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ARTICLES

Welfare Reform, Privatization, and Power

RECONFIGURING ADMINISTRATIVE LAW STRUCTURES FROM THE GROUND UP

Wendy A. Bach[†]

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 was true

[†] Faculty, CUNY School of Law. I owe thanks to many colleagues, members of the CUNY Faculty as well as to the school for its financial support of this project. I am particularly grateful to Sameer Ashar, Rebecca Bratspies, Sue Bryant, Matthew Diller, Stephen Loffredo, Andrea McCardle, Brooke Richie, Ruthann Robson, 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 as well as the wonderful staff of the *Brooklyn Law Review* for their research and editing assistance. And finally, thanks to Carol O'Donnell for her consistent support.

¹ Clinton's famous pledge was originally made during his 1992 presidential campaign, R. KENT WEAVER, ENDING WELFARE AS WE KNOW IT 127 (2000), and reiterated in his 1993 State of the Union Address. See 139 CONG. REC. H674, 676 (1993).

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 services to huge swaths of the plaintiff class, were motivated by the 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 asks a series of questions. For example, 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, how effective are 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, what tools might be effective?

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* Parts II-III.

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 Orly Lobel, *Rethinking Traditional Alignments: Privatization and Participatory Citizenship*, in *PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS: RETHINKING IDEOLOGY AND STRATEGY* 209, 210 (Clare Dalton ed., 2007); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 *HARV. L. REV.* 1229, 1246-54 (2003); Paul Starr, *The Meaning of Privatization*, 6 *YALE L. & POL'Y REV.* 6 *passim* (1988).

Part I, 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.

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

Part III 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, Part III argues that we must design new mechanisms to enable substantive community participation. Finally, Part IV suggests that the creation of robust, community-controlled monitoring bodies can address the accountability⁴ problems of governance by contract.

I. CASE STUDY: WELFARE REFORM AND PRIVATIZATION IN NEW YORK CITY

A. *The National Context: A Move Toward Privatization*

The privatization⁵ of the United States public assistance provision system through contracting has accelerated dramatically in the last ten years. The Personal Responsibility and Work Opportunity

⁴ In this Article, the term “accountability” refers to government and 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 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., Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569 *passim* (2001); David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231, 279-306 (1998).

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. See Jack M. Beermann, *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 F. HANDLER, *DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT* 6-7 (1996). This Article addresses only privatization through contracting between administrative agencies and private entities.

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.⁶ 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 was seen as excessive bureaucracy and constrictive civil service rules.⁷ Throughout the country, state and local jurisdictions have turned to the private sector to respond to the challenges posed by the PRA. In the welfare-to-work 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.⁹ 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,¹⁰ creating a new and potentially

⁶ 42 U.S.C. § 601 (2001).

⁷ See, e.g., M. BRYNA SANGER, *THE WELFARE MARKETPLACE: PRIVATIZATION AND WELFARE REFORM 2* (2003) (“Most states and localities have been seizing the opportunities provided by a loosening of federal mandates, responsibilities, and authorities to restructure the arrangements for provision of services.”); see also Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1123-29 (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).

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. SONDR A YUDELMAN 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), available at <http://www.cvhaaction.org/reports> (follow link to *The Revolving Door—Full Report.pdf*) [hereinafter *THE REVOLVING DOOR*].

⁹ 42 U.S.C. § 604a(a)(1)(A) (2001).

¹⁰ *Id.* § 604a(a)(1) (“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] program[] . . . 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

tremendously lucrative market for the for-profit sector.¹¹ Second, and equally significantly, the statute moved power for setting welfare policy from the federal government to states and localities, a trend generally referred to as “devolution.”¹² 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, and enormous motivation to lower their welfare caseloads by any means they saw fit.¹³ 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.¹⁴ These twin invitations, to use private entities to provide services and to use virtually any means

to contract out its TANF program on the grounds “that it would empower private sector employees to determine eligibility for Medicaid and Food Stamps.” Kennedy, *supra* note 4, at 231 (citing *White House Limits States in Privatizing Welfare*, WALL ST. J., May 5, 1997, at A20).

¹¹ 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 (2003). For a more extensive discussion of the role of privatization in the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (“PRA”) and in particular the move to inclusion of for-profit entities in the provision of welfare programs, see Kennedy, *supra* note 4, at 256-67.

¹² See 42 U.S.C. § 601(a) (2001); see also *infra* notes 13 & 15.

¹³ The welfare law was touted as promoting devolution and, to a certain extent, it did leave states room to experiment. See, e.g., 42 U.S.C. § 601(a) (describing the purpose of the legislation as “to increase the flexibility of States”). However, state flexibility was limited by a series of significant constraints on the ability of the states to provide assistance. 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. *Id.* §§ 608-609 (Supp. III 1997).

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, 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.* § 601 (Supp. III 1997).

¹⁴ 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 subjects of the program are 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.

at their disposal to lower the rolls, created an ideal environment for a large growth in the role of private entities.¹⁵

And grow it did. The most recent national survey, released in 2002 by the United States General Accounting Office, reported that in 2001, forty-nine states and the District of Columbia used contracts with private entities to provide some welfare services.¹⁶ 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.¹⁷ And not only did the general use of private entities grow, but 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.¹⁸

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 predicated eligibility for public assistance on participation in WEP for thirty-five hours per week.¹⁹ Along with WEP, Giuliani and Turner changed the “culture” of welfare offices by establishing Eligibility Verification Review, a system that mandated that recipients repeatedly verify factors related to eligibility, and by converting Income Support

¹⁵ 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).

¹⁶ See GAO, WELFARE REFORM, *supra* note 8, at 8.

¹⁷ *Id.* Temporary Assistance to Needy Families, or TANF, is the name of the federal program created by the 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. 45 C.F.R. § 263.1 (2006). This is referred to as the “Maintenance of Effort” (“MOE”) requirements. *Id.* § 263.30. 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, 10:02 AM 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 \$51 million to \$703 million per year).

¹⁸ 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.

¹⁹ COMM. ON SOCIAL WELFARE LAW, NEW YORK CITY BAR, WELFARE REFORM IN NEW YORK CITY: THE MEASURE OF SUCCESS § I.C (Aug. 2001), http://www.abcny.org/Publications/reports/show_html.php?rid=41 [hereinafter WELFARE REFORM IN NEW YORK CITY].

