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THE NEW PRIVATE LAW: AN INTRODUCTION

JULIE A. NICE*

This introductory essay provides the backdrop against which the New Private Law Symposium developed. It briefly explains our unique symposium model, which informed much of this volume. In addition, it introduces this year's topic, the New Private Law, an idea so fresh as to resist definition. Readers can best understand what we mean by the New Private Law by understanding how we came to coin the phrase.

OUR MODEL: DENVER'S CONTEXTUALIZED SYMPOSIUM

Each year members of the University of Denver law faculty select a symposium topic from among common themes we encounter in our work. In this endeavor, we hold a series of meetings and discuss trends emerging in our teaching, research, and writing. From among common themes, we select as our symposium topic a pattern which both relates to and transcends our diverse contextual interests. We focus our group inquiry on developing the pattern in context, both to investigate its specific contextual impact and as a grounded means to explore whether a cross-contextual pattern emerges. Next, we search for willing travelers to participate in a classic symposium, an intimate round-table exchange requiring full engagement of all who attend. This format stands in stark contrast to the experience of many of us, who have attended too many conferences involving talking heads, sterile audiences, and far too little meaningful engagement. We conduct the symposium through contextualized discussions which ground our examination of how the identified pattern plays out both in context and across contexts. Our symposium process allows us to do what legal scholars do best, identifying broad patterns in the development of law in society, analyzing them, and when necessary, giving them names.

OUR TOPIC: EXPLORING THE EMERGENCE OF NEW PRIVATE LAW

As we met to develop a topic for this symposium, one theme repeatedly emerged: the growing trend toward preferring private ordering over public governance. The mainstream media had reported about experiments in privatizing traditionally government institutions such as schools and prisons. Several

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faculty members identified this pattern within their legal contexts, including the evolution of private labor dispute resolution systems,¹ the emergence of techniques for private environmental preservation,² and the increasing contractualization of family structures.³

In my work,⁴ I had observed privatization take hold even in welfare, one of the most traditionally "public" arenas. In the recent federal welfare reform legislation, Congress authorized states to provide services through contracts with charitable, religious, or private organizations.⁵ Some states and counties had been experimenting with private contracts prior to this new round of welfare reform.⁶ Proponents of welfare privatization claim that it costs less because of greater flexibility, and provides better services because workers receive performance-based financial incentives.⁷ Opponents, including unions, counter that privatization costs more, reduces the quality of services, eliminates expertise, fosters patronage and corruption, and diminishes public accountability.⁸

Welfare privatization has taken many forms. For example, some states have used competitive request-for-proposal bidding processes, while others have relied on a non-competitive single-bidder method.⁹ Some states contract with large corporations, while others rely on smaller, local entities.¹⁰ Some state agencies compete with private bidders for welfare contracts, while others simply select among private bids.¹¹ Texas has entertained bids for its contract to administer welfare from public-private partnerships consisting of Texas public agencies working in conjunction with major corporations, as well as from wholly private competitors.¹² In whatever manner Texas and other states configure their welfare privatization, many states seem firmly committed to

1. See Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051 (1996).

2. See Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077 (1996).

3. See Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996).

4. See JULIE A. NICE & LOUISE G. TRUBEK, *POVERTY LAW: THEORY AND PRACTICE* (1997).

5. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

6. *Contractors Must Learn Intricate, Varying Procurement Rules to Win Bids*, 5 WELFARE TO WORK (MII) No. 24, at 380-81 (Dec. 16, 1996) [hereinafter *Contractors*] (describing welfare privatization efforts in Texas, Michigan, Connecticut, Maryland, Indiana, and Virginia).

7. *Privatization Useful but Risky Tool in Welfare Reform*, 4 WELFARE TO WORK (MII) No. 14, at 108-09 (July 31, 1995).

8. See, e.g., AFSCME, AFL-CIO, *Government for Sale: An Examination of the Contracting Out of State and Local Government Services* (on file with the author).

9. *Contractors*, *supra* note 6.

