

THE PROBLEM OF THE LEGITIMACY
OF THE WELFARE STATE

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Professor Stone sets out to describe and rationalize the extent to which the imposition of coercive sanctions upon a formal bureaucratic entity depends on whether it is organized in a way that causes it to be characterized as "public" or "private." He also seeks to formulate guidelines to govern the treatment of entities that are hybrids of the two.¹ Sanctions may be imposed either because the entity has engaged in tortious conduct or because it has shirked its fairness obligations by being discriminatory, arbitrary, or anything but a model of virtue.² Public entities are less likely to be burdened with tort liability than are private entities; the reverse is true with respect to fairness obligations.³ The sanctions imposed are of two kinds: liability judgments and direct intervention.⁴ Monetary damages and nonmonetary liability penalties are more likely to be invoked if the entity is private; direct intervention is primarily employed as to public entities.⁵

At every turn, Professor Stone acknowledges that the existing pattern of legal sanctions does not reflect a uniform treatment of entities that are concededly public or private.⁶ The abolition of some forms of sovereign immunity has resulted in the expanded application of private tort law concepts to public entities.⁷ Legislative enactments and common law doctrine impose duties on private entities that are similar to the constitutional obligations of fairness placed upon public entities.⁸

The increasingly similar treatment of public and private entities is not a surprising phenomenon in light of the fact that ours

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¹ See Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1444-45 (1982).

² See *id.* 1449-50.

³ See *id.* 1449.

⁴ See *id.* 1452-53.

⁵ See *id.*

⁶ See, e.g., *id.* 1454-55.

⁷ See *id.* 1453-54.

⁸ See *id.* 1480-82.

is a welfare-corporate state.⁹ The legal system is no longer simply concerned with facilitating the market and protecting property rights. The economic activities of private entities are regulated to varying degrees; the extent and visibility of the socialization of their formerly "private" conduct depends upon the regulatory mechanism employed. Moreover, the state has gone into the business of supplying primary goods and services (including protection against market risks) to its citizens.

Given that the state has become in significant respects both the regulator and the competitor of private economic concerns,¹⁰ the interesting questions are who or what controls its expanded activities and by what power or authority does he or it do so. The answers to these questions are equally relevant to the imposition of tort liability on public concerns and of fairness obligations on private concerns. The actor who commands the state's primary behavior may also control its regulatory conduct.

At issue is the legitimacy of the welfare-corporate state.¹¹ Legitimacy is a constant problem because of the state's contradictory structures and functions.¹² The role of the state in rectifying the deficiencies of the social and economic spheres politicizes production decisions and subverts the ideology that supported the "free market."

⁹ See generally R. UNGER, *KNOWLEDGE AND POLITICS* 174-76 (1975).

¹⁰ See Stone, *supra* note 1, at 1445-48.

¹¹ According to Max Weber, legitimacy arises out of authority. Authority is a species of control predicated on belief. Authority exists when a command is obeyed because

the content of the command may be taken to have become the basis of action for its own sake. Furthermore, the fact that it is so taken is referable only to the formal obligation, without regard to the actor's own attitude to the value or lack of value of the content of the command as such.

M. WEBER, *ECONOMY AND SOCIETY* 215 (G. Roth & C. Wittich eds. 1978). Authority, i.e., a belief in the legitimacy of the ruling entity, assures unquestioned obedience of its commands. Legitimation is a necessity in any situation involving a disparate distribution of power and advantages. See *id.* 953-54.

¹² See J. HABERMAS, *Legitimation Problems in the Modern State*, in *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 178, 195-96 (1979) [hereinafter cited as *Legitimation Problems*]; R. UNGER, *LAW IN MODERN SOCIETY* 172-75, 200-03 (1976); Offe & Ronge, *Theses on the Theory of the State*, in *CLASSES, POWER, AND CONFLICT* 249 (1982). See generally J. HABERMAS, *LEGITIMATION CRISIS* (1973); Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 L. & Soc'y Rev. 529, 557-58 (1977). As used herein legitimacy is a normative concept. There is some question as to whether the norms whose erosion threatens the state's legitimacy ever filtered down to what might be characterized by some sociologists as "the lower social strata," i.e., to ordinary folks. It may be that the legitimation crisis is a crisis only among elites, including law professors. See Held, *Crisis Tendencies, Legitimation and the State*, in *HABERMAS: CRITICAL DEBATES* 181, 188-93 (1982); Habermas, *A Reply to My Critics*, in *id.* 281.

