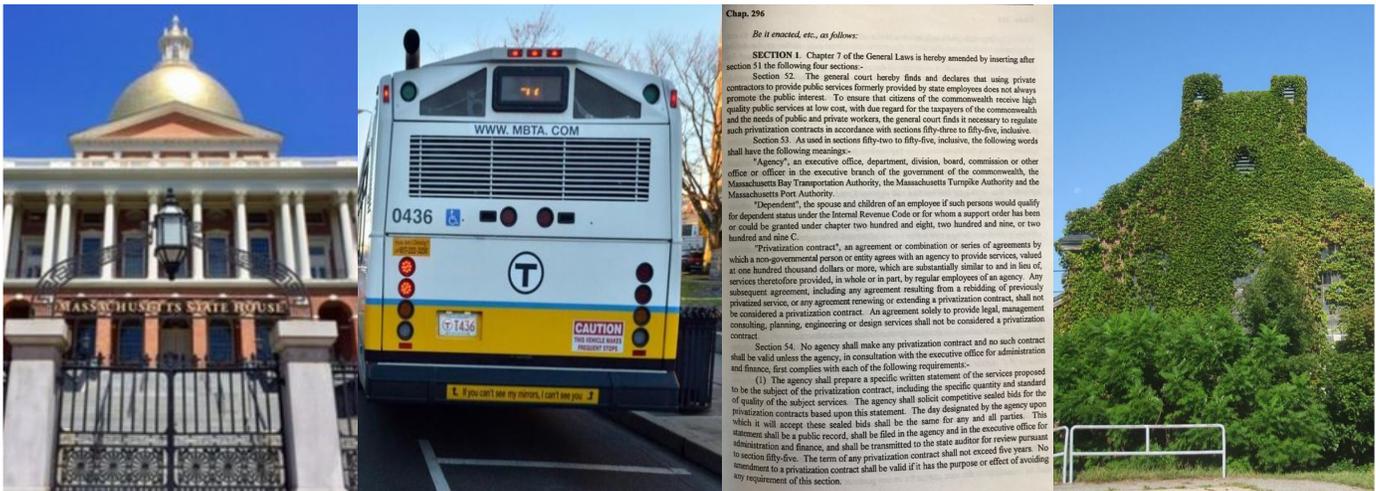


The Pacheco Law: 25 Years of Taxpayer Protection



Chap. 296

Be it enacted, etc., as follows:

SECTION 1. Chapter 7 of the General Laws is hereby amended by inserting after section 51 the following four sections:-

Section 52. The general court hereby finds and declares that using private contractors to provide public services formerly provided by state employees does not always promote the public interest. To ensure that citizens of the commonwealth receive high quality public services at low cost, with due regard for the taxpayers of the commonwealth and the needs of public and private workers, the general court finds it necessary to regulate such privatization contracts in accordance with sections fifty-three to fifty-five, inclusive.

Section 53. As used in sections fifty-two to fifty-five, inclusive, the following words shall have the following meanings:-

"Agency", an executive office, department, division, board, commission or other office or officer in the executive branch of the government of the commonwealth, the Massachusetts Bay Transportation Authority, the Massachusetts Turnpike Authority and the Massachusetts Port Authority.

"Dependent", the spouse and children of an employee if such persons would qualify for dependent status under the Internal Revenue Code or for whom a support order has been or could be granted under chapter two hundred and eight, two hundred and nine, or two hundred and nine C.

"Privatization contract", an agreement or combination or series of agreements by which a non-governmental person or entity agrees with an agency to provide services, valued at one hundred thousand dollars or more, which are substantially similar to and in lieu of, services theretofore provided, in whole or in part, by regular employees of an agency. Any subsequent agreement, including any agreement resulting from a rebidding of previously privatized services, or any agreement renewing or extending a privatization contract, shall not be considered a privatization contract. An agreement solely to provide legal, management consulting, planning, engineering or design services shall not be considered a privatization contract.

Section 54. No agency shall make any privatization contract and no such contract shall be valid unless the agency, in consultation with the executive office for administration and finance, first complies with each of the following requirements:-

(i) The agency shall prepare a specific written statement of the services proposed to be the subject of the privatization contract, including the specific quantity and standard of quality of the subject services. The agency shall solicit competitive sealed bids for the privatization contract based upon this statement. The day designated by the agency upon which it will accept these sealed bids shall be the same for any and all parties. This statement shall be a public record, shall be filed in the agency and in the executive office for administration and finance, and shall be transmitted to the state auditor for review pursuant to section fifty-five. The term of any privatization contract shall not exceed five years. No amendment to a privatization contract shall be valid if it has the purpose or effect of avoiding any requirements of this section.

Elliott Sclar

Michael Snidal

David Kassel

December 14, 2018

Executive Summary

The Pacheco Law: 25 Years of Taxpayer Protection

In commemoration of the Pacheco Law's 25-year anniversary, this paper commences a larger project built around a careful study of public contracting in an era of privatization. We propose to draw lessons from the Massachusetts experience with the Pacheco Law along with experiences from similar policy initiatives elsewhere to inform a national dialogue on good public management. This is especially critical at a time when the institutions of democratic public service are under severe stress.

A careful review of the context and intellectual history that led to the passage of the Pacheco Law, assessing its benefits along with critiques of its shortcomings, provides important insights into the ways that public service contracting, when properly done, can improve the production and management of public services. By way of contrast the lack of such statutory guidance makes abuse of public contracting far easier.

Major findings:

- The Pacheco Law emerged as a guardrail against ideological, imprudent, and corrupt contracting initiatives that commenced under the Weld Administration.
- The Pacheco Law has not been a hinderance to privatization. It has allowed privatization in 75 percent of the cases in which the Law has been invoked enabling over \$60 million in contracting savings.
- The Pacheco Law has not been invoked in all aspects of outsourcing human services. There has been a missed opportunity to strengthen the law to ensure smart cost accounting and quality of service in the outsourcing of all human services.
- A widely publicized study of the Pacheco Law by the Pioneer Institute badly misunderstood the workings of the statute and used a misleading cost analysis to impugn its integrity.
- Had the Pacheco Law not been in effect, and the MBTA privatization of bus routes in 1997 proceeded, the Commonwealth of Massachusetts could have lost well over \$200 million as of 2018.

Page 1	The Pacheco Law: 25 Years of Taxpayer Protection
Page 2	A Brief History: The Pacheco Law
Page 11	The Pacheco Law in Action
Page 16	The Pacheco Law and Human Services
Page 19	Pioneer on the Pacheco Law: Misleading the Taxpayer for 25 years
Page 23	The Pacheco Law: Beyond Twenty-Five Years

The Pacheco Law: 25 Years of Taxpayer Protection

25 years ago, the Commonwealth of Massachusetts passed a law requiring state agencies to establish quality of service and cost savings before in-house services and labor were contracted out. An Act Further Regulating the Purchase of State Services, Chapter 296 of the Acts of 1993, popularly known as the “Pacheco Law” or the “The Taxpayer Protection Act,” was the first of its kind and remains precedent for smart government management today.

The Law was born in a time when state budgets were bridled by reductions in Federal funding; when a dogma that substituting private service for public employees would both improve quality of services and lower taxes reigned supreme. The Pacheco Law sought not ideology but rational order; it did not oppose privatization in theory but privatization as it was being practiced. It simply required quality and cost savings be proven before work being done by state employees be outsourced.

Over 25 years, the Law has faced no shortage of criticism. Some has been justified; certain agencies and services—particularly human services—have continued to be outsourced without the law being invoked. The costs and benefits of these contracts have not been thoroughly vetted. However, contrary to projections advanced by libertarian “think-tanks” like the Pioneer Institute and too often accepted at face value by media outlets including the *Boston Globe*, the Pacheco Law has not prevented cost effective outsourcing.

Rather, the Pacheco Law has allowed wise and appropriate outsourcing proposals. To date it has saved the Commonwealth well over \$130 million.

Specifically, since the Law’s passage, numerous agencies and organizations have attempted to contract out 19 separate services that were reviewed by the Office of the State Auditor (OSA) as per the requirements of the Act. Twelve of these proposals have been approved, four denied, and the other three not subject to the Law. Our detailed examination of these audits reveals the Law has enabled over \$60 million in contracting savings while preventing, at a minimum, \$73 million in taxpayer losses.

The Pacheco Law incentivizes smart contracting decisions and competent public management. It requires public managers to justify change via documented cost savings and or improved services. It

offers legislators a tool with which to keep a critical eye on contracting; an area of public expenditure that is also vulnerable to high degrees of waste, fraud, and abuse.