10. *Id.*

11. *Id.*

12. Bidders for the Texas contract include the Texas Department of Health and Human Services, Texas Workforce Commission, Anderson Consulting, Electronic Data Systems, IBM, Lockheed Martin, and Unisys. See Nina Bernstein, *Companies See Profits in Welfare Law*, DALLAS MORN. NEWS, Sept. 15, 1996, at 10A; John Carlin, *How to Profit from the Poor*, INDEPENDENT (London), Sept. 29, 1996, at 12; *Contractors*, *supra* note 6; Laura Griffin, *Nation's Eyes Turn to Texas*, DALLAS MORN. NEWS, July 22, 1996, at 5B.

the basic notion that private entities can provide welfare services both more efficiently and effectively than government.¹³ This Symposium explores what the different forms of, and basic commitment to, privatization mean.

Though our inquiry revealed ubiquitous privatization, we approached privatization as a symposium topic with some trepidation for two reasons: (1) none of us was an immediate fan of the trend; and (2) some of us were skeptical about its importance in legal scholarship. Some of us viewed the trend as a political tool of lawmakers, rather than as an identified movement in legal scholarship. We wondered, nonetheless, whether this trend toward privatization might represent something more than a new technique of the political right. Might it also constitute a legal movement that could be characterized as New Private Law? If so, what are the movement's attributes? How can it best be situated within legal discourse?

To capture the gist of our conversations, we coined the phrase "New Private Law"¹⁴ and began our attempt to identify what it is. The primary characteristics of New Private Law include deregulation, decentralization, privatization, and contractualization. New Private Law reflects a normative regime which both recognizes a distinction between public and private domains and prefers the ordering of the private market to that of public decisionmakers. The preference for the "private" seems, at a minimum, to tolerate inequality and, perhaps, to reify existing power hierarchies.

In a broad-stroke attempt to situate our inquiry within the tradition of legal discourse, we began to compare New Private Law to recognized jurisprudential schools. Initially, we assumed that New Private Law shared the conservative values underlying jurisprudential movements more typically associated with the political right. We speculated that New Private Law could be an outgrowth of Formalism and Law and Economics (see Table 1). Specifically, it seemed to share core values with both Formalism and Law and Economics, especially a commitment to an individualist, pluralist, liberal ideal. Some of us were struck, however, by differences between New Private Law and these existing schools of thought. For example, New Private Law rejects Formalism's devotion to rules and categories. Unlike Law and Economics, it

13. The confidence in privatization may be premature. In a recent comparison of three states' private and public child support collection performances, for example, one study concluded that "because full-service privatization of child support enforcement is relatively new, the extent to which it offers comparable performance and cost-effectiveness remains an issue for additional evaluation over the long term." UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON THE BUDGET, HOUSE OF REPRESENTATIVES, PUB. NO. GAO/HEHS-97-4, CHILD SUPPORT ENFORCEMENT: EARLY RESULTS ON COMPARABILITY OF PRIVATIZED AND PUBLIC OFFICES 16 (1996). The study included specific findings of mixed performances:

The relative cost-effectiveness of the privatized versus public offices, however, differed among the comparisons we made. Specifically, Virginia's and Arizona's privatized offices were more cost-effective—60 percent and 18 percent, respectively—than their public counterparts. However, in Tennessee, one public office was 52 percent more cost-effective than the privatized office we reviewed, while the remaining privatized office in Tennessee was about as cost-effective as its public counterpart.

Id. at 2-3.

14. We were particularly inspired by the *Michigan Law Review's* Symposium on the New Public Law. See Symposium, *The New Public Law*, 89 MICH. L. REV. 707 (1991).

seems less concerned with efficiency and more concerned with whether an activity is conducted by the private sphere (see Table 2).

