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Public Oversight of Public/Private Partnerships

PUBLIC OVERSIGHT OF PUBLIC/PRIVATE PARTNERSHIPS

PROFESSOR BRIFFAULT: This is the panel in which we begin to look more directly at some of the mechanisms for accountability and monitoring, a central theme of the entire Symposium. The panelists will be talking about such issues as the role of the courts, litigation, government agencies, monitoring procedures, community organizations, advocacy groups, and public interest lawyering in providing monitoring and accountability for the new organizations and hybrid organizations that are center stage in the era of privatization. These include private, quasi-private, and mixed public/private entities. These various sorts of line-blurring organizations are playing a much greater role in providing services that in recent decades had been considered public services.

Our five panelists are Jack Beermann, Professor of Law at Boston University School of Law, where his primary teaching and research interests have been civil rights litigation and administrative law; Barbara Bezdek, Associate Professor of Law at the University of Maryland School of Law, where she teaches in the legal theory and practice curriculum; Wayne Hawley, Deputy Counsel to the New York City Conflicts of Interest Board, who advises city employees on the city's ethics laws, and brings a government perspective to this panel and to this conference; Susan Sturm, who teaches at Columbia Law School after a very distinguished career at the University of Pennsylvania Law School, and specializes in issues relating to race and gender in the work place, employment discrimination, and remedies; and Louise Trubek, Clinical Director and Senior Attorney at the Center for Public Representation at the University of Wisconsin Law School, where her work emphasizes such issues as telecommunications and access to justice.

Professor Beermann?

PROFESSOR BEERMANN: Thank you very much. I was asked to be on this panel, I think, to give an overview of the issues of political accountability and privatization. I do not profess to know very much about particular privatizations, so I am going to be general, out of necessity.

In reading the legal literature on privatization, there are two different types of articles that interested me. One type discusses the kinds of legal or constitutional constraints there are on privatization, and, as part of the analysis, discusses the fact that there really

are *not* any direct legal constraints on privatization.[1] The other type describes a particular kind of privatization and bemoans its failures, the problems it causes, and the lack of adequate checks on private governance.[2]

In my paper for this Symposium, I speculate on constitutional limits that courts might place on privatization within the context of what limits already exist,[3] and what limits may be possible.[4] I also look at the different kinds of privatization, with an eye toward modeling the way in which political accountability is affected by different kinds of privatization.

One of the big issues of privatization is the question of political accountability: Will the privatized entity or cooperative entity be less accountable through the political process?

I think it is important always to separate the market accountability question from the political accountability question, because the two kinds of accountability are radically different. I will talk about that a little bit later.

The first thing then, is to define "political accountability." I define political accountability very simply as amenability of an action or activity to monitoring and control through the political process.[5] That is a circular definition, I know, but it includes the clarification of lines of responsibility, that is, who is responsible and to whom one goes to try to change a particular action. Also, it addresses more specifically the ability to get information, the applicability of legislation like the Freedom of Information Act,[6] and administrative, procedural constraints on accountability.

Now, I tend to be somewhat of a pessimist when analyzing legal institutions, and so it is tempting for me to look at this issue through a "public choice" lens[7] and question whether public sector

1. Ronald A. Cass, *Privatization: Politics, Law and Theory*, 71 MARQ. L. REV. 449, 455-56, 480 (1988) ("While privatization presents many legal issues, it does not confront serious legal constraints other than process requirements."); Clayton P. Gillette & Paul B. Stephan III, *Constitutional Limits on Privatization*, 46 AM. J. COMP. L. 481, 481-82 (Supp. 1998) (discussing the "paucity" of constitutional limits on privatization).

2. *E.g.*, Joseph E. Field, Note, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649 (1987).

3. For the limits that already exist, see Cass, *supra* note 1, at 455-56, 480.

4. Professor Beermann's discussion is based upon an article, appearing in its entirety, *infra*, this volume of the *Fordham Urban Law Journal*. Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507 (2001).

5. *Id.*

6. 5 U.S.C. § 552 (2001).

7. By a "public choice" lens, I mean explanations of government regulation that focus more on the political forces that are arrayed concerning the regulation rather

resistance to privatization is explained by fear on the part of government officials of losing the power they get through patronage and through all the other sorts of things that make government inefficient. There are many discussions from a public choice perspective about why government is so inefficient,[8] and about patronage problems and the aspirations of government officials toward profitable work in the private sector.[9] These things combine to make it unrealistic, according to public choice theorists, to expect that government will ever do anything well.

However, it is risky to rely on public choice criticisms of government to argue for privatization because under public choice assumptions, we should assume that the same distortions in the political process that make much government regulation inefficient will affect the decision whether and how to privatize. This is because it is government officials who decide whether and how to privatize. Public choice analysis would assume that they will privatize only when it is in their interests to do so,[10] i.e., when the gains to the government officials from privatization (in terms of political or economic support from beneficiaries of privatization) outweigh any losses to the officials, perhaps in reduced support from organized labor and reduced control over patronage appointments to government positions.

There is also this notion that when something is privatized, the government official is hoping to get some sort of campaign support or a good job after government service. This is a very common problem with the public sector, the movement from government to the private sector in which regulators obtain lucrative employment from the groups they formerly regulated. In wondering why regu-

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than the public interest explanations that government typically offers for regulation. *See* Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148-57 (1977) (describing public interest and public choice models of understanding government regulation).

8. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12-37 (1991).

9. *See* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 709 (2000) (discussing the problem of government employees "selling out" the administration's program to maximize their own post-government employment opportunities).

10. *See* Paul B. Stephan III, *Toward a Positive Theory of Privatization—Lessons from Soviet-Type Economies*, 16 INT'L REV. L. & ECON. 173 (1996) (arguing that in post-Soviet-type economies, privatization may result from rent-seeking behavior by government officials). Stephan appears to assume that privatization in a democratic country like the United States is not rent-seeking because of the "transparency" of the political process. *Id.* at 184. The basis for this optimistic assumption is unclear.

lators treat regulated industries so well, it is because otherwise they would never get those lucrative jobs after their government service.

Therefore, because the government decisions to privatize are likely to be made for the same reasons that the public choice movement cites to criticize government generally, the case for privatization cannot be made by simply pointing out all the problems that government has in acting efficiently and effectively. It is important to look at each privatization proposal on its own merits, and perhaps hope for the best.

So assume for the sake of discussion that there is less—or less clear—accountability when you have a privatized activity, in very general terms, than when an activity is within government. The question that I have is whether this raises a constitutional question. In other words, does the Constitution require clear lines of political accountability and does the Constitution require that government activity be amenable to control through the political process?

There is some state law that very directly addresses this question.[11] There is even one state, at least, that has an accountability clause in its constitution, requiring that the government activity remain accountable.[12]

However, I am going to focus more on federal law, because that is what I know more about. There are some possible federal constraints on privatization, such as the Appointments Clause of the Constitution,[13] which requires that only properly appointed officers of the United States may exercise the power of the United States government.[14] And appointments, obviously, are political, so there is a very direct political control there on government activity.

There is also the presidential removal power[15]—or, at least, executive branch removal power[16]—an implied limitation on the structure of government recognized by the Supreme Court, stating that to completely shield people exercising government power from removal within the executive branch would at some level violate separation of powers.[17]

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11. *E.g.*, Julie Huston Vallarelli, Note, *State Constitutional Restraints on the Privatization of Education*, 72 B.U. L. REV. 381, 393 (1992).

12. MASS. CONST. pt. 1, art. V. (discussed in Vallarelli, *supra* note 11, at 393).

13. U.S. CONST. Art. II, § 2, cl. 2.

14. Buckley v. Valeo, 424 U.S. 1, 125-26 (1975).

15. *See generally* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (approving congressional restrictions on the President's removal of a Federal Trade Commissioner).

16. *E.g.*, Morrison v. Olson, 487 U.S. 654 (1988) (approving assignment of power to remove special prosecutor to the Attorney General of the United States).

17. *Id.* at 695-97.

There is also the nondelegation doctrine,[18] which might disallow discretionary decision-making by private groups.[19] Since no statute has been invalidated by the Supreme Court on nondelegation grounds since 1936, some relatively moribund precedents would have to be revived, but the potential is there in old cases like *Carter Coal*.[20] At the state level, there may be some Guarantee Clause issues,[21] although that is an unenforced constitutional norm. You could imagine a situation in which the state tried to have, for example, a private police force or private administrative agency. These might be held to violate some sort of a Guarantee Clause norm, that the guarantee of a "Republican Form of Government" requires that certain government functions, such as these, be carried out by actual government officials.

There is also the constraint of liability. That is, privatized groups such as private prisons, for example, often are treated just as if they are government, and so they are held to the due process[22] and cruel and unusual punishment norms[23] to which government prisons are held. And they are even worse off because, according to the Supreme Court, their officials are not entitled to the immunities that government employed officials would have.[24] So there is that kind of constraint.

But I am thinking that maybe we could imagine a pure accountability doctrine, a pure doctrine looking at the political accountability of something and finding that if it is a government entity that is not sufficiently politically accountable, it will be struck down, held unconstitutional, or be constitutionally regulated on those grounds.

I think that the way in which anticommandeering norms under current Tenth Amendment doctrine[25] developed parallel the manner in which an accountability based limitation on privatization

18. The nondelegation doctrine prohibits Congress from delegating its legislative power. *E.g.*, Field v. Clark, 143 U.S. 649, 692 (1892).

