

# Asymmetrical Information and Public Failure in the Myriad Decision: Public Value as a Mid-Range Theory in Legal Studies' Antitrust Field

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## Abstract

The Public Value concept is a Public Management normative process that utilizes efficiency and ethics as co-equal determinants to assess organizational outcomes. As such, Public Value represents what Ghoshal calls *intellectual pluralism* or the utilization of normative management processes in the social sciences to challenge the *intellectual absolutism* of the Chicago School. One discipline where Public Value can be used to assess normative results is Legal Studies' antitrust field. This research applies Public Value criteria in evaluating the U.S. Supreme Court's 2013 ruling in *Association for Molecular Pathology v. Myriad Genetics*. The conclusions tentatively found the Court's decision will (a) create Public Value at the macro level but (b) trigger public failure at the micro level for poor women because of an asymmetrical information network. This outcome fits with Stiglitz's hypothesis concerning asymmetrical information and market failure. Further empirical research on Myriad's policy is recommended.

## Keywords

public value, public failure, market failure, Chicago school, asymmetrical information

## Introduction

The concept of Public Value as a normative management construct has become popular in the public administration discipline over the past 15 years (Alford & O'Flynn, 2009; Bozeman, 2002, 2007; Moore, 1995; Shareef, 2008; Williams & Shearer, 2011). Bozeman's (2002, 2007) work in this area is especially instructive. His public failure model supports the use of efficient market processes—to create Public Value—by managers until these market dynamics reach the point of creating public failure (i.e., unethical organizational and social outcomes). Shareef (2010) calls this the market efficiency/public failure model.

As such, some scholars see the Public Value framework as a model of Ghoshal's (2005) intellectual pluralism, that is, the sharing of normative management processes that challenge the influence of the non-normative Chicago School of Economics in MBA education and the broader social sciences. For instance, Shareef (2008, 2010) argues that the Public Value construct (a) offers a *tipping point* for both MPA and MBA students to determine when efficient market process stops and public failure begins and (b) can be used as a replacement paradigm for the Chicago School's non-normative organizational economics in triggering a transformation of the MBA curriculum. Likewise, Moore and Khagram (2004) contend the Public Value construct should be used to

enhance the teaching of Corporate Social Responsibility (CSR) in MBA programs.

Since the beginning of the decade, there has been a demand in the management literature (Ghoshal, 2005; Kanter, 2005; Mitroff & Swanson, 2004; Shareef, 2007; Tsui, 2013) for a shift from both public and private organizations using economic efficiency as the sole determinant of institutional success to a value system where ethics and efficiency are co-equal determinants in assessing organizational performance. The evolution of efficiency and ethics becoming the criteria of institutional success has followed Kanter's (2005, 2009) sociology of knowledge/demand-side organization change process. Kanter (2005) argues that organization change is often predicated on ideas that are outliers in one period of time and later become mainstream as a result of demands placed on intellectuals (i.e., knowledge producers) by social actors (i.e., knowledge consumers) because of rapidly changing environmental events. She writes,

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In my early studies of the change process, I found multiple tendencies coexist in organizations. At any one time, some are core, some are peripheral. Much of the change involves nothing really new—just bringing peripheral tendencies to the core. (Kanter, 2005, p. 95)

Organization ethics, relegated to the periphery of management thought because of the triumph of market capitalism over socialism in the early 1980s, has now become the core of management thought because of 21st-century corporate scandals (Kanter, 2005).

Tsui's (2013, p. 171) research also suggests that normative frameworks are now at the core of management theory and practice. She describes the four types of organizations now operating in the global economy: (a) classic for-profit Friedman-model firms that are primarily concerned with economic objectives; (b) some for-profit firms where economics is still the primary objective but social responsibility is a second-place contender; (c) social enterprises where both social responsibility and economic objectives are primary; and (d) charity-based non-profits which have social responsibility as their primary objective and economics as a secondary objective necessary for survival. She sees accelerated interdisciplinary movement from the Friedman model to social entrepreneurial enterprises and notes these organizations feature both social responsibility and economics in assessing performance success.

Consequently, the call to utilize Public Value's market efficiency/public failure criteria to analyze the efficiency and ethical outcomes in legal studies' antitrust field fits with both Ghoshal's (2005) intellectual pluralism and Kanter's (2005) demand-side change constructs. The Harvard School's public interest approach has been largely dislodged by the Chicago School's economic analysis paradigm over the past 30 years (Hovenkamp, 2010; Piraino, 2007). However, legal scholars have been searching for a mid-range theory in the antitrust field between Harvard's non-diagnostic public interest framework and the "endless empirical inquiry of the Chicago School" (Piraino, 2007, p. 368). This article suggests the Public Value framework provides such a mid-range theory in the legal studies discipline to assess the normative outcomes of cases—using Stiglitz's (2001) asymmetrical information/market failure model—like the U.S. Supreme Court's 2013 ruling in *Association for Molecular Pathology v. Myriad Genetics*.

The research question explored in this article asks the following: Using Stiglitz's asymmetrical information/market failure assessment model, did the U.S. Supreme Court's ruling in the *Myriad* case trigger public failure?