Centers to Job Centers.²⁰ Welfare reform was designed to create “a crisis in welfare recipients’ lives, precipitating such dire prospects as hunger and homelessness.”²¹

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.²² Privatization of welfare-to-work services proceeded and expanded over the next several years with contracts to provide employment assessments, services for individuals who alleged physical and mental impairments that interfered with their ability to work, and a variety of other services.²³ The contracts were generally performance-based, paying contractors only when they met performance goals for a particular client.²⁴

1. The Advocacy Community Responds to Welfare Reform

Central among the advocacy community’s strategies to combat welfare reform were the filing of class action law suits to stop or slow the implementation of key welfare reform initiatives and a series of lobbying and organizing efforts to blunt the harshest effects of reform.²⁵ The litigation successfully slowed implementation of welfare reform, ensuring some adherence to both due process and substantive rights in the implementation of reform.²⁶ Similarly, lobbying efforts resulted in the

²⁰ *Id.* § II.A.1.

²¹ *Id.* (citing Commissioner Jason Turner, Address at the Nelson A. Rockefeller Inst. of Gov’t (Nov. 1998)).

²² *See id.*

²³ *See generally, e.g.,* THE REVOLVING DOOR, *supra* note 8 (discussing contracting out of assessment and welfare-to-work services); ALEXA KASDAN WITH SONDR A YOUDELMAN, COMMUNITY VOICES HEARD, FAILURE TO COMPLY: THE DISCONNECT BETWEEN DESIGN AND IMPLEMENTATION IN HRA’S WE CARE PROGRAM (2007) [hereinafter FAILURE TO COMPLY], available at <http://cvh.mayfirst.org/files/WeCareReportFinal.pdf> (discussing the privatization of HRA’s disability assessment process). This growth in welfare contracting was part of an overall expansion of human services contracting 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> (stating that in 2000 human services contracting was over \$4.2 billion or 11% of New York City’s budget).

²⁴ *See infra* notes 43-46 and accompanying text.

²⁵ *See* WELFARE REFORM IN NEW YORK CITY, *supra* note 19, § II (describing a series of problems with the welfare system and the litigation that responded to that problems); *see also infra* notes 31-34 and accompanying text (describing organizing efforts around welfare). Among the litigation efforts was *Reynolds v. Giuliani*, 35 F. Supp. 2d 331 (S.D.N.Y. 1999), which challenged the conversion of welfare centers from Income Support Centers to “Job Centers” on the ground that the agency was “preventing people from applying for Medicaid, food stamps, cash assistance, and emergency assistance in violation of federal and state statutory and constitutional law.” WELFARE REFORM IN NEW YORK CITY, *supra* note 19, § II.A.1. For an in-depth look at the litigation efforts of the advocacy community from 1996 forward, see Nat’l Ctr. for Law and Econ. Justice, Case Developments (1996-2004), <http://www.nclj.org/courts-case-dev.php> (last visited Oct. 1, 2008).

²⁶ WELFARE REFORM IN NEW YORK CITY, *supra* note 19.

preservation of some protections that had been assured under AFDC.²⁷ 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 sixty-five percent.²⁸ If parallel economic improvements by former welfare recipients accompanied those roll reductions, advocates could have concurred with the administration that welfare reform was a success. But, as was the case nationwide, this did not occur.²⁹ 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.³⁰

In addition, paralleling a nationwide trend, 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,³¹ 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 firsthand experience of poverty) into [welfare reform debates],"³² and Community Voices Heard ("CVH"), "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."³³ 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

²⁷ See, e.g., Stephen Loffredo, *Poverty Law and Community Activism: Notes From a Law School Clinic*, 150 U. PA. L. REV. 173, 193-96 (2001) (discussing the lobbying campaign spear headed by the Welfare Rights Initiative, a community based organizing group, and supported by a CUNY Law School clinic to expand access to education and training through amendments to state legislation and characterizing those changes as reclaiming ground lost as a result of welfare reform).

²⁸ Sewell Chan, *Welfare Rolls Falling Again, Amid Worries About Poverty*, N.Y. TIMES, Apr. 6, 2006, at B1. 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>.

²⁹ WELFARE REFORM IN NEW YORK CITY, *supra* note 19 (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 workforce due to increased expenses associated with work).

³⁰ See, e.g., WELFARE REFORM IN NEW YORK CITY, *supra* note 19, § II.A.1 (discussing the rise in hunger and homelessness that occurred in New York City).

³¹ See Families United for Racial and Economic Equality, *Who We Are*, <http://www.furee.org> (last visited Sept. 27, 2008).

³² See Welfare Rights Initiative, *Mission Statement*, <http://www.wri-ny.org> (last visited Sept. 27, 2008); see also Loffredo, *supra* note 27, at 190-91.

³³ Community Voices Heard, *Mission Statement*, <http://www.cvhaction.org> (last visited Sept. 27, 2008). CVH aims to accomplish its goals "through a multi-pronged strategy, including public education, grass roots organizing, [and] leadership development." *Id.*

local administration around some of the worst aspects of welfare reform and in adding to national efforts to combat welfare reform.³⁴

2. 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.³⁵

In 1999, the Giuliani administration sought to let \$500 million in private entities contracts to provide welfare-to-work services.³⁶ 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.³⁷ The comptroller engaged in a protracted but ultimately unsuccessful effort to stop the letting of the Maximus contract.³⁸

In addition, in 2004 and 2005, CVH began to research the effectiveness of welfare-to-work contracts.³⁹ The report the group issued is one of the few pieces of qualitative research documenting the problematic experience of welfare recipients in privatized service

³⁴ Some of the most visible New York City organizing work from this time was documented in *A Day's Work, A Day's Pay*, a documentary produced by Mint Leaf Productions:

[The documentary] 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.

Mint Leaf Productions, *A Day's Work, A Day's Pay*, <http://www.mintleafproductions.com/adw.html> (last visited Sept. 27, 2008). Another highly visible and effective national campaign, *Welfare Made a Difference*, was launched by the Community Food Resource Network. Caitlin Johnson, *When Welfare Works*, CONNECT FOR KIDS, <http://www.connectforkids.org/node/222> (last visited Sept. 27, 2008). "The mission of the . . . campaign [was] to document the experiences of parents who have received welfare and collect their recommendations for improving the system." *Id.*

³⁵ See, e.g., *Privatization in Practice: Human Services*, 28 FORDHAM URB. L.J. 1435, 1446-51 (comments of Liz Krueger, former Associate Director of Community Food Resource Center, describing her criticisms of various early contracting efforts by New York City).

³⁶ WELFARE REFORM IN NEW YORK CITY, *supra* note 19.

