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New Poverty Agenda**

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Symposium: New Governance and the Transformation of Law

GOVERNANCE, ACCOUNTABILITY, AND THE NEW POVERTY AGENDA

Wendy A. Bach [FNa1]

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Across the country a new poverty agenda is emerging. These efforts are limited by the political consensus that has emerged since welfare reform, and the focus, as has always been the case, on the “deserving”—in today’s iteration, primarily the working poor. Mirroring national and international trends, the means of governance of these new social welfare programs has also begun to change. Where once there was a set of programs ostensibly controlled through law and regulations, in growing pockets there is now radical devolution and abandonment of traditional legal and rule making structures. Experiments in policy, program structure, and governance frameworks proliferate. These new governing structures are closely aligned with new governance theory, which in turn holds out the promise that—through a process of deep democratic participation and continual experimentation and redesign—the governing enterprise will produce a set of policies that are more responsive to the real needs of those in poverty.

This Article argues, however, that prevalent governing mechanisms of the new poverty agenda diminish rather than enhance accountability and responsiveness. Program structures undermine the ability of recipients to ensure that these benefits are being fairly administered. Moreover, contrary to the best of new governance theory, the absence of substantive participation by poor communities in goal-setting and program design fundamentally undermines the experimentalist enterprise. The new poverty policy “experiments” reveal an unwillingness to test the subordination-tinged political assumptions of “deservingness” and “undeservingness” that lie at the heart of the new poverty policy, thereby limiting the ability of the experimentalist enterprise to create more responsive poverty policy. Despite these striking failures, however, new poverty programs could realize the deep democracy promise of new governance. If governing systems include effective structures to ensure accountability both to those who seek to benefit and to the communities that seek to participate in designing and evaluating programs, new governance frameworks can be strategically deployed to facilitate the creation of a more responsive new poverty agenda.

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Introduction

It has been fourteen years since U.S. welfare reform. If we ever had a safety net, it is gone. At the same time, across the country there is a growing set of efforts to understand and address poverty. These efforts are limited by the political consensus about poverty that has emerged since welfare reform, and focus, as has always been the case, on the “deserving”--today, primarily the working poor. Accompanying the shifts in policy are radical shifts in governance. Mirroring national and international trends, the means of governance of social-welfare programs--in significant and growing program areas--has begun to change. Where once there was a set of programs created and ostensibly controlled through law and regulations, in growing pockets there is now radical devolution and abandonment of traditional legal and rule-making structures. Experiments in policy, program structure, and governance frameworks proliferate. These new governing structures are, to greater and lesser extents, aligned with new governance theory, often described as a collaborative, “softer” model of administrative governance where a variety of stakeholders work together to create, implement, and continually renegotiate programmatic goals, structure, and implementation.

The shifts in the substance and governance structure of the new social-welfare programs epitomizes a central question at the heart of new governance theory: is new governance more aligned with the fundamentally conservative drive towards “[d]eregulation, privatization, [and] reduction of social services,” [FN1] or is it--as Fung and Wright among others suggest-- radically left, the source of “transformative democratic strategies that can advance . . . egalitarian social justice, individual liberty combined with popular control over collective decisions, community and solidarity, and the flourishing of individuals in ways which enable them to realize their potentials”? [FN2] Do new governance structures render the government more deeply accountable to individuals and communities--and therefore provide a structural mechanism to achieve a more responsive set of policies and programs--or is the converse true? [FN3]

A careful examination of trends in U.S. social-welfare policy suggests a complicated answer to these questions. The case study herein suggests that the new poverty agenda threatens unaccountability, both to the individuals who might seek to benefit from new social-welfare programs and to the poor communities that might seek to participate in the design and evaluation of those programs. The result is a new poverty agenda that is, to a significant extent, insulated from critique by poor communities. But accountability and mechanisms toward improvement of these programs are not necessarily out of reach. If the governing mechanisms of the new poverty agenda are explicitly structured to render them accountable to both individuals and communities, they can deploy the transformative possibilities within new governance and provide an important structural means to bring about progressive change. [FN4] This Article seeks to describe the substantive, governance, and accountability trends epitomized by shifts in U.S. social-welfare policy and suggest a roadmap towards this transformative possibility.

The Article relies upon a case study of New York City's Center for Economic Opportunity (CEO), perhaps the most fully realized manifestation of emerging trends in U.S. poverty policy. Through a close examination of New York City's experimentation with conditional cash transfer programs and its efforts to more accurately measure poverty, this Article argues that if the CEO model continues to gain prominence and is replicated, the programs that characterize the new poverty agenda will fail to be accountable in at least two crucial respects. First, they will diminish rather than enhance

the ability of individuals who are the targeted beneficiaries of the program to ensure that the benefits are being administered fairly and consistently. Second, in direct opposition to the best of new governance theory, the governing structures will fail to deepen or broaden the means by which affected communities participate in the design, implementation, and evaluation of the programs that affect their lives. Despite these striking failures, however, neither the new poverty agenda nor its governing structures must be characterized by this lack of accountability. If careful attention is paid to inclusion of structures to ensure accountability, poverty programs characterized by new governance have the potential to significantly enhance domestic poverty policy.

The Article will proceed as follows: Part I describes the shifts in poverty policy in the post welfare-reform era, tracing the trajectory of the kinds of programs being offered and the shifting target of those who the programs posit as worthy of support. Part II describes emerging trends in governance structure that characterize the new poverty agenda and argues that these structures align in significant respects with new governance theory. Part II also argues that the CEO is increasingly viewed as a trendsetter in poverty policy and therefore merits careful consideration. To more precisely frame the question of accountability and responsiveness at the heart of this Article, Part III defines two related measures of accountability: first, the ability of individuals to ensure that they receive benefits in a fair and consistent manner; and second, the ability of affected communities to impact the programmatic decisions that affect their lives. Part III then outlines the structures designed to reach those aspects of accountability in old and new governance, and reviews some of the critiques of the ability of new governance to promote accountability along each measure. Part IV turns to the New York City case study for a more detailed look at accountability along both measures in emerging new poverty agenda programs. Finally, Part V argues that new governance structures--if designed to ensure accountability along these two measures--have the potential to facilitate the creation of a more progressive and responsive policy agenda.

I. Domestic Poverty Policy: From Entitlement to Limited and Conditional Support for the Working Poor

American poverty policy has significantly changed during the last thirteen years. Most famous among these shifts is the abandonment of a national commitment to provide support for indigent families and an abandonment of uniformity in the means of administering social-welfare programs. With the signing of the Personal Responsibility and Work Opportunity Reconciliation Act in 1996, Bill Clinton famously ended “welfare as we [knew] it,” [FN5] and with it, the federal government's commitment to provide centrally regulated, baseline assistance to families in need. In place of Aid to Families With Dependent Children (AFDC)--the assistance program that arose out of the New Deal and created an entitlement to benefits--the federal government created Temporary Assistance to Needy Families (TANF), a program that limited receipt of assistance to five years over the course of a recipient's adult life, [FN6] targeted immigrant communities, [FN7] devolved significant authority for program design and administration to states and localities, [FN8] and invited states to include private entities in the administration of welfare programs. [FN9] The devolution of authority from national to state and local government and the invitation to engage private entities would alter significantly both the substance and the governing structures of the new poverty agenda.

In large part as a result of welfare reform, welfare caseloads have dropped dramatically. Whereas in 1995 there were 13.6 million individual AFDC beneficiaries, [FN10] by 2009 that number dropped to just over 4 million [FN11]--an unprecedented 70-percent drop in the national caseload. [FN12] With the exception of a limited number of states where state programs provide some level of cash assistance when families hit the federal time limit, across the nation today, poor individuals receive no cash assistance to help them meet their basic needs.

To the extent that welfare programs still exist, they are focused, far more than their predecessors, on forcing recipients to comply with onerous work requirements as a condition of receiving assistance. Federal legislation mandates that

states meet work participation requirements and significantly limits states' ability to provide assistance to individuals who do not comply with work requirements. [FN13]

The results of welfare reform are hotly contested from a variety of perspectives. Some view the dramatic drop in caseload itself as a tremendous success. [FN14] According to these analysts, AFDC was largely a failed program that created negative incentives by keeping people out of the workforce and mired in poverty. AFDC was said to create a “culture of dependency” and thus the decline in assistance alone is viewed as a success.

The effect of welfare reform on those in poverty--apart from the decline in the use of assistance programs--is more complicated. During the late 1990s, poverty rates dropped, and it appeared that welfare reform contributed at least in part to that trend. Later, as the economic bubble of the late 1990s began to burst, the picture became more dire. Families were, overwhelmingly, trapped within an unstable low-wage labor market that failed to provide the minimum subsistence they needed. Over time, families did not appear to be moving up the economic ladder in any significant number. [FN15] Women were faring particularly badly. [FN16] In addition, the minimal data that exists evaluating welfare outcomes on the basis of race suggests that programs are administered in a way that results in better outcomes for whites than for people of color. [FN17] For example, in Wisconsin from 1995 through 1996, “61 percent of the white families receiving assistance left the caseload, compared to 36 percent of the African-American families.” [FN18] In Illinois, data analyzing why recipients left the roles from June 1997 to June 1999 revealed racial disparities in the reasons for case closure. [FN19] In that period,

[a] total of 340,958 cases closed . . . of which 102,423 were whites and 238,535 were minorities. Fifty-four percent of minority cases, but only 39 percent of white cases, closed because the recipient failed to comply with program rules. Though earned income made 40 percent of white families ineligible for support, earned income made only 27 percent of minority families ineligible. [FN20]

In addition, various studies indicate better treatment of white recipients than African American recipients in regard to positive encouragement and assistance in job search and provision of supportive assistance. [FN21]

In addition to the data above, there is substantial anecdotal evidence arising from recent litigation that public-benefit programs still fail to conform to statutory and regulatory mandates. Across the country, lawyers continue to litigate on behalf of classes of individuals who have been denied benefits in violation of law or have been treated illegally in a variety of other ways. [FN22]

The more disturbing results of welfare reform--the increasing vulnerability of poor people to an unstable low-wage labor market, the lack of a safety net in times of economic crisis, the disparate negative outcomes for people of color, and the continuing prevalence of maladministration of assistance programs--can be contextualized within a long history of using social-welfare policy as a tool to perpetuate gender, class, and race subordination. [FN23] There is no question that racial stereotypes “about lack of work effort (along with the widespread stereotype that all or most welfare recipients are black)” have been subtexts to arguments on behalf of key features of contemporary welfare reform. [FN24] Such features include mandatory work requirements for welfare recipients, along with punitive sanctions and eligibility time limits, all of which are said to be necessary to prod supposedly indolent poor mothers to end their purported preference welfare dependency and become “responsible.” [FN25] It is also clear that welfare reform, with its emphasis on marriage promotion and its active derogation of single parenthood was meant both to restore the patriarchal family [FN26] and to render the poor more economically vulnerable, thereby lessening their bargaining power in the low-wage workforce. [FN27] Although U.S. social-welfare policy has--in response to activism [FN28]--provided significant support for poor individuals, it also has been characterized by programs that prevent political unrest and create a workforce that is desperate enough to engage in low-wage work. [FN29] It often has been fairly characterized as a means to keep that workforce

desperate and willing to do the worst work in the economy. It is into that breach that the new poverty agenda steps.

A. The New Poverty Agenda

Both the content and the rhetoric of poverty policy has shifted, in some respects, since 1996. At least until the economic crisis of 2008, [FN30] there was--among national and state policy-makers--a nearly universal acceptance of welfare reform's eradication of a safety net. However, the rhetoric on poverty policy began to shift in some circles after the economic decline of the late 1990s, in part because some saw the results of welfare reform as far more complicated. There has been a growing, vocal, and ultimately national level acknowledgment that, despite any success that might be attributed to welfare reform, many people remained trapped in poverty. Statistics such as the high percentage of full-time head-of-household workers living well below the federal poverty line, [FN31] high numbers of full-time workers without health insurance, [FN32] and the increased visibility of deep poverty that arose from Hurricane Katrina drive these trends. In response, policy-makers and advocates began to emphasize programs to address the needs of the working poor. [FN33] Programs began to be reframed as support for the working poor. We began to hear that food stamps were not "welfare" but were "work supports"; they were not unjustified handouts to the undeserving poor, but support designed for those who are productive, working members of society. [FN34] Similarly, child-care payments and the payment of Earned Income Tax Credits (EITC) are characterized not as handouts but instead as "demand side" intervention--supplements designed to make up for the "market failure" that is low-wage work and tools to incentivize the choice to engage in work over welfare.

As a result, we began to see movement at every level of government to design programs that would--to some degree, and within significant political constraints--attempt to address this problem. This trend represents, in some senses, a different kind of break from the New Deal. The New Deal government-benefit programs represented a commitment to providing minimal subsistence; its welfare programs did not purport to help families move out of poverty. At the start of the twenty-first century, a significant number of local and state officials, and many policy-makers and advocates, began to talk about poverty and to design programs that purport to address it. [FN35]

On every level of government, the initiatives directed at poverty reduction fall very roughly into two conceptual categories. First, advocates and policy-makers have emphasized expansion of preexisting programs--food stamps, health insurance, child-care assistance, and housing subsidies--targeted at low-income workers. Second, there has been a focus on a different set of interventions that emphasize setting targets and the use of experimental programs to address the needs of the poor. A brief overview of some of these initiatives gives some contour to these trends.

Efforts to expand traditional interventions targeted at the working poor have taken place at every level of government. On both the national and state level, [FN36] initiatives focus on the expansion of the EITC and on other programs designed to assist low-income working families. On the national level, the EITC program has been recognized as one of the most successful federal programs to assist working families out of poverty. [FN37] Federal funding for EITC steadily increased from \$30.4 billion in 1997 to \$49.1 billion in 2008. [FN38] Also, under the 2009 American Recovery and Reinvestment Act (ARRA), a new category for EITC-eligible participants was created to further expand the program in response to the recession. [FN39] Similarly, the Supplemental Nutrition Assistance Program (SNAP)--formerly known as Food Stamps--also experienced a steady increase in federal funding from \$21.5 billion in 1997 to \$53.6 billion in 2009. [FN40] SNAP participation rates increased by 96 percent from 2000 to 2009. [FN41] SNAP caseloads reached over 33 million individuals in 2009. [FN42] Federal statutes including the 2002 Farm Bill and 2009 ARRA provided increased eligibility and removed barriers to participation mainly for the working poor. [FN43] Federal spending on child-care also saw an increase from \$2.3 billion in 1996 to \$4.8 billion in 2001. [FN44]

Additionally, advocates and lawmakers have begun to promote new initiatives. Most prominent among those initiatives has been to set targets for poverty reduction as a means to drive policy. This trend was represented, perhaps most visibly, by the campaign of John Edwards for President. Edwards launched and ended his campaign from New Orleans, the city where, ever so briefly, the realities of deep poverty in the United States were revealed on an international stage during Hurricane Katrina. [FN45] Edwards pledged during his campaign to end poverty within a generation. [FN46] His clearly articulated commitment to addressing the needs of those in poverty was a central organizing principle of his campaign, and his presence in the contest drew the issue into national discourse in a way that arguably had not occurred at any time since welfare reform. The Edwards campaign was supported by national calls to set poverty reduction targets. For example, the Center for American Progress (CAP), an organization formed in 2003 “to provide long-term leadership and support to the progressive movement,” [FN47] issued a 2007 report titled “From Poverty to Prosperity: A National Strategy to Cut Poverty in Half.” [FN48] This report advocated the use of targets as a means to rally government toward effective programs. The move to targeting has taken hold across the states. As of December 2009, nine states have officially set such targets. [FN49]

In each of these states the initiative to lower poverty is linked to a poverty council, task force, or commission. [FN50] States across the country have established bodies to address poverty issues. As of December 2009, nineteen states (Alabama, Arizona, Colorado, Connecticut, Delaware, Illinois, Indiana, Kentucky, Louisiana, Maine, Michigan, Minnesota, Montana, New Mexico, Ohio, Rhode Island, Vermont, Virginia, and Washington), the Virgin Islands, and the District of Columbia have established such an initiative. [FN51]

State targeting initiatives have taken different forms, some of them representing primarily the setting of a target and the issuance of a report, and others characterized by more robust on-going mechanisms to evaluate programs in light of their proven ability to meet the target and to force change in unsuccessful government programs. Many of the state efforts have focused on the creation of a legislative commission and the issuance of a report to the legislature. For example, in 2006, in response to a call from religious leaders to address the needs of those in poverty, the Minnesota legislature created a commission to end poverty and charged it with providing recommendations on how to end poverty in the state by 2020. [FN52] The commission was to issue a report by December 15, 2008, and the commission was to expire by the end of December 30, 2008. [FN53] Similar efforts were undertaken in Maine and Washington State. [FN54]

Some of the state entities do more than issue a report and recommendations. For example, in 2008, the Louisiana legislature created the Child Poverty Prevention Council of Louisiana and the Child Poverty Prevention Fund. As articulated in its statutory enabling legislation,

[t]he council shall have as its purpose the goal of pursuing programs which will reduce child poverty in the state by fifty percent over the next ten years. The council shall work to establish public-private partnerships and seek private sector funding to be used with public funds to support solutions to poverty initiatives with the greatest potential for reducing child poverty. [FN55]

The Council issued its first report in early 2009 and laid out a variety of detailed policy recommendations. [FN56] The legislation conceptualizes the body as an ongoing entity. In 2004, Connecticut engaged in a similar effort. [FN57]

On the local level, the most prominent effort to address poverty has taken place in New York City. In 2006, Mayor Michael Bloomberg--presumably acting within his proscribed executive powers--convened the Commission for Economic Opportunity (Commission) to research and design a new poverty policy for the city. [FN58] The Commission was composed of business and community leaders who were hand-selected by the Mayor's office. [FN59] The Commission was charged with generating innovative poverty solutions that the city could execute without significant new expenditures and without reliance on state or federal action. It issued a report in 2006, and in 2007, Bloomberg opened a new ex-

ecutive office--The Center for Economic Opportunity (CEO)--to implement the recommendations of the report. [FN60] Since that time the Commission has overseen the implementation of a wide variety of programs, has issued multiple reports on its work, is regularly cited by other jurisdictions and in Washington as a model for new poverty policies, and is actively seeking to promote and replicate its work. [FN61]

Additionally, efforts to reexamine how to measure poverty have taken hold in a variety of jurisdictions in a purported attempt to lay the groundwork for more realistic conversations about what domestic poverty looks like today. [FN62] These efforts have drawn light toward the tremendously difficult life circumstances of those who--although just above the current federal poverty measure--still lead lives characterized by enormous economic vulnerability.

