2008

Welfare Reform, Privatization and Power: Reconfiguring Administrative Law Structures from the Ground Up

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WELFARE REFORM, PRIVATIZATION AND POWER: RECONFIGURING ADMINISTRATIVE LAW STRUCTURES FROM THE GROUND UP, FORTHCOMING 74 BROOKLYN LAW REVIEW (NOVEMBER 2008).

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ABSTRACT

Since welfare reform in 1996, privatization has led to a radical reconfiguration in the dominant mode of governance in public benefits programs. The United States has largely moved from systems controlled through law and regulation to systems controlled through contracts. With this shift has come a significant diminishment in public accountability in general and, more specifically, a diminishment in the ability of poor communities and their advocates to intervene in the making of welfare policy. At the same time, privatization has proven to be an extraordinarily effective mechanism for imposing highly punitive welfare programs on poor communities. Building upon the findings of grassroots, community-controlled research on the effectiveness of privatized welfare-to-work programs, this article argues that "collaborative" or "new governance" structures provide potentially meaningful opportunities for increasing public accountability in privatized welfare settings. However, given the long history and current practice of using welfare programs as a means of subordination, these structures must be configured in a way that makes primary and renders substantive the role of low income communities in the new collaborative governance enterprise.

[*] Faculty, CUNY School of Law. I owe thanks to many members of the CUNY Faculty as well as to the school for their financial support of this project. I am particularly grateful to Sameer Ashar, Rebecca Bratspies, Sue Bryant, Stephen Loffredo, Andrea McCardle and the participants in a Spring 2008 CUNY Faculty Forum for their invaluable feedback and editing assistance. In addition, thanks go to Bao Chao Ruland, Dawn Philip, Stephanie Sampalis, Sally Curan, Megan Stewart, Shalini Deo, and Anthony Cardoso for their research and editing assistance. And finally, thanks to Carol O'Donnell for her consistent support.

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WELFARE REFORM, PRIVATIZATION AND POWER: RECONFIGURING ADMINISTRATIVE LAW STRUCTURES FROM THE GROUND UP, FORTHCOMING 74 BROOKLYN LAW REVIEW (NOVEMBER 2008).

INTRODUCTION

A few years ago, I was sitting across the table from a group of lawyers representing the New York City welfare department. We were discussing monitoring a settlement, negotiated after six, hard-fought years of litigation. Like most test-case litigation, the case consumed, over the years, enormous advocacy resources from multiple financially strapped and woefully understaffed legal services offices. The case concerned the means by which the department provided welfare-to-work services for welfare recipients who wanted to go to school; the settlement contained extensive and detailed requirements about how the interactions between our clients and the city would proceed. As plaintiffs' counsel, we used the lawsuit as a tool to enhance welfare recipients' access to education. And more broadly, like the last decade of welfare advocates' work, the litigation was part of our efforts to fight against a web of mechanisms designed to force poor women off of assistance in a continuing effort to "end welfare as we [knew] it."[1] The settlement was drafted as is typical in these cases: if a class member with characteristics 1, 2 or 3 said X, the department had to do Y unless A, B, or C were true and so on. Every term had been carefully negotiated to increase educational access and to afford procedural and substantive rights to class members.

During this particular conversation, the parties turned to the topic of how to monitor the specific terms of the settlement when the terms were to be carried out by private entities under contract to the city. When we questioned how we could monitor the vendor's compliance with the settlement provisions, the city's attorney looked across the table and said without hesitation: "we can't monitor them. We don't know what they are doing or how they are doing it. We just know about outcomes like job placement." Although we worked our cumbersome way through this problem for the purpose of that litigation, in that moment I realized that there was an elephant in the room. The contractors, who provided

[1]Clinton's famous pledge was originally made during his 1992 presidential campaign, R. KENT WEAVER, ENDING WELFARE AS WE KNEW IT 127 (2000). and reiterated it in his 1993 State of the Union Address. *See* 139 CONG. REC. H674-03 (1993).

services to huge swaths of the plaintiff class, were motivated by terms of their contract and the monthly contract monitoring sessions conducted by the city and not by any of our carefully negotiated words. At best, our effects were secondarily removed. So we had a problem.

The more I thought about this problem, the more I realized that it centered around a fundamental mismatch between current modes of governance in public welfare programs and the tools used by advocates in their efforts to fight on behalf of their clients. The tools designed in response to New Deal and post-New Deal governance structures were becoming increasingly ineffective.

This article addresses this mismatch between the law and traditional advocacy methods in the context of the privatization of the state's welfare functions.[2] Beginning with the recognition that privatization in the form of contracting out is a significant and growing trend in welfare administration, this article ask a series of questions: From an administrative law perspective, how does privatization, and specifically the contracting out of welfare programs, affect the ability of poor communities to participate in the formulation of welfare policy?[3] Similarly, what is the efficacy of current administrative law tools in fostering accountability and, to the extent that those tools are not effective at creating points of intervention in policy making for poor communities,

[2] Although some academics have begun to raise this issue and some organizations have begun to tackle this problem our collective strategy on this issue remains underdeveloped. *See infra* Sections Two and Three.

[3] The efficacy and wisdom of turning to private entities to administer all or part of welfare programs in specific, and the overwhelming role of privatization in governance in general, is subject to substantial debate and raises tremendously important questions. While I do not address these questions, the case study and other examples in this article support many of the concerns about this governmental strategy that others articulate. For some important discussions of the threats of privatization *see* Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POL'Y REV. 6 (1988); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1246-56 (2003); Orly Lobel, *Rethinking Traditional Alignments: Privatization and Participatory Citizenship*, *in* PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS: RETHINKING IDEOLOGY AND STRATEGY 209, 210 (2007).

what tools might be effective?

Section One, relying on a case study of welfare privatization in New York City, illustrates how the dominance of contracting out has radically changed the mode of governance in public welfare programs, shifting it from law and regulation to contracts and contract monitoring. Privatization in this context, without any public input or initial scrutiny, has resulted in a program that imposes highly punitive welfare policies and fails to meet the needs of the poor for education and jobs.

Section Two examines whether either administrative law or the market currently offers effective mechanisms for public participation in this new form of administrative governance. The section concludes that neither the market itself nor administrative accountability tools as currently configured are effective at creating accountability for poor communities.

Section Three explores new collaborative governance structures. These structures provide a fruitful conceptual basis for creating a politically feasible and effective governance structure. However, the history of subordination and disproportionate power that characterizes social welfare history raises serious questions about the ability of poor communities to participate effectively in these collaborative endeavors. As a result, Section Three argues that we must design new mechanisms to enable substantive community participation. Finally, Section Four suggests that the creation of robust, community controlled monitoring bodies can address the accountability[4] problems of governance by

[4] In this Article, the term "accountability" refers to government and their private partners' accountability to the public in general and poor communities in particular for the creation and implementation of welfare policy that can positively affect their lives. The myriad of individually-focused, non-accountability issues that arise in privatized welfare services is not the Article's focus. For example, this Article focuses on structures that would facilitate government transparency and participation by community-based organizations in a policy setting rather than on how individual welfare recipients might challenge the actions of a private entity providing services. For discussions of these individual rights questions, see *e.g.*, David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231, 279–306 (1998); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569 (2001).

contract.

I. Case Study: Welfare Reform and Privatization in New York City

A. The National Context: A Move Toward Privatization

The privatization of the United States public assistance provision system through contracting[5] has accelerated dramatically in the last ten years. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (hereinafter "PRA") eliminated Aid to Families With Dependent Children (hereinafter "AFDC") and its guarantee of minimal subsistence and created Temporary Assistance to Needy Families (hereinafter "TANF") in its stead. Importantly, the PRA joined a rising tide of initiatives to "reinvent government" by using private sector tools and entities to free government from the constraints of what is seen as excessive bureaucracy and constrictive civil service rules.[6] Throughout the country, state and local jurisdictions have turned to the private sector to respond to the challenges posed by the PRA.[7] In the welfare-to-work

[5] The term "privatization" covers a broad range of mechanisms, including the complete divestiture of assets by the government, deregulation, the use of vouchers paid for by the government to buy particular commodities in the private market, and contracting between the government and private entities, as well as other measures. Jack M. Beerman, *Privatization and Political Accountability,* 28 FORDHAM URB. L.J. 1507, 1519 (2001) (citing Ronald Cass, *Privatization: Politics, Law and Theory*, 71 MARQ. L. REV. 449, 449 (1988)). *See also* JOEL HANDLER, DOWN FROM BUREAUCRACY 6–7 (1996). This article addresses only privatization through contracting between administrative agencies and private entities.

[6] *See, e.g.*, Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000) (describing the prominent role of the private sector and private sector management techniques in the administration of welfare programs after 1996 and arguing that these changes are decreasing opportunities to hold government accountable).

[7] Note that this Article is not designed to add to the very important ongoing debate about the extent to which such services should be subject to privatization. Instead I start by assuming that, to the extent that privatization is in fact driving social welfare policy and implementation, communities and the lawyers that work with them need new tools to hold government accountable for how it treats some of its most vulnerable members. For a good general introduction to the legal issues involved in privatization, see Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1212 (2003); Symposium,

area, privatization has been a major tool in a very effective campaign to significantly reduce the welfare rolls. Today, the full range of services, from eligibility determinations to welfare-to-work services, are being conducted not directly by government entities but by private, often large, for-profit corporate entities.[8] Although contracting had always played some role in the provision of welfare-to-work services, the entrance of large, for-profit corporations, the scale of contracting out in some jurisdictions, and the focus on performance-based contracting, has significantly altered this landscape.

The move to privatization arose in large part from two significant shifts in federal law. In 1996, the federal government invited states to use private entities to provide services and to use virtually any means at their disposal to lower the welfare rolls. These changes created an ideal environment for a large growth in the role of private entities. The PRA included a provision allowing states and localities to contract out eligibility determinations,[9] creating a new and potentially tremendously lucrative

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Redefining The Public Sector: Accountability and Democracy In The Era of Privatization, 28 FORDHAM URB. L.J. 1307 (2001). For an interesting discussion of the effects of privatization on the delivery of welfare services, see MARY BRYNA SANGER, THE WELFARE MARKETPLACE: PRIVATIZATION AND WELFARE REFORM (2003).

[8] U.S. GEN. ACCOUNTING OFFICE, GAO-02-245, WELFARE REFORM: INTERIM REPORT ON POTENTIAL WAYS TO STRENGTHEN FEDERAL OVERSIGHT OF STATE AND LOCAL CONTRACTING 3 (2002), *available at* http://www.gao.gov/new.items/d02245.pdf [hereinafter GAO, WELFARE REFORM]. In 2005, forty-nine states and the District of Columbia did some contracting of welfare-to-work services at the state or local level. SONDRA YOUDELMAN WITH PAUL GETSOS, COMMUNITY VOICES HEARD, THE REVOLVING DOOR: RESEARCH FINDINGS ON NYC'S EMPLOYMENT SERVICES AND PLACEMENT SYSTEM AND ITS EFFECTIVENESS IN MOVING PEOPLE FROM WELFARE TO WORK 21 (2005), http://cvh.mayfirst.org/files/The%20Revolving%20Door%20-%20Full%20Report.pdf [hearinafter THE REVOLVING DOOR].

[9] 42 U.S.C. §604(a)(1)(A) & (B) (1996) ("A State may . . . administer and provide services under the [TANF program] . . . through contracts with charitable, religious, or private organizations; and . . . provide beneficiaries of assistance under the [TANF] programs . . . with certificates, vouchers, or other forms of disbursement which are redeemable with such organizations."). As a practical matter, the PRA's allowance of the contracting out of eligibility determinations was limited, to a certain extent, by the federal government's refusal to allow the contracting out of eligibility determinations for food stamps and Medicaid. For example, in 1997, the Clinton administration denied a request from Texas to contract out its TANF program on the grounds "that it would

market for the for-profit sector.[10] Second, and equally significant, the statute moved power for setting welfare policy from the federal government to states and localities, a trend generally referred to as "devolution." The PRA envisioned widespread state and local experimentation and, in many ways, paralleled the incentive-based contracts that would emerge in the welfare-to-work arena. States were given a fixed sum of money, the sum they received under the AFDC program in 1995, few mandates,[11] and enormous motivation for lowering their welfare caseloads by any means they saw fit.[12] The message from the federal government to the states was crystal clear: if you manage to cut the welfare rolls, you will be rewarded financially, and, to a far greater degree than under the AFDC program, we will not hold you accountable for the means by which you achieved this goal.[13] These twin

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empower private sector employees to determine eligibility for Medicaid and Food Stamps." Kennedy, *supra* note 4, at 231 n.4 (citing *White House Limits States in Privatizing Welfare*, WALL ST. J., May 5, 1997, at A20).