³⁷ Nina Bernstein, *Company Had Head Start Preparing Bid in Welfare-to-Work Program*, N.Y. TIMES, Mar. 10, 2000, at B6.

³⁸ See WELFARE REFORM IN NEW YORK CITY, *supra* note 19.

³⁹ THE REVOLVING DOOR, *supra* note 8, at 17.

environments.⁴⁰ The report provides essential data on how privatization harms 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 Part IV, CVH's work and methodology can be incorporated into public law mechanisms to create accountability in the contracting process.

3. 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* ("The Revolving Door"), CVH studied the effectiveness of contracts between the City of New York and private vendors to provide welfare-to-work services.⁴¹ The researchers took New York City at its word that the main goal of the program was to 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."⁴² 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.⁴³ At

⁴⁰ *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. *Id.* at 392.

⁴¹ THE REVOLVING DOOR, *supra* note 8, at 2. The program under study in THE REVOLVING DOOR was New York City's Employment Services and Placement (ESP) program. *Id.* 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. *Id.* at 28. 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. *Id.* 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 27.

⁴² *Id.* at 13. 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.

⁴³ *Id.* at 27. 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.* (citing SANGER, *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

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.⁴⁴ The actual outcomes, however, were far less impressive. Of the average of 4144 people who were referred into the system each month, only 8%, 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.⁴⁵ The program referred clients to jobs that offered low salaries, little stability and very little chance of leading the families out of poverty. Seventy-five percent of those with Employment Services and Placement (“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.⁴⁶ 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.⁴⁷

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.⁴⁸ The program punished, through a reduction of already meager benefits,⁴⁹ a disturbingly high number of individuals for

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. *See 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. *Id.* at 27. 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. *Id.*

⁴⁴ *Id.* at 28.

⁴⁵ *Id.* at 32. 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. Email from Sondra Youdelman, CVH, to Wendy A. Bach, CUNY Law School (Nov. 8, 2008, 12:12:17 PM EST) (on file with author). Thus CVH’s calculation leaves all referred individuals in the denominator, thus reducing the percentages of “success.” 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 do not 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 affect CVH’s findings as to the nature of the jobs held by those who actually obtained employment. THE REVOLVING DOOR, *supra* note 8, at 33, 35-36.

⁴⁶ *Id.* at 35.

⁴⁷ *Id.* at 39.

⁴⁸ THE REVOLVING DOOR, *supra* note 8, at 77-92.

⁴⁹ 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. *See* N.Y. SOC. SERV. LAW § 342 (McKinney 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.* § 342.2-.3 For example, for the mother of 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. N.Y. COMP. CODES R & REGS. tit. 18, § 385.12(d) (2008). 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

some failure to comply with rules.⁵⁰ Of all those referred each month, 76% of the population (on average 3149 people) fell into this category, either because they did not attend the program at the start (30% of the full 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).⁵¹ This dramatic contrast between the 121 people in jobs after six months and the over 3000 people punished monthly in the system represented, in CVH's estimation, an utterly failed system.⁵² Despite these clear failures, when the city redesigned and rebid the contracts in 2006, the contract incentives were modified only slightly,⁵³ and the same vendors that had run the ESP program received new contracts.⁵⁴

These two pieces of data, first that the overwhelming majority of recipients ended up sanctioned instead of employed, and second that, despite this failure, the contracts were re-let to the same vendors on similar terms, suggest 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 a 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 punishment than at placement. Given the agency's apparent endorsement of these outcomes through the re-letting of contracts to the same vendors, it is fair to speculate that these devastating outcomes were endorsed by

work participation status of the New York City caseload, see HUMAN RES. ADMIN., CITY OF N.Y., DEP'T OF SOC. SERVS., WEEKLY CASELOAD ENGAGEMENT STATUS (2008), <http://www.nyc.gov/html/hra/downloads/pdf/citywide.pdf>. 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. The statistics posted from the week of October 12, 2008 listed 24.2% of cases as in the sanction process (10.3%) or with a sanction in effect (13.9%). *Id.*

⁵⁰ THE REVOLVING DOOR, *supra* note 8, at 77.

⁵¹ *See id.* 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% still active in the program. *Id.* at 78.

⁵² *Id.* at 32, 93.

⁵³ The payment milestones under the Back to Work Program were as follows: contractors could be paid a maximum of \$5,000 per participant; 10% 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 twenty hours per week; 10% is paid if the placement is of a "time limited" or for a 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, May 2, 2006 (on file with author); *see also* ALEXA KASDEN WITH SONDR A YOUDELMAN, MISSING THE MARK: AN EXAMINATION OF NYC'S BACK TO WORK PROGRAM AND ITS EFFECTIVENESS IN MEETING EMPLOYMENT GOALS FOR WELFARE RECIPIENTS 79 (2008) [hereinafter MISSING THE MARK], available at <http://cvh.mayfirst.org/files/Missing%20the%20Mark%20-%20Final%20Report.pdf>.

⁵⁴ *See* COMMUNITY VOICES HEARD, HRA BACK TO WORK SUPPORT AND ACCOUNTABILITY INITIATIVE: TECHNICAL ASSISTANCE/TRAINING, MONITORING/ASSESSMENT, AND EVALUATION (2007), <http://www.cvhaaction.org/node/160#attachments>.

the agency letting the contract.⁵⁵ For the purposes of this Article, the question becomes how these outcomes were effectuated.

4. 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. Its criticisms were wide-ranging. CVH noted problems that predicted failure, including the lack of experienced job developers and inadequate curriculum for job skills training.⁵⁶ 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.⁵⁷ 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.⁵⁸

Despite a legal entitlement to having one's preference for education or training honored under many circumstances⁵⁹ and a desire, by 71% of the clients, to attend education or training,⁶⁰ CVH found that one in three clients "did not know that education and training might satisfy a portion of their work requirements"⁶¹ and only 18% of ESP participants attended such programs.⁶² CVH reported that the structure of the contract payment system led to a failure to provide education and training.⁶³ Quite simply, the contracts created no real incentive to place

⁵⁵ In addition, although the specific reasons for the re-letting of the contracts were not clear, it is likely that the agency was subject, to a certain degree, to capture by the agencies that held the ESP contracts. This means that even if real competition existed at the beginning of the ESP program, by the time the new requests for proposals were issued, there were very few other vendors who were able to credibly bid for the contracts. This phenomena and its possible impact 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* note 100. That the ESP program was designed more as a caseload reduction mechanism than as a real means to helping recipients find work is confirmed by the statement of Nancy Biberman, the Executive Director of WHEDCO, a New York City non-profit that received an ESP contract:

The ESP program and contracts were never intended to result in viable jobs for welfare recipients. The rapid reduction of the welfare caseload was the public policy mandate out of which the ESP program was created. . . . The contracts were structured to provide financial incentives for "rapid labor market attachment" (the expressly stated goal of HRA commissioner Jason Turner). Consequently at best they provided quick job placements and woefully unsatisfactory job retention outcomes.