19. The nondelegation doctrine has been applied most strongly when Congress delegates legislative power to private individuals or groups. *E.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

20. *See generally Carter*, 298 U.S. 238.

21. U.S. CONST. art. IV, § 4.

22. *See* Warren L. Ratliff, *The Due Process Failure of America's Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371, 398-99 (1997) (discussing the application of due process requirements to private prisons).

23. West v. Atkins, 487 U.S. 42, 56 (1988).

24. Richardson v. McKnight, 521 U.S. 399 (1997).

25. Under current Tenth Amendment doctrine, the federal government may not require state and local government entities or officials to carry out a federal regulatory program. New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997).

might develop. At one time, there were specific limitations on federal regulation of the states under *National League of Cities v. Usery*.[26] In fact, there was a test that federal law had to pass to avoid being struck down as violating the Tenth Amendment.[27]

Justice O'Connor's dissent, written when she first joined the Court, stated that the problem was not about the regulation of states as states. Rather, she maintained that the lines of accountability between the federal and state government are too blurred when the federal government compels state agencies to act.[28] So she pushed for a new doctrine.[29]

When the Supreme Court decided to abandon its general scrutiny of the federal regulation of states, Justice O'Connor's accountability doctrine bore fruit as the new Tenth Amendment doctrine,[30] which does not allow the federal government to commandeer state government entities.[31] Therefore, it is possible to imagine a doctrine springing from nowhere, the same way that that an equal protection norm to regulate ballot-counting procedures did in the recent presidential election.[32] At least the accountability doctrine I discuss springs from the normative basis of the Tenth Amendment doctrine.

In my last two minutes, I would like to discuss the topic addressed in the second type of legal literature on privatization—the success or failure of different kinds of privatization. In an article a while back, Ron Cass, my Dean, categorized privatizations as divided up into divestiture, ccontracting out, deregulation, vouchers,

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26. 426 U.S. 833 (1976).

27. FERC v. Mississippi, 456 U.S. 742, 765 (1982) (suggesting that Congress would be violating the Tenth Amendment by passing a law "'directly compelling' the States to enact a legislative program").

28. *Id.* at 775 (O'Connor, J., concurring in the judgment in part and dissenting in part).

29. O'Connor agreed with the majority that Congress' enactment of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered section of the U.S. Code), was supported by the Commerce Clause, but rejected the Tenth Amendment analysis employed by the majority. *Id.* O'Connor argued that "Titles I and III of the PURPA conscript state utility commissions into the national bureaucratic army," which violates the principles of *National League of Cities* and was "antithetical to the values of federalism, and inconsistent with our constitutional history." *Id.*

30. The Supreme Court overruled *National League* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 557 (1985). Several years later, the Court adopted Justice O'Connor's anti-commandeering principle in both *New York*, 505 U.S. 144, and *Printz*, 591 U.S. 898.

31. *See generally New York*, 505 U.S. 144; *Printz*, 591 U.S. 898.

32. *See generally* Bush v. Gore, 531 U.S. 98 (2000).

tax reduction, and user fees.[33] In my paper, I talk about the importance of looking at each of the categories and then different kinds of privatization within these categories to understand the political accountability problems.

It is important to define "contracting out." Contracting out is when a government contracts with a private entity to provide goods or services either to or on behalf of government. There are several different kinds of contracting out. Nobody finds it problematic that the government does not make its own paper clips. But people do think it is a problem that the government contracts out for prisons or schools, because of accountability concerns.

The biggest opponent of privatization is organized labor,[34] which argues that government saves money through privatization only at labor's expense.[35]

It is possible to propose that labor actually created the accountability problem—the one present before privatization is introduced—because government provides more protection to organized labor than to the private sector.[36] Therefore, it could be argued that privatization increases accountability because the government agency monitoring the contracted out activity will bear more direct responsibility.

Interestingly, the warden of the state prison from which a group of inmates in Texas recently escaped was demoted after the escape.[37] This government administrator, who apparently failed in

33. Cass, *supra* note 1.

34. *E.g.*, Editorial, *Charter Amendment is Ill Advised*, OMAHA WORLD-HERALD, Nov. 3, 2000, at 22 ("Moreover, this amendment would be a regrettable precedent. It is a brainchild of organized labor, which hates the privatization of public jobs."); Brian C. Mooney, *DeNucci May Bar $305m Bus Deal*, BOSTON GLOBE, May 16, 1997, at B3 ("Privatization, a watchword of Governor William F. Weld's administration and a political battle cry for organized labor, faces a crucial test today.").

35. Business Briefs, *Welfare Issue Could Mean Major Job Losses*, DALLAS MORNING NEWS, Apr. 29, 1997, at 1B ("Organized labor is opposing the Texas privatization plan—which has been stalled at the White House for four weeks—in large measure because of concern that good-paying public sector jobs will vanish.").

36. Government workers have due process and civil service protections that do not apply to private sector labor. Thus, it may be more difficult for managers to control them than their private counterparts. *See* Richardson v. McKnight, 521 U.S. 399, 410-11 (1997) (stating that civil service rules "may limit the incentives or the ability of individual departments or supervisors flexibly to reward, or to punish, individual employees").

37. Darren Barbee & Melody McDonald, *Four Prison Escapees Captured in Colorado, 1 Fugitive Kills Himself, Search Continues for 2 Others, TV Show Segment Leads to Tip on Location of Men*, FORT WORTH STAR-TELEGRAM, Jan. 23, 2001, at 1 ("After a long investigation, state prison officials reduced pay to Senior Warden Timothy B. Keith and reassigned him to a group that monitors private prison contracts.").

his duties to provide direct government services, was made part of the state bureaucracy that monitors the private prisons in Texas. Perhaps this shows the importance the Texas government places on monitoring private prisons.

I have no time left, but I just want to mention one more thing. In addition to questions regarding the reach of the Administrative Procedure Act[38] and Freedom of Information Act,[39] one additional issue discussed in my paper is accountability of government corporations. There are many government corporations such as Fannie Mae[40] and Ginnie Mae,[41] parts of the Federal Reserve System,[42] and the corporation that is going to give all the federal money to faith-based organizations.[43] These corporate structures are, arguably, the most opaque in terms of accountability.

This topic has been addressed,[44] but we should pay closer attention to the massive amount of federal money doled out to government corporations whose boards of directors are selected by the very people who are being regulated.[45] Further, it is very unclear to whom one would go in the federal government to influence the activities and decisions of these corporations.[46] I think that issue needs to be discussed. Thank you.

PROFESSOR BRIFFAULT: Next is Professor Bezdek.

PROFESSOR BEZDEK: Good morning.

My paper addresses local government contracts for welfare-to-work services, and I have subtitled it *Non-Accountability and Diminished Democracy in Local Government Contracts For Welfare-to-Work Services.*[47]

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38. 5 U.S.C. § 551 (1994).

39. *Id.* § 552.

40. *See* Beermann, *supra* note 4.

41. *Id.*

42. *Id.*

43. Exec. Order No. 13199, 66 Fed. Reg. 8499 (Jan. 31, 2001); Editorial, *The Amen Corner*, WALL ST. J., Jan. 31, 2001, at A20.

44. *E.g.*, A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543 (arguing that some federal corporations operate under a legal regime that allows them to escape accountability to Congress, the President, and the private market, and that, because of this, their private investors, shareholders, and managers may benefit more than the public they are supposed to serve).

45. Beermann, *supra* note 4.

46. *Id.*

47. Professor Bezdek's discussion is based upon an article, appearing in its entirety, *infra* this volume of the *Fordham Urban Law Journal*. Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Deomcracy in Local Government Contracts for Welfare-to-Work Services*, 28 FORDHAM URB. L.J. 1559 (2001).

I will begin with a very brief tour of the recent history of welfare reform. The welfare state of the mid-twentieth century has been supplanted by the rise of the contractual state.[48] Welfare reform in the United States also is mired in the worldwide reinvention of government, the devolution revolution.[49] It is particularly important to note that the 1996 Act that we think of as welfare reform in this country, the Personal Responsibility and Work Opportunity Reconciliation Act,[50] devolved significant control over welfare policy from the federal government to the states.[51] Many states then further devolved the actual implementation of this enormous policy revolution to their county, and even city, levels, which then contract it to other vendors for the actual implementation of welfare-to-work services.[52]

As this devolution revolution plays out in the administration of public welfare benefits, it is much more difficult for citizens not only to get benefits, but also for the public to hold the new regime accountable. This is significant, in part, because the decisions by government agents that most determine whether welfare reform works for the people who need to move from welfare to work are largely insulated from public input and judicial review.[53]

I have attempted to look at one city's contracts with private vendors for the provision of welfare-to-work services. I did so both to examine the apparent system set in place, by looking at the requests for proposals[54]—what it is that the local government people intended to accomplish—and then to read the contracts and to talk with people involved with that system to discern how well the program is working.

As a background, the Act requires that parents receiving assistance go to work,[55] a lifetime cap of sixty months on the ability to receive public assistance,[56] and that states be rewarded by the re-

48. *Id.*

49. *Id.*

50. Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2279 (1996) (codified in scattered sections of 42 U.S.C).

51. *Id.*

52. Bezdek, *supra* note 47.

53. *Id.*

54. *Id.* (discussing Baltimore's localism regime).

55. 42 U.S.C. § 602(a)(1)(A)(ii) (2001). Parents not working must engage in approved community service after they have been on the assistance roll for two months. *Id.* § 602(a)(1)(B)(iv).

