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***575 PUBLIC INTEREST LAWYERS AND NEW GOVERNANCE: ADVOCATING FOR HEALTHCARE**

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Introduction

Scholars and lawyers working in the area of public policy have been preoccupied with the issue of how to maintain social values in a shifting governance framework. Much of the debate has been focused on specific sectors and defensive strategies. In the area of welfare reform, in particular, criticism has been directed at cutbacks in client benefits and reduced provider accountability due to the transfer of authority to local, non-governmental organizations. [\[FN1\]](#) An alternative strand of scholarship has focused on how these same shifts in governance have the potential to produce humane social policy. [\[FN2\]](#) They note the potential for increased participation at the local level, greater collaboration, and reduced adversarial positioning.

The goal of this Article is to place the emerging role of the public interest lawyer in the context of the broader changes that are occurring in American governance. The underlying assumption is that it is better to harness the changes that are occurring for the public good rather than to wax nostalgic for an earlier era of administrative practice. Furthermore, this Article suggests how the emerging system can be harnessed for the public as well as private interest. This Article also illustrates the broader lessons for public interest advocacy through an examination of the managed care healthcare movement.

The analysis of this Article proceeds in four steps. The initial Section outlines the classic model of public interest law in the context of the post- New Deal era. This Article then lays out three broad "movement" changes in governance: a movement of authority downward from the federal government to the state and local level; an ***576** outward movement of responsibility for designing, implementing, and enforcing social programs from government to market and non-governmental actors; and a movement outside the regulatory box, away from the traditional regulatory framework. This Article then describes how these changes in governance have encouraged the development of an emerging model of public interest advocacy, which emphasizes collaboration, linked local action, and a diffusion of roles and practices. This model is illuminated through a case study, based on the experience of healthcare lawyers in the regulatory framework of Wisconsin. It describes new processes, tools, and techniques that are developing from the give-and-take that occurs within the new governance context. This description lays out how public interest advocates are seeking to embed the social values of transparency, accountability, and participation within the new governance framework. This Article also addresses the legitimate concerns of progressive scholars and advocates regarding the maintenance of protections required by disadvantaged groups and underrepresented interests. Finally, it concludes that, though the roles and skills of the public interest lawyer must evolve to adapt to the changes in governance, the public interest lawyer will remain a key player in this new scheme.

I. A Brief History of Public Interest Law

In order to achieve a clearer understanding of the new model of public interest advocacy, it is necessary to first understand the classic practice and theory of public interest law and its symbiotic relationship with the structures and theory of government. Since the New Deal, the United States has created or expanded a series of governmental institutions with the goal, at least in part, of creating a more just society. [\[FN3\]](#) The growth of these institutions was part and parcel of the expansion of the federal government and concomitant removal of power from state and local governments. As power moved to Washington, the scope of government action increased as well. It expanded from regulating the market to promoting social welfare. The new social welfare programs took the form of administrative agencies, modeled after agencies that were created to regulate market activity.

In the 1960s and 1970s, this expansion of government intervention and agency power reached its apex. New agencies were created to confront an array of newly recognized issues, such as the protection of the environment and consumers, and the enforcement of minority and women's rights. The Supreme Court, under the leadership of activist ***577** justices, also contributed to this evolution through the expansion of individual rights and by allowing citizen access to agency and market institutions. [\[FN4\]](#)

Advocates for disadvantaged clients and groups encouraged the development of these new agencies. The advocates soon concluded, however, that the proliferation of agencies and the expansion of their power contained dangers for their clients. They were distressed by the narrow participation in agency decision-making, the capture of agencies by regulated industries, and the self-interested bureaucracies. To address these perceived problems, advocates adopted various strategies. Advocates for the poor, for example, sought social programs better tailored to the needs of their client groups. [\[FN5\]](#) Consumer activists and environmentalists wanted governmental systems geared towards protecting their interests. [\[FN6\]](#) Law students and lawyers saw a role for expert advocates as representatives for underrepresented clients in these expanding agencies. [\[FN7\]](#)

The expansion of public interest law in these middle decades [\[FN8\]](#) was thus a manifestation both of the growth of agencies and the increasing awareness of their limits. The lawyers seized upon the dissatisfaction with the large Washington-based agencies. They viewed themselves as correcting the lack of participation and accountability in agency procedures by interjecting themselves into the agency process. This development led to the epoch that may be termed the "classic period" of public interest law.

The theories upon which this classic period was rooted were an amalgam of interest group pluralism, market failure, and legal professional expertise. [\[FN9\]](#) The argument was that government institutions alone could not protect the constituencies. The agencies were seen as subject to capture by businesses, legislators were vulnerable to fiscal and local interests, and the judiciary focused on scope of review and creation of abstract rights.

***578** To overcome these obstacles, the voices of disadvantaged constituencies had to be amplified in the decision-making process. The political science theory of interest group pluralism and the economic theory of market failure both supported the concept that the voices of these groups had to be heard in the courts, in Congress, and in the agencies. As Kenneth Arrow stated "much of [private activity] is specifically directed toward more general government failure When private groups urge reform legislation, they are essentially seeking to repair government's own deficiencies." [\[FN10\]](#)

Added to the political and economic theory was the notion put forth by progressive lawyers and law students that full-time lawyers committed to the social movements should be the spokespersons for the underrepresented. High-level legal skills, knowledge, and status were deemed necessary for effective representation. This movement built on the historic institutional role of the legal profession speaking out for the disadvantaged in our society; contingent fees since the nineteenth century, progressivism and legal aid in the 1910s, and cause lawyering in the 1920s were the forerunners. [\[FN11\]](#) The lawyers viewed themselves as providing the remedy needed to produce government action that appropriately intervened in the private market. The remedy was implemented by voicing the needs and approaches that served the "true" beneficiaries of government agencies. In addition to providing the input of the voices into traditional bureaucratic hearings and rule-making processes, they also provided constant monitoring of agency actions and procedures to insure that the actions were transparent and subject to public scrutiny.

The organizational embodiment of this theory was the public interest law firm. These firms blossomed in the 1960s and the early 1970s, [\[FN12\]](#) founded by lawyers, who were largely young graduates of elite law schools. Most of these firms were located in Washington and consisted almost exclusively of lawyers organized as

independent, nonprofit law firms. The lawyers advocated primarily in federal courts, federal agencies, and before Congress. Among the clients were groups deemed to be "underrepresented": interests that could not be funded by the market for lawyers. Examples of such groups are poor people represented by the Legal Services Corporation, consumers seeking fair products in Nader firms, and environmentalists in the Natural Resources Defense Council seeking a sustainable world.