SANGER, *supra* note 7, at 56.

⁵⁶ THE REVOLVING DOOR, *supra* note 8, at 4-5, 45.

⁵⁷ *Id.* at 69-71.

⁵⁸ *Id.*

⁵⁹ *See* N.Y. SOC. SERV. LAW § 335 (McKinney 1997).

⁶⁰ THE REVOLVING DOOR, *supra* note 8, at 64.

⁶¹ *Id.* at 53

⁶² *Id.*

⁶³ *Id.* at 69-71.

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.⁶⁴ These performance incentives led the vendors to “cream,” selecting out and serving those who were easier to serve, and avoiding serving those with greater needs:⁶⁵

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 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.⁶⁶

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 long amount of time often necessary to address barriers and are instead encouraged to sanction them.”⁶⁷ 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 for initial placement. Clients realize this and grow wary of a system that is failing to meet their needs.”⁶⁸

⁶⁴ *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. *See id.*

⁶⁵ Although the CVH study is one of the few to document the creaming phenomenon, it has long been the fear of critics who oppose using performance-based contracts in the welfare area. *See, e.g.,* LaDonna Pavetti et al., *Changing the Culture of the Welfare Office: The Role of Intermediaries in Linking TANF Recipients with Jobs*, FED. RES. BANK N.Y. ECON. POL’Y REV., Sept. 2001, at 63, 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.

HANDLER, *supra* note 5, at 28.

⁶⁶ THE REVOLVING DOOR, *supra* note 8, at 70.

⁶⁷ *Id.* at 8.

⁶⁸ *Id.*

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. In the words of one vendor 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.⁶⁹

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.⁷⁰ 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 beyond this, 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 rather than give them services, this dynamic became clear.

Although CVH was able, through fairly extraordinary efforts,⁷¹ to uncover this data and write a detailed and critical report, the contract

⁶⁹ *Id.* at 7 (quoting an ESP provider).

⁷⁰ 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, 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 Bernstein, *Wisconsin Works—For Private Contractors, That Is*, 35 J. POVERTY L. & POL'Y 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 301-02.

⁷¹ 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. FAILURE TO COMPLY, *supra* note 23, at 10.

terms and contract monitoring structures that led to these outcomes were created with little or no public scrutiny.⁷²

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. Part II 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 the public and adheres to fundamental democratic norms.⁷³ Chief among these structures are freedom of information and sunshine laws, laws requiring that the government 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.⁷⁴

Each of these bodies of law creates opportunities for democratic participation in a privatized context. However, participation by the private entity significantly complicates the analysis and renders exclusive reliance on these structures difficult, if not impossible.⁷⁵ In addition, public law also offers a variety of mechanisms designed to ensure the fairness of government contracting processes. Chief among these are

⁷² 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* Part II.

⁷³ *See generally* RICHARD J. PIERCE ET AL., *ADMINISTRATIVE LAW AND PROCESS* 23-40 (4th ed. 2004).

⁷⁴ The Sunshine Act was passed because “the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government.” Sunshine Act, Pub. L. No. 94-409, § 2, 90 Stat. 1241 (1976). The Act requires that most meetings with agency members be open to the public and prohibits *ex parte* communications in formal adjudications or hearings. *Id.* §§ 3-4; *see also* 5 U.S.C. § 553(b) (2006) (“General notice of proposed rule making shall be published . . .”); *id.* § 553(c) (“[An] agency shall give interested persons an opportunity to participate in the rule making . . .”).

⁷⁵ For additional discussion 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, 1301-10 (2003); Freeman, *supra* note 15, at 176. For an even more general discussion of public law concerns raised by various forms of privatization, see Minow, *supra* note 3, at 1246-55.

regulations governing procurement processes.⁷⁶ 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 Part, I briefly review the feasibility of using both sets of administrative law structures as well as the market itself to increase accountability. In Part IV, 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.

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 is created and governed by statutory enabling legislation, and creates and implements rules that govern its interactions with the public.⁷⁷ To check what would otherwise be inappropriate power, the agency is subject to a variety of mechanisms designed to render the conduct of the agency more democratic.⁷⁸ Meetings of the government body are, in theory, subject to sunshine laws, allowing the public to view the formal workings of this process.⁷⁹ 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.⁸⁰ 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.⁸¹ 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.⁸²

As an initial matter, each of these tools presumes that a government agency is the primary actor. If the government is not the

⁷⁶ See 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).

⁷⁷ See generally ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* § 16.1 (2d ed. 2001).

⁷⁸ For a general discussion of the statutory and judicial checks on administrative actions, see PIERCE ET AL., *supra* note 73, at 79-226.

⁷⁹ *Id.* at 497-98.

⁸⁰ *Id.* at 431-73.

⁸¹ *Id.* at 327-43.

⁸² *Id.* at 364-408.

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 Procedure Act, the Freedom of Information Act, and 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.”⁸³ Thus, initially 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.⁸⁴ 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,”⁸⁵ 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.⁸⁶ Administrative law accountability tools of the kind I have discussed arose, 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

⁸³ Administrative Procedure Act, 5 U.S.C. § 551(1) (2006). For a detailed discussion of the significance of this restriction, see Alfred D. Aman, *Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest*, 6 IND. J. GLOBAL LEGAL STUD., 397, 415-16 (1999).

⁸⁴ 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., Ervin v. S. Tier Econ. Dev., Inc.*, 809 N.Y.S.2d 268, 270 (App. Div. 2006) (finding a non-profit development corporation was not an agency where its board was comprised of private individuals, it was not subject to control by municipality of corporation, it did not make public the audits of its financial records, it did not hold itself out as an agent of the municipality, and it did not disburse funds on behalf of municipality); *Farms First v. Saratoga Econ. Dev. Corp.*, 635 N.Y.S.2d 720, 720-21 (App. Div. 1995) (finding a non-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 the county on a fee-for-service basis). *But cf. Buffalo News, Inc. v. Buffalo Enter. Dev. Corp.*, 619 N.E.2d 695, 696-98 (N.Y. 1994) (non-profit local development corporation considered an “agency” for FOIL purposes as it was “created exclusively by and for [municipality],” “required to publicly disclose its annual budget,” held itself out as an “agent” of municipality, “channel[ed] public funds into the community,” and had board members who were public officials, held offices in public buildings, and enjoyed many attributes of public entities).