[10] *See, e.g.*, Nina Bernstein, *Giant Companies Entering Race to Run State Welfare Programs*, N.Y. TIMES, Sept. 15, 1996, at 1; Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83, 89–90 (2003). For a more extensive discussion of the role of privatization in the PRWORA and in particular the move to inclusion of for-profit entities in the provision of welfare programs, see Kennedy, *supra* note 4, at 256.

[11] The welfare law was touted as promoting devolution and, to a certain extent, it did leave states room to experiment, but this was only in the context of significant constraints on the states' ability to provide assistance with federal TANF dollars. For example, states were barred from providing TANF-funded benefits to many lawful immigrants, were not permitted to provide federally funded benefits for more than five years, and were constrained in a variety of ways from providing these benefits to teenage parents and to parents who failed to comply with work and child support requirements. 42. U.S.C.A. § 609.

[12] Principle among the changes embodied in federal welfare reform was the concept of "devolution"—a devolving of authority for programmatic design from the federal government to the states. This principle is embodied in 42 U.S.C. §601 (1997), which describes the purpose of the program as "increas[ing] the flexibility of States in operating a program designed to" meet the purposes of the statute and which eliminates any individual entitlement to receive benefits under the program. *Id.*

[13] Although there is no question that the PRA called for devolution of power on a much larger scale than earlier welfare programs, Joel Handler argued persuasively that throughout the twentieth century the United States has consistently delegated administration of social welfare programs to lower levels of government when the

invitations, to use private entities to provide services and to use virtually any means at their disposal to lower the rolls created an ideal environment for a large growth in the role of private entities.[14]

And grow it did. The most recent national survey, released in 2002 by the United States General Accounting Office reported that, in 2001, 49 states and the District of Columbia used contracts with private entities to provide some welfare services. Nationwide spending in 2001 exceeded $1.5 billion, which represented at least 13% of total federal TANF and state maintenance-of-effort expenditures, excluding expenditures for cash assistance.[15] And not only did the general use of private entities grow, but

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subjects of the program socially categorized as "undeserving." HANDLER, *supra* note 5, at 49.

> When there is agreement on the deservingness of the category, the program is federally administered and fairly routine. On the other hand, when welfare is controversial, and when controversies boil up and demand upper-level attention . . . the preferred response, from the perspective of the legislature, is to try to escape political costs by granting symbolic victories and delegating the controversy back down to the local level.

Id.

[14] For a discussion of the interlinking roles of privatization, devolution and reinvention of government in an array of social service contexts see Jody Freeman, *The Contracting State*, 28 FLA. ST. U.L. REV. 155, 160-64 (2000).

[15] GAO, WELFARE REFORM, *supra* note 8, at 8. Temporary Assistance to Needy Families, or TANF is the name of the federal program created by the 1996 Personal Responsibility and Work Opportunity Reconciliation Act ("PRA"). Under the terms of the PRA, in order to draw down federal TANF funds, states were required to spend on TANF or TANF-like programs, 75% (or in some circumstances 80%) as much as they contributed toward federal welfare assistance – the Aid to Dependent Children program – in 1994. This is referred to as the "Maintenance of Effort" ("MOE") requirements. 45 C.F.R. §263.1 (1999). Thus, the GAO's use of the combined TANF and MOE dollars to calculate the scale of privatization accurately reflects the minimum amount states were spending on privatized welfare services in 2001. In addition, because some states actually regularly spend more on TANF and TANF-related goals than they need to in order to meet the federal MOE requirement, the GAO estimate is probably low. *See, e.g.*, E-mail from Trudi Renwick, Senior Economist, Fiscal Policy Institute to Wendy A. Bach, Instructor, City University of New York School of Law (Nov. 16, 2007, 09:59 EST) (on file with author) (citing data provided to Ms. Renwick from the New York State Division of the Budget showing that New York State MOE spending exceeded required MOE spending in federal fiscal years from 2001–2006 in sums ranging from

the use of for-profit entities grew exponentially. By 2001, 13% of the $1.5 billion given to private entities to operate TANF and TANF-related programs went to for-profit entities.[16]

B. New York City: Welfare Reform and the Move Toward Privatization

Welfare reform of the kind envisioned by the PRA began in earnest in New York City prior to passage of the federal law. In 1995, then-Mayor Rudolph Giuliani and then-Human Resources Commissioner Jason Turner created the work experience program ("WEP") and mandated participation for 35 hours per week in that program as a condition of eligibility for public assistance.[17] Along with WEP, they changed the "culture" of welfare offices by establishing Eligibility Verification Review, a system designed to root out "welfare fraud" by creating administrative hurdles to eligibility and by converting Income Support Center to "Job Centers." In the words of then-Commissioner Jason Turner, welfare reform was designed to create "a crisis in welfare recipients' lives, precipitating such dire prospects as hunger and homelessness. . . ."[18]

The move to privatization in New York City came a few years later. In 1999, the Giuliani administration put out for bid $500 million in contracts to provide welfare-to-work services for public assistance recipients.[19] Privatization of welfare-to-work services proceeded and expanded over the next several years with contracts to provide employment assessments, services for individuals who allege physical and

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$51 to $703 million per year).

[16] GAO, WELFARE REFORM, *supra* note 8, at 8. An in-depth discussion of the significance of the entrance of the for-profit sector in welfare services is outside the scope of this Article. For an interesting discussion of this topic, see SANGER, *supra* note 7, at 72–97.

[17] NEW YORK CITY BAR, COMMITTEE ON SOCIAL WELFARE LAW REPORT, WELFARE REFORM IN NEW YORK CITY: THE MEASURE OF SUCCESS 3, http://www.abcny.org/Publications/reports/show_html.php?rid=41 [hereinafter WELFARE REFORM IN NEW YORK CITY] (Nov. 1998)(last visited March 7, 2008).

[18] *Id.* at 23 (citing Commissioner Jason Turner, Address at the Nelson A. Rockefeller Institute of Government (Nov. 1998)).

[19] *Id.* at 10.

mental impairments that interfere with their ability to work, and a variety of other services.[20] The contracts were generally performance-based, paying contractors only when they met performance goals for a particular client.

i. The Advocacy Community Responds to Welfare Reform

Central among the advocacy community's strategies to combat welfare reform were the filing of class actions law suits to stop or slow the implementation of key welfare reform initiatives and a series of lobbying efforts to blunt the harshest effects of reform.[21] The litigation successfully slowed implementation of welfare reform, ensuring some adherence to both due process and substantive rights in the implementation of reform. Similarly, lobbying efforts resulted in the preservation of some protections that had been assured under AFDC. Nevertheless, welfare reform, evaluated solely on the basis of whether welfare rolls plummeted, was significantly more successful. Between 1995 and 2006, the welfare rolls in New York City plummeted an astounding 65 percent.[22] If parallel economic improvements by former welfare recipients accompanied those role reductions, advocates could have concurred with the administration

[20] This growth in welfare contracting was part of an expansion of human services contracting overall during this period in New York City. *See, e.g.*, SUSAN BUTTENWIESER, CITY PROJECT BULLETIN, FOCUS ON CONTRACTING (Dec. 2000) http://www.cityproject.org/publications/contracting/2000-12-31.html (last visited March 7, 2008) (stating that in 2000 human services contracting was over $4.2 billion or 11% of New York City's budget).

[21] WELFARE REFORM IN NEW YORK CITY, *supra* note 17. Among these litigation efforts were *Reynolds v. Guiliani*, which challenged the conversation of welfare centers from Income Support Centers to "Job Centers" on the ground that the agency was "preventing peoplepl from applying for Medicaid, food stamps, cash assistance and emergency assistance in violation of fedral and state statutory and constitutional law" *Id* For an in depth look at the litigation efforts of the advocacy community from 1996 forward, *see* http://www.nclej.org/courts-case-dev.php (last visited September 19, 2008).

[22] Sewell Chan, *Welfare Rolls Falling Again, Amid Worries About Poverty*, N.Y. TIMES, April 6, 2006, http://www.nytimes.com/2006/04/06/nyregion/06welfare.html. As of April 16, 2007, New York City's welfare dropped to a historic low of 368,444, a total decline of nearly 68% since 1995. Press Release, Office of Temporary and Disability Assistance, New York State Welfare Rolls Continue To Decline (April 16, 2007), http://www.dads.ny.gov/main/news/2007/2007-04-16.asp).

that welfare reform was a success. But, as was the case nationwide,[23] this did not occur. The social safety net was largely dismantled and families remained steeped in deep poverty and ever more vulnerable to the vagaries of the low wage labor market.

In addition, in a trend paralleled nationwide, New York City saw the founding and growth of a number of grassroots organizing groups that took on various welfare reform issues. Chief among these were Families United for Racial and Economic Equality, founded in 2000 by a group of women on welfare to improve welfare recipients' access to education;[24] the Welfare Rights Initiative, founded in 1997 by a group of women on welfare attending the City University of New York who work to "inject the voices of students (especially those with first hand experience of poverty) into . . . welfare reform debates"[25] and Community Voices Heard, "an organization of low-income people, predominantly women on welfare, working to build power in New York City to improve the lives of our families and communities . . . through a multi-pronged strategy, including public education, grass roots organizing, and leadership development . . . ."[26] These groups employed a variety of organizing and advocacy strategies to bring attention to and combat welfare reform. These organizing tactics were, in many cases, quite effective in bringing pressure to bear on the local administration around some of the worst aspects of welfare reform and in adding to national efforts to combat welfare reform.[27]

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[23] WELFARE REFORM IN NEW YORK CITY, *supra* note 17 at 13-14 (discussing the rise in hunger and homelessness that occurred in New York City). *See also* Juliet M. Brodie *Post-Welfare Lawyering: Clinical Legal Education and a New Poverty Law Agenda*, 20 WASH. U. J.L & POL'Y 201, 216 (2006)(discussing the often worsening economic circumstances of former welfare recipients in the work force due to increased expenses associated with work).

[24] *See* FUREE's homepage, http://www.furee.org (last visited Feb. 22, 2008).

[25] *See* Welfare Rights Initiative, Mission Statement, http://www.wri-ny.org (last visited Feb. 25, 2008); *see also* Stephen Loffredo, *Poverty Law and Community Activism: Notes From a Law School Clinic*, 150 U. PA. L. REV. 173 (2001).

[26] Community Voices Heard, http://www.cvhaction.org (last visited Feb. 22, 2008).

[27] Some of the most visible New York City organizing work from this time was documented in *A Days Work, A Day's Pay,* a documentary produced by Mint Leaf Productions which:

ii. The Advocacy Community Responds to Privatization Directly

While the traditional litigation and lobbying advocacy efforts affected privatization only indirectly, other advocacy efforts aimed directly at privatization itself. Chief among early efforts to combat privatization was a campaign to target ethical breaches in the city's first wide-scale contracting efforts.

In 1999, the Giuliani administration sought to let $500 million in private entities contracts to provide welfare-to-work services.[28] Almost immediately, the administration's contractual bidding process embroiled the administration in a scandal. The City Comptroller Alan Hevesi investigated allegations that the administration violated fair bidding rules by engaging in "wide-ranging discussions on its 'welfare reform efforts'" with officials at Maximus Inc., the eventual recipients of the largest share of the contracts, five months prior to its first informational meeting with other prospective bidders.[29] The comptroller engaged in a protracted but ultimately unsuccessful effort to stop the letting of the Maximus contract.[30]

In addition, in 2004 and 2005, Community Voices Heard ("CVH")

> follows three welfare recipients in New York City from 1997 to 2000 as they participate in the largest welfare-to-work program in the nation. When forced to work at city jobs for well below the prevailing wage and deprived of the chance to go to school, these individuals decide to fight back, demanding programs that will actually help them move off of welfare and into jobs. It was broadcast nationwide on PBS and cable throughout 2002 and 2003.

http://www.mintleafproductions.com/adw.html (last visited Feb. 23, 2008) (citing A DAY'S WORK, A DAY'S PAY (Mint Leaf Productions 2002)). Another highly visible and effective national campaign, the *Welfare Made a Difference* campaign, was launched by the Community Food Resource Network. "The mission of the . . . campaign [was] to document the experiences of parents who have received welfare and collect their recommendations for improving the system." CAITLIN JOHNSON, CONNECT FOR KIDS, WHEN WELFARE WORKS, http://www.connectforkids.org/node/222.

[28] WELFARE REFORM IN NEW YORK CITY, *supra* note 17 at 10.

[29] Nina Bernstein, *Company Had Head Start Preparing Bid in Welfare-to-Work Program*, N.Y. TIMES, Mar. 10, 2000, at B6.