*579 Initially, the vision for funding these firms was based upon a charitable model supported by private foundations, bar associations, and court-awarded fees. There was also, however, an effort to obtain support from the government, using the argument that public interest lawyers provided the necessary check upon the agencies and that government should support these advocates. The Legal Services Corporation was enacted as a result of this argument. [\[FN13\]](#) These firms became canonical within government and the legal profession. In fact, the conservatives emulated their success in the late 1970s and 1980s. [\[FN14\]](#)

II. The Changing Nature of Governance and Shifts in Public Interest Law

For the past several decades, the administrative state has been undergoing a process of change. Trust in the expertise of federal agencies has been replaced by skepticism and even outright disdain. The desire for centrally coordinated government solutions to vexing social problems has given way to a thirst for local control, and the role of the private sector in designing and implementing experimental programs has been revived. Decentralization, deregulation, and privatization are the catchwords of the day, and whether driven by, or reflected in, the federalism of the Supreme Court and the platforms of various politicians from Jimmy Carter to George W. Bush, [\[FN15\]](#) this new style of governance has influenced both institutional relations and professional roles at the most intimate level. Legal scholars have begun to take notice of these deep and seemingly permanent changes in the administrative state. [\[FN16\]](#)

They have just started, however, to come to grips with the effect of the new governance on the public interest in general. More specifically, scholars are just beginning to understand the impact of the new governance on public interest advocacy, often assuming that a decentralized form of governance is clearly beneficial to the public interest or potentially harmful. Practitioners are also noting the changes *580 in the world within which they advocate. They see that the structures that they assumed would confine their advocacy are opening up in strange and unexpected ways. In response, practitioners are notably beginning to shift their advocacy. This Section describes the governance changes and then ties practitioner shifts to these governance shifts.

American governance has become increasingly decentralized in at least three separate directions. First, there has been a movement of authority downward from the federal government to state and local governments. Second, there has been a shift of regulatory mechanisms outward to non-governmental actors, including non-profit and private businesses. Third, there has been what can be described as a leap outside the regulatory box as new mechanisms are created that did not exist before and that do not fit neatly into the traditional notion of top-down regulation. Each movement, described more fully below, has important implications for understanding the changes that have taken place, and continue to take place, in the world of public interest advocacy.

A. The Movement Downward

Perhaps the most conspicuous aspect of the new approach to governance is the movement of authority downward from federal to state and municipal governments. This "localization" of governance is in stark contrast to the ethos of the New Deal era that, in the process of responding to the misery of the Great Depression, taught Americans to look to the expertise of federal administrative agencies for solutions to social, political, and economic problems. [\[FN17\]](#) Trust and confidence in federal agencies, however, began to wane in the 1970s due in part to general social unrest and the political pressures brought about by inflation. There developed a consensus that the federal government had assumed too many responsibilities and grown too large. Aided by the Supreme Court's new federalism, [\[FN18\]](#) authority began to shift back to the states. [\[FN19\]](#)

Welfare reform is the hallmark of this process of devolution. In 1996, President Clinton, backed by a conservative Congress, replaced the decades old Aid to Families with Dependent Children (AFDC) *581 program with the

enactment of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). [FN20] Whereas AFDC had relied on federal subsidies and a centralized administrative system, the new program provided individual states with incentives to remove people from the welfare roll and put them back to work, fostering individual responsibility and initiative. Some of the early critics of the new program have since been won over, but it remains to be seen whether the new program can remain a success in more difficult economic times.

Rather than a mere anomaly, welfare reform is regarded as the "maturation of a generation-long trend that fundamentally transformed community governance." [FN21] Just as the Supreme Court justifies its new federalism by invoking the positive effect that deflecting responsibility to lower levels of government has on public participation in the legislative process, so too has Congress defended its actions in terms of the benefits devolution has bestowed upon local governments and individuals. The bottom line, however, appears to be that it has saved the federal government billions of dollars, earning proponents of the legislation a great deal of political capital. In the current debate on reauthorization of PRWORA, there is little organized effort to return power to the federal government. State and local agencies, now running the programs, have coalesced in alliances to support the devolution. [FN22]

B. The Movement Outward

A second trend in American governance undermines the New Deal era's trust in government, whether at the federal, state, or local level. [FN23] Instead of giving government agencies the responsibility for designing and implementing social programs, Americans today are increasingly shifting the responsibility for these tasks outward to market forces and non-government actors.

The shift of responsibility to market forces occurs through deregulation. [FN24] Although deregulation began in the early 1970s, it did *582 not really take hold until later, in part because Americans found it difficult to give up the security and control that comes with a hierarchically-imposed regulatory framework. The arguments in favor of deregulation, however, proved to be overwhelming in the face of a general skepticism and disdain for government control that emerged in the wake of the Vietnam War and scandals from Watergate to Waco. Congressional gridlock frustrated Americans and heightened their dissatisfaction with government even further; the unpredictable movement of the market eventually came to be seen as preferable to no movement at all. While deregulation remains controversial, for the moment, the lesson appears to be that not all deregulation plans are created equal; some are clearly better than others. The challenge will be to distinguish among the many options available, finding an appropriate balance between market forces and government intervention. [FN25] States continue to experiment with deregulation, attempting to find the appropriate balance.

A second option available to politicians has proven equally tantalizing. Rather than abandon government functions altogether, politicians and agency heads at every level are increasingly turning to non-governmental actors, such as private businesses, faith-based charities, and other non-profit organizations to carry out these duties. [FN26] Thus, privatization has permitted the visible size of government to shrink while allowing the actual amount of public services to expand, thus pleasing both the liberal and libertarian impulses in the voting public. [FN27] Public administration scholarship over the past two decades *583 shows that much of the federal government's work is carried out through "an elaborate network of contracting, intergovernmental grants, loans and loan guarantees, regulations, and other indirect administrative approaches." [FN28] Reportedly, for every federal worker, there are now nine "shadow" employees working in local government or the private sector carrying out the federal government's operations. [FN29] Despite increasing consumer awareness that certain traditional governmental services are no longer being provided, the trend toward privatization appears to continue.

C. The Movement Outside the Regulatory Box

The downward movement of government programs to the state and local level, and the shift outward of responsibility for the management and implementation of these programs to the private sector, has had a secondary effect which will ultimately prove crucial for understanding how advocacy has shifted. In the new regulatory environment, new mechanisms have emerged to monitor, guide, and direct those public and private agents who exercise direct control over particular social programs. Because these mechanisms are not established or connected

to a formal government agency, they constitute a leap outside the regulatory box. As a result of the recent changes in information technology, many of these mechanisms have evolved on their own without any conscious government guidance or involvement. The Internet, for example, provides the ability to disseminate information quickly and efficiently at minimal cost. Informal monitoring systems have been established, creating new opportunities for citizen and consumer involvement. Private actors who wish to sidestep the traditional regulatory procedures may use these informal systems. In this manner, these new regulatory mechanisms have helped break down the barriers between the enactment, implementation, and revision of government programs. The end result is that we live in a much more dynamic, fluid regulatory environment than before.

One consequence of stepping outside the regulatory box is that the box itself becomes less important. For some time, such a de-emphasis on formal agency structures has been observed. Richard Stewart has noted that reliance on agency expertise is one of the first "solutions" *584 to the problem of agency discretion. [FN30] This reliance made sense under the traditional model of administrative law, which viewed an agency's role as that of a "manager or planner with an ascertainable goal." [FN31] Stewart argued, however, that a number of factors have undermined this trust in agency expertise. First, the American public has lost faith in an objective basis for social change. Rather than seeing agency actions as methodical steps toward an objective goal, the exercise of agency discretion is now seen as "the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy." [FN32] Second, steady economic growth since World War II shifted focus to distributional questions in administrative law, which do not turn on technical issues that can be safely left to agency experts. [FN33] Third, agencies themselves have come to be seen as subject to biases that affect the outcome of their decisions. As such, they are no longer looked upon as neutral arenas of impartial, professional judgment. Rather they are seen as highly politicized entities. In fact, agency bias is thought to favor industry over consumer interests. [FN34] Extra- agency mechanisms are supplementing, if not replacing, the administrative agencies. Today, the presence of these mechanisms underscores the pervasive disenchantment with the traditional model of administrative law.