Most importantly, the Law, and by extension policy initiatives that can flow from it, avoids stepping into the ideologically dead-end and overly stereotyped public versus private debate. At its core the Pacheco Law is simply a requirement that privatization must always begin with sound cost accounting. This silver anniversary provides a ripe opportunity to review the Law and its outcomes and commence a national dialogue on how to improve the quality of service delivery for all Americans and the lives of the public and private employees who deliver them.

I. A Brief History: The Pacheco Law

The Pacheco Law emerged as a response to the neoliberal drive for “privatization” of public services that was in full flower across the globe in the late 1980s and early 1990s. Libertarian proponents of privatization promised more for less; better services and lower costs for taxpayers. Nowhere was this drive more staggering than in the Commonwealth of Massachusetts—a bastion of liberalism and the only state to have voted for George McGovern for president in 1972. Governor William Weld entered the State House in 1991 with an unabashed conviction that less direct government service provision guaranteed better outcomes.

Privatization was in many ways new, but it rested on contracting and outsourcing which were, of course, as old as the Republic. The difference was that historical contracting was a matter of practical management whereas neoliberal contracting or “privatizing” had become a matter of ideology, a belief that the private sector is always competent and the public sector inherently deficient.

The larger and more relevant argument concerns the organizational forms needed to deliver various services for which the public sector must maintain responsibility. Within this context legitimate arguments have long shifted back and forth over whether public or private provision of specific services would better serve the public. The financial failures of privately built turnpikes in the 18th and 19th centuries, for example, led to the notion that public roads are important public goods regardless of whether they can pay for themselves via user fees or need public support.¹ The

¹ Wood, Frederic James, and Ronald Dale Karr. *The Turnpikes of New England*. Branch Line Press, 1997.

resolution that emerged was that actual construction could be outsourced but the ownership and management of these vital public goods would remain government domain.

Similarly, the evolution of mental health services from confinement of the mentally ill in largely public hospitals has evolved with our understanding of mental illness and the advent of psychotropic medications. It was in that context in the 1960s and 1970s, that the Commonwealth began contracting out mental health and youth services. There was a growing sentiment that program experimentation was desperately needed and that civil service requirements had become restrictive relative to the forms of care required. The national movement for deinstitutionalization became part and parcel of a larger concern that state institutions were now failing society's most vulnerable. Government run facilities were now confining citizens who could be better cared for with individualized treatment, by their families, and in their community. These were deserved and legitimate concerns. In this case the balance of public and private shifted in response to the nature of the service provided

Shifts from in-house service provision to contract provision prior to the Weld years were taking place but this was occurring in response to changes in the nature of service delivery; not as an ideological and political attack on public employees. Under the Dukakis Administration, preceding Weld, the Commonwealth began privatizing "off road" transportation functions including the cleaning of the Massachusetts Bay Transit Authority (MBTA) facilities and highway grass cutting as well as some human services – but these were undertaken mainly in the name of cost savings, not a vitriolic anti-government sentiment. Moreover, they were generally carefully negotiated with union leadership and cautious of the need to both provide high quality services, especially around health care for the vulnerable, and to support decent employment².

In contrast, Weld's no holds barred approach to privatization received nationwide attention. A *New York Times* article, "Weld Denting Massachusetts' Liberal Framework," had chronicled the Administration's transformative approach to state services in just nine months³. The Governor had been advised by David Osborne, whose book Reinventing Government, which advanced the hackneyed notion that governments were inefficient bureaucracies that could only be saved by the

² Pacheco, Marc. Personal Interview. 29 Nov. 2018.

³ Butterfield, Fox. "Weld Denting Massachusetts' Liberal Framework." *New York Times* 17 Oct. 1993: Archives.

entrepreneurial spirit of an untethered free market, was assigned reading for Administration staff⁴. John Moffit, the chief secretary of the Governor's cabinet, had turned the Special Research Officer, a position initially created to vet gubernatorial appointments, into a position to research privatization opportunities. Privatization proposals flew in from near and far; from local foundations like the Pioneer Institute and antigovernment hard hitters like the Heritage Foundation and the Cato Institute, the latter which declared Weld the best Governor in America⁵. Peter Nessen, the Secretary of Administration and Finance, sent out a memo to all cabinet members and agency heads requesting they pursue opportunities to privatize⁶.

Less than half a year into office, the Administration convened a "Privatization Summit." It might as well have been a summit for reflection; their "anything goes" approach to contracting was well under way. Contracting was to be made easy. The charge to agencies was underwhelming to say the least; if the services could be distinctly defined in an RFP, if the privatization had measurable performance standards, and if more than just one vendor was able to perform the service, criteria had been established to propose privatization. The Administration did consider a few criteria/scenarios where contracting would not make sense, but these were generally vague (e.g. for "core functions" of government) or political (e.g. "where legal barriers exist" or "when done in conjunction with service cuts"). Specific standards, benchmarks, and goals to ensure the public would benefit from the privatization were not a priority. Competition, the ideological rationale for all of this, wasn't even encouraged.

Noting that Massachusetts had the highest per inmate health care costs in the nation, the Administration began with privatizing prison health care, setting off some 30 rapid-fire privatizations completed halfway into Weld's first term and before the Pacheco Law became a statute. The largest of these projects was the contracting out of highway maintenance in eastern Massachusetts and outsourcing made its greatest headway in human services (discussed in detail in Section III) and transportation where outsourcing was spearheaded by two libertarian ideologues: James Karasiotes, first Highway Commissioner and later Secretary of Transportation; and current Governor Charles Baker, at the time Secretary of Human services then appointed to Secretary of

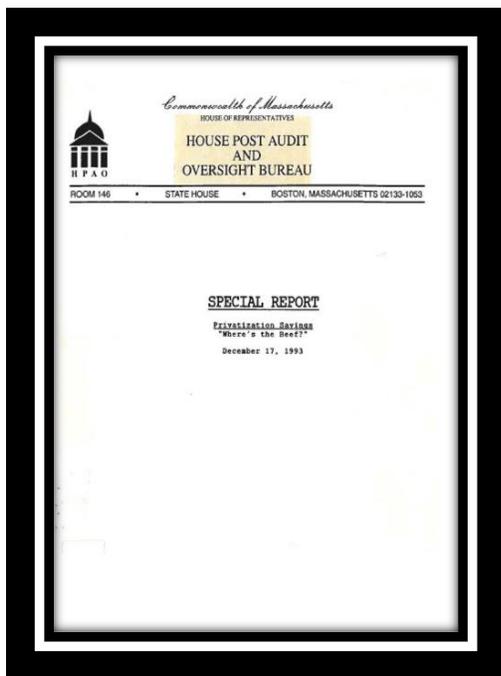
⁴ Wallin, Bruce A. "Privatization of State Services in Massachusetts: Politics, Policy, and an Experiment That Wasn't." *conference "Privatization: Trends, Evidence, and Alternatives," Economic Policy Institute, Washington, DC, January*. Vol. 11. 2001.

⁵ Jacoby, Jeff. "Bill Weld's Revolution That Wasn't." *City Journal* 6 (1996): 49-59.

⁶ Wallin, Bruce (2001).

Administration and Finance and who came highly recommended to the Administration by the Pioneer Institute.

Services once accepted as governmental domain were being sent to the contracting chopping block with a dearth of detailed information, numbers, and analysis⁷. Contracts were ostensibly sold as a cost-effective efficiency; as improvements for the public sector to lower costs for taxpayers. It was in direct response to this face-value claim that the “Taxpayer Protection Act” would take its name.



A Special House Audit Report challenges the supposed benefits of ideological privatization in December 1993 (Massachusetts State House: 1993)

Sworn into the Massachusetts Legislature in January of 1989, Representative Marc Pacheco (D) watched the harried contracting of human services unfold in his own backyard, Taunton. While deinstitutionalization was based on legitimate concerns, it was also being used as cover for an underlying agenda. Antigovernment ideological purity was now taking a toll. Families and individuals who required programming and assistance for special needs were secondary to the quest of shedding state sponsored services and responsibilities.

⁷ House Post Audit and Oversight Committee: Commonwealth of Massachusetts, House Post Audit and Oversight Committee, 1993a. "Privatization Savings: Where's the Beef." December 17.

The closings of the Paul A. Dever State School in Taunton and nearby Lakeville Hospital had hastily pushed families dependent on chronic care away from places they had called home for decades. Parents were being harassed into removing their children from facilities; the quality of the new caregivers was in question, and state workers were being left under-considered and unemployed. There was no strategy and no concern for the taxpayer and no tracking of the displaced -- many suspected of being left homeless. The equipment at Lakeville, for example, which had recently been upgraded with Commonwealth dollars, was given away to private Parkwood Hospital in New Bedford at no cost. This imprudence towards citizens, paired with job loss associated from both the national recession and the regional closings, was suffocating the Taunton District⁸.