⁸⁵ 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).

⁸⁶ *See* PIERCE ET AL., *supra* note 73, at 282 (describing informal rulemaking as creating procedures that “closely resemble the process of enacting legislation” and noting that “[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”).

impose its will on the public without any form of accountability.⁸⁷ 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.⁸⁸ Notice and comment and procedural mechanisms, which allow 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 in the non-legislative category. A prime example is the exclusion of government contracting from the notice and comment provision of the Administrative Procedure Act.⁸⁹ 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 when the government is procuring human services.⁹⁰

Returning to how the formal contract terms and the informal contract mechanisms discussed above motivated the interactions between private vendors and welfare recipients, and the likely applicability of these findings to a wide variety of privatized contexts, it is clear that the contracts themselves, as well as the informal contract monitoring functions, should be recategorized from a non-quasi legislative function into a quasi legislative function.⁹¹ This would subject them to traditional administrative law mechanisms. Thus, at least one potential “solution” to the problem described above is to subject contracts to notice and comment rulemaking. 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,

⁸⁷ See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462, 503 (2003).

⁸⁸ 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. PIERCE ET AL., *supra* note 73, at 322.

⁸⁹ 5 U.S.C. § 553(a)(2) (2006).

⁹⁰ See Gomez-Velez, *supra* note 76, at 353.

⁹¹ See Aman, *supra* note 83, at 417.

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.⁹²

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 Part III, without taking into account both the 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.⁹³

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.”⁹⁴ Procurement mechanisms, traditionally designed for contexts involving the delivery of tangible good and services, “[m]ay be too limited to address the much more substantial issues that arise when government contracts out social services and traditionally governmental functions.”⁹⁵ 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 through . . . contracts” can lead to improved procurement policies.⁹⁶ In Part IV of this Article, I suggest ways that administrative law concepts can be imported into the procurement process to meet these ends.

⁹² *Id.* at 417 (citation omitted).

⁹³ For additional discussion of the problems of importing traditional public law mechanisms, wholesale and without modification, 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).

⁹⁴ Gomez-Velez, *supra* note 76, at 332-33.

⁹⁵ Freeman, *supra* note 15, at 165.

⁹⁶ Gomez-Velez, *supra* note 76, at 333. 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. *Id.* at 352-53. 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. See Freeman, *supra* note 75, at 1301-10. This term also aptly describes the project of this Article.

B. The Feasibility of Relying on the Market

Proponents of privatization posit the market itself as the means to creating effective welfare programs.⁹⁷ The previous 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.⁹⁸ Here, given the structure of welfare programs, it is faulty to assume that the 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 no doubt the case in many jurisdictions, they are assigned by the agency on a random basis.⁹⁹ 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 “consumer.” 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.¹⁰⁰

⁹⁷ Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739, 1743-49 (2002).

⁹⁸ *Id.* at 1743.

⁹⁹ MISSING THE MARK, *supra* note 53, at 3.

¹⁰⁰ 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 Part III, that the government is likely, if not subject to substantial outside pressure, to create policies that do not advance the needs of poor communities. 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. SANGER, *supra* note 7, at 19. For 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. Kennedy describes the attempted buy out by Citibank EBT Services of Transactive which, if successful, would have given Citibank monopoly control over electronic benefits transfer systems in thirty-three states. *Id.* Second, because government has turned over the running of the program to a private entity, the capacity of the government to run the program without the vendor decreases. See, e.g., *Privatization in Practice: Human Services*, *supra* note 35, at 1450-51. As a result of these parallel trends, the vendors begin to have monopoly control over the program and the government becomes 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 SANGER, *supra* note 7, at 16-21. In addition, government typically has difficulty building sufficient expertise to monitor vendor performance. As M. Bryna Sanger 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

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 were not placed and 76% were punished.¹⁰¹ Despite these dismal outcomes, the contracts were renewed with very few changes to the incentive payment structure.¹⁰² 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.¹⁰³

This accountability failure is not surprising. As Martha Minow aptly observes,

With 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.¹⁰⁴

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

indications that these developments do not necessarily coincide.” *Id.* at 16; *see also* Freeman, *supra* note 15, 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.

¹⁰¹ *See supra* notes 45-51 and accompanying text.

¹⁰² *Compare* note 43 (detailing the contract payment structure in the ESP contract), *with* note 53 (detailing the contract payment structure in the Back to Work program). The Back to Work program differed from the ESP program in that it combined within it the services originally provided under ESP with assessment and employment planning services previously provided under a different set of contracts during the time that ESP was in effect. MISSING THE MARK, *supra* note 53, at 23-24. Thus, the contracts included incentive payments totaling 10% for provision of those services. However, the incentives connected to the provision of employment services changed only slightly, by placing some more emphasis on very short term retention (thirty days) and some targeting of services to special populations (those under welfare time limits or sanctions). For example, under ESP the vendors received 25% at placement, 45% at three month retention, and 25% at six months with a high wage bonus, whereas under Back to Work the placement and retention payments were 30% at 30 day placement, 30% at 90 day retention, and 25% at 180 day retention. *Id.* at 79; *supra* note 43 and accompanying text.

¹⁰³ *See supra* Part I.B.3.

¹⁰⁴ Minow, *supra* note 3, at 1262. 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:

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 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.

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).

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 the making of welfare policy from public scrutiny.¹⁰⁵ 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.¹⁰⁶

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 through the use of contracting.¹⁰⁷ Ironically, the study also suggests that under a market model, rather than functioning inefficiently as suggested by many scholars,¹⁰⁸ the system 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 affected communities.¹⁰⁹

¹⁰⁵ Diller, *supra* note 97, at 1757.

¹⁰⁶ *Id.* In some senses, privatization can be seen as taking the process by which power is granted to local government to administer welfare programs even further and in a way that entirely undermines any apparent positive benefit to the recipient. For an extensive discussion of this phenomenon prior to 1996, see HANDLER, *supra* note 5, at 42-49.