56. *Id.* § 608(a)(7)(A).

ceipt of federal money as long as the state gets enough of its caseload involved to meet the state's work participation rates.[57]

Thus, there is a system in the Act for accountable work activities[58] that enables the state to get its federal dollars, which may or may not bear a relationship to whether the person who is moving from the welfare caseload into some work setting is actually being led to employment. Instead, they may be spending their sixty-month, lifetime limit in some kind of nonemployment limbo, because countable work activities include many things which sound worthy, but which may or may not lead to employment: adult basic education, and English as a second language, of course; job readiness activities; job search; job skills training, which may not lead to a job; on-the-job training, which may not include a requirement that the person who successfully completes the training is in fact employed by the employer at the end of that training.[59]

So there is a risk that the public agency is actually directing TANF ("Temporary Assistance for Needy Families")[60] recipients to work activities that count toward the state's requirements under federal law, but do not in fact help parents find employment and support their families.[61] This makes it imperative to examine not only the policies, practices, and, indeed, the objectives of the government actor as it spends the state's welfare block grant, but also how those policies affect the recipient's lifetime limit.[62]

My paper analyzes both the accountability problem presented here—the duty of public officials and managers to explain or justify their actions—and the duty to provide a remedy for people harmed by failures in that system. The paper also examines administrative efficacy—what administrators are doing to make the system work.

For example, the contracts in Baltimore are, as in many places, ordinary procurement contracts.[63] Be aware that the administrative acts and public information laws generally do not apply to pri-

57. *Id.* § 607(a)(1) (setting "minimum participation rates" of twenty-five percent in 1997, rising to fifty percent by 2002, for single-parent families); *id.* § 607(a)(2) (setting the "minimum participation rate" for two-parent families at seventy-five percent for 1997 and ninety percent by 2002).

58. PRWORA replaced the old AFDC program with Temporary Assistance to Needy Families ("TANF"), and abolished any entitlement to assistance by any individual or family under any state program so funded. *Id.* § 601(b).

59. Bezdek, *supra* note 47.

60. 42 U.S.C. § 601(b).

61. Bezdek, *supra* note 47.

62. *Id.*

63. *Id.*

vate contractors.[64] Rules governing public procurement are principally directed to protect the integrity of the competitive process. They have never been designed to solicit public input in creating the policy. They do not ask to what jobs the program is leading people, or what the indicators are that training in these welfare-to-work vendor contracts actually increases employment levels. Procurement procedures generally fail as a vehicle for public participation in the development of contract specifications, the selection of contractors, or the enforcement of contract terms.

The public, no doubt, is aware of concerns that have been raised in many states and cities, including this one, about procurement processes, whether or not they actually encourage cronyism of some kind. Similar concerns have been raised in Milwaukee.[65]

For example, in Washington, D.C., there was an audit that identified fifty million dollars in welfare-to-work job-training contracts that were awarded illegally in 1999.[66] Part of the critique of that system was that the agency employees actually wrote unduly vague requests for services and then failed to follow up to ensure that vendors had performed that which was promised. It is important to consider the availability of taxpayer suits in one's locality to address problems of that kind.

A section of my paper will speak to the problem that welfare recipients in a place like Baltimore City encounter, and this section is entitled "The Devil's In the Details."[67] Concentrated poverty is the context for much of contract welfare.[68] Baltimore City certainly well illustrates this fact.

The premise of the welfare reform statute was that the individual was a welfare recipient and should now become a worker, and freely chooses between deviant dependency and joining the work force. So some truth exists to the notion that any individual welfare parent faces not only her own constraints about succeeding in the job market, but also many things that are outside of her personal control: infrastructural matters, such as the labor market opportunities, job availability, potential wage rates, the availability of work support systems like day care and transit.

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64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*

Welfare caseloads have become predominantly urban in this country in the last half of the 1990s.[69] Even currently, during the most sustained economic boom in U.S. history, four out of five American cities have not staged a comeback in job growth, and certainly not relative to their suburbs.[70] Therefore, we face a further dilemma about the complexity of the task in which we have asked local departments of social services to engage: the geographic boundedness of the programs that they are administering. There are, of course, county and local programs trying to serve a county caseload or a state caseload in order to keep the federal money stream flowing. The market of job opportunities, however, is not so bounded.

Much of my paper will address my particular locality, the case study in Baltimore, on the premise that, yes indeed, many of the devils are in the details.

We face this question: Whether the welfare agency and its contractors are in fact helping TANF recipients move to work, on penalty of sanctions for the individual family, and the deepening poverty of their children? These are questions of great public concern.

My premise for this project is that the details of welfare policy delivery are necessary fuel for the deeply democratic practices of citizen critique, confrontation, negotiation (if citizens can get themselves to any of the relevant tables for negotiation), and creation of some kind of meaningful change. In this particular contracting process, this citizen scrutiny is appropriate at several junctures in order to determine the effectiveness of welfare reform at the place where the government services meet the recipient who must get off welfare.

One of these junctures is the specificity and the scope of the request for proposal ("RFP") that the government writes and issues to private vendors for job-related services. Another juncture for citizen scrutiny is the contract rebid and renewal procedure for vendors. Are vendors, in fact, held to standards of performance that bear on the public policy objective of moving people from welfare to work? There are also important questions on the form of agency management of ongoing contracts; and then, issues about whether the state has utterly abdicated or retained some oversight for a locality's implementation of welfare reform.

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69. *Id.*
70. *Id.*

Underscoring the urgency of this oversight is the fact that in many states around the country it is the Department of Social Services that is asked to help people get from welfare to work, not the work force development system of that state.[71] A few states have made this arrangement differently.[72] Maryland is one of those, and there are several companions around the country, where we are asking a welfare bureaucracy, not very much retooled, to put into place a complex set of services to prepare people for work—work which most of the affected people are not currently ready to do—and also to plan and coordinate with the needs of a local economy, particularly in declining center cities.[73] This is a tall order.

Baltimore, for example, is one of the places that does not appear to make much effort, if any, to coordinate its TANF work policies and contracted services with the job development or economic development arms of the city or the state. In the new economy, this is presumptively a dangerous omission, leading to the perpetuation of yet another bleak economic ghetto, particularly for residents of the state's largest city, and the source of its largest TANF recipients caseload.

I engaged in a document review to audit the local welfare's agency management of the TANF recipients' time-limited opportunity to prepare to leave welfare for work. I should underscore that these welfare recipients who are prepared to enter the work force, a population composed mainly of people who rely on welfare for a short period of time, generally have left already: they got jobs. Sometimes economic circumstances, like the loss of jobs, mean that former welfare recipients return briefly. A large part of the question for all local agencies is: What happens to the individuals who do not possess skills to perform the jobs that exist?

Baltimore contracts are in no way a model for any local contracts. I could give indications or illustrations of the utter vagueness and vacuity; the absence of targets or performance benchmarks relating to relevant issues of policy, of availability of jobs, the sustainability of that work, wages, retention of those jobs, and so forth; the utter insufficiency of direction by the government agency in the management of those contracts; and, most strikingly, the utter lack of control mechanisms in the contracts subsequently let. Nonetheless, Baltimore City has spent some fifty million dol-

71. *Id.*
72. *Id.*
73. *Id.*

lars in contracts let and cannot make a report about what it has to show for it.

PROFESSOR BRIFFAULT: Mr. Hawley.

MR. HAWLEY: First, my standard disclaimer: anything sensible I might happen to say this morning reflects the opinion of my employer, the Conflicts of Interest Board of the City of New York [hereinafter "Board"].[74] Anything else is my own.

Regarding the Board, I want to acknowledge the presence on the Fordham Law School faculty of Professor Bruce Green, who has been a member of the Board since 1995 and is the Co-Director of the Louis Stein Center for Law and Ethics, a co-sponsor of this Symposium. Bruce is, I think you would say, a walking public/private partnership in himself.

I am going to start with my tentative conclusion and then offer a few examples that might illustrate or support, or might perhaps call into question, that tentative conclusion.

My conclusion, which is unique because it is offered from the perspective of the one nonacademic and one government employee here on the panel, is that, as an oversight mechanism, our particular form of oversight—classic, post-Watergate public ethics regulation; or better termed, conflict of interest regulation—is not well suited, even if tinkered with, for the regulation of public/private partnerships.

A simple example would be a classic public defender system staffed by public employees. Those government attorneys are regulated by the applicable city ethics board. However, here in New York City, we have a contract with Professor Diller's[75] old employer, the Legal Aid Society. We would not begin to think about regulating the conflict of interest issues regarding those private attorneys because in any jurisdiction that privatizes its public employee/public defender system, a system that would be regulated

74. *See* N.Y.C. CHARTER § 2602 (2000). The New York City Conflict of Interests Board is charged with administering New York City's Conflicts of Interest and Financial Disclosure laws. *Id.* § 2601. The Board's mission is to promote integrity of city government by preventing unethical conduct through the enforcement of the ethics laws. For more information, see the official Web site of the Board at http://nyc.gov/ethics.

75. Professor Diller is a Professor of Law at Fordham University School of Law, where he is Coordinator of the William and Burton Cooper Chair on Urban Legal Issues and the Associate Director of the Louis Stein Center for Law and Ethics. Professor Diller presented the introduction at the Symposium, reprinted in its entirety, *supra* this volume of the *Fordham Urban Law Journal. Introduction: Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1307 (2001).

pre-privatization, that privatized system would not be regulated. That may or may not make sense, but that is my working hypothesis.