The substantive recommendations and initiatives supported by the various commissions vary significantly. However, they do share some characteristics. First, and most significantly in light of the political trends discussed above, a significant number of the interventions that are directed toward adults focus on the working poor. For example, there is significant support for expansion of federal and state EITC programs. [FN63] Similarly, recommendations to expand access to adult education focus on those engaged in low-wage work, and multiple bodies support enhanced child-care funding for the working poor. [FN64] A few states also focus on financial literacy and expansion of Individual Development Accounts (IDAs). [FN65] Although other states including Minnesota, Michigan, Ohio, and Montana mention some improvements to public assistance, the recommendations generally focus on coordination and creating uniform eligibility criteria. [FN66] Thus there is no question that the focus of the new poverty agenda has shifted significantly towards supporting the working poor. [FN67]

II. The Shift to New Governance in Poverty Policy

Along with the reconfiguration of poverty policy and the shifting focus towards the needs of the working poor that has taken place in the last decade, there has been a significant reconceptualization of the governing structures of poverty programs. Although traditional government structures still play a significant role, states and localities increasingly use structures that align, to greater and lesser extents, with “new governance” theory.

Before proceeding, it is important to define how this Article uses the terms “new governance” and “traditional governance,” and define the purpose in drawing on that body of literature. “Traditional” or “old” governance stands, as a theoretical matter, in opposition to new governance. [FN68] It is top-down, rule-bound, centralized, government-run and, in the view of its critics, profoundly resistant to innovation. As extensively discussed elsewhere in this issue, [FN69] new governance theory offers a collaborative model of administrative governance in which a variety of public and private stakeholders work together to create, implement, and continually renegotiate programmatic goals and structures. [FN70] It is characterized by public-private collaboration, experimentation, and localized program design and the ability to test programs, jettison programs that are not effective and to promote and bring to a larger scale programs that are. In a new governance model, government acts not as a centralized rule-maker but as a facilitator of the experimentalist enterprise. Program improvements occur, over time, through the experimentalist, evaluative, and orchestration process. Of particular importance in new governance structures is the active participation of affected communities within the governance structure. [FN71]

When one looks at the newer national, state, city, and multijurisdictional efforts discussed above, two conclusions become clear. First, there is a significant mix of “new” and “old” governance elements. For example, expansion and reformulation of the Food Stamps program, and national and state initiatives to expand the EITC, are primarily characterized by old governance mechanisms. In contrast, the push toward target-setting, re-measuring poverty, and experimentation more easily fit within the definitions of new governance. Second, governance mechanisms that are consonant with new

governance theory are becoming increasingly prevalent and promoted within policy circles. The groups gathered together to address poverty often mirror some of new governance theory. They are, to greater and lesser extents, multi-representational public-private collaborations, and there is a consistent and strong focus on data collection, evaluation, and orchestration. Strikingly, in the poverty area, however there is a marked lack of intentionally structured participation by poor people. [FN72]

It bears repeating here that the new poverty agenda arose to respond to what many view as welfare reform's insufficient response to the conditions of poverty in the U.S. [FN73] It also bears repeating that welfare reform was fairly critiqued as complicit with U.S. poverty policy's long history of race, class, and gender subordination, and comes amidst significant evidence of continuing maladministration of public-benefit programs. [FN74] What, then, of the new poverty agenda? Is it more responsive or is it also constrained by this history and current practice? In one sense, these questions have nothing to do with governing mechanisms and revolve only around the substance of the program. Programs either are or are not less mired in concepts of subordination. However, this Article posits that the questions of subordination are intertwined with conceptions of accountability. In short, we are more likely to conceptualize and create a more responsive, less subordinating poverty policy if there are effective mechanisms for poor people and communities to hold the program accountable by intervening and advocating for programs that are more responsive to their needs. In the next Part, this Article turns to these questions of accountability.

III. Old and New Governance Conceptions of Accountability Along Two Measures

This Part seeks to evaluate new poverty agenda programs along two theoretical measures. First, are programs accountable to applicants and recipients in the sense that benefits are implemented in conformance with law and fairly and consistently administered to similarly situated individuals? Second--and particularly importantly for understanding whether and to what extent new governance structures provide a means to create more responsive poverty policy--are there available and effective ways for poor communities to understand and participate in the process by which decisions about poverty policy are made? [FN75]

To set the stage for these questions, this Part briefly discusses both the structure of and some key justifications for the "old governance" mechanisms that address both these aspects of accountability. Then the discussion moves to the means by which new governance structures attempt or fail to provide both forms of accountability. Part IV then turns to an in depth case study of New York City's experimentation with poverty policy.

A. Old Governance Structures to Ensure the Accountability of Social-Welfare Programs

Along the first measure of accountability--that is, accountability to individuals for the lawful and consistent treatment of similarly situated individuals--post-New Deal social-welfare programs rely on a variety of governance mechanisms. Detailed national statutes and regulations set out specific program rules and federal agencies either administer the program directly or oversee implementation by the states. Under this schema, people have a right, individually and collectively, to hold the government accountable if it fails to provide benefits to which the individual is entitled under the statutory scheme. Under *Goldberg v. Kelly*, [FN76] individuals have a right to a pre-termination administrative hearing to contest an adverse action by the government. [FN77] These hearings, pursuant to *Goldberg*, apply to subsistence-level cash assistance [FN78] and, through a variety of judicial, [FN79] legislative, and administrative [FN80] actions, to a wide range of public benefits. Using various mechanisms, individuals can bring suit on their own behalf and, in certain circumstances, on behalf of a class of similarly situated individuals. [FN81] Supervising administrative agencies on both the federal and state level also have mechanisms--through technical assistance, oversight, and sanctioning structures--to

ensure that states and localities implement and administer these systems lawfully. [FN82]

These structures have provided the primary mechanisms that lawyers have used in the last several decades to ensure that programs are lawfully and fairly implemented and administered. Early in the history of the development of these accountability structures, there was considerable hope among their proponents that they might lead to constitutional recognition of some form of positive economic rights. However, by 1976, with the Supreme Court's decision in *Dandridge v. Williams*, [FN83] it was clear that this was not meant to be. [FN84] Nevertheless, these accountability structures continue to provide a jurisdictional basis for individuals and attorneys to maintain an essential defensive project: in short, these mechanisms provide a tool to ensure that the government delivers what it promises to deliver, and does so in a manner that comports with constitutional norms.

In the context of evaluating the utility of new governance structures, it is important to note the continuing importance of these tools. Across the country, individuals request and prevail at administrative hearings challenging reduction or termination of benefits, and lawyers bring suits on behalf of similarly situated individuals to stop government agencies from violating substantive and procedural rights. [FN85] The continued success of these administrative and litigation strategies [FN86] provides ample evidence that, post welfare reform, government benefits programs continue to be operated in ways that violate the law. In Part V.A, this Article argues that, given this history and current practice of maladministration and systemic violation of statutory and constitutional rights, retention of structures to ensure this form of accountability is essential.

Accountability along the second measure--the presence and efficacy of means for poor communities to understand and participate in the process by which decisions about poverty policy are made--exists, in an old governance framework, almost entirely within mechanisms that are targeted not specifically to affected communities but instead to the greater public. First, at the most basic and general level, the franchise provides an opportunity for the public to elect the leaders that make law. [FN87] Beyond this, old governance administrative law structures offer a variety of tools to ensure that government policy is promulgated in a way that ensures some level of public access and participation. [FN88] For example, freedom of information and sunshine laws allow limited public access to government records and meetings; and the Administrative Procedure Act mandates notice of administrative rulemaking, an opportunity for the public to comment prior to final promulgation of rules, and mechanisms to sue if an administrative agency acts outside the boundaries of its statutory mandate. [FN89] Each of these mechanisms provides some generalized access, but it is fair to critique these mechanisms as tremendously limited in their capacity to allow for substantive participation.

Thus, in summary, old governance offers mechanisms to support a crucial defensive project that yields some degree of accountability by ensuring that programs are governed by clear rules, and by ensuring fair and consistent application of rules. [FN90] It also offers a fairly thin scheme for participation by affected communities in the social-welfare programs that affect their lives. The question then becomes whether newer governing forms offer less or more along these measures of accountability.

B. New Governance Conceptions of Accountability

The form of individualized and class-based first-measure accountability of the type described above stands in fairly stark opposition to new governance principles. Many new governance scholars explicitly represent new governance structures as turning away from a highly detailed, rule-bound, rights-based, litigation-centered conception of democratic accountability. [FN91] For example, in their introduction to *Law and New Governance in the EU and the US*, de Búrca and Scott describe that a “characteristic often present in new governance processes is the voluntary or non-binding nature of the norms.” [FN92] To the extent that first-measure accountability is predicated on the existence of fixed, detailed, en-

forceable rules, then it is, at least at first blush, in significant tension with the experimentalist nature of new governance structures. New governance structures are consistently described as characterized by softness, flexibility, and experimentation. [FN93]

Despite what appears on the surface of new governance theory as a rejection of first-measure accountability, this Article will argue that, in the field of social-welfare programs, this is not necessarily the case. [FN94] However, two characteristics of governing structures that can play a role in newer governing forms do undermine first-measure accountability and merit some consideration here: privatization [FN95] and the move toward “softness in law.”

The impact of privatization on first-measure accountability is quite clear. Although privatization need not necessarily diminish the possibility of individualized accountability, in several recent examples, that has in fact been the case. [FN96] First, to the extent that privatization involves the use of incentive-based contracts that do not dictate specific modes of interaction but instead pay vendors for achieving particular outcomes, interactions between the contractors and individual program participants are not governed by specific rules. This leads to serious individual accountability problems. [FN97] In addition, to the extent that functions previously undertaken by the government are, in a new governance regime, being conducted by private entities, there is a substantial question as to whether the private entity would be seen as a “state actor” for the purposes of various accountability theories. [FN98] As a result of these structural problems with first-measure accountability in privatized settings, any newer governing model that might incorporate first-measure accountability must address these failures. [FN99]

Although the degree and nature of “softness in law” necessary to create a new governance structure is an area of substantial dispute, [FN100] some degree of flexibility in legal rules and a softening of some of the administrative state's ability and inclination to sanction those that fail to comply with rules is certainly an aspect of new governance. [FN101] To the extent that softness in law is equated with the absence of detailed rules regarding program administration and a diminishment in the authority of courts to create enforceable orders, this affects the strength of first-measure accountability. However, despite the seeming tension between new governance and first-measure accountability, the case studies below suggest that in certain circumstances, inclusion of structures to ensure first-measure accountability might not only provide an important defensive mechanism on the ground but might also be designed to augment rather than undermine new governance goals. This Article returns to that possibility in Part V.

C. New Governance Offers a Detailed Schema for Enhancing the Participation of Affected Communities

In contrast to the first measure of accountability, new governance theory and practice purports to significantly deepen and broaden accountability along the second measure--the ability of affected communities to participate in the design and evaluation of programs that affect their lives.

New governance is linked to a perceived democracy deficit [FN102] in current and historical government systems. Archon Fung and Erik Olin Wright, in their seminal work on Empowered Participatory Governance (EPG), provide a clear articulation of this theory. As they frame their project, EPG offers a response to the failure of the “institutional forms of liberal democracy . . . to [address] the novel problems we face in the twenty-first century.” According to Fung and Wright the current governance crisis is a failure of our democracies to live up to

the central ideals of democratic politics: facilitating active political involvement of the citizenry, forging political consensus through dialogue, devising and implementing public policies that ground a productive economy and healthy society, and, in more radical egalitarian versions of the democratic ideal, assuring that all citizens benefit from the nation's wealth. [FN103]

In Fung and Wright's iteration, then, new governance is a means to “[shift] to a more advanced form of public, deliberative participation.” [FN104]

To the extent that new governance in fact moves towards a deeper conception of democratic accountability, it does so through, in the first instance, enhancement of the opportunities for substantive participation by affected communities. [FN105] Affected communities participate in the setting of policy and, ideally, are positioned to continually insist on responsive institutions and programs. “Participation and partnership” are set up in opposition to the centralized, expert control that characterizes “old governance.” [FN106] So, in examples highlighted by Fung and Wright, decision-making authority is devolved to neighborhood governance councils in Chicago or local participatory bodies deliberating over city budgets in Porto Alegre, Brazil. [FN107] Closely related to the commitment to broad-based participation are a variety of structures that enhance the meaningfulness of that participation. New governance forms are local, in large part because localization is said to promote grassroots participation. [FN108] New governance projects are subject to robust forms of transparency to promote ongoing evaluation by a variety of insider and outsider actors. [FN109] They are subject to rigorous evaluation and peer review, as a means to continually reevaluate their effectiveness. And finally, local efforts are ideally linked to larger scale coordination so that successful experiments can be promoted and implemented more widely. [FN110] “Institutional design based on inclusion and the proliferation of normative authorities encourages the adoption of a wide variety of approaches, methodologies, and practices. This design must be coupled with the development of comparative measures to assess the relative success of varying methods in comparable circumstances.” [FN111]

The success of these participatory structures to promote accountability along the second measure has been subject to multiple critiques. These critiques are instructive in examining the new poverty agenda. First, and most simply, although some new governance programs comport with conceptions of deepened democracy, many do not place primary value on that norm. Particularly in the social-welfare field, the programs described in Part II are characterized, to varying degrees, by experimentation, devolution, public-private partnerships, and orchestration, but rarely seek to include any poor people or any organizations controlled by poor people in their deliberative governing bodies. In the multiple commissions and bodies described in Part II, a small minority mandated participation by poor people in the governing enterprise. [FN112] So in that very basic sense, these bodies fail to live up to the second-measure accountability norms at the heart of democratically motivated new governance enterprises.