TABLE 1
NEW PRIVATE LAW AS CONSERVATIVE OUTGROWTH

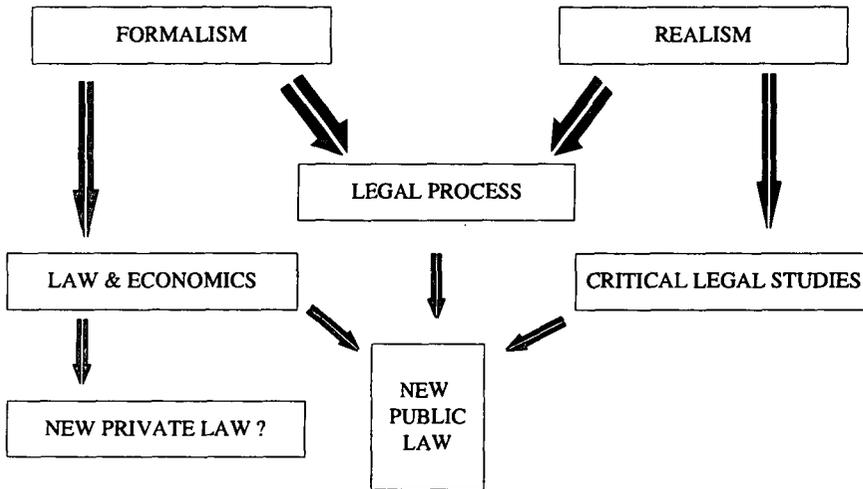


TABLE 2: CHARACTERISTICS OF FORMALISM, LAW AND ECONOMICS, AND NEW PRIVATE LAW

FORMALISM ¹⁵	LAW AND ECONOMICS	NEW PRIVATE LAW
▶ Primacy of Private Domain over Public (Liberalism)	▶ Primacy of Private Domain over Public (Liberalism)	▶ Primacy of Private Domain over Public (Liberalism)
▶ Formalism	▶ Normativism	▶ Normativism
▶ Common Law Baselines	▶ Efficiency Baseline	▶ Privatization Baseline

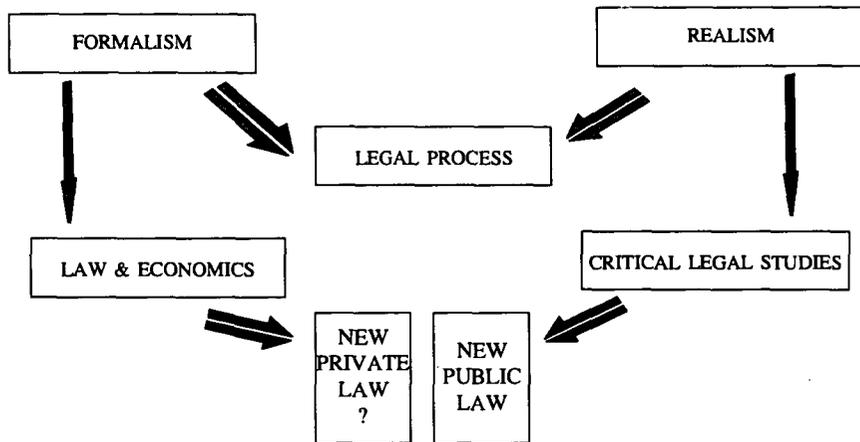
We compared New Private Law with the centrist legal movements which had attempted to synthesize values from both the political left and right. For example, in the simplest terms, mid-twentieth century Legal Process thinkers criticized Formalism as too conservative and Realism as too politicizing.¹⁶ They devoted themselves to process and institutional competence as the solu-

15. William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 717 (1991) (adapted from Table 1: Common Law Formalism, Legal Realism, and Legal Process and Table 2: From Common Law Formalism to the New Public Law).

16. See, e.g., *Id.* at 709-10.

tion to these faults. More recently, New Public Law scholars similarly criticized Law and Economics as too conservative and Critical Legal Studies as too politicizing.¹⁷ The New Public Law scholars responded to these perceived extremes by devoting themselves to normativism and pragmatism as the solution to these faults. Our comparisons between the New Private Law, Legal Process, and New Public Law yielded several additional queries. Is the New Private Law a synthesis between Law and Economics and Critical Legal Studies? If so, could the New Private Law be the conservative-oriented centrist response to the polarization between Law and Economics and Critical Legal Studies, as New Public Law may be the progressive-oriented centrist response (see Table 3)?