The article proceeds as follows. First, an overview of the Public Value model is offered. The following section discusses (a) the battle for paradigm dominance in legal studies' antitrust law between the Harvard School's public interest approach and the Chicago School's economic analysis framework and (b) how the Public Value construct can serve

as a mid-range theory in *quick look* antitrust cases. A discussion of Joseph Stiglitz's asymmetrical information/market failure construct is then presented. Next, the U.S. Supreme Court's recent ruling in the *Myriad* case is assessed for Public Value criteria and against Stiglitz's asymmetrical information model. The Conclusion section summarizes key findings concerning the sociology of knowledge-based paradigm shift from Friedman-type profit maximization firms to organizations where efficiency and social welfare are co-determinants of organizational and the role Public Value is playing in this transformation.

## Public Value: An Overview<sup>1</sup>

Bozeman's seminal 2002 *Public Administration Review* article on Public Value outlines the praxis relationship between public and economic value. His construct of public value failure parallels economics' market failure concept and specifies criteria to determine achievement of Public Value or diagnosis of public failure:

My goal is to develop a model that is analogous in many respects to market failure, but that eschews concerns for price efficiency and traditional utilitarianism in favor of a public-value focus. I present a *public-value-failure* model that, like the market failure model, includes criteria for diagnosing public failure (and identifying public successes). (Bozeman, 2002, p. 146)

He argues that one of the primary triggers for both market and public failure is imperfect information between buyer and seller (Bozeman, 2007).

Bozeman (2002) sees his Public Value construct as a mid-range theory: "In this article, I seek a 'middle-range conceptualization' of public value, one pertaining to a wide range of policy and public-value domains, but at the same time anchored by diagnostic criteria" (p. 146). He lists seven criteria that lead to public failure: mechanisms for articulating and aggregating values, imperfect monopolies, benefit hoarding, scarcity of providers, short time horizon, substitutability versus conservation of resources, and threats to subsistence and human dignity (Bozeman, 2002). Bozeman (2002) calls threats to dignity and subsistence "The Greatest Public Failure" (p. 154). In sum, when either market or public management efficiencies violate any of these diagnostic norms, public failure has occurred.

Shareef (2010) calls Bozeman's construct the market efficiency/public failure model as Bozeman (2002) accepts the economic assumption that market efficiency, in which prices act as a coordinating mechanism, is an effective framework to facilitate public agency delivery of goods and services. Yet, Bozeman's (2002) analysis also recognizes that often "prices lie" (p. 146). His model encourages managers to engage in efficient market activities but articulates the public failure criteria tipping points to prevent market efficiency from leading to public failure (Shareef, 2010).

Bozeman (2007) especially believes that the Public Value construct has a role to play when determining the value of scientific knowledge. He argues that economic criteria are insufficient for valuing scientific knowledge as this form of knowledge has many types of value and is broadly used in the public domain: “Economists refer to this application robustness as the ‘public goods characteristics of knowledge’ and cast it as a market failure” (Bozeman, 2007, p. 129). The problem, Bozeman (2007, p. 129) argues, lies not in markets but “. . . with the failures of market-based theories.”<sup>2</sup> Shareef (2010), Moore (1995), and Moore and Khagram (2004) believe that creation of Public Value enhances the social legitimacy and political support of business enterprises, especially those that operate in intensely political environments. Moore and Khagram (2004) specifically link social and political legitimacy with CSR. They note that contemporary corporate strategy focuses on competition in markets with the goal of maximizing shareholder wealth. Consequently, private sector entities tend to see customers, investors, and shareholders as providing legitimacy and support.

However, Moore and Khagram (2004) point out that business organizations are not immune to the social context—or social costs—of their operating environment:

The reason is simply that leaders and managers have substantial *de jure* and *de facto* discretion in setting the strategy of the firm. They can choose to accommodate or strain against the external forces that society has erected around them. . . . There are prices to be paid for these decisions. As part of developing corporate strategy, a firm has to weigh the consequences of acting or failing to act in accord with the legal, moral, or practical standards that society has constructed for them—either through law, or through the social expectations backed by the threat of economic or political damage if they do not comply. In short, the firm has to be concerned about the social and political legitimacy of its strategy as well as its economic potential. (p. 17)

Moore and Khagram (2004) suggest that business firms develop expertise in creating and measuring Public Value as a means of developing social and political legitimacy. In addition, Moore (1995) contends his mutually influencing strategic triangle—Public Value/Organizational Capacities/Legitimacy and Support—provides a framework for business strategists to generate social and political support for their enterprises. Importantly, Moore and Khagram (2004) believe this societal legitimacy can only come from public agencies:

Yet, this important work has been left off the map in most discussions of corporate strategy. It is the kind of work that could come to the fore and be more successfully integrated into strategic business thinking if it was better understood that business more systematically needed to develop legitimacy and support from stakeholders beyond investors and customers and understood that in an important respect, government can act as a

device for limiting and focusing the moral, legal, and social vulnerability of business. Companies need a license to operate. They need to be responsive to those who grant them that license. (p. 23)<sup>3</sup>

Tsui’s (2014) social entrepreneurial concept—where social responsibility and economic objectives are co-equal determinants of successful organizational outcomes—is a popular form of CSR. However, only the Public Value construct provides clear criteria to assess when market efficiency stops and public failure starts. These criteria are essential so both social entrepreneurial firms and non-profits that establish credentials for CSR are not *co-opted* (Selznick, 1948) by strictly for-profit businesses. Research by Baur and Schmitz (2012) found that corporations often co-opt the autonomy of non-profits by advancing notions of CSR that don’t facilitate the change of profit maximization practices. When this occurs, both meaningful CSR development and the image of the non-profit are negatively socially constructed.