¹⁰⁷ *Hearing Series on Welfare Reform, Work Requirements on the TANF Cash Welfare Program: Hearing Before the Subcomm. on Human Resources of the H. Comm. on Ways and Means*, 107th Cong. (2001) (statement of Steve Savner, Senior Staff Att'y, Center for Law and Social Policy). 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 break down outcome data by race, some national data suggests that both outcome and the quality of service provision vary along race lines. *Id.* In Wisconsin in 1995 through 1996, "61 percent of the white families receiving assistance left the caseload, compared to 36 percent of the African-American families." *Id.* In Illinois, leaver data from June 1997 to June 1999 revealed racial disparities in the reasons for case closure. *Id.* In that period,

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

Id. 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. *Id.*

¹⁰⁸ See *supra* note 100.

¹⁰⁹ See MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* 31 (2001). The disturbing "efficiency" of the market in imposing harsh penalties on

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 implementation, new administrative law structures must be created to advance these values. Part III details the conceptual underpinnings for the creation of such administrative law structures while Part IV identifies practical accountability structures that might serve these ends. 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 recipients 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.¹¹⁰

A. *The Administrative Law Framework Offered by New Governance Scholarship*

Although definitional frames and boundaries are hotly contested,¹¹¹ 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.¹¹² Seeking a third way between these

poor communities is not surprising. As Katz notes, this kind of “market success” has been manifested in a variety of privatized programs:

The 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.

¹¹⁰ See *infra* Part IV.A.4.

¹¹¹ See, e.g., Bradley C. Karkkainen, Reply, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 473 (2004) (responding to Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004)).

¹¹² See generally, e.g., Freeman, *supra* note 93.

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.”¹¹³ For the purposes of this Article, this body of 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.¹¹⁴ 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.”¹¹⁵

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.”¹¹⁶

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.”¹¹⁷ 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

¹¹³ Lobel, *supra* note 111, at 344.

¹¹⁴ See also Karkkainen, *supra* note 111, at 473 (describing new governance scholarship as endeavoring “simultaneously to chronicle, interpret, analyze, theorize, and advocate a seismic reorientation in both the 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”).

¹¹⁵ Lobel, *supra* note 111, at 373.

¹¹⁶ *Id.* at 374.

¹¹⁷ *Id.* at 377.

facilitator, and law becomes a shared problem-solving process rather than an ordering activity.”¹¹⁸

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.¹¹⁹ 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.¹²⁰

Finally, a fundamental aspect of new governance frameworks is the possibility of “orchestration.”¹²¹ Orchestration requires that “decentralization . . . be coupled with regional and national commitments to coordinate local efforts and communicate lessons in a comprehensive manner.”¹²² 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.”¹²³ In a very real sense, the power of the government in this conception is the power of the purse.¹²⁴ Government calls for and supports innovation, evaluates proposals, 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 Part I, privatization and large-scale collaborations between government and private entities increasingly dominate welfare programs.¹²⁵ Theories and strategies that question, slow, and alter this process are an essential part of any comprehensive advocacy strategy to respond to privatization.¹²⁶ However, the dominance of privatization in the provision of previously government-run welfare programs and the current welfare

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 379-86.

¹²⁰ *Id.* at 396.

¹²¹ *Id.* at 400.

¹²² *Id.*

¹²³ *Id.* at 400-01.

¹²⁴ Freeman, *supra* note 75, at 1285.

¹²⁵ See *supra* Parts I.A, I.B.1.

¹²⁶ Several scholars have focused considerable attention on strategies and theories that would slow privatization. See Freeman, *supra* note 93, at 574-93.

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 City, although the data was sparse and merited further research, CVH did find that some ESP vendors were slightly better for program clients than others.¹²⁷ 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.¹²⁸ However, detailed, top-down rule making has historically been beset by significant implementation challenges on the ground.¹²⁹ If the experimental, collaborative processes 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.¹³⁰

¹²⁷ 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 33-34. 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.

¹²⁸ 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.

¹²⁹ See, e.g., Minow, *supra* note 3, at 1242-43.

¹³⁰ The degree and nature of the “softness” is hotly contested by a variety of new governance scholars. See, e.g., Karkkainen, *supra* note 111, 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 and 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 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 111, 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.* at 391-92. 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.

Karkkainen, *supra* note 111, at 488 (citing Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (citation omitted)). Despite these arguments, however there is no question that allowing experimentation and diversity of approaches

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, while, arguably, the government sought and endorsed a punishment and caseload reduction mechanism.¹³¹ 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.¹³² On a very basic level, if the structure offered by new governance scholarship is one of broad-based, multi-constituent collaboration, then ESP was fundamentally flawed in 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, 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 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 Bradley Karkkainen frames it, “[a] central challenge for the governance model is . . . to understand

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 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.

¹³¹ See *supra* Part I.B.3.

¹³² See generally Gomez-Velez, *supra* note 76 (describing New York City's procurement process).

how collaborative environments can be nurtured to produce equitable results, especially in settings where vast power imbalances exist.”¹³³ Although there are valuable suggestions in the literature as to how to begin to solve this problem¹³⁴ and some discussion of moments when true power was wielded by historically less-powerful groups in a new governance framework,¹³⁵ the practical problem of what governance structures might be put in place to address these issues remains underdeveloped.

In a new governance environment, problems with 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 Bureaucracy*, Joel Handler examines the consequences of decentralization, deregulation, and privatization for “citizen empowerment.”¹³⁶ 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.”¹³⁷ 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.”¹³⁸ This program is a system of self-regulation in which labor management committees are formed and work together to develop and implement health and safety inspection standards and protocols.¹³⁹ In particular, Handler describes a study by Joseph Rees on the use of voluntary regulatory structures in the California Cooperative Compliance Program.¹⁴⁰ 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.”¹⁴¹ According to Rees’ study, this particular program was tremendously successful in the sense that it resulted in far lower accident rates than comparable sites.¹⁴² Rees

¹³³ Karkkainen, *supra* note 111, at 458-59.

¹³⁴ See, e.g., Lobel, *supra* note 3, at 216-27; Minow, *supra* note 3, at 1266-70; see *infra* note 165 and accompanying text.

¹³⁵ See HANDLER, *supra* note 5, chs. 5-8.

¹³⁶ See *id.* at 5.

¹³⁷ *Id.* at 5.

¹³⁸ U.S. Dep’t of Labor, Occupational Safety & Health Administration, Voluntary Protection Programs, <http://www.osha.gov/dcsp/vpp/index.html> (last visited Nov. 21, 2008).

¹³⁹ *Id.*

¹⁴⁰ HANDLER, *supra* note 5, at 134-39.

¹⁴¹ *Id.* at 137.

¹⁴² *Id.* at 138.