D. The Emerging Model of Public Interest Advocacy

The current regulatory climate is creating a disconnect for the classic strategy and practice of public interest law. Due to devolution, privatization, and deregulation, problems and assumptions have changed, thus it should not be surprising that there is a disconnect at both the practical and theoretical level. These changes are forcing the strategies of public interest lawyers to evolve.

The classic public interest law movement saw government, especially the federal government, as the primary vehicle for implementing social values. Participating within the structure of the centralized state authority was viewed as the way to effectuate democratic values. As the authority shifted to local units, however, the types of participation had to change. Advocates are now dealing with a variety of state and local agencies that are numerous and difficult to locate. They can no longer advocate exclusively before Washington-based agencies closely linked to Congressional leadership. The *585 efficiencies of a single level of government, permitting a system where expert and experienced public interest lawyers affected important decisions by providing advocacy before a single agency with a limited number of decision- makers, are gone. This system of a few expert lawyers providing advocacy for decisions that affected millions kept the costs of providing public interest advocacy at a level that could be met through charitable contributions and fee awards.

The traditional public interest law model did not view markets as a vehicle for achieving justice. Public interest lawyers understood the importance of the market to governance structures, but they viewed strong agencies as the way to curb and cabin the power of markets. This pro-agency movement emphasized the use of private agencies contractual relationships, and competitive service delivery. These changes undercut the tools and strategies that public interest lawyers had traditionally employed. It has become difficult to locate the agency providing the services because the contracting process is hard to figure out. The private agencies do not have to comply with open records and meetings acts, or certain due process procedures. [FN35] The substantive provisions are included in contracts rather than through the traditional rulemaking system developed under the Administrative Procedure Act. For example, in welfare reform, when privatization occurred, the lawyers found it very difficult to figure out how to attack the abuses that occurred because there was no one responsible agency. [FN36]

The disenchantment with the expert model of the administrative agency is accompanied by a more widespread disenchantment with the notion of professional expertise. This disillusion affected public interest lawyers because they based their model on the view that their skills and knowledge were needed to augment the expertise of the agencies. They viewed themselves as the antidote to powerful agencies and influential business interests: they saw themselves as powerful lawyers equipped with expertise to combat the hidebound bureaucrats and greedy business interest. The move out of the regulatory box threatened the legitimacy of the public interest lawyers' role.

These changes in the classic system require a rethinking of where and how public interest lawyers work. As the bureaucracies lose their strength and new technology emerges, new strategic understandings and organizational structures must be developed. The new practices--collaboration/shared experience, linked local action, and diffusion--are explored below.

*586 1. collaboration/shared expertise

The movement out shifted the focus of advocacy from individual governmental agencies to numerous groups of non-governmental actors. In the uncertainty of the current regulatory climate, collaboration among previously antagonistic actors is essential. Charles Sabel recently noted that the emergence of a collaboration of unlikely allies indicates that the current policy regime is in need of substantial revision. [\[FN37\]](#) It may also reflect a serious desire to carry out major change. Collaborations among stakeholders and experts serve two purposes: the exchange of information and expert knowledge and the pooling of this information to create new techniques and systems. These stakeholders and experts often negotiate with the agencies and legislators to implement their proposals, a departure from the earlier "capture" view of the relationship between agencies, legislatures, and lobbyists. The increasing complexity of the issues, devolution, and the use of private groups have realigned the relationships between actors. More opportunity for innovation exists through these alliances. The interest group pluralism theory that underlies much of the regulatory action of public interest lawyers is no longer an accurate portrayal of the relationship of the advocate to the regulatory structure. The lawyer has moved from the role of an adversary in the legislature, courts, and agencies to a collaborator engaged in a series of alliances to develop and implement policy.

These new collaborations present a different practice for public interest lawyers. Previously there was great deference to the lawyer's expertise, this confidence, however, is diminishing. The lawyer is no longer considered a social engineer with magical knowledge who can redesign anything using her own expertise. This is related to the general reduction in the power of expertise but also reflects skepticism regarding the exclusiveness of lawyer expertise and the public's willingness to use other non-traditional sources of authority.

2. linked local action

The movement down forced lawyers to move the locus of their advocacy to state and local governments. However, the move is more expensive and difficult to coordinate, thus inefficient. The advantage, however, is that one is forced to find allies and move into horizontal and broader coalitions. Collaboration among actors in one locality is the *587 first step through which individuals and organizations are able to reassert their influence in a changed regulatory environment. Not surprisingly, these initial collaborations have been local in nature, and, as the local groups have emerged, they have displayed innovation and credibility.

They are moving to linking across states rather than advocating for a shift of control back to the federal government. This is occurring through the development of networks and intermediaries, spreading the information among actors across states. Linking local action is an effective strategy; it combines local action with the creation of national scope. It allows "scale"; local experiments that are successful can be communicated to actors in other states, replicated, and linked. Conversely, unsuccessful projects can be jettisoned.

Linked local action is an alternative view of how public interest lawyers can be effective, compared to the rigid hierarchical view of appropriate state and federal action underpinning the original public interest law vision. The role of public interest lawyers in creating these collaborations and developing and serving as facilitators is an important new role. As the local collaborators seek broader alliances, public interest lawyers can serve as intermediaries.

3. diffusion of roles and practices

Two kinds of diffusion accompany collaborative practice and local linkages. First, actions by advocates are occurring in an increasing variety of institutional arenas. Rather than focusing on the regulatory agency, advocates now support systems implementing social values within private organizations. [\[FN38\]](#) This move requires transparency in organizational action. Public interest lawyers can monitor the information, demand accountability, and train consumers on how to work within the organizations.

Second, diffusion is occurring insofar as the public interest lawyer is now located in many different practice sites. While the traditional public interest law model placed the lawyer exclusively in an independent nonprofit law firm supported by foundations, government grants, and pro bono contributions from the Bar, the new public interest advocate has a greater variety of bases of operation. Advocates today can choose to work within non-governmental organizations (NGOs), within private collaborations, or for business organizations. Different work places have shifted the sources of the advocate's funding. For [*588](#) example, fees from clients and income from stakeholders within the Bar have begun to replace contributions.

III. Advocacy in the New Governance Context: A Wisconsin Healthcare Case Study

A. Managed Care: The New Healthcare System

The extensive restructuring of the healthcare system that emerged in the 1980s is illustrative of the new governance. Managed care is a manifestation of the movements down and out of the regulatory box. While healthcare has traditionally been provided at the local level, Medicare and Medicaid were largely federal programs. In the 1990s, Medicaid expanded to serve more moderate-income people and was substantially devolved to the states. [\[FN39\]](#) The concept of managed care is based upon the development of private organizations that compete for consumer and employer dollars by offering a package of services at a fixed price. The development of managed care organizations created a new set of actors that operated in the private market but were regulated by a variety of governmental entities. The creation of these new institutions throughout the country led to confusion about how they should be appropriately regulated. Since the organizations combined financing and delivery of services, traditional insurance regulators were perplexed. Healthcare actors attempted to redefine their roles and functions within this changing system; there were various shifts in the practices of healthcare institutions and players throughout the nation. This Section analyzes these shifts from the perspective of the Wisconsin experience.

