

# Privatization, Representation, and Accountability

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# The Question

- What is morally objectionable, if anything, with (which instances of) privatization?
  - Existing approaches:
    - Outcomes-oriented (Risse 2005)
    - Commodification (Walzer 1982; Anderson 1997; Satz 2010)
- Even if privatizing public functions could improve outcomes, would there be reasons of legitimacy to limit the extent of privatization?
  - Legitimacy: the moral right and standing to impose certain decisions on others.

# The Nature of Delegated Power

- Not merely executive;
- Partly autonomous, rule-making power.
  - E.g. “[C]orrections officers in a prison serve in a quasi-judicial role...Although prisons are often highly regulated, *these regulations* [on the basis of which punishment determinations are made] *are derived more from the prison environment than from the legislature...*the very nature of prisons suggests that they cannot be run by procedures carefully detailed by ‘outsiders’.” (Field 1997)

# The Question of Legitimate Exercise

- What conditions must a delegated agent (A) of a democratic government (G) meet in order for A's exercise of political power (P) to count as legitimate?

## 1. The Authorization Condition

A must be *validly authorized* by G to exercise P.

## 2. The Domain Condition

A's *exercise of P* must fall within the scope of A's authorized activity.

## 3. The Representation Condition

A must exercise P *in the name* of G.

# I. Representation and Legitimacy

## **The communicative nature of delegated functions and the scope of authorization.**

- Some inherently communicative functions can only be performed by agents having the appropriate representative capacity (e.g. punishment, see Dorfman and Harel, 2013).

## **The nature of justice claims and the content of democratic entrustment.**

- Duties of justice can only be discharged either by the agents who owe them or in their name (Beerbohm, 2016).

## II. The Conditions of Representation

### **The Mandate View:**

1. Authorization condition;
2. Behavioral congruence with authorized mandate.

“If the public authority is entitled to confer the power on me in the name of everyone, then my specific exercise of the power [as long as it falls within the conferred mandate] is also in everyone’s name.” (Ripstein 2009, p. 154)

“[T]he distinction between an official’s acting within his mandate and outside it does not depend on the official’s attitude,” but rather on his “external conduct.” (p. 192)

# The Insufficiency of the Mandate View

- **Corruption.** Some lawmakers are under an electoral mandate to “pass a law that will result in 1000 new job placements.” None of them intend to pass the law. However, a group of wealthy donors promises the lawmakers future benefits in exchange for passing a law the content of which happens to be identical to the one demanded by the people’s mandate. In response to the donors’ request, the lawmakers pass the law, which they would not have otherwise passed. The law successfully results in 1000 new job placements. After the law is passed, the donors change their mind and the lawmakers receive no extra benefit for passing the law.
- Adding a further condition:
  - **Lackey’s condition:** The agent must “*aim to*” perform the actions, or “reflect the views,” the principal intends for her to perform or assert on its behalf (Lackey 2018).

# The Problem with Lackey's Condition

***Infiltrating Spy.*** A foreign spy infiltrates the US Government as a public official. In order to avoid being discovered, the spy must do her job as a US official impeccably. Therefore, the spy aims to do everything her mandate as a public official requires her to do.

- Adding a further condition:
  - ***The shared reasons condition:*** in order to act “in virtue of” her authorized mandate, the agent must act for the same reasons for the sake of which the authorized mandate is given in the first place.



# The Problem with the Added Condition

***Alienated official.*** An official intends to comply with her mandate but *only* because she aims to get her paycheck at the end of the month.

- The alienated official fails to meet the shared reasons condition, but she is not a failed representative. Why?
- The alienated official, unlike the spy, acts for reasons that, albeit not the same reasons for the sake of which the mandate is conferred, are not *positively excluded* by it.
- In order to act “in virtue of” her authorized mandate, the representative must act on reasons that are not positively excluded by the mandate.

# The Conditions of Representation

- An agent (A) performs X in the principal (P)'s name if and only if:
  1. *The authorization condition*: P validly granted to A the authority to do X;
  2. *The included reasons condition*: A intentionally does X for reasons – on the basis of considerations - that are not positively excluded by P's authorization.