Corporate entities seem to be heeding Moore and Khagram’s (2004) advice on the linkage between CSR and Public Value. For example, the day before the U.S. Supreme Court heard oral arguments in April 2013 on whether Myriad Genetics could patent the genes that determine hereditary breast and ovarian cancer, the company’s CEO, Peter Meldrum, explained Myriad’s position in a *USA Today* commentary. Meldrum especially wanted to clarify the company’s social welfare policy on female access to the genetic tests, irrespective of socioeconomic class:

We have done extensive clinical studies to help insurance companies cover the testing. And patients can get second opinions. The average out-of-pocket cost for a woman who may be at risk for hereditary breast cancer is about \$100. For women who cannot afford it, we make the tests available for free. And patients can get second opinions. We have partnered with one of America’s largest reference labs, major universities, and cancer centers to offer confirmatory testing. (Meldrum, 2013)

Consequently, Bozeman’s (2002, 2007) public failure criteria—based on the same neo-classical economic criteria that determines market failure—can be applied to assess public and business sector outcomes (see Shareef, 2008, 2010). Similarly, Moore and Khagram’s (2004) strategic triangle outlines how profit-making businesses need to create Public Value—through interaction with regulatory agencies, the media, and the courts—to maintain social and political legitimacy. As we shall see in a later section on the U.S. Supreme Court’s decision in the *Myriad* case, Bozeman’s public failure model allows determination of whether public failure occurred, while Moore and Khagram’s (2004) framework provides an understanding of whether Myriad’s policy concerning genetic testing accessibility met Public Value established criteria for CSR.<sup>4</sup>

## The Chicago School, Antitrust Law, and a Mid-Range Theory

The late Milton Friedman, a Nobel Prize winner in economics, is most closely identified with what is known as the Chicago School of Economics worldview. Friedman (1953) sought to develop a *scientific model of management*—called Positive Economics—that omitted all ethics or morality from the management process. Ghoshal (2005) explains, “Since morality, or ethics, is inseparable from human intentionality, a precondition for making business studies a science has been the denial of any moral or ethical considerations in our theories, and therefore, in our prescriptions for management practice” (p. 77).

Friedman’s theoretical construct is based on two related assumptions: (a) all theories of human motivation are based on notions of homogeneous, self-interested human behavior and (b) because of human imperfection, the problem of social organization is the *negative problem* of preventing bad people from doing harm (Friedman, 2002). Moreover, the Chicago School promotes *agency theory* to conceptualize the negative problem (Shareef, 2011). Agency theory teaches that since managers (agents) are not the owners (principal) of firms, they will not act with the single purpose of an owner to maximize profits. Friedman (2002) contends that maximizing shareholder value is the sole reason for an organization’s existence. When profit maximization is not achieved, *agency loss* occurs.

The Chicago School’s pessimistic view of human nature and the role of organizations in society has had a profound influence on various academic disciplines including sociology, psychology, and anthropology. Ghoshal (2005) writes,

Even practitioners of sociology and psychology, the starting points of which as academic fields were defined by the recognition that human behavior can be shaped by factors other than conscious, rational self-interest have increasingly adopted the notion of behavior being self-seeking as their foundational assumption. Friendship ties of people are now analyzed by sociologists as a means for individuals to use social networks to influence their personal influence, power, or pay. (p. 82)

One academic discipline where the Chicago School has become the dominant paradigm, but is rarely discussed by the movement’s critics, is legal studies. This is especially true in the field of antitrust legislation and is primarily the result of one extremely prolific, influential Chicago School scholar—Judge Richard Posner of the U.S. Seventh Circuit Court of Appeals (see Posner, 1976, 1979).

Until the 1970s, courts and government agencies assumed that firms with market concentration would act in an anti-competitive manner (Hovenkamp, 2010; Piraino, 2007). This worldview is commonly known as the “Harvard School” approach and it seeks to protect the public interest by preventing—under the Sherman Anti-Trust Act—mergers, joint ventures, or agreements that allow firms to gain monopoly

market power. Piraino (2007) describes this worldview as follows:

In the middle of the twentieth century, Harvard economists such as Edward Chamberlain, Edward Mason, and Joe Bain argued that an industry’s structure, that is, the number of firms in the market and their relative sizes, determines how effectively firms will perform in that market. (p. 348)

These scholars contend that when markets are concentrated, firms are more likely to engage in anticompetitive practices (Piraino, 2007). Harvard’s public interest approach argues that courts should (a) be guided by Congress’s desire in enacting the Sherman and Clayton Acts to protect individual competitors from the market power wielded by large firms, (b) avoid market concentration even when it might lower costs and prices thereby benefitting consumers, and (c) engage a *presumption of illegality* when market monopolies occur without engaging in a complicated analysis of economic circumstances in the relevant market (Piraino, 2007).