As an aside, I want to note one thing about nomenclature. This panel happens to use the term "public/private partnerships." The other panels throughout the day, and the Symposium as a whole, use the term "privatization." I am not sure they mean the same thing. In my experience, those terms are used loosely, and sometimes to describe the same arrangement. Often those who favor the arrangement use the term "public/private partnership" with violin music. Those who question it use the term, often with a sneer, "privatization."

In any event, whatever term is used—and I prefer to use more neutral terms, whether it is "vendor" or "government contractor" or "provider"—although I will note later I think there are some true public/private partnerships, they differ from the classic privatization model.

My tentative conclusion is that devices such as sound procurement policies, alert and effective contract management, and periodic management audits—with Elliott Sclar's point in mind, that one person's oversight is another person's red tape[76]—are better suited to oversee many of these arrangements than ethics regulation.

As for conflicts of interest regulation, at least as currently understood, and as an example, it would surely be a violation of any respectable ethics code if a high-level executive branch official hired his brother's company to provide goods or services to that agency. However, there would be no violation if a government contractor—say, a bridge designer—hired his brother to work on the bridge project. The explanation of the different result is, of course, that the ethics codes regulate the conduct of public officials but not that of private individuals.

That explanation, if at least moderately satisfying, might come up short in cases where a core government function is being privatized. Another example from an Internet discussion group I saw some months ago involved a situation in Florida.[77] There, the writer wondered about ccontracting out the chief of staff position

76. *See* Remarks of Elliott Sclar, *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).

77. Joe Follick, *Ethics Panel Faces Its Former Aide for Lobbying*, TAMPA TRIB., Mar. 22, 2001.

to the entity's chief executive public officer. They apparently did not have an Appointments Clause issue there, so they were thinking about ccontracting out this job. The question, of course, was: Can this chief of staff be a private person and not subject to the local ethics regulation?

I, frankly, did not have any particular useful thoughts, other than the sort of common law notion that you might pierce the veil between what is truly an independent contractor and what is an employee. But that piercing solution did not lead me very far when talking about a private entity, as opposed to a single individual taking over a "core" government function.[78]

But I do cling to my working conclusion, that classic ethics regulation is best suited to regulating public and not private conduct. That is not to say, however, that such regulation cannot play a significant role in these interactions.

For example, while most such regulations, including those in New York,[79] impose penalties only on public servants, some jurisdictions, Ohio[80] and Alabama[81] among them, impose penalties on private parties who induce public servants to violate ethics rules. In other words, the private gift giver as well as the public gift recipient gets fined. Even here in the city, where, as I said, we only can fine present or former servants and not private parties, the Board does have an as-yet-unused power to void contracts that are involved in some kind of ethics violation, a power that previously rested in the city comptroller.

Another fine-tuning concept, credited to Mark Davies, the Executive Director of the Conflicts Board, is that most ethics rules prohibit a public servant from using his or her position to advantage himself, his family, or his business associates.

What about banning the use of one's public position to help campaign contributors? Perhaps this could be done with a threshold amount, so that under such a rule, the elected official—the recipient of the contributions—would, under the common understanding of the conflicts law, be required to recuse himself or herself from any official involvement with that major campaign contributor. This might mean that the official could not attend meetings, take

78. *E.g.*, John Tierney, *The Big City; Accountabiility at Prisons Run Privately*, N.Y. TIMES, Aug. 15, 2000, at B1 (discussing the constroversy and debate over privatization of prisons).

79. *See* N.Y.C. CHARTER § 2604 ("No *public* servant shall . . . .") (emphasis added).

80. OHIO REV. CODE ANN. § 102.03(F) (2001).

81. ALA. CODE § 36-25-5(d) (2000).

phone calls, or receive documents. It might not make a particular difference in contributions of soft campaign money, but it might make a real difference in how willing contributors are to make hard-dollar contributions. That, arguably, may have some impact on the kinds of decisions made about who gets what contracts.

I will give one more citation that may be useful. The union issue was mentioned.[82] That example illustrates how classic ethics law may produce too harsh a result as applied to privatization. If a function were privatized, and the public-sector workers all stand to lose their jobs, there might be classic revolving-door problems about those workers not being able to find work in their field. We are not talking about the agency heads now, we are talking about the working stiff, the corrections officer, for example. New York State has an exception for the layoff situation for those entry-level workers.[83]

If not classic ethics regulation, what else? Contracts.

Contracts with vendors, contracts sensibly drawn to produce the result desired, and not to hamper those people providing that service, might substitute. A contract that might, for example, in the bridge designer case, if it was sensible, have forbidden the bridge designer from hiring his brother. Obviously, with the independent contractor chief of staff, if that truly is a nongovernmental position, that official has got to have those kind of contract restrictions, too.

The city does this kind of thing. The city has, among its myriad, quasi-public entities, the Economic Development Corporation ("EDC"), which is involved in a lot of the major job retention and public land deals in the city.[84] That entity, for reasons not all that interesting, does not happen to be covered by the conflicts rules, but by contract. EDC staff come to the Board regularly for advice about whether their conduct conforms to the city's ethics rules. Ccontracting out the ethics regulation does seem to work in that case.

To conclude, restrictions on the internal operations of private contractors are perhaps less likely to be strongly resisted in the wake of the Federal Sentencing Guidelines for organizations,[85] which appear to motivate corporations to adopt policies that they

82. *See supra* notes 34 to 36 and accompanying text.

83. N.Y. PUB. OFF. LAW § 73.8(f) (Consol. 2001).

84. For information on the New York City Economic Development Corporation, see http://www.newyorkbiz.com.

85. Individuals and groups convicted in federal court are sentenced pursuant to the formulations set forth in the U.S. SENTENCING GUIDELINES MANUAL. These Guidelines are relevant in the sentencing of corporate entities, and take into account,

did not have previous to the adoption of the Guidelines about ten years ago.

PROFESSOR STURM: The first panel this morning really addressed this problem of new governance from the top-down. It took an over-arching look at these new patterns and attempted to figure out how our current ways of thinking about them are inadequate and how we need to start developing new categories, new frameworks, new sets of questions.

One could think about this panel as the bottom-up panel. Barbara[86] said the devil is in the details. Well, what does that mean?

This panel is, like this morning's panel in some ways, also taking the view that to understand where to go next in terms of public oversight, we need the top-down theory that helps us have a new set of categories. It also is taking the view that we need to look at some detailed theoretical problems like: Where are the incentives to include the range of stakeholders with an interest in regulatory problems? How are we going to deal with differences in power that will shape the way in which the public can participate in decision-making effectively? How do you construct information systems in the face of tremendous incentives to hoard information, particularly in light of legal regulation? And how do you create regular opportunities for the public actually to reflect and engage with the information that they get?

Now, my approach to answering these questions is from the bottom-up. Hopefully, looking deeply at context will help us rethink the theory. I have examined this problem in the context of the regulation of workplace bias, or more particularly, the regulation of what I call "second-generation employment discrimination."[87] Unlike first-generation cases, in which overt acts are clearly identifiable as problematic and in which the remedial solutions are somewhat clear, second-generation problems are structural, relational, interactive, and complex. They often emerge out of institutional or

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among other things, whether the entity has established an internal good citizen program (e.g., ethical standards and compliance procedures). *Id.* § 8C2.5(f) (1995).

As a result, virtually overnight, all major corporations have done something, a change reflected in the mushrooming over the past decade of the Ethics Officers Association (EOA), the association of the compliance officers at America's major corporations. The Association's Web site is at http://www.eoa.org.

86. *See* Remarks of Barbara Bezdek, *supra* this Panel Discussion.

87. These ideas are more fully developed in Professor Sturm's recent article *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

organizational interaction, so rules do no work well to deal with this type of bias.

Now, "privatization" does not adequately describe where governance or regulation has moved in employment discrimination, because the law continues to regulate this field. More importantly, legal actors of all types are heavily involved inside and outside organizations. At the same time, regulation, in the top-down command-and-control sense, also does not adequately describe or prescribe where we need to go in terms of oversight.

So an interesting form of governance has emerged in this field that pushes us, first, to rethink the language of privatization, as we heard this morning.[88] I refer to this emerging new form as a "structural approach to second-generation bias," which essentially poses issues of problem solving. This is a form of regulation that encourages the development of institutions and processes to enact general norms in specific contexts. It establishes a framework both within and across organizations, continually to reassess the adequacy of these structured interactions, and their implications for general norms. It embraces experimentation as an important part of this process—experimentation with organizational structure, decision-making, incentives, and accountability.

Workplaces and nongovernmental institutions are treated as law-making bodies within this legal regime. They *interact* with public regulatory bodies, rather than serving only as *objects* of state regulation. Now, I think the best way to make clear what I am talking about is to give one example of this and then talk about the theoretical implications of that example.

I start in the workplace, because all of this regulation is really about trying to shape practice on the ground. So let's take an example from a company called Home Depot.[89] This is a company that had a problem. Female employees were being steered primarily to dead-end jobs. Home Depot's female employees and applicants throughout its West Coast division alleged gender discrimination in hiring, initial assignments, promotions, compensation, and training. This situation coincided with the company's

88. *See generally* 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).