[30] *Id*.

began to research the effectiveness of welfare-to-work contracts. The report the group issued is one of the few pieces of qualitative research documenting the problematic experience of welfare recipients in privatized service environments.[31] The report provides essential data on how privatization is harming poor communities, augments and legitimates an organizing campaign to improve welfare policy, and offers an effective model of advocacy to address the harms of privatization. As described more fully in Section Four, CVH's work and methodology can be incorporated into public law mechanisms to create accountability in the contracting process.

iii. Privatization Outcomes: A Program That Failed to Move People From Welfare to Work

CVH's report documented the extraordinary overall failure of New York City's first large-scale privatization effort. In the report, entitled "*The Revolving Door: Research Findings on NYC's Employment Services and Placement System and Its Effectiveness in Moving People from Welfare to Work*" (hereinafter "*The Revolving Door*"), CVH studied the effectiveness of contracts between the City of New York and private vendors to provide welfare-to-work services.[32] The researchers took New York City at its word that the main goal of the program was to

[31] *But see* Frank Munger, *Dependency by Law: Poverty, Identity, and Welfare Privatization*, 13 IND. J. GLOBAL LEGAL STUD. 391 (2006). Relying on extensive focus group interviews with welfare recipients and other actors in the social welfare system in Buffalo, New York, Professor Munger provides a fascinating account of the effects of privatization and other aspects of welfare reform on the self perception of women receiving welfare.

[32] THE REVOLVING DOOR, *supra* note 8. The program under study in THE REVOLVING DOOR was New York City's Employment Services and Placement (ESP) program. This program was designed to serve approximately 27,000 clients per year from the city at a cost of approximately $43,000,000 per year. Individuals participated for 35 hours per week for a maximum of six months. *Id.* at 29. For the first two weeks of the program, they spent all their time with the private vendor, engaging in assessment, job readiness and job search activities. After two weeks they spent two full days a week at the vendor's site and three days a week working in a work experience placement at another site. *Id.* The goal of the program, according to city documents, was to "assist all non-exempt" applicants and participants to achieve self-reliance through paid employment. *Id*. at 1.

move people from welfare to work and, "set out to uncover whether or not currently operating job readiness and job placement programs accomplish their intended goals, what stands in their way, and how they might be improved to better serve the needs of the clients, the providers, and the system at large."[33] With very few exceptions, CVH revealed a system that was almost completely failing to meet its stated goals.

The contracts were entirely performance-based, meaning that vendors were paid only when a client reached a particular outcome.[34] At the start of the contracts, the city projected that, of the individuals who enrolled in the program, 46% would be placed, 35% would retain jobs for three months, and 25% would retain them for six months. The actual outcomes, however, were far less impressive. Of the average of 4,144 people who were referred into the system each month, only eight percent, or 346, were placed in employment, and of those 43% (149 individuals) still had their jobs at three months, and 35% (121 individuals) had their jobs after six months[35] The program referred clients to jobs that offered

[33] *Id.* at 27. In order to evaluate the effectiveness of the program, CVH analyzed documents from the city agency obtained through Freedom of Information Act requests, performed a random survey of 600 clients, interviewed staff from all but one of the vendors, and conducted twelve in depth client interviews. *Id.* at 17-18.

[34] *Id.* The total reliance on performance based incentives in these contracts made them unusual. In 2001, only 20 percent of all TANF contracts were incentive-based in any way. *Id.* at 27 (citing SAGNER, *supra* note 7, at 20). The privatized vendors were representative of the wide range of private entities in the field. Included were large, multi-national and national corporations such as Affiliated Computer Services, Inc. and America Works, fairly large non-profits such as Federation Employment Guidance Service, Inc., Goodwill Industries, and Wildcat Service Corporation, and New York City based non-profit entities such as the Non-Profit Assistance Corporation. *Id.* at 28, 33. The organizations used a wide variety of programs and tactics to provide services but were all operating under the same incentive-based contract terms. Vendors received 25% percent of the maximum per client payment at job placement, 45% if the person retained the job after three months and the remainder if the person retained the job for six months. The vendor could also receive some bonus payments for placement in "high wage" jobs or jobs that led to a closure of the welfare case.

[35] *Id.* at 31. Interestingly, after the report was released, the major dispute between CVH and the city agency had to do with how placement and retention figures should be calculated. CVH insisted that the system as a whole be held accountable not only for those who enroll but for those who are referred. Thus CVH's calculation leaves all referred individuals in the denominator, thus reducing the percentages of "success."

low salaries, little stability and very little chance of leading the families out of poverty. Seventy-five percent of those with ESP vendor-referred jobs earned $8.00 per hour or less; 19% were referred to part-time positions, and many of the full-time positions were temporary.[36] Moreover, of those placed in jobs who earned enough to close their welfare cases, 29% returned to public assistance within six months and 36% remained unaccounted for.[37]

Given the low placement and retention figures, CVH focused significant portions of the report on documenting what happened to the 92% of the population who were not placed and the structures that led to these breakdowns. The program punished, through a reduction of already meager benefits,[38] a disturbingly high number of individuals for some failure to comply with rules. Of all those referred each month, 76% of the population (on average 3,149 people) fell into this category, either because they did not attend the program at the start (30% of the full

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CVH's position was, rightly, that, given that the city advertised the program as one designed to assist clients, if clients choose not to participate in a program that too is a sign of failure on the program's part. However, even if one accepts the city's position and calculates the numbers counting only those who enrolled in the program, the statistics don't improve significantly: only an average of 15% of those who enroll are placed in jobs by the end of six months in contrast to the 25% projected by the city. In addition, this calculation dispute does not effect CVH's findings as to the nature of the jobs held by those who actually obtained employment. *Id.*at 33.

[36] *Id.* at 35.

[37] *Id.* at 39.

[38] Under New York State Law, when an individual fails or refuses without good cause to comply with work program requirements, their pro rata share of the budget is reduced for some period of time. N.Y. SOC. SERV. § 342 (1997). The length of sanction varies based on the number of previous sanctions in the household's record and the composition of the family. *Id.* For example, for a household with a mother and two children who "fails to comply" a second time, her regular grant of $691 is reduced by one third for a minimum of three months. At any one time an average of approximately 25% of the overall caseload is either in the pipeline to be sanctioned or is actually sanctioned. For the current work participation status of the New York City caseload, see City of New York, Department of Social Services, Human Resources Administration, Weekly Caseload Engagement Status (Jan. 2008), http://www.nyc.gov/html/hra/downloads/pdf/citywide.pdf (last visited Feb. 23, 2008). This document regularly provides data on the proportion of the caseload in various statuses including those in the sanction process or with a sanction in effect.

population) or because the agency concluded that they had failed to comply with some program rule later in the process (46% of the full population).[39]

This dramatic contrast between the 121 people in jobs after six months and the over 3,000 people punished monthly in the system, represented, in CVH's estimation, an utterly failed system. Despite these clear failures, when the city redesigned and rebid the contracts in 2006, the contract incentives were modified only slightly,[40] and the same vendors that had run the ESP program received new contracts.[41]

These two pieces of data: first that the overwhelming majority of recipients ended up sanctioned instead of in employment and second that, despite this failure, the contracts were relet to the same vendors on similar terms, suggests something quite disturbing. As noted above, welfare reform has been deemed a success in large part because of the radical reductions in caseload. However those reductions have not been accompanied by similar advancement of welfare recipients in the labor market. The ESP program, although promoted as one designed to move people into the labor force, appears significantly more successful at

[39] The complete outcome data was as follows: 8% placed; 30% sanctioned for failure to appear; 14% sent back to the agency because of an inappropriate referral, 46% sanctioned for failure to comply with a program rule and 2% were still active in the program. *Id.* at 30.

[40] The payment milestones under the Back to Work Program were as follows: Contractors could be paid a maximum of $5,000 per participant. Ten percent is paid upon completion of an assessment and employment plan (a new aspect of the contracts); 30% is paid upon placement in unsubsidized employment for thirty days at a minimum of 20 hours per week; 10% is paid is the placement is of a "time limited" or sanctioned individual; 2% is paid if the placement results in a case closure; 25% is paid for retention at 180 days and an additional 3% is paid if the individual shows a 10% wage gain from initial placement. The contracts also provide additional incentive payments for vendors that increase the rate of sanction case removal, increase positive administrative indicators and increase the federal work participation rate. *See* Contract Between the City of New York and America Works of New York (on file with author).

[41] COMMUNITY VOICES HEARD, HRA BACK TO WORK SUPPORT AND ACCOUNTABILITY INITIATIVE: TECHNICAL ASSISTANCE/TRAINING, MONITORING/ASSESSMENT, AND EVALUATION (2007), http://www.cvhaction.org/node/160#attachments.

punishment than at placement. Given the agency's apparent endorsement of these outcomes through the reletting of contracts to the same vendors, it is fair to speculate that these devastating outcomes were endorsed by the agency letting the contract. [42] For the purposes of this article, the question becomes how these outcomes were effectuated.

iv. Privatization Incentives: The Motivating Forces Behind Failure

CVH's report not only documented the failures of the ESP system but identified the systemic problems that led to these outcomes. It's criticisms were wide ranging. CVH noted problems that predicted failure, including the lack of experienced job developers and inadequate curriculum for job skills training. For the purposes of this article, however, the most interesting critiques focused on how both the formal contract terms and the formal and informal contract performance monitoring failed to create meaningful employment. In particular, the report criticized the lack of access to education and training and the contractual disincentives to providing services to clients whose path to work would be challenging.

Despite a legal entitlement to having one's preference for education or training honored under many circumstances[43] and a desire, by 71% of the clients, to attend education or training,[44] CVH found that one in three clients did not know that education and training might satisfy a portion of their work requirements[45] and only 18% ESP participants attended programs.[46] CVH reported that the structure of the contract payment

[42] In addition, although the specific reasons for the reletting of the contracts was not clear, it is likely that the agency was subject, to a certain degree, to capture by the agencies that held the ESP contracts, meaning that even if real competition existed at the beginning of the ESP program by the time the new requests for proposals was issued, there were very few other vendors who were able to credibly bid for the contracts. This phenomena and its possible impact here provide support for arguments that privatization through contracting is problematic because it strips the government of the ability to control programs over time. *See infra* n. 78.

[43] N.Y. SOC. SERV. § 335 (1997).

[44] THE REVOLVING DOOR, *supra* note 8, at 64.

[45] *Id.* at 53

[46] *Id.*

system led to a failure to provide education and training. Quite simply, the contracts created no real incentive to place people in education and training as vendors, paid only for placement and retention, focused their efforts on placement as the most likely strategy to improve their rates.[47] These performance incentives led the vendors to "cream," selecting out and serving those who were easier to serve and avoiding serving those who had greater needs: [48]

> Many providers felt frustrated that the fully performance-based structure of the contracts, defining performance solely in reference to the final outcome of job placement and not the steps necessary to reach that outcome, put them in a bind. They did, at times, need to focus on the individuals that were most likely to be placed quickly, and overlook those that needed more support to reach that stage. Such a financial assessment forced vendors from time to time to

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[47] *Id.* at 70. Although the contractual focus on retention would seem to push vendors to give participants access to education and training to promote hiring into more stable employment, this apparently did not occur. Instead, given the difficulty in meeting the retention goals, vendors reported to CVH that they focused efforts on upping their numbers of initial placements as a way to ensure a steady cash flow. *Id.*

[48] Although the CVH study is one of the few to document the creaming phenomena, it has long been the fear of critics of using performance-based contracts in the welfare area. *See, e.g.*, LaDonna Pavetti, Michelle K. Derr, Jacquelyn Anderson, Carole Trippe, & Sidnee Paschall, *Changing the Culture of the Welfare Office: The Role of Intermediaries in Linking TANF Recipients with Jobs*, FED. RESERVE BANK N.Y. ECON. POL'Y REV., Sept. 2001, at 68. For an extensive discussion of these and other phenomena in the contracting out of welfare services, see SANGER, *supra* note 7, at 16–21. In addition to the clear contract incentives to serve only those easiest to serve, there are greater institutional pressures on employment agencies to avoid serving those who are hardest to serve. As Joel Handler has aptly observed:

> > State employment services compete with private services in presenting themselves as reliable sources of qualified labor to private employers. Sadly, it is not in their interests to devote a great deal of resources to those welfare recipients who could benefit the most from work experience and training. . . . The strategy will be to satisfy the minimum funding requirements and somehow deflect the hard cases. Difficult clients (that is, clients with lots of problems) will somehow be excused or dropped from programs instead of receiving extra help and encouragement.
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> HANDLER, *supra* note 5, at 28.