While the Harvard School’s non-diagnostic analysis sought to utilize market concentration—based on a presumption of illegality—to define the public interest concerning market monopoly and antitrust law, the lack of economic analysis made the paradigm susceptible to intellectual attacks by the empirical-based Chicago School. By the 1960s, Chicago School economists and law professors were challenging the Harvard School’s non-economic approach to analyzing antitrust cases. The late U.S. Supreme Court nominee Robert Bork’s (1966) article, *Legislative Intent and the Policy of the Sherman Act*, argues that antitrust laws were designed to increase the efficiency of the firms and thus the economy. For Bork, efficiency and profit maximization were synonymous as Piraino (2007) describes:

Bork defined economic efficiency in terms of conditions that maximized wealth, and he equated wealth enhancement with “consumer welfare,” meaning lowered costs, reduced prices, and increased amount of products and services desired by customers. . . . All other possible goals of the antitrust laws, including the protection of small businesses from the power of large firms, were irrelevant. (p. 350)

Posner (1979) agrees with Bork’s analysis of the Sherman Act and argues that courts can no longer simply indulge in the presumption of antitrust illegality based on market concentration. Rather, judges have to review economic analyses that empirically demonstrate the adverse economic impacts of particular types of monopolistic practice. Consequently, it is no longer sufficient to show an enterprise merely possessed dominant market power: “In addition, plaintiffs would have to demonstrate, through empirical evidence, that the conduct at issue harmed consumers by increasing prices or decreasing output” (Piraino, 2007, p. 352). Posner (1979) succinctly describes the Chicago School’s distinguishing characteristic of antitrust analysis as being framed . . . “through the lens of price theory” (p. 925).

By the late 1980s, the Chicago School's economic analysis paradigm had replaced the Harvard School's public interest approach to analyzing antitrust legal issues (Hovenkamp, 2010; Piraino, 2007). Wright (2008) summarizes the Chicago School's impact on U.S. Supreme Court rulings in the following manner:

The Chicago School's influence on antitrust law and policy has been substantial, especially in the U.S. Supreme Court . . . Indeed, the 1970s and 1980s were marked by a dramatic shift in antitrust policies, a significant reduction in agency enforcement activity levels, and calls for repeal of antitrust laws altogether. (p. 5)

Wright (2008) predicts an even greater influence of the Chicago School in antitrust cases with the Roberts' Court.

Posner's Chicago School antitrust economic analysis is predicated on cost-benefit procedures that seek to improve the consumer welfare of the individual. Wolfson (2001) describes cost-benefit analysis from this perspective:

Benefits are then usually defined in terms of the change in individual well-being that the policy induces, and costs are usually measured in terms of monetary costs or resources required to implement the project . . . Comparison of costs and benefits thus requires the cost benefit analyst measure subjective benefits in monetary terms. (p. 94)

Normative economists and organization theorists criticize the Chicago School's cost-benefit analysis approach because it "monetizes" important values—like a clean environment or health outcomes—that are absolute, regardless of monetary cost (Wolfson, 2001). Others criticize cost benefit analysis for ignoring questions of fairness: "For example, a certain policy may pass a cost benefit analysis but only at the expense of the poor and minorities" (Wolfson, 2001, p. 95).<sup>5</sup>

Piraino (2007), a leading antitrust legal scholar, has called for a mid-range theory to be utilized that fits between the non-diagnostic presumptions of the Harvard School and the empirical analysis of the Chicago School to determine the consumer welfare effects of challenged anticompetitive conduct:

To adopt an inquiry 'meet for the case' as required by *California Dental*, the courts and agencies should categorize all competitive conduct on a continuum according to its likely effect on consumers. In order to confirm that effect, the courts and agencies will have to undertake varying degrees of inquiry depending upon the type of conduct at issue. (p. 367)

In *California Dental Association v. Federal Trade Commission* (1998), the Federal Trade Commission (FTC) charged California Dental Association (CDA) with restricting two types of truthful, non-deceptive advertising: price advertising and advertising related to the quality of dental services. In a 5-4 ruling, the majority opinion of the U.S. Supreme Court concluded the FTC's jurisdiction extended to

non-profits like the CDA and because the disputed anticompetitive efforts were not obvious in the case, more than a *quick look* rule of reason analysis was required. The Court uses three standards to assess anticompetitiveness: (a) per se illegal (i.e., Harvard's Public Interest Model); (b) the quick look rule of reason that does not exclude per se illegality but screens evidence to determine if proffered pro-competitive effects are plausible; and (c) rule of reason, the analytical and evidentiary standard advocated by the Chicago School.