To the extent that exchange relationships are prepared and maintained through visible political and administrative acts of the state, the actual exchange value any unit of property (be it in labor or capital) achieves on the market can be seen at least as much determined through *political* measures as through the *individual* way of managing one's property and resources. These resources themselves thus come to be seen as something resulting from, and contingent upon, political measures.¹³

At the same time, however, the state is engaged in validating the private sphere and its distributional inequities by

representing the accomplishments of the capitalist economy as, comparatively speaking, the best possible satisfaction of generalizable interests—or at least insinuating that this is so. The state thereby programmatically obligates itself to keep dysfunctional side effects within acceptable limits. In this assignment of roles, the state provides legitimating support to a social order claiming legitimacy.¹⁴

Private appropriation, however, is increasingly seen as being inconsistent with politicized social production.¹⁵ As might be expected, the welfare-corporate state is attacked by leftist and radical critics who portray it as an instrument that reflects and sustains societal and economic domination rather than one that facilitates an integrated order that is free (or freer) from hierarchy, inequality, and coercion.¹⁶

Professor Stone's article represents an attempt to reconcile the contradictions of the welfare-corporate state. Stone's theory of the state¹⁷ denies the total disintegration of the line between the public

¹³ Offe & Ronge, *supra* note 12, at 256 (emphasis in original).

¹⁴ *Legitimation Problems*, *supra* note 12, at 196.

¹⁵ See Held, *supra* note 12, at 184-87.

¹⁶ See, e.g., T. LOWI, *THE END OF LIBERALISM* 198-236 (2d ed. 1979); Offe, *Advanced Capitalism and the Welfare State*, 2 *POL. & Soc'y* 479 (1972). See generally T. BOTTOMORE, *POLITICAL SOCIOLOGY* 71-76, 86-88 (1979). The welfare state is also assailed from the right. See, e.g., R. NISBET, *TWILIGHT OF AUTHORITY* (1975). For a liberal response to the conservative and radical assaults, see N. FURNISS & T. TILTON, *THE CASE FOR THE WELFARE STATE*, 50-66, 67-93 (1977).

¹⁷ The failure of Stone's deductive effort is augured by Professor Frug, who argues that it is virtually impossible to make a "meaningful, nonpolitical distinction between functions 'naturally' performed by public or by private corporations, between 'public goods' and 'private goods.' Only our judgment about the extent to which the state ought to control the exercise of the function determines who performs it." Frug, *The City as a Legal Concept*, 93 *HARV. L. REV.* 1057, 1138 (1980) (footnote omitted). The only basis on which to evaluate the article is to approach it as outright political theory despite Stone's denial that his initial premise is a theory of his own. See Stone, *supra* note 1, at 1444.

and private spheres.¹⁸ Each sphere is subject to legitimating control. Political accountability justifies the affairs of the public sphere, while the influence of the state's good moral example on the unregulated conduct of the private sphere makes it deserving of legitimacy. It follows that public production and private appropriation are compatible. Stone's theory is not sustained by his analysis, however. The public depends upon and at the same time collapses into the private. To some extent, the converse is also true. The source of the legitimacy of the welfare state is, at best, mysterious and, at worst, repugnant.

Stone suggests that in the absence of complications the state is subject to the control of the "political process." Intervention by the electorate provides the necessary coercive restrictions. Such political control also legitimates the conduct of public entities. Activities that proceed without intervention are deemed to have the consent of the electorate; intervention terminates the assumption of consensual legitimacy.¹⁹ Because taxes supply the resources that would be used in paying any judgment, even the availability of damages is subject to the control of the political process.²⁰ In his roles as political coercer, taxpayer, and potential victim, each citizen in Stone's state apparently is equal. Each generally prefers to control the state with his vote rather than through liability judgments because each seeks to protect his share of the common purse.²¹

There is, of course, a potential for conflict if an equal distribution of votes coincides with an unequal distribution of the tax or victimization burdens. If those who would be encumbered by increased taxes have any economic leverage,²² they may employ it, as well as their votes, in an effort to limit the availability of damage recoveries against the state. Likewise, those citizens who can identify themselves as potential victims of the state may act politically to avoid paying an indirect tax because of their inability to recover for harm suffered at the hands of a public entity. If there exists an apolitical alternative, such as judicially created damages or immunities, the politicization of the determination of when liability sanctions will be available might well be an issue after either the

¹⁸ See Stone, *supra* note 1, at 1506-07.

¹⁹ See *id.* 1467.

²⁰ See *id.* 1468.

²¹ See *id.*

²² For example, an employer, by virtue of the economic power it wields over its employees, may "suggest" that they vote a certain way on a public referendum affecting the employer or contact their elected representatives to present the employer's viewpoint concerning a particular piece of legislation.

taxpayers or victims are defeated at the polls. The losers might object to the use of the political process to determine those issues that will be submitted to the political process, as opposed to the apolitical alternative, for a decision on the propriety of the conduct of a public entity.