> compromise their ethics . . . . Vendors that would normally want to prioritize education and training for clients . . . are forced to merely focus on job placement for cash flow purposes.[49]

Equally disturbing were the incentives created by the contract to divert those who were harder to serve by finding a means to punish them for non-compliance instead of serving them. CVH reported that the vendors were "discouraged from working with clients for the length of time often necessary to address barriers and are instead encouraged to sanction them."[50] Furthermore, "[t]he incentives are structured in a way that encourages vendors to work with those easiest to place quickly, and leave behind those that need more support and more time to achieve initial placement. Clients realize this and grow wary of a system that is failing to meet their needs."[51]

Not only did the performance incentives, on their face, discourage vendors from working with those clients requiring additional services, but vendors reported that, in the informal monitoring processes, they were regularly encouraged by the city agency to sanction clients. "Vendors [were] quick to explain that they are discouraged from working with clients for the long amount of time often necessary to address barriers and are instead encouraged to sanction them."[52] In the words of one vendor

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[49] THE REVOLVING DOOR, *supra* note 8, at 70.

[50] *Id.* at 8.

[51] *Id.*

[52] *Id.* at 89. This encouragement to sanction clients in New York City's privatized system was paralleled by a perhaps more explicit action in Wisconsin, a jurisdiction famed for being at the forefront of welfare reform. According to Lawrence Mead, a strong supporter of welfare reform and privatization, at one point during the implementation of welfare-to-work contracts in Milwaukee, the private vendors were, in the eyes of state administrators, exempting too many clients from work requirements and were therefore putting into jeopardy the ability of the state to meet federally mandated participation rates.

> Worried about this threat to federal funding, a high-ranking Wisconsin administrator ordered the contractors to sanction more recipients for nonwork. Thus, unrelated to any change in recipient behavior, the rate of sanctioning rose from single-digit percentages to more than 30 percent in a matter of weeks, knocking many nonworking recipients off the rolls and restoring the participant rate.

addressing the failures of the ESP system:

> Why continue to send [people to the same] program if it's not working? … HRA tells us to [sanction them for failing to comply] . . . but why? They are just sent to another ESP Site. We're known for keeping people on our roster for too long. But, if we [sanction] everyone, we wouldn't have anyone. The whole system is a recycling process."[53]

At this point several things should be clear. First, from an outcome perspective, privatization failed to move people from welfare to work and the vast majority of clients ended up punished instead of helped. Second, the city's renewal of contracts with the same vendors and with only minor modifications of the contract terms appeared to endorse these outcomes.[54] Third, from an administrative law perspective, the motivating force governing the interaction between the welfare recipient and the "welfare worker" had radically shifted. In a traditional administrative law setting, the behavior of the government-employed welfare worker is motivated, at least in theory, by the mandates contained in law, regulation and sub-regulatory materials.

CVH's report provides support for the hypothesis that the vendor's behavior is governed in large part by contract terms and not primarily by the substantive statute or regulation governing the welfare program. Even

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Munger, *supra* note 30, at 399–400 (citing LAWRENCE M. MEAD, GOVERNMENT MATTERS: WELFARE REFORM IN WISCONSIN 146 (2004)).

[53] *The Revolving Door, supra* n. 8 at 7.

[54] In many ways the data CVH uncovered was not surprising when viewed in a national context. Researchers have long observed that performance-based contracts in the welfare arena would create incentives to reduce services and push recipients off of the welfare rolls. For example, in probably the most celebrated use of private contractors in welfare reform, contractors in the W-2 program in Wisconsin were permitted to keep a portion of unspent contract funds, and, in certain circumstances, were permitted to keep benefits that they withheld from recipients as a result of case sanctions, thus creating enormous incentives to withhold benefits and services. Karyn Rotker, Jane Ahlstrom & Fran Berstein, *Wisconsin Works—for Private Contractors, That Is*, 35 CLEARINGHOUSE REV. 530, 533 (2002). For a more in depth discussion of the way that corporations are given incentives to maximize profits through denying or reducing benefits and services, see Kennedy, *supra* note 4, at 301–03.

beyond this, the performance under the contract is motivated not only by those formal contract incentives but by informal monitoring mechanisms. When the city agency pushed vendors to sanction clients instead of giving them services, this dynamic became clear.

Although CVH was able, through fairly extraordinary efforts,[55] to uncover this data and write a detailed and critical report, the contract terms and contract monitoring structures that led to these outcomes were created with little or no public scrutiny.[56]

Privatization, at least in this context, was thus an extraordinarily effective mechanism to design and implement, without any public input or initial scrutiny, a program that would impose highly punitive welfare policies. This lack of public input is precisely the problem that this article seeks to address. The central question, then, is whether either administrative law or the market currently offers an effective mechanism for public participation in this new form of administrative governance or whether new administrative law structures must be designed to respond more effectively to this lack of transparency and accountability. Section Two turns to the first of these questions.

II. The Feasibility of Relying On Traditional Accountability Structures Or the Market To Address The Problems of Privatization

Traditional administrative law offers a variety of tools designed to ensure that when the government formulates policies, it is accountable to

[55] CVH relied both on its own capacity to collect data and, to some extent, on the initial naiveté of the administration. When CVH sought to reproduce its methodology in a subsequent report, it encountered substantially more resistance and ultimately did not prevail in getting anywhere near the robust data that it did for the ESP report. ALEXA KASDAN WITH SONDRA YOUDELMAN, FAILURE TO COMPLY: THE DISCONNECT BETWEEN DESIGN AND IMPLEMENTATION IN HRA'S WECARE PROGRAM 10 (2005), http://www.cvhaction.org/english/reports/FailureToComply.pdf [hereinafter FAILURE TO COMPLY].

[56] The contracts were let through traditional public contracting procedures, a process that leaves virtually no room for public input into the substantive terms of the contract. *See infra* Section Two.

the public and adheres to fundamental democratic norms.[57] Chief among these structures are freedom of information and sunshine laws, laws requiring the government to provide notice of administrative rulemaking and an opportunity for the public to comment prior to final promulgation of rules, and mechanisms for members of the public to sue if an administrative agency acts outside the boundaries of its statutory mandate.

Each of these bodies of law creates opportunities for democratic participation in a privatized context. However, the fact of participation by the private entity significantly complicates the analysis and renders exclusive reliance on these structures as they are currently constituted difficult if not impossible.[58] In addition, public law also offers a variety of mechanisms designed to ensure the fairness of government contracting processes. Chief among these are regulations governing procurement processes.[59] Finally, inherent in the move toward privatization is a suggestion that the market itself will stand in the place of regulatory structures to create good policy. In the following section I briefly review the feasibility of using both sets of administrative law structures as well as the market itself to increase accountability. In Section Four I will argue that a substantial reworking of elements of all these structures that takes into account both the realities of public contracting and the power differentials inherent in provision of social welfare services offers some potential to increase the accountability of this system.

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[57] *See generally* RICHARD J. PIERCE, SIDNEY A. SHAPIRO & PAUL R VERKUIL, ADMINISTRATIVE LAW AND PROCESS 23–40 (2004).

[58] For additional discussions of the erosion of traditional administrative law norms raised by the contracting of government functions to public entities and the critiques leveled at privatization as a result of that erosion, see Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1301–11 (2003); Freeman, *supra* note 14, at 176. For an even more general discussion of public law concerns raised by various forms of privatization, see Minow, *supra* note 3.

[59] Natalie Gomez-Velez, *Proactive Procurement: Using New York City's Procurement Rules to Foster Positive Human Services Policies and Serve Public Goals*, 9 N.Y. CITY. L. REV. 331, 352-53 (2006).

A. The Feasibility of Relying on Traditional Administrative Law Mechanisms Designed to Create Accountability in Administrative Rulemaking and Operations

As a conceptual matter, freedom of information, sunshine, and notice and comment laws are predicated on a traditional conception of administrative law: the administrative agency, which is the creation of and is governed by statutory enabling legislation, creates and implements rules that govern its interactions with the public. To check what would otherwise be inappropriate power, the agency is subject to a variety of mechanisms designed to render more democratic the conduct of the agency.[60] Meetings of the government body are, in theory, subject to sunshine laws, allowing the public to view the formal workings of this process.[61] Freedom of information laws allow the public to obtain some access to documents produced by the government, again subjecting the agency to public scrutiny and therefore enhancing democratic accountability.[62] Notice and comment laws provide an informal rulemaking process in which members of the public participate in the promulgation of regulations that govern the way the agency interacts with the public.[63] Finally, actions predicated on claims that an administrative agency exceeded its statutory mandates confine the ability of the government agency to wholly circumvent the democratic checks inherent in the passage of laws by publicly elected legislative bodies.[64]

As an initial matter, each of these tools presumes that a government agency is the primary actor. If the government is not the actor, it is far from clear whether any of these laws apply, leaving some doubt as to the efficacy of a litigation strategy for addressing the concerns I raise in this article. For example, the relevant provisions of The Administrative

[60] For a general discussion of the statutory and judicial checks on administrative actions, *see* PIERCE, SHAPIRO & VERKUIL *supra* note 57 at 79-226.

[61] *Id.* at 497-98.

[62] *Id.* at 431-73.

[63] *Id.* at 327-43.

[64] *Id.* at 364-408.

Procedure Act, the Freedom of Information Act and the Government in the Sunshine Act apply, with some exceptions not relevant to this discussion, to "agencies" defined as "each authority of the Government of the United States . . . ."[65] Thus, on an initial look it appears, for example, that documents produced by an entity under contract with the government to provide welfare services may not be available under freedom of information laws.[66] Under the same doctrine, sunshine laws may not allow one to view meetings being held by entities under contract with the government.

Beyond the problems raised by the applicability of the relevant administrative law tools to a restrictive conception of what is a "government agency" or what is "state action," [67] however, is a fundamental distinction in administrative law, between quasi-legislative functions of administrative agencies on the one hand and all other functions on the other.[68] Administrative law accountability tools of the

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[65] Administrative Procedure Act 5 U.S.C § 551(1) (1994). For a detailed discussion of the significance of this restriction see Alfred Aman, *Proposals for Reforming the Administrative Procedure Act* 6 IND J. GLOBAL LEGAL STUD, 397, 415-16 (1999).

[66] For example, although CVH was able to procure data given by the vendors to the administrative agency through the state Freedom of Information Law, it is not at all clear under New York Law that they could have gotten any data directly from the vendors. *See e.g.* Farms First v. Saratoga Economic Development Corp., 635 N.Y.S.2d 720 (App. Div. 3d 1995)(Non-for-profit corporation not subjected to Freedom of Information Law even though it received over 50% of its revenues from the county, where it simply contracted with county on a fee-for service basis); *Ervin v. Southern Tier Economic Development, Inc.*, 809 N.Y.S.2d 268, 270 (3d Dep't 2006) (non-profit development corporation not an agency where board was comprised of private individuals, no control by municipality of corporation, audits of financial records are private and not public record, did not hold itself out as an agent of the municipality, and did not disburse funds on behalf of municipality); *but cf Buffalo News, Inc. v. Buffalo Enterprise Development Corp.*, 619 N.Y.S.2d 695, 697 (N.Y.,1994) (non-profit local development corporation considered an "agency" for FOIL purposes where it was created exclusively by and for municipality, required to publicly disclose its annual budget, held itself out as an "agent" of municipality, channeled public funds into the community, board members were public officials, held offices in public buildings, and enjoyed many attributes of public entities).

[67] For a particularly compelling reconceptualization of state action doctrine, *see* Daphne Barak-Erez, *A State Action Doctrine for An Age of Privatization*, 45 SYRACUSE L. REV. 1169 (1995).

[68] *See* Pierce, Shapiro & Verkuil, *supra* note, 57, at 282 (describing informal

kind I have been discussing arise, fundamentally, from a concern that the administrative state functions without the checks and balances inherent in the other branches of government. The fear, embodied in some conceptions of this branch of administrative law, is that the administrative state is in effect an unelected legislative body, able to impose its will on the public without any form of accountability. As a result, when an administrative agency acts more like a legislature, for example promulgating a welfare regulation governing employment rules or eligibility standards, it is acting in its quasi-legislative function.[69] Laws such as notice and comment and procedural mechanisms allowing parties to litigate against the agency if it promulgates a rule in excess of its statutory authority are applicable to those processes precisely because, in theory, these processes, if unchecked, lack sufficient limitations on the power of the administrative agency. But when the government is not acting in a "quasi legislative" function, these protections do not exist.

In the context of trying to create accountability in a privatized sector of government programs, this matters because government contracting is traditionally placed on the non-legislative category. A prime example is the exclusion of government contracting from the notice and comment provision of the Administrative Procedure Act.[70] The theory behind this and similar exclusions is that when the government is procuring services, for example, to build a road, it is acting more like any other actor in the marketplace and less like a legislature. This may make sense when applied to building a road or entering into a contract to procure office supplies for a government agency, but it makes significantly less sense

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rulemaking as creating procedures that "closely resemble the process of enacting legislation . . . . [The agency] can act through . . . issuing a notice of its intent to act, providing an opportunity for individuals and groups to comment in writing on its proposed action, and accompanying its final action with a statement of basis and purpose. Functionally, informal rulemaking is well-suited to quasi-legislative tasks – establishing rules applicable to groups of people.").