This story was neither unique to these institutions nor confined to Taunton. Facilities across the Commonwealth with millions of dollars invested into them under the Dukakis Administration, including the Northampton State Hospital and Belchertown State School, were also being shuttered -- their failures as the guise to give away public assets and equipment to private companies and profits. Without a doubt, state facilities needed to be reformed and rethought; many had deplorable histories of restricting individuals with developmental disabilities, including children, from mainstreaming into society. But reform was eschewed; what would happen to these families and children, making sure the public got a return on taxpayer funded equipment, not adequately considered.



Equipment bought with taxpayer dollars from the Lakeville State Hospital was given away to the private Parkwood Hospital in New Bedford at no cost (Wikimedia Commons)

⁸ Pacheco (2018).

Deinstitutionalization was a mask and, to no surprise, the conversation did not stop in its wake. In addition to new transit sector and human services privatization schemes, Pacheco also began hearing rumblings of the privatization of higher education. While legitimate concerns existed regarding qualified management across all public entities, a dialogue from the Weld administration on how to locate the root causes of failed management and fix them remained glaringly absent. There was never an explanation as to why the public sector was inveterately incapable as was alleged. Only the private sector, citizens were told, could reform poor service.

Reducing the Commonwealth's budget became the singular variable of analysis. Privatization in the name of budget cutting, however, was also insincere. The Weld Administration wanted to have their cake and eat it too. They attempted to take every piece of management off the public budget books--even if corresponding cost increases related to outsourcing were showing up in vendor operated accounts or in the form of bonding--for which the taxpayer would ultimately receive the bill.

Scandals and corruption were the icing on the cake. While the *Boston Globe* Editorial Board had generally been supportive of the Administration's brash approach to trimming government, their "Spotlight" series had unveiled the network of corruption littering the road to privatization both literally (the House Post Audit and Oversight Committee revealed that one vendor hired to pick up trash and mow the lawn in Essex County was instead mowing the trash on taxpayer dollars);⁹ and figuratively: the Weld Administration and its privatization arrangements were deeply conflicted by special interest money, lobby motivated lunches, and massive corporate campaign donations¹⁰.

Moffit, for example, continued to operate as an advisor to Weld simultaneously thriving as a consultant who helped corporations and executives navigate the very state agents he had previously hired. Peter J. Berlandi, close advisor to and chief fundraiser for the Governor, and regular interlocuter with Kerasiotes, was working on behalf of corporations like Bechtel Corp., which was given a two-year, \$250 million contract to co-manage road construction and highway projects.¹¹ Money was disappearing, accountability was nowhere to be seen. The *Globe's* spotlight series was critical in educating the public on the need for better public management to rein in the double billing, revolving doors, and kickbacks.

⁹ Sclar, Elliott D. *You don't always get what you pay for: The economics of privatization*. Cornell University Press, 2001, 33-36.

¹⁰ The Spotlight Team. "Weld finds support in special interests." *Boston Globe*. 12 Dec. 1993: Archives.

¹¹ The Spotlight Team "Weld advisor has veiled consulting practice." *Boston Globe*. 13 Dec 1993: Archives.



This series was prepared by the Spotlight Team: Editor Gerard O'Neill, reporters Bruce Mosk, Brian C. Mooney and Adam Fortman, and researcher Karen Douglas. Today's story was written by O'Neill.

Weld finds support in special interests

Corporate donations, plugged-in consultants, easy access mark GOP influence game

First of three parts
On a February day last year, a thick package of \$1,000 checks landed at a Winter Street office in Boston and instantly made the state's leading auto insurer the biggest donor to the reelection of William F. Weld.

In one day, executives of Commerce Insurance Co. had put together \$42,000 for the governor, an unprecedented contribution from a single company that the

business with special interest money. Why would the employees give so much, and what does the company get out of it?

To hear Commerce's lawyer tell it, the company's executives and lobbyists seek only a healthy economic climate.

But industry insiders tell a different tale. Using the power of political money, they say, the company president and his top advisers have become the state's pre-

mier-most seat at all major decisions made by the state Division of Insurance.

Last year, for example, Commerce won a low-profile battle for higher auto-insurance rates, benefiting from an 110-hour tip-off within the administration. A similar windfall for the industry reared nearly \$3 million in profit to Commerce.

Commerce's trust doesn't square with the governor's pronouncements that his administration is open to all careers and

Democratic Legislature - and its cautious with lobbyists and reliance on special interest money.

A five-month investigation of the administration showed a reelection campaign big deep in special interest money, and found regulations lurching with lobbyists, unfettered access to state officials, and high-powered companies pulling together massive donations from executives for between \$10,000 and \$40,000 a shot.



Gov. Weld is aided by "unfettered" contributions.



This series was prepared by the Spotlight Team: Editor Gerard O'Neill, reporters Bruce Mosk, Brian C. Mooney and Adam Fortman, photographer John Timonick and researcher Karen Douglas. Today's story was written by Mosk.

Weld helper has veiled consulting practice

Fund-raiser Peter Berlandi's business appears to trade heavily on his special ties to the governor

Second of three parts

Just days after Gov. Weld moved into his corner office on Beacon Hill promising to revolutionize the way state government does business, Peter J. Berlandi set up his own office downtown and began conducting business in a more traditional State House style.

Berlandi, the governor's campaign chairman and superstar fund-raiser, opened a secretive influence-peddling business with two top Beacon Hill lobbyists.

As Weld's fund-raiser, Berlandi is the governor's traffic cop at the busy Massachusetts intersection of money and politics. He is in a position to direct contributions from top corporate officials into the governor's coffers and simultaneously route corporate business to himself. The traffic pattern appears to pay off for him, his clients and the governor.

Weld said he sees nothing wrong with his campaign chairman's corporate consulting business, but then he admitted he knows virtually nothing about it and does not want to know. He said he is content to

trust his aides and Berlandi to set appropriately.

This eyes-closed attitude has given Berlandi the latitude he needs. He works the administration on behalf of his clients while going to great lengths to cover his tracks. Not only does he keep the identity of his clients a secret, he hides the true nature of the work he does for them.

What emerges is a pattern of deception.

Berlandi insisted he has never called top regulators in the Weld adminis-

tration on behalf of his clients, yet one of those regulators remembers Berlandi calling her about Revere Insurance Co. and other firms concerning "specific matters relating to my regulatory oversight."

Berlandi said he does no government relations work, but Weld's secretary of transportation and construction views Berlandi as an intermediary between him and the company co-managing the \$7.7 billion Central Artery/Third Harbor Tunnel project for the state.

Democrats Roosevelt and Barrett, each of whom plans a gubernatorial challenge, criticize Weld for accepting campaign contributions from special interests while taking a public position as a reformer. Page 19.

SPOTLIGHT Page 24



This series was prepared by the Spotlight Team: Editor Gerard O'Neill, reporters Bruce Mosk, Brian C. Mooney and Adam Fortman, and researcher Karen Douglas. Today's story was written by Mosk.

Membership in Weld's "family" of advisers gives Moffitt and Tennant extraordinary access. It's a level of access not only beneficial to their business, but also unavailable to their competitors.

GOP aides find profit through revolving door

Continued from Page 1

Weld said he sees nothing wrong with his campaign chairman's corporate consulting business, but then he admitted he knows virtually nothing about it and does not want to know. He said he is content to trust his aides and Berlandi to set appropriately.

But clean-government advocates said the three-day audit, which detailed the millions Weld has raised from special interests and the way key political aides trade on their access as business consultants, showed something was rotten in the state of Massachusetts. They called for the governor to distance himself from friends and associates with special interest ties.

Speaking to reporters yesterday afternoon, Weld called the Spotlight reporting "a good review" that underscores the need for campaign finance reform, but added: "I didn't see anything there that was a violation of laws or regulations."

Asked if he planned any corrective action, Weld replied: "I am going to continue to support the Common Cause set of campaign finance reforms that we testified in favor of last year and this year." He also said he would support legislation "to extend lobbying registration requirements to people who deal with executive agencies."

But Weld repeatedly said he wouldn't issue new, stricter rules to guide the conduct of his own administration or political advisers. "I see a lot of trouble," he said. "I think that the law has to apply to everybody."

The real standard of good government, Weld insisted, was whether decisions were made impartially. "The most important thing is to conduct public office without fear or favor," Weld said. "It should not make any difference who knows whom and every decision should be made on the merits."