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.¹⁴³ 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”)¹⁴⁴ 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.¹⁴⁵

While WIA appears to function successfully in fostering increased accountability in some localities,¹⁴⁶ the Anti-Displacement

¹⁴³ *Id.*

¹⁴⁴ 29 U.S.C. § 2832 (2006).

¹⁴⁵ *Id.* § 2832. WIA incorporates many new governance concepts. The statute calls for the creation of local workforce investment boards that must bring together a wide variety of stakeholders in state and local boards to govern the provision of workforce development services. *Id.* § 2832(a)-(d). Local boards include members from major constituencies and are responsible for local oversight and administration. The local board negotiates performance measures with the state and is accountable for meeting those performance measures. *Id.* § 2832(d)(5). Under WIA, the 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. *See id.* § 2871 (describing the performance accountability system for workforce investment systems). WIA also incorporates some accountability and transparency concepts from traditional administrative law. WIA requires that proceedings of the workforce investment boards be open to the public and that certain documents be available for public scrutiny. *Id.* § 2832(e). It also requires that plans be available for comment prior to their approval. *Id.* § 2832(e). In theory, WIA structures create opportunities for community participation, thus generating accountability. Lobel, *supra* note 111, at 411.

¹⁴⁶ 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. Lobel, *supra* note 111 at 413-15. 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 focused on 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

Project (the “A-DP”), an institutionally based membership organization controlled by low-income people and located in Springfield, Massachusetts,¹⁴⁷ 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, clients of the system appeared initially unable to participate meaningfully in setting local WIA priorities.¹⁴⁸ Nevertheless, the new governance structure that characterizes WIA ultimately appeared to play some role in facilitating significant accountability to the community.¹⁴⁹

In 2001, using a strategy remarkably similar to that utilized by CVH, the A-DP set out to monitor implementation of WIA in their jurisdiction.¹⁵⁰ Strikingly, the data revealed by CVH and the A-DP were quite similar.¹⁵¹ The A-DP research revealed a program that failed to provide access to the education, training, and other essential services sought by the clients.¹⁵² Both programs failed to meet the clients’ self-

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.

¹⁴⁷ Alliance to Develop Power, <http://www.a-dp.org/> (last visited Nov. 21, 2008). The mission of the A-DP is as follows:

The Alliance to Develop Power, (formerly Anti-Displacement Project) based in the three counties of Western Massachusetts, has undertaken a set of bold initiatives in community organizing, civic engagement, cooperative economic development, and community building activities. ADP has instituted a model that prioritizes leadership development, cooperative principles, and moving a membership into action, while simultaneously winning major policy reforms, preserving thousands of units of housing, developing community-owned businesses, and operating the region’s only membership based low wage and immigrant worker center affiliated with the local and national AFL-CIO.

Id.

¹⁴⁸ ANTI-DISPLACEMENT PROJECT, *FUTUREWORKS: ROADBLOCKS TO SUCCESS, HOW FUTUREWORKS IS A DEAD END STREET FOR LOW WAGE WORKERS* (2001) [hereinafter *FUTUREWORKS*] (on file with author).

¹⁴⁹ See *infra* notes 159-161 and accompanying text.

¹⁵⁰ *FUTUREWORKS*, *supra* note 148. The A-DP created a leader-driven testing project to explore the training services provided under the WIA. *Id.* Over a two-month period, leaders went into the WIA administered One-Stop Career Center and documented their experiences. The A-DP identified thirty-two people who were either low-wage workers, unemployed, or welfare recipients. *Id.* The “testers” were a multi-racial, multi-ethnic team who had varying needs and skill levels. The testers made a total of forty-two 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.” *Id.* 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. *Id.*

¹⁵¹ 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.

¹⁵² 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 148.

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 actors have, often in response to pressure from a variety of fronts,¹⁵³ 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.¹⁵⁴ Social welfare policy is 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.¹⁵⁵

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.¹⁵⁶ 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

¹⁵³ 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 ATTACK: FIGHTING BACK: WOMEN AND WELFARE IN THE UNITED STATES* (2d ed. 2000).

¹⁵⁴ See generally FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (1971).

¹⁵⁵ See, e.g., KENNETH J. NEUBECK & NOEL A. CAZENAVE, *WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR* (2001); JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994). See generally *LOST GROUND: WELFARE REFORM, POVERTY AND BEYOND* (Randy Albelda & Ann Withorn eds., 2002); *WHOSE WELFARE* (Gwendolyn Mink ed., 1999).

¹⁵⁶ See HEATHER BOUSHEY & DAVID ROSNICK, *CTR. ON ECON. & POL'Y RESEARCH, JOBS HELD BY FORMER WELFARE RECIPIENTS HIT HARD BY ECONOMIC DOWNTURN* (2003), available at http://www.cepr.net/documents/publications/welfare_reform_2003_09.pdf. According to Boushey and Rosnick,

Nine industries, mostly in the service sector, account for the employment of nearly two-thirds of all former welfare recipients. Overall, these are relatively low-wage industries: in the second quarter of 2003, retail had an average hourly wage of \$10.64 while food establishments averaged \$6.94 per hour (not including tips), both of which were much lower than the \$13.94 average for the private sector as a whole.

Id.; 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); Julia R. Henly, *Informal Support Networks and the Maintenance of Low-Wage Jobs*, in *LABORING BELOW THE LINE: THE NEW ETHNOGRAPHY OF POVERTY, LOW-WAGE WORK, AND SURVIVAL IN THE GLOBAL ECONOMY* 179 (Frank Munger ed., 2002).

colleagues in the workplace,¹⁵⁷ and what few positive outcomes come from welfare reform appear to fall disproportionately to white recipients.¹⁵⁸

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 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."¹⁵⁹ The A-DP was granted a seat on the Regional Employment Board.¹⁶⁰ In addition, the Regional Employment Board agreed to

¹⁵⁷ See Vicki Lens, *Work Sanctions Under Welfare Reform: Are they Helping Women Achieve Self-Sufficiency?*, 13 DUKE J. GENDER L. & POL'Y 255, 281 n.130 (2006). Lens summarizes various statistics showing that

[a]bout two-thirds of former recipients work in service sector jobs, such as retail, eating and drinking establishments, and personal care services. Service sector jobs are often predominantly female; for example, in 2004, 91.8% of nursing, psychiatric, and home health aid workers were women, as were 89.7% of all maids and housekeeping cleaners. These jobs are among the lowest paying of all occupations; for example the median hourly wage for personal care and service occupations is \$8.59 an hour.

Id.