As a mid-range theory, Public Value would include consideration of social costs in a quick look analysis. For instance, the CDA restricted inexact references to price in advertising (e.g., reasonable fees or low costs) and non-price claims like "gentle care" or "satisfaction guaranteed" (*California Dental Association v. Federal Trade Commission*, 1998). The FTC ruled that restraints on price advertising were per se illegal while the Court's ruling required more expansive economic analysis to determine if the claims of anticompetitive effects of the price restrictions were valid.

As we will see in the next section, utilizing Stiglitz's asymmetrical information/market failure model in a quick look analysis would conclude that inexact price information leads to both market failure and social welfare harm. As such, the asymmetrical information flow would also trigger public failure. The FTC in CDA reached the correct conclusion but provided no empirical analysis to support its per se illegality analysis. Using Public Value criteria and Stiglitz's asymmetrical information/market failure framework would make the quick look analysis a more robust mid-range theory of liability in antitrust legal decisions.

Bozeman's Public Value construct meets the criteria Piraino outlines for a mid-range theory:

Managing Publicness differs in that public value is preeminent, not just one criterion to be balanced against others. Public value is the starting point . . . Managing Publicness does *not* require the courts or an agency to eschew market or quasimarket approaches such as contracting and privatization. (Bozeman, 2007, pp. 176-177)

Therefore, the fundamental criterion of a Public Value mid-range theory in antitrust law analysis would be whether monopoly economic power represents a social welfare threat to subsistence or victimization of the poor.

Bozeman's examples of the selling of human organs (2002) and prostitution (2007) are illustrative. Both activities could be organized via monopoly power and would be extremely efficient market processes (see, for example, Levitt & Dubner, 2009). However, Bozeman (2002, 2007) believes that despite obvious market efficiencies inherent in both activities, each constitutes public failure because they promote dehumanization and social cleavage (Bozeman, 2002).

He makes an interesting point, as well, concerning public failure and institutional arrangements:

Public values may be viewed as a criterion by which to judge institutional arrangements for goods and services but should not be confused by them. Thus, public values neither support government action nor abjure markets; they are orthogonal to both. Prostitution makes this case. If one agrees with Anderson that prostitution has the effect of violating the individual autonomy and that autonomy is a public value, then one might well deplore both free markets for prostitution and government regulated prostitution. (Bozeman, 2007, p. 137)

## Joseph Stiglitz: Asymmetrical Information, Market Failure, and Public Policy Interventions

Columbia University economist Joseph Stiglitz won the Nobel Prize in Economics in 2001—along with co-recipients George Akerlof and Michael Spence—for his pioneering research in the field of *information economics* or, more precisely, outlining the causal relationship between asymmetrical information and market failure (including market failure triggered by agency loss). Stiglitz (2001) believes that market efficiency depends on symmetrical flows of information and government has a role to play in facilitating informational transparency. Thus, he begins his Nobel Prize acceptance speech by stating,

Many of the major political debates over the past two decades have centered around one key issue—the efficiency of the market economy and the appropriate relationship between the market and the government. The argument of Adam Smith, the founder of modern economics, that free markets led to efficient outcomes has played a central role in these debates. It suggested we could, by and large, rely on markets *without government intervention*. The view I present here undermined Smith's theory and the view of government that rested on it. (Stiglitz, 2001, pp. 472-473)

Stiglitz (2001) argues that for over 100 years, economic models were premised on the fallacy that information was perfect. Moreover, he notes that even when economic modeling recognizes this fallacy, economists continued with the models and merely hoped that “. . . economies in which information was not too imperfect would look very much like economies in which information was perfect” (p. 475). His research shows this proposition is not true and that even a small amount of information imperfection can have a profound effect on market efficiency. Stiglitz (2001) provides a simple example using the Chicago School's *efficient market hypothesis* which contends that prices in the stock market fully reflect all information. If this were true, he argues, there would be no incentive for anyone to expend money to collect information.

Likewise, Stiglitz (2001) attacks the Chicago School for assuming that information imperfection is merely a transaction cost that is in the price of a commodity:

In the approach of many Chicago economists, information economics was just like any other brand of economics, one simply analyzed the special factors determining the supply and demand for information, just as agricultural economics analyzed those factors affecting the market for wheat . . . Our analysis showed that this approach was wrong, as were the conclusions drawn from it. (p. 477)

Stiglitz agrees—concerning stock prices and transaction costs—with Bozeman's (2002) assertion that often “prices lie” (p. 146).

A major goal of Stiglitz's research is to demonstrate why asymmetrical information flows persist. The reason was not an *invisible hand* but deliberate managerial manipulation to maintain monopoly power and profit maximization:

Similarly, the presence of information imperfections give rise to market power; and firms can exploit this market power through “sales” and other ways of differentiating among individuals who have different search costs. The price dispersions in the market were *created* by the market—they are not just the failure of markets to arbitrage fully price differences *caused* by shocks that affect different markets differently. (Stiglitz, 2001, p. 490)

What then is government's role in creating symmetrical information and efficient market processes? Stiglitz (2001) is no apologist for his belief in an activist Pareto tax policy that redistributes income to achieve broad social outcomes:

One of the functions of government is to redistribute income; even if it did not want to redistribute actively it has to raise revenues to finance public goods and there is a concern that the revenue be raised in an equitable manner. (p. 516)

Hence, the difficulty lies in creating a symmetrical information flow so that government can maximize social welfare: “The problem of the government maximizing social ‘profit’ (welfare) subject to information constraints, is closely analogous to that of the monopolist, maximizing private profit subject to information constraints” (Stiglitz, 2001, p. 516).