Even if the institutions of the new poverty agenda were in fact participatory as envisioned by new governance theory, given the long history of using social-welfare policy as a tool of gender, race, and class subordination, [FN113] it is not clear that deliberative governance bodies can be structured to account and correct for those power imbalances. As disturbingly framed by NeJaime, “[p]urportedly participatory processes may in some instances merely reinscribe existing power dynamics, leaving outsider interests on the outside. Moreover, contesting outcomes becomes more difficult when such outcomes carry the presumption of community endorsement.” [FN114] Fung and Wright, in describing the necessary enabling conditions for effective EPG, identify power imbalances as a significant obstacle to effective participatory governance:

Most fundamentally, perhaps, the likelihood that these institutional designs will generate desired effects depends significantly upon the balances of power between actors engaged in EPG, and in particular the configurations of non-deliberative power that constitute the terrain upon which structured deliberation inside EPG occurs. Participants will be much more likely to engage in earnest deliberation when alternatives to it--such as strategic domination or exit from the process altogether--are made less attractive by roughly balanced power. [FN115]

Fung and Wright make clear that, in their estimation, absolute equality need not exist, but, in the face of power imbalances, a variety of factors might come together to enable deliberation even in the face of power imbalances. They identify “self-conscious institutional design efforts” as one key. “When administrators or legislators endow parents with

the power to fire school principals or popular councils with authority for reviewing village budgets, they put citizens and local experts on a more equal footing.” [FN116] In addition, the presence of strong outsider groups such as “community organizations, labor unions, and advocacy groups often check the tendencies of both officials and groups of citizens to commandeer ostensibly deliberative processes to advance their own narrow ends.” [FN117]

The central role of evaluation and its potential complicity with subordination also poses related, extraordinarily difficult questions. Of particular concern is the strategic use or misuse of data to support ideological or partisan positions and the control of evaluation by entities that accept inequality as a given. [FN118] The critiques about power imbalance and strategic misuse of data are, of course, interlocking. If participation by affected, subordinated communities is either non-existent (as it appears to be in much of the new poverty agenda) or otherwise ineffective-- or if the peers participating in the design, evaluation, and implementation of the programs are willing to accept as inevitable political compromises that may not be acceptable to those communities themselves--then data and studies about program effectiveness are, potentially, of very little use in rendering programs accountable along the second measure. The case study below focuses, in large part, on the role of political compromise in framing empirical inquiry in the new poverty agenda. It suggests that, in order to promote second-measure accountability, one must pay careful attention both to particular robust forms of transparency and to ensuring that participation is broad and multifaceted enough to counter these subordinating phenomena.

IV. New York City's Center for Economic Opportunity: Conditional Cash Transfers and Re-Measuring Poverty

Emerging poverty policy is, in significant and growing aspects, characterized by new governance concepts. The extent to which any particular governance structure or programmatic endeavor is on all fours with every aspect of new governance theory certainly varies significantly. Nevertheless, conceptions of devolution, localization, public-private collaboration, and a dedication to ongoing evaluation and revision in light of evaluation are increasingly prevalent. [FN119] This Part focuses on two highly promoted initiatives taken on by New York City's Center for Economic Opportunity. The first is its experimentation with conditional cash transfers as a means to alleviate long-term poverty, and the second is the City's efforts to implement and promote nationally a re-measurement of the poverty line. CEO itself sounds strongly in new governance and is, in many respects, at the forefront of the new poverty agenda. Because of this, these programs offer cogent lessons both about the substance and accountability of mechanisms within the emerging new poverty agenda. Specifically, CEO's conditional cash-transfer program turns away from first-measure accountability by divorcing programming entirely from structures for individuals to enforce programmatic rights. On the second measure, both the conditional cash-transfer program and re-measurement of poverty offer a disturbing view of the way that seemingly objective empirical measures are both complicit in subordination of poor people and are structurally fairly impervious to challenge by affected communities.

A. New York City's Center for Economic Opportunity

New York City's CEO exemplifies both the substantive and governance trends described above and is a prominent and highly promoted example of the new domestic programs that purport to move people out of poverty. Using words and structures that align with new governance, the Mayor of New York City has described CEO as “an innovation lab to test a diverse new generation of anti-poverty programs.” [FN120] CEO focuses on “the design, implementation, and evaluation of innovative programs . . .” [FN121] Among its key strategic approaches are “[u]sing data and evaluation to improve programs and allocate resources based on measurable results” and “[s]haring lessons learned and advocating on a national level for strategies shown to make a difference.” [FN122] CEO is often described--and describes itself--as leading innovation in the area of urban poverty. For example, CEO was recently named a finalist for the Harvard's Kennedy School's Innovation in American Government award. [FN123] Moreover, CEO's adherence to conceptions of

experimentation, evaluation, and national level orchestration is evident from its recent proposal to create a Federal Urban Innovation Fund, which would bring CEO's model to a national scale. [FN124]

Because of both the consonance of CEO's work with much of new governance theory, and the prominent role it is playing among centrist and progressive organizations in forging the new poverty agenda, the accountability and responsiveness mechanisms it offers or fails to offer merit close examination.

B. Opportunity NYC

A CEO central initiative is Opportunity NYC, a privately funded \$63 million pilot conditional cash transfer (CCT) program in which low-income families and children receive cash transfers, in exchange for performing specific actions in the areas of adult workforce and training participation, child education, and family health. [FN125] The program was launched in the fall of 2007 and is scheduled to operate for two to three years. Its impact on participating families will be studied for a minimum of five years. [FN126]

By way of brief background, Opportunity NYC [FN127] is the first large-scale implementation of a CCT program in the United States. The basic framework for CCT is as follows: individuals or families receive payments for engaging in particular behaviors, traditionally in the areas of children's education and health. [FN128] For example, a family will receive a cash payment for meeting a school-attendance target or ensuring that children attend health visits or receive vaccinations. [FN129] CCT programs were developed and have grown exponentially and internationally over the last several years as a bold new set of initiatives in poverty policy. The most famous program started in Mexico. That program, which was designed to replace a large-scale agricultural subsidy program, [FN130] began as a pilot initiative and grew from a program serving 300,000 individuals in 1997 to current coverage of about 5 million households. [FN131] In 1997, there were a few scattered programs, primarily in Mexico and South America. By 2008, there were active programs in virtually every country in Central and South America, and many programs in various states of development in the Middle East, Africa, Southeast Asia, and elsewhere. [FN132] CCT programs are regularly referred to as a "magic bullet" in development policy. [FN133]

CCT programs are generally justified as addressing two simultaneous goals. Cash transfers alleviate immediate poverty by raising the income of families in the short-term. CCT programs are thought to promote "human capital investment" by incentivizing families to engage in activities that are deemed to be likely to reduce poverty in the long-term. [FN134] The assumption underlying the imposition of conditions as a price for receiving the cash transfer is generally framed in terms of market failure. For a variety of reasons, families are perceived as acting against the long-term economic interest of their children. [FN135] Cash transfers are designed to correct these failures by creating an incentive to act differently. [FN136] To take a prominent example, several programs give money to mothers if their children attend school and attend required health visits. [FN137] In addition, in some programs, school-attendance payments are higher for girls than for boys. [FN138] The payments both transfer money to some poor families (those that comply with the behavioral requirement) and presumably produce children who, by benefit of receiving additional education and health care, will be less likely to remain in poverty in the future. The cash transfer allows the family to choose education over wage labor for their children.

Opportunity NYC was established as a pilot initiative that was designed to be studied and, crucially for its short-term political viability, the program itself is wholly privately funded. Despite its current state as a privately funded program, it is quite clear that, given the extraordinarily high cost, if the program succeeds and proposals are made to bring it to scale, it would have to become a publicly funded program.

Opportunity NYC is overseen by the Mayor's Center for Economic Opportunity but is administered by a group of non-profit organizations. [FN139] Under the terms of its largest program, Family Rewards, 2,389 families living below 130 percent of the federal poverty line in targeted high-poverty neighborhoods and having children in designated grades enrolled in the program in fall 2007. [FN140] At the same time, an equal number with the same characteristics were assigned to a control group. [FN141] The families in the program group fully participate in the rewards program and are paid at regular intervals for meeting a set of targets in the areas of workforce participation, children's educational progress and family health. For example, families are paid \$25 for attending a parent-teacher conference, \$150 per month for holding down a full-time job, or \$200 for attending a preventative health screening. [FN142] In total, families can receive up to \$7,000 a year [FN143] for participating in the program, although in practice participants receive significantly less. [FN144] Interestingly for the purposes of discussing first-measure accountability, although program participants can reach out informally to the non-profit organizations administering the program and have access to a centralized hotline if they believe they have not received "rewards" that they "earned," [FN145] there is no formal appeal or compliance mechanism. [FN146]

A central and defining feature of Opportunity NYC--and a central new governance feature--is its dual design as both a poverty program and an object of study. MDRC--the private, non-profit research organization charged with evaluating the program--will use detailed quantitative and qualitative measures to study outcomes for both the program and control group for five years. [FN147] The program will be evaluated for its success in "alleviating poverty in the short run, improving health, education and self-sufficiency outcomes in the intermediate term, and reducing intergenerational poverty in the long term." [FN148]

Despite the ambitious and, in many respects, thorough research agenda inherent in the design of Opportunity NYC, from the perspective of answering fundamental questions about the program, the research design is fundamentally flawed. From the outset, the program was criticized by low-income-led community groups as infected with bias. In short, poor women and their allies were insulted by the suggestion that poor women would not act in ways that supported their children's education or health absent a financial incentive to do so. [FN149] An obvious solution to this problem was that, at the very least, the program should include a non-conditional control--a group that would receive payments without complying with behavioral requirements--to test the assumption of the program that the imposition of the conditionality is necessary to achieve any particular positive outcome. [FN150] Despite this critique and suggestion, the program's designers, principally the Center for Economic Opportunity and MDRC, decided against that option and retained only the two groups: the program group that receives payments based on complying with conditions, and the control with the same demographic profile that receives no payments.

Although at this point the outcome data for Opportunity NYC necessarily focuses only on short-term effects, [FN151] there is some international data to suggest that, any positive results may not flow from the imposition of the conditionality itself. [FN152] For example, internationally, it is quite clear that CCT programs have a significant effect on things like school attendance, and there is some evidence to show that they correlate positively with improvements in child health. [FN153] At least one study, however, identifies similar positive effects on infant morbidity and mortality in non-CCT settings, and others indicate positive effects on both school attendance and health from non-CCTs. [FN154] The imposition of the conditionality then amounts not to a correction of a "market failure," as the literature suggests, or, more colloquially, as an assistance for families who want to make "good choices" for their families, but to something different. If in fact, as the international literature suggests, the conditionality affects only behavior and not, necessarily, long-term, non-behavioral indicia of improved well-being, then the program is, like welfare reform and like much of the poverty programs that preceded it, one focused on changing the behavior of poor, stereotypically women of color deemed deviant by the powers that be and depriving the "non-deserving" of aid. [FN155]

Despite the import of these questions, the evaluation of Opportunity NYC will never have data on these questions. Just as the designers of Opportunity NYC may be right that imposition of the condition is a key to any program success, the argument articulated above might also be true: any positive outcome may be due not to the imposition of the condition but to the cash transfer itself. However, the point is that the program evaluation is designed in such a way that the supposition argued above can never be tested. Due to the lack of a control group that receives payments absent any conditions, in the event that the program results in “positive outcomes” there will be no way to tell whether those outcomes are dependent on the imposition of the conditionality or whether the outcomes would have arisen or would perhaps even have been better in a program where equivalent cash transfers were made to similarly situated families without the imposition of conditions. [FN156] Thus the central critique of the program by low-income groups and their advocates, that the program ignores structural factors leading to poverty by reinforcing “the impression that if everybody would just work hard enough and change their personal behavior we could solve poverty in this country” [FN157] will remain despite its untestability under the current study design. Moreover the problem with failing to test this assumption is not just one of insult. The retention of conditionality in any future, publicly funded program imposes a real and significant cost on participants. Every failure to meet the condition, whether intentional or not, costs the family dollars. For families living below 130 percent of the federal poverty level, this is a high price to pay for an assumption that can never be tested. [FN158]

As a result of the research design, at best outcome research will result in endorsements of programs modeled on Opportunity NYC, or endorsements of other programs, such as the much lauded tying of welfare benefits to work requirements, that condition benefits on behavior, a result that resonates strikingly and disturbingly in the long history of using poverty policy as a means of subordination. [FN159]

C. Re-Measuring Poverty

Over the last several years, a coalition of national progressive organizations have supported and advocated a revision of the federal poverty standard. This work builds on what is now a widespread agreement among centrist and progressive institutions and experts that the current mode of measuring poverty is ineffective. The movement to change the measure has become a major focus of several important progressive institutions and has resulted in currently pending federal legislation that would mandate the creation of new metrics and a recent announcement by the Obama administration that the U.S. Census Bureau will begin issuing a supplemental poverty measure, along with the official measure each year. [FN160] In August 2008, New York City, on the recommendation of the Commission on Economic Opportunity, became the first local jurisdiction to engage in this effort. [FN161]

The justifications offered for changing the poverty measure sound strongly in new governance theory. It is consistently described as a precondition for evaluating the attempts to address poverty described in Part I. For example, Rebecca Blank and Mark Greenberg--two primary progressive proponents of the adoption of the federal legislation to change the poverty measure--justify it in these terms. As states and localities seek to develop poverty goals or strategies, they realize that to measure the effects of their initiatives they need a measure of poverty that takes into account the effects of policies such as health-care or child-care expansions, and changes in the state tax structure. [FN162]

This effort was conceived in New York City of as a foundational part of CEO's work. [FN163] And like New York City's evaluation of Opportunity NYC, upon closer examination this seemingly objective measure is informed by political choices that fail to bring to the forefront some of the most pressing needs of poor families.

Before proceeding to some of the political choices that inform these efforts, a bit of background on poverty measurement and some description of the new measure and the prominent critiques of it provide important context. There is sig-

nificant consensus that the current federal poverty measure no longer reflects economic realities and fails to provide an accurate or useful measure. The federal measure was developed in 1963, as part of the 1960s War on Poverty, by Mollie Orshansky, an analyst at the Social Security Administration. [FN164] The methodology is fairly simple. It has two components: first, it defines a poverty threshold. Individuals and families at or below the line are in poverty and those above are not. Second, it defines the resources that are to be counted when figuring out whether any particular household is above or below the line. For the threshold, the federal measure took the cost of a subsistence food budget for a family of four at the time and multiplied it by three. The subsistence food budget was developed by the Department of Agriculture in 1961. The number was multiplied by three because in 1955, the average family spent one-third of its after-tax income on food. [FN165] This threshold is adjusted annually for inflation and family size. [FN166] The measure is set nationally and is not adjusted for geographic variation in costs. The definition of resources in the federal measure is also very simple: resources are the pre-tax income of an individual family. [FN167]

Both the threshold definition and the resource definition have been widely criticized for their inability to provide an appropriate current measure. On the threshold side, it is simply no longer true that families spend an average of one-third of their money on food. The current estimate is that the average household spends about one-eighth of its budget on food. [FN168] The enormous growth in housing costs is one very significant--although by no means the only--change in family budgets since 1963. Another consistent critique is the lack of any means to vary the measure by location. There is no question that the cost of living and poverty vary significantly by location: the same amount of money will buy very different standards of living depending on whether one lives in New York City, or a small rural community in the Midwest, or the South. On the resource side, the use of pre-tax income is widely considered inappropriate. Particularly criticized is the lack of deductions for taxes paid or additions to resources to reflect receipt of tax credits like the EITC or non-cash governments benefits such as SNAP benefits and rent subsidies. [FN169]

In response to these longstanding critiques, in the early 1990s Congress asked the National Academy of Sciences (NAS) to convene a panel of experts and devise a new methodology for measuring poverty. [FN170] The NAS released a report in 1995 proposing a new measure. The NAS measure, like the federal measure, consists of a threshold and a resource definition but it varies in several important respects. First, the threshold is defined by relying on expenditure data for four basic expenses--food, shelter, clothing, and utilities--plus a small addition for miscellaneous expenses. [FN171] The report suggests using a number between the 30th and 35th percentile of nationally representative expenditures using the Consumer Expenditure Survey. This figure is then varied for household size and geographic location. [FN172] On the resource side, the NAS report recommends calculating the "adjusted disposable income" of each household. [FN173] Rather than counting pre-tax income, the measure deducts taxes paid, adds in tax credits and adds benefits that can be used to pay for food, shelter, clothing, or utilities. [FN174] In addition, the measure deducts some expenses for households that actually pay for them. Specifically, the NAS report suggests deduction of child-support payments, out-of-pocket medical costs and work-related expenses such as child-care and transportation. [FN175]

CEO committed to re-measure poverty in the City to provide a better metric with which to evaluate their poverty initiatives. The report, issued in August 2008, was based largely on methodology proposed by the NAS. [FN176] As with the examination of Opportunity NYC above, New York City's implementation of the NAS measure raises significant questions about the political choices imbued in the measurement tools of the new poverty agenda. Or to put it more bluntly: measures that purport or appear to be objective (i.e., newer and presumably more accurate measure of poverty or evaluations of the "success" of Opportunity NYC) are informed by subordination-tinged political compromises that are, in turn rendered invisible by the seeming objectivity of the measure.