Reminded of his reform rhetoric during the



Team players
Peter J. Berlandi, Weld's chief fund-raiser and another member of the revolving door, using it often to move back and forth between the political and business worlds. Weld they work as consultants to lobby, they remain close and loyal to the governor and his business and will be active in their campaign next year.



My friendship with the governor, does that hurt me in business... It's crazy to think it does, but is that why I'm ultimately successful? No.

Weld said he sees nothing wrong with his campaign chairman's corporate consulting business, but then he admitted he knows virtually nothing about it and does not want to know. He said he is content to trust his aides and Berlandi to set appropriately.

But clean-government advocates said the three-day audit, which detailed the millions Weld has raised from special interests and the way key political aides trade on their access as business consultants, showed something was rotten in the state of Massachusetts. They called for the governor to distance himself from friends and associates with special interest ties.

Speaking to reporters yesterday afternoon, Weld called the Spotlight reporting "a good review" that underscores the need for campaign finance reform, but added: "I didn't see anything there that was a violation of laws or regulations."

Asked if he planned any corrective action, Weld replied: "I am going to continue to support the Common Cause set of campaign finance reforms that we testified in favor of last year and this year." He also said he would support legislation "to extend lobbying registration requirements to people who deal with executive agencies."

But Weld repeatedly said he wouldn't issue new, stricter rules to guide the conduct of his own administration or political advisers. "I see a lot of trouble," he said. "I think that the law has to apply to everybody."

The real standard of good government, Weld insisted, was whether decisions were made impartially. "The most important thing is to conduct public office without fear or favor," Weld said. "It should not make any difference who knows whom and every decision should be made on the merits."

Reminded of his reform rhetoric during the

Weld declines to act on Spotlight report

By Scot Lehigh
GLOBE STAFF

Gov. Weld yesterday praised a Globe Spotlight report that painted a picture of special-interest influence in his administration, but said he saw no need to impose higher standards unilaterally on his aides and advisers.

But clean-government advocates said the three-day audit, which detailed the millions Weld has raised from special interests and the way key political aides trade on their access as business consultants, showed something was rotten in the state of Massachusetts. They called for the governor to distance himself from friends and associates with special interest ties.

Speaking to reporters yesterday afternoon, Weld called the Spotlight reporting "a good review" that underscores the need for campaign finance reform, but added: "I didn't see anything there that was a violation of laws or regulations."

Asked if he planned any corrective action, Weld replied: "I am going to continue to support the Common Cause set of campaign finance reforms that we testified in favor of last year and this year." He also said he would support legislation "to extend lobbying registration requirements to people who deal with executive agencies."

But Weld repeatedly said he wouldn't issue new, stricter rules to guide the conduct of his own administration or political advisers. "I see a lot of trouble," he said. "I think that the law has to apply to everybody."

The real standard of good government, Weld insisted, was whether decisions were made impartially. "The most important thing is to conduct public office without fear or favor," Weld said. "It should not make any difference who knows whom and every decision should be made on the merits."

Reminded of his reform rhetoric during the



GOV. WELD
To back previous reform rules

1990 campaign, Weld said that he and Lt. Gov. Paul Cellucci "had been pretty quick to refer matters over to the attorney general or the State Ethics Commission or OCPF [the Office of Campaign and Political Finance] if we saw a hint of trouble."

However, Stephen Stephano, executive director of Citizens for Participation in Political Action, said Weld's explanation was inadequate.

"The fact that Weld ran as a reformer means that his standard should be higher than the law and he should be advocating laws that are very strict on the issue of revolving doors," he said. "Until such a law is passed, he needs to set a good example, and if he doesn't, voters should question his sincerity."

Although Weld seemed relatively unconcerned about revelations of special interest access, some other political figures said the revelations could

hurt a governor who came to power promising to clean up Beacon Hill.

"I don't think these stories are fatal at all, but what they do take away is the kind of moral high ground that I think is very important in politics," said former US Sen. Paul Tsongas.

Weld's ideological allies tended to be muted or strained in his defense.

House Minority Leader Peter Forman (R-Plymouth) said he thought the appearance was worse than the reality, but added: "I think you have to be more aware that this stuff can happen and the people under him have to be more aware of how their actions can reflect on the governor."

Barbara Anderson, executive director of Citizens for Limited Taxation, said the stories didn't make the governor look bad - but only because Weld, she said, was honestly oblivious to what was happening in his administration.

Anyone who knew Bill Weld knows he has been living on another planet," Anderson said. "I think that not knowing and not wanting to know is a sin too, but it is not as bad as lying."

Former Republican Gov. Francis Sargent, a strong Weld supporter, said he had been "surprised to read some of those things" about special interest wheeling and dealing. Asked if Weld would now be able to run for reelection in 1994 as a reformer, Sargent replied: "That is his problem - but my hunch is that he will come out clean."

CPA's Stephano said Weld should cut off any political relations with campaign aides, such as campaign chairman and chief fund-raiser Peter Berlandi, who now consults with special interests on government issues.

The Spotlight report said Berlandi displayed "a pattern of deception" in denying he had interacted with the administration on behalf of his consulting clients. But Weld took exception to that description, saying the word "deceptive" just doesn't apply to him in my book.

The Boston Globe Spotlight Team Exposes contracting graft endemic in the Weld Administration (Boston Globe Archives: 1993)

Over his first term Pacheco had frequent conversations with labor leaders, social service advocacy providers, and constituents to explore different strategies to establish a guardrail against ad-hoc and unaccountable contracting; to curtail this nonsense. The intention was not to jettison privatization but simply to make sure contracting decisions were being made in the interests of taxpayers, patients, and workers; to implement a process to understand all the facts, costs, and benefits of

contracting vs keeping a service in house. One of these conversations was with Chris Gregory who at the time was working on behalf of many of the families affected by the closure of the Paul A. Dever State School. Gregory had stumbled upon statutes that had been adopted to make decisions about federal contracting and passed them on to Senator Pacheco¹².

It was this Federal Office of Management and Budget (OMB) A-76 Circular that would become the frame and inspiration for An Act Further Regulating the Purchase of State Services, Chapter 296 of the Acts of 1993 popularly known as the “Pacheco Law” or the “The Taxpayer Protection Act.”

The A-76, initially issued in 1966 and revised several times since, had been formulated in response to decades of competition between the federal government and the private sector. It has roots as deep as the 1930s when the House of Representatives attempted to establish a committee on “government competition with private enterprise.” However, it was the Eisenhower Administration that first issued numerous statements supporting the idea that the federal government rely on the private sector for required goods and services¹³

Circular A-76 is a policy statement, a requirement for agencies to submit inventories of their commercial activities to OMB and a guide for determining whether government agency or private business shall perform commercial activities. In brief, it informs agencies whether to “make or buy” a commercial service. The circular is based in free market ideology: government should not compete with citizens; a competitive enterprise system and individual freedom are crucial components of national economic power. However, in relying on the private sector for needed commercial services, the policy simply demands that the American people receive maximum value for their tax dollars and be free from the forces of monopoly competition and contracting.

Pacheco first introduced a bill-based on the A-76 as a member of the House in June of 1992. The original proposal required that contracts advanced by state agencies document a 10 percent taxpayer savings with no decrease in level of service and that health insurance be provided to employees of

¹² Pacheco (2018).

¹³ The Bureau of the Budget (which preceded the OMB) in 1955, Bulletin Number 55-4, stated: “It is the general policy of the administration that the Federal Government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels”(11). See Halchin (2007).

the contracting vendor. Weld branded the proposal “the anti-privatization bill” and it did not have enough traction to pass in the Senate and override the Governor’s veto¹⁴.

However, a growing concern around corruption ensuing from the Spotlight series, in addition to the Weld Administration’s brazen attempt to privatize a host of additional services and responsibilities via the budget process, sparked the seeds of a coalition including labor leaders, major legislators, social service advocacy groups and concerned citizens. This coalition held countless meetings, gathered documents, and ultimately embolden those in and around the State House to act.

When Pacheco ran for State Senate in 1992, his bill became the central talking point of his campaign. He and House Majority Whip, Joan Menard, emboldened by this unprecedented collation, slowly turned the tables and ultimately garnered the votes to pass what would become the Pacheco Law. Key to their success was to remove the greater ideological debate from the legislation and the campaign that fueled it – to make the issue not about public or private but about accountability and good management. Moreover, the growing coalition put together a series of public radio campaign ads which outlined the need for accountability in contracting and effectively began to shift public opinion on how the Weld Administration was dealing with transparency in contracting.

The final and amended bill was passed in both houses of the legislature, vetoed by the Governor, and overridden into law on December 15, 1993.