Consequently, two criteria are involved in creating a symmetrical taxing policy: (a) what is observable and (b) the social welfare function or attitudes toward inequality (Stiglitz, 2001). To achieve market efficiency, cost shifting to third parties cannot be hidden as the existing medical system allows (see, for example, Shareef, 1984). Moreover, the social welfare function for access to medical services in the United States has long been accepted as a public good since federal law (even before the Affordable Care Act) allows all citizens to be seen in the nation's emergency rooms, regardless of market inefficiencies or ability to pay (Shareef, 2011).

Based on (a) Stiglitz's (2001) theory concerning symmetrical information leading to efficient market processes that result in desired social welfare outcomes and (b) Bozeman's Public Value criteria, the diagnostic tools exist to determine

whether the U.S. Supreme Court's ruling in *Myriad* actually resulted in the creation of Public Value or was the catalyst for public failure.

### The *Myriad* Ruling and Public Value

In the *Myriad* case, Myriad Genetics sought to patent two human genes segments it discovered. They also sought to patent Myriad's synthetic replica of those human gene segments. The discovery of these segments was important because mutations of these segments provide indicators of propensity for breast or ovarian cancer. However, the Court found that Myriad was not entitled to patent protection of the two genes because (a) products of nature cannot be patented and (b) the grant of patents would tie up the basic tools of scientific and technological work and inhibit future innovation premised upon them (*Association for Molecular Pathology v. Myriad Genetics*, 2013). Writing for unanimous court, Justice Thomas outlined the anticompetitive aspects of Myriad's patent claim:

Myriad's patents would, if valid, give it exclusive rights to isolate an individual's BRCA1 and BRCA 2 genes. . . . The patents would also give Myriad the exclusive right to synthetically create BRCA cDNA. In Myriad's view, manipulating BRCA DNA in either of those fashions triggers its 'right to exclude others from making' its patented composition of matter under the Patent Act'. . . . Myriad also filed patent infringement suits against other entities that perform BRCA testing, resulting in settlements in which the defendants agreed to cease all infringing activity. Myriad then solidified its position as the only entity providing BRCA testing. (pp. 6-7)

The Court did find Myriad could patent cDNA (synthetic DNA) created in the laboratory and maintain patents on the BRCA tests developed by the company. The majority opinion also noted that Myriad can still make profit from other existing gene patents it has procured and remains the only company performing BRCA tests.<sup>6</sup>

### Public Failure Analysis

The Court's ruling *seems* to fit Bozeman's (2002) market efficiency/public failure criterion as it allows Myriad to sell its patented BRCA test, but does not allow patents that would bar or inhibit genetic research from other scientists on these individual genes. Public Value is enhanced since (a) Myriad's retention of patent control over its BRCA 1 and 2 tests represents an efficient market process and (b) it reduces the threats to subsistence for women with health insurance.

The *Myriad* decision *appears* to uphold Bozeman's Public Value construct of placing intrinsic value over economic value in two fundamental ways. First, had the Court granted patent rights to Myriad, the company would have stifled innovation in the field by charging other research enterprises prohibitively high costs to use the two gene segment for

scientific inquiry. Thus, the company would possess years of a monopolized market for its BRCA testing and therefore harmed the broader social welfare by impeding development of competitive breast and ovarian diagnostic tests.

Second, the ruling is *ostensibly* consistent with Bozeman's (2007) argument that ". . . economic currency is a poor surrogate for valuing *scientific knowledge*" (p. 129). Often the costs of a commodity's economic value and its public value have little relationship. Bozeman (2007) finds that economic costs attach a value to a commodity but that attachment says nothing important about the value itself. Conversely, Public Value does say something important about the value placed on a commodity. In the *Myriad* decision, the unanimous opinion essentially concludes that the high social costs of granting the company patent rights over the gene segments themselves outweigh Myriad's reduced profit margins. This rationale also fits with Bozeman's Public Value value-preference of protecting subsistence and human dignity.

However, public failure was created in the *Myriad* case because the asymmetrical information barrier design for poor women to access applications forms for the BRCA tests creates both market and public failure. Low-income women are required to download and read copious information to apply for the BRCA tests. The Myriad webpage directs poor women to a series of links that require downloading of a Myriad Financial Assistance Application, Medical Criteria, and Financial Criteria.

Yet, research shows that this type of Informational challenge often creates disincentives for the poor to effectively utilize the American health care system. For instance, Halpern, Ubel, and Asch (2008), in their study of medical default settings, found that low-income patients having to complete forms and obtain referrals often confront insurmountable informational barriers that mitigate effective health care outcomes. Thaler and Sunstein's (2008) research on enrollment in Medicare's Part D Prescription Plan reveals that high enrollment rates of seniors were primarily the result of automatic default enrollment—not information and forms provided by the government—through Medicaid or the Veterans Affairs. Consequently, many other eligible Americans never enrolled in Medicare Part D because of information overload.

