

## Critical Exchange | **The Privatized State, Output Legitimacy, and Market Structure<sup>1</sup>**

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It is hard to overstate the significance of Cordelli's wonderful *The Privatized State. Why Government Outsourcing of Public Powers is Making Us Less Free* (Princeton University Press, 2020). The book is closely argued, original, complex in design and execution. The narrative that Cordelli wants to bring to philosophical life is a relatively familiar one. Over the past fifty years or so, increasing parts of traditional state functions have been wholly or partly privatized. Political philosophers, as Cordelli correctly argues, have not, however, fully grasped the significance of these changes. They have oscillated between a concern for the efficiency of privatized services on the one hand, and the search for what might putatively make a given aspect of state activity inherently public (think of prisons, courts, the army etc.) on the other. In this picture, there might be parts of state activity that simply cannot be delegated to private actors in light of their essentially public nature, while for all others, the only thing that seems to matter is whether they make people better or worse off than available alternatives. Yet this all-or-nothing approach is too simplistic, Cordelli goes on to argue, and runs the risk of "presenting the problem simply as a question about the desirability or permissibility of transferring discrete state functions to private actors" which would in turn suggest that "government is ultimately reducible to a provider of particular goods and services" (6). Instead, progressive privatization should be seen as a fun-

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damental transformation “of the mode of governing and of the identity of government” thus calling into question one of the, if not the, main normative properties(y) of any political order, namely, its legitimacy. According to Cordelli:

The ultimate wrong of privatization... consist in the creation of an institutional arrangement – the privatized state – that denies, to those subject to it, equal freedom, understood not as mere noninterference but rather as a relationship of reciprocal independence. It does so by making the definition and enforcement of individuals’ rights and duties, as well as the determination of their respective spheres of freedom, systematically dependent on the merely unilateral will of private actors... (9).

Though the overall argument is complex, its core is relatively simple to grasp. The problem with privatizing an increasingly large part of state functions is that citizens interact with one another, and thus affect one another’s rights and prerogatives, merely as private individuals; this is, in the end, what happens when important aspects of someone’s life (e.g. access to medical care) are delegated to private providers of goods and services. The distinction between public offices and private roles is progressively eroded; our daily lives include a growing number of instances in which our independence is made precarious by the intervention of agents that lack appropriate standing. To avoid the normative pitfalls of the privatized state Cordelli proposes two distinct solutions. The first involves setting ex-ante constitutional limits on the outsourcing of state functions to private agents. The second consists in developing a democratic theory of public administration. This second aspect is crucial to understand that a more idealized version of public governance is possible and to be preferred to either privatization or to the acceptance of a dysfunctional and largely unresponsive state bureaucracy.

I have started my engagement with Cordelli’s work by offering praise. And the praise is well deserved. However, in what follows, I shall highlight several points I found less intuitively appealing. I use the word ‘appealing’ advisedly, for I cannot hope to offer, given the space I have available, a detailed analytical appraisal of those points. Rather, I hope that by discussing them, the contours of an alternative picture might come to life, and thus that the nature of my perplexities can come to

be seen for what they are, namely, the result of a different overall philosophical orientation. To be clear, offering an alternative philosophical orientation does not prove Cordelli wrong. After all, to simply *assert* that the premises to an argument are incorrect does not, usually, invalidate its conclusions. However, offering such an alternative may provide some context to the discussion and explain the genesis of one's more specific perplexities about the argument under scrutiny.

To begin with, I should note that the book has a clear (and well defended) set of normative foundations. It is, more specifically, heavily indebted to a Kantian approach to political philosophy. Now, this is, to be fully clear, not a problem per se. And yet one is bound to balk at the idea that

only in the presence of appropriately constituted democratic institutions can rights and duties be defined, adjudicated, and enforced in a way that is fully consistent with a norm of mutual respect both for the equal normative authority of all and for individuals' rational independence (47).

This kind of argument suggests a very specific normative framework. One where we have on hand: a) a well-defined conception of the free person; b) a clear picture of what kind of problem political institutions are meant to be a solution to; c) an uncontroversial account of what grounds the authority of democracy; and d) of the bases of the legitimacy of state action more broadly. The fact that political philosophers have spent considerable energy debating different views concerning a)-d) does not imply, to repeat, that Cordelli is wrong, yet, at times, one might feel that going along her criticism of the privatized state involves accepting a fair amount of 'philosophical baggage'. This is, to be fair, a feature rather than a bug of her work, and it is also part of what gives it depth, philosophically speaking.