In order to understand this critique, it is important to look at some of the effects of utilization of the NAS methodology. First, by tagging the threshold to a number between the 30th and 35th percentile of median expenditures, the meas-

ure results in fairly small changes in overall percentages of people in poverty. For example, when New York City implemented the measure, the percentage of people in poverty went from 18 percent under the federal measure to 23 percent under the CEO measure. While this is in some circles viewed as significant, it perpetuates the exclusion from official “poverty” of “individuals with incomes too high to be officially poor but too low to make ends meet.” [FN177]

The choice to link the threshold to between 30th and 35th percentile of median expenditures is a purely political one. As explained by many of its supporters, this choice is seen as reasonable and key to the political viability of the measure. In evaluating the impact of this political choice, it is important to look at the effect of adopting this particular threshold in terms of who gets defined as “poor”--and therefore is presumably worthy of support--and who does not. Most centrally, leaving the overall number of poor people largely unchanged, and at the same time lending significant legitimacy to the continued exclusion of large numbers of economically unstable households from the definition, raises serious questions about the utility of the measure.

Another set of results that appear incongruous to some analysts is the effect of the NAS methodology on the comparative rates of poverty among the elderly, children, and female-headed households. Under the NAS measure, principally because of the deduction from resources for out-of-pocket medical expenses, the rates of poverty among the elderly rise more than for any other sub-group. In the New York City measurement the rate of poverty among the elderly rose by 13.9 percent. [FN178] In contrast, child poverty fell slightly (from 27.2 percent under the federal measure to 26.6 percent under the CEO measure). As Shawn Fremstad points out,

Considered in isolation, the increase in the elderly poverty rate is unobjectionable and is arguably an important indicator that more attention needs to be paid to poverty among the elderly. However, when considered in relation to the decrease in child poverty (or smaller increase, depending on the precise NAS-style measure used), it raises a question about whether the resulting rates are consistent with differences in other forms of economic hardship between children and the elderly In general, the elderly experience much lower rates of economic hardship than children and families with children. [FN179]

Apart from these more specific critiques, the NAS measure has been criticized by some as too conservative for this political moment. John Quinterno frames the growing support for the NAS measure as a lost opportunity and as reflective of the late 1990s. As he frames it,

The NAS measure originally was developed at a time when the economy was expanding, conservative politics were ascendant and antipathy to poverty programs was mounting. Today's environment, however, is radically different: the economy is mired in a severe recession, the public is extremely aware of issues related to work and income and the political climate is more hospitable to progressive solutions Might the time therefore be ripe to replace the poverty statistic not with a reformed version of itself but with a more comprehensive measure of economic well-being and social development? [FN180]

The NAS measure undoubtedly has a great deal to offer, but as these critiques suggest, it is also a creature of political compromise. Perhaps the most stark example of this is the choice to tag the threshold to between the 30th and 35th percentile of median expenditures, although the other critiques of the measure detailed above also have political aspects. What is disturbing is not necessarily any one of these substantive decisions; each can be justified in very rational terms. Instead it is the impact of these political choices on the objectivity and utility of the measure and, specifically for new governance, what the complicity in political choices means for the viability of a governing system centered on purportedly objective measurement tools. Quite simply, if New York City's measure is perceived as an “accurate” measure, what implications might this have for the ability of poor communities to advocate for those--for example, significant members of the working poor--whose poverty is defined out of the measure? Or for poor children, whose poverty is minimized?

D. Are These Programs Accountable?

1. first-measure accountability

Opportunity NYC offers no suggestion that first-measure accountability is present or important to those constructing these initiatives. Although there are some informal mechanisms designed to resolve disputes, the program has no mechanism for participants to challenge determinations. It is true that the program is nearly entirely funded by private sources and that, if the program were to move to public funding, there may be significantly more attention to these concerns. However, the lack of these mechanisms is nevertheless instructive. As discussed in Part II above, [FN181] privatization and softness in law play a significant role in this lack of accountability and, even if it were to become publicly funded, these characteristics may not disappear. Opportunity NYC is privatized to a very high degree. The program is overseen by a part of the NYC Mayor's office, but it is wholly administered by private, non-profit entities. Even in event of public funding, these factors might dissuade any court from imposing first-measure accountability mechanisms into the program. Opportunity NYC is also characterized by a high degree of softness in law: there are no governing, enforceable rules within the program. If a person fails to get a reward that she claims she earned, she can informally approach the nonprofit administering the program; but if this fails there is no apparent remedy. [FN182] More broadly than that, there are no legal rules governing this program or any other CEO initiative. Neither Opportunity NYC nor CEO are based in statute or regulation. The office, and all of its work, is a creation of the Mayor and its programs arguably can be administered in virtually whatever fashion the office deems appropriate. It is possible that, if the program were to move to public support, these concerns may be addressed. But given the likely continued role of private entities in program administration and the current absence of rules, this is not likely to happen without outside pressure.

If New York City's efforts in general and Opportunity NYC in particular are, as argued in Part II, emblematic of the new poverty agenda, then it is fair to say that there is a trend--within the new poverty agenda-- away from first-measure accountability. If it were likely that programs within the new poverty agenda would run without error and without discrimination, then perhaps this would not be of great concern. But the history and current reality of U.S. social-welfare policy provides little to reassure us that these mechanisms are no longer necessary. Across the country today, privatization of social-welfare programs is leading to administration of programs that purport to help people transition from welfare to work but in fact do a much better job of punishing recipients than assisting them. [FN183] What little data exists strongly suggests that outcomes in welfare programs vary disproportionately along the lines of race. [FN184] Finally, across the country today lawyers representing poor people continue to bring and prevail in lawsuits that attack shocking failures of government to consistently and fairly provide what they purport to provide. [FN185] In the face of this long history and current practice, reincorporating first-measure accountability structures into newer governing forms, particularly in the field of social-welfare policy, is essential.

2. second-measure accountability

The case studies reveal that, within the context of the new poverty agenda, programs that sound strongly in new governance in their reliance on measurement, experimentation, and the creation of metrics against which to measure progress, put forward a face of objectivity but are complicit in the politics of subordination. What appear to be progressive ends are not quite as progressive as they seem. In fact, both Opportunity NYC and the new poverty measure implicitly accept political consensuses that are, from an anti-subordination perspective, highly suspect. In the case of Opportunity NYC, the experimental design accepts behavioral control and deprivation of support for non-compliance as the price of government support. [FN186] In the case of poverty measurement, the measure's design accepts fairly arbitrary exclusions of families earning above 35 percent of median expenditures for defined expenses, and undercounts child poverty and families too poor to pay for child care and health care, as the price of politics. In both cases, these experiments will

measure what those in the peer network that defined the measurement tool are willing to look at and, conversely, will not provide any data on questions that those who designed the experiments are not willing to ask. So we will look at the effect of conditioned benefits on the economic state of families in the near and long-term but not at the price of the conditionality, no matter how dire. Similarly in the case of poverty measurement, we will look at the positive effect of some government benefit programs but will at the very least fail to increase the visibility of the extensive material hardships experienced by poor children and the wide swaths of households who, though above the NAS measure, still cannot meet their basic needs.

In this sense, CEO provides important examples of the way that seemingly objective and rigorous evaluation structures, structures that are fundamental to new governance theory, can be complicit with subordination. To the extent that this is true, and to the extent that new governance structures are, as detailed above, purportedly designed to deepen democracy, these case studies raise serious questions about the role of experimentalism in current poverty policy. The following Part suggests some ways in which governance structures might be amended to destabilize [FN187] the political consensus reflected in these initiatives and create opportunities for anti-subordination agendas to play a significant role in poverty policies characterized by new governance.

V. Incorporation of First-Measure and Second-Measure Accountability Into New Governance Structures

The CEO case studies provide some answers to the questions of accountability and governance posed at the beginning of this Article. The social-welfare programs themselves, while offering some positive assistance to poor people, are constrained by political consensuses about which poor people deserve assistance and what they do and do not deserve. Crucially for individuals interested in creating more responsive policy, the governance structures provide few points of access designed to ensure either that applicants and recipients actually get the benefits they are supposed to get or that poor communities and their advocates can participate in program design and evaluation. To begin formulating a solution to these accountability problems one must recall the way in which new governance systems purport to operate. Speaking fairly reductively, new governance decision-making takes places at three conceptual stages: (1) a broadly representative group of stakeholders come together to set goals, e.g., the reduction of poverty by X percent in a jurisdiction; (2) a governing body designs programs and simultaneous systems to evaluate the efficacy of those programs in meeting the pre-set goals; and (3) the programs are evaluated, and in response to that evaluation the programs and responses are redesigned.

In terms of first-measure accountability, it involves only phase two of the governing enterprise--the design and implementation of the program. Here the solution is fairly clear. We must fold back in individualized accountability structures. Section A below describes what is required and argues that reincorporation of those structures does not undermine central new governance objectives. As to the second measure, at first blush the fact that there are no poor people included in the governing structures of the case study programs, appears to mean that they lend no data to help understand whether new governance can work. However, when contextualized within the long history of subordination in social-welfare policy, this absence suggests that such inclusion may be difficult to achieve, leading to a need for other more politically viable solutions. In short, in addition to the important emphasis on creating viable insider participation mechanisms, we must begin to create viable paths towards multi-level outsider participation that can successfully intervene at all three stages of the governing enterprise. Section B begins to sketch out this possibility.

A. Incorporation of First-Measure Accountability

First-measure accountability mechanisms must be included in new poverty programs for two fundamental reasons. First, given the long history of subordination and maladministration, giving up important tools to prevent these practices

would have to result in significant benefits in order to be justified. [FN188] Second, the lack of first-measure accountability structures, particularly in highly privatized programs, provides any easy mechanism for government agencies to implement punitive, discriminatory policies with little or no challenge. [FN189]

To reincorporate first-measure accountability mechanisms into new poverty programs, program designers must ensure that, once a program is designed and put into practice, it must be governed by enforceable rules. This means having clear eligibility criteria and clear criteria for how the agency, be it public or private, should interact with a benefit applicant or recipient. So in the example of Opportunity NYC, there would need to be clear, publicly available rules and a clear mechanism for enforcing those rights. An administrative hearing system is one mechanism that accomplishes this end, but there may be other solutions. What is important is that there is some system in place that accomplishes that goal. In addition, the possibility of systemic remedies must exist. If the government designs and implements a poverty program, there is no reason that an individual or class of individuals should not have a clear right of action and entitlement to injunctive relief to remedy any failure of the government to implement the program according to its own rules. [FN190] Moreover, to the extent that the government agency uses private entities to administer programs, then they, like their government counterparts, must be subject to remedial judicial orders for failing to comply with program rules.

In a new governance context, any argument for reincorporation of hard rules must answer a few key critiques. First, does the reincorporation of rules undermine the innovation at the heart of new governance structures? And second, does the reincorporation of individual and systemic remedies raise significant problems concerning the utility of those tools, the competence of the judiciary to formulate effective orders, and the possibility that judicial orders result in unintended negative consequences?

As to the first critique, in the particular area of government benefit programs, if first-measure accountability is incorporated at the level where a program is implemented it should not undermine innovation. Calls within new governance scholarship for fewer and “softer” rules typically arise with reference to the role of administering agencies in regulating the conduct of entities and individuals. Regulations focusing on environmental protection and workplace safety are paradigmatic. Detailed rule-based regulatory regimes have been widely criticized. As Bradley Karkkainen has described the critique, “[r]ules of this type, it is said, are often both over- and under-inclusive. They tend to be costly to implement, inflexible, insensitive to local variations in the costs and benefits of environmental improvements, and they may stifle innovation.” [FN191] Another and related part of the appeal of a less rule-bound system is a rejection of principle-agent theory and dedication to goal-setting and perpetual experimentation as a central governing concept. New governance is said to have a “flagrant disrespect for the distinction between enactment (or law making) and enforcement (or law application).” [FN192] The rejection of this distinction is based in the much made observation that, “[r]ule makers know that today’s solutions may not be optimal by the time they have embodied them in specific decrees.” [FN193] These critiques, while perhaps applicable to an environmental regime, simply do not fit in government benefits programs of the kind run by CEO. CEO’s objectives are to pilot programs that address their goals. Opportunity NYC is one example of such an experiment. While these concerns might justify devolution and orchestration in light of learning, they do not justify running a program in a fashion that undermines the ability of individual applicants and recipients to enforce whatever rights to a benefit they might have under the program. The central concern of the first measure of accountability is giving an individual applicant or recipient, or classes of similarly situated individuals, the right to be treated in accordance with clear rules: to be given the benefit if she qualifies for it, to only lose it if similarly situated individuals would lose it. Once the experiment is undertaken, there is no reason, justified within new governance theory, to bar rules that the program have clear eligibility criteria that individuals and classes of individuals can enforce.

It is, however, probably true that importing the mechanisms of individual and class-based enforceability may slow down the experimentation process. It would likely subject private entities to liability and judicial control and could dis-

suade some private entities from participating in these programs. But ensuring that both public and private entities administering government-supported programs administer them fairly and consistently remains essential.

Finally, if properly structured, data arising from first-measure accountability systems might lend significant information to those evaluating the efficacy of the program being challenged. [FN194] So for example, if Opportunity NYC were subject to administrative hearings and the records of those hearings, stripped of confidential information, were available to the public and to those charged with evaluating the program, that could provide useful additional evidence to consider in the ongoing evaluation of the program.

As to the second obvious critique, both *Goldberg v. Kelly* and institutionally focused public law litigation have, of course, been subject to substantial critique as means to ensuring accountability. In particular, as Noonan, Sabel, and Simon note, it is

apparent that the hearing process was not adequate to accomplish the broader rule-of-law goals of cases like *Goldberg*. For one thing, beneficiaries lacked the knowledge and resources to identify legally questionable decisions and appeal them. Although rates of hearing decisions for claimants were often high, only a tiny fraction of frontline decisions are taken to hearing in most programs. There have been many indications that large numbers of decisions that could have been reversed at hearings went unchallenged. [FN195]

While this is certainly true, this articulation describes the limitations of the remedy, not its utter lack of utility. While fair hearings are no doubt of limited utility, they do remain a vital individual, as opposed to systemic, accountability mechanism.

Critiques of systemic judicial remedies, particularly in polycentric systems, are equally strong. Again as Noonan, Sabel, and Simon note,

Lon L. Fuller (1978) raised doubts about the role of courts in the welfare system by suggesting that “polycentric” claims were ill suited for judicial intervention. Polycentric problems arise in complexly integrated systems where a judicial mandate with respect to one part might ramify in unpredictable or uncontrollable ways to other parts. [FN196]

While these critiques are well founded, offer substantial arguments to justify a move away from these strategies as the sole or even most effective means to ensure accountability and offer important suggestions for the form of relief that might be appropriate, particularly in complex systems, the case study above signals a virtually complete departure from rule-based, judicially enforced accountability. [FN197] This Article argues simply that, absent other mechanisms to ensure that individuals can engage in the essentially defensive task of ensuring that government assistance programs provide what they purport to provide, rule-bound individual and systemic remedial structures remain essential.

B. Incorporation of Second-Measure Accountability

Measure two accountability asks whether or not those affected by programmatic decisions have a real opportunity to participate in goal setting and program design and evaluation. The answer provided by this study of the new poverty agenda is a resounding “no.” In this context, there are virtually no mechanisms for substantive participation by poor communities in program design and evaluation. The problems of second-measure accountability are compounded by the incorporation of some but not all of new governance theory. The new poverty programs are experimental and characterized by public-private collaborations, but they are not participatory, and this is, perhaps, the source of their problem.