¹⁵⁸ See *supra* note 107.

¹⁵⁹ Lori Stabile, *Career Center Changes Focus: Now Non-Profit FutureWorks Meets Demands of Community*, THE REPUBLICAN, Dec. 9, 2001, at D2.

¹⁶⁰ Lori Stabile, *Jobs Group Marks Approval of Reforms*, SPRINGFIELD UNION NEWS, Nov. 1, 2001, at A11.

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.¹⁶¹

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.¹⁶² 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 the multiple opportunities for collaboration that new 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

¹⁶¹ Stabile, *supra* note 159. Throughout the campaign, *The Springfield Union 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, Apr. 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 23, 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.

¹⁶² See *supra* notes 115-123.

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.¹⁶³ As argued above, given the history of subordination, participation that rises above mere tokenism is difficult to achieve without a significant alteration of the structures and mechanisms of participation.¹⁶⁴ 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 needs. Thus, to the extent that that this Article envisions structures that will create a “real seat at the table” for affected communities, that seat must be reserved for grassroots organizing groups.

IV. COMMUNITY-BASED, RESEARCH-DRIVEN PARTICIPATION AS A POTENTIAL RESPONSE

Part 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 Part proposes the creation of social service contract

¹⁶³ 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); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879 (2007); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 460-69 (2001); 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 Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 (1988). For an extraordinarily useful introduction to the literature of this growing field, see Loretta Price & Melinda Davis, *Seeds of Change: A Bibliographic Introduction to Law and Organizing*, 26 N.Y.U. REV. L. & SOC. CHANGE 615 (2001).

¹⁶⁴ See *supra* text accompanying notes 133-158.

monitoring bodies as a means to render meaningful community participation in the governance structure.¹⁶⁵ These bodies would broaden the participants in the formulation of policy and, essentially, would provide a structural means to augment and build on the political power of community-based groups in a 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.¹⁶⁶

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,¹⁶⁷ 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.¹⁶⁸ The monitoring body could be a separately staffed organization or an ongoing committee with

¹⁶⁵ Some new governance scholars have suggested augmenting new governance structures in much more limited forms with community-based oversight mechanisms. For example, in her discussion of nursing homes in *The Contracting State*, Jody Freeman suggests ways that contracts can be used to increase accountability and suggests methods 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 15, 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 203-04 (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, 1609 (2001). Finally, 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, *supra* note 3, at 1267.

¹⁶⁶ The subject area covered by the monitoring body could narrowly focus on specific welfare programs or broadly focus on all human services contracts targeted at poor communities.

¹⁶⁷ See *supra* Part I.A.

¹⁶⁸ Given the emphasis on good governance among current private funders, efforts to fund these initiatives through a combination of public and private sources may well be successful.

organizational members, such as the local workforce investment boards, mandated by the Workforce Investment Act, where membership and function is mandated by statute as a precondition to the operation of the program.¹⁶⁹

A. *Specific Essential Elements*¹⁷⁰

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.

1. 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 terms¹⁷¹ 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.¹⁷² Thus, any accountability structure must incorporate traditional public law concepts of government transparency and opportunity for public participation into the 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

¹⁶⁹ See *supra* note 145 and accompanying text.

¹⁷⁰ Before discussing 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. In other jurisdictions, more political and practical compromises might be necessary. For that reason, each subsection in this Part describes why the element is essential, what the element is designed to accomplish, and then both the element's ideal implementation form and some political compromises that may still have the desired effect.

¹⁷¹ See *supra* notes 65-72 and accompanying text.

¹⁷² See *supra* notes 75-96 and accompanying text.

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.

2. 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 are the emphasis on experimentation, evaluation, and the flexibility to redefine programs in response to successes and failures.¹⁷³ 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.¹⁷⁴

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 its participation in the contracting process.

¹⁷³ See *supra* notes 115-124 and accompanying text.

¹⁷⁴ 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. See *THE REVOLVING DOOR*, *supra* note 8, app. A, at 19. Similarly, the A-DP depended entirely on its own sample data and thus issued results based on a very small data set. *FUTUREWORKS*, *supra* note 148, § II. 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 substantially more resistance in providing data through the Freedom of Information Law, which significantly impaired CVH's ability to draw reliable conclusions. See *supra* note 71. Clearly, had these organizations been able to force data collection on points of interest to them, they would have been able to monitor more effectively and to be even more productive in making policy change recommendations.

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

As discussed extensively in Part III, welfare programs have historically participated in the subordination of poor communities. As argued in Part II, 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.

4. 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.¹⁷⁵

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.¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸ However, the entity in question had numerous contracts with the agency, and CVH concluded that the organization was not "entirely independent of HRA and the reviews that [were] made available do not provide adequate evaluations of WeCARE services."¹⁷⁹

Ideally, the monitoring body would be comprised of organizations that are, with the exception of any funding provided to

¹⁷⁵ At this point, in the jurisdictions discussed above, contracting leaves no room for participation by any other entities, much less impacted community members. *See supra* Part II.

¹⁷⁶ *See generally* FAILURE TO COMPLY, *supra* note 23.

¹⁷⁷ *Id.* at 1.

¹⁷⁸ *Id.* at 18.

¹⁷⁹ *Id.* at 10.

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.¹⁸⁰ Still, to ensure 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. 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

¹⁸⁰ Beyond the exclusion of the contractor and potential bidders, however, are 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 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. Bezdek, *supra* note 165, at 1566. 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. *Id.* at 1565-66; *see generally* MIMI ABRAMOVITZ, HUNTER COLLEGE SCHOOL OF SOCIAL WORK, IN JEOPARDY: THE IMPACT OF WELFARE REFORM ON NONPROFIT HUMAN SERVICE AGENCIES IN NEW YORK CITY (2002), available at http://www.unitedwaynyc.org/pdf/in_jeopardy.pdf (discussing the enormous adverse impact of welfare reform on the economic and social security of clients and describing the impact of those changes on the the non profit sector). 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.

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 less overtly political means for communities to advocate that additional oversight is needed to improve 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.¹⁸¹ 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.¹⁸² 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 of the incredible importance of continuing to enforce what few procedural, 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 privatization¹⁸³ be expanded and that others in the welfare advocacy community join forces with community-based organizations to advocate for policies that respond directly to privatization.

¹⁸¹ See *supra* notes 159-161 and accompanying text.

¹⁸² See *supra* notes 159-161 and accompanying text.

¹⁸³ 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, <http://www.nclej.org/key-issues-privatization.php> (last visited Oct. 3, 2008).