89. Home Depot is the world's largest home improvement retailer. The company innovated the home improvement industry, and caters to do-it-yourself home improvement construction and building maintenance. For a more complete discussion of Home Depot's effort to address gender bias and improve their employment practices, see Sturm, *supra* note 87, at 509-18.

concern that its more informal hiring and promotion process did not work well for the large, fast-paced company that Home Depot had become.

Barry Goldstein, one of the foremost employment discrimination lawyers in the country, represented a class of plaintiffs in a class action challenging the company's hiring and promotion practices.[90] That case settled on the eve of trial.[91] The settlement agreement created is a very interesting public/private governance structure. Basically, the company took responsibility for designing a system at the intersection of equity and efficiency. It put together an internal problem-solving team with input from plaintiffs' lawyers, who basically acted as a stand-in for the state, and outside experts who had many opportunities to plan these types of systems both with government regulators and other companies.

The solution to the problems of inequity and inefficiency was to achieve accountability through technology, information systems, and systematizing discretion, rather than through rules. Home Depot added a computer-based job application system that basically made it impossible for a manager to steer workers to particular jobs based upon race or gender. More importantly, the settlement agreement built in institutional problem-solving systems and actors, equipping internal and external agents to use the data from the hiring and promotional system to reveal patterns that relate both to equity and efficiency, and then to use benchmarks that would prompt the company to inquire further when the benchmarks were not met. Basically, they were building the capacity of constituencies inside and outside of the organization to problem solve in ways that would address the underlying problem.

So where is law in this? First of all, in this structural regime, law defined the goal and the problem very differently. Instead of having a rule that very specifically dictated "this is how many people you should employ in this way," the law, as interpreted by the court in the early stages of this litigation,[92] adopted this structural approach. The documented pattern of gender exclusion was a signal that forced reflection about the adequacy of the decisionmaking processes within the organization. The problem was the

90. Butler v. Home Depot, Inc., No. C-94-4335 SI, C-95-2182 SI, 1997 U.S. Dist. Lexis 16296 (N.D. Cal. Aug. 28, 1997); Butler v. Home Depot, Inc., No. C-94-4335 SI, 1996 U.S. Dist. Lexis 3370 (N.D. Cal. Jan. 24, 1996).

91. *Home Depot Settles Women's Class Action*, IN THE WORKPLACE, Winter 1998, *available at* http://www.mbc.com/db30/cia-bin/pubs/laborwinter98.pdf.

92. Butler v. Home Depot, Inc., 984 F. Supp. 1257 (1997).

systems and their arbitrary exclusion of women. Then, that framework provided an incentive to create new institutions and systems of accountability that would change the underlying discriminatory condition while simultaneously improving the effectiveness of those systems in making good decisions more generally.

Instead of having a rule that would be enforced after the fact, the law embraced contextualization as part of the process of elaborating the legal norm.[93] Also, it defined the underlying legal problem as a condition or problem that had to be effectively addressed.[94] It encouraged, indeed, embraced, institutional innovation within workplaces by prescribing an approach that encourages employers to take accountability for making change.[95] It provided for accountability by evaluating the effectiveness of the internal processes in relation to predefined criteria.[96]

One of the important pieces of this problem, if we have a generally articulated norm and we are encouraging institutional innovation, is to determine what will bridge the legal norm to the reality of the workplace. How will employers translate legal norms into day-to-day practice? What incentives do they have to link concerns of equity with long-term efficiency? This poses a particular challenge for employers who do not already recognize the long-term benefit to be realized by instituting fair employment practices.

Third-party actors or "mediating organizations" come in at this point. In each of the examples of companies that have developed these kinds of internal effective systems of problem-solving, intermediary actors, both individuals and organizations, have played a key role. They compensate for the limitations of both government regulation in its traditional form and in the market.

If courts assume direct responsibility for articulating legal norms, they will fail to develop a set of legal rules adequate to address the needs of particular workplaces. This process of institutional design requires the participation of those who understand the culture of

93. *Id.* at 1261-62; Watson v. Forth Worth Bank & Trust Co., 487 U.S. 977, 990 (1988) (holding that disparate impact applies to subjective employment systems, including "an employer's undisciplined system of subjective decisionmaking").

94. *Butler*, 984 F. Supp. at 1266; Sturm, *supra* note 87, at 478-79.

95. *Butler*, 984 F. Supp. at 1266. Business necessity, under this approach, is established by showing that the employer took steps that minimized the degree of unaccountable or unstructured discretion and thus the expression of bias. *See* Butler v. Home Depot, Inc., No. C-94-4335 SI, 1996 U.S. Dist. Lexis 3370, at *33 (N.D. Cal. Jan. 24, 1996).

96. *Butler*, 984 F. Supp. at 1266; Sturm, *supra* note 87, at 488-89.

the particular setting and who must cooperate in the implementation of any new system. Yet, if you delegate this problem entirely to the workplace, you would sacrifice accountability in relation to public norms, as well as the opportunity to pool knowledge about how best to achieve these norms through institutional innovation.

This dilemma seems intractable if regulation is posed as a necessary choice between government regulation dictated by rules, and privatization dictated by the market. But a third way of proceeding has begun to develop, in part through the emergence of non-governmental actors who serve as intermediaries between formal legal institutions. These intermediary organizations include insurance companies and nonprofit research organizations that bring together companies, consultants, and lawyers who develop effectiveness criteria and then pool information. These mediating actors perform the important, shared function of building capacity and constituencies to operate effective and accountable mechanisms, generating norms of effectiveness, and constructing practice communities across boundaries that permit necessary cross-boundary work to take place.

Case studies such as this one involving Home Depot clearly illustrate how intermediaries bridge conventional dichotomies such as public/private, legal/non-legal, general/contextual, and coercive/-cooperative, by creating tiers of relationships that translate between the workplace and the formal institutions that articulate and enforce the law.

Some of these change agents are individual professionals such as human resource professionals and lawyers who, as repeat players, have the resources to build expertise within a field. There are also organizations that act as mediators of change. Catalyst[97] and the Center for Gender and Organizations[98] work within and between private organizations and governments. Insurance companies are another example. They create incentives for organizations to install internal accountability mechanisms to reduce their premium, and provide resources to firms that do not have the in-house capacity to do this. Additionally, there are professional organizations that have not yet undertaken the role of formulating criteria of ef-

97. Catalyst is "America's leading nonprofit organization working to advance women in business and the professions." For more information, see Catalyst's Web site at http://www.catalystwomen.org/home.html.

98. The Center for Gender in Organization ("CGO") at Simmons Graduate School of Management is a "major catalyst for change in promoting gender equity in organizations in both the profit and not-for-profit sectors worldwide." For more information, see their Web site *at* http://www.simmons.edu/gsm/cgo/index.html.

fectiveness of holding their members accountable for responsible practice.

Both individual and organizational mediating actors are looked to, both by companies and by courts, to put general legal norms into context.

The next important step is to theorize about the emerging roles of these "problem solvers," who cross boundaries and deploy multiple disciplines in their work. They are emerging in disciplines such as law, accounting, business, human resource practice, systems design, and information technology. A coherent, problem-solving practice seems to be emerging across discipline boundaries.

But important questions remain unanswered such as: One, what is that practice? Two, how do we understand it? Three, how do we discover what an effective intermediary organization is? And four, how will organizations be held accountable for their crucial role of providing for both democracy and accountability in these public/private relationships?

Thank you.

PROFESSOR TRUBEK: This is my fourth Fordham conference, the third for the *Fordham Urban Law Journal*, and I have obtained a tremendous amount of insight from my many times here.

Today, I am joined by two other people from Wisconsin, who will participate in this afternoon's discussion. So, not only do you have the East Side/West Side/crosstown New York discussion, but our own little Wisconsin discussion as well.

Today, I want to talk about being a public interest lawyer in a state that has been a leader in privatization and whose governor is now going to help lead some of that privatization from Washington, D.C.[99] It is no coincidence that the three of us who do most of our work in Wisconsin will provide a very different perspective.

I am going to discuss how public interest practice responds to privatization in a state that has substantially—and to some extent much more successfully—attempted to incorporate interesting values and mechanisms than has Baltimore.

To me, what I am trying to do as a public interest lawyer is deal with the "democracy problem."[100] I have divided the "democracy

99. Governor Tommy Thompson was recently appointed by President Bush as Secretary of Health and Human Services. David E. Sanger, *Bush Cabinet Takes Shape*, N.Y. TIMES, Dec. 31, 2000, § 4, at 2.

100. *See generally* Panel Discussion, *The Changing Shape of Government*, *in* Symposium, *Redefining the Public Sector: Accountability and Democracy in the Era of*

problem" into three aspects: (1) transparency (getting the information); (2) participation; and (3) redistribution. These are the three privatization aspects focused on by people interested in the representation of disadvantaged groups.

After all, public interest lawyers like myself established public interest law firms in the 1960s and 1970s in order to bring to the forefront voices not being heard through public agencies—the same public agencies that are now being privatized. We were, by our own definition, critics, and therefore in no position to stand on our high horse today and say "privatization is all bad because the public system is all good."

So what happened when privatization occurred? Why is it significant from the vantage point of the public interest lawyer and how has it changed our practice? Let me address these questions by discussing three areas of privatization in Wisconsin in which I have participated. The first is health care. The second, welfare reform, is the best-known in Wisconsin, but actually the one in which I have done the least. The third is telecommunication.