New governance theory suggests that programs will be continually reevaluated and improved in light of evidence of

their efficacy. The status quo will, through the ongoing evaluation of policies and programs by a peer network, be destabilized. That network serves as the impetus for accountability for those implementing programs or policies and the mechanism by which the governance enterprise pushes toward better and better solutions to complicated problems. But when, as in the case studies discussed above, the terms of the evidence, the parameters of permissible questions, and the menu of possible programmatic strategies are constrained by the biases and political perspectives of those admitted into the collaborative body that designs and evaluates the programs, there is a problem. The experimentalist enterprise will move forward with no substantive mechanism in place for people to ask whether or not they are meeting the needs of poor communities as those communities might define their need or remedy. Moreover, because of its facial reliance on empiricism, this harm to poor communities is effaced.

So in the new poverty agenda, we are faced with a lack of second-measure accountability. An obvious solution to this problem is that poor people need a seat at the table, wherever that program design and evaluation table might be located. And this is certainly a beginning. Inclusion in the governing body or peer network certainly contributes significantly to second-measure accountability, and, as Lisa Alexander suggests, in contexts characterized by disproportionate power and subordination, it is likely necessary that inclusion be mandatory and that their participation be supported by hard law remedies that will enable them to ensure attention to their concerns. [FN198] However, this is easier said than accomplished. As argued earlier, creation of a robust, participatory governing body where affected communities can have a real say in decision-making depends on the relative political power of the affected community. [FN199] In American social-welfare policy, where poor people have historically been stigmatized and targeted, anything approaching parity of political bargaining power is unlikely to exist. Moreover, the case studies above and the more general conversation of the governing structures of the new poverty agenda suggest that there are serious political forces at play that lead to the exclusion of poor communities and their advocates from the governance table. For example, despite fairly broad inclusion in New York City's Economic Opportunity Commission, organizations headed by low-income groups were not included. [FN200] Similarly, among the many initiatives described in Part I, very few mandated inclusion of poor people on the governing body [FN201] and none included mechanisms, like those suggested by Alexander, that serve to counter the possibility of cooption and tokenism that can plague efforts to include substantive participation by poor people in governing bodies. [FN202]

For these reasons, in addition to the essential work being done to figure out how to render substantive the participation of these insiders in new governance structures, [FN203] in response to the perhaps inherent limitations to insider participation in fields characterized by subordination, the answer may be to broaden conceptions and modes of participation and to focus energy on the development of robust structures to facilitate multi-level outsider participation. What this would mean, in very practical terms, is that poor individuals and communities who are affected by policies but are not among the decision-makers would have clear modes of intervention and advocacy. The question then becomes: at what point and by what means might affected communities intervene from the outside?

The center of the second-measure accountability problem identified in this Article is that, in the new poverty agenda, the terms of the evidence and the parameters of permissible questions, and, as a result, the menu of possible solutions, are constrained by the biases and political perspectives of those admitted into the peer network that will set goals and design and evaluate the programs. In the case of CEO, the political biases of program designers, at every juncture from the initial commission to the designers of the evaluation of Opportunity NYC led to an experimentalist enterprise that leaves out possibilities that fall outside dominant political notions of deservingness. Similarly, in the case of poverty measurement, the measure that, according to its proponents, will form the base upon which the City's and, if the national legislation passes, the nation's poverty policy will be evaluated in the future, effaces the existence of wide swath of the economically insecure and devalues the relative poverty of significant groups of poor people. So if the problem has to do with the questions that those inside the governing structure are willing to ask and the solutions they are willing to con-

sider, perhaps the answer lies in destabilizing that part of the structure.

To further conceptualize these possibilities it is helpful to think about two additional locations, outside the collaborative decision-making body, from which affected communities might participate: the first being an officially constituted separate monitoring structure that is, in some sense halfway outside--constituted by the government but outside the decision-making body. And second a location entirely outside--locations from which those excluded both from the decision-making body and the outside monitor might intervene to press for more responsive decisions.

As to the location, "halfway outside," in an earlier article I suggested that one might create community-controlled monitoring bodies to provide measure two accountability for welfare contracting processes. These structures can be conceptualized as ongoing, community-controlled bodies that serve a watchdog function. In order to function they would have robust access both to program data and program administrators for the purpose of conducting research, adequate resources in order to evaluate data that they receive and a practical ability to issue reports evaluating the efforts of the governing body. [FN204]

Moving the focus to a possible intervention from the outside, poverty programs must be characterized, at all levels of governing, by very robust forms of transparency. If an outside group is to challenge the status quo represented by the politically constrained terms of the evaluation mechanism in place, then that group must have access to sufficient data to challenge those in charge. For example, on a micro level, for Opportunity NYC, the program would have to make available sufficient raw data and access to program staff and participants, and outside groups must be granted the ability to force reasonable data collection to enable outside research with independent conclusions about the program's efficacy. Consideration should also be given to expanding judicial enforceability of these data access mechanisms.

In addition, to facilitate outsider input, one might look to the structure of traditional notice and comment for guidance and transport that framework into goal setting, program design and evaluation mechanisms. If a pre-condition to establishing a new initiative was to publish the goals and proposed programs, some form of research design agenda and then to subject the published information to comment and response, as well as to publish research results and similarly subject those results to comment and response, that might broaden the terms of inquiry in a way that supports destabilization and participation by outsiders. So for example, in the context of New York City's CEO, if the initial report issued by the insider governing body, the Commission on Economic Opportunity, and the proposed initiatives of CEO were both subject to publication, comment and response, it might give those who are, for reasons of politics, excluded from the governing body, a structural opportunity to intervene at the point of goal setting and program design to challenge the politics of the possible and to propose that the governing body consider different goals, strategies and measures for evaluation. Similarly, if the design of the poverty measurement tool was subject to notice and comment, some of the critiques raised above could have been raised, creating a strategic opportunity to advocate for the use of a more inclusive measure.

Conclusion

U.S. social-welfare policy stands today at a crossroads. After welfare reform, we find ourselves with on the one hand a shredded safety net and on the other some significant, albeit politically constrained, efforts to create a different set of supports. But those shifts have largely come at the price of accountability. Today the new poverty agenda is increasingly impervious to challenges that it fails to provide what it purports to provide. More disturbingly, the promise of increased responsiveness and participation offered by new governance, in this context, has failed to materialize thus giving poor communities few tools to intervene to push the agenda towards a policy that might be more responsive to their needs. If we are to reverse this trend and strategically deploy the new governance promise of deepened democracy, remedying these accountability failures must be at the top of the poverty agenda.

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[FN1]. Archon Fung & Erik Olin Wright, *Thinking About Empowered Participatory Governance*, in *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* 4 (Archon Fung & Erik Olin Wright eds., 2003).

[FN2]. *Id.*

[FN3]. This question was raised, in various forms and by various participants, throughout the conference. See, e.g., David & Louise Trubek, *Questions As We Go Forward: A Final Discussion* (Nov. 21, 2009) (slides on file with author).

[FN4]. This Article seeks to use new governance mechanisms as a tool for the creation of a more progressive poverty policy. In this sense it is aligned with an instrumentalist lawyering view of those governance mechanisms. As Douglas NeJaime frames this view,

[W]hile New Governance positions itself mainly as a project of the Left, there is little inherently progressive about it, and many of its strategies and principles seem decidedly centrist. Indeed, New Governance is in some ways a coming-to-terms with the conservative turn of the state in the last several decades. In fact, New Governance resonates with neo-liberalism; the impulse toward less centralized regulation and an appeal to privatization reflects neo-liberal ideals which have enjoyed currency in the American post-welfare state. Those coming from politically conservative perspectives might have little reason to resist New Governance process on purely political grounds, thus giving advocates a way to devise governance systems that seek to bring about progressive change through centrist means....

Douglas NeJaime, [When New Governance Fails](#), 70 *Ohio St. L.J.* 323, 343-44 (2009).

[FN5]. Barbara Vobejda, *Clinton Signs Welfare Bill Amid Division*, *Wash. Post*, Aug. 23, 1996, at A1.

[FN6]. 42 U.S.C. § 608(a)(7) (2006).

[FN7]. 8 U.S.C. § 1612 (2006).

[FN8]. 42 U.S.C. § 601(a) (2006).

[FN9]. 42 U.S.C. § 604(a)(1) (2006). See also generally Wendy A. Bach, [Welfare Reform, Privatization, and Power: Reconfiguring Administrative Law Structures from the Ground Up](#), 74 *Brook. L. Rev.* 275, 279 (2009).

[FN10]. Office of Family Assistance, U.S. Department of Health and Human Services, 1995 AFDC Total Caseload, http://www.acf.hhs.gov/programs/ofa/data-reports/caseload/afdc/1995/fycyttotal_95_ek.htm.

[FN11]. Office of Family Assistance, U.S. Department of Health and Human Services, TANF: Total Number of Recipients, Fiscal Year 2009 (Jan. 28, 2010), http://www.acf.hhs.gov/programs/ofa/data-reports/caseload/2009/2009_recipient_tan.htm. Note that these figures pertain to receipt of Temporary Assistance to Needy Families, the program that followed

AFDC.

[FN12]. Office of Family Assistance, U.S. Department of Health and Human Services, TANF Caseload Data, http://www.acf.hhs.gov/programs/ofa/data-reports/caseload/caseload_recent.html (last visited Feb. 17, 2009).

[FN13]. 42 U.S.C. § 607 (2006).

[FN14]. See Welfare and Work Data: Hearing Before the Subcomm. on Human Resources of the H. Comm. on Ways and Means, 109th Cong. 25 (2005) (statement of Dr. Wade F. Horn, Asst. Sec'y for Children & Families, U.S. Dept. of Health & Human Servs.) (celebrating a 55-percent decrease in welfare caseloads). See also Christine Kim & Robert Rector, Welfare Reform Turns Ten: Evidence Shows Reduced Dependence, Poverty 1 (WebMemo No. 1183, 2006), available _____ at _____ <http://www.heritage.org/Research/Reports/2006/08/Welfare-Reform-Turns-Ten-Evidence-Shows-Reduced-Dependence-Poverty>.

[FN15]. See Heather Boushey & David Rosnick, Jobs Held by Former Welfare Recipients Hit Hard by Economic Downturn 2 (2003), available at http://www.cepr.net/documents/publications/welfare_reform_2003_09.pdf (“Unemployment has risen from 3.9 percent to 6.2 percent between October 2000 and July 2003 and many of the industries in which former welfare recipients found jobs were hit harder than the average industry.”).

[FN16]. Elizabeth Lower-Basch, TANF Policy Brief: Cash Assistance Since Welfare Reform 1 (2009), available at <http://www.clasp.org/admin/site/publications/files/CashAssistance.pdf> (“As the welfare caseloads fell, the number of low-income single mothers who were working and not receiving welfare increased, but so did the number of low-income single mothers who were neither working nor receiving welfare. In 2007, the Congressional Research Service calculates that one third of single mothers-- heading more than 1.2 million families--were neither working nor receiving cash assistance. Many of these woman have disabilities that limit their ability to work, but either do not meet the stringent definition of disability needed for SSI benefits, or are waiting for their SSI applications to be approved.”).

[FN17]. Second in Series on Welfare Reform: Work Requirements on the TANF Cash Welfare Program: Hearing Before the Subcomm. on Human Resources of the H. Comm. on Ways and Means, 107th Cong. 10 (2001) (statement of Steve Savner, Senior Staff Attorney, Ctr. for Law & Soc. Policy).

[FN18]. *Id.* at 64.

[FN19]. *Id.* at 65.

[FN20]. *Id.*

[FN21]. *Id.* at 65-66.

[FN22]. See *infra* note 85 and accompanying text.

[FN23]. See, e.g., Kenneth J. Neubeck & Noel A. Cazenave, Welfare Racism: Playing The Race Card Against America's Poor (2001); Jill Quadagno, The Color of Welfare: How Racism Undermined the War on Poverty (1994); Lost Ground: Welfare Reform, Poverty and Beyond (Randy Albelda & Ann Withorn eds., 2002); Whose Welfare? (Gwendolyn Mink ed., 1998).

[FN24]. Neubeck & Cazenave, *supra* note 23, at 115.

[FN25]. The emphasis on “responsibility” was clear from the name of the act: The Personal Responsibility and Work Opportunity Reconciliation Act.

[FN26]. For clear evidence of the focus, within welfare reform, on marriage promotion, the evils of single parenthood and its explicit promotion of two-parent families, see generally Personal Responsibility and Work Opportunity Reconciliation Act of 1996, *Pub. L. No. 104-193*, § 101(1), (8), 110 Stat. 2105, 2110-11 (codified at *42 U.S.C. § 601*) (finding that “[m]arriage is the foundation of a successful society” and that “[t]he negative consequences of an out-of-wedlock birth are well documented”). For extensive discussions of the role of racist and patriarchal assumptions about welfare recipients, see generally sources cited *supra* note 23.

[FN27]. See generally Frances Fox Piven & Richard A. Cloward, *Regulating the Poor: The Functions of Public Welfare* (1971).

[FN28]. A review of the extensive victories of advocates and communities in fighting on behalf of those in poverty is beyond the scope of this Article. For an interesting history of the legal and organizing movements, see Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973* (1st ed. 1993); see also Mimi Abramovitz, *Under Attack: Fighting Back: Women and Welfare in the United States* (2d ed. 2000).

[FN29]. See *supra* note 27 and accompanying text.

[FN30]. In the months following the economic crisis, there emerged (in addition to the programs and policy proposals discussed herein) some movement toward a conception of baseline assistance--an acknowledgment that the new focus on programs designed to support workers is insufficient in a world where the economy fails to provide even low-wage unstable work. For example, in 2009, President Obama signed the American Recovery and Reinvestment Act, which created the TANF Emergency Contingency Fund. Funded at \$5 billion, the Emergency Contingency Fund targeted basic assistance, non-recurrent short-term benefits and subsidized employment. Elizabeth Lower-Basch, *Questions and Answers about the TANF Emergency Fund 2* (2009), available at http://www.seta.org/uploadedFiles/spring10conference/tanf_efc_qanda0409.pdf. See also Peter Edelman & Barbara Ehrenreich, *Why Welfare Reform Fails its Recession Test*, *Wash. Post*, Dec. 6, 2009, at B1.

[FN31]. A 2001 study conducted by the Urban Institute estimated that 41 percent of former welfare recipients lived below the federal poverty level even after considering earned income tax credit, food stamps, and other resources. In 2002, the General Accounting Office estimated that former welfare recipients earned between approximately \$9,500 to \$15,000 annually, leaving them below the federal poverty level. Cynthia M. Fagnoni, U.S. Gen. Accounting Office, *Welfare Reform: States Provide TANF-Funded Work Support Services to Many Low-Income Families Who Do Not Receive Cash Assistance 5*, GAO-02-615T (2002).

[FN32]. According to the U.S. Census Bureau, in 2007 and 2008, about 21 million full-time workers in the U.S. did not have health insurance. In the same period, uninsured part-time workers increased from 5.7 million to 6.8 million. U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2008*, tbl.7 (2009), available at <http://www.census.gov/prod/2009pubs/p60-236.pdf>.

[FN33]. See *infra* notes 36-44 and 63-67 and accompanying text.

[FN34]. The food stamp program was in fact recently renamed the Supplemental Nutrition Assistance Program (SNAP), a clear effort to disentangle it from stigmatized welfare benefits of the past. The Urban Inst., *LIWF Fact Sheet: Many Low-Income Working Families Turn to the Supplemental Nutrition Assistance Program For Help 4* (2009), available at

[http:// www.urban.org/uploadedpdf/411938_snapforhelp.pdf](http://www.urban.org/uploadedpdf/411938_snapforhelp.pdf). Left out of these programs are, of course, those who are deemed undeserving because of their refusal to work.

[FN35]. See *infra* notes 45-67 and accompanying text.

[FN36]. In recent years there has been an increase in EITC state participation. In 2006, nineteen states participated in the state EITC program. See Ami Nagle & Nicholas Johnson, Ctr. on Budget & Policy Priorities, *A Hand Up: How State Earned Income Tax Credits Help Working Families Escape Poverty In 2006*, at 21 (2006), available at <http://www.cbpp.org/files/3-8-06sfp.pdf>. Currently there are twenty-three states participating in the program. See also State EITC Online Resource Center, 50 State Map, [http:// www.stateeitc.com/map/index.asp](http://www.stateeitc.com/map/index.asp) (last visited Mar. 23, 2010).