[69] As a general matter under the Administrative Procedure Act, "[a]ny rule that has a significant, binding effect on the substantive rights of parties will be characterized as a legislative rule" and will be subject to the rule-making procedures in the APA. *Id.* at 322.

[70] 5 U.S.C. § 553(a)(2) (2004).

when the government is procuring human services.[71]

Returning now to the description above of how the formal contract terms and the informal contract mechanisms were the primary force motivating the interactions between the private vendors in New York City and welfare recipients, and the likely applicability of these findings to a wide variety of privatized contexts, it is clear that contracts themselves, as well as informal contract monitoring functions, should be moved over from non-quasi legislative function into a quasi legislative function, thus subjecting them to traditional administrative law mechanisms.[72] So at least one potential "solution" to the problem described above is subjecting contracts to notice and comment. However, as Alfred Aman has noted, and as the CVH study indicates, because informal contract monitoring mechanisms play such a significant role in actual contractor behavior, merely subjecting contracts themselves to notice and comment will not fully address the problem. As Aman discusses it,

> Even if the details [of the contract] are noticed, its day-to-day implementation may not be visible to the public. . . . [S]uch an approach assumes a distinction between administration and policymaking that does not exist in reality. The process of administration inevitably involves policymaking, especially when emergencies or unusual circumstances arise. Thus, noticing the full details of a proposed contract with a private provider should be a minimum requirement of the privatizing process, but these contracts themselves may need to be subject to frequent review.[73]

Therefore, there is a case to be made that tools such as freedom of information and sunshine laws, notice and comment requirements, and the state action doctrine, must be expanded to include the conduct of private entities. These strategies offer potential avenues for increasing accountability and must be pursued by scholars and advocates in the field. However, as argued in Section Three, without taking into account both the

[71] Gomez-Velez, *supra* note 59.
[72] Aman, *supra* note 65, at 417.
[73] *Id.* at 417.

radically changed nature of governance in many sectors and issues of disproportionate power, strategies such as these may ultimately fail to significantly enhance accountability on their own.[74]

Another body of public law that provides some possibilities for public participation is the law governing public procurement processes. However this body of law focuses almost exclusively, "on ensuring low price, fairness to vendors and the avoidance of corruption."[75] Procurement mechanisms, traditionally designed for contexts involving the delivery of tangible good and services, ". . . may be too limited to address the much more substantial issues that arise when government contracts out social services and traditionally governmental functions."[76] Nevertheless, as Professor Natalie Gomez-Velez has pointed out, and as the wide-scale use of contracting in traditional government-run programs suggests, examination and alteration of procurement policies to, "improve the quality of human services provided though contracts" can lead to improved procurement policies.[77] In Section Four of this article, I suggest ways that administrative law concepts can be imported into the procurement process to meet these ends.

B. The Feasibility of Relying on the Market.

Proponents of privatization posit the market itself as the means to

[74] For additional discussion of the problems with importing wholesale and without modification traditional public law mechanisms to a private context, see e.g., *id.* at 417; *see also* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 574–93 (2000).

[75] Gomez-Velez, *supra* note 59, at 332.

[76] Freeman, *supra* note 14, at 165.

[77] In an extensive study of procurement reforms in New York City, Gomez-Velez suggests that, in incorporating more mechanisms to address the substance and quality of contracts for human services, procurement policies are changing to accommodate values associated with the quality of government services. Gomez-Velez, *supra* note 59. Gomez-Velez posits this change as part of what Jody Freeman has termed "publicization," the incorporation of public law values into formerly private settings as a means of ensuring continued adherence to Constitutional and public law values in the face of privatization. Freeman, *supra* note 58. This term also aptly describes the project of this Article.

creating effective welfare programs. The above subsections examined traditional administrative law tools with an eye to whether they successfully created accountability to poor communities in a contracted-out welfare setting. The same question applies here: does the market itself, absent any public law intervention, offer a structure of accountability to the poor clients of the welfare system? Will competition inherent in market-based structures lead to increased innovation and efficiency and ultimately to programs that are "better" in the eyes of those served by the programs?

In a market model, a hypothetical consumer chooses one product over another, drawing resources to the better product and leading to the improved outcomes and efficiencies that the market model promises. Here, given the structure of welfare programs, it is faulty to assume that that consumer role is played by the welfare applicant or recipient. Welfare recipients do not choose the program to which they are assigned. Instead, in New York City, as is the case in many jurisdictions, they are assigned by the agency on a random basis. As it is certainly not the welfare recipient who is making choices in the market, resources are not drawn to one vendor or another based on the preferences of the "customer." When one conceives of the consumer not as the welfare recipient but instead as the government, who is measuring performance based on milestones they have set, the model makes a bit more sense.[78]

[78] This Article assumes, based on CVH's data, as well as on a long history of social welfare policy being used as a tool of subordination, discussed in Section Three, that the government is likely, if not subject to substantial outside pressure, to create policies that do not advance the needs of poor communities. The literature on market efficiencies does not largely share this assumption. Although a full discussion of market failures in the more traditional senses is beyond the scope of this Article, there are at least two fundamental market failures that can lead to inefficiencies. First, for a variety of reasons, it is difficult to maintain sufficient competition for contracts to lead to optimal market results. What tends to happen, instead, is that even if a significant number of entities initially compete for a particular contract, over time vendors tend to become established as the providers for a particular program. For a discussion of an egregious example of the way in which competition can be eliminated in a privatized welfare context, *see* Kennedy, *Due Process in a Privatized Welfare State, supra* note 4 at 261-62 (describing the attempted buy out, by Citibank EBT Services of Transactive, thus threatening to give Citibank monopoly control over electronic benefits transfer systems in thirty three states). At the same time, because government has turned over the running of

But from the perspective of accountability to poor communities, the ESP program data clearly indicates that the government does not stand in the shoes of program clients in choosing where to direct resources. In the ESP program, 92% of the population was not placed and 76% were punished.[79] Despite these dismal outcomes, the contracts were renewed with very few changes. Had welfare recipients done the choosing, it is difficult to imagine that the program would have received such an endorsement. In fact, if one allows CVH to speak for the community, it is quite clear that welfare recipients considered the program a failure and would have reconfigured it much more substantially.

This accountability failure is not surprising. As Martha Minow aptly observes "[w]ith social services, including welfare-to-work transition assistance . . . accountability becomes especially important but also recalcitrant, because those most directly affected by the services or failures to provide services are politically and economically ineffectual. Treatment of vulnerable populations simply does not work well in markets that depend upon consumer rationality or upon political processes that demand active citizen monitoring."[80]

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the program to a private entity, the capacity of the government to run the program without the vendor decreases. As a result of these parallel trends, the vendors begin to have monopoly control over the program and the government begins to be captive to the vendors. Under any analysis, this does not lead to efficient markets. For an extensive discussion of these and other phenomena in the contracting out of welfare services see SAGNER, *supra* note 7 at 16-21. In addition, government typically has difficulty building sufficient expertise to monitor vendor performance. As M. Bryna Sagner has noted, "[g]rowth in contracting must be accompanied by an equal growth in government's ability to manage and monitor contractor behavior, but there are indications that these developments do not necessarily coincide." *Id.* at 16. *See also* Freeman, *supra* note 14 at 171-72. So even assuming good intentions on the part of government actors, there are substantial reasons to suspect the ability of the market to lead to "good" outcomes.

[79] *See infra* notes 35-39 and accompanying text.

[80] The unsuitability of the market to create accountability in a setting such as the contracting out of welfare has also been noted by Alfred Aman. *See* Alfred C. Aman Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477, 1496 (2001) ("Too often . . . the politics of privatization and the market populism that is often a dominant part of the political rhetoric that comes into play make it seem as if the privatization of prisons or the determination of welfare eligibility were similar to the

Given the lack of an active consumer whose interests are aligned with poor communities, it seems that the market offers fewer rather than more opportunities to create accountability. Matthew Diller has persuasively argued that while welfare's move to privatization has been characterized by its proponents as technocratic – seeking increased efficiency and innovation - this explanation is insufficient and deceptive. Diller instead views privatization as a means to obscure from public scrutiny the making of welfare policy.[81] As he observes,

> One of the consequences of the technocratic basis of privatization in welfare is that critical policy decisions are made in obscure ways. The actual content of programs is determined through contract provisions governing performance measurement, governmental oversight and financial incentive structures. All of these features are generally hidden from public view by their sheer technical complexity. To make matters worse, the process of drafting and negotiating the critically important contractual terms is largely closed to public input.[82]

In New York City, the imposition of policies that harm rather than help poor communities was being obscured through the use of contracting. In fact, the ESP case study provides substantial evidence to suggest that this is in fact precisely the role of privatization of this program. In this instance, privatization created a situation where extraordinarily punitive policies were imposed on welfare recipients

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regulation of airlines or cable television. The transparency that comes with consumers or customers voting with their feet, as it were, is not likely to materialize in the context of such privatized governmental services without processes designed to provide the kind of information that can empower citizens and make their participation meaningful.").

[81] Matthew Diller, *New Forms of Governance: Ceding Public Power to Private Actors: Form and Substance in the Privatization of Poverty Programs,* 49 UCLA L. REV. 1739, 1757 (2002).

[82] *Id.* In some senses, privatization can be seen as taking even further, the process by which power is granted to local government to administer welfare programs in a way that entirely undermines any apparent positive benefit to the recipient. For an extensive discussion of this phenomenon, before 1996, see HANDLER, *supra* note 5, at 42–49.

through the use of contracting.[83] Ironically, it also suggests that the turn to a market model, rather than functioning inefficiently as suggested by many scholars, actually functions extraordinarily well in rendering the poor of New York City tremendously vulnerable to the vagaries of the low wage labor market and doing so without any real accountability to either the public or the effected communities.[84]

III. Creating Solutions: Conceptual Underpinnings

Given the wide scope of contracting out of traditional government welfare functions and the effect of that transformation on the ability of communities to create accountability in program design and

[83] This data raises even more concerns when one looks at both outcome and service provision data through the lens of race. Although CVH was not able to breakdown outcome data by race, some national data suggests that both outcomes and the quality of service provision vary along race lines. In Wisconsin in 1995-96, "61percent of the white families receiving assistance left the caseload, compared to 36 percent of the African-American families." [CITE] In Illinois, leaver data from June 1997 to June 1999 revealed racial disparities in the reasons for case closure. [CITE] In that period a, "total of 340,958 cases closed, of which 102,423 were whites and 238,535 were minorities. [CITE] Fifty four percent of minority cases, but only 39 percent of white cases, closed because the recipient failed to comply with program rules. [CITE] Though earned income made 40% of white families ineligible for support, earned income made only 27% of minority families ineligible." [Cite] 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 such as transportation help. Testimony of Steve Savner, Senior Staff Attorney, Center for Law and Social Policy, House Committee on Ways and Means, April 3, 2001 at 4-7.

[84] The disturbing "efficiency" of the market in imposing harsh penalties on poor communities is not surprising. As noted by Michael B. Katz, this kind of "market success" has been manifested in a variety of privatized programs. MICHAEL B. KATZ, THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE 31 (2001). As he notes,

> [t]he women forced to claim public assistance in order to survive exert little if any influence over the design of newly 'marketized' welfare policies. The real exchange links politicians and their constituencies. The commodity is votes, and the desired outcome is reduced welfare rolls, regardless of what happens to those rejected for benefits or terminated from assistance.

Id. at 31.

implementation, new administrative law structures must be created to advance these values. Section IV identifies practical accountability structures that might serve these ends. This section details the conceptual underpinnings for the creation of such administrative law structures. These conceptual underpinnings rely on three bodies of scholarship: "new governance" theory, social science literature documenting the historical subordination in social welfare programs, and community/rebellious lawyering scholarship. To create accountability in privatized programs traditionally characterized by subordination, new governance structures provide a politically promising means of reform. However, given the disproportionate power between government and welfare recipient and the long history of the use of social welfare programs to subordinate poor communities, these governance structures must be significantly re-conceptualized. Community participation must be transformed from mere tokenism into substantive participation by poor communities. In addition, the insights of community/rebellious lawyering scholarship argue for making the source of that participation grassroots organizing groups.

