.nytimes.com/2004/05/04/international/middleeast/04CONT.html>
- . 2004b. "Contractors in Sensitive Roles, Unchecked." *New York Times* online, 7 May; retrieved 7 May 2004. <http://www.nytimes.com/2004/05/07/politics/07CONT.html>
- Cooper, Phillip J. 1995. "Accountability and Administrative Reform: Toward Convergence and Beyond." In *Governance in a Changing Environment*, ed. B. Guy Peters and Donald J. Savoie. Montreal: McGill-Queen's University Press.
- Frederickson, H. George. 1993. "Ethics and Public Administration: Some Assertions." In *Ethics and Public Administration*, ed. H. George Frederickson. Armonk, NY: M.E. Sharpe, pp. 243-61.
- Freeman, Jody. 2003. "Symposium: Public Values in an Era of Privatization: Extending Public Law Norms Through Privatization." *Harvard Law Review* 116 (2003): 1285-1352.
- Friendly, Henry J. 1982. "The Public-Private Penumbra—Fourteen Years Later." *University of Pennsylvania Law Review* 130: 1289-95.
- Gilmour, Robert S. and Jensen, Laura S. 1998. "Reinventing Government Accountability: Public Functions, Privatization, and the Meaning of 'State Action.'" *Public Administration Review* 58: 247-58.
- Hardin, Russell. 1998. "Trust in Government." In *Trust and Governance*, ed. Valerie Braithwaite and Margaret Levi. New York: Russell Sage Foundation.
- Howey, Brian A. 1998. "Peeling the Goldsmith Onion: The Mayor Brought Dramatic Changes to City Government, But What it Cost and What We Got is a Mystery." *Nuvo Newsweekly*. 3 December.
- . 1999. "Goldsmith's Community Credit Card." *Nuvo Newsweekly*. 20 May.
- Howey, Brian A., and Schoeff, M. Jr. 1998. "Inside the Stunning '98 Indiana Election." *The Howey Political Report*. November.
- Hudnut, William H. 1999. Interview with Sheila Suess Kennedy. 18 February.
- Indianapolis Star*. 1994. "Privatization Run Amuck." 30 August.

- Kennedy, Sheila S. 2001. "When is Private Public? State Action in the Era of Privatization and Public-Private Partnerships." *George Mason University Civil Rights Law Journal* 11: 203-223.
- Kettl, Donald F. 1988. *Government by Proxy: (Mis)Managing Federal Programs*. Washington, DC: CQ Press.
- . 1993. *Sharing Power: Public Governance and Private Markets*. Washington, DC: Brookings Institution.
- Krotoszynski, Jr., Ronald J. 1995. "Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations." *Michigan Law Review* 94: 302-47.
- Krull, John. 1999. Interview with Sheila Sues Kennedy. 27 January.
- Metzger, Gillian E. 2003. "Privatization as Delegation." *Columbia Law Review* 103: 1367-1502.
- Miller, Jack. 2001a. "Privatization in Indianapolis: Problems, 'Proximity Issues' and Oscar Robertson Smoot." In *To Market, To Market: Reinventing Indianapolis*, ed. Ingrid Ritchie and Sheila Sues Kennedy.
- . 2001b. "Privatizing the City's Golf Courses." In *To Market, To Market: Reinventing Indianapolis*, ed. Ingrid Ritchie and Sheila Sues Kennedy.
- . 2001c. "Privatizing the City's Swimming Pools." In *To Market, To Market: Reinventing Indianapolis*, ed. Ingrid Ritchie and Sheila Sues Kennedy.
- Miller, T. Christian. 2004. "Contractors Fall Through Legal Cracks." *Los Angeles Times*. 4 May, p. A8.
- Miller, T. Christian and Miller, Greg. 2004. "Iraq Prison Workers Questioned." *Los Angeles Times*. 1 May, p. A7.
- Minow, Martha. 2002. *Partners, Not Rivals: Privatization and the Public Good*. Boston: Beacon Press.
- O'Laughlin, Beth. 2000. Interview with Sheila Sues Kennedy. 28 June.
- Posner, Paul L. 2002. "Accountability Challenges of Third-Party Government." In *The Tools of Government: A Guide to the New Governance*, ed. Lester M. Salamon. New York: Oxford University Press, pp. 523-51.
- Remondini, David. 1991. "Goldsmith Looking to Cut City Force by Twenty-Five Percent." *Indianapolis Star*. 26 November.
- Ritchie, Ingrid and Kennedy, Sheila Sues. 2001. *To Market, To Market: Reinventing Indianapolis*. Lanham, MD: University Press of America.
- Rohr, John A. 1998. *Public Service, Ethics, and Constitutional Practice*. Lawrence, KS: University Press of Kansas.
- Romzek, Barbara S. and Dubnick, Melvin J. 1987. "Accountability in the Public Sector: Lessons from the Challenger Tragedy." *Public Administration Review* 47: 227-38.
- Salamon, Lester M., ed. 2002. *The Tools of Government: A Guide to the New Governance*. New York: Oxford University Press.
- State of Indiana, Board of Accounts. 1999a. "Special Report of Construction Projects for Municipal Gardens Recreations Center and Carson Park Recreation Center." 16 September.