Managed care emerged out of the dissatisfaction with escalating healthcare costs in the late 1970s and 1980s. Businesses, which pay for close to fifty percent of the costs of health care, and unions paying through foregone wages, were frustrated with the ability of the system in place to curb costs. They observed the power of physicians, both individually and through their organizations, to block efforts at cost controls. They also noted the weakness of a regulatory system divided among public and private payers, and federal and state governments. [\[FN40\]](#)

In the early 1980s, managed care emerged as a new system to cure some of these ills. The emphasis was not on increasing access but rather, on curbing costs. [\[FN41\]](#) The ideal model was a strong central [*589](#) managing organization that had the ability to control entrance and the work of health care professionals. It also conceived of financial incentives, both for the managed care organization (MCO) and the individual provider, to encourage the provision of effective service at the lowest possible cost. This required gatekeeping before services could be provided and financial incentives such as capitation (a fixed sum for a package of services). The MCO system took off in both the public and private sectors.

By the late 1990s, a majority of medical services were delivered through some form of managed care. The transformation was amazing. The leading losers from managed care were physicians as a group. Physicians were no longer able to exclusively determine the type of care provided and were subject to financial incentives to reduce care. They felt demeaned, losing both their autonomy as professionals and, in many cases, income. Physician self-regulation was replaced by "bureaucratic" medicine controlled by profit-making MCOs. [\[FN42\]](#)

As managed care became the dominant mode for financing and delivering health care services, new information

systems emerged. [FN43] These information systems were used to collect and analyze data and provide information on medical advances and qualifications of providers. Purchasers, who wanted to control costs by eliminating unnecessary procedures, were preoccupied by the collection and dissemination of data. This allowed much more data to be available and permitted the creation of independent agencies that could analyze it. Many physicians were skeptical of the use of the data, believing it would be used only to control costs and not to encourage quality.

The uncertainty created by the three new elements--MCO cost-saving incentives, physician loss of control, and the development of data systems-- created fear and confusion among consumers. The rigidity of the MCOs created difficulties for consumers who sought to stay with their original doctor or who wanted a different set of services than those provided for in the MCO protocols. Consumers were fearful that the new system was interested in controlling costs rather than delivering services. They felt a loss of their traditional trust in physicians and other health care professionals and institutions. Physician groups and *590 other providers who feared MCO control over their income and autonomy fueled this fear. Often consumers had no exit from the plan that their employer chose. If their customary hospital or provider was outside the MCO network, they had to pay a premium to utilize the service.

Consumers became distrustful of the new MCO system, a distrust sometimes fueled by their doctors and unfair media coverage. [FN44] They were uncertain about both financial incentives that could set up the doctor as the adversary and the credibility of the payors who had cost-containment as their most important goal. They also felt hemmed in by the lack of exit from the employer-offered plan and the inability to choose their own health care professional from the restricted list of plan providers. The emergence of new information sources that allowed consumers access to information previously unavailable further contributed to their sense of unease. This information, available on the Internet, was often presented in a form difficult to analyze and questioned by reputable organizations.

The issue of quality thus rose to a position of preeminence in the debate over managed care. [FN45] Consumers were seeking some guarantee that the commercialized, competitive system would still give them quality service. Traditionally, transparency and accountability have been used to achieve social policy objectives in administrative law. In the new context, transparency and accountability had to be restored to ensure quality service and assuage the fears of consumers.

B. Creating the Collaboration: Shared Expertise

In Wisconsin, two consumer groups came to the fore to advocate for healthcare consumers. One was the Wisconsin chapter of American Association of Retired Persons (AARP), which asserted an interest in the entire healthcare system, not only programs for the elderly. The other, a Wisconsin-based public interest law firm, the Center for Public Representation (CPR), had a long-standing advocacy program in health care. [FN46] Both groups were generally supportive of managed care but *591 were increasingly concerned about the excesses of MCOs and the distrust expressed by consumers. The situation was particularly alarming in light of Congress's failure to either approve or provide a substantive alternative to the Clinton health care plan or to adequately address the growing concerns over the quality of care offered by managed care generally.

Consumer advocates were confronted with a difficult situation. The traditional regulatory system was in transition, federal action was unlikely, and the atmosphere was deregulatory. They saw the advantages of the new MCO system in terms of potential cost savings but realized that some steps had to be taken to balance the fears of consumers losing their trust in physicians, commercialized health care, and cost-containment. When consumer groups attempted to use the traditional Wisconsin regulatory process, they felt unheard by the agency and out-lobbied by MCOs and business.

The unhappiness of consumer groups and physicians encouraged a bi-partisan group of legislators to introduce legislation. Nonprofit associations, especially "Women in Government," began to circulate draft legislation called the "Patients' Bill of Rights" throughout the United States. The legislation created a series of initiatives aimed at increasing the countervailing power of consumers, physicians, and other health care professionals. [FN47] The American Medical Association was a strong proponent.

The Medical Society of Milwaukee County, the largest local group of physicians in the state, approached CPR and

asked if they would be interested in forming a group to work together to pass a strong and effective Patients' Bill of Rights. [\[FN48\]](#) The two groups decided to form a new collaborative organization to increase their effective participation in the process. They created the Collaboration for Healthcare Consumer Protection (CHCP). [\[FN49\]](#) The group initially included two medical societies, two additional healthcare professional trade associations, CPR, and AARP. A representative of CPR and the President of the Medical Society of Milwaukee County served as facilitators.

CHCP felt that the Office of the Commissioner of Insurance (OCI), the agency in charge of regulating MCOs and protecting the public interest, failed to provide genuine participation, lacked expertise, and lagged in acting. When rulemaking hearings were announced, consumer *592 groups and physicians did not feel that their concerns were being addressed. OCI proved too slow and static in carrying out its traditional activities. Instead of resolving conflicts between actors, it more often exacerbated them. [\[FN50\]](#) Because of the ponderous nature of the administrative process, traditional regulation couldn't keep pace with the rapid changes occurring in the healthcare industry. Moreover, state civil servants proved incapable of changing their roles in this highly fluid environment. CHCP saw OCI as having too much control and not enough health care expertise (or at least less expertise than the patients and physicians themselves). CHCP envisioned their collaboration as allowing them to use their shared expertise, counterbalancing the bureaucratic system represented by OCI.

The group consisted of people with very little previous contact. As they interacted, the group developed strong trust and confidence in the expertise and commitment of all members. They soon realized that there were no clear answers and that the draft legislation was only a starting point. The meetings were long, with extensive dialogue. Law students enrolled in the CPR clinical program analyzed alternative models. The physicians provided insight into the medical situation, and the other health care professionals added their perspective on the issues and proposed reforms.