# III. Privatization and Failed Representation

- Can private actors exercise substantive discretion “in the name of” government?

# Privatization and Moral Conflict

- Privatization causes private actors to simultaneously occupy different institutional roles;
- This generates a conflict of obligations that have different normative sources.
  - E.g. Reasons to fulfill contractual obligations owed to the state vs. reasons to fulfill pre-existing obligations (e.g. fiduciary duties towards shareholders or obligations to effectively pursue charitable ends).

# The Case of “WorkOpts”

- Conflicting obligating reasons:
  1. Contractual obligation owed to the state: serve 1,200 welfare recipients, including “hard to place” individuals, and provide job placements to 10% of overall recipients.
  2. Fiduciary obligation owed to the company’s shareholders: make at least 8% profit.
- To fulfill both obligations simultaneously managers decide to reduce time and resources that caseworkers could devote to each recipient, and thus to shift their focus to “easily employable” recipients (Dias & Maynard-Moody 2007).
- Result: both obligations are met (although no “hard to place” individual finds a job).

# Institutional Roles and Representation

- The only way in which the managers can fulfill both obligations is by balancing different reasons for actions. But:
- **The problem of exclusionary reasons:** the occupancy of an institutional role can be a second-order reason why certain considerations lose the status of a valid reasons for action, within the context of that role.
- When an occupant of an institutional role acts on reasons that have *no* status as reasons for action from the perspective of the institution (like in *Infiltrating Spy*) the occupant becomes a failed representative agent.

# WorkOpts as a Failed Representative

- Being an agent of government is the second-order exclusionary reason why a company's private goal loses the status of a valid reason for action.
- By (i) acting for the sake of their private company's goal, and by (ii) taking this goal as a reason for adopting one contractual interpretation rather than another, the managers act for purposes that lack the status of reasons from the perspective of their institutional role as governmental agents.
- WorkOpt fails to meet the included reasons condition on representative agency.
- WorkOpt is a failed representative

# Implications

1. If the democratically legitimate exercise of political power demands that this power be exercised in a representative capacity, then, *private actors* fail to exercise this power legitimately, even when they are legitimately authorized.
2. Legitimacy provides outcomes-independent reasons to support a more radical division of institutional labor between the public and the private.
3. *Accountability for what?* Quality of reasoning beyond quality of actions.



# Objection 1

- Why is the private company's organizational goal an excluded reason from the government's perspective?
  - Can't a democratic people authorize private actors to perform whatever goals (within constitutional limits) they want on behalf of government?
- The state, unlike private companies, lacks the right to pursue nonpublic purposes, for citizens can always reasonably reject to be coerced for purposes others than justice.
- The state cannot transfer this right to its agents, through contract.

# Objection 2

- Public actors also face conflicts between conflicting goals and competing obligations.

But:

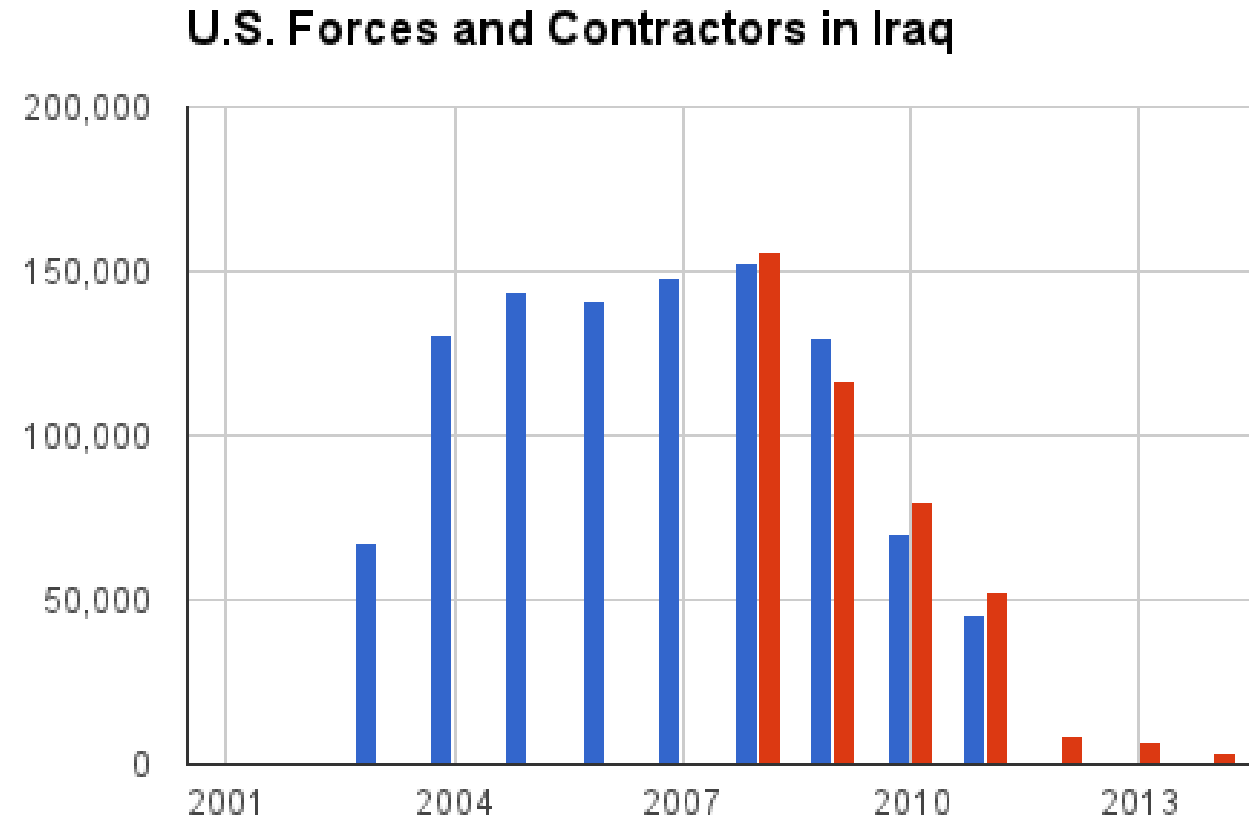
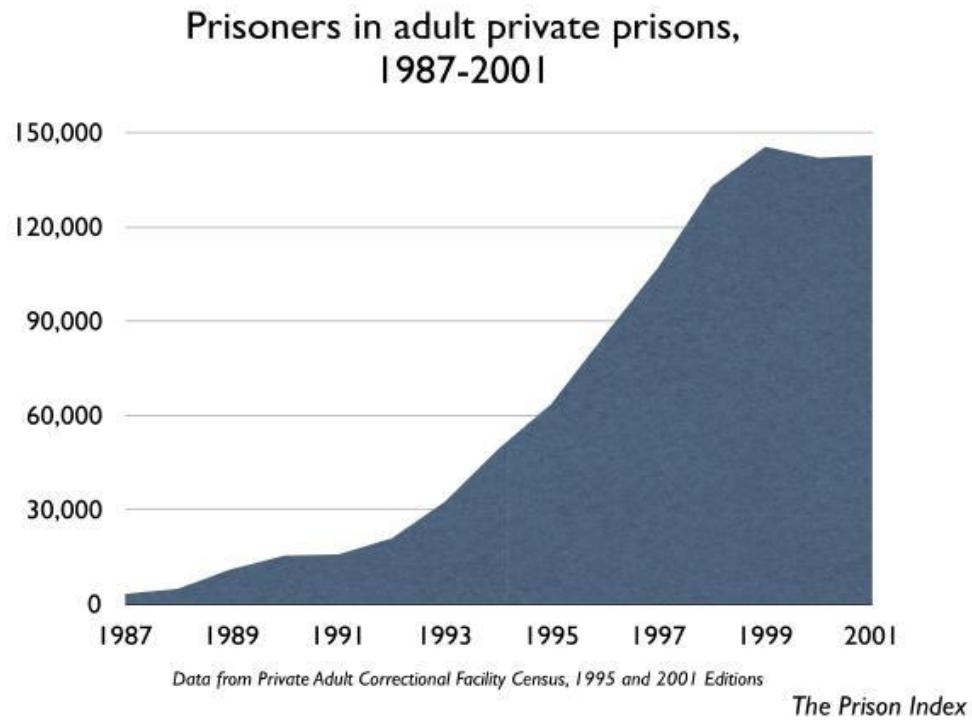
- Public actors are created by an act of public entrustment, while private actors have an independent existence.
- Public actors' fiduciary **duty of loyalty** vs private actors' contractual **duty of performance** (which, unlike the former, does not imply a duty to act for entrusted public purposes alone).
- Only private actors have reasons to act for nonpublic purposes, which however lack the status of reasons from the perspective of a democratic government.