[FN37]. Marybeth J. Mattingly, *Forty-Three Percent of Eligible Rural Families Can Claim A Larger Tax Credit With EITC Expansion 1* (2009), available at <http://www.carseyinstitute.unh.edu/publications/PB-EITC-09.pdf>.

[FN38]. Internal Revenue Service, *EITC State Statistics At-a-Glance for Tax Year 2008*, <http://www.eitc.irs.gov/central/eitcstats/>.

[FN39]. Internal Revenue Service, *ARRA and the Earned Income Tax Credit*, <http://www.irs.gov/newsroom/article/0,,id=205666,00.html> (last visited Mar. 23, 2010).

[FN40]. U.S. Dept. of Agriculture, Food and Nutrition Service, *Supplemental Nutrition Assistance Program Participation and Costs* (Mar. 30, 2010), [http:// www.fns.usda.gov/pd/SNAPsummary.htm](http://www.fns.usda.gov/pd/SNAPsummary.htm).

[FN41]. *Id.*

[FN42]. The Urban Inst., *supra* note 34, at 2.

[FN43]. *Id.* at 2-4.

[FN44]. Through TANF or CCDGB allocations, states vary widely in child-care spending. CLASP reported that in 2007, thirty-one states increased overall spending on child-care while twenty states decreased spending on child-care. Hannah Matthews, Ctr. for Law & Soc. Policy, *Child Care Assistance in 2007: Spending Update 1-2* (2007), available at <http://www.clasp.org/admin/site/publications/files/childcareassistance2007.pdf>.

[FN45]. Mark Greenberg, *Making Poverty History*, *Am. Prospect*, Apr. 22, 2009, http://www.prospect.org/cs/articles?article=making_poverty_history.

[FN46]. John Edwards, *John Edwards' Plan to Build One America*, [http:// www.johnedwards.com/issues/](http://www.johnedwards.com/issues/) (last visited Oct. 25, 2009).

[FN47]. Center for American Progress, *About the Center for American Progress*, <http://www.americanprogress.org/aboutus> (last visited Feb. 11, 2010).

[FN48]. Ctr. for Am. Progress, *From Poverty to Prosperity: A National Strategy to Cut Poverty in Half* (2007), available at [http:// www.americanprogress.org/issues/2007/04/pdf/poverty_report.pdf](http://www.americanprogress.org/issues/2007/04/pdf/poverty_report.pdf).

[FN49]. The states are Colorado, Connecticut, Delaware, Illinois, Indiana, Louisiana, Minnesota, Vermont, and Virginia. Ctr. for Law & Soc. Policy, *Poverty and Opportunity: State Government Task Forces 2* (2009), available at <http://www.clasp.org/admin/site/publications/files/StatewithPovertyCommissions-1.pdf> [hereinafter *State Government*

Task Forces].

[FN50]. Jodie Levin-Epstein & Kristen Michelle Gorzelany, Ctr. For Law & Soc. Policy, *Spotlight on Poverty and Opportunity, Seizing The Moment: State Governments and the New Commitment to Reduce Poverty in America* 36 (2008), available at http://www.clasp.org/publications/clasp_report_0418.pdf; State Government Task Forces, *supra* note 49, at 2.

[FN51]. State Government Task Forces, *supra* note 49, at 2; Wash. St. Dep't of Cmty., Trade, & Econ. Dev., *Poverty Advisory Committee: Challenging Poverty in Washington* 8 (2007), available at <http://www.clark.wa.gov/community-action/documents/CTED%20Poverty%20report.pdf>.

[FN52]. H.F. No. 4162, 2006 Minn. Laws, ch. 282, art. 2, § 27.

[FN53]. *Id.* Minn. Legislative Report: Commission to End Poverty in Minnesota by 2020 (2009), available at http://www.commissions.leg.state.mn.us/lcep/LCEP_Final_Report_SinglePgs.pdf.

[FN54]. See *Me. Rev. Stat. Ann. tit. 5, § 12004-1(6-H)* (2009); Wash. St. Dep't of Cmty., Trade, & Econ. Dev., *supra* note 51, at 8.

[FN55]. Child Poverty Prevention Council for La., *Implementation Plan* 59 (2009), available at <http://www.clasp.org/admin/site/documents/files/CPPC-Implementation-Plan-2009.pdf> (quoting S.B. 660, Reg. Sess. (La. 2008)).

[FN56]. *Id.*

[FN57]. Conn. Child Poverty Council, *January 2006 Progress Report* 1 (2006), available at <http://www.ct.gov/opm/LIB/opm/HHS/CPC/CPCProgress2006.pdf>. Another tremendously interesting example of the use of targets to guide policy is the Oregon Progress Board. It offers a robust early example of efforts in this respect. As described by the state, “[t]he Oregon Progress Board is an independent board created by the Legislature in 1990 to monitor the state's 20-year strategic vision, Oregon Shines, and keep it current.” Oregon Progress Board, *About Us*, http://www.oregon.gov/DAS/OPB/about_us.shtml (last visited Feb. 6, 2010). Unfortunately, the progress board was recently defunded due to budget cuts, but Oregon is pursuing alternative means of funding. *Id.* The progress board issues regular reports evaluating the state's progress in meeting its benchmarks. See, e.g., *Or. Progress Bd., 2009 Benchmark Report to the People of Oregon* (2009), available at http://www.oregon.gov/DAS/OPB/docs/2009Report/2009_Benchmark_Highlights.pdf. It also maintains an impressive dataset online that enables the public to generate reports on the state's progress in meeting the benchmarks. See Oregon Progress Board, *Benchmark Report Generator*, <http://benchmarks.oregon.gov> (last visited Feb. 6, 2010). The Progress Board not only issues ongoing reports and provides ongoing access to data, but it is empowered to evaluate existing efforts. The Board has an ongoing ability to recommend statutory and policy changes, including modification in public fiscal policies to be carried on by state and local governments, businesses, private citizens, and other organizations. Board staff assists local communities, wherever possible, in developing plans measures of success to achieve the goals established. *Or. Rev. Stat. § 284.618* (2009). The legislation further mandates that that “[t]he Oregon Department of Administrative Services shall ensure that state agency activities and programs are directed towards achieving the Oregon benchmarks.” *Or. Rev. Stat. § 291.110(1)* (2009).

[FN58]. NYC Ctr. for Econ. Opportunity, *Strategy and Implementation Report* 1 (2007), available at http://www.nyc.gov/html/ceo/downloads/pdf/ceo_2007_exec_sum.pdf.

[FN59]. *Id.*

[FN60]. NYC Center for Economic Opportunity, About the Center, <http://www.nyc.gov/html/ceo/html/about/about.shtml> (last visited Mar. 23, 2010).

[FN61]. See *infra* Part IV.

[FN62]. See *infra* Part IV.A.

[FN63]. Alabama, Delaware, Kentucky, Minnesota, and New Mexico's state task forces recommend an expansion of state EITC. Ala. H.R., Poverty Task Force: Final Report 3 (2008); Del. Child Poverty Task Force, Analysis of Child Poverty and Economic Opportunity in Delaware: Findings and Initial Recommendations, Executive Summary (2009), available at http://www.udel.edu/ccrs/pdf/KC_2009/CPTF_ExecutiveSummary.pdf; Jessica Noll, Poverty Task Force Holds First Meeting, KYPost.com, Sept. 21, 2009, <http://www.kypost.com/news/local/story/Poverty-Task-Force-Holds-First-Meeting/PjOMGyT0L0674W0HwfCuFQ.csp>; Minn. Legislative Report, *supra* note 53, at 32; New Mexico Governor Richardson's Poverty Reduction Task Force, Final Report 41-42 (2008), available at <http://www.tax.state.nm.us/pubs/TaxreseStat/povertyreductiontaskforcefinalreport.pdf> [hereinafter N.M. Poverty Reduction Task Force].

[FN64]. Alabama, Connecticut, Delaware, Kentucky, Minnesota, and New Mexico all included increased child-care support in their respective task force initiatives. Specific recommendations varied from child-care tax credits, providing affordable child-care programs and direct child-care subsidies. Many states that included child-care supports also recommended increased funding for early childhood education and after-school programs. Ala. H.R., *supra* note 63, at 2; Conn. Child Poverty Council, *supra* note 57, at 14-16; Del. Child Poverty Task Force, *supra* note 63; Noll, *supra* note 63; Minn. Legislative Report, *supra* note 53, at 35; N.M. Poverty Reduction Task Force, *supra* note 63, at 61.

State poverty initiatives in Delaware, Louisiana, Indiana, Kentucky, New Mexico, and Ohio recommended improvements in adult education. These recommendations are focused mainly around job or workforce training and development and expanding GED programs. Del. Child Poverty Task Force, *supra* note 63; Child Poverty Prevention Council for La., *supra* note 55, at 50-51; S.B. 260, 116th Gen. Assem., Reg. Sess. (Ind. 2009); Noll, *supra* note 63; N.M. Poverty Reduction Task Force Report, *supra* note 63, at 53-66; Ohio Anti-Poverty Task Force, The Ohio Anti-Poverty Task Force Report: Strategic Recommendations for Expanding Opportunity and Reducing Poverty 8-11 (2009), available at <http://www.governor.ohio.gov/Portals/1/APTF%20final%2006.09.pdf>.

[FN65]. Delaware, Ohio, Rhode Island, and Washington each included increased financial literacy or encouraged expansion of IDA programs. IDA programs encourage individuals to open a savings account through providing matching funds by the state. Del. Child Poverty Task Force, *supra* note 63; Ohio Anti-Poverty Task Force, *supra* note 64, at 14-15; H.R.J. Res. 6561, 2007 Leg. 404th Sess. (R.I. 2007); Wash. St. Dep't of Cmty. Trade & Econ. Dev., *supra* note 51, at 32.

[FN66]. See Minn. Legislative Report, *supra* note 53, at 37; Mont. Exec. Order No. 3-2007 (Feb. 22, 2007); Mich. Voices for Action, Michigan Voices for Action Poverty Summit: Overview (2008).

[FN67]. For example, in Ohio recommendations included:

1. Strengthen state investments in housing, healthcare, mental health and addiction services, and food assistance.
2. Strengthen federal advocacy for housing, food assistance, and work related tax credits.
3. Streamline and simplify the process for accessing work supports and other benefits.
4. Coordinate outreach across relevant state agencies and establish data sharing policies to increase access to work supports and public benefits.

5. Establish a statewide 2-1-1 information and referral system.
6. Improve access to needed supports for seniors and disabled Ohioans.
7. Utilize the Ohio Family Resource Simulator.

8. Endorse and expand Ohio's 21st Century Transportation Priorities Task Force's recommendations to improve transportation coordination.

9. Protect families in crisis and ensure they have access to basic utilities including gas, electric, water, and telephone service.

Ohio Anti-Poverty Task Force, *supra* note 64, at 6-7.

[FN68]. Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 *Minn. L. Rev.* 471, 473 (2004) (responding to Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *Minn. L. Rev.* 342 (2004)) (describing new governance scholarship as endeavoring “simultaneously to chronicle, interpret, analyze, theorize, and advocate a seismic re-orientation in both public policymaking process and the tools employed in policy implementation ... generally away from the familiar model of command-style, fixed-rule regulation by administrative fiat, and toward a new model of collaborative, multi-party, multi-level, adaptive, problem-solving New Governance”).

[FN69]. For a description of the conference and the full list of papers presented, see the Foreword to this volume.

[FN70]. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *Minn. L. Rev.* 342, 371-404 (2004).

[FN71]. Gráinne de Búrca & Joanne Scott, Introduction: New Governance, Law and Constitutionalism, in *Law and New Governance in the EU and the US* 2, 3 (Gráinne de Búrca & Joanne Scott eds., 2006); Fung & Wright, *supra* note 1, at 16-17 (identifying “bottom-up participation” as a central principle of empowered participatory governance).

[FN72]. Of the multiple official bodies discussed *supra* in Part I, only four--Alabama, the District of Columbia, Illinois, and Maine--appear to mandate some participation by members of affected communities in their governing bodies. See *Ala. Code § 29-2-250 (2009)* (mandating that “two individuals living in poverty” be included among the members of the Alabama Commission to Reduce Poverty, in addition to members of various community-based organizations); *D.C. Code § 3-631-632* (establishing the Commission on Poverty and mandating that the commission be comprised of “no more than 21 members” of which no more than nine shall be employees of the District of Columbia Of the remaining, “public” members, “[n]o fewer than five ... shall be persons who live in census tracts with poverty rates of at least 20 percent or who have personal experience living in poverty”); *20 Ill. Comp. Stat. 4080/15 (2009)* (mandating that the Illinois Commission on the Elimination of Poverty include no more than twenty-six voting members, twenty of whom are from the “public” and two “who have experienced extreme poverty”); *Me. Rev. Stat. Ann. tit. 5, § 13171(1) (2009)* (mandating that the Maine Council on Poverty and Economic Security be comprised of twenty-one appointed, voting members including “[o]ne person who has experienced poverty who is a woman ... [o]ne person who has experienced poverty who is elderly”). Also notable in the Illinois statute is a reliance on international human rights norms as a basis for the Commission's work. *20 Ill. Comp. Stat. 4080/5 (2009)*.

[FN73]. See *infra* Part IV.A.

[FN74]. See *infra* Part IV.C.

[FN75]. These two measures are, of course, interrelated. The first focuses on implementation and the second focuses on program design and evaluation. An obvious and crucial additional schema for conceptualizing accountability is that of in-

ternational human rights conceptions of social and economic rights. Although a discussion of this conception of accountability offers a potentially fruitful avenue to impose both the right to a baseline of economic subsistence as well as a vital conception of progressive realization of better economic circumstances for the poor, a full discussion of how to incorporate those norms is well beyond the scope of this Article. For an interesting discussion of those possibilities, see Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 *Yale Hum. Rts. & Dev. L.J.* (forthcoming 2010), available at <http://ssrn.com/abstract=1268907>. See also Lobel, *supra* note 70, at 393 (noting, in a discussion of the role of “soft law” in new governance that, “[a] second reason to use soft law involves circumstances in which the gap between the aspired norm and the existing reality is so large that hard regulatory provisions are meaningless. Many proposals for social and economic rights in developing countries rest in this rationale. The underlying idea is that it is better for the normative order to recognize in advance the impossibility of immediate change and to explicitly acknowledge the space between real and ideal. Softer mechanisms allow a regime to establish minimum levels of adherence and to formalize advancement toward higher, aspirational standards”). Along these lines, it is interesting to note that, with the exception of AFDC's very limited and state-controlled guarantee to minimal subsistence, “old-governance” institutions offer and have historically offered virtually nothing along this measure of accountability. Any hope, in the mid- to late-twentieth century for incorporating any conception of economically based rights (either through the imposition of heightened scrutiny for policies involving the poor or any conception of a fundamental right to subsistence) into a constitutional framework was extinguished with the Supreme Court's decision in *Dandridge v. Williams*, 397 U.S. 471 (1970). Davis, *supra* note 28, at 132. Thus to the extent that new governance institutions can by themselves, or through outside pressure, play a role in the realization of those rights, that would be a very positive trend.

[FN76]. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[FN77]. *Id.*

[FN78]. *Id.* at 264-65.

[FN79]. Compare *Goldberg v. Kelly*, 397 U.S. 254 (1970) (establishing a right to a hearing prior to termination of welfare benefits), with *Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding that a pre-termination hearing is not constitutionally required when the government seeks to terminate Social Security benefits).

[FN80]. See, e.g., 7 C.F.R. § 273.15 (2009) (requiring pre-termination hearings prior to adverse action for Supplemental Nutrition Assistance Program (formerly Food Stamps)).

[FN81]. Although the availability of federal judicial relief under 42 U.S.C. § 1983 has been severely curtailed by the Supreme Court's decision in *Gonzaga University v. Dow*, 536 U.S. 273 (2002), it does provide a mechanism for enforcement of some federally conferred rights.

[FN82]. For a typical example, see 7 C.F.R. § 276.1-.7 (2009) (describing the rights and responsibilities of states participating in the Supplemental Nutrition Assistance program and the various penalties that the Food and Nutrition Service of the Federal Department of Agriculture can impose against states that fail to comply with federal requirements).

