

Article

Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty

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In 1964, President Lyndon B. Johnson called for a Nationwide War on the Sources of Poverty to “strike away the barriers to full participation” in our society. Central to that war was an understanding that given poverty’s complex and multi-layered causes, identifying, implementing, and monitoring solutions to it would require the “maximum feasible participation” of affected communities. Equally central, however, was an understanding that such decentralized problem-solving could not be fully effective without national-level orchestration and support. As such, an Office of Economic Opportunity was established – situated in the Executive Office of the President itself – to support, through encouragement, funding, and coordination, the development and implementation of community-based plans of action for poverty alleviation, as identified and prioritized by the poor themselves.

This Article urges a return to this practical, locally-responsive, yet federally-orchestrated orientation of U.S. social welfare law. It argues that while the regulatory and political context of the 1960s provided inauspicious ground for the early “maximum feasible participation”

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policy to effectively take root, four decades later, two broad paradigm shifts have yielded a new, more fertile opportunity framework. The first involves the shift in U.S. regulatory law away from earlier command-and-control structures favoring fixed rules and centralized enforcement, toward a New Governance model that privileges decentralization, flexibility, stakeholder participation, performance indicators, and guided discretion. The second is the concurrent paradigm shift in U.S. social movement approaches to poverty – what I call “New Accountability” – which similarly promotes local voice and inclusive participation, performance monitoring around human rights standards, and negotiated policymaking (rather than non-negotiable material demands and mass confrontation, the preferred tactics of 1960s activism). Supported by a renewed U.S. interest in collecting and reporting performance indicators for government programs, these two shifts converge to create a theory and policy-based environment in which it is both practically feasible and normatively coherent to re-embrace the participatory orientation of the early “War on the Sources of Poverty” strategy.

The challenge for U.S. social welfare rights law, I argue, is how to bring these two complementary paradigms together in constructive synergy to mount a 21st century battle against poverty. A set of national subsidiarity-based institutions to support this effort is proposed, each mandated to orchestrate and competitively incentivize targeted anti-poverty efforts by all social stakeholders, while opening new institutional spaces for the active participation of the poor in all aspects of meeting the nation’s poverty reduction targets.

INTRODUCTION

In 1970, the United States Supreme Court affirmed that the poor have a constitutional right to be heard in a meaningful manner before subsistence-based entitlements are terminated.¹ While the case-specific holding of *Goldberg v. Kelly* was narrow, limited to the procedural scope of the Due Process Clause where statutory subsistence entitlements are administratively terminated,² the Court’s decision derived from a much broader principle of democratic self-governance and public accountability: the imperative of ensuring that the poor have the “same opportunities that are available to others to participate meaningfully in the life of the

1. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

2. This scope was found to extend to a right to meaningful participation in judicial processes undertaken to correct arbitrary bureaucratic action affecting subsistence-based entitlements.

community.”³

This principle of participatory self-governance, self-consciously inclusive of the poor, did not emerge *sui generis* from the Court’s 1970 opinion. It derived from the normative milieu and formal political commitments of the 1960s in which *Kelly* was briefed and argued.⁴ That era was one in which meaningful participation of the poor in identifying barriers to economic opportunity and defining poverty-alleviation strategies came to be seen as core to American democracy and post-war progress. Nowhere was this vision better exemplified than in President Lyndon B. Johnson’s 1964 federal commitment to wage a “Nationwide War on the Sources of Poverty.” In declaring that war, President Johnson affirmed the “total commitment” of the Executive, the Congress, and the nation “to strike away the barriers to full participation in our society,”⁵ as a means of addressing the profound inequalities of opportunity in post-war American society.⁶

To implement that commitment, Congress passed the 1964 Economic Opportunity Act, one of a series of coordinated federal anti-poverty programs designed to equalize opportunity and participatory engagement in all aspects of social, economic, civic, and political life.⁷ That Act, like the War on the Sources of Poverty as a whole, had two distinct, yet equally essential components. The first, organized under Titles I, III, IV, and V, comprised a new set of federal legislative entitlement programs. Supplemented by other anti-poverty policies of the Great Society legislative agenda,⁸ these federally-financed programs were designed to

3. 397 U.S. at 265.

4. Justice Brennan identified its source more broadly as “the Nation’s basic commitment [from its founding] . . . to foster the dignity and well-being of all persons within its borders.” *Id.* at 264-65.