Let me begin with health care. From the start, Wisconsin has been at the forefront of health care privatization through the development of managed care. Managed care, or managed competition, is an effort to privatize both the delivery and financing of health services through managed care organizations.[101] Privatization occurred both in Medicaid—which is a government-provided healthcare program for low-income people—and in the private employment area.[102]

I continue to be active in both aspects. I represent underrepresented consumers, health-care consumers, and low-income people on Medicaid. I also am involved in the development of patient protections, which are a response to privatization upon managed care's entrance into the private sector. Patient protections are a systemic response to abuses in the development of managed care.

Privatization, 28 FORDHAM URB. L.J. 1319 (2001) (discussing the democracy problem in the context of the changing shape of government as it addresses issues such as globalization).

101. Professor Trubek's discussion is based upon an essay, appearing in its entirety, *infra*, this volume of the *Fordham Urban Law Journal*. Louise Trubek, *Old Wine in New Bottles: Public Interest Lawyering in an Era of Privatization*, 28 FORDHAM URB. L. J. 1739 (2001).

102. *Id.*

The second area is welfare reform. Here, I simply want to supplement what Barbara said earlier.[103] For those of you who are not familiar with the history of welfare reform, in Wisconsin we were a little different from other states because we had originated the legislation that created what became the federal welfare reform; specifically, our state legislature created a program called "W-2" that predated PRWORA.[104] Under W-2, the administration of the welfare programs of what became the TANF program[105] had to be contracted out, and those contracts had to be accompanied by performance standards. So we were one step ahead of some of the issues that have come up subsequently, and we had a principled view of what privatization and welfare reform would mean.[106]

The third area is telecommunications. In 1994, Wisconsin privatized telecommunications.[107] Eventually the whole United States privatized telecommunications through what is called "deregulation,"[108] which eliminated a lot of rate regulation and was an effort to open up more competition in telecommunications.[109] Telecommunications deregulation has not been the disaster that electric utilities deregulation was in California.[110]

One part of deregulation is the creation of the Universal Service Fund.[111] Funding was obtained from telecommunications providers to create programs that would ensure equity and access for those underrepresented groups that might lose access to service or competitive rates as a result of deregulation, such as rural consumers, low-income people, people who live in cities, and persons with disabilities.[112] The Fund is administered by the Wisconsin Public Service Commission, which is advised by a committee consisting of what are called "consumers" and providers. I have served on that committee for the last four years.

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103. *See* Remarks of Barbara Bezdek, *supra* this Panel Discussion.

104. Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2279 (1996) (codified in scattered sections of 42 U.S.C).

105. Temporary Assistance to Needy Families, 42 U.S.C. § 601(b) (2001).

106. *Id.* at 4.

107. WISC. STAT. § 196. 218 (1994) (deregulating telecommunications in Wisconsin); Trubek, *supra* note 101.

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

109. *See id.*

110. *See id.*

111. *Id.*

112. *Id.*

From these three examples of privatization, what have I and my colleagues learned? We were a public interest law firm, created in the 1970s with the goal of providing input into the regulatory process on behalf of underrepresented people. We were active in representing these groups—healthcare consumers, low-income people. We were active in providing representation in these three areas for a period of, say, fifteen years.

I learned three things. First: strengthen non-profits. When you privatize, which I call the "movement out," you are taking power from the state, the government, and putting it into the hands of various private actors. One of the major actors is nonprofits. President Bush contributed to this trend by creating a new office, the Office of Faith-Based and Community Initiatives.[113]

I always have been very interested in supporting nonprofits. Community economic development,[114] which is very important, also relies on a foundation of nonprofits.

We have worked to strengthen nonprofits. For example, the Universal Service Fund recently dedicated one million dollars a year to be spent on tele-medicine nonprofits, and nonprofits that provide healthcare services. Specifically, that is five-hundred thousand dollars for each to be able to develop technology to enable them to be efficient and provide better services to their clients. The ultimate end is that by receiving these funds, they will become effective actors in providing services.

Second, my experience with privatization and public interest lawyering taught me to collaborate with groups that had diverse interests and expertise. In this regard, it is interesting that Chuck Sabel this morning noted that such collaboration exists suggests that the system has failed.[115] We are in agreement. I have worked with these unexpected allies precisely because the system had failed in all three areas.

My work in health care has been extremely interesting. I spend a lot of my time working with physicians and physicians' groups

113. OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE, EXECUTIVE ORDER, ESTABLISHMENT OF THE WHITE HOUSE OFFICE OF CENTER FOR FAITH BASED INITIATIVES (2001) (creating the office to "develop, lead, and coordinate the Administration's policy agenda affecting faith-based and other community programs and initiatives, expand the role of such efforts in communities, and increase their capacity through executive action, legislation, Federal and private funding, and regulatory relief").

114. *See generally*, Trubek, *supra* note 101.

115. *See* 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).

who had a very uneasy relationship with consumers and patients prior to the onset of managed care. Now, both groups are frightened, and do not know what to do. Doctors have lost a lot of their power, and are eager to work in collaboration with consumer groups—proof of Sabel's adage that if there is that kind of collaboration going on, then there is a problem in the system.

The collaboratives I participate in are helping to resolve this problem. We are the canary in the coal mine. The existence of collaboratives shows there is a problem, but hopefully, we also are contributing to some positive changes.

The third thing I learned is that monitoring performance and creating standards is important. We did that in the health care sector by creating standards and monitoring performance in both the Medicaid managed care and in patient protection.[116]

We have attempted to transfer some of that knowledge and learning to the welfare reform system, with very mixed success. I think perhaps Dave Riemer will talk a little more about that this afternoon.[117] But we have attempted to use, and are using, that effort at monitoring what is happening, creating standards, making sure those standards reflect what Barbara talked about, actual results for the people.[118] That is not an easy thing to do. It requires a lot of new collaboration skills and ideas. But we were fortunate in that we went through this experience with health care first, so when welfare reform came, we were able to transfer some of that learning. Perhaps the new Secretary of Health and Human Services will apply this experience at the national level.

These shifts in our practice have led to my reconceptualizing how public interest law should be practiced today. As I talk with students about what public interest practice should look like in the future, I tell them to diversify where they practice, how they approach their work, and also that they always need to learn different skills.

I feel that privatization has led to a rethinking of the role of public interest lawyers in our society today. It is part of many other trends, including the necessity of lawyers working together with

116. Trubek, *supra* note 101.

117. *See* Remarks of David Riemer, *in* Panel Discussion, *Privatization in Practice: Human Services*, *in* Symposium, *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1435 (2001).

118. *See* Bezdek, *supra* note 47.

other professionals, forcing a dramatic rethinking of what public interest law can and should be.[119]

Thanks.

PROFESSOR BRIFFAULT: I am going to throw out two observations of my own, see if anybody on the panel wants to respond, and then take questions from the floor.

These observations are provoked in particular by Susan Sturm's and Louise Trubek's comments, but also, I think, by Barbara Bezdek's research. What we are seeing apparently is the emergence of new forms of new accountability mechanisms that are themselves private actors—Louise's public interest law firm,[120] the intermediaries that Susan has been talking about,[121] and Barbara's own research.[122] It sounds like you will find the lack of accountability within Baltimore, but you, yourself, are the accountability mechanism, for better or for worse. Once your reports come out, that will be a form of accountability.

And so, are we seeing the emergence of the privatization of accountability mechanisms, and is that a good thing or a bad thing? Is that part of the solution, part of the problem, or both?

PROFESSOR TRUBEK: Well, Wayne[123] pointed out the privatization of ethics standards regulation. I think that is very significant.

In a sense, I see this as an opportunity for us to grow. We were ahead of our times in that regard. We focused on accountability toward a narrower set of institutions.

PROFESSOR STURM: I would have to reiterate that the dichotomy does not really work that well. What makes these intermediary actors effective is having a legal norm, general as it is, and some sanction attached to it, because there has to be the creation of incentives to engage with these intermediary actors. And secondly, it is often in the public settings that you have the greatest incentives for the pooling of information that is crucial to building capacity.

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119. *See, e.g.*, Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices for People*, 7 CLINICAL L. REV. 227 (2000).

120. *See* Remarks of Louise Trubek, *supra* this Panel Discussion.

121. *See* Remarks of Susan Sturm, *supra* this Panel Discussion.

122. *See* Bezdek, *supra* note 47.

123. *See* Remarks of Wayne Hawley, *supra* this Panel Discussion.

So without some kind of norm of effectiveness, for example, that underlies the sexual harassment employer liability standard[124] that currently permits employers to avoid liability if they create internal problem-solving mechanisms, there has to be some public law baseline. An exception should be made if a court that is going to be there to say, "Well, I am not going to articulate what those criteria of effectiveness are; I am going to look to those mediating actors to help us do that. But you have got to have developed them; and, if you did not and this pattern exists, you are going to be held accountable." Accountability is formed in relationship with these mediating actors.

So I would say "yes, but."

PROFESSOR BEERMANN: My reaction to your question is that there is a phenomenon of redescribing in slightly different terms something that has existed for a very long time. The Framers of the Constitution of the United States were worried about factions. We have had private organizations that have engaged in a lot of monitoring of government for a very long time.

The issue I brought up about government corporations in this country could date back to the Massachusetts Bay Colony. Was the government a public or private entity when it ruled what is now Maine, part of New Hampshire, and Massachusetts?

I think that there *are* already a lot of accountability mechanisms. For example, the Underwriters Laboratory,[125] which, if your product has their seal, you know that your clock radio is not going to blow up when you plug it in. Many organizations like that function in a very similar way.