The source of the legitimacy of the political process and the results it produces must lie ultimately outside of the process.²³ The private nonpolitical sphere could be the source. The potential conflict over the choice between liability judgments and political accountability may be resolved in several (nonexclusive) ways, all of which depend upon the private order: the losers may believe, without questioning, that the outcome produced by the political process is superior to any other, they may consent to it because they decide that it is in their best nonpolitical interests to do so, or they may have it imposed upon them by a force external to and antedating the political process.²⁴ Unfortunately, looking to the private sphere is problematic. The hierarchy and inequality of the social and economic orders make them less than optimal sources of the legitimacy of a democratic political order. If the private sphere plays politics, the public sphere is misbegotten. At the same time, it appears that the private sphere has lost its independence of the public sphere. It is regulated. It is burdened by fairness obligations. It is compromised. The only legitimacy it can supply would seem to be dependent upon the legitimacy of that which is to be legitimated, that is, the public sphere. If everything is politics, the locus of control and the justification for the welfare-corporate state become obscure without eliminating the possibility that private interests dominate perversely.²⁵

It is convenient that in Stone's state the political process does not always work. The impermeability of the bureaucracy and the

²³ See J. HABERMAS, *LEGITIMATION CRISIS*, *supra* note 12, at 98, 100-10.

²⁴ See M. WEBER, *supra* note 11, at 212-13; Blau, *Critical Remarks on Weber's Theory of Authority*, in MAX WEBER 147, 156-58, 162 (D. Wrong ed. 1970) (arguing that authoritative belief arises out of dependence and coercive power); Lukes, *Power and Authority*, in A HISTORY OF SOCIOLOGICAL ANALYSIS 633, 639-44 (1978).

In democratic liberal states, consent, particularly as reflected by voting, is most often invoked as a basis for governmental legitimacy. The concept of consent is meticulously dissected and critiqued by Carole Pateman in her book, *The Problems of Political Obligation*. Professor Pateman concludes that actual consent in the form of a voluntary promise of self-obligation is not achieved in liberal democratic societies. See C. PATEMAN, *THE PROBLEM OF POLITICAL OBLIGATION* (1979).

²⁵ For an explanation of how social forces dominate the political sphere after the collapse of the exclusive private domain, see Offe, *Political Authority and Class Structures—An Analysis of Late Capitalist Societies*, 2 INT'L J. SOC. 73 (1972).

escalation of the costs of political control often require that sanctions be judicially imposed instead.²⁶ The lawfulness of the imposition of liability damages could depend on the greater responsiveness of the judicial system to political pressure. Professor Stone rather suggests that damages may fuel the political process, "oiling, even firing [it] up."²⁷ If judicial damages are a response to and a panacea for the malfunctioning of the political process, the question then arises as to what makes the assessing of a breakdown legitimate. A political process that is not working cannot be the direct source of the legitimacy of the proposed judicial imposition of liability judgments.²⁸ Stone, aware of the problem, suggests that the legislative and administrative branches anticipate judicial intervention to "correct misjudgments, compensate the injured, and even rebuke and reform should that be appropriate."²⁹ Yet, even if the anticipation were deemed to be the equivalent of consent, it would not legitimate judicial intervention, because the acts of the branches that are theoretically politically responsive have not been shown to be justified.³⁰ Illegitimate themselves, they have no legitimacy to impart.

A similar conundrum is raised by Stone's suggestion that some institutions are designed to be immune from "political winds."³¹ Both their legitimacy and the legitimacy of any interference with their activities must be specified. When the political process is not functioning or when it is irrelevant—that is, vis-a-vis these immune institutions—some alternative must fill the void to render the courts' activities lawful. In sum, the public sphere is not a self-contained enclave subject to political ordering alone. It is not independent of the private sphere. At the same time, the reverse is true. The collapse of the public and private spheres makes the public com-

²⁶ See Stone, *supra* note 1, at 1468-69.

²⁷ *Id.* 1472.

²⁸ The legitimacy of judicial intervention to correct political malfunctions depends upon assumptions concerning the legitimacy of the political process. The more legitimate the political process in general, the less legitimate is judicial review and the less likely it is that a court will identify a malfunction. See Parker, *The Past of Constitutional Theory—and its Future*, 42 OHIO STATE L.J. 223, 247-49 (1981).

²⁹ Stone, *supra* note 1, at 1475.

³⁰ It has been strongly argued that a court cannot construct the result that a properly operating political process would have caused the legislative or administrative branches to reach any more than it can neutrally assess that a breakdown of the process has occurred. See Baker, *Neutrality, Process and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1055-61 (1980).