Likewise, a recent Kaiser Foundation study found that most of Kentucky's 650,000 residents who are eligible for Medicaid under the Affordable Care Act (ACA) are confused because of disinformation campaigns concerning the supposed defunding of "Obamacare" (Galewitz, 2013). Thus, because of deliberate information confusion about the Affordable Care Act and *Obamacare* by political partisans, ACA navigators are told that the Obamacare label is toxic and avoid using it when explaining who is eligible for coverage under Medicaid expansion.

These information barriers, by design, constitute information asymmetries and thereby trigger market failure. Stiglitz (2001) notes that business managers have an economic incentive to create asymmetrical information networks:

While early work in the economics of information dealt with how markets overcome information asymmetries, later research turned to how markets create information problems, partly in an attempt to exploit market power. Managers of firms attempt to *entrench* themselves, increasing their bargaining power, e.g., via alternative management teams, and one of the ways they do this is to take actions which increase information asymmetries. Doing so effectively reduces competition in the market for management. (p. 490)

As previously noted, Bozeman (2007) argues that neither a market process nor government regulation inherently determines whether Public Value has been created. The *Myriad* case provides an interesting example of this paradox. It is undeniable that the Court's decision does broaden social welfare benefits at the expense of Myriad's profits. However, because of asymmetrical information barriers for the poor to utilize the company's cutting-edge medical innovations, participation by eligible low-income women is likely to be reduced. Stiglitz (2001) says these information barriers are deliberate and designed to enhance profitability.

Based on Tsui's (2013) typology, Myriad appears to remain a typical Friedman-type profit maximization organization that will take advantage of the poor via its established asymmetrical information flow. If theory (Stiglitz, 2001) and empirical evidence (Galewitz, 2013; Halpern et al., 2008; Thaler & Sunstein, 2008) are indicative, the asymmetrical information barrier will be so difficult for lower income women to surmount that Myriad's profits will only be marginally impacted by giving the test free of charge to this class of women. As such, the *Myriad* ruling will create public failure based on the Public Value criteria of threats to both the subsistence for low-income women and to human dignity.

Bozeman (2002) is also concerned about the relationship between imperfect information in health care (concerning the selling of human organs) and exploitation of the poor causing social cleavage in the broader society:

The same argument can be made against the trade in human organs. If the person who takes the risk of living with just one kidney turns out to have made a bad bet, then society, not just the individual, suffers the cost. This is especially likely since the sellers will come disproportionately from the poorer segments of society, selling their "natural resource" to the wealthy. (p. 155)

Thus, the catalyst for public failure in both selling human organs and the *Myriad* ruling are asymmetrical information flows.

### Public Value and CSR

As Myriad remains a Friedman-type profit maximization organization, it also fails Moore and Khagram's (2004) Public Value criterion test for establishing CSR-based social and political legitimacy. A statement by the American

Medical Association's President Jeffrey Lazarus (2013) applauded the Court's ruling and questioned Myriad's commitment to the broader social welfare:

The American Medical Association (AMA) has long advocated a clear prohibition against human gene patents. To ensure the U.S. Supreme Court heard physicians' voices loud and clear, the AMA joined with other health care organizations to file an amicus brief in defense of the federal court ruling that invalidated patents held by Myriad Genetics on the BRCA 1 and BRCA 2 genes consistent with the law . . . Removing the patents on the building blocks of life ensures that scientific discovery and medical care based on insights into human DNA will remain freely accessible and widely disseminated, not hidden behind a vast thicket of exclusive rights.

### Conclusion

Several related conclusions can be drawn from this research concerning intrinsic versus economic value in decision-making and asymmetrical information.

First, Kanter's (2005) sociology of knowledge construct accurately identifies the *social context* of organizational change concerning the shift from Friedman-type enterprises to organizations where intrinsic and economic values are co-determinants of institutional success. Because of 21st-century corporate scandals, the public now finds organizations featuring social welfare norms more acceptable. Corporate CEOs are also aware of this shift in attitudes. Myriad's CEO's editorial in *USA Today* sought to portray his firm as one exhibiting desired social welfare norms (Meldrum, 2013).

Kanter's (2005) framework suggests the U.S. Supreme Court is also aware of this social shift in attitudes. Despite Wright's (2008) prediction that Chicago School profit maximization norms will be the foremost value that justices on the Roberts' Court use in determining Sherman antitrust cases, a unanimous court in *Myriad* attempted to broaden the concept of consumer welfare by placing intrinsic values over economic values. The Court weighed the value of scientific knowledge as a public good versus giving monopoly rights to the owners of the most efficacious BRCA test in today's market. Conversely, Bork (1966) and Posner (1979) would have supported an opinion favoring *Myriad*.