A. The Administrative Law Framework Offered By New Governance Scholarship

Although definitional frames and boundaries are hotly contested,[85] new governance scholars seek to build a conceptual bridge between those administrative law scholars that advocate the strengthening of New Deal-based centralized regulatory structures and those scholars from the law and economics school that seek to rely on market forces to create efficiency.[86] Seeking a third way between these two schools, scholars in this field describe a new paradigm, "a key strength . . . [of which] is its explicit suggestion that economic efficiency and democratic legitimacy can be mutually reinforcing"[87] For the purposes of this article, this body of

[85] *See, e.g.*, Bradley C. Karkkainen, Reply, *"New Governance" in Legal Thought and in the World: Some Splitting as an 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)).

[86] *See, e.g.*, Freeman, *supra* note 74.

[87] Lobel *supra* note 85 at 344.

scholarship is particularly compelling because it accepts the shift to market structures and theory inherent in so much of current governance and attempts to impose accountability in light of these shifts.

In seeking new administrative law paradigms, these scholars describe movements away from both top-down regulation and "deregulation" in the law and economics sense, and towards a collaborative, "softer" model where a variety of stakeholders work together to create, implement, and continually renegotiate programmatic structure and implementation.[88] This scholarship engages directly with the newly configured modes of governance of which privatization is a major component.

New governance frameworks put a premium on experimentation and means of learning from experimentation. Fundamentally, they put far less emphasis on centralized, expert decision-makers and,

> ". . . [broaden] the decision-making playing field by involving more actors in the various stages of the legal process. It also diversifies the types of expertise and experience that these new actors bring to the table."[89]

Among the key players included in this broadened set of governing actors are third parties, non-government actors enlisted to administer public functions, ". . . such as the delivery of social services. Sharing tasks and responsibilities with the private sector creates more interdependence between government and the market. In turn, increased participation leads to fluid and permeable boundaries between private and public."[90]

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[88] *See also* Karkkainen, *supra* note 85 at 473 (describing new governance scholarship as endeavoring to "simultaneously to chronicle, interpret, analyze, theorize, and advocate a seismic reorientation 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.").

[89] Lobel *supra* note 85 at 373.

[90] *Id.*

New governance structures are also, ideally, characterized by increased collaboration. Individuals participating in the governance scheme, "are involved in the process of developing the norms of behavior and changing them." Individuals interact over time, share information and responsibility and continually renegotiate and reconfigure program structures as their collective understanding evolves. "In a cooperative regime, the role of government changes from regulator and controller to facilitator, and law becomes a shared problem-solving process rather than an ordering activity."[91]

New governance frameworks also reject the centralization and standardization characterized by New Deal structures and instead embrace localization, competition, solutions derived from the particular needs and circumstances of those closest to the problem, solutions that cross over traditional boundaries between areas of law, and a kind of perpetual experimentation inherent in multiple, ongoing collaborations.[92] Related to collaboration is a concept of heterogeneity of approaches and continuous improvement as a result of this ability of multiple, often private, actors to approach problems from multiple perspectives. New governance structures are envisioned as inherently dynamic and experimentalist in nature.[93]

Finally a fundamental aspect of new governance frameworks is the possibility of "orchestration."[94] Orchestration requires that, "decentralization must be coupled with regional and national commitment to coordinate local efforts and communicate lessons in a comprehensive manner."[95] In theory, orchestration allows the government to identify a problem in need of solving and then, "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."[96] In a very real sense, the power of the government in this conception is the power of

[91] *Id.* at 377.
[92] *Id.* at 379-86.
[93] *Id.* at 396.
[94] Lobel, *supra* note 85 at 400.
[95] *Id.*
[96] *Id.* at 400-01.

the purse.[97] Government calls for and supports innovation, evaluates, and then encourages both best practices and continued experimentation.

New governance frameworks offer a promising means of creating accountability in contracted-out welfare programs for a variety of reasons. First is the political feasibility of the project. As discussed in Section One, privatization and large-scale collaborations between government and private entities increasingly dominate welfare programs. Theories and strategies to question, slow, and alter this process are an essential part of any comprehensive advocacy strategy to respond to privatization.[98] However, the dominance of privatization in the provision of previously government-run welfare programs and the current welfare program strategies require engagement with the ideologies and practices of market-based, privatized structures.

Second, in the midst of substantial data suggesting that privatization failed in New York, although the data was sparse and merited further research, CVH did find that some ESP vendors were slightly better for program clients than others.[99] In this sense, the CVH report teaches that experimentation can be of value and program design should, in the right circumstances, encourage this innovation and learning. Any endorsement of experimentation implicitly endorses a move away from specific, judicially enforceable hard rules of conduct by welfare workers. Lawyers who have spent their careers seeking to create and enforce detailed rules for the conduct of welfare workers on the ground may find this suggestion, in some senses, near heresy.[100] However, detailed, top-down rule making has historically been beset by significant implementation challenges on the

[97] Freeman, *supra* note 58 at 1285.

[98] Several scholars have focused considerable attention on strategies and theories that would slow privatization. *See generally* Freeman, *supra* note 74 at 574-93.

[99] THE REVOLVING DOOR, *supra* note 8 at 20. For example, vendor six month retention figures varied from a low of 10% to a high of 20%, *id.* at 33-4, and while most vendors reported that they could focus almost no resources and attention on services to promote job retention, one vendor developed a program to enhance retention. *Id.* at 33-34, 37.

[100] As a lawyer and clinician who relies on and continues to enforce hard rules on behalf of my individual clients, I offer these proposals with a deep understanding of this hesitation.

ground.[101] If the experimental, collaborative process envisioned by new governance theory were structured to ensure significant participation by and accountability to low income communities, then those structures may be more effective than the top-down regulatory structures in creating positive welfare policy.[102]

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[101] *See e.g.* Minow, *supra* note 3 at 1242-43.

[102] The degree and nature of the "softness" is hotly contested by a variety of new governance scholars. *See e.g.* Karkkainen *supra* note 85 at 486-89. The concept of "softness" refers, in part, to a move away from exclusive reliance on formal accountability mechanisms such as sanctions for failure to comply with regulatory mandates, away from a capacity to sue on the basis of agency disregard for its own rules and a move toward an expansion of the means by which and the stages in which multiple actors can participate in governance decision-making and the means by which the government can intervene to control outcomes. Involved are a variety of inducements toward good behavior, such as performance incentives. Lobel, *supra* note 85 at 390. In addition, new governance concepts can include, ". . . variation in the communications of intention to control and discipline deviance." *Id.* at 391. A prime example of the new sanction regime is an increased reliance on government support of multiple approaches to problem solving. "For example, recently adopted performance-based regulation, designed to allow a range of reasonable interpretations that can meet the legal requirement of comparable outcomes, promotes flexibility in the means adopted to achieve the specified goals." *Id.* Despite the variability in possible outcomes permissible under these regulatory frameworks, many scholars argue that the frameworks do involve government retention of significant coercive power. For example Michael Dorf and Charles Sabel's vision of "democratic experimentalism, a leading new governance concept,

> contemplates mandatory participation in local problem-solving experiments under the discipline of mandatory (but rolling) minimum performance standards set and periodically revised by a central coordinating body, coupled with a reserved coercive power on the part of the center to intervene for purposes of forcing reconsideration and reconfiguration of local experiments gone seriously awry.

Karkkanen, *supra* note 80, at 488 (citing Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998)). Despite these arguments, however there is no question that allowing experimentation and diversity of approaches and endorsing a move to incentive- rather than mandate-based regimes raises a disturbing spectre for recipients of welfare programs. In short, without hard rules, it is difficult to compel outcomes, and, as the CVH report makes abundantly clear, when a set of rules focuses entirely on outcome, whether it be in a performance-based contract or a performance-based regulation, the means of implementation are not subject to rules. This is problematic for a variety of reasons. If there are no rules about the means used, it is far more difficult for advocates to control interactions between the government (or private

B. The Challenges To New Governance Structures Posed By Disproportionate Power

New governance theory offers a politically feasible and potentially promising framework for change. However, the accountability problem inherent in the privatization of welfare programs, as revealed by CVH, is that the government's actual goals differed substantially from those of the community. CVH sought programs that would help move people from welfare into sustainable employment, and, arguably, the government sought and endorsed a punishment and caseload reduction mechanism. Looking at this program through the framework of new governance theory, the governance process was deficient in a number of ways. Most fundamentally, there were only two constituents who were party to the creation of the program – the government and the vendors. On a very basic level, if the structure offered by new governance scholarship is one of broad-based, multi-constituent collaboration, then a fundamental flaw in the means by which the ESP program was created was that the affected constituency was not at the table. And the solution is, at a minimum, to bring the clients into the collaborative governance structure. However, this statement begs the far more complicated questions of how to bring a party or community into a collaboration when (1) the parties to be included (here welfare recipients) have substantially less political power than anyone else at the table and, (2) even more disturbingly, when the program at issue has historically been used to subordinate the clients it purports to serve.

The effects of disproportionate power and subordination have been the

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party acting on behalf of the government) and the person being served by the program. Even given their failures, traditional accountability mechanisms create a clear means for intervention that does produce some level of results. For example, even given the structural problems in the implementation of the settlement discussed at the beginning of this article, it did allow the mandating of hard rules and clear sanctions for systemic noncompliance. Abandoning such tools, however limited, seems foolhardy. For this reason, although this article advocates the investment of advocacy resources in the creation of governance structures that augment community participation and input, its suggestions should be critically evaluated in light of these risks.

topic of some new governance scholarship. New governance structures are least effective, in terms of holding true to the democratic participatory values of administrative law, when key figures in a particular system do not wield sufficient political power to participate in these collaborative governance structures. As Orly Lobel frames it, "[a] central challenge for the governance model is . . . to understand how collaborative environments can be nurtured to produce equitable results, especially in settings where vast power imbalances exist."[103] Although there are valuable suggestions in the literature as to how to begin to solve this problem,[104] and some discussion of moments when true power was wielded by historically less-powerful groups in a new governance framework,[105] the practical problem of what governance structures might be put in place to address these issues remains underdeveloped.

In a new governance environment, problems in terms of accountability to any particular entity or interest group tend to arise when that entity or group does not have the political power to affect process and outcome. From the perspective of democratic accountability, when all relevant entities or parties possess sufficient political power to participate in a meaningful way in governance structures, accountability problems tend not to arise. A few examples demonstrate this point.

In *Down From Bureacracy*, Joel Handler examines the consequences of decentralization, deregulation and privatization for "citizen empowerment." He seeks to determine whether, given the shift towards these new governance structures, "ordinary citizens – clients, patients, teachers, students, parents, tenants, neighbors – have more or fewer opportunities to exercise control over decisions that affect their lives."[106] One prime example, discussed by Handler as one where democratic accountability problems tend not to arise is the use, under the Occupational Safety and Health Act (OSHA) of the "voluntary protection program." This program is a system of self-regulation in which labor

[103] Freeman, *supra* note 85 at 458-59.

[104] *See e.g.* Lobel, *supra* note 3 at 216-27; Minow *supra* note 3 at 1266-70; *infra* note 122 and accompanying text.

[105] HANDLER *supra* note 5 at 115-242.

[106] *Id.* at 5.

management committees are formed and work together to develop and implement health and safety inspection standards and protocols. In particular, Handler describes a study by Joseph Rees of the use of voluntary regulatory structures in the California Cooperative Compliance Program. In that program, joint labor management committees acted as a surrogate for the OSHA inspector, and the role of the OSHA inspector shifted from direct inspection to, in many circumstances, "problem solving consultant."[107] According to Rees' study, this particular program was tremendously successful in the sense that it resulted in far lower accident rates than comparable sites.[108] Rees and Handler attribute this success to a variety of factors, the most important of which, according to Handler, was the consistent presence of strong unions at successful sites. In short, strong unions ensured that labor participation was meaningful and that the interests of the workers who would suffer accidents as a result of health and safety hazards were consistently represented and accounted for.

In contrast to the OSHA example where the affected constituency, the workers, possessed sufficient political power to compel outcomes in their favor, is the implementation of the Workforce Investment Act ("WIA"), in Springfield, Massachusetts. In this example, the affected constituency, potential clients of the workforce investment system, initially had little if any role in policy creation and had to resort to an outsider, organizing strategy to augment their political capital. WIA, in many ways a model new governance structure, illustrates the continuing challenges for these structures. The WIA-enabling legislation mandates the creation of local workforce investment boards with broad membership, including client membership, and policy setting authority.[109]

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[107] HANDLER *supra* note 5 at 137.

[108] *Id.* at 138.