5. President’s Special Message to Congress Proposing a Nationwide War on the Sources of Poverty, 1 PUB. PAPERS 375-80 (Mar. 16, 1964) [hereinafter LBJ Special Message to Congress]. As President Johnson announced to Congress in proposing his Nationwide War, “The war on poverty is not a struggle simply to support people, to make them dependent on the generosity of others. It is a struggle to give people a chance . . . an effort to allow them to develop and use their capacities, as we have been allowed to develop and use ours, so that they can share, as others share, in the promise of this nation.” *Id.* at 376.

6. These inequalities and their impact on America’s poor, estimated at forty to fifty million, were increasingly being documented in this era of otherwise robust economic growth. *See, e.g.*, MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* (1962). This growing witness led President John F. Kennedy to declare “a basic attack on the problems of poverty and waste of human resources” to be a central feature of the 1964 legislative program, a program developed and implemented by the administration of President Lyndon B. Johnson. *See* DANIEL PATRICK MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY* xiv (1969).

7. The Act defined the elimination of poverty as “the policy of the United States.” Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 2, 78 Stat. 508, 508 (repealed 1981) (to be achieved by “opening to everyone the opportunity for education and training, the opportunity to work, and the opportunity to live in decency and dignity.”). This policy was established under the express understanding that “[t]he United States can achieve its full economic and social potential as a nation only if every individual has the opportunity to contribute to the full extent of his capabilities and to participate in the workings of our society.” *Id.*

8. The Great Society as it related to poverty consisted not only of the Economic

open new job opportunities in the labor market and to build human capacity through new services aimed at job training, work-study, adult basic education, school improvements, loans to rural families, and increased access to health care, child care, and legal services.

The drafters of the 1964 Economic Opportunity Act nonetheless understood that while such federal programs were necessary to any serious poverty alleviation initiative, they were insufficient by themselves. Without a congruent focus on community-based participation from below, they could not ensure that the practical day-to-day barriers to opportunity experienced by the nation's poor (including barriers institutionalized in the administration of poverty programs themselves) were systematically identified and targeted for removal. Nor could they ensure that community leadership, ingenuity, and resources were being effectively mobilized to find proactive solutions to the most serious causes of poverty identified locally in each community. Accordingly, proceeding on the understanding that neither voting rights,⁹ federal income supports,¹⁰ nor top-down professional provision of social services to the poor¹¹ by themselves were sufficient to guarantee equal opportunity and responsive policy solutions for all social sectors, especially historically marginalized ones, Title II of the Act mandated "*the maximum feasible participation*" of affected communities in the development, implementation, and administration of programs aimed at eliminating the causes of poverty.¹²

To establish a coordinating structure through which such participatory engagement could be effectuated, the Act thus authorized federal funding for the establishment of locally-administered community action programs (CAPs). Designed to mobilize local action and stimulate neighborhood involvement in the implementation of innovative, community-owned poverty-alleviation activities and strategies, such programs aimed to "give every American community the opportunity to develop a comprehensive plan to fight its own poverty."¹³ Indeed, as President Johnson himself declared, community action plans based on maximum feasible participation would be "based on the fact that local citizens best

Opportunity Act of 1964, but also a long list of other anti-poverty policies and programs, including the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Food Stamp Act of 1964, Medicare and Medicaid, the Elementary and Secondary Education Act of 1965, Head Start, neighborhood health centers, Foster Grandparents, Upward Bound, and neighborhood legal services (not the Legal Services Corporation). See, e.g., Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1712-13 (1993) [hereinafter Edelman, *Silver Bullet*].

9. As guaranteed in the Voting Rights Act of 1965, 42 U.S.C. §1971 (2006).

10. As guaranteed to qualified recipients in the Social Security Act of 1935, ch. 531, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.).

11. See *infra* Part I, for further discussion.

12. Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 202(a), 78 Stat. 508, 516 (repealed 1981).