Realizing that they needed a patient group perspective, the initial members added the Wisconsin Breast Cancer Coalition. A progressive insurer also asked to participate in the meetings. This insurer added invaluable perspective on a potential health care plan, allowing the group to take positions that reflected a deeper understanding. CHCP, for example, supported a small fee to access the external review system, accepting that abuse of the system would undermine its long-range viability. CHCP worked together testifying and lobbying for the enactment of two patients' bills of rights that included quality assurance, strengthened grievance procedures, and an external review system for patients whose requests for medical care were denied. These provisions, while under the oversight of OCI, created internal monitoring systems within healthcare plans. CHCP met with managed care organizations to work out a common agreement on contentious issues, then presented their agreed-on positions to OCI.

CHCP continues to work on a variety of initiatives. With the legislation, it is monitoring compliance by health care plans and OCI. It is participating in emerging health care issues, such as increasing access *593 and patient safety. CHCP is also providing consumer and physician advocacy training by creating and disseminating information on the new protections. This education and training program is funded under a national grant. [\[FN51\]](#)

The CHCP experience demonstrates why collaborations between unlikely allies are emerging as crucial elements in the new governance system. Collaborative participation allowed members to influence health care policy in a more effective way by influencing the agency and legislative decisions. By aligning themselves with consumers and other health care professions, physicians could regain some of their lost power. As a result of this changed process, the role of the regulatory agency seems to be de-centered. [\[FN52\]](#)

The show of unity has allowed their voice to be heard. OCI now takes their positions much more seriously and physicians rely upon alliances and collaborations to put forth their views. Through their strong alliance with the still powerful physicians, consumer groups influence public and private decisions. Additionally, their relationship with insurers and businesses is more congenial and productive

The ability of the group to thrive for over three years strengthens the collaborator's voice. This success allows the group to consider other roles such as educating and training their constituents. CHCP's dialogues and interactions produced innovative programs, such as training for consumers and physicians on how to advocate within the healthcare system. The ability to share information and knowledge produces education and training that responds to the needs of both groups.

C. Linking Local Action

The development of healthcare collaborations, such as CHCP, is based largely upon the importance of state action in healthcare. Patients' bills of rights are being enacted across the states. In fact, it appears highly likely that no patients' bill of rights will be enacted in Congress, or if one is, it will rely on legislation enacted by the states. One article noted that, since forty states enacted patient protection, the need for federal action has been significantly reduced. [\[FN53\]](#)

*594 The Wisconsin statutes were based on drafts circulating from various groups that had developed model patients' bills of rights, some of which had been adopted by other states. Though the states have become the locus of power in healthcare, there is still a need for uniformity across state lines. It is in the interest of large health care plans to have similar procedures across states, facilitating efficient business practices. It is also in the interests of consumers and physicians to share information and experiences across states so that the "best practices" emerge.

Generally, two types of networks are used to link local action. First, there are information sharing networks for state actors. For example, the National Association of Insurance Commissioners (NAIC) has long produced uniform standards for state use. The recent "movement down" has accelerated the formation and strengthened the influence of these networks. The National Commission of State Legislatures (NCSL) is conducting a study of best practices in quality by states. [\[FN54\]](#) This report allows legislators and advocates in each state to compare their efforts, seeking to improve the actions of their state. The reports are shared through websites, teleconferencing, and email networks.

Another example is the formation by the NCSL of a "Forum for State Health Policy Leadership," amply funded by private foundations. [\[FN55\]](#) This forum brings together business representatives, health care professionals, consumer advocates, and government officials. [\[FN56\]](#) Its detailed state by state comparisons allow local actors to compare their success. [\[FN57\]](#) AARP has its own system of providing information to its state chapters as well. The AARP representative in CHCP was able to effectively use this information to influence CHCP decisions. Many actors are linking together via these networks and creating quality control mechanisms that are implemented by a variety of organizations outside the traditional regulatory model.

Non-governmental standard setting and certification organizations such as the National Commission for Quality Assurance (NCQA) represent a second type of network. NCQA develops standards for data collection and healthcare plans that must meet quality and access requirements for certification. NCQA's standards and certifications are then used by healthcare plans and regulatory agencies to identify quality *595 in the delivery of services. CHCP advocated for quality standards in the state legislation, understanding that these certification entities were available and accessible. The availability of standards and data created by groups like NCQA increases the ability of state actors to work together towards quality at the local level.

D. Diffusion of Practices

The patients' bills of rights demonstrate the approaches that the states have taken to create countervailing measures to the perceived overreaching by MCOs. These statutes aimed to create a more "humane" managed care system. New arenas and actors were seen as necessary to create countervailing forces. Although the regulatory agency remained involved as an oversight agency, new actors obtained substantial power under this legislation. Consumer advocates supported this diffusion; they were disillusioned with the traditional regulatory tools and felt empowered by these new systems.

1. influencing the internal structures of mcos.

The patients' bills of rights rely on influencing the internal workings of MCOs. They aim to balance MCO cost-containment incentives by emphasizing performance standards, reasserting medical expertise, and increasing consumer information. There are three techniques that are used: contract terms, quality assurance, and dispute resolution. CHCP supported these provisions.

The contract between the physician and the MCO outlines the financial and personnel relationship between the physician and the MCO. The ability of the physician to advocate for treatment that meets new developments in quality can be directly related to her security in the terms of the contract. The MCO may also use the contract to enforce quality indicators, such as ensuring that the physician keeps her practice up to date and fine-tuning the financial incentives. These requirements can prevent excessive financial incentives to reduce services, allow for provision of uncompensated care for the uninsured, and mandate public disclosure. Wisconsin enacted legislation restricting certain types of clauses in these contracts which do not serve to protect consumer interests. [\[FN58\]](#)

Requiring quality compliance systems is a second example of moving quality norms within the MCOs. [\[FN59\]](#) These include data collection *596 based on specific guidelines developed by national private certifying organizations, such as NCQA. The new tools create a novel relationship between the consumer groups, physician groups, and MCOs. It moves attention from the regulatory agency to the internal workings of the MCO.

The third technique is a dispute resolution system to resolve disputes between MCOs and consumers when there is a denial of service. Consumers and physicians were disturbed by the MCOs' power to deny services when the physician viewed them as medically required. People unqualified on the types of procedures and protocols required for specific illnesses often made the decision to deny service. The review procedures mandate a second and third review of the initial denial, [\[FN60\]](#) conducted by qualified professionals. [\[FN61\]](#) In Wisconsin, these grievance systems are carefully spelled out. Over 5000 appeals are filed annually. [\[FN62\]](#) An external system of review is now mandated. [\[FN63\]](#) The consumer can request a review of the grievance denial, [\[FN64\]](#) and peer professionals are retained by external organizations to reconsider the initial denial of the grievance decision. [\[FN65\]](#) This dispute resolution system reduces the use and importance of lawyers, courts, and administrative agencies by using private review organizations, elevating medical professional expertise. CHCP promoted the system that creates a counter to the power of the MCOs. The physicians are also enthusiastic about the peer review aspect, which restores the power of the physician in treatment decisions.