[109] The Workforce Investment Act ("WIA") incorporates many new governance concepts. The statute calls for the creation of state and local Workforce Development Boards that must bring together a wide variety of stakeholders in state and local boards to govern the provision of workforce development services. 29 U.S.C. § 2832(d)(5) (1998). State and local boards include members from every major constituent and are responsible for local oversight and administration. The local board negotiates performance measures with the state and is held accountable for meeting those performance measures. 29

While WIA appears to function successfully in fostering increased accountability in some localities,[110] the Anti-Displacement Project (hereinafter the "A-DP"), an institutionally based membership organization controlled by low-income people and located in Springfield, Massachusetts, came to a very different conclusion about the implementation of WIA policy in their jurisdiction. Strikingly, despite the presence of new governance structures in the form of rolling performance mandates and governance by state and local workforce investment boards mandated to have community representation, in Springfield, clients of the system appeared initially unable to meaningfully participate in setting local

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U.S.C. § 2832(d)(5). Under WIA, program design is created through the participation of this broad group of actors and jurisdictions function under performance mandates that leave substantial room for experimentation. [CITE] WIA also incorporates some accountability and transparency concepts from traditional administrative law. WIA requires that proceedings of the Workforce Boards be open to the public and that certain documents be available for public scrutiny and requires that plans be available for comment prior to their approval. N In theory, WIA structures create opportunities for community participation, thus creating accountability. Lobel, *supra* note 85 at 411.

[110] Lobel cites, as a prime example of the effectiveness of WIA policy in a new governance framework, the work of Project QUEST in San Antonio, Texas. *Id.* at 413–16. Project QUEST has been cited as one of the most successful job training programs in the country. Paul Osterman, *Organizing the US Labor Market: National Problems, Community Strategies*, *in* GOVERNING WORK AND WELFARE IN A NEW ECONOMY 289 (Jonathan Zeitlin & David Trubeck eds., 2003). It grew, beginning in 1991, from the work of community activists in San Antonio who put at the center the experiences and needs of low income members of its organizations. *Id.* at 254. These organizing groups ultimately designed a program, Project QUEST, that provided long term training, modest financial support of program participants during training, and direct linkages with jobs at the conclusion of the program. *Id.* at 255. Project QUEST was not only tremendously successful in its placement rate and the wage gains realized by participants, but it assisted in reforming the community college system, altered the hiring patterns of employers and augmented the larger organizing goals of the community organizing groups that developed it. *Id.* at 256–57. The relationship between the development and success of this program and WIA is not entirely clear. Although causation is difficult to identify, it appears fair to speculate that Project QUEST's success could have arisen, like that of the union workers in the OSHA context, initially from the political power of the membership organizations that led to the formation and ongoing support of the project. Once developed and backed by the considerable political power of the organizing groups, the governance structures of WIA clearly supplemented rather than hindered local support of the program.

WIA priorities. Nevertheless, the new governance structure that characterizes WIA ultimately appeared to play some role in facilitating significant accountability to the community.

In 2001, using a strategy strikingly similar to that utilized by CVH, the A-DP set out to monitor implementation of WIA in their jurisdiction.[111] Strikingly, the data revealed by CVH and the A-DP were quite similar.[112] The A-DP research revealed a program that failed to provide access to the education, training and other essential services sought by the clients.[113] Both programs failed to meet the clients' self-articulated needs and compromised the ability of poor people to succeed in the labor market. In both programs, clients wanted to build skills that would enable them to move towards economic sustainability, and in both cases, they were almost uniformly denied these opportunities and diverted into the low-wage labor market.

The results revealed by CVH and the A-DP are, sadly, consistent with the history of social welfare programs and policies. Although government

[111] The A-DP created a leader-driven testing project to explore the training services provided under the WIA. Over a two-month period, leaders went into the WIA administered One-Stop Career Center and documented their experiences. The A-DP identified 32 people who were either low-wage workers, unemployed, or welfare recipients. The "testers" were a multi-racial, multi-ethnic team who had varying needs and skill levels. The testers made a total of 42 visits to the Future Works One Stop Career Center with specific requests such as "I want to get computer training" or "I'm looking for a job in childcare." Testers also documented language access as well as the availability of services such as transportation and childcare assistance. After each visit, the testers met with the testing coordinator and documented their overall experience, what they asked for, and what they were told. ANTI-DISPLACEMENT PROJECT, FUTUREWORKS: ROADBLOCKS TO SUCCESS, HOW FUTUREWORKS IS A DEAD END STREET FOR LOW WAGE WORKERS (2001) (on file with author) [hereinafter FUTUREWORKS].

[112] It is, however, worth noting that the A-DP's research methods were significantly less rigorous than CVH's, so limited conclusions can be drawn from it. Nevertheless, the results are striking.

[113] Everything testers asked for and documented was an eligible activity within the Workforce Investment Act. None of the forty-two tests resulted in enrollment in a skill development or training program. FUTUREWORKS *supra* note 111.

actors have, often in response to pressure from a variety of fronts,[114] designed some programs that have advanced the interests of program participants, social welfare policy over the course of American history has been dominated by systems and programs that serve primarily to control against political unrest and maintain a workforce that has little option but to accept unstable, low-wage employment.[115] Social welfare policy is quite often fairly characterized primarily as a means of labor market control and a bulwark against social unrest rather than as a system to meet the real needs of program participants. Social welfare policy is also characterized by a long and shameful history of contributing to gender and race subordination.[116]

Welfare reform after 1996 only added to this long history. While welfare rolls have plummeted, former welfare recipients have been pushed off of welfare and into the low-wage labor market. They are off welfare, but on the whole they have not moved towards any form of economic security. Jobs into which former welfare recipients have been pushed fall to women who suffer financially in comparison to their male colleagues in the workplace and what few positive outcomes come from welfare reform appear to fall disproportionately to white recipients.[117]

When viewed through this historical lens, the results revealed by CVH and the A-DP are not surprising. If in fact social welfare programs have historically been and continue to be used to subordinate poor communities, then one expects precisely these results: WIA would fail to provide

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[114] 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 (1993); *see also* MIMI ABRAMOVITZ, UNDER ATTACH, FIGHTING BACK: WOMEN AND WELFARE IN THE UNITED STATES (2000).

[115] *See generally* FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE (1993).

[116] *See, e.g.*, JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994); KENNETH J. NEUBECK & NOEL A. CAZENAVE, WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR (2001); *see generally* LOST GROUND: WELFARE REFORM, POVERTY AND BEYOND (Randy Albelda & Ann Withorn eds., 2002); WHOSE WELFARE (Gwedolyn Mink ed., 1999).

[117] *See supra* note 83 and references cited therein.

training that would render participants more expensive to employers and New York City contractors would be rewarded for placing disproportionately high numbers of recipients in highly unstable low-wage jobs, would not be penalized for failing to provide program participants with any marketable skills and would be rewarded for punishing the vast majority of clients. The contracts CVH described, and the welfare reform movement of which they are a key part, have the effect of giving recipients little option but to subject themselves to the vagaries of the low-wage labor market. The difference between this privatized context and earlier forms of policy creation and implementation is, then, not so much the effect of policies but the specific structural contractual framework that has made successful interventions by low-income communities even more difficult.

Thus, in important senses, the programs that CVH and the A-DP faced and mobilized against were strikingly similar. However, the results of the A-DP's work suggest that the new governance framework in WIA may have provided more opportunities for the community group to intervene in the governance structure in a way that increased accountability to program clients. Using the results of this testing project to mobilize substantial opposition to the WIA system in Springfield, the A-DP reached an agreement with several key terms. The for-profit entity running the one stop system was forced to transform into a "non-profit governed by a local board of directors…."[118] The A-DP was granted a seat on the Regional Employment Board.[119] In addition, the Regional Employment Board agreed to, "set aside 50 percent of all federal WorkForce Investment Act funds for job training and education for low-income adults, [ensure that] all low-income job seekers receive training within 45 days of their initial entry to FutureWorks, [create] a grievance process for career center customers and [establish] a system to track wages and benefits in job placements as well as success rates for training programs."[120]

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[118] Lori Stabile, *Career Center Changes Focus: Now Non-Profit FutureWorks Meets Demands of Community*, THE REPUBLICAN, Dec. 9, 2001, at D2.

[119] Lori Stabile, *Jobs Group Marks Approval of Reforms*, SPRINGFIELD UNION NEWS, Nov. 1, 2001, at A11.

[120] Stabile, *supra* note 118 at D2. Throughout the campaign, *The Springfield Union*

Some of these successes appear to stem in part from the participatory nature of the structures governing design and implementation of workforce strategies under WIA. For example, the existence of the regional board as a target of the A-DP's activism, the award of a seat on that board to the A-DP, and the emphasis on performance measurement are all closely related to new governance theories of broad-based participation and performance-driven policy. In essence, by leveraging information accessed not primarily as a result of the structure of WIA but instead as a result of an organizing and research strategy, the A-DP raised their political capital sufficiently to become members of the collaborative governance structure and to effect significant change in WIA policy in favor of their constituency.

The A-DP and CVH examples teach important lessons about how new governance structures can be formulated to increase accountability. First, the A-DP story offers a caution that the mere presence of broad participation inherent in WIA's enabling legislation or any other proposed governance structure can be an empty shell if there is no mechanism for substantive participation by the affected constituency. Second, one of the key lessons of the story told by CVH and, by analogy told by the A-DP, is that programs that purport to serve welfare recipients by assisting them in moving from welfare to work, often actually function very differently, rewarding contractors for punishing welfare recipients and placing the vast majority of clients at the mercy of the low-wage labor market without any enhancement of skills or marketability. In effect, the use of contracting enabled the government to create and perpetuate a program that subordinated rather than assisted its clients.

Thus, in addition to multiple opportunities for collaboration that new

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News and other local papers provided extensive coverage of the campaign and its results. *E.g.*, Stephanie Barry, *Angry Protests Invades Board Meeting*, SPRINGFIELD UNION NEWS, Mar. 22, 2001, at B4; Elizabeth Zuckerman, *Career Center Focus of Debate*, SPRINGFIELD UNION NEWS, April 18, 2001, at B3; Maureen Turner, *Activists Inflicted the First Wound to a Local Job Center—Now the Political Sharks are Circling*, THE VALLEY ADVOCATE, May 24, 2001; Chris Hamel, *FutureWorks Center Faces Shaky Future*, SPRINGFIELD UNION NEWS, June 3, 2001, at A13; Stephanie Barry, *Changes in the Works for Training Center*, SPRINGFIELD UNION NEWS, June 6, 2001, at A1.

governance structures offer, there must be mechanisms to counteract the tendency of both government and private entities to perpetuate the subordination of clients in these programs. In short, if one turns to the collaborative, experimental frameworks offered by new governance scholarship, one must ensure that, for programs characterized by disproportionate power and a history of subordination, the seat at the table reserved for program clients is a real seat.

Finally, a note on community organizing and lawyering. A central task of the administrative law mechanism that this article seeks to describe is the facilitation of substantive participation by welfare recipients and other members of poor communities in the creation of welfare policy. In this sense, this article joins a variety of scholars and activists who seek to use lawyering and legal structures as a means to augment organizing campaigns.[121] As argued above, given the history of subordination, participation that rises above mere tokenism is difficult to achieve without a significant alternation of the structures and mechanisms of participation. However, even with a substantial reworking of structures of collaborative modes of participation, if there is no person or group of people who have the time, resources, and authenticity to speak on behalf of communities, the project simply will not work. One viable answer to this problem, which finds its roots in community lawyering principles, is to turn to community-based grassroots organizing as the best hope for capturing and amplifying the opinions, needs, and goals of poor communities as well as exercising the power necessary to communicate and negotiate for these

[121] An expansive discussion of law and organizing is outside the scope of this Article. However, some particularly important texts in the law and organizing field include: GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995); Lucie E. White, *To Learn and Teach: Lessons from Diefontein on Lawyering and Power*, 1998 WIS. L. REV. 699 (1988); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 460–69 (2001); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879 (2007). For an extraordinarily useful introduction to the literature of this growing field, see Loretta Price & Melinda David, *Seeds of Change: A Bibliographic Introduction to Law and Organizing*, 26 N.Y.U. REV. L & SOC. CHANGE 615 (2001).

needs. Thus, to the extent that that this article envisions structures that will create a "real seat at the table" for effected communities, that seat must be reserved for grassroots organizing groups.