The legislation requires that that contracts pursued by state agencies must first be approved by the Office of the State Auditor (OSA). The OSA must certify that the cost of performing the service by the private vendor is less costly than having the work done by state employees and that the quality of services will be equal or better. In other words, it requires the proponents of privatization document “market efficiency.” Additionally, the Law puts a five-year sunset on any contract; guarantees employees receive the average private sector or state wage (whichever is lower); requires positions of contracted activities be offered to qualified state employees; and has conflict of interest, affirmative action, and equal opportunity provisions.

¹⁴ Pacheco (2018).

The legislation was not the same as the original proposal -- the 10 percent taxpayer savings provision meant to protect the public from underbidding, for example, was removed. However, the bill was the first of its kind, and it remains largely intact today. Most importantly the Law remains in the taxpayers' interest.

II. The Pacheco Law in Action

For 25 years, various agencies and organizations have attempted to contract out 19 separate services that have been reviewed by the Office of the State Auditor (OSA) under the authority of the Pacheco Law. Twelve of these proposals have been approved, four denied, and three determined they were not subject to the Law. Our detailed examination of these audits reveals the Law has enabled over \$60 million in contracting savings while preventing, at a minimum, another \$73 million in taxpayer losses.

The Pacheco Law does not discourage wise contracting decisions, it simply avoids outsourcing against the taxpayers' interest. Since its inception, operations as large and complex as road maintenance for an entire county (Worcester) and as small and simple as bookstore operations for community colleges (Holyoke, Dartmouth, Quinsigamond, and North Shore) have been outsourced with a financial benefit to the Commonwealth. In each of these cases, the Law has compelled public managers to engage in a dialogue with a competent public auditor and justify change in the name of either cost savings and/or improved services.

The Law has permitted seventy-five percent of proposed privatizations. It has also been critical in protecting taxpayers from cost ineffective outsourcing on four occasions: highway maintenance in central and western Massachusetts by the Massachusetts Highway Department (MHD); the cleaning and maintenance of bus shelters by the Massachusetts Bay Transportation Authority (MBTA); the operation of bus routes from the Charlestown and Quincy Garages by the MBTA; and the operation of Information and Technology services by Roxbury Community College. In all these cases the OSA has not prevented privatization. Rather the OSA has requested the agency resubmit a proposal that has adequate information to demonstrate it is in the public interest.

The first proposal denied by the Pacheco Law was by MHD to outsource two of five highway maintenance contracts in central and western Massachusetts to a third party in August 1996. The remaining three of the five contracts MHD intended to keep in house. The proposal was denied

because the agency failed to demonstrate that the contracting costs would be less than the costs of keeping the two contracts in house. MHD’s analysis was specious: their cost comparison had established a “contracting-out” price and an “in-house” estimate but it was using the same cost data, based on the costs of activity they were keeping in house, for both. Therefore, the OSA correctly determined that for MHD to properly show costs savings they would need to identify and segregate the actual costs of outsourcing and compare them to the in-house numbers. The proposal was also rejected because MHD provided “no information whatsoever” on whether the safety or quality of the maintenance would be equal or better to the existing service and as they failed to submit information on whether the contractor and its supervisory employees had historically complied with Federal and State Laws¹⁵

Month	Year	Decision	Privatization Proposal	Agency
March	1995	Bypassed	Mail Opening Services	Department of Revenue
June	1995	Not subject	Parking Lot Services	Metropolitan District Commission
January	1996	Approved	Storage and Retrieval of Records	Department of Emp and Training
June	1996	Approved	Property Management/Development	MBTA
August	1996	Denied	Highway Maintenance	Massachusetts Highway Dept
September	1996	Approved	Food Services	Holyoke Community College
December	1996	Denied	Cleaning/Maintenance Bus Shelters	MBTA
December	1996	Approved	Maintenance of State Roads	Massachusetts Highway Dept
June	1997	Denied	Bus Routes: Charlestown and Quincy	MBTA
June	2000	Approved	Management of Bookstore	University of Massachusetts Amherst
February	2004	Not subject	Privatize Radiology/EKG Department	Soldiers' Home in Holyoke
April	2004	Approved	Seasonal Passenger Service	Nantucket Steamship Authority
August	2004	Approved	Pharmacy Services	Soldiers' Home in Holyoke
September	2008	Approved	Management/Operation Bookstore	Springfield Technical Community College
January	2014	Approved	Management/Operation Bookstore	University of Massachusetts Dartmouth
November	2015	Denied	Information and Technology Services	Roxbury Community College
March	2016	Approved	Southeast Emergency Services	Department of Mental Health
August	2016	Approved	Management/Operation Bookstore	Quinsigamond Community College
November	2017	Approved	Management/Operation Bookstore	Northshore Community College

Contracting from various organizations and agencies has been proposed since the inception of the Pacheco Law. Proposals have been approved seventy-five percent of the time.

¹⁵ Auditor of the Commonwealth, Privatization Reports, www.state.ma.us/sao/privpage.htm, Boston, MA.

The MBTA's attempt to contract bus shelter advertising and maintenance to Outdoor Systems was the second outsourcing proposal rejected by the Pacheco Law. It was first denied by the OSA in August and then again in November of 1996. Responding to the first proposal, The OSA determined that "the MBTA had not met the requirements of the Privatization Statute in that the contractor's maintenance cost estimate was incomplete... and could not be documented." Outdoor Systems compliance with certain regulatory statutes also failed to be documented.

The MBTA responded with a second ten-part proposal including a written statement of services, proposed contract, cost forms, supporting documentation, and a management study. The agency attempted to rejoin the shortcomings of the rejected proposal by including more detailed cost comparisons between present in-house maintenance, and future maintenance costs under the proposed privatization.

The analysis suggested in-house costs for the cleaning and maintaining of bus shelters would total \$1,177,867 over five years, while Outdoor System's cost would be almost half at \$634,846 and the MBTA would pay nothing. Contracting would drastically save costs via more efficient shelter cleaning and by using versatile employees that would allow for a reduction in total employees. The in-house cost comparisons did not account for the number of shelters increasing--which was proposed by Outdoor Systems. The MBTA estimated that contract performance costs would result in net revenues of over \$2 million, leading to a total five-year cost savings of over \$3.2 million for the Commonwealth.

At face value, the MBTA would see significant guaranteed revenue, and potentially additional revenue through the planned installation of additional advertising space on new or replaced shelters--to be installed by the contractor. Outdoor Systems presented the cleaning and maintenance of bus shelters as an additional benefit of contracting out advertising; they would improve performance over in-house provision of the service and at no cost to the Authority¹⁶.

The OSA, however, carefully examined the proposal and, after digging below the surface, rejected it in December of 1996. The OSA noted that the MBTA had not accurately shown the proposed

¹⁶ Sclar, Elliott. Privatization in Massachusetts: An Evaluation of the 1993 Privatization Law ("The Pacheco Law"). May 18, 2004.

contract cost would be less than the estimated cost of keeping the service in-house. Instead they had conducted an “apples to oranges” analysis; assessing a proposal for maintenance where the chosen contractor planned to increase the number of shelters and advertisements which was not analogous to existing operations. They again noted that compliance with Federal and State law had not been documented for Outdoor Systems.

To be clear, the OSA was not opposed to outsourcing, it just needed proof of taxpayer protection. In fact, in rejecting this proposal, the OSA reversed a draft approval which allowed the contract, and which had been circulated to the MBTA. This draft outlined the MBTA’s compliance with all sections of the privatization law. In this initial approval, the OSA adjusted the amount to be paid to the MBTA for advertising out of the performance costs, noting that the MBTA did not explain why only the private contractor (and not the MBTA) could realize revenue from bus shelter advertising. After adjusting for this bias, the OSA determined that the Outdoor Systems contract would save the Commonwealth roughly \$24 thousand per year or about \$120 thousand over the five-year life of the contract. However, the approval was ultimately revoked; the OSA discovered that the MBTA had been using conflicting estimates of the number of bus shelters to be maintained in their cost comparison¹⁷.

The third and most controversial proposal prevented by the Pacheco Law was the MBTA ‘s attempt to outsource the operation and maintenance of Charlestown/Fellsway and Quincy bus routes. The case was twice litigated and received substantial attention in the local press. It is the prime example of how the Pacheco Law has saved taxpayers of the Commonwealth tens of millions of dollars.