THANK YOU

# Objection 2

- It cannot be the case that every time the bearer of an institutional role takes into consideration reasons that are excluded by her role, she fails to act in the name of her institution.
  - E.g. A lawyer can successfully present a defense in the name of her client even if the lawyer takes, say, her love for tennis as a reason to set constraints on how much time she can dedicate to her client's defense.
- Contrast with:
  - E.g., The lawyer is made responsible for protecting the reputation of her firm and, in turn, this reputational goal either (i) changes the purpose for the sake of which the lawyer acts (i.e. the lawyer no longer acts for the defense of her client alone when arguing her case in court), or (ii) dictates the lawyer's choice between defense strategies.

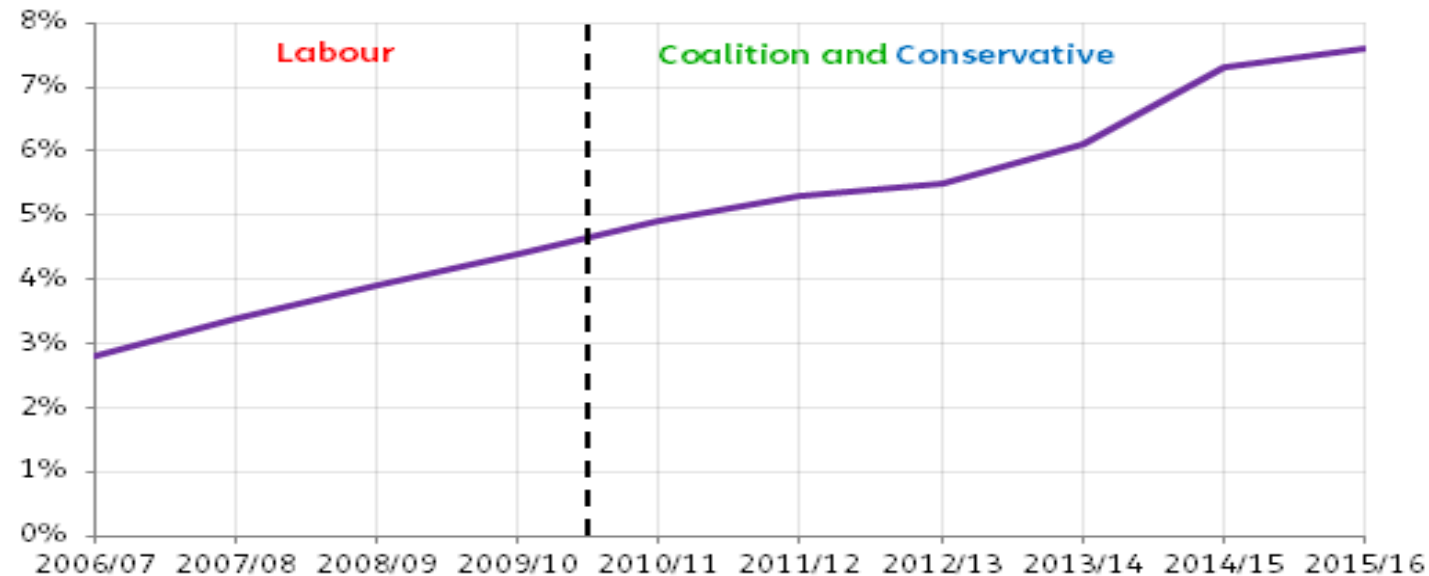
# Privatization of Prisons and the Military