2. using the market-utilizing data-driven evaluation systems

Information has become an important enforcement tool in the new healthcare system. The development of credible private systems with national scope, the desire of consumers for information, and the availability of such information have resulted in substantial changes in the roles of regulators, consumers, and MCOs. There are several private organizations that are developing and disseminating health information. [\[FN66\]](#) NCQA is the most active. NCQA promotes private *597 certification based on the provision of data indicating compliance with its standards. Cost, quality, and access statistics are among the data gathered. The Wisconsin statutes now require quality assurance standards, relying on these private accreditation services. [\[FN67\]](#)

CHCP supported the use of impartial and accessible national systems of private accreditation. These systems provide a measure of MCO performance that can give comparative quality indicators. [\[FN68\]](#) By providing national comparative quality standards, these systems help to facilitate a broad market. A broad market allows healthcare consumers greater freedom of choice, thereby creating an incentive for quality.

E. Diffusion of Lawyer's Roles

Historically, public interest groups have been relatively inactive on health issues. With the exception of lawsuits and legislative advocacy by anti-poverty groups fighting for access to healthcare, there had been relatively little consumer action on behalf of healthcare consumers. [\[FN69\]](#) CPR had actively worked for health care for the poor since the 1970s. CPR's experience in the 1980s with Medicaid managed care provided it with expertise and credibility among healthcare actors. [\[FN70\]](#) CPR had both an experienced director and law students who participated in a clinical program at the University of Wisconsin Law School. When contacted by the Medical Society of Milwaukee County, CPR lawyers decided that advocating for all health care consumers through a collaborative process was an important advocacy tool.

The CPR lawyers advocated for healthcare consumer protections in a variety of ways and at a variety of sites. CPR

provided CHCP members knowledge on how agencies and legislatures worked, analyzed statutes, drafted language for rules and legislation, and located and applied relevant cases. CPR also provided legitimacy to physicians and other health care professionals, who may seem self-serving, by working in a coalition with them. AARP also lent credibility to CHCP by providing actual consumers to testify at hearings, thus providing a consumer perspective on their advocacy positions.

CPR lawyers also played the role of educator by developing educational materials and conducting training programs. They wrote the consumer education materials and were crucial in the development of *598 physician training modules.

Finally, CPR is also responsible for CHCP's oversight activities. CPR continues to monitor and provide information on how well OCI is performing its oversight function and publicly distributes information on the use and patterns in the grievance resolution system. [\[FN71\]](#)

As a result, the lawyers' workplace has shifted. Much of the time lawyers are meeting with collaborators, informing and assisting patients in using the grievance process, and evaluating performance standards and data. Lawyers could perform these functions within the MCOs or within a physician organization. The reliance on data systems and performance evaluations opens up the potential for lawyers administering compliance systems both within MCOs or in other health care organizations.

IV. The Emerging Model Examined

Although the new practices of public interest advocates in health care have produced positive results, there are still significant concerns regarding the recent trends in public interest advocacy, such as those voiced by Professor John Blum. [\[FN72\]](#) These changes in the practice, both in terms of healthcare and more generally, pose the risk of undermining the traditionally effective aspects of public interest practice. There is a legitimate concern that these new strategies will be detrimental to public interest clients and society.

While the public interest law model of the 1960s was a response to the dominance of the national government, the importance of public programs and administrative agency control (the model now emerging) reflects a decentralized, deregulatory context. The 1960s public interest lawyers, through their actions in courts, the legislature, and agencies, provided a necessary voice for disadvantaged groups. The critics of the emergent model are concerned that this voice will be lost. This critique stems from a resistance to the movement down, out, and outside the regulatory box. Some scholars and traditional public interest advocates worry that the movement down will lead to a race to the bottom, that states lack the expertise and experience to handle their new responsibilities, and that some problems have to be dealt with at the federal level. [\[FN73\]](#) Finally, there is concern that there will not be sufficient protection for individuals, oversight of the regulatory processes, and accountability to the public.

*599 The movement outward raises a number of similar concerns. First, although the government's increasing reliance on market forces and private organizations limits the size of government bureaucracy, maximizes economic efficiency, and "wire[s] civil society ever more directly into public programs," [\[FN74\]](#) it also blurs the lines of accountability. As Gilmour and Jensen pointed out:

[w]hen public functions are delegated to private actors and are allowed to be transformed into "private" actions, public accountability is inevitably lost. Indeed, delegations of this sort may even shield such private actors from the mechanisms of private accountability as well, since they may be able to assert governmental immunities as instrumentalities of the state. [\[FN75\]](#)

Concerns have also been raised that in leaping outside the regulatory box, the American public is exposing itself to dangers and uncertainty that the traditional regulatory framework protected against. It is not yet clear whether the tradeoff is worth the price in all circumstances. Some of the risks that private regulatory mechanisms carry with them include the following: poor enforcement of the informal and formal regulations, the inadequate assessment of the qualifications of private experts, the lack of transparency of the work of the actors, and the exacerbation of industry influence. The critique for advocates has two prongs: one deals with the changes in governance generally, and the other confronts the evolving role of the lawyer.

Critiquing the changes in governance raises several questions. The first question is whether local action is sufficient in a national economy. The response to this critique is that the national government will remain an important element in advocacy strategies, but it will be supplemented by linked local action. Local collaborations are linked with other similar groups through a variety of networks and intermediaries, providing national scope and influence in setting policy and coordinating efforts within the judicial system. It is also clear that federal dollars flowing to state and local groups are essential to the viability of these groups. The reason for the increasing importance of local action is the ability of these smaller units to provide more transparency and accountability. Through the use of collaborations and shared data, linked local action can shed light upon best practices, which can be *600 utilized across the states and by many actors. Furthermore, smaller units can provide increased experimentation, which is especially necessary in this era of uncertainty.

The second question is whether the market and non-governmental agencies can provide caring, participatory, and accountable services. Collaborations, through sharing knowledge and expertise among for-profit and nonprofit organizations, advocacy groups, and governmental actors, can provide more rapid solutions than the more formal and rigid regulatory processes. Hence, incorporation of social context within organizations that deliver services can be a more efficient and responsive method to incorporate social values.

The final question is whether transparent law is possible without regulation. In response to the criticism that there cannot be law without regulation, or a sanctioning system that will require people to follow the system, is the recent discussion of "soft law." Soft law is a term used to refer to guidelines, recommendations, policy suggestions, and other government systems designed to influence behavior without imposing formal legal obligations. The recent flourishing of untraditional laws is particularly evident in the European Union, where the effort to integrate national law into a super-national system is providing a rich set of new techniques. [\[FN76\]](#)

The second set of concerns revolves around the role of the lawyer. Implicit in the new model is a loss of the vision of the lawyer as a heroic, independent figure. The lawyer is presented as embedded in a series of collaborations, perhaps working in a social service agency, with local visibility. Traditional lawyer roles, such as litigation and presenting testimony before regulatory agencies, appear to be under-emphasized. Core values of independence of judgment and avoidance of conflicts seem to be in jeopardy. This model requires advocates to engage in nontraditional activities, such as facilitating collaborations, sharing expertise with other professionals and clients, monitoring performance, and gathering data.