Following an audit and operational review in mid-1993, a consulting firm, COMSIS, had recommended the MBTA contract out a significant portion of the fixed bus routes then operated by the authority. The MBTA had an abiding cost issue: their overall bus operating cost was the second highest in the nation at about \$95 an operation hour. At the same time, the MBTA was then paying private contractors to operate marginal routes at less than half the cost of their in-house rates (about \$46 an operating hour). Thus, COMSIS extrapolated that the MBTA could save as much as sixty percent on routes it privatized. (Twenty-five years later this erroneous understanding of cost

¹⁷ The MBTA could have separated bus shelter maintenance and advertising rights and outsourced the latter without invoking the Pacheco Law. But the agency never proposed that option because the Weld Administration purposefully entangled them in attempts to undermine the Pacheco Law. This political and legal battle is beyond the scope of this White Paper. See Sclar (2004) for thicker discussion.

accounting continues to be misused by libertarian ideologues like the Pioneer Institute in attempts to dismantle the Law—see section IV). According to COMSIS this was the only way to stabilize MBTA's perilous financial situation¹⁸.

After an initial proposal failed to thoughtfully demonstrate cost savings, the MBTA submitted a second proposal in May of 1997 for the contracting out of two “bundles” of fixed route bus service operation and maintenance that had previously been operated in house. MBTA selected ATC/Vancom as vendor to operate and maintain the Charlestown/Quincy routes and ATE/Ryder for the Quincy bundle. The MBTA's second submission estimated a savings of over \$23 million through the privatization of both bundles.

ROBERT A. JORDAN

Weld driving MBTA buses down a wrong way



GOV. WELD'S LATEST privatization crusade will begin this summer when he puts 11 MBTA bus routes in several communities under private operators – a move he hopes the public will see as an attractive way to save taxpayers' dollars.

But, upon closer examination, it may be that the best way to save taxpayers some money is for the Weld administration to derail this experiment before it begins.

Weld and MBTA executives have put forth strong arguments to back this privatization experiment. They say this “competitive contracting” is necessary if the MBTA hopes to eliminate its \$500 million to \$600 million deficit and control costs. The privatization will save at least \$2 million a year, they argue. And, they say, a private company will operate the routes more efficiently, improving service as well as saving dollars.

While supporters of the privatization effort – which involves routes in Watertown, Waltham, Newton, Allston-Brighton (Boston), Needham and Duxham – say it will have a positive impact on the MBTA budget, critics suggest otherwise.

For example, bus operation represents only 26.7 percent of the total MBTA operating budget, which means that nearly 74 percent of the total budget is not affected by privatization. In fact, it has no effect on what some critics describe as the fastest growing section of the budget – debt and capital bonding. This experiment does not address these escalating costs.

Not mentioning very much by the pri-

vatzation backers is where the projected “savings” come from. As some managers acknowledge, most – if not all – of it will come from wage and benefit cuts because the private companies operating the bus routes will pay their employees less than the MBTA drivers are now paid.

The MBTA suggests to bidders for the routes that they pay their drivers \$10.03 an hour, according to one report. That is about \$8 less than an MBTA driver's hourly wage. Boston school bus drivers with state and federal licenses receive \$13 an hour.

As for benefits, the drivers hired by private operators must have access to health insurance, but there are no requirements for pensions, disability, vacations and other benefits. As some critics suggest, the MBTA is, in effect, taking middle-income jobs with benefits and turning them into low-income jobs with virtually no benefits.

Regarding the MBTA argument that privatization improves efficiency, the workers note that the 11 targeted routes are operated out of the Albany Street garage. The MBTA's own newsletter reported that public employees working in that garage achieved in February a 100 percent trip-completion record, the first in MBTA history. The workers regularly have a 99 percent trip-completion record. This does not leave much room for increased efficiency from the private sector.

And then there is the fate of the 100 drivers in question, workers who have shown they know how to do a good job. The administration says that privatizing their bus routes would not leave these drivers jobless because they will be offered other – if lesser – MBTA jobs. Layoffs can be avoided because the MBTA work force will naturally shrink with at-

trition, maintains the administration. But critics point out that the turnover rate is so low that the possibility of layoffs looms.

Some critics of the privatization effort suggest that since the Weld administration is so confident of the savings that privatization can bring, perhaps this experiment can be redirected, if not derailed.

One MBTA union, Local 589, offers this suggestion: Instead of privatizing the bus routes affecting 100 drivers' jobs, privatize the job functions of the 100 highest paid MBTA executives. After all, it adds, the MBTA hires consultants to tell the executives how to run the authority.

As Richard Murphy, president of Local 589, recently wrote, “Privatizing the functions of desk-bound political appointees offers the public a higher tax savings with little or no impact on daily service.”

Of course, it is not likely the MBTA would accept this offer, but it does shed light on where some of the real costs are.

If the record of the MBTA's private cleaning contractors is any indication of how the privatization of the bus routes will fare, both the workers and the riders may be in for a rough trip. By many accounts, some of the private cleaning companies hired by the MBTA have been far from models of efficiency.

Fundamentally, the Weld administration's privatization crusade is more to do with political philosophy than it is a fiscally sound idea. More important, it is a philosophy which can, and has, hurt many working families without any real benefits to taxpayers.

Perhaps, as a real savings, this latest privatization effort should roll right out of Massachusetts, and never be seen, or heard from, again.

Robert A. Jordan is a Globe columnist.

The Boston Globe Columnist Robert A. Jordan was quick to point out that the MBTA bus route privatization proposals were rooted in political philosophy and not fiscal analysis (*Boston Globe Archives: 1995*)

The back of the envelope calculations by COMSIS, and the MBTA proposals that stemmed from them, were appealing on the surface. However, OSA's deeper dig uncovered that between

¹⁸ Sclar (2004).

deficiencies in the MBTA's submission and an understatement of the value of concessions, the privatization would instead cost taxpayers \$73 million. Without the Pacheco Law, this contracting would certainly have moved forward, and the taxpayers would have suffered outsourcing losses pushed by a consultant and overlooked by an operating agency.

The final proposal prevented by the Pacheco Law was Roxbury Community College's attempt to privatize its Information Technology (IT) services in October of 2015. The OSA determined that this privatization contract was in the public interest, meeting cost and quality criteria as needed. However, the proposal was rejected because the College failed to put the contract out for competitive bid. If the proposal was resubmitted with the same contractor and other vendors were given an opportunity to make an offer, it would have been approved. In this case, the Pacheco Law simply ensured competitive markets were given the opportunity to function.

All four rejections of outsourcing highlight a dynamic dialogue that took place between the subject agencies and the OSA. They reveal how the Pacheco Law encourages better management in contracting decisions. Most importantly, the OSA's review of the MBTA bus privatization routes saved the Commonwealth from what would have been devastating losses to taxpayers.

III. The Pacheco Law and Human Services

While the Pacheco Law has effectively ensured taxpayer savings and quality of service across a range of outsourcing proposals (discussed above), it has been bypassed and largely inadequate in providing even a guardrail against the outsourcing of human health services, particularly for the care of the developmentally disabled.

As outlined above, the contracting of human services expanded under the guise of deinstitutionalization. Specifically, The Commonwealth underwent two periods of shutting down hospitals for the mentally ill: the first between 1973 and 1981 under sincere deinstitutionalization policy and a second between 1991 and 1993, when privatization ideology was the actual agenda, but deinstitutionalization remained as an ideological loss leader¹⁹. Closures of state facilities for the developmentally disabled largely occurred under the latter and in the early 1990s.

¹⁹ Hogarty, Richard A. "Downsizing the Massachusetts mental health system: The politics of evasion." *New England Journal of Public Policy* 12.1 (1996): 3.

This political attack commenced and crystallized under Weld. In his second month in office, the Governor appointed a seventeen-member special commission to study “the problem” of state-operated hospitals. The commission included industry and accounting experts, all ideologically predisposed toward shifting care for persons with disabilities from large state institutions to private community-based organizations, hospitals, and nursing homes. Among those appointed to the commission was Pioneer staffer Charles Baker who would continue the privatization trend as a senior official under the Weld Administration (discussed above) and as the current governor.

By June, 1991, Weld’s special commission released its report, which recommended the closing of three adult mental hospitals, three public health hospitals, and three institutions for the developmentally disabled.²⁰ The commission also called for the development of 2,000 new community residential placements and associated community support programs, 300 new general hospital acute-care beds, and 200 new long-term-care nursing home beds for former state hospital patients²¹.

The commission projected that its recommendations would save the state approximately \$60 million in annual operating costs and another \$143 million in avoided capital expenditures. The latter number was calculated by estimating savings from not upgrading antiquated facilities to the required contemporary standards of the Joint Commission on Accreditation of Healthcare Organizations and the Health Care Finance Administration. Thus, the accounting was deceptive: the cost avoidance number was a soft number and based on a reduction in the provision of service. The assertion that care would be equal or better in transferring residents out of the state facilities and into privatized, community-based group homes went unexplained and fiercely contested.