Second, Bozeman's Public Value construct provides the requisite diagnostic criteria—analogue to market failure in neoclassic economics—to determine whether social welfare has been achieved or public failure has occurred. Therefore, Public Value criteria can serve, in case-by-case situations, as a mid-range theory between the Harvard and Chicago Schools in quick look antitrust cases. In the Public Value theoretical construct, had the Court utilized established Public Value cause and effect relationships between asymmetrical information and victimization of the poor in a quick look analysis in its *Myriad* ruling, the ruling would have avoided public failure.

However, the Court never considered the social costs of asymmetrical information for poor women in *Myriad* because of the dominance of the economics paradigm in the social sciences, including law. Pfeffer (2005) notes,

In a word, Ghoshal is right. He is right in the sense that economics is indeed taking over management and organization science, just as it has taken over political science and law . . . Ghoshal is right that this takeover matters because social theories matter. The theories that come to be believed and accepted affect both public and organizational policies and practices. Moreover theories, once accepted, set into motion processes that tend to become self-fulfilling. (p. 96)

Economic language now determines our collective social construction of reality (see Berger & Luckman, 1967) and affects what people see, what people ignore, and what people think is important (Ferraro, Pfeffer, & Sutton, 2005). Consequently, the Court in *Myriad* did not ignore the difficulties of poor women attempting to access the BRCA tests out of meanness or indifference. Rather, they ignored poor women because of a social conditioning that leads to thinking solely about economic profitability and disregards the social costs of organizational and public policy.

Bozeman's (2002, 2007) public-value-failure model and Moore and Khagram's (2004) Public Value/CSR concept—along with Tsui's (2013) social entrepreneurship—are all manifestations of Ghoshal's (2005) intellectual pluralism movement to require both (a) scholars in the social sciences and (b) business and public sector leaders to consider social welfare costs equally with economic profitability. These ideas are moving from the periphery to the core of how to define organizational success. As a result, we very well may be witnessing a paradigm shift (Kuhn, 1970) in academic and societal thinking about why organizations exist and the inextricable link between profitability and social welfare costs.

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### Notes

1. Weick (1995), in his Organization Sensemaking construct, contends that there has to be an agreed upon *point of reference* to begin making sense of social phenomenon. For many in the Public Management discipline, the point of reference for understanding the Public Value concept begins with Moore's (1995) book where he introduces the concept. However, my point of reference for *making sense* of Public Value starts with Bozeman's (2002) *Public Administration Review* article that

establishes criteria for determining where market efficiency stops and public failure begins.

2. Bozeman and Sarewitz (2011) contend contemporary research evaluation does an excellent job assessing scientific and economic impacts; however, there is poor assessment of the social outcomes of research processes. Hence, they provide *public value mapping* criteria of science policy to evaluate public value failure.
3. Many Public Management scholars view the Public Value concept as a *unique* normative management process that can only be utilized in public agencies. Perry and Kraemer (1991, p. 5) introduced the concept of Public Management's uniqueness by stating, "Although there is much that public management shares with private management, it also has a unique content." Thus, these scholars tend to reject generic management approaches that are applicable to both public and business management processes. Williams and Shearer's (2011) review of journal articles and books on the Public Value concept over a 15-year period is illustrative. Any research that applied Public Value in a non-public organization setting was excluded from their review, including Shareef's (2008, 2010) and Moore and Khagram's (2004) research.
4. The National Basketball Association (NBA) Board of Governor's recent forced sale of the Los Angeles (LA) Clippers team by owner Donald Sterling provides an easy assessment of both Bozeman's and Moore and Khagram's Public Value frameworks. Although the LA Clippers are an efficient market entity (the team is a playoff contender and valued at over \$500 million dollars), the NBA has banned Sterling (because of recorded racist remarks made to a female acquaintance) for life and forced him to sell the team. These comments violate Bozeman's (2002) public failure criteria of "dehumanization and threats to human dignity." When the comments were made public, the players union threatened to boycott the 2014 playoffs, corporate sponsors withdrew, civil rights groups staged protests at Clipper games, and President Obama publicly condemned the racist statements (Berman, 2014). Consequently, Sterling had lost all social and political support to remain the owner of the team—although the team was economically profitable—because of public failure.
5. While neo-classical economists like Belfield (2012) continue to argue that cost-benefit analysis fits with the Public Value construct, Bozeman (2002) explicitly rejects this linkage arguing this analytical approach focuses solely on economic outcomes and excludes social costs.
6. The Court announced its *Myriad* decision on June 13, 2013. On May 13, 2013, popular celebrity actress Angelina Jolie wrote an op-ed in *The New York Times* announcing that she had undergone BRCA testing, was found to have an inherited gene mutation, and made the decision to have a preventive double mastectomy. The column focused public opinion on the *Myriad* case. Much of Jolie's commentary discussed the high cost of BRCA testing: "Breast cancer alone kills 485,000 people each year according to the World Health Organization, mainly in low and middle-income countries. It has to be a priority to ensure that more women can access gene testing and lifesaving preventive treatment, whatever their means and background, wherever they live." The cost of testing for BRCA1 and BRCA2, at more than \$3,000 in the United States, remains an obstacle for many women.

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