A lot of these are phenomena and mechanisms that have existed for a very long time. Whenever you see something for the first time, or it is brought up in a new way, there is a temptation to redescribe it theoretically in much the way that the original law-and-economics scholarship was characterized as nominalism;[126] it was just a way of renaming lots of things that everybody had seen in the past.

I think sometimes renaming can be very useful because it brings a new angle or perspective and we can attack problems. So I do

124. *See* 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).

125. For information on Underwriters Laboratories, Inc., see http://www.ul.com.

126. Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 459 (1974).

not mean to criticize the idea that we should be doing what we are talking about in terms of the way we do it, but I do not think it is necessarily all that new.

PROFESSOR BEZDEK: I agree with both Jack and Susan. Certainly in my position in Baltimore, it is one thing to call upon actors to be accountable and another thing to get them to be accountable. And so, the point that matters most is that we actually need some mechanism by which to require a response.

Yes, we have had intermediaries, outside groups, that have taken it upon themselves to call upon government or call upon private actors to be responsible,[127] to create the intersections of efficiency and equity. But that does not mean that private actors are responding.

PROFESSOR BRIFFAULT: So the answers are either that it is not happening or it has always happened, or possibly both.

PROFESSOR STURM: I think it is really interesting to observe that the more activity there is in the intermediate sector in defining how to do privatization, the more willing are public agencies to become involved, because the public agency, or the court, does not want to be the one to construct these standards whole cloth. But if there is a lot of activity suggesting that the court would necessarily be put in that role and that there were constituencies out there holding the court accountable, it is easier to say, "Okay, I am going to articulate the broad standard and then hold you to it."

PROFESSOR BRIFFAULT: Just one other question, then I will open it up. Are there two accountability problems here? The first relating to delegation doctrine, accountability to the public as a whole, whether the public is perceived of as taxpayers, policy-setters, or the electorate, and the underlying legitimacy of any system.

There also may be a second accountability issue, which is the relationship to the constituency receiving service. Is the accountability problem different when we are talking about increased changes in the way we deliver social services? We're talking about people receiving income supports, welfare-to-work training, low-income people receiving subsidized health care, addiction services, treatments like that, prisons. Is there a need for building in some kind of accountability to the constituency as well as to the public, or is that a different set of issues?

PROFESSOR BEERMANN: In my paper, I call that "accountability writ small."[128] It is the responsiveness of the entity to the

127. *See* Bezdek, *supra* note 47.

128. *See* Beermann, *supra* note 4.

people that are being served, as when you have contracting out that is not just buying paper clips for the government office, but providing services to needy people. That distinction has existed for a long time also. Government contracts out to build roads, it has been doing that for a very long time, and that affects people.

But in social service providing, the first thing they ask is: "Was there a general perception that when government directly provides social services, it is very responsive to the people who are getting it?" I think the answer to that would probably be "not very much."

So now you say: "Well, is the private entity that has contracted with the government going to be more or less accountable to the service recipient?"

Obviously, if you make it a situation where there is an array of service providers and the private individual has the opportunity to choose the different ones—for example, in the short period of time that Medicare people could go to every HMO. Those HMOs were falling all over each other competing for the business. That is substituting market accountability for government accountability.

When you have private service providers, there is not a situation in which a recipient has to go to the Department of Social Services and complain and get some supervisor to tell the line worker "answer this service recipient's inquiry." Such a delivery scheme was hopeless to a lot of people. But when you substitute market accountability, then an array of service providers, choice, and accountability can all coexist.

But there is a perception that the profit motive—for example, in corrections—really reduces the incentive for the corrections people to treat inmates decently. In a documentary I saw on Court TV, there was a suggestion that the increased criminalization of conduct is the result of lobbying by Wackenhut and Corrections Corporation of America. They want more business, so they lobbied to make more conduct criminal.

Professor William Stuntz from Harvard has written about the fact that now almost everything you do is criminal, some white-collar crime or something; if you call someone a name, it is harassment; if you cheat them in a contract, it is fraud.[129]

There may be reasons to fear a combination of a strong profit motive and little incentive for the outside world to monitor. I mean, many people really do not care how prisoners are treated. Maybe they would if we are talking about juveniles, but does the

129. William J. Stuntz, The Deep Politics of Criminal Law (on file with Professor Jack M. Beermann).

body politic generally care whether prisoners are given just bologna sandwiches every day or whether they are given three square meals? If there is no effective outside monitoring, and if the demotion after letting people escape from your prison is from warden of a state prison to being the person who monitors these private prisons, we can imagine that there is an accountability problem. Even if the public doesn't care, where is the accountability to the recipients of the services, the prisoners and their families that want to visit them?

PROFESSOR STURM: I want to note a relationship between the two kinds of accountability, particularly in a situation where the constituency is most closely connected in their interests to at least one definition of the norm—the public regulatory norm that you care about—so that having them involved at the table is also crucial to defining that public norm. But you do not want to allow a particular site responding to accountability concerns about a constituency within a particular site to define the public norm, so it is really important to think both within a particular context and across contexts to how you link together, or where you want to keep distinct, the accountability to the constituency most directly affected by the norm involved, and to the concerns of the polity as a whole.

QUESTION: I had an observation: in both the first and second panels, this issue of what is public and what is private became somewhat muddied. I believe that if you have private operators with market governance, that is a very viable alternative to a public sector. But many panelists have been saying that market mechanisms are very weak in a lot of the instances.

This then leads to a cynical question: If we do not have a clear delineation between public and private, and we are concerned about accountability, and market governance does not prove to be the best example, are we not just rearranging the deck chairs on the Titanic? I am not convinced we are moving anywhere here.

QUESTION: This question is directed to Professor Trubek. A recent article that I read in the magazine *Dollars and Sense* did an exposé about MAXIMUS Corporation in Milwaukee and how they recently had been found to have misused hundreds of thousands of dollars in their welfare contract.[130] Wisconsin had contracted with MAXIMUS to provide welfare services. MAXIMUS was found to

130. Karyn Rotker, *Corporate Welfare for Welfare Corporations*, DOLLARS & SENSE, Jan./Feb. 2001, *available at* http://www.dollarsandsense.org/2001/233-rotker.htm.

have used some of the state money to send their employees to New York City to lobby the Human Resources Administration, New York City's human services agency, to get a contract here to provide welfare services.

We are talking about accountability, so I want to know what has been done to address these seemingly commonplace, gross, and illegal actions?

PROFESSOR TRUBEK: The connection between MAXIMUS, Wisconsin, and New York is very interesting. The MAXIMUS issue received a lot of attention, and there has been action on the part of Wisconsin and its legislature in response. MAXIMUS has been a focal point, but we have a lot of nonprofits that are also doing the contracting in Milwaukee. Milwaukee is all contracted out. David Riemer will be in a better position to talk about that this afternoon.

There was some misunderstanding or vagueness in Milwaukee's contract with MAXIMUS regarding what kind of expenses were appropriate. Probably no government agency would have sent their staff to these very expensive training sessions or brought in whomever they brought in as an entertainer because that is considered inappropriate in the public sector, particularly in Wisconsin, which is very puritanical. The private sector contractors came from a much more loose corporate culture. So some of that had to do with a misunderstanding of cultures.

But MAXIMUS was very heavily chastised and new regulations and policies were put out as a result.

DR. MASTRAN: I am the CEO of MAXIMUS and I would like to address certain questions.[131] There are a lot of things that went wrong in Wisconsin, and MAXIMUS is at fault in many ways. In the instance you talk about, where we sent people off-site to go to training, that is a "cost-plus contract" we had in Wisconsin, and there is something called "employee welfare" that is generally regarded, in government terms, as an "allowable cost." Under that allowable cost of employee welfare, we took our management staff off-site and trained them. This is done in all our projects all around the country. We got the scrutiny of a state audit committee going in and looking at this contract. The auditors picked out that cost as

131. David Mastran addresses in depth a number of questions raised here and defends the record of MAXIMUS during the final Panel Discussion in this Symposium. *See* Remarks of David Mastran, *in* Panel Discussion, *Privatization in Practice: Human Services*, *in* Symposium, *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1435 (2001).

inflammatory and the press picked up the story. But it is an allowable government cost. Nonetheless, when we were challenged in Wisconsin, we said, "Fine."

In terms of the "entertainment," it was Melba Moore, the singer from Broadway. We brought her in because she is a former welfare recipient who became a huge success. When we won the contract, we were told by the state, "Look, you are the private sector. We want innovative ways to get people off welfare. We want you to think outside the box. We want you to do things that we the state cannot do so that we can test new ideas, and what is the value of outsourcing if we do not do that?"

So one of our people came up with the idea, "Why don't we get Melba Moore, as a former welfare recipient, to come out, and we will gather welfare recipients together, and we will have her do motivational speeches and then, since she is a singer, she can sing after?" So we did that. It sounds terrible when the press gets it because it sounds like we are hiring Broadway singers to come out and help welfare recipients. In fact, we were doing something with the tacit approval of the state, before there were specific guidelines on what could and could not be done. When the state challenged the expense, we said, "Fine, we will pay for it."

So if you look at what is going on in Wisconsin, and even in New York, we are a firm that is trying to do a good job, that is getting caught up in a situation where the government really has no financial standards established on what cost is allowable and what is not allowable. We were encouraged to be innovative, we were innovative, and we got "caught" trying to do something good.