TABLE 3
NEW PRIVATE LAW AS CENTRIST SYNTHESIS.



How do New Private Law and New Public Law compare? Certainly New Public Law and New Private Law share several characteristics: both seem simultaneously normative and pragmatic (see Table 4). But they seem committed to different fundamental values. New Public Law seems more committed to values of community and equality, while New Private Law seems more committed to values of individualism and market integrity. Other questions seem more difficult to call. For example, to what extent do they comparatively tend to reinforce extant power relations?

17. *Id.* at 725-26.

TABLE 4:
CHARACTERISTICS OF NEW PRIVATE LAW AND NEW PUBLIC LAW

NEW PRIVATE LAW	NEW PUBLIC LAW ¹⁸
▶ Deregulation, Decentralization, Privatization, Contractualization	▶ New Forms of Regulation, or Deregulation
▶ Public/Private Distinction	▶ Denial of Public/Private Distinction
▶ Normativism	▶ Normativism
▶ Individualism	▶ Communitarianism
▶ Market Values	▶ Nonmarket Values
▶ Liberty	▶ Equality

This Symposium issue explores the potential of the New Private Law and related questions through the contextualized analyses which follow. First, Gary Peller¹⁹ and Dan Farber²⁰ explore privatization with a focus on public school administration. In the context of labor law, Katherine Van Wezel Stone²¹ explores the danger to employees when labor and employment disputes are privatized. Roberto Corrada²² and Dennis Lynch²³ comment on Professor Stone's cautionary tale. In the context of environmental law, Federico Cheever²⁴ explores the use of land trusts as progressive tools toward conservation, on which Richard Collins²⁵ comments. In the context of sexual regulation, Martha Ertman²⁶ provides a model for charting privatization as a way station on the road to progressive protection for those she identifies as sexual marginories, followed by a comment from Mary Becker.²⁷ On a broader level, Clayton Gillette²⁸ explores the potential competition between public and private provision of goods and services, with a response by Elaine Welle.²⁹

18. *See id.* at 744 (adapted from Table 2: From Common Law Formalism to the New Public Law).

19. Gary Peller, *Public Imperialism and Private Resistance: Progressive Possibilities of the New Private Law*, 73 DENV. U. L. REV. 1001 (1996).

20. Daniel A. Farber, *Whither Socialism?*, 73 DENV. U. L. REV. 1011 (1996).

21. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

22. Corrada, *supra* note 1.

23. Dennis O. Lynch, *Conceptualizing Forum Selection as a "Public Good": A Response to Professor Stone*, 73 DENV. U. L. REV. 1071 (1996).

24. Cheever, *supra* note 2.

25. Richard B. Collins, *Alienation of Conservation Easements*, 73 DENV. U. L. REV. 1103 (1996).

26. Ertman, *supra* note 3.

27. Mary Becker, *Problems with the Privatization of Heterosexuality*, 73 DENV. U. L. REV. 1169 (1996).

28. Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185 (1996).

29. Elaine A. Welle, *Opting Out of Public Provision: Constraints and Policy Considerations*, 73 DENV. U. L. REV. 1221 (1996).

Finally, Nancy Ehrenreich³⁰ explores the potential of privatization and Alan Chen³¹ critiques the existence and potential of New Private Law.

This Symposium accomplishes several objectives. It addresses an overarching topic and captures it in context. It considers whether a New Private Law exists, and if so, what characteristics define it. Finally, it examines who benefits from a New Private Law: suggesting that while privatization may generally benefit powerful parties, it may benefit less powerful actors as well. If the legal and social developments that led us to name the New Private Law continue, we hope the provocative ideas in this Symposium will provide a foundation for further exploration of its significance.

30. Nancy Ehrenreich, *The Progressive Potential in Privatization*, 73 DENV. U. L. REV. 1235 (1996).

31. Alan K. Chen, "Meet the New Boss . . .", 73 DENV. U. L. REV. 1253 (1996).