These lawyers can be viewed as using their skills in new ways to provide services that were poorly provided in the old regulatory system: information and action, individual assistance, and system change. In health care, for example, the data systems are balanced with the individualized grievance system to create both individual assistance and system change. The information from data can accompany advocacy to improve the performance of the physicians, hospitals, and regulators. Lawyers are still crucial in this new model. They provide the *601 knowledge of how public and private institution's function, reassure the consumers that their voices will be heard, and speak out when there are malfunctions. But they do not do it alone; they are part of a multi-faceted approach.

While lawyer skills and roles are valuable in the new model, there are still legitimate concerns about providing knowledgeable, adequately -funded lawyers to serve these functions. Legal education has not even begun to consider how to train and teach lawyers for these new careers. Moreover, opportunities for these new careers are not included within career placement offices. [\[FN77\]](#)

Funding lawyers in these new roles also presents a challenge. Litigation and regulatory appearances were considered part of the classic public interest law function. Attorney fee awards, charitable contributions, contingency fees, and occasional government grants bankrolled these activities. Similar sources of funding may not be available for the emergent lawyer roles. However, charitable foundations and some governmental agencies might view these activities as positive for their constituencies and might be inclined to fund these lawyers. For example, foundations and law school clinics are supporting environmental lawyers who spend much of their time in meetings and negotiations to proactively address potential environmental problems. [\[FN78\]](#)

V. Conclusion

There is overwhelming evidence that governance is in transition. Authority is shifting back to state and local control, the role of private actors is taking on increased importance, and new regulatory mechanisms are evolving. The transition requires disadvantaged groups and underrepresented interests to adapt how they participate in policy discussions and implementation. Although public interest lawyers have been active players in the design and implementation of social programs, they must now adapt their strategies and organizational base in order to maintain their effectiveness. This Article has provided one example of the evolution of the role of the public interest lawyer in the healthcare context and made some preliminary generalizations as to how this new role indicates a new model of public interest theory and practice.

*602 Despite the need to rethink their traditional role, the underlying values of the public interest lawyer remain. Lawyers and the law have helped achieve an inclusive society, linked regulation and markets, and balanced the roles of expertise with the desire for public participation-- lawyers will continue to play these roles. As a result, lawyers will continue to occupy an important societal role in the new governance model. Adjustment will be difficult, but it has the potential to yield positive results for lawyers, their clients, and society as a whole.

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[FN1]. See, e.g., Barbara L. Bezdek, [Contractual Welfare: Non- Accountability and Diminished Democracy in Local Government Contracts for Welfare-To-Work Services](#), 28 *Fordham Urb. L.J.* 1559, 1560-61 (2001); Matthew Diller, [The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government](#), 75 *N.Y.U. L. Rev.* 1121, 1127-28 (2000).

[FN2]. See, e.g., Jody Freeman, [The Private Role in Public Governance](#), 75 *N.Y.U. L. Rev.* 543, 672-74 (2000); Charles Sabel, et al., *Beyond Backyard Environmentalism*, *Boston Rev.*, Oct.-Nov. 1999, at 1.

[FN3]. Freeman, *supra* note 2, at 558-59.

[FN4]. Council for Pub. Interest Law, *Balancing the Scales of Justice: Financing Public Interest Law in America* 57-76 (1976).

[FN5]. *Id.* at 45-49.

[FN6]. *Id.* at 59-65.

[FN7]. *Id.* at 69-70.

[FN8]. Martin Shapiro, [Administrative Discretion: The Next Stage](#), 92 *Yale L.J.* 1487, 1497-99 (1983).

[FN9]. See, e.g., Burton A. Weisbrod, Preface, in *Public Interest Law: An Economic & Institutional Analysis* vii, vii-viii (Burton A. Weisbrod et al. eds., 1978); Shapiro, *supra* note 8, at 1496-98; see also Richard B. Stewart, [The Discontents of Legalism: Interest Group Relations in Administrative Regulation](#), 1985 *Wis. L. Rev.* 655, 666-67.

[FN10]. Kenneth J. Arrow, Foreword, in *Public Interest Law: An Economic and Institutional Analysis*, *supra* note 9,

at ix.

[FN11]. See Council for Pub. Interest Law, *supra* note 4, at 26-57.

[FN12]. *Id.* at 57.

[FN13]. *Id.* at 50-53; see also Joel F. Handler et al., The Public Interest Law Industry, in *Public Interest Law: An Economic and Institutional Analysis*, *supra* note 9, at 42, 45-47.

[FN14]. See James Allen Smith, *The Idea Brokers: Think Tanks and the Rise of the New Policy Elite* 167-89 (1991).

[FN15]. President George W. Bush is the most recent politician to adopt the rhetoric of decentralization. See James Dao, Bush, Wooing Pennsylvania, Attacks Gore's Character, *N.Y. Times*, Oct. 27, 2000, at A26; see also Stephen Labaton, Bush is Putting Team in Place for a Full Bore Assault on Regulation, *N.Y. Times*, May 23, 2001, at C1.

[FN16]. See, e.g., Charles Sabel et al., *supra* note 2, at 4; Jody Freeman, *supra* note 2, at 546-47.

[FN17]. See [Living With Privatization: At Work and In the Community](#), 28 *Fordham Urb. L.J.* 1397, 1402-03 (2001).

[FN18]. The new federalism of the Supreme Court is generally understood to have begun with Justice Frankfurter's dissent in [Monroe v. Pape](#), 365 U.S. 167, 202 (1961) (Frankfurter, J., dissenting). See also Labaton, *supra* note 15; Jeffrey Rosen, *The End of Deference*, *New Republic*, Nov. 6, 2000, at 39, 43.

[FN19]. Charles W. Holmes, *Fewer Bureaucrats, So Services Decline*, *Wis. St. J.*, Apr. 15, 2001, at A1.

[FN20]. Personal Responsibility and Work Opportunity Reconciliation Act of [1996, Pub. L. No. 104-193, § 401, 110 Stat.](#) 2105, 2113.

[FN21]. Donald F. Kettl, *The Transformation of Governance: Globalization, Devolution, and the Role of Government*, 60 *Pub. Admin. Rev.* 488, 493 (2000).

[FN22]. See Ron Haskens & Rebecca M. Blank, *Five Years After Welfare Reform: An Agenda for Reauthorization* (May 9, 2001) (unpublished manuscript, on file with author).

[FN23]. Joel F. Handler, *Down from Bureaucracy: The Ambiguity of Privatization and Empowerment* 4 (1996). Handler stated that a profound distrust of government animates the reallocation of authority in the United States. *Id.*

[FN24]. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1669, 1759-60 (1975) (discussing how administrative law has to reconcile the competing private and governmental interests in the rising privatization movement); see also Paul Krugman, *Editorial, The Public Interest*, *N.Y. Times*, Oct. 10,

2001, at A19 (commenting on the apparent shift back to the federal government in the aftermath of the September 11, 2001 attacks).

[FN25]. See generally Robert Kuttner, *Everything for Sale: The Virtues and Limits of Markets* (1997).

[FN26]. See, e.g., Paul C. Light, *The True Size of Government* 102 (1999).

