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Old Wine in New Bottles: Public Interest Lawyering in an Era of Privatization

Louise G. Trubek
University of Wisconsin Law School, Center for Public Representation

OLD WINE IN NEW BOTTLES: PUBLIC INTEREST LAWYERING IN AN ERA OF PRIVATIZATION

*Louise G. Trubek**

INTRODUCTION

Both the theory and practice of public interest lawyering are in transition. Whereas the public interest lawyer of the 1960s and 1970s typically advocated before administrative agencies and courts on behalf of poor people and underrepresented groups,[1] the public interest lawyer of today assumes a much greater variety of roles and is involved in a broader array of tasks. One of the causes of this development is the privatization of government, which has been defined as an increased reliance on the private institutions of society to satisfy public needs.[2] The institutions involved in this shift are quite diverse, ranging from the marketplace and corporations, to charitable organizations and the family.[3] Although many have lauded privatization as a means of making government more efficient and responsive to community needs, the jury is still out on whether privatization in all its varied forms is a positive develop-

* Clinical Professor of Law, University of Wisconsin Law School and Senior Attorney, Center for Public Representation (lgtrubek@facstaff.wisc.edu). I would like to express my deep appreciation to Ed Baker for his editorial assistance and support.

1. *See, e.g.*, COUNCIL FOR PUB. INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA (1976) [hereinafter BALANCING SCALES]; David M. Trubek, Book Review, 1977 WIS. L. REV. 303 (1977).

2. *See* Remarks of E.S. Savas, *in* Panel Discussion, *The Changing Shape of Government*, *in* Symposium, *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1319 (2001). Privatization can be described as the "movement out." Other causes behind the change in public interest practice include devolution, the blurring of professional boundaries, and changes in technology. For devolution, see Donald F. Kettl, The Transformation of Governance: Globalization, Devolution, and the Role of Government (June 1, 2000) (unpublished manuscript, on file with the Fordham Urban Law Journal). For blurring of professional boundaries, see Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices For People*, 7 CLINICAL L. REV. 227 (2000). For changes in technology, see William M. Sage, *Regulating Through Information: Disclosure Laws and American Healthcare*, 99 COLUM. L. REV. 1701 (1999).

3. Panel Discussion, *The Changing Shape of Government*, *in* Symposium, *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1319 (2001).

ment from the standpoint of the disadvantaged and those who advocate on their behalf.[4]

A central concern is that a privatized government is less transparent and participatory than traditional governance, and therefore less accountable, both to the public as a whole and to the constituency receiving the services.[5] My own experience indicates that this concern is somewhat misdirected. As the founder and Executive Director of the Center for Public Representation, the oldest public interest law firm in Wisconsin, I have observed that public interest lawyers can work effectively within a privatized system on behalf of their constituencies. Doing so, however, requires reimagining the role of the public interest advocate and adopting new strategies to foster transparency and participation in the changed regulatory environment. In this essay, I will support this claim by providing examples from my own experience.

I. PUBLIC INTEREST LAWYERING BEFORE PRIVATIZATION

Perhaps the best place to begin is with the practice of public interest law before privatization became widespread.[6] In 1973, I was a lawyer based in a Madison, Wisconsin, a graduate of the Yale Law School, familiar with the new theory and practice of public interest law.[7] With the dean of Wisconsin Law School, I decided to set up a Wisconsin-based version of the public interest law firms springing up in New York, Washington, and California.[8] The organization we created, the Center for Public Representation ("CPR"), has provided advocacy for the underrepresented on a variety of issues over the years, including environmental regulation, consumer protection, and gender discrimination.[9] As a nonprofit

4. *Id.*

5. *See, e.g., id.*; Robert S. Gilmour & Laura S. Jensen, *Reinventing Government Accountability: Public Functions, Privatization, and the Meaning of "State Action,"* 58 PUB. ADMIN. REV. 247 (1998).

6. Of course, American governance always has involved some private mechanisms. What is noteworthy is that in the past several decades, this way of doing business has become a platform on which politicians get elected and a means by which social service programs previously handled exclusively by the government have been privatized.