# Privatized Healthcare (UK)

## Private providers in the NHS

NHS spending on independent sector providers as a proportion of total NHS revenue spending

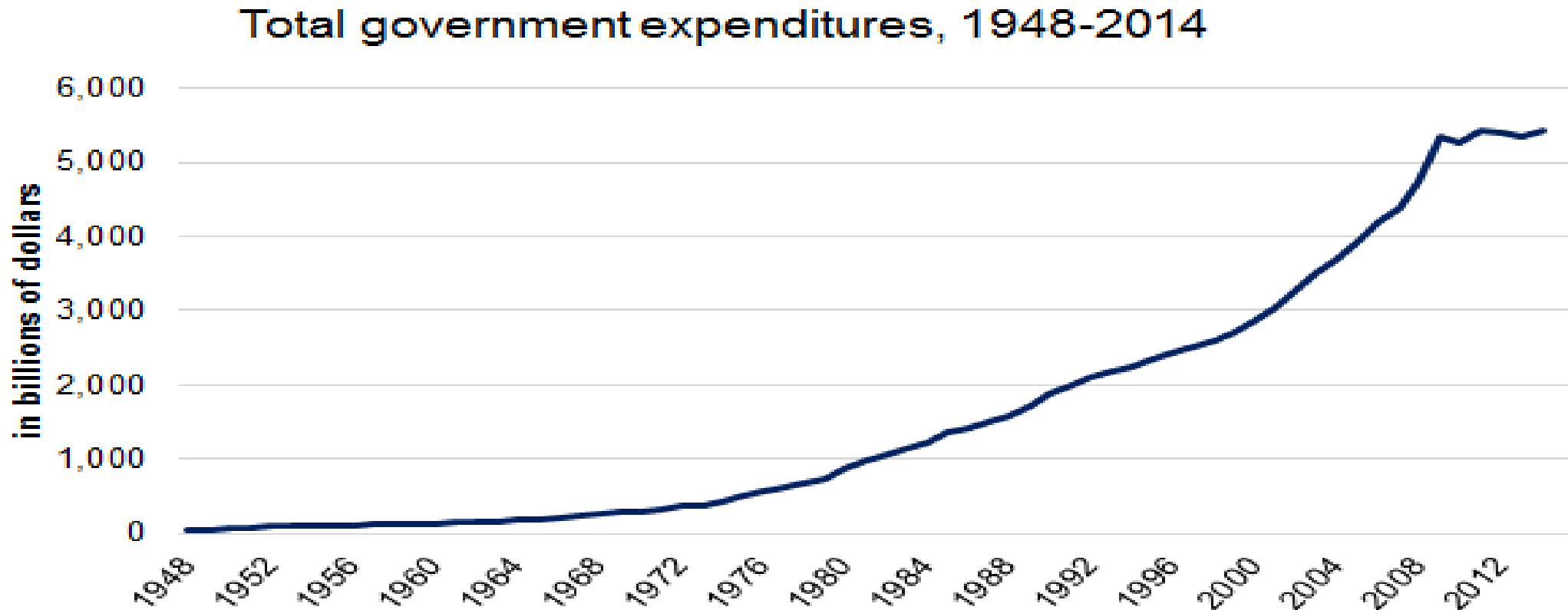


Source: Department of Health figures provided to Full Fact and parliamentary written question 66091 (1 March 2017)

# Further growth in population held in private prisons

- Between 2000 and 2016, the number of people incarcerated in private prisons further increased of almost 50 percent while the overall prison population increased only 9 percent (The Prison Index).

# US Government Spending



Source: Office of Management and Budget, Fiscal Year 2016: Historical Tables -- Budget of the U.S. Government, Table 14.4, "Total Government Expenditures By Major Category of Expenditure, 1948-2014"

**BROOKINGS**



# A Shadow Government