The true problem in Wisconsin was that MAXIMUS overbilled the state by $500,000. The papers got hold of the story, but focused on certain cost items, like Ms. Moore's fees. What is not known, what was not publicized, is we also underbilled them $1.6 million.

The invoicing system in the state was complex. Our people did not understand it. We messed it up. I take the blame. We lost $1.6 million that we did not bill, but we also made mistakes and overbilled them $500,000. So the net result was we paid them the $500,000 that we overbilled them, and we agreed that we would not be reimbursed for the underbilling because the term of the contract had expired and we could not claim now that we had underbilled. It was our own fault.

But, in addition, MAXIMUS said: "Look, we have caused a lot of problems here inadvertently. We will take the responsibility." So MAXIMUS has, through our MAXIMUS Foundation, donated

$500,000 to local charities, nonprofit organizations in Milwaukee, to try to say, "Look, we are sorry we made these mistakes."

There is a context for all of these contract problems. What you read in the paper is only the sensational aspect of it.

QUESTION: I have a question about a recent case in New York City that brings in some of the questions the moderator talked about.[132] There was a panel of private experts reviewing the standard of foster care in New York City,[133] which is the only city dealing with taking care of children through mostly private organizations.[134] Most families dealing with the city agency that was reformed in the case, the Administration for Children's Services, still do not feel satisfied with what happened as a result of the *Marisol A.* case.[135]

It takes on a lot of the aspects of what we are talking about, in that there is a group of people served who are not really looked at by the rest of us as "worthy" of services, who do not have a loud voice anymore, especially since most of their attorneys are Legal Services Corporation attorneys who cannot speak out for them based on federal regulations. Could you comment on that and put it into your perspectives and where you think things would go on that?

MR. HAWLEY: As it happened, *Marisol*[136] occurred to me during Susan's remarks. That consent decree, which brought in outside mediators of the kind you are talking about, I believe some from Baltimore, such as the Annie E. Casey Foundation[137] was a sensible mechanism to approach a very difficult problem.

I have a lot of respect for the effort being made by the current head of the Administration for Children's Services,[138] in what is a

132. *See supra* note 122 and accompanying text.

133. The audience member's question refers to the Special Child Welfare Advisory Panel. For more information, see http://www.aecf.org/child.

134. New York City uses contract agencies to serve approximately eighty percent of the children and families that enter the child welfare system. *See* Press Release, Annie E. Casey Found., Advisory Panel Reports on Monitoring and Improving the Performance of Contract Agencies. For more information on The Annie E. Casey Foundation, which works to support disadvantaged children and their families, see http://www.aecf.org/child.

135. Marisol A. v. Giuliani, 929 F. Supp. 662 (S.D.N.Y 1996) (denying motion to dismiss and certifying class for plaintiffs alleging systematic deficiencies in the administration of the New York City Child Welfare System); Marisol A. v. Guiliani, 185 F.R.D. 15 (S.D.N.Y. 1999) (approving the settlement agreement).

136. *See* cases cited *supra* note 135.

137. *See supra* note 134.

138. Mr. Hawley refers to Nicholas Scopetta, Commissioner, New York City Administration for Children's Services.

near-impossible job. That kind of solution seemed to me a sensible one, as it did to the plaintiff's lawyers, who, as you know, litigated that case and others like it for decades.

PROFESSOR BEZDEK: Let me say that the question speaks to the two dimensions of what we all have been talking about here. One is the substance of what is it that should be prescribed, and the other is the mechanism by which that should be prescribed. You are speaking about a settlement in which the parties agreed, and the court accepted, that private entities should be empaneled to bring their expertise to prescribe something that should happen next to reform the delivery of government services.

There is a variety of those mechanisms by which government or others could do that. The information explosion in the realm of monitoring welfare outcomes is astonishing. But a lot of that information is held by private actors. Some are private actors under big federally-funded contracts for evaluation, government contracts by the U.S. General Accounting Office and several other branches of government. So there are lots of sources, some public, some private, some public/private partnerships, for providing substantive information about welfare reform; yet access to public information still needs to be better—to figure out what it is that should apply in a given setting to a given problem.

That does not answer, then, the question about how will it be made the responsibility of the acting organizations, be they private, public, or some new-fangled mix, to respond to requests for information or accountability.

So in the welfare-to-work arena I described a pretty deplorable system in Baltimore.[139] In welfare-to-work there actually are some other remarkable state programs that have been well examined. Additionally, there is a federal system for the Department of Labor's welfare-to-work grant program, which has vastly more extensive specifications for what are the problems to be addressed, what was the measure of performance, who gets paid how, that kind of thing, compared to what Baltimore does.

Workforce development services, which are not focused on welfare recipients, are another context in which to examine how pro-

139. *See, e.g.*, Kate Shatzkin, *More Former Welfare Recipients Are Returning to Assistance Rolls*, BALT. SUN, Oct. 11, 2000; Kate Shatzkin, *Study Finds Workers Off Welfare Often Remain in Need of Assistance*, BALT. SUN, Oct. 6, 2000. *Contra* Press Release, Innovators in Welfare to Work Initiatives Recognized by U.S. Dep't of Labor, Oct. 25, 2000 (recognizing innovative and outstanding welfare-to-work programs around the country) (on file with the Fordham Urban Law Journal).

fessionals in a field other than welfare services prepare people to move into work and to have value-added experiences when moving to work.

So these really are questions: Where do you go for information about how to solve a service delivery problem with contractual regulations and what mechanisms are available to give teeth to those regulations?

PROFESSOR BEERMANN: In cases like this, the most important accountability issue is information, because it is relatively common that in child welfare, services are provided by private groups. When they were provided by public hospitals and public homes, a lot of lawsuits were brought about the terrible conditions there. It may just be that when delivery is public, it is easier to get the information about poor conditions.

Ultimately, responsibility in terms of accountability is pretty clear. When a private school, or a private foster home, or some private institution treats children badly, the social welfare agencies are held accountable. So a lack of information is really the only significant effect of privatization, in my experience with this.

QUESTION: Do any of the panelists have any thoughts as to whether or not the accountability deficit with privatization is a by-product, or actually a goal, of privatization? Perhaps the systems are designed to disenfranchise some people who were beginning to make gains through the old system, where we had rights, rules, and regulations?

PROFESSOR STURM: I would not assume, simply because you are moving in the direction of decentering, as opposed to eliminating regulatory oversight, that you necessarily are doing that for the purpose of undermining the norm and disenfranchising people.

What we really need are criteria to evaluate when you have a system that is creating possibilities for meaningful participation and actual accountability. When you have a move that is essentially deregulating and moving away from any kind of public oversight or accountability, I think it is a mistake, at least in the areas that I work in, to assume that the best way to handle complex problems is the way we did it at the inception of the Civil Rights Act.[140]

One of the problems with advocacy in this field is that it has been stuck somewhat. Now, that does not mean that you abandon advocacy on behalf of service recipients when government con-

140. Civil Rights Act of 1964, 42 U.S.C. § 2000a (1991).

tracts-out to the private market. Instead we have to start thinking more creatively about when to scream like hell when it looks like you are moving in the direction of just disenfranchising groups of people and when to begin to collaborate because it looks like there is the possibility of actually embodying meaningful change.

PROFESSOR TRUBEK: I want to emphasize the point that in Legal Services, there are restrictions on certain kinds of lawsuits, particularly those challenging welfare reform. Therefore, within the particular legal context that some of you are interested in, there are clearly more restrictions now on lawyers doing certain kinds of advocacy, which contributed to the "stuckness" of that problem.

So I do not think you have to come up with an elaborate conspiracy theory to see that when we move to this new system, it is extremely important that people interested in the people who are being affected, and more generally, in accountability, figure out that they need to get information, hold providers accountable, and seek the resources and the systems to do that.

The moves toward privatization and globalization were made very rapidly and a lot of institutions were left behind. Certainly, the law schools are way out of it, and many lawyers are way out of it. One reason we lawyers are losing business is we have not figured out this new system, except those who went to work for the accounting firms.

So we cannot sit back and say, "Oh, it will all just resolve itself without any action or changing or looking at things differently." So in that sense, I certainly agree with you that there is a need for new accountability mechanisms that will require active participation. It is not just going to happen by itself. We found in Wisconsin that in health care we had to make those accountability mechanisms; they would not have been there otherwise.

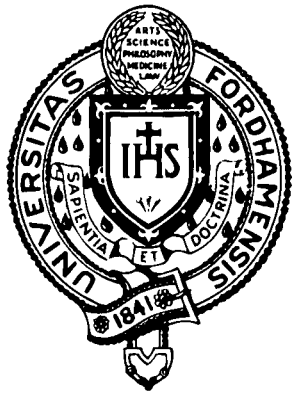
PROFESSOR BEERMANN: There are two reasons, one very cynical and one only slightly cynical, to agree with the implication of your question.

The first is that if you assume that privatization is a product of private lobbying of government to give advantages to certain private groups, then from a public choice perspective, it is all a conspiracy to divert public money somewhere where the public is not going to be able to see how it is spent.

The other thing is, though, that if one reason why private action is preferable to government action is because it is cheaper, and it is cheaper because there is less procedural protection and less labor protection, then it would be a natural by-product of privatization

that you would have less procedure and less labor protection. If that is what is causing the cost differential between doing something government-wise and doing something privately, it seems perfectly logical.

PROFESSOR BRIFFAULT: It is not quite clear that the older system is itself a paragon of accountability. Maybe we are talking about comparative accountabilities and basically how to make things work better in particular cases.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