7. For the theory and practice of public interest law in the 1960s and 1970s, see BALANCING SCALES, *supra* note 1.

8. *Id.*

9. *See, e.g.*, Press Release, Louise G. Trubek, Untitled (Feb. 18, 1974) (on file with Fordham Urban Law Journal); Center for Public Representation Articles of Incorporation (Dec. 18, 1973) (on file with the Fordham Urban Law Journal) [hereinafter CPR Articles of Incorporation]; By-Laws of Center for Public Representation, Inc. (Jan. 2, 1974) (on file with the Fordham Urban Law Journal) [hereinafter CPR

organization, we have received funding for our efforts from foundations, government agencies, law schools, lawyers, and bar associations. Currently, CPR speaks out for its constituencies through information dissemination, policy research, and advocacy, public workshops, and clinical programs in the areas of health care, telecommunications, and consumer protection.[10] Our focus consistently has been to advocate for our clients in the administrative process.[11]

The original conceptualization of CPR reflected the broader theory of public interest law prevalent at the time.[12] As described in *Balancing the Scales of Justice*, the original theory underlying public interest practice relied on the existence of administrative agencies that embodied bureaucratic expertise and public commitment to state action.[13] Public interest practice was envisioned as asserting a voice for individuals and groups whose interests were ignored because of their inability to organize and obtain resources to counterbalance more powerful parties advocating before agencies.[14] Finding themselves in a position of relative weakness, public interest lawyers consistently criticized the agency system as being too hierarchical, unresponsive, and unbalanced.[15] This critique helped to undermine the public perception of government as the solution to all social problems, thereby contributing to privatization.[16]

Inspired and influenced by this conceptual model, our goal at CPR was to advocate on behalf of underrepresented interests through participation in administrative agency processes at the state level. We envisioned our staff as a cadre of full-time lawyers dedicated to public interest practice. We firmly believed that our expertise as lawyers with substantive knowledge of the field would enable us to speak out effectively before agency decision-makers, and that our advocacy would counteract the resources and knowledge of the regulated industry, thereby "balancing the scales of jus-

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By-Laws]; Center for Public Representation, *at* http://www.law.wisc.edu/pal [hereinafter CPR Web site].

10. *See, e.g.*, CPR Web site, *supra* note 9.

11. *Id.*

12. BALANCING SCALES, *supra* note 1.

13. *Id.*

14. *Id.*

15. *See generally* CPR Articles of Incorporation, CPR By-Laws, *supra* note 9; BALANCING SCALES, *supra* note 1.

16. Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 PUB. INT. L. J. 49 (1991), *reprinted in* JULIE A. NICE & LOUISE G. TRUBEK, CASES AND MATERIALS ON POVERTY LAW: THEORY AND PRACTICE 236-37 (1997).

tice."[17] The result, we hoped, would be a fairer process at the agency level and, perhaps, some substantive changes in the law as well. Over the years, our efforts have met with some success.

II. PUBLIC INTEREST LAWYERING AND PRIVATIZATION

The privatization of public services dates to the early 1980s and the Reagan presidency.[18] This trend reached Wisconsin a few years later, in the mid-1980s. The processes of privatization affected CPR's practice because it overlapped with three areas on which we had chosen to focus our energies: health care, telecommunications, and antipoverty. The following is a brief description of privatization in Wisconsin and the manner in which we at CPR adapted our practices to serve our clients.

A. Privatization in Wisconsin

Wisconsin has been a leader in privatization, not only in the area of welfare reform, but also in health care and telecommunications. Health care was the first area the state reorganized, through a process called managed competition.[19] Under managed competition, Wisconsin converted public and private health care delivery and financing into a system in which Health Maintenance Organizations ("HMOs"), both nonprofit and for-profit, competed with each other for health care contracts from public and private payors.[20] Reflecting the pervasiveness of privatization, the state Medicaid program switched to the new system in the mid-1980s.[21] The success of Medicaid managed care subsequently led to BadgerCare, a well-regarded new program that funds health care for low-income families.[22] A complex system of participation mechanisms eventually evolved into the system that is in place today.[23] Priva-

17. BALANCING SCALES, *supra* note 1.

18. JOEL F. HANDLER, DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT 4 (1996).

19. Louise Trubek, *Making Managed Competition A Social Arena: Strategies for Action*, 60 BROOK. L. REV. 275, 276 (1994).

20. *Id.*

21. Louise G. Trubek, *Symposium: The Health Care Puzzle: Creating Coverage for Low-Wage Workers And Their Families*, *in* HARD LABOR: WOMEN AND WORK IN THE POST-WELFARE ERA 143 (Joel F. Handler & Lucie White eds., 1999).