- , 1999b. "Special Report of Construction Projects for Franklin-Edgewood Park, Krannert-King-Brookside Aquatic Centers, and Perry Park Ice Rink and Aquatic Facility. 16 September.
- Stern, William M. 1994. "We Got Real Efficient Real Quick." *Forbes*. 20 June.
- Trant, Robert. 1999. "Comment: *Richardson v. McKnight*: Are Private Prison Operators Engaged in State Action for the Purposes of 42 U.S.C. §1983?" *New England Journal on Criminal and Civil Confinement* 25: 577-606.
- Ullmann, Harrison. 1999. Interview with Sheila Suess Kennedy. 23 January.
- Washington Post*. 1993. "A Mayor Shows Gore's Team the Way." 25 August.
- Zore, Gerald. 2000. Interview with Sheila Suess Kennedy. 20 June.

Cases Cited

- American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999).
Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, 84 F.3d 487 (1996).
Blum v. Yaretsky, 457 U.S. 991 (1982).
Blumel v. Mylander, 919 F. Supp. 423 (M.D. Fla. 1996).
Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001).
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
Civil Rights Cases, 109 U.S. 3 (1883).
Crissman v. Dover Downs Entertainment Inc., 289 F.3d 231 (2002).
Davenport v. Saint Mary Hospital, 633 F. Supp. 1228 (E.D. Pa. 1986).
DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989).
Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).
Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978).
Giron v. Corrections Corporation of America, 14 F. Supp. 2d 1245 (D. N.M. 1998).
Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1978).
Johnson v. Rodrigues, 293 F.3d 1196 (2002).
Lebron v. National Railroad Passenger Corporation, 513 U.S. 374 (1995).
Lemoine v. New Horizons Ranch and Center, Inc., 990 F. Supp. 498 (N.D. Tex. 1998); *reversed*, 174 F.3d 629 (1999).
Logiodice v. Trustees of Maine Central Institute, 296 F.3d 22 (2002).
Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982).
Medina v. O'Neill, 589 F. Supp. 1028 (S.D. Tex. 1984), *vacated in part, rev'd in part*, 838 F.2d 800 (1988).
National Collegiate Athletics Association v. Tarkanian, 488 U.S. 179 (1988).
Plain v. Flicker, 645 F. Supp. 898 (1986).
Polk County v. Dodson, 454 U.S. 312 (1982).
Reitman v. Mulkey, 387 U.S. 369 (1967).
Rendell-Baker v. Kohn, 457 U.S. 830 (1982).
Richardson v. McKnight, 521 U.S. 399 (1997).
San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987).
Shelley v. Kramer, 334 U.S. 1 (1948).
Skelton v. Pri-Cor, Inc., 963 F.2d 100 (1991); *cert. denied*, 503 U.S. 989 (1992).
Virginia v. Rives, 100 U.S. 13 (1879).
Wade v. Byles, 886 F. Supp. 654 (N.D. Ill. 1995); *affirmed*, 83 F.3d 902 (1996); *cert. denied*, 519 U.S. 935 (1996).
West v. Atkins, 487 U.S. 42 (1988).