13. LBJ Special Message to Congress, *supra* note 5 ("This program asks men and women throughout the country to prepare long-range plans for the attack on poverty in their own local communities."). The program thereby intended to "strike at poverty at its source – in the streets of our cities and on the farms of our countryside among the very young and the impoverished old." *Id.*

understand their own problems, and know best how to deal with those problems";¹⁴ as such, they would be able to "strick[e] at the many untilld needs which underlie poverty in each community, not just one or two," with "components and emphasis [differing] as needs differ."¹⁵

At the same time, to ensure that this community-based problem-solving infrastructure did not degenerate into "a series of uncoordinated and unrelated efforts – that it perish for lack of leadership and direction"¹⁶ – the Act went on to create an Office of Economic Opportunity. Through this national headquarters on poverty alleviation, housed in the Executive Office of the President and directed by the President's personal Chief of Staff for the War on Poverty,¹⁷ the government was to act in an essential orchestrating role, "help[ing] [communities] to carry out their plans"¹⁸ through concerted federal oversight, coordination, information sharing, and financial assistance.

In structuring its War on Poverty, the Johnson administration did not then understand the proper role of government as providing a one-stop federal solution to poverty "prepared in Washington and imposed upon hundreds of different situations."¹⁹ Rather, promoting "a creative federalism,"²⁰ it understood its role as affirmatively supporting, coordinating, and orchestrating a plurality of solutions percolating up from the grassroots where "the causes, not just the consequences of poverty,"²¹ could best be identified and where proposed solutions could be most attentive to localized needs, democratic experimentalism, cross-jurisdictional learning, and continuously evolving priorities.

This Article urges a return to this practical, locally-responsive, yet federally-orchestrated orientation of U.S. social welfare law. Specifically, it calls for a new twenty-first century Nationwide War on the Sources of Poverty that, like its predecessor, takes the active participation of those most affected by poverty, and their recognition within a nationally-orchestrated institutional framework of participatory planning, monitoring, evaluation, and review, as its central motivating policy commitment. Most importantly, it argues that given two coinciding

14. *Id.*

15. *Id.*

16. *Id.* ("I do not intend that the war against poverty become a series of uncoordinated and unrelated efforts – that it perish for lack of leadership and direction.").

17. Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 601 (a), 78 Stat. 508, 528 (repealed 1981); LBJ Special Message to Congress, *supra* note 5 ("[The Act] will give the entire nation the opportunity for a concerted attack on poverty through the establishment, under my direction, of the Office of Economic Opportunity, a national headquarters for the war against poverty. . . . Its Director will be my personal Chief of Staff for the War against poverty.").

18. LBJ Special Message to Congress, *supra* note 5.

19. *Id.*

20. President Johnson, Remarks at the University of Michigan, 1 PUB PAPERS 704, 706 (May 22, 1964) ("The solution to these [national social] problems does not rest on a massive program in Washington, nor can it rely solely on the strained resources of local authority. They require us to create new concepts of cooperation, a creative federalism, between the National Capital and the leaders of local communities.").

21. LBJ Special Message to Congress, *supra* note 5 ("[The Act] charts a new course. It strikes at the causes, not just the consequences of poverty.").

paradigm shifts in the domestic policy environment – one in the regulatory apparatus, the other in social movement organizing strategies – the political moment for reengaging this participatory approach to poverty alleviation has never been more propitious than it is today.

In advancing this argument, this Article seeks to add an important and underrepresented voice to the growing chorus calling for a new approach to national poverty in the United States. This rising chorus reflects a mounting consensus that U.S. poverty levels, the highest amongst industrialized countries,²² are intolerable in the world's wealthiest nation, that too many hardworking people have fallen through the system's cracks, and that government can and must do more. Indeed, voting majorities today indicate that poverty is either "the single most important priority" facing the nation or a "top priority for Congress and the President."²³ Standing at thirty-seven million, or 12.6 percent of the population, the number of people living below the federal poverty line has grown by millions over the last decade, with record numbers, 17.1 million, experiencing extreme poverty.²⁴ In 2008, over forty-nine million people lived in food-insecure households, the highest level since official data was first tracked fourteen years ago.²⁵ These numbers have only worsened with

22. See, e.g., CTR. FOR AM. PROGRESS, FROM POVERTY TO PROSPERITY: A NATIONAL STRATEGY TO CUT POVERTY IN HALF 11 (2007) (U.S. ranks twenty-fourth of twenty-five developed nations when measuring the share of the population with income below fifty percent of the national median income, followed only by Mexico); Legal Momentum, *Welfare Benefits and Child Poverty: A Cross-Country Comparison* 1-3 (2009) (among seventeen high income democracies U.S. ranks last with respect to its child poverty rate, which at twenty-one percent stands at more than double the 10 percent average of the other sixteen nations).