³¹ Stone, *supra* note 1, at 1471.

ponent of welfare-corporate state as described by Stone an illegitimate enigma.

The second part of Stone's article is devoted to the subject of fairness obligations. Stone is concerned with the protection of a domain of private action in which legal burdens of fairness may not intrude on the judgment of corporate entities accorded the status of natural persons. Private entities may be arbitrary, capricious, prejudiced, and unfair. Private judgment is allowed because "it promotes the exercise and development of individual wills and personalities, personalities that may produce better citizens in the long run."³²

Because of material costs and political repercussions, Stone's state cannot afford to compel or coerce its corporate individuals to be virtuous.³³ Instead the state becomes "a moral model or teacher, an exemplar of virtue."³⁴ The virtues of fairness are not merely limits imposed upon the state for the benefit of a liberated private sphere; they are also presented to society as a model of private morality. The virtues are public goods in that they require more of the state than any individual complainant deserves.³⁵ The citizens are free to engage in arbitrary, capricious, and discriminatory conduct or to embrace the virtues exemplified by the state and embodied in its laws. Thus, the state does not coerce its citizens to follow its example and there is no belief in the authority of the state's scheme of virtue such as to generate a suspension of independent private judgment.³⁶ Rather, the entities occupying the status of citizens consent to the proposition that the state's moral example will influence the conduct of their private affairs.

The theory of the state as moral exemplar is sufficiently attractive to merit greater elaboration and criticism than are warranted here. Stone's discussion of the theory, however, does not establish it as the source of legitimacy of the activities of the private sphere. The analysis fails because Stone does not disclose who determines the content of the morality the state is to exemplify for the guidance of the private sphere. It might be the very entities that are supposed to be influenced. The state's morality must come from some component of the private sphere because it is not a mere reflection

³² *Id.* 1489 (footnote omitted).

³³ *See id.* 1494-95.

³⁴ *Id.* 1494.

³⁵ *See id.* 1494-95.

³⁶ *See generally* Friedman, *On the Concept of Authority in Political Philosophy*, in *CONCEPTS IN SOCIAL & POLITICAL PHILOSOPHY* 121, 127-31 (R. Flathman ed. 1973).

of an uncontroverted ethos that unites all of its citizens and otherwise limits their choices; were it so the exemplar function would be merely symbolic. If the entities are the source of the public morality, they probably will take the exemplar effect into account and shape the state's virtue so as to preserve their right to choose a private morality or to limit the conflict they face in doing so. In fact, there is built into Stone's exposition a disincentive or an excuse that limits the extent to which entities will follow the state's example. Because the "public" or "state action" label is to attach only when the costs of fairness can be passed on to and spread among the public,³⁷ the label "private" is to be applied in the very situation in which there is little economic reason for the private concern to mimic the state's morality.

The state as moral exemplar is not benign. Either it intentionally manipulates or restricts private choice or it is a subterfuge that fails to legitimate the unregulated conduct of private entities. One may look to a private sphere characterized by hierarchy and domination to explain a public morality that is an ineffective optional exemplar of private morality. Beyond this the extension of obligations of fairness, through the expansion of the categories of private activities classified as state action, reflects a weakening of the boundaries of the private preserve as well as the limits of the exemplar effect. The legal imposition of fairness obligations, particularly on a selective basis, in lieu of greater political control requires the exercise of a political power that has been legitimated. Legitimacy, however, cannot be achieved or maintained if the role of powerful forces in the private or nonpolitical sphere in dictating the morality is evident.³⁸

The nature of authority and legitimacy in the modern welfare-corporate state is not well understood and the public/private distinction as developed by Professor Stone does not aid the inquiry. The distinction was crucial to the legitimacy of the liberal state.³⁹ The private sphere was supreme. The public sphere was necessary but feared. It was primarily charged with facilitating the activities of the private sphere through limited intrusions constrained by constitutional restrictions. The public sphere was ostensibly operated according to democratic principles; the hierarchy and domination that characterized the private sphere were explained by the market.⁴⁰

³⁷ See Stone, *supra* note 1, at 1501.

³⁸ See J. HABERMAS, *LEGITIMATION CRISIS*, *supra* note 12, at 70-72.

³⁹ See generally Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424-26 (1982).

⁴⁰ See J. HABERMAS, *LEGITIMATION CRISIS*, *supra* note 12, at 22.

The legitimacy of a state in which decisions concerning production and distribution have been to a large extent politicized cannot be constructed upon a revision of the liberal public/private distinction. The distinction is just about dead. In the terminology of Professor Kennedy, it is "loopified."⁴¹ Stone's theory of the welfare-corporate state does not work.

⁴¹ Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1354-57 (1982).