The Pacheco Law was a missed opportunity to examine and check assertions about cost effective management in decisions around outsourcing of human services. The problem was and remains that the law permits the closure of large developmental centers in the state without cost or quality analysis of the alternatives. Precisely, while the Pacheco Law applies to state agencies seeking to outsource a service that is presently performed by state or authority employees, the Law’s definition of a “privatization contract,” is inadequate. This ambiguity has permitted successive administrations to assert that they are not outsourcing if they treat the closure of a state-run residential center for the

²⁰ Hogarty (1996).

²¹ Hogarty (1996).

developmentally disabled and the opening or expansion of privatized residential facilities as separate acts.

Following Weld, the Romney and Patrick administrations thus continued to outsource the work of developmental centers, but their promises of cost savings and equal or better care only required good faith. They have relied on carefully selected numbers--not wholistic analysis--to bolster the case for outsourcing. For instance, both the Romney and Patrick administrations claimed that community-based care was cheaper per resident than developmental-center care by comparing the *average* cost in the community to a calculated cost of care at the state-run Fernald Hospital. This comparison was disingenuous; Fernald served a population with a much more profound level of intellectual disability and more severe medical needs than the population in the community system.²² Their cost comparison method also overstated the state costs per resident; they simply divided the total Fernald budget by its population of residents to determine an average, overlooking the portion of Fernald's budget that went to programs that benefitted community-based residents.



The Walter E. Fernald Developmental Center remains unused today (Wikimedia Commons)

²² “Our last Fernald post,” Blue Mass Group blogsite, 26 Oct. 2010, //bluemassgroup.com/2010/10/our-last-fernal-post/

Bypassing the statute, these administrations never seriously considered proposals to operate developmental centers more efficiently. For instance, COFAR, the Fernald League, the Waltham Council of Neighborhood Advocates, League of Women Voters and other organizations had proposed a “Village at Fernald” concept, which called for encouraging small scale economic development and other activities on the Fernald campus while preserving at least 60 of Fernald’s 190 acres as a site for the current residents. The Fernald League argued that the proposal would have been more cost-efficient than the practice of operating the facilities with fewer and fewer residents while not adequately downsizing them.²³ The Pacheco Law, if invoked, would have encouraged such proposals for cost efficient operation.

Finally, the promise of equal or better care in closing the institutions has not been kept or realized. The Romney administration allowed recurrence of some of the same conditions that were previously resolved at state facilities including insufficient staffing, lack of equipment, delayed maintenance, and infestation of vermin. In many instances conditions in the privatized system have become worse than in the state-run facilities. The services provided by DMR (now the Department of Developmental Services) through contractors had fallen behind what they originally offered. For many patients, care is far worse than when they first moved into the community.²⁴

In summary, had the cost and quality analyses required by the Pacheco Law been used in the contracting of services for the developmentally disabled in Massachusetts since the 1990s, a better understanding of the costs involved in that process and higher quality care would have resulted. The Pacheco Law would have: 1) ensured that all potential costs were fully analyzed prior to closing state-operated facilities, and 2) ensured the quality of care run by corporate providers be equal or better than state-run facilities.

IV. Pioneer on the Pacheco Law: Misleading the Taxpayer for 25 years

Throughout the quarter century since its passage, the Pacheco Law has faced no greater opponent than the Pioneer Institute, a libertarian “think tank,” and the intellectual backbone for unbridled

²³ “Legislators visit Fernald,” *The COFAR Voice*, Apr. 2004, <https://cofar1.files.wordpress.com/pdf>

²⁴ “Memorandum in Support of Wrentham Association’s Motion to Reopen Case and Restore to Court’s Active Docket”. Case. 07 Feb. 2006.

contracting schemes that commenced under Governor Weld (see section I). Their embrace of ideology over rationality continues unabated today and remains a threat to the taxpayers of the Commonwealth.

In July 2015, Pioneer issued a major report asserting the Pacheco Law effectively prevented the Commonwealth from saving \$450 million by rejecting the MBTA's attempt to outsource the operation and maintenance of Charlestown/Fellsway and Quincy bus routes in 1997 (discussed in Section III).²⁵

To arrive at this conclusion, Pioneer reviewed the two bus contracts that were rejected by the OSA. Those proposals, which had established an agreed-upon cost over five years, totaled \$305 million to provide 4.1 million revenue hours of bus service, amounting to \$74.34 per revenue hour of bus operation. The Pioneer report noted that the in-house cost of bus service at the MBTA was \$85.09 per revenue hour in 1997. Using little more than this revenue-hour difference as the basis of analysis, the Pioneer report determined that if the Pacheco Law had not been in effect, and if the MBTA had continued to contract this bus service through 2015, "the authority would have saved at least \$450.3 million between 1997 and 2015.

This study was influential in getting approval by the Legislature in July 2015 of a three-year suspension of the Pacheco Law on MBTA privatization. However, the analysis was erroneous on several fronts. Most importantly, Pioneer inappropriately compared bids to actual costs and, in doing so, they relied upon a faulty assumption: that subsequent outsourcing would have experienced the same rate increases (i.e. cost escalation factor) as the MBTA's in house services had. Specifically, Pioneer compared bids proposed by the two prospective bus service vendors with *actual costs* incurred by the MBTA in 1997 and applied the same cost-escalation factor to the bids and in-house costs between 2003 and 2013.

²⁵ Sullivan, Greg, "The Pacheco Law Has Cost the MBTA More Than \$450 million. Here's the evidence," Boston: The Pioneer Institute, 2015. https://pioneerinstitute.org/better_government/pacheco-law-has-cost-mbta-at-least-450-million-since-1997/

Study: "Pacheco Law" Has Cost MBTA At Least \$450 Million Since 1997

A report by the Pioneer Institute was critical in a three-year suspension of the Pacheco Law on MBTA privatization but the analysis was faulty (The Pioneer Institute Website)

Unfortunately, regardless of whether a service is public or private, it is always easier to project lower costs than to achieve them. Precisely one of the reasons the Pacheco Law came into effect was to ensure agencies understood this when conducting cost comparisons. The Law requires agencies like the MBTA to compare “apples to apples” bids where both numbers represent a projection i.e. a contracted projection against a projection of in-house services delivered in a “cost efficient manner.” The Pioneer analysis even accepted the contract proposals at face value, and with no escalation of the first 5 years of the contract, while leaving the in-house rate inflated.

As the OSA report outlines, had the Pacheco Law not been invoked and had the proposed bus contract been awarded, the Commonwealth would have lost \$73 million in liabilities and other costs (see section II). However, taxpayers would likely have lost even more money in future and unexpected costs in the form of “down the road” cost escalations which are frequent in outsourcing. While Pioneer’s analysis assumes contracting costs increase at a similar rate as in-house services, MBTA’s history with contacting commuter rail suggests otherwise.

Beginning in 1987, Amtrak began providing commuter rail services to the MBTA under a cost-plus-overhead and profit contract. In 1995, this was changed to a negotiated fixed price contract with a three-year term and two one-year options. In May 2000, the MBTA was given permission by the federal government to extend the Amtrak contract without bidding for an additional three years. The total cost of the three-year contract extension, plus additional work that was included in subsequent contracts, came to \$168 million per year. Subsequently, the Massachusetts Bay Commuter Rail Company (MBCR) won a competitive RFP process to operate the commuter rail system, starting in 2003. The cost per year of that fixed price contract was \$217.4 million, which amounted to a 29.4 percent increase over the cost of the Amtrak contract just three years earlier. In that same period, the in-house cost of MBTA bus operations rose by just 12.8 percent.

In fact, the annual cost to the MBTA of contracting for commuter rail services rose by 99.4 percent from 2000 to 2015, compared with a 74.9 percent increase in the annual cost of the agency's in-house bus operations.²⁶ Between the 2003 and 2014, when commuter rail switched operation from Amtrak to MBCR and then to Keolis, commuter rail saw year over year cost escalations averaging almost 6.5 percent. Over the same period, in house costs for bus service experienced an average cost escalation under 4.5 percent.

To demonstrate the methodological flaws behind such non-activity-based cost accounting, like the analysis found in the Pioneer Report, the authors of this paper conducted our own cost analysis on the 1997 MBTA proposal to outsource the operation and maintenance of Charlestown/Fellsway and Quincy bus routes. We assumed it was not subject to the Pacheco Law and was outsourced as proposed. We applied 2003 to 2014 cost escalations from outsourcing commuter rail as a relevant yardstick against which to compare what might have happened had that privatization of the bus routes proceeded. It would have been taking place under the same MBTA management at the same time and in the same place. Thus, this could be argued to be a much more reasonable assumption than that which the Pioneer Institute used i.e. assuming that projected contracting cost escalations would be identical to actual in-house cost escalations in a straight-line projection.