23. Zogby International, *Zogby Poll: Majority Call Fighting Poverty a "Top Priority"* (June 4, 2007), <http://www.zogby.com/news/readnews.cfm?ID=1320> (last visited Feb. 22, 2009) (documenting fifty-eight percent voter support for these statements, while a similar percent declares itself more likely to support a candidate who would "set a national goal of cutting poverty in half within a decade"); see also THOMAS Z. FREEDMAN ET AL., ALLIANCE TO END HUNGER AND SPOTLIGHT ON POVERTY AND OPPORTUNITY, NEW ATTITUDES ABOUT POVERTY AND HUNGER: THE RISE OF THE "DO RIGHT" VOTER AND OTHER LESSONS FROM RECENT RESEARCH (Oct. 30, 2007), http://www.spotlightonpoverty.org/users/spotlight_on_poverty/documents/Alliance%20to%20End%20Hunger%20Poll.pdf (noting that fifty-four percent of Americans do not believe "political candidates have spent an adequate amount of time discussing hunger and poverty issues").

24. From 2000 to 2006, the number of people living below the federal poverty line in the U.S. (\$19,971 for a family of four) increased by five million, rising to 37 million Americans, or 12.6 percent of the population. UNITED STATES CENSUS BUREAU, CURRENT POPULATION SURVEY (2006). At the same time, the number of Americans living in extreme poverty – with incomes below half the poverty line, or less than \$9,903 for a family of four – grew by over three million, with the share of poor people living in extreme poverty "now greater than at any point in the last 32 years." CTR. FOR AM. PROGRESS, *supra* note 22, at 8 (citing Tony Pugh, *The U.S. Economy Leaving Record Numbers in Severe Poverty*, McClatchy Newspapers (Feb. 23, 2007)); see also Peter Edelman & Barbara Ehrenreich, *Why Welfare Reform Fails is Recession Test*, WASH. POST, Dec. 6, 2009 (from 2000 to 2008, people living in extreme poverty in U.S. grew from 12.6 million to 17.1 million). From 1995 to 2004 the number of single-mother families with combined annual incomes from public assistance and work of less than \$3,000 increased by fifty-six percent, to stand at 1.7 million. See Rebecca Blank, *Improving the Safety Net for Single Mothers Who Face Serious Barriers to Work*, 17 THE FUTURE OF CHILDREN 183, 186 (2007).

25. U.S. DEPT. OF AGRIC., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES, 2008 (2009).

the 2009 economic recession.²⁶ In fact, poverty rates have not appreciably declined in the United States since the period between 1964 and 1973, the last time poverty alleviation was made an explicit national priority. During that period, poverty rates fell by forty-two percent in the United States.²⁷

Anti-poverty advocates have, correspondingly, increasingly emphasized the imperative of a new national commitment to poverty elimination. A series of specific proposals have been offered as the legislative basis of this recommitment, almost all for new or expanded government safety-net programs. These include raising and indexing the minimum wage to half the average hourly wage, expanding the Earned Income Tax Credit and Child Tax Credit, guaranteeing child care assistance to low-income families, promoting unionization, expanding federal Temporary Assistance for Needy Families (TANF) payments, ensuring equity for low-wage workers in the Unemployment Insurance system, and expanding and simplifying the Saver's Credit, amongst many others.²⁸

Notably absent amidst these calls, however, is anything even remotely akin to the early War on Poverty's "maximum feasible participation" component. This is true even as the early War's successes in reducing poverty are repeatedly invoked. This Article seeks to fill that troubling void. It argues that, just as President Johnson's War on the Sources of Poverty envisioned a wide series of national entitlement programs – including Medicare and Medicaid, Head Start, Job Corps, and expanded access to Aid to Families with Dependent Children (AFDC) – *together with* community-based plans and programs of action based on "maximum feasible participation" of affected communities, so too must current initiatives look through dual lenses. The challenge is how to tie these two components together in a national orchestrating structure, ensuring that the practical obstacles, lessons, and solutions identified at the local level by intended beneficiaries can in fact be channeled effectively to influence, in a regular manner, the design and modification of targeted anti-poverty programs at local, state, and national levels.