I am not, however, particularly attracted to the overall Kantian picture that seems to emerge. My philosophical sympathies lie closer to the 'liberal' in 'liberal democracy', my understanding of the function of political institutions leans more heavily on their unique ability in solving coordination problems (though of course I am not equally attracted to all kinds of solutions!), the conception of the person I have in mind is rather more minimal and rather non-committal when it comes to the role of

rational independence, my enthusiasm for the authority of democracy is mild, and I am relatively happy to accept that the legitimacy of state institutions is affected by their outputs, not simply their inputs, over and above the realization of basic justice or guaranteeing the substantive conditions for a functioning democratic order.

This last point is, I believe, worth belaboring. Cordelli is not committed to the implausible view that Kantian input legitimacy is all that matters (and there are output elements in the Kantian account, as Cordelli correctly reminds us of), and she is also ready to concede that when state institutions are corrupted or exceedingly prone to malfunctioning there might be a case for delegating certain responsibilities to the private sector (12). Things must get done after all. However, one might feel that efficiency considerations do not exactly take pride of place in the overall structure of her argument. The relative unimportance of efficiency can be gleaned both at more abstract and more concrete levels of analysis. At the highest level of abstraction, efficiency is always presented by Cordelli as providing normative reasons that seem to be of lesser importance. I suspect that the explanation for this situation is closely related to what I have labelled, above, 'philosophical orientation'. In a Kantian approach political societies are not, or not primarily, cooperative ventures for the pursuit of mutual advantage in the context of relatively radical forms of pluralism. Rather, they are more akin to the creation of a normative order to preserve individuals' freedom when the latter is made precarious by the absence of public adjudication and enforcement of rights. While both approaches will certainly be hospitable to considerations pertaining to the fair division of the burdens and benefits of social cooperation, the place of efficiency is, however, bound to differ. For only in the first kind of approach does it even make sense to entertain the idea that efficiency can be considered central to the very point and purpose of political association. How so? One attractive option is, following Joseph Heath (2020, 142-146), to see the commitment to efficiency as one way in which public institutions respect liberal neutrality among conceptions of the good while at the same time registering the fact that persons cooperate, at a fundamental level, to improve their lives.

One, this time more applied, instance of the secondary importance assigned to efficiency is clearly visible in Cordelli's discussion of how to legitimize bureaucratic discretion. Cordelli is frankly admirable in the sub-

stantial amounts of reasonableness she injects in her Kantian democratic account when she suggests what she calls an integrative model (97 ff.). Nonetheless, the insistence on top-down and bottom-up forms of democratic control over public administrators' discretion have not, alas, managed to warm this reader's heart. Cordelli readily accepts that democratic control "should be limited by a requirement of fidelity to other aspects of the constitutional democratic state" (99). Yet, in my view, this is too loose a requirement. There are plenty of ways to waste public money, or simply to employ it in ways that are damaging for the ordinary lives of citizens, that pose no threat to the constitutional democratic state. The fact that such outcomes could be the result of robust democratic control over public administration would not, in my view, contribute to salvage them.

In the context of what we might reasonably see as a qualified defense of a fiduciary approach to the legitimation of bureaucratic discretion, Cordelli writes that "citizens are not children, and therefore they may, within certain boundaries, legitimately expect public administrators to carry out their own judgment and interpretation of what counts as a public purpose" (102). Hoping not to come across as exceedingly cynical or elitist, I would want to highlight that citizens not being children does not provide the sort of reassurance that would allow me to feel confident that *their* judgment and purposes are such that my life will not be made considerably worse because of *their* oversight over *our* bureaucracy. More to the point, it is at best unclear to me that the comparative evaluation of the risks involved in a despotic and unresponsive professional bureaucracy on the one hand, and of poor-quality inputs from democratic forms of oversight on the other, ought to be settled by assigning greater urgency to the former.

I suspect that my reaction is in part dictated by the kind of political context in which I spend most of my time. Southern Italy, and especially Napoli, are not exactly under threat from massive waves of privatization of core state functions. In addition, given the world as it is, the idea that the fundamental concern for public bureaucracies is to constraint professional discretion in light of democratic inputs from elected officials and ordinary citizens is bound to strike most people who live south of Rome as at best creative. I think that Cordelli would probably recognize that these contextual elements ought to matter to some extent. But I also suspect that some residual forms of disagreement would still stand.