22. *Id.*

23. Louise G. Trubek, Symposium, *Medicaid Managed Care: Symposium on Consumer Protection in Managed Care: Mechanisms of Consumer Protection—the Marketplace and Regulation, The Social HMO for Low-Income Families: Consumer Protection and Community Participation*, 26 SETON HALL L. REV. 1143, 1152-53 (1996).

tization also occurred in the employer-provided health care sector. Specifically, concerns for quality and access resulted in Wisonsin's enactment of patient protection legislation and administrative rules.[24] These rules created new dispute resolution systems, imposed data collection and analysis requirements, and inserted protections for patients into the contractual agreements between physicians and managed care organizations.[25]

In the early 1990s, Wisconsin also privatized telecommunications by limiting the regulatory role of the Public Service Commission.[26] As part of the legislation that brought about these changes, Wisconsin created a fund to maintain access and equity during the transition to a market-based system.[27] A council consisting of a minority of telecommunication providers and a majority of consumer representatives would oversee this fund. As part of its activities, the council developed programs to provide equity and access to telecommunication services.[28] Two of these are original to Wisconsin: (1) a program to fund telemedicine equipment for nonprofit and local public health agencies that serve the uninsured; and (2) a program to fund telecommunications projects by nonprofits that assist low-income populations and persons with disabilities.[29]

Finally, in the 1990s, Wisconsin privatized the administration of welfare benefits through a program called "W-2."[30] The legislation creating W-2 required welfare services to be contracted out to private agencies, and the use of performance criteria in the contracts.[31] Health advocates expressed concern at the time that the selected agencies, which were chosen by requests for bids based on a master contract, would not adequately inform and enroll people for the Medicaid program.[32] When Wisconsin sent the second round of W-2 contracts out for bids, health advocates pressed for the insertion of a performance criterion to measure an organiza-

24. Louise G. Trubek, *Informing, Claiming, Contracting: Enforcement in the Managed Care Era*, 8 ANNALS HEALTH L. 133 (1999).

25. *Id.*

26. WIS. STAT. § 196.218 (1993) (deregulating telecommunications in Wisconsin).

27. Adam Nathe, *Special Report—Promoting Universal Service Through Grant Funding for Non-Profits: Wisconsin PSC § 160.125's First Grant Cycle*, *in* 26 THE PUB. EYE i (2001).

28. *Id.* at i-ii.

29. *Id.*

30. Act of April 25, 1996, 1995 Wis. Laws 289.

31. WIS. STAT. § 49.143 (1996).

32. JULIE A. NICE & LOUISE G. TRUBEK, CASES AND MATERIALS ON POVERTY LAW: THEORY AND PRACTICE 167 (1999 Supplement).

tion's success in enrolling welfare beneficiaries in health care plans, thereby putting pressure on bidders to take this task more seriously. The state Department of Workforce Development adopted this suggestion, establishing a benchmark to indicate the number of individuals who obtained jobs providing adequate health care coverage.[33] A committee now monitors this benchmark on a monthly basis.[34]

B. Changes to CPR Practice

In response to the three areas of privatization described above, CPR's practice underwent a gradual but profound change over the course of the past decade. Because administrative agencies were no longer the central or exclusive arena for public interest advocacy, we developed three new strategies for achieving our original goal of giving voice to the underrepresented. These strategies included strengthening nonprofits, working with collaborative groups, and monitoring the performance of private and public agencies in the new system.

1. *Strengthening Nonprofits*

Nonprofit agencies serve as ideal candidates for providing services in a privatized system because they tend to be more participatory in their internal structures and delivery mechanisms than their for-profit counterparts.[35] The ability of nonprofit agencies to compete for available funds in the privatized arena, however, is limited by their often underdeveloped financial and organizational infrastructure, including their low-level of technological competence. CPR is addressing this problem by actively helping nonprofits obtain funding for technology equipment and training that will enable them to be more efficient in serving their clients and more competitive in future contracting. We are the main proponent and watchdog for the grant programs made available to nonprofits by

33. Wisconsin Department of Workforce Development Performance Standards (2000) [to be provided]. State of Wisconsin Department of Workforce Development, *Department Announces 95% of W-2 Agencies Meet or Exceed Performance Standards* (Feb. 16, 2001), http://www.dwd.state.wi.us/notespub/DWDWebMa/389e_ 536.htm.