It is important to underscore, in this respect, the parameters of my argument. In calling for a return to the *dual* emphases of Johnson's earlier war, this Article focuses its lens on only one of those components: the "maximum feasible participation" (MFP) component. Specifically, it

26. See, e.g., Jason DeParle & Robert Gebeloff, *Food Stamp Use Soars, and Stigma Fades*, N.Y. TIMES, Nov. 29, 2009 (noting that one in eight Americans and one in four children now receive food stamps, while representing only two-thirds of those eligible to receive them).

27. See CTR. FOR AM. PROGRESS, *supra* note 22, at 16.

28. See, e.g., *id.* at 16, 26-58 (proposing a strategy of twelve specific policies to reach a goal of halving national poverty within ten years, and citing a study estimating that just four of them would successfully reduce poverty by twenty-six percent) (report and recommendations compiled by blue-ribbon Task Force on Poverty, composed of leading academic and think-tank authorities on poverty, convened to examine the causes and consequences of poverty in America and make recommendations for national action); CTR. FOR CMTY CHANGE ET AL., *BATTERED BY THE STORM: HOW THE SAFETY NET IS FAILING AMERICANS AND HOW TO FIX IT* (2009) (offering comprehensive relief plan of job creation, state and local fiscal relief, and safety net improvements, including expansion of federal TANF payments).

focuses on *how* and *why* that component must be recovered in any modern national poverty alleviation initiative. This focus is vital given that the need for participatory channels through which the input and knowledge base of the poor can effectively be tapped has not been part of the national conversation since the 1960s.²⁹ Consequently, this Article does *not* speak to the set of national-level entitlement-based social safety-net programs that should, and must necessarily, be a part of any effective anti-poverty campaign.³⁰ Rather, the crux of this Article is to insist that no set of government entitlement programs, on their own, can address the depth and complexity of U.S. poverty without a congruent focus on institutionalizing community-based participation in corresponding poverty alleviation efforts.³¹

In urging a national re-embrace of the core tenets of Johnson's MFP policy, this Article nonetheless remains acutely attentive to what is perhaps the most formidable argument against it: the difficulty of overcoming the powerful political legacy that survives practical experience with the early MFP policy. Indeed, despite the community-based activity, enthusiasm, and benefits (both tangible and intangible) it promoted at the grassroots,³²

29. Indeed, current efforts to recover the national anti-poverty commitment of the sixties have been notable in their omission of any reference to "maximum feasible participation," a policy that remains crippled by its association with the tactics of the early national welfare rights movement in the United States. That movement, given its consumerist, material-demand bent, has been widely criticized as one of the great errors of post-war history.

30. That effort has, and will continue to be, undertaken by others. *See, e.g., supra* note 28. Special mention should be made here of Spotlight on Poverty and Opportunity, a foundation-led, non-partisan initiative that brings together diverse perspectives from the political, policy, advocacy, and foundation communities aimed at "ensuring that U.S. political leaders take significant actions to reduce poverty and increase opportunity in the United States." *See* Spotlight on Poverty and Opportunity, <http://www.spotlightonpoverty.org> (last visited Feb. 21, 2010).

31. In this regard, nothing in this Article should be read as a proposal to substitute local policy-making processes and micro-projects for national policy-making processes and structural or macro-policy reforms. Rather, both levels need to be strengthened and, most importantly, tied together through a *nationally-orchestrated system* of monitoring and review to ensure that policies are working at all levels to in fact improve the human welfare outcomes for which they have been instituted. Where such outcomes are not achieved, stakeholder input – especially from intended beneficiaries on the *reasons* programs were less effective than expected – needs to be channeled in a way that it can be heard by policymakers and actively taken into consideration in flexible and responsive program modification or amelioration efforts, within a structure of stakeholder accountability.

32. *See, e.g.,* DANIEL YANKELOVICH, INC., OFFICE OF ECON. OPPORTUNITY, DETAILED FINDINGS OF STUDY TO DETERMINE THE EFFECTS OF COMMUNITY ACTION PROGRAMS ON SELECTED COMMUNITIES AND THEIR LOW INCOME RESIDENTS 8-9 (1967) ("[T]he large majority of the poor reached by CAA programs report significant changes in their own and their children's lives as a result of their participation. For their children, they report improvements both in school and at home. For themselves, they report a mix of tangible and intangible benefits including new jobs, special trainings, more earnings, education, stretching available dollars further, improvement of neighborhoods, and increased hope, self-respect and confidence in the future (mixed with an intense impatience especially on the part of the Negro families to share in the affluence they see in the rest of the society)."); ARTHUR WHITE, CAP PROGRAMS AND THEIR EVALUATION: A MANAGEMENT REPORT 8-16 (1967) (synthesizing and evaluating accomplishments of CAP programs).