IV. Community-Based, Research-Driven Participation As a Potential Response

Section III recognized that, for a wide variety of reasons, new governance structures provide a promising framework for creating accountability in privatized social service programs only if these structures create meaningful participation for those historically subordinated beneficiaries of the programs. Drawing on the concepts of collaboration, experimentation, and accountability at the root of new governance theory and the lessons from the successful work of CVH and A-DP, this section proposes the creation of social service contract monitoring bodies as a means to render meaningful community participation in the governance structure.[122] These bodies would broaden the participants in the

[122] Augmenting new governance structures with community-based oversight mechanisms has been suggested by some new governance scholars in much more limited forms. For example, Jody Freeman, in her discussion of nursing homes in *The Contracting State* suggests ways that contracts can be used to increase accountability and has a lot of suggestions that are in line with mine. For instance, she suggests that "contracts could be instruments for diversifying sources of oversight. For example, a contract could establish an ombudsman to represent nursing home residents, or it could demand that nursing homes submit to periodic review by a community oversight committee." Freeman, *supra* note 14 at 202. Similarly, she suggests, in discussing Medicaid contracts (MCOs), that "[t]he contracts themselves could constitute crucial accountability mechanisms, enabling state agencies to demand submission to independent third-party oversight, private accreditation, and insurance requirements, among other things. Contracts might thus serve as a means of enlisting additional nongovernmental entities such as community groups and patient advocates to provide accountability." *Id.* at 204 (citing examples in Massachusetts and Wisconsin that ensure community participation in Medicaid contracting). Likewise, in discussing welfare-to-work contracts and concluding that there is a significant lack of public accountability, Barbara Bezdek proposes the creation of a "community congress to be held quarterly, to elicit the input of TANF customers and affected communities, including locally operating employers, as a source of guidance for the services offered by vendors." 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). Finally,

formulation of policy and, essentially, would provide a structural means to augment and build on the political power of community-based groups in way that would significantly enhance their ability to participate in policy creation.

The proposed monitoring body is a separate entity that provides substantial oversight over all aspects of contracting for social services. It ensures that contracting processes are transparent and that the voices and priorities of potential recipients of the service under contract have the resources and structural mechanisms to meaningfully influence contract structures.[123]

The monitoring body could be created by either the legislative branch of local government or by publicly elected officials - comptrollers, public advocates and the like - whose offices provide an oversight function. The body could receive substantial structural support from private funding sources concerned with the accountability and effectiveness of social service contracts. The move to reliance on private entities to participate in governance, discussed extensively above, lends credence to proposals for the government to augment their capacity by using private groups to assist in the funding and implementation of their oversight responsibilities.[124] The monitoring body could be a separately staffed organization or an ongoing committee with organizational members, such as the local workforce investment boards, mandated by the Workforce Investment Board, where membership and function is mandated by statute as a precondition to operation of the program.[125]

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in *Public and Private Partnerships*, Martha Minow points to contract law as a promising place of intervention to increase accountability in a privatized social service environment. Minow, s*upra* note 3, at 1267, 1269.

[123] The subject area covered by the monitoring body could be focused narrowly on specific welfare programs, or have a broader scope of all human services contracts targeted at poor communities.

[124] Given the emphasis on good governance among current private funders, efforts to fund these efforts through a combination of public and private sources may well be successful.

[125] *See infra* n. 109 and accompanying text.

A. Specific Essential Elements[126]

To function successfully, monitoring bodies must have four basic characteristics:

1. Imposition of an altered notice and comment structure in the procurement process;
2. Mandates to enable the monitoring body to design and implement an ongoing research agenda;
3. Substantial participation by program recipients in all aspects of the monitoring bodies' work; and
4. A lack of conflict of interest between the monitoring body and any potential bidders for government services.

i. Imposition of An Altered Notice and Comment Framework Into Public Procurement Processes.

To advance the values of government transparency and public accountability, as well as to create structures that lend additional political strength to traditionally subordinated communities, procurement policies must be amended to invite substantial input from both the public and the monitoring body. This element is required because contract terms have essentially taken the place of regulatory terms[127] and contracting, in the welfare-to-work area, is a closed, non-transparent process with little if any means for affected communities to participate in the process.[128] Thus, any accountability structure must incorporate traditional public law concepts of government transparency and opportunity for public participation into the

[126] Before proceeding to a discussion of the specific elements of the proposal, it is important to note that there is variation across jurisdictions on questions of political and practical feasibility. In jurisdictions where local government has a history of receptivity to advocacy and where organizing and advocacy resources are plentiful, advocates may be successful in implementing very robust forms of these proposals, and in other jurisdictions more political and practical compromises might be necessary. For that reason, each subsection in this section describes why the element is essential, what it is designed to accomplish and then both the ideal form of implementation of this element and some political compromises that may still have the desired effect.

[127] *See infra* notes 48-56 and accompanying text.

[128] *See infra* notes 58-77 and accompanying text.

procurement process. The changes needed include: the publication of proposed contract terms concerning performance measures prior to their adoption, the imposition of a mandatory comment period during which the monitoring body, along with the general public, will have an opportunity to evaluate the proposed performance measures and issue recommendations, and a requirement that the executive agency publish responses to comments received both by the monitoring body and the general public. These mechanisms would provide an opportunity for both members of the community and the monitoring body to have access to terms and to comment on them prior to their use in an executed contract.

ii. Mandates to Enable The Monitoring Body to Design And Implement An Ongoing Research Agenda

Among the principles of new governance theory that are particularly attractive in this context is the emphasis on experimentation, evaluation, and the flexibility to redefine programs in response to successes and failures.[129] As every good social science researcher knows, however, the quality of any evaluation always depends on the quality of the questions asked and the ability of the researcher to get real answers. The role of the proposed monitoring body is, in large part, to provide ongoing evaluation of programs that is driven by the self-articulated needs of program clients. In order to effectuate this agenda, the body must be able to force government actors and private entities to record and make publicly available data on outcomes identified by the monitoring body, regardless of whether those outcomes are included in the contract terms. In addition, the monitoring body must have ongoing access to program participants as well as government and private staff involved in designing and implementing the program.[130]

[129] *See infra* note 89-97 and accompanying text.

[130] Inclusion of these elements would result in research even more effective than the research CVH was able to conduct. Although CVH managed to draw significant conclusions from the available data, it was hampered by the lack of collection of certain data points. For example, it depended heavily on its own survey for important data points, such as knowledge about access to education and training and disparities in outcome based on race, that would have been substantially more convincing had the data come from the entire population. Similarly, the A-DP depended entirely on its own

Like the element requiring substantial control by program participants discussed in the next subsection, this research-focused proposal represents a significant departure from traditional administrative law concepts as well as from generally broadened participatory governance concepts. Like the element of community control, this element addresses the problems of new governance structures when dealing with traditionally subordinated populations and the need to explicitly account for subordination in designing contracting processes. A robust ability to force collection and publication of data is essential in lending the political weight to a monitoring body necessary to render substantive their participation in the contracting process.

iii. Substantial Participation by Program Recipients in All Aspects of the Monitoring Bodies' Work.

As discussed extensively in Section Three, welfare programs have been historically participated in the subordination of poor communities. As argued in Section Two, any ability that communities and their advocates had to render these programs accountable has been significantly eroded by privatization. Although new governance structures are promising, they will only be effective in creating programs that actually assist poor communities if there is a mechanism in place to ensure that community participation is meaningful. For all these reasons, perhaps the most important attribute of any monitoring structure is ensuring that the body includes substantial participation by welfare recipients and low-income communities in all aspects of the body's work.

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sample data and thus issued results based on a very small data set. In addition, CVH's experience in a subsequent study lends credence to an argument that more robust data access provisions are essential. In contrast to CVH's experience in the research for *The Revolving Door,* in researching the WeCARE program, CVH met with substantially more resistance to provide data through the Freedom of Information Law, which significantly impaired CVH's ability to draw reliable conclusions. *See infra* note 55. Clearly, had these organizations been able force data collection on points of interest to them, they would have been able to monitor significantly more effectively and to be even more productive in making policy change recommendations.

iv. A Lack of Conflict of Interest Between the Monitoring Body and Any Other Participants in the Contracting Process.

To adhere to transparency and public participation principles, the composition or structure of the monitoring body must function independently of both the executive branch letting the contracts and any potential bidders for government contracts. The exclusion of these two entities ensures a more open conversation about these contracts, moving them from an essentially closed, non-transparent negotiation between the administrative agency and bidders into a process in which affected participants can participate meaningfully.[131]

The importance of creating a monitoring body that is independent of both the agency and the contractors was highlighted in a subsequent study by CVH. After issuing *The Revolving Door*, CVH began a study of the WeCare program, a program designed to assess and assign individuals with physical and mental impairments. The contract design for that program, unlike that of the ESP program, included mandatory monitoring by an outside entity, and the agency in fact hired an outside entity to do this. However, the entity in question had numerous contracts with the agency, and CVH concluded that that the organization was not "entirely independent of HRA and the reviews that [were] made available do not provide adequate evaluations of WeCARE services."[132]

Ideally, the monitoring body would be compromised of organizations that are, with the exception of any funding provided to serve on the monitoring body, fiscally independent from government simply because this would provide the maximum institutional independence. In larger jurisdictions with a robust non-profit sector, such an exclusion may be feasible. In others, where there are fewer potential organizations available to play a role, compromises may have to be made.[133] Still, to ensure

[131] At this point, in the jurisdictions discussed above, contracting leaves no room for participation by any other entities, much less impacted community members.

[132] FAILURE TO COMPLY *supra* note 55 at 21.

[133] Beyond the exclusion of the contractor and potential bidders, however, are other more difficult issues concerning, primarily, the role of non-profit entities that are not potential bidders but that do rely on government funds for their operation. The non-profit

independence, the better choice is to exclude government-funded entities entirely and rely solely on membership organizations and organizations focused on research rather than include participation by organizations whose ability to critically examine government programs would be significantly compromised by funding concerns.

B. Political and Practical Feasibility

There is no question that there is a fundamental contradiction at the heart of this proposal. On the one hand, the government's historic and current role in the creation and implementation of social welfare policy is so fundamentally intertwined with subordination that relying on government to create and monitor contracts for provision of social services will inevitably lead to a continuation of this history of subordination. In light of this, there is a certain irony in advocating for the creation of monitoring bodies by and with the government. It seems that if this history is determinative, then in some sense, the proposal is doomed either to be entirely politically unfeasible to implement, or, if implemented, to be co-opted in a way that fundamentally undermines its strength. My belief that this is, perhaps, not entirely true comes from two observations. First, in a very real sense, the technocratic efficiency justifications that are the public face of privatization are also its Achilles heel. CVH's analysis of outcomes, when framed as a matter of economic efficiency, bolsters less politically charged and highly credible assertions that funds are being wasted and may provide motivation for other branches of government or quasi-governmental bodies to step in to play some role in improving outcomes. While that does not lead, *per se*, to community-led monitoring, it does provide a less overtly political means for communities to advocate that additional oversight is needed to improve

sector has historically played and to this day plays an enormously important role both in the provision of social welfare services and in bringing attention to the needs of low-income communities. At the same time, as the government turns more and more to the private sector to perform functions previously performed by government agencies, the role of the non-profit sector in this work has substantially increased and, in many circumstances changed. As the government provides more and more of the funds supporting the non-profit sector, the ability of these organizations to zealously advocate against government policy is significantly compromised. Among the difficult questions a jurisdiction would face in implementing these proposals is whether to exclude from membership in the monitoring body entities that receive funding from the same branch of government letting the contract but who do not intend to bid on the contract at issue.

results.

The second reason for hope is the presence, in at least some communities, of community-based, membership-led groups like CVH and the A-DP. The creation of a monitoring body, even in a weaker form than proposed here, has the potential to create a point of intervention and an additional site through which these organizations can assert themselves and engage in the politically contested questions of whose interests social welfare programs should serve. And in turn, participation in such a body could raise the institutional capacity of less strongly established community-based groups that might lead to increased political power. The A-DP story lends credence to that theory because the local Workforce Investment Board, which, despite a facial requirement of community participation, was originally not serving the needs of the intended recipients of WIA services, did ultimately provide a point of intervention for the A-DP. As a result of their report, the A-DP was able to advocate for the restructuring of the local workforce development system in a way that made it more responsive to community needs. Similarly, the monitoring body could create points of intervention through which community organizations could intervene to affect welfare policy.

CONCLUSION

In closing, I want to say just a few words about limited advocacy resources. Having spent the better part of a decade working on welfare issues in New York City, I am all too aware of the limited resources available to advocate on behalf of welfare recipients, and the incredible importance of continuing to enforce what few procedural and substantive constitutional and statutory protections still apply. On the other hand, given the scale of privatization and its broad applicability to the wide range of programs traditionally run by the government, I urge that existing efforts to confront privatization[134] be expanded and that others in the welfare

[134] In the welfare area, in addition to the work of Community Voices Heard and the Anti-Displacement Project highlighted in this Article, the National Center of Law and Economic Justice works extensively on these issues. *See* National Center for Law and Economic Justice, Privatization & Modernization, links to Advocacy and Resources, http://www.nclej.org/key-issues-privatization.php (last visited Feb. 23, 2008).

advocacy community join forces with community-based organizations to advocate for policies that respond directly to privatization.