34. W-2 Contract & Implementation Committee, http://www.dwd.state.wi.us/-desw2/w2min/2001_minutes.htm.

35. WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY (forthcoming 2001) (manuscript on file with author); Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195 (1997).

the state's Public Service Commission.[36] Our staff maintains pressure on the Commission to continue these programs and provides information and training to nonprofits that wish to take advantage of them. This new type of advocacy, to which we devote a significant amount of our time and resources, is part of our overall strategy of strengthening the role of nonprofits in the new public/private networks.

2. *Working with Collaborative Groups*

As a consequence of privatization, government agencies no longer have exclusive decision-making power. Rather, this authority now is decentralized and distributed among different public and private groups.[37] Many of these groups have yet to fully grasp their new roles, including how to network with others in the new privatized environment. For example, in the health care arena, managed care created great confusion and dismay among nonprofits and public health agencies, and among health care professionals and insurers as well. CPR has participated in two collaborative networks to address this confusion.

First, as Medicaid managed care emerged in the state, CPR helped initiate forums on both a regional and state-wide basis that brought together community groups, public interest advocates, state and county officials, health care providers, and HMOs.[38] These ongoing forums provide opportunities for participants to comment on the contracting process, identify problems in the system, and develop performance standards. Second, when private employer funded managed care began to impact consumers and physicians, CPR formed a coalition of consumer and health care professional groups called "Collaboration for HealthCare Consumer Protection" ("CHCP").[39] The Collaboration meets with representatives of private insurers, managed care organizations, administrative agencies, and the state legislature.[40] Together, we identify problems in the quality and accessibility of health care, with particular attention placed on employer-funded insurance.[41] Once the problems have been identified, we seek solutions that are

36. Nathe, *supra* note 27.

37. HANDLER, *supra* note 18, at 1, 8.

38. *See* Trubek, *supra* note 23, at 1152-54.

39. COLLABORATION ON HEALTHCARE CONSUMER PROTECTION MISSION STATEMENT (1999) (on file with the Fordham Urban Law Journal).

40. *Id.*

41. CHCP GRANT DOCUMENT, PHYSICIAN-CONSUMER PARTNERSHIP IN ADVOCACY (1999) (on file with the Fordham Urban Law Journal).

supported by a consensus of the disparate member groups. This type of cooperative interaction was hard to imagine under the older model of public interest advocacy.

3. *Monitoring Performance*

A further aspect of privatization is reliance on contracting for services. Unfortunately, contracting can have undesirable consequences if the bidding process is not equitable and performance not carefully monitored. When welfare reform began in Wisconsin, CPR realized that the new system, which included contracting out of services, could have a potentially negative effect on the number of recipients of health care coverage provided through Medicaid. Like others, we feared that the Medicaid entitlement retained under the welfare reform legislation would be underutilized by confused former recipients of the Aid to Families with Dependent Children Program ("AFDC").[42] We therefore sought and obtained evaluative standards in the contracts between the state and the agencies administering the program. These standards measured the number of enrollees who had taken advantage of their Medicaid benefits and placed responsibility on the private agencies that were administering the delivery system to reach a benchmark figure. To ensure continued efforts to reach and exceed the benchmark, local agencies regularly report on their compliance with the benchmark standard. Moreover, there are regular meetings among state officials, contracting agencies, and others community advocates to monitor compliance and progress in meeting the benchmark. Participants also share ideas for improving the practice of contracting agencies. The standards and data that come out of these meetings are available to the public, and much of the work,

42. AFDC, ch. 531, 49 Stat. 627 (1935) (codified as amended at 42 U.S.C. §§ 601-615 (1982)), was a federal program that provided cash grants to families and children whose incomes are not adequate to meet their basic needs, http://192.234.213.2/chc5180.html. AFDC prohibited private entities "from determining eligibility or performing case management functions" in this area. NAT'L CTR. FOR POLICY ANALYSIS, WISCONSIN STUDY: PRIVATIZING WELFARE ADMINISTRATION, http://www.ncpa.org/pd/private/feb98d.html. AFDC factored contributing to the eligibility of families to receive grants included the death, incapacity or continued absence of both parents, unemployment of one or both parents, or certain foster care situations, http://192.234.213.2/-chc5180.html. Created in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.), the Temporary Assistance for Needy Families ("TANF") program became effective on July 1, 1997 and replaced the AFDC Program, http://www.acf.dhhs.gov/programs/ofa.