that policy has widely been perceived as a failure.³³ Across the mainstream political spectrum it has been credited with entrenching an entitlement culture that, far from fostering local initiative and problem-solving capacity, functioned to sap personal initiative and to create a permanent sub-class of welfare recipients dependent on federal handouts.³⁴ Breaking the resulting cycle of dependency has subsequently become a major policy goal of social welfare policy, with “rights” talk and participation of poor communities seen as a core part of the problem, not part of the solution.³⁵

Within this context, any call to affirmatively re-embrace the participatory, rights-based framework of Johnson’s early MFP policy must explain why such a model would have a different impact today than it did in the 1960s. It must also explain how, once such a program were put in place, appropriate “buy-in” by relevant actors could be assured. Such buy-in must come both from the regulatory apparatus, which has for nearly four decades resisted a participatory orientation that includes recipient communities, and by poor communities themselves, who for an equal number of decades have felt pushed out of and marginalized by politics.

This Article takes up both challenges. It does so by reexamining the environment in which the MFP policy was introduced, and contrasting that with the environment that exists today. Specifically, I argue that while the political and regulatory context of the 1960s provided inauspicious ground in which Johnson’s MFP policy could effectively take root – indeed, that policy was largely defunded and in disarray within a few years³⁶ – a new opportunity framework exists today, four decades later, that offers a distinctly more amenable environment in both its theoretical foundations and practical policy-orientations for facilitating an institutionalized participatory role for the poor, as democratic stakeholders, in defining the policies that affect them.

That environment is one defined by two broad paradigm shifts. The first is the rise of “New Governance” approaches to regulatory law, displacing both the earlier “social work” and “legal-bureaucratic” models that dominated twentieth-century social welfare policy and, accordingly,

33. This perception of failure was as true in the late 1960s as it is today. *See, e.g.,* MOYNIHAN, *supra* note 6, at 136-42 (documenting failures); S.M. Miller & Pamela Roby, *The War on Poverty Reconsidered*, in *POVERTY: VIEWS FROM THE LEFT* (Irving Howe & Jeremy Lerner, eds. 1968) (concluding policy brought about little change, produced few supporters, and brought on “enormous dissatisfaction”); Edelman, *Silver Bullet*, *supra* note 8, at 1713-16 (identifying Community Action, the principle implementing policy of “maximum feasible participation,” as one of only two programs under the 1964 Economic Opportunity Act that could credibly be called a failure).

34. *See, e.g.,* *infra* text accompanying notes 56-57, 139-142.

35. *Id.* *See generally* MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (arguing that absolutist rights talk in the United States privileges hyperindividualism at the expense of social responsibility).

36. The most active community action agencies (CAAs) were effectively defunded by 1968, while the Office of Economic Opportunity was closed in 1972. *See infra* text accompanying notes 275-284. CAAs were not, however, disbanded; approximately one thousand continue to operate in the United States, albeit without the benefit of a federal orchestrating body. *See* About Community Action Agencies, <http://www.cap-dayton.org/about> (last visited Mar. 24, 2009).

defined the political context within which poor people's social movements organized to secure their rights. The second is the rise of what I call "New Accountability" strategies from grassroots organizations of the poor.³⁷ Unlike their U.S.-based 1960s forbears, these strategies do not focus on absolutist politics and nonnegotiable demands for fixed sums of money and consumer goods as a solution to poverty.³⁸ Rather, they consist of increasingly sophisticated institutional-engagement initiatives that, drawing upon process-oriented human rights methodologies, insist upon inclusive participation in policymaking, orchestrated goal-setting and performance monitoring, targets and concrete plans of action, and a framework of political accountability in which the poor have a recognized and secure voice.³⁹

Brought together, these two shifts not only mutually complement each other – strengthening the other's core weaknesses – but, if constructively merged as the basis of a national recommitment to poverty alleviation, in fact recreate the decentralized policy environment in which the participatory orientation of the early War on Poverty was originally conceived – and, I argue, if structured properly, could effectively be recovered today.