[FN83]. 397 U.S. 471 (1970) (upholding Maryland's enactment of a maximum grant system, which granted proportionally fewer benefits to individuals in larger families, under a rational basis Equal Protection review).

[FN84]. Davis, *supra* note 28, at 132.

[FN85]. A detailed discussion of these ongoing advocacy efforts is beyond the scope of this Article. For a detailed listing of examples of this essential work, see National Center for Law and Economic Justice, In the Courts, <http://ncej.org/courts.php> (last visited Mar. 23, 2010). Examples include [Reynolds v. Giuliani](#), 506 F.3d 183 (2d Cir. 2007) (successfully blocking New York City from unlawfully deterring applicants for Food Stamps and Medicaid); [United States v. City of New York](#), 359 F.3d 83 (2d Cir. 2004) (holding that participants in New York City's welfare experience program were employees for the purpose of a Title VII action of the Civil Rights Act of 1964 and therefore stated a cause of action when they alleged sexual and racial harassment in violation of Title VII); [Julia M. v. Scott](#), 498 F. Supp. 2d 1245 (W.D. Mo. 2007) (holding that Missouri can no longer close the cases of tens of thousands of children receiving Children's Health Insurance without first giving them notice of their right to appeal and the opportunity to explain why their case should not be closed); [Doe v. Doar](#), 807 N.Y.S.2d 909 (N.Y. App. Div. 2006) (successfully challenging a New York policy that changed the formula for calculating cash assistance for needy families that include children receiving federal SSI benefits because of the child's disabilities).

[FN86]. Both fair hearings and systemic litigation against the administrative state have, of course, been subject to extensive critique. For a discussion of these critiques and their relationship to the proposals in this Article, see *infra* notes 191-197 and accompanying text.

[FN87]. Fung & Wright, *supra* note 1, at 4.

[FN88]. See generally Richard J. Pierce et al., *Administrative Law and Process* 23-40 (4th ed. 2004).

[FN89]. The Sunshine Act was passed because “the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government.” Government in the Sunshine Act, [Pub. L. No. 94-409](#), § 2, 90 Stat. 1241 (1976). The Act requires that most meetings with agency members be open to the public and prohibits *ex parte* communications in formal adjudications or hearings. §§ 3-4, 90 Stat. 1241-47 (1976); see also [5 U.S.C. § 553\(b\)](#) (2006) (“General notice of proposed rule making shall be published”); *id.* [§ 553\(c\)](#) (“[An] agency shall give interested persons an opportunity to participate in the rule making....”). Although the efficacy of these tools for creating accountability in light of shifts in the mode of governance of social-welfare programs is beyond the scope of this Article, I discussed that topic extensively in *Bach*, *supra* note 9.

[FN90]. But see notes 195-196 and accompanying text.

[FN91]. See, e.g., Charles F. Sabel & William H. Simon, [Destabilization Rights: How Public Law Litigation Succeeds](#), 117 *Harv. L. Rev.* 1015, 1021-22 (2004) (describing the “command-and-control” orientation as characterized by “an effort to anticipate and express all the key directives needed to induce compliance in a single, comprehensive, and hard-to-change decree” and describing a “growing and promising shift from command-and-control to experimentalist intervention”).

[FN92]. de Búrca & Scott, *supra* note 71, at 3.

[FN93]. See, e.g., Sabel & Simon, *supra* note 91 (describing new governance structures as an explicit rejection of traditional rights jurisprudence).

[FN94]. See *infra* Part V.A.

[FN95]. See, e.g., *Bach*, *supra* note 9, at 295-96 (discussing the role of privatization in new social-welfare policy programs).

[FN96]. For examples of situations illustrating the shift to using private actors and entities to carry out social-welfare programs and the accountability problems that can arise in those circumstances, see, e.g., Bach, *supra* note 9; Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 *Fordham Urb. L.J.* 1559 (2001); Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 *N.Y.U. L. Rev.* 1121 (2000).

[FN97]. See generally Bach, *supra* note 9.

[FN98]. *Id.* at 295-96.

[FN99]. The individualized accountability concerns that arise in privatized environments are of particular concern because of the link, in privatized social-welfare programs, between the use of private vendors and the implementation of punitive programs. In one recent example, a set of contracts between the New York City social-service agency and private entities to run a welfare-to-work program resulted in a program that, although it purported to attempt to move people from welfare to work, turned out to be far more effective at punishing recipients (76 percent were punished for alleged failures to comply) than at placing the in jobs (8 percent were placed). See generally *id.* at 278-92. Given the link between the implementation of punitive policies and the use of privatization, questions of accountability along the first measure are crucial.

[FN100]. See, e.g., Karkkainen, *supra* note 68, at 485-89.

[FN101]. Lobel, *supra* note 70, at 388-95.

[FN102]. *Id.* at 360.

[FN103]. Fung & Wright, *supra* note 1, at 3.

[FN104]. Lobel, *supra* note 70, at 356. Lobel makes an important point, however, that new governance must struggle at the margin between a conception of populist, direct control and a Madisonian conception of representative democracy. *Id.* at 453 (“A second challenge posed by the shift to a governance model is striking a balance between the value of direct participation and the need for a high-quality representative democracy Under the new model, the valuation of direct engagement and experience risks becoming too populist. The Renew Deal should not abandon a Madisonian notion of democracy, based on checks and balances among branches of government backed by expert agencies.”).

[FN105]. See, e.g., Fung & Wright, *supra* note 1, at 16-17; NeJaime, *supra* note 4, at 332.

[FN106]. In these structures external participation is, in theory, posited as essential rather than threatening to the governing enterprise. Lobel, *supra* note 70, at 371-73.

[FN107]. Fung & Wright, *supra* note 1, at 5.

[FN108]. Lobel, *supra* note 70, at 384. Another fundamental aspect of new governance is decentralization. One rationale for decentralization is its capacity to increase democratic engagement. “[D]ecentralization follows naturally from the generation of multiple links among groups and individuals. The aspiration of the governance model is that increased engagement will contribute to the building of deliberative and collaborative capacities, thus sustaining an environment for democratic engagement.” *Id.*

[FN109]. Susan Sturm, *Gender Equity Regimes and the Architecture of Learning*, in *Law and New Governance in the EU*

and the US 323, 324 (Gráinne de Búrca & Joanne Scott eds., 2006) (“New Governance’s traction depends upon strategically located actors engaged in ongoing and insistent questioning about the adequacy of the status quo and efforts to reform it.”). Sturm also highlights the necessity of outsider participation in the governance enterprise:

Outsiders ... by definition, do not occupy formal positions of power, and thus are less subject to the pressures of order maintenance and power preservation that militate against destabilizing the status quo.... This participation value lies at the core of democratic principle and fair process. Citizen participation is particularly important in addressing complex problems because most problems are not exclusively technical; they necessarily involve prioritising and choosing among values under conditions of scarce resources. For that reason, ongoing participation by those affected is needed if they are to have influence when value choices are actually made.

Id. at 330.

[FN110]. Lobel, *supra* note 70, at 400 (“While power is decentralized to allow local knowledge to match solutions to their individual circumstances, decentralization must be coupled with regional and national commitments to coordinate local efforts and communicate lessons in a comprehensive manner.... The role of government is to promote and standardize innovations that began locally and privately. Scaling up, facilitating innovation, standardizing good practices, and researching and replicating success stories from local or private levels are central goals of government.”); NeJaime, *supra* note 4, at 336 (“New Governance distinguishes itself from mere informal negotiated policymaking by deliberately constructing a process that is inclusive, making that process transparent, and imbuing the outcomes of the process with flexibility by consistently engaging in reflection and revision.”).

[FN111]. Lobel, *supra* note 70, at 380.

[FN112]. See *supra* note 72 and accompanying text.

[FN113]. See generally Frances Fox Piven & Richard A. Cloward, *Regulating the Poor: The Functions of Public Welfare* (1971); see also *supra* notes 23-27 and accompanying text.

[FN114]. NeJaime, *supra* note 4, at 348.

[FN115]. Fung & Wright, *supra* note 1, at 23.

[FN116]. Id.

[FN117]. Id. For an interesting and nuanced discussion of how the incorporation of some “hard law” mandates for participation might address some of these power imbalances, see Lisa T. Alexander, [Stakeholder Participation in New Governance: Lessons from Chicago’s Public Housing Reform Experiment](#), 16 *Geo. J. on Poverty L. & Pol’y* 117 (2009).

[FN118]. David Super, in his scathing critique of the use of new governance structures in poverty policy, focuses strongly on the problems of selective, political use of data. He says

[i]n practice, both sides’ reliance on research can be selective. Moreover, even tendentious studies with fundamental, well-documented flaws have proven influential and been cited by policymakers if they supported those policymakers’ normative stance.... Whatever role that research evidence may have played in resolving particular policy disputes, however, experimentalism did shift the terms of the debate from broader societal problems that are difficult to measure, such as racism, to criticism of low-income people’s behavior.

David A. Super, [Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law](#), 157 *U. Pa. L. Rev.* 541, 581 (2008). As he argues,

[d]emocratic experimentalism assumes that reliable metrics exist, and can be readily agreed upon and imple-

mented, for measuring policies' effectiveness. These metrics must produce reliable results relatively quickly so that the community may correct defective policies. Without such metrics, local policy variations will be experiments in name only. This assumption is obviously linked to the preceding two: without an agreement on the nature of the problem and the objectives of public action--including how to balance competing objectives--no consensus metrics are possible.

Id. at 556. Super is focusing here primarily on welfare reform and the passage and implementation of Temporary Assistance to Needy Families in 1996. Super is certainly correct that TANF has been used as a means to veil the imposition of extraordinary harsh policies directed at poor people. He is also correct in implying that the rhetoric of behavioral control and widespread and racialized gender subordination played a key role in the design and implementation of TANF, although it is quite clear that this is not a new phenomena. See *supra* notes 23-29 and accompanying text. For an account of how elements of federal TANF policy result in extraordinarily punitive welfare policies, see Bach, *supra* note 9. However, it is not clear that TANF falls within new governance structures. TANF is characterized by devolution and abandonment of the safety net, among other things. Id. at 278-80. But it is not in any way committed to engendering the participation of affected communities in program design and evaluation nor does it have a robust framework for transparency. In this sense, although some of its devolutionary structure and experimentalist rhetoric sounds like new governance, it is quite different. Nevertheless, the problem Professor Super identifies--the strategic use or misuse of data to subordinate program recipients--is a significant danger that must be accounted for in functioning new governance structures.

[FN119]. See *supra* Part II.

[FN120]. Michael R. Bloomberg, Introduction to NYC Ctr. for Economic Opportunity, Early Achievements and Lessons Learned (2009), available at http://www.nyc.gov/html/ceo/downloads/pdf/early_achievement_report_2008.pdf.

[FN121]. NYC Ctr. For Economic Opportunity, Early Achievements and Lessons Learned 1 (2009), available at http://www.nyc.gov/html/ceo/downloads/pdf/early_achievement_report_2008.pdf.

[FN122]. Id.

[FN123]. Press Release, Harvard Kennedy Sch. Ash Inst. for Democratic Governance & Innovation, Innovations in American Government Finalists Announced (May 18, 2009), <http://ash.harvard.edu/Home/News-Events/Press-Releases/Innovations-Finalists-Announced>. See also Center for American Progress, Advancing Opportunity in New York City: Next Steps for the City, Lessons for the Nation, Summary of Event (Apr. 21, 2009), <http://www.americanprogress.org/events/2009/04/nyc.html>.

[FN124]. NYC Ctr. for Econ. Opportunity, The City of New York's Proposal for a Federal Urban Innovation Fund, Executive Summary (2009), available at http://www.nyc.gov/html/ceo/downloads/pdf/innovation_fund_january_2009.pdf.

[FN125]. See NYC Center for Economic Opportunity, Opportunity NYC, http://www.nyc.gov/html/ceo/html/programs/opportunity_nyc.shtml (last visited Mar. 23, 2010).

[FN126]. NYC Ctr. for Econ. Opportunity, *supra* note 58, at 25. Prior to the finalization of this Article, MDRC, the research organization that helped design and is responsible for evaluating the Family Reward program, released a preliminary report on the program. Opportunity NYC, Toward Reduced Poverty Across Generations: Early Findings from New York City's Conditional Cash Transfer Program (2010), available at <http://www.mdrc.org/publications/549/full.pdf> [hereinafter Toward Reduced Poverty]. Although the press focused on the lack of current plans to continue the program as a signal that the city considered it a failure, the press release issued by New York City stressed that the report indicated some positive results and would lend data to the ongoing effort to determine whether or not CCT programs are ef-

fective. Compare Kate Lucadamo, *Poor Results Doom Anti-Poverty Project Opportunity NYC*, N.Y. Daily News, Mar. 31, 2010, available at http://www.nydailynews.com/news/2010/03/31/2010-03-31_poor_results_cash_in_anti-poverty_project.html, and Julie Bosman, *City Will Stop Paying the Poor for Good Behavior*, N.Y. Times, Mar. 31, 2010, available at <http://www.nytimes.com/2010/03/31/nyregion/31cash.html?hp>, with Press Release, *Mayor Bloomberg Announces Early Findings of Nation's First-Ever Conditional Cash Transfer Program* (Mar. 30, 2010), http://www.nyc.gov/portal/press_release_redirect.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2010a%40pr138-10.html&cc=unused1978&rc=1194&ndi=1.

[FN127]. Opportunity NYC consists of three distinct programs. The first and largest is Family Rewards, a program in which parents and children receive financial compensation for meeting goals in the areas of adult workforce or training participation, child education, and family health. The second is WorkRewards, in which families living in subsidized housing receive a combination of conditional cash transfer payments and federally funded services, and the third is Spark, a program that provides cash incentives to students for meeting educational targets. *Id.* at 25-29.

[FN128]. Ariel Fiszbein & Norbert Schady, *Conditional Cash Transfers: Reducing Present and Future Poverty 1* (2009).

[FN129]. *Id.*

[FN130]. *Id.* at 35.

[FN131]. *Id.* at 31-32.

[FN132]. *Id.* at 31-34. In 1997, two countries, Mexico and Brazil, were running a conditional cash transfer program; by 2007, “29 developing countries had some type of CCT program in place ... and many other countries were planning one.” *Id.*

[FN133]. *Id.* at 29.

[FN134]. *Id.* at 8.

[FN135]. *Id.* at 9.

[FN136]. *Id.* at 8-9.

[FN137]. *Id.* at 1; Laura B. Rawlings & Gloria M. Rubio, *Evaluating the Impact of Conditional Cash Transfer Programs: Lessons from Latin America 4* (World Bank, Working Paper No. 3119, 2003), available at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/09/30/000094946_0309160409264/Rendered/PDF/multi0page.pdf.

[FN138]. Fiszbein & Schady, *supra* note 128, at 81.

[FN139]. NYC Ctr. for Econ. Opportunity, *supra* note 58, at 20-21, 25.

[FN140]. Cynthia Miller et al., *A Preliminary Look at Early Educational Results of the Opportunity NYC - Family Rewards Program 4* (2009), available at http://www.nyc.gov/html/ceo/downloads/pdf/preliminary_look_early_education_onyc.pdf; see also NYC Ctr. for Econ. Opportunity, *supra* note 58, at 24.

[FN141]. Miller et al., *supra* note 140, at 4.

[FN142]. *Toward Reduced Poverty*, supra note 126, at 19-21.

[FN143]. *Id.* at 235.

[FN144]. *Id.* at 96 (noting that families enrolled in the program received an average of about \$3,100 in reward payments).

[FN145]. *Id.* at 85-88 (noting that families enrolled in the program received an average of about \$3,100 in reward payments).

[FN146]. Meeting between Members of the Social-Welfare Law Committee of the New York City Bar Association and Senior Staff at SEEDCO in New York City (Apr. 7, 2008) (on file with author).

[FN147]. Miller et al., supra note 140, at 1.

[FN148]. NYC Ctr. for Econ. Opportunity, supra note 58, at 26. For a more detailed discussion of the plans to evaluate the program, see *Toward Reduced Poverty*, supra note 126, at 260.