including minutes of the monitoring committee meetings, is made available on the state Web site.[43]

C. Accountability and Privatization

CPR's three new strategies offer guidance for improving transparency and participation in a privatized system, thereby clarifying the lines of accountability. First, by strengthening nonprofits, public interest lawyers tap into those organizations that, because of their grassroots nature, serve as a direct link to the community, and are ideally suited to get a broader array of people and interests involved in the mechanisms of government. Raising their level of service has a snowball effect. As nonprofits are strengthened, they are better able to serve their constituency. Their success in doing so gains them more respect in the system, and they are thereby better able to compete for additional funding. Moreover, as nonprofits become more embedded in the social service delivery network, they are more likely to speak out when the needs of the community are not being met. Because they are in the best position to know what these needs are, nonprofits have a certain built-in credibility that other actors typically lack.[44] Thus, when nonprofits complain that others are "hiding the ball," their complaints are more likely to be heard by the public and the press. Of course, there is no guarantee that nonprofits will maintain their grassroots character and integrity in light of the seduction of money and power. The challenge they face is to remain participatory and transparent in their own organizational structure and activities even as they increase in scope and size. Opening their books to outside scrutiny and placing information on the Web is one way in which nonprofits can ensure their own accountability, and that of the system as a whole.

A second means of improving accountability in a privatized system is through collaborations. By forming collaborations, public interest lawyers can take advantage of the uncertainty inherent in a privatized environment as to what service delivery practices will be effective. Faced with this uncertainty, traditional and non-traditional actors have a greater incentive not only to join collaborations, but also to share information and work cooperatively once

43. For more information, see http://www.wisconsin.gov/state/home.

44. These nonprofits have become integrated in the health care delivery system in Medicaid managed care. Their ability to provide and advocate for services for specific communities such as Latinas and Hmong have made them an essential part of the heath care delivery system. *See generally* Trubek, *supra* note 24.

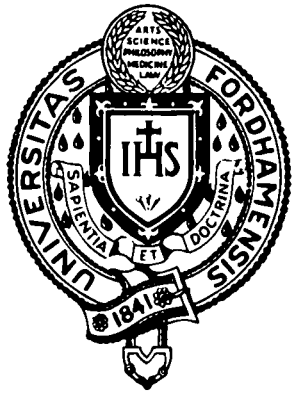
they do. This may allow under-represented groups to play a more influential role in the design of new practices and to gain more timely access to valuable information that might not have been available before. Public interest lawyers can use this information to intervene more quickly on behalf of their constituencies, making the system more transparent and responsive to community needs. Accountability is further improved by the non-adversarial nature of collaborations. Working side-by-side rather than at arm's length fosters a sense of trust and dependency between public interest groups and traditionally stronger actors that is not easily betrayed. This dynamic, however, requires advocates for under-represented groups to remain true to their constituency while exploring approaches that may be initially threatening to preconceived notions of success. Public interest lawyers may also be reluctant to learn the new skills and invest the time and energy on informal interactions that is necessary to make the collaborative process effective.

Finally, accountability can be achieved by monitoring the outcomes and processes of a privatized system. As described earlier, contracting is one way in which opportunities for monitoring are created through privatization. Standards can be inserted into contracts to evaluate performance. Assuming that the standards are arrived at through a collaborative process, public interest lawyers can influence the information that the contracting agency must collect and reveal. They also can take an active role in analyzing the data collected and making it available to the public. Both steps serve to increase the transparency of the system, and thus the accountability of the actors. To be effective, however, the performance standards must be well designed and service providers must be discouraged from "teaching to the test," namely, narrowing their services to concentrate exclusively on the privileged standards, rather than attending to more personal and contextual needs. Public interest lawyers also must learn the technical skills necessary to evaluate meaningfully complex informational systems.

CONCLUSION

My experience with CPR indicates that privatization forces adaptation of the traditional public interest law practice. The earlier conception of public interest advocacy was based on a regulatory system in which the agencies were the primary arenas for public interest law firms to present competing points of view. Public interest firms used these arenas to provide not only a competing voice but also to serve as a "watchdog" over the impartiality of

government agencies. Under privatization, public interest lawyers still can serve as watchdogs and spokespersons for the disadvantaged. But, in order to maintain this two-pronged role, they must rethink their advocacy strategies and learn new skills. Like putting old wine in new bottles, public interest lawyers must adapt if they are to maintain their essential role in our complex and often unequal society.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