[FN27]. Stewart, *supra* note 24, at 1760:

In the absence of authoritative directives from the legislature, decisional processes have become decentralized and agency policy has become in large degree a function of bargaining and exchange with and among the competing private interests whom the agency is supposed to rule. Private ordering has been swallowed up by government, while government has become in part a species of private ordering. Where the governmental and private spheres are thus melded, administrative law must devise a process, distinct from either traditional political or judicial models, that both reconciles the competing private interests at stake and justifies the ultimately coercive exercise of governmental authority. The notion of adequate consideration of all affected interests is one ideal of such a process. Stewart then provided a critique of the public interest representation model. *Id.* at 1789, 1802-05.

[FN28]. Kettl, *supra* note 21, at 492.

[FN29]. *Id.* (citing Paul C. Light study). Kettl also discussed Medicare and Medicaid as examples of privatization concluding that "[t]he government has thus built an extensive publicly funded health care system without making it publicly run." *Id.* at 494.

[FN30]. See Stewart, *supra* note 24, at 1678.

[FN31]. *Id.*

[FN32]. *Id.* at 1683.

[FN33]. *Id.* at 1684.

[FN34]. *Id.* at 1685-86.

[FN35]. See Jack M. Beermann, [Privatization and Political Accountability](#), 28 *Fordham Urb. L.J.* 1507, 1525-28 (2001).

[FN36]. See Bezdek, *supra* note 1, at 1564; Diller, *supra* note 1, at 1206-12.

[FN37]. The [Changing Shape of Government](#), 28 *Fordham Urb. L.J.* 1319, 1351 (2001).

[FN38]. See, e.g., Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 *Law & Soc'y Rev.* 941 (1999).

[FN39]. See Louise G. Trubek, [Working on the Puzzle: Healthcare Coverage for Low Wage Workers](#), 12 *Health Matrix* 157 (forthcoming 2002).

[FN40]. Id.

[FN41]. Louise G. Trubek, [Making Managed Competition a Social Arena: Strategies for Action](#), 60 *Brook. L. Rev.* 275, 292 (1994). There were some positive gains in access and preventative care that did come from managed care. [Id. at 289-94.](#)

[FN42]. See Jennie Jacobs Kronenfeld, *New Trends in the Doctor-Patient Relationship: Impacts of Managed-Care on the Growth of a Consumer Protections Model*, 21 *Soc. Spectrum* 293, 293-96 (2001).

[FN43]. See Frances H. Miller, [Health Care Information Technology and Informed Consent: Computers and the Doctor-Patient Relationship](#), 31 *Ind. L. Rev.* 1019, 1020 (1998); Gina Kolata, *Web Research Transforms Visit to the Doctor*, N.Y. Times, Mar. 6, 2000, at A1.

[FN44]. David Mechanic, *The Managed Care Backlash: Perceptions and Rhetoric in Health Care Policy and the Potential for Health Care Reform*, 79 *Milbank Q.* 35, 37-38 (2001); Mark A. Peterson, *Introduction: Politics, Misperception, or Apropos?*, 24 *J. Health Pol., Pol'y & L.* 873, 876-80 (1999).

[FN45]. See, e.g., Inst. of Med., *Crossing the Quality Chasm: A New Health System for the 21st Century* 23-35 (2001); Inst. of Med., *To Err is Human: Building a Safer Health System* 1-16 (2000), available at <http://books.nap.edu/books/0309068371/html/1.html>.

[FN46]. The Author is the senior attorney and clinical director of the Center for Public Representation.

[FN47]. See, e.g., Mark Schlesinger, *Countervailing Agency: A Strategy of Principled Regulation Under Managed Competition*, 75 *Milbank Q.* 35, 38 (1997).

[FN48]. Julie Snelder, *In Health Politics, It's Hip To Be Pro-Consumer*, *Bus. J. (Milwaukee, Wis.)*, Apr. 24, 1998, at 1.

[FN49]. *Collaboration for Healthcare Consumer. Mission Statement* (July 21, 1999) (unpublished document, on file with author).

[FN50]. This was due in part to the fact that Wisconsin's administrative procedure laws, on which OCI relied, allowed for extensive review of agency rules by the legislature, leading to long delays in the implementation of rules and the playing off of one branch of government against another. [Wis. Stat. § 227.20](#)-26 (1999-2000).

[FN51]. *Grant Document for the Physician-Consumer Partnership in Advocacy* (1999) (on file with author).

[FN52]. Cf. Thomas D. Bixby, Comment, [Participatory Rulemaking in State Government: A Managed Care Success Story](#), 65 *Mo. L. Rev.* 707 (2000) (describing managed care rule-making in Missouri, told from the perspective of a regulator).

[FN53]. Linda Greenhouse, Justices Hold Hearing in Case Concerning Patients' Rights, *N.Y. Times*, Jan. 17, 2002, at A18.

[FN54]. Kala Ladenheim et al., Nat'l Conference of Legislators (Washington, D.C.), State Purchasing for Healthcare Quality (Oct. 2000).

[FN55]. For more information see the National Conference of State Legislatures' website at <http://www.ncsl.org/programs/health/forum>.

[FN56]. *Id.*

[FN57]. *Id.*

[FN58]. See Louise G. Trubek, Informing, Claiming, Contracting: Enforcement in the Managed Care Era, 8 *Annals of Health L.* 133, 141-43 (1999).

[FN59]. *Id.* at 136-38.

[FN60]. *Wis. Stat. §§ 632.83, 632.835* (1999-2000).

[FN61]. *Id.* § 632.835 (6m).

[FN62]. Ctr. for Pub. Representation, *Monitoring the Quality of Health Care in Wisconsin* 9-10, *eratta* (2001).

[FN63]. *Wis. Stat. § 632.835*.

[FN64]. *Id.*

[FN65]. *Id.*

[FN66]. See John V. Jacobi, [Patients at a Loss: Protecting Health Care Consumers Through Data Driven Quality Assurance](#), 45 *U. Kan. L. Rev.* 705, 782 (1997).

[FN67]. *Wis. Stat. § 609.32* (1999-2000).

[FN68]. See Trubek, *supra* note 58, at 136-38.

[FN69]. See David Mechanic, Part 1: The Medical Marketplace and Its Delivery Failures, in Public Interest Law: An Economic and Institutional Analysis, supra note 9, at 350, 370-73.

[FN70]. See Trubek, supra note 41, at 290-92.

[FN71]. Ctr. for Pub Representation, supra note 62.

[FN72]. John D. Blum, [Leveraging Quality In Managed Care: Moving Advocates Back Into The Box](#), 2002 Wis. L. Rev 603.

[FN73]. Id.

[FN74]. Kettl, supra 21, at 492.

[FN75]. Robert S. Gilmour & Laura S. Jensen, Reinventing Government Accountability: Public Functions, Privatization, and the Meaning of "State Action", 58 Pub. Admin. Rev. 247, 249 (1998).

[FN76]. Francis Snyder, Soft Law and Institutional Practice in the European Community, in The Construction of Europe: Essays in Honour of Emile Noel 197 (Stephen Martin ed., 1994).

[FN77]. Deborah Howard, How to Extend Legal Education to Support Solo and Small-Firm Practitioners and Increase Access to Justice to Low and Moderate- Income Individuals and Communities (Dec. 18, 2001) (unpublished manuscript, on file with author).

[FN78]. Bradley C. Karkannian, [Environmental Lawyering in the Age of Collaboration](#) 2002 Wis. L. Rev. 555.

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