[FN149]. See, e.g., Jarrett Murphy, *City Limits Investigates: Today's Anti-Poverty Fight*, City Limits, Apr. 21, 2008, http://www.citylimits.org/news/article.cfm?article_id=3541 [hereinafter Murphy, *Today's Anti-Poverty Fight*]; Posting of Maureen Lane to DMI Blog, *Conservatives Flummoxed By Poverty to DMI Blog*, http://www.dmiblog.com/archives/2007/09/post_13.html (Sept. 20, 2007, 13:32 EST) (characterizing Opportunity NYC as “charity” rather than “policy”). One program participant, who was the co-chair of Community Voices Heard, a membership-led activist group in New York City, stated that:

People seem enthused--\$25 for some families might make a difference if their kid can get something to wear for the first day of school But they also have the same questions: Why do you think I need to be paid to do these types of things?

Murphy, *Today's Anti-Poverty Fight*, supra (internal quotations omitted). These reactions can be contextualized within a long history of centering poverty policy around negative assumptions about those in poverty, assumptions that are themselves intertwined with racialized gender subordination. For example, the clearly sexualized and racialized negative image of the “welfare queen,” was in many senses at the center of the late 1990s elimination of AFDC. Quadagno, supra note 23, at 1. Similarly here, and as will be discussed further below, the imposition of the conditionality assume that, absent coercion, women will not act in the best interest of their children. See infra notes 156-159 and accompanying text.

[FN150]. This problem was not lost on progressives critiquing the program. An investigative report by City Limits Investigates (a progressive New York City journal) found that

[w]hat won't be assessed, though, is whether any of the measured changes in people's lives occur because they go to the doctor or attend parent-teacher conferences--or simply because they got the cash. The money itself could make a major difference. In fact, one question that Killlett [a participant in the program and the co-chair of Community Voices Heard, a low-income activist group in New York City] and other low-income activists have asked is whether it wouldn't be just as effective to give out small cash grants at the beginning of each month, so parents could actually use it for, say, train fare or a sitter to enable them to go to the doctor.

Neil deMause, *Building A Better Bootstrap: Can Mayor Bloomberg Really Tackle Poverty One Incentive at a Time?*, City Limits Investigates, Spring 2008, at 4, 12. In response to questioning on the possibility of an unconditional control, Jim Riccio, the principal researcher at MDRC, responded that “it was decided that, ‘it was going to be complicated enough to test this basic model,’ without adding another variable.” *Id.* at 10-12.

[FN151]. See generally Miller et al., *supra* note 140, at 4; *Toward Reduced Poverty*, *supra* note 126.

[FN152]. Prior to the finalization of this Article, MDRC released a report laying out early findings on Opportunity NYC's Family Rewards program. See generally *Toward Reduced Poverty*, *supra* note 126. The report provides extensive preliminary evidence of the program's impact in the first two years of its operation. Because of the date of publication of the MDRC report and its preliminary nature, an extensive discussion of its findings is not included here. However, some of the most significant findings include, as might be expected, significant positive effects on poverty rates and more moderate short term positive effects on material hardship. *Id.* at 145. For example, program participants' household income increased by approximately 23 percent when compared to the control group. *Id.* at 125-26. Program participants experienced some small but significant improvements in material hardship. *Id.* at 124-38. In addition, although the data is preliminary, the results on the behavioral, or, in the words of the program, human capital investment, were more mixed. Although it is too early to draw significant conclusions from the York City data, the preliminary results are fairly consistent with the international studies. Because of the early nature of these findings the report does not provide any data on the long range economic, behavioral or non-behavioral impacts of the program. And, as noted below, due to the absence of a non-conditional control, neither this report or any subsequent report will be able to analyze whether or not any positive impacts might occur absent the imposition of the conditionalities.

[FN153]. There is no question that CCT programs are effective at reducing poverty and increasing utilization of targeted services, positively affecting, for example, school enrollment rates and utilization of preventative health. Fiszbein & Schady, *supra* note 128, at 16-20. The evidence of the impact on "final" or non-behavioral outcomes is more mixed. "Some (but by no means all) evaluations have found that CCTs contributed to improvements in child height among some population groups; there is also some evidence that program beneficiaries have better health status." *Id.* at 20. In regard to final education outcomes, "a number of evaluations have concluded that the higher enrollment levels have not resulted in better performance on achievement tests." *Id.* at 21.

[FN154]. Christina Paxson & Norbert Schady, *Does Money Matter? The Effects of Cash Transfers on Child Health and Development in Rural Ecuador 2* (World Bank, Working Paper No. 4226, 2007), available at <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2007/05/03/000016406&uscore;20070503092958/Rendered/PDF/wps4226.pdf>. This program, which was one in a series of impact evaluation reports issued by the World Bank,

is of particular interest because, unlike other transfer programs that have been implemented recently in Latin America, receipt of the cash transfers was not conditioned on specific parental actions, such as taking children to health clinics or sending them to school. This feature of the program makes it possible to assess whether conditionality is necessary for programs to have beneficial effects on children.

Id. The authors found that the program had, "positive effects on the physical, cognitive, and socio-emotional development of children ..." *Id.* For another example of the positive effects of non-CCTs on both behavioral and non-behavioral positive indicia of improvement, see Armando Barrientos, *Social Transfer and Growth: A Review 30* (Chronic Poverty Research Centre, Working Paper No. 112, 2008), available at http://www.chronicpoverty.org/uploads/publication_files/WP112_Barrientos-Scott.pdf ("The evidence on the capacity of social transfers to facilitate investment in human development is not limited to transfer programmes targeting human development or children. Studies on the impact of social pension receipt in South Africa and Brazil, for example, find that households with a pension beneficiary have higher enrolment rates among children of school age and improved health status."). While this is by no means definitive proof that the imposition of the condition is not necessary to achieve positive behavioral or final outcomes, it does raise a question that MDRC's research on CCTs is not being designed to address.

[FN155]. See *supra* notes 23-29 and accompanying text.

[FN156]. The problems that arise from the lack of a non-conditional control are not unique to the New York City program. In fact, the authors of the World Bank's recent book on CCT programs acknowledge this absence as a fundamental problem to ideal evaluation of CCT programs. See Fiszbein & Schady, *supra* note 128, at 156 (“Ideally, to disentangle the effect of conditions from the income effect inherent in the transfer, an experiment would be designed whereby a first group of households or villages receives a UCT [unconditional cash transfer], a second group receives a CCT, and a third group serves as a control group. That experiment has not yet been conducted anywhere.”).

[FN157]. Besa Luci, Cash Incentives For the Poor, *Gotham Gazette*, Aug. 2007, <http://www.gothamgazette.com/article/socialservices/20070828/15/2271> (quoting Margy Waller, a domestic policy advisor for the Clinton administration).

[FN158]. One disturbing piece of data from MDRC's preliminary report indicates that those already experiencing more hardship are more likely to be deprived of program payments. MDRC reports that, “relative disadvantage” correlated with low program earnings in the first two years. *Toward Reduced Poverty*, *supra* note 126, at 111. So for example, program participants with lower levels of education, lower levels of employment and earnings and higher physical or mental health programs were significantly less likely to earn rewards. *Id.* at 112.

[FN159]. See *supra* notes 23-29 and accompanying text.

[FN160]. Measuring American Poverty Act of 2009, H.R. 2909, 111th Cong. §§ 3-4 (2009); Measuring American Poverty Act of 2009, S. 1625, 111th Cong. §§ 3-4 (2009); For information on the U.S. Census Bureau measure, see Press Release, U.S. Dep't of Commerce, Census Bureau to Develop Supplemental Poverty Measure (Mar. 2, 2010), http://www.commerce.gov/NewsRoom/PressReleases_FactSheets/PROD01_008963; U.S. Census Bureau, Observations from the Interagency Technical Working Group on Developing a Supplemental Poverty Measure (2010), http://www.census.gov/hhes/www/povmeas/SPM_TWGObservations.pdf. The Census Bureau measure is, like New York City's measure, based in large part on the National Academy of Sciences methodology. *Id.* at 2.

[FN161]. See NYC Ctr. for Econ. Opportunity, *The CEO Poverty Measure 2* (2008), available at http://www.nyc.gov/html/ceo/downloads/pdf/final_poverty_report.pdf [hereinafter NYC Ctr. for Econ. Opportunity, *The CEO Poverty Measure*].

[FN162]. Rebecca M. Blank & Mark H. Greenberg, *Improving the Measurement of Poverty* 6, 8 (2008), available at [http://www.brookings.edu/papers/2008/~media/Files/rc/papers/2008/12_poverty_measurement_blank/12_poverty_measurement_blank.pdf](http://www.brookings.edu/papers/2008/~/media/Files/rc/papers/2008/12_poverty_measurement_blank/12_poverty_measurement_blank.pdf).

[FN163]. See Mark Levitan, *Poor Measurement Series: Measuring Poverty in New York City*, *Spotlight on Poverty and Opportunity*, Mar. 4, 2009, <http://www.spotlightonpoverty.org/ExclusiveCommentary.aspx?id=606a3854-cd49-4778-82cd-d8caec194529> (explaining that New York City chose to re-measure poverty because, “[t]he Commission members were soon confronted by the shortcomings of the conceptual tools at their disposal. They found them inadequate guides for understanding the current level of economic deprivation in New York, assessing the effect of existing public policy, or forecasting the potential impact of new initiatives on the City's low-income population. The Commission concluded that, along with programmatic innovations to reduce poverty, the City needed to improve its method of measuring poverty”).

[FN164]. Blank & Greenberg, *supra* note 162, at 6.

[FN165]. Id.

[FN166]. Id.

[FN167]. Id. at 7.

[FN168]. Id. at 6.

[FN169]. Id. at 7.

[FN170]. Id. at 10.

[FN171]. Id. at 16.

[FN172]. Id. at 10.

[FN173]. Id.

[FN174]. Id. Note that this very general description of the NAS measure leaves out several details such as which taxes and benefits are included and precisely how the formula works.

[FN175]. Id.

[FN176]. NYC Ctr. for Econ. Opportunity, *The CEO Poverty Measure*, supra note 161, at 2. The current pending federal legislation, introduced by Senator Dodd and Representative McDermott, proposes that the federal government implement the NAS measure as a principle tool to

provide for an improved and updated method for measuring the extent to which families and individuals in the United States have sufficient income to allow a minimal level of consumption spending that meets their basic physical needs ... in order to better assess the effects of certain policies and programs in reducing the prevalence and depth of poverty, to accurately gauge the level of economic deprivation, and to improve understanding of the targeting of public resources

Measuring American Poverty Act of 2008, H.R. 2909, 111th Cong. § 3 (2009).

[FN177]. John Quintero, *Poor Management: Time for a Comprehensive New Poverty Measure*, *Spotlight on Poverty and Opportunity*, June 8, 2009, <http://www.spotlightonpoverty.org/ExclusiveCommentary.aspx?id=813ce98d-610f-4f41-b174-4c79e81c317d>. Moreover, while rates rise in urban areas like New York City, if implemented nationally they would remain stagnant or fall in rural, Appalachian and Southern communities, leading to a fairly stagnant overall number of poor people nationally. As Shawn Fremstad notes:

Changes in subgroup and sub-national poverty rates are not necessarily a concern, particularly if the changes are due to improvements in the accuracy of a poverty measure. However, changes that appear contrary to other evidence about the distribution of basic-needs deprivation deserve further scrutiny.

Shawn Fremstad, *Measuring Poverty and Economic Inclusion* 19 (2008), available at <http://www.cepr.net/documents/publications/2008-12-Measuring-Poverty-and-Economic-Inclusion.pdf>. Given the extensive evidence of material deprivation in particular in the South and in Appalachia and the apparent economic instability of many who will continue to be excluded from the “poor,” these results are disturbing. Id. at 22. While these critiques are not really relevant to New York City’s implementation, it does suggest that national implementation of the measure will have negative consequences in rural and southern areas.

[FN178]. NYC Ctr. for Econ. Opportunity, *The CEO Poverty Measure*, supra note 161, at 3.

[FN179]. Fremstad, supra note 177, at 20. Another tremendously interesting choice, reflected in the NAS measure, is the choice to count work related expenses like child-care not as a basic need akin to shelter, food, clothing, and utilities. In the NAS measure, a family's resources are decreased when they spend money on work related expenses, but if they are too poor to do so, the result is that they appear less poor under the NAS measure.

[FN180]. Quinterno, supra note 177.

[FN181]. See supra notes 95-101 and accompanying text.

[FN182]. MDRC's preliminary data provide some interesting information about the possible need for more or more formal dispute resolution mechanisms. For example, “[d]uring the in-depth interviews, almost all participants reported feeling that they were not paid for an activity for which they thought they had earned a reward, even if the case was later rectified or the participant recognized that he or she was in error.” *Toward Reduced Poverty*, supra note 126, at 84. On the other hand, the informal mechanisms that are available, namely the staff of community-based organizations administering the program and the centrally operated hotline available to participants, were more likely than not to be viewed favorably by program participants. *Id.* at 85-92. More data on the exact nature of the disputes, or the actual error rates would provide assistance in understanding what dispute resolutions mechanisms would be required and effective for this program.

[FN183]. Bach, supra note 9, at 295-96.

[FN184]. See supra notes 18-21 and accompanying text.

[FN185]. See supra note 85 and accompanying text.

[FN186]. Strikingly, prominent international researchers studying CCT programs make no secret of the effect of political conditions on program design. In fact, Norbert Schady and Ariel Fiszbein, authors of the seminal World Bank book summarizing the current state of research on CCTs, identify the presence of a “political economy [that is] antipoor” as a key factor that might lead program designers to create a conditional as opposed to an unconditional cash transfer program. Fiszbein & Schady, supra note 128, at 12.

[FN187]. The reference here to “destabilization” is a term of art and refers to Simon and Sabel's conception of “destabilization rights” defined as, “claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability.” Sabel & Simon, supra note 91, at 1020.

[FN188]. See supra notes 18-21 and 85 and accompanying text.

[FN189]. See supra notes 96-99 and accompanying text.

[FN190]. Depending on the complexity of the system, the available remedy might vary. So for example, in a program like Opportunity NYC, where there are clear implicit eligibility rules, traditional injunctive orders might be appropriate. However, as Sabel and Simon point out, public law litigation involving more complex systems is more likely to succeed in destabilizing an entrenched failing institution if the remedy focuses not on adherence to specific rules but instead on experimentalism within a bounded set of goals. See generally Sabel & Simon, supra note 91.

[FN191]. Bradley C. Karkkainen, Information-Forcing Regulation and Environmental Governance, in *Law and New Governance in the EU and the US* 293, 293 (Gráinne de Búrca & Joanne Scott eds., 2006).

[FN192]. Charles F. Sabel & William H. Simon, Epilogue: Accountability Without Sovereignty, in *Law and New Governance in the EU and the US* 395, 398 (Gráinne de Búrca & Joanne Scott eds., 2006).

[FN193]. *Id.*

[FN194]. This idea is related to the observation of Noonan, Sabel, and Simon regarding “the process by which individual case data is aggregated and generalized to achieve indications of systemic problems” in governing innovations in the Alabama and Utah child welfare systems. Kathleen G. Noonan, Charles F. Sabel & William H. Simon, [Legal Accountability in the Service-Based Welfare State: Lessons From Child Welfare Reform](#), 34 *Law & Soc. Inquiry* 523, 557 (2009). The idea is particularly close to their call for incorporation of data gathering as a mechanism for learning into administrative adjudicatory processes designed “to respond to stakeholder complaints.” *Id.* at 558.

[FN195]. *Id.* at 557.

[FN196]. See *id.* at 559. See also Sabel & Simon, *supra* note 91, at 1017-18 (describing various critiques of traditional public law litigation including lack of systemic expertise by courts necessary “to supervise institutional restructuring effectively” and serious compromises of the “principles of federalism and local autonomy”).

[FN197]. See *supra* Part III.D.1.

[FN198]. Alexander, *supra* note 117, at 182.

[FN199]. See *supra* notes 114-117 and accompanying text.

[FN200]. For a full list of commission members, see NYC Center for Economic Opportunity, Commission Members, <http://www.nyc.gov/html/ceo/html/about/members.shtml> (last visited Mar. 11, 2010).

[FN201]. See *supra* note 72 and accompanying text.

[FN202]. See *supra* note 191 and accompanying text.

[FN203]. See, e.g., Alexander, *supra* note 117.

[FN204]. For an extensive discussion of this possibility, see Bach, *supra* note 9, at 317.

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