One way to formalize this concern would be to say that one ought to discuss at greater length at what level of idealization we are required to operate for top-down and bottom-up democratic control to prove desirable. And I suspect that it would have to be considerable. Put differently, to the extent one assigns greater weight to efficiency considerations than Cordelli does, and to the extent that one sees the legitimacy of state action more strongly connected to its outputs, it seems reasonable to imagine that democratic control over state bureaucracies would have to be wielded by persons that are significantly different than the ordinary citizens of existing liberal democracies.

The relationship between efficiency and institutional design is also relevant in Cordelli's treatment of the market. The core of my concerns is related to what kind of picture of the market we are likely to gain by reading *The Privatized State*. A short detour is in order here. The premise I would like to begin with is that there is no such thing as 'the market', there are, instead, markets. As Debra Satz elegantly put it, "the view of the market as a homogeneous mechanism operating across different types of exchanges is distinctly modern" (2010, 39). Markets are socially embedded, and this implies that we need to look at how they are set up to understand who is likely to exercise more or less power within them. This last point is particularly salient in the context of the privatization of state functions. For it is precisely when we mix public goals and purposes with some form of price or incentive mechanism that we are likely to explore the regulatory complexities of different kinds of market structures (here I follow Claassen 2022). Concretely, this suggests that the privatization of utilities, rail transportation, health care, education etc. is unlikely to lead to market structures that resemble, say, the market for shoes.

So what? Much of life is about trade-offs. An interesting question, the question that I, for one, would be interested in getting an answer to, is what is gained and what is lost when a given market structure is introduced for the funding and/or production and/or allocation of a public service. We might lose some measure of public control, but, for example, gain some measure of efficiency, and the latter might come from empowering those who we might intuitively think are the 'right agents'. In Jane Gingrich's apt words, we can say that markets in public services "vary in how they place costs on users and in how they distribute power among (a) the state, (b) users of services, and (c) new

producers of services” (2011, 7). To illustrate, if a government decides to fund access to a service through a voucher citizens can spend by selecting a private provider instead of producing the service in question (think of schools), it is not obvious that competition between providers would not empower users (here, parents) as opposed to the providers themselves. Much will depend on how many providers there are, what standards the government sets to enter the market, whether families can realistically choose between different providers and are aware of what those choices involve etc.

Similar considerations, I believe, apply to some of the examples that Cordelli often reaches for to illustrate her concerns (154). The problem with, for example, contracting a specific firm for assessing a person’s eligibility for a given benefit might not necessarily be that the firm’s decision is illegitimate, but that, in the absence of competition, the firm might be tempted to exercise its (market) power to serve its purposes at the expense of applicants. If we could imagine a scenario where assessing benefit eligibility was contracted out to, say, twenty firms that applicants can realistically choose from, it is not at all obvious that benefit seekers would not gain substantially more ‘power’ than in a putative alternative where their eligibility was assessed by the government. Looking at things from the standpoint of efficiency, one might be tempted to say that replacing government monopolies with private ones is seldom a good idea if there are plausibly feasible alternatives, and that, if there aren’t, then, the resulting market ought to be highly regulated precisely to avoid undesirable outcomes such as profit maximization attitudes without market discipline. Putting things in a slightly different way, we might, *arguendo*, concede that the only truly legitimate exercises of quasi-legislative power are public ones. What is less obvious is what follows from this. For, we might discover that some market structures, while permitting some exercises of power by private agents, would also allow us to minimize the latter while at the same time offering some form of improvement to citizens’ quality of life. And, if this is the picture we face, it is unclear, at least to me, that privatization would be morally inappropriate. Benefit seekers are, after all, deeply interested in seeing their case assessed quickly, and fairly, not in the nature of the stamps that cover their applications.

To be fair, no one in their right mind should claim that it is easy to create market structures that combine effective public regulation engen-

dering efficiency gains and greater power for individual participants (especially when those individual participants come from disadvantaged groups in society). But thinking of privatization as ‘the state vs. the market’ suggests a different kind of all-or-nothing picture compared to the one Cordelli so insightfully warns us against. All forms of privatization are not created equal, and this is because market structures vary significantly, and their variations matter immensely. That many forms of privatization we are familiar with end up empowering private providers rather than users is not the result of destiny or nature, but of (poor) design (or lack thereof).

Whether or not one agrees with Cordelli’s overall argument, her concern for the legitimacy of the privatized state is a healthy reminder of the fact that the political economy of very unequal democracies can often lead to undesirable outcomes. That the reminder comes from a well written and philosophically sophisticated book is a much-appreciated bonus.

### *References*

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