²⁶ Kassel, David, "MBTA commuter rail contracts rose by a greater percentage than in-house bus costs," COFAR Blog, 20 Jul. 2015, <https://cofarblog.wordpress.com/2015/07/20/mbta-commuter-rail-contracts-rose-by-a-greater-percentage-than-in-house-bus-costs/>

We compared our projections to the actual in-house costs of running the bus routes from 1997 and 2018. Our model finds that had the MBTA bus route outsourcing gone forward, taxpayers would have been losing almost \$2 million a year by 2006; over \$10 million a year by 2010 and lost cumulatively over \$150 million between 1997 and 2018, with taxpayer losses expected to grow. In brief, any short-term operation savings from contracting would have caught up to taxpayers quickly.

Adding the \$73 million in onetime transaction costs, our analysis suggests outsourcing the operation and maintenance of the bus routes in 1997 would have cost taxpayers well over \$200 million by 2018.

Our point here is not to get into a debate over which “back of the envelope” superficial methodology is better. Rather it is to use this to illustrate the importance of the legal requirements embodied in the Pacheco Law to insist on in-depth activity relevant cost analysis. The Pacheco Law gives taxpayers and legislators a far more in-depth basis for understanding the financial risks inherent in privatizations. We can only speculate about hundreds of millions in additional savings that have been made by stopping other ill-advised proposals from even coming forward as a result of the existence of this law.

Finally, the Pioneer analysis misrepresented the conclusion of the state auditor in the denied proposal. Their report repeatedly suggested that the OSA had “banned,” “blocked,” or “barred” the MBTA’s proposal to privatize the agency’s bus services in 1997. According to the report, this adverse decision, which was based on the Pacheco Law, thwarted the MBTA’s attempts to save costs and improve quality of its bus service. However, the OSA does not ban contracts; in the case of the MBTA, the agency was asked to resubmit its proposal once it demonstrated outsourcing would be in the public interest. The MBTA decided not to resubmit indicating the agency was unable to show even a single dollar in taxpayer savings.

V. The Pacheco Law: Beyond Twenty-Five Years

There is no inherent advantage in public or private provision of any service -- the consensus in the academic literature on this is clear. Governmental cost-effectiveness is always a matter of two factors: the level of management competence in the public agency faced with the “make versus buy” decision and the actual nature of the market to which they would turn to “buy” service.

Governments may be able to maintain quality of service and reduce their bottom line if there exists a competitive private market that has a known quality and price. e.g. contracting for the painting of government buildings or using private parking garages for public employee vehicles. Similarly, when new technologies render an existing government function obsolete or when the new technology establishes the need for a new service, it may be cost effective to turn to the private market rather than (re)establish the government as the provider of that new technology or service. A prime example of this is the outsourcing of the provision of public employee email servers and telecommunications that came with the advent of the internet.

Most of the products that fit these cost-effective contracting scenarios are already being pursued by public agencies. These cost-effective privatization practices stand in sharp contrast to the type of ideologically driven privatization explored and executed under the Weld administration (discussed in section I).

Contracting and outsourcing that moves beyond traditional “make-buy” decisions and actively seeks private organizations to assume control of services central to the mission of the public sector are inherently ill advised. If the government is the only or principal customer then a competitive or efficient market does not and will not exist. Instead the privatization will devolve into a clientelist relation between the public purchaser and the one, or perhaps two or three contactors who provide the service. Taxpayers will not pay less. Indeed, they are likely to pay more with the bulk of the revenues going as profits to corporate owners and high salaries and bonuses to managers²⁷.

Hence any consideration of “make versus buy” decisions must always consider the centrality and uniqueness of the service to the mission of the public sector and improving the managerial competence of the public sector to cost-effectively provide the vital services. That is why the demands of the Pacheco Law for accountability are so critical. That is why the Pacheco Law has saved the taxpayers of Massachusetts hundreds of millions of dollars over the last twenty-five years.

Idealized notions of textbook competitive markets are often contrasted with stereotypes of inefficient public bureaucracies to make the case for outsourcing and diminishing the ability of public managers to provide the vital public sector that allows democracy to flourish. What is needed is not an unvetted belief system that pits the public sector vs the private sector with one inherently

²⁷ Sclar, Elliott D. "Public-service privatization: Ideology or economics?." *Dissent* 41 (1994): 329-336.

better than the other but effective legislation and policies that ensure decisions using taxpayer dollars are guided by organizational commonsense and actual operation. Unproven generalizations about the cost effectiveness of privatization must be challenged. Improving public sector productivity must become central to the agenda of sustaining progressive democracy.

The Pacheco Law's 25-year anniversary provides a ripe occasion to start a national dialogue about how we restore vibrancy to a public sector that has been badly damaged by ideological attacks on government. It is a moment to envision reform proposals that enhance rather than degrade public service, to give taxpayers value for their money. It is not a moment to rehash the debate of public versus private. Rather it is an opportunity to begin the important discussion about sensible policies to ensure high quality public service using both public agency and outsourcing when and where it is economically appropriate.

Our intention in preparing this paper is to commence a wholistic and in-depth study of good public contract management and the changes in laws that would be needed to ensure that. We need better methods if we are to make the right political decisions when we outsource public services. As President Eisenhower understood six decades ago, a private enterprise economy does many vital things well but not all of them.

Our next steps include organizing and commissioning studies by scholars of the lessons learned in the United States and abroad from the experiments with privatization that were undertaken in the last several decades. The studies, in book form, will serve as the basis for a conference in early 2020 to provide ideas for public discussion and debate in that most political of years.

Elliott Sclar
Michael Snidal
David Kassel

References:

Auditor of the Commonwealth, Privatization Reports, www.state.ma.us/sao/privpage.htm, Boston, MA.

Butterfield, Fox. "Weld Denting Massachusetts' Liberal Framework." *New York Times*. 17 Oct. 1993: Archives.

Halchin, L. Elaine. "The Federal Activities Inventory Reform Act and Circular A-76." Congressional Research Service, Library of Congress, 2007.

Hogarty, Richard A. "Downsizing the Massachusetts mental health system: The politics of evasion." *New England Journal of Public Policy* 12.1 (1996): 3.

House Post Audit and Oversight Committee: Commonwealth of Massachusetts, House Post Audit and Oversight Committee, 1993a. "Privatization Savings: Where's the Beef." 17 Dec. 1993.

Jacoby, Jeff. "Bill Weld's Revolution That Wasn't." *City Journal* 6 (1996): 49-59.

Kassel, David, "MBTA commuter rail contracts rose by a greater percentage than in-house bus costs," COFAR Blog, 20 Jul. 2015, <https://cofarblog.wordpress.com/2015/07/20/mbta-commuter-rail-contracts-rose-by-a-greater-percentage-than-in-house-bus-costs/>

"Legislators visit Fernald," *The COFAR Voice*, Apr. 2004, <https://cofar1.files.wordpress.com/pdf>

"Memorandum in Support of Wrentham Association's Motion to Reopen Case and Restore to Court's Active Docket". Case. 07 Feb. 2006.

"Our last Fernald post," Blue Mass Group blogsite, 26 Oct. 2010, [//bluemassgroup.com/2010/10/our-last-fernal-post/](http://bluemassgroup.com/2010/10/our-last-fernal-post/)

Pacheco, Marc. Personal Interview. 29 Nov. 2018.

Sclar, Elliott. Privatization in Massachusetts: An Evaluation of the 1993 Privatization Law ("The Pacheco Law"). May 18, 2004.

Sclar, Elliott D. *You don't always get what you pay for: The economics of privatization*. Cornell University Press, 2001.

The Spotlight Team. "Weld finds support in special interests." *Boston Globe*. 12 Dec. 1993: Archives.

The Spotlight Team. "Weld advisor has veiled consulting practice." *Boston Globe*. 13 Dec. 1993: Archives.

Sullivan, Greg, "The Pacheco Law Has Cost the MBTA More Than \$450 million. Here's the evidence," Boston: The Pioneer Institute, 2015. https://pioneerinstitute.org/better_government/pacheco-law-has-cost-mbta-at-least-450-million-since-1997/

Wallin, Bruce A. "Privatization of State Services in Massachusetts: Politics, Policy, and an Experiment That Wasn't." conference "Privatization: Trends, Evidence, and Alternatives," *Economic Policy Institute, Washington, DC, January*. Vol. 11. 2001.

Wood, Frederic James, and Ronald Dale Karr. *The Turnpikes of New England*. Branch Line Press.