The Article offers, in this regard, two critical insights aimed at filling important gaps in the academic and policy literature. The first is that new governance and new accountability, as theory-based frameworks of action, embrace an effectively identical set of organizational precepts and guiding principles. These include a shared policy preference for decentralization and broad stakeholder participation, flexible results-oriented policy planning, coordinated public-private partnerships, innovation and competitive experimentalism, rigorous monitoring and performance evaluation, and nationally-orchestrated incentive systems around defined performance goals and targets. While enormous scholarly attention has been directed to describing these organizational tenets in new governance theory,⁴⁰ virtually none has focused on the congruent tenets that structure and organize new accountability. Nor has attention been directed to how the deficiencies characteristic of each framework are in fact constructively addressed by the complementary reinforcement of the other. As such, the necessity and feasibility of their constructive merger within a new national orchestrating structure has yet to be addressed.

37. The term "new accountability" has likewise been used to describe local school governance structures in the U.S. as well as in the context of a "new corporate accountability." See James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 229-31 (2003) (discussing "new accountability" in school governance); *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* (D. McBarnet et al. eds., 2007). The "new accountability" agenda discussed here is broader in scope and less centralized in the setting of performance goals than these other models, as discussed in Part III, *infra*.

38. See discussion *infra* Part III.A.

39. See discussion *infra* Part III.B.

40. See, e.g., *infra* notes 115-125.

The second critical insight, viewable only when new governance and new accountability are considered at their constructive interface, is that it is precisely upon their shared organizational precepts that the War on Poverty's MFP policy idea was conceptually constructed. That idea likewise derived from a programmatic commitment to flexible policy planning, innovative learning and competitive experimentalism, decentralization and broad stakeholder participation, coordinated public-private partnerships, rigorous performance monitoring, and federal orchestration. While the War on Poverty was in fact *implemented* in a 1960s political and regulatory environment that increasingly eschewed those principles in favor of centralized bureaucracy, fixed-rules, and militant rights absolutism – contributing to the policy's rapid political unraveling – the convergence of new governance and new accountability in the twenty-first century provides a uniquely propitious environment for its modern re-embrace. This is particularly true with respect to new accountability's conceptual *delinking* of participation of the poor from the dominant tactics embraced by social movements of the 1960s.

Within this context, the central policy challenge faced today remains the same as in 1964: how to create a new set of era-appropriate national orchestration mechanisms and policy arrangements through which the voices and constructive inputs of the poor – those best situated to identify day-to-day barriers to opportunity – can continually be taken into account by the regulatory apparatus in practical social-welfare policymaking. Such institutional mechanisms serve not only as an essential check and reinforcement on effective and responsive policy implementation, but also to ensure that all stakeholders, including particularly the poor, feel part of a common project of mutual responsibility and community ownership in overcoming the sources of poverty. The institutionalization and operation of such mechanisms thus serves both instrumental and intrinsic-value ends, each as vital today as they were in our nation's first War on the Sources of Poverty.

Perhaps nowhere is this challenge more timely and urgent than in the field of social welfare policy. In 1996, in a solid embrace of new governance theory, Congress passed the 1996 Personal Responsibility and Work Opportunity Act ("PRWORA" or "Welfare Reform Act") under the promise to "change welfare as we know it."⁴¹ Tasked with the goal of reducing the welfare rolls and getting recipients back into the workforce, the policy has been hailed a great success, with government-defined performance measures being continually met, even exceeded.⁴² Yet, levels of economic hardship, deprivation, and exclusion of the poor from both

41. See *infra* notes 138-139.

42. According to the Department of Health and Human Services, the number of welfare recipients has declined by almost two-thirds since 1996, falling from 4.8 million families with 9 million children in 1995 to 1.9 million families with 3.5 million children in 2006. See U.S. DEPT OF HEALTH & HUMAN SERVS., INDICATORS OF WELFARE DEPENDENCE: ANNUAL REPORT TO CONGRESS 2008 Appendix A at A-8 (2008), available at <http://aspe.hhs.gov/hsp/Indicators08/apa.pdf>.

social life and the political process have been on a noted rise, with poverty rates in fact rising and disillusionment in ascent.⁴³ Although new governance theory touts stakeholder participation as a guiding principle, the poor have been left with ever less power within the PRWORA regulatory relationship. Social movements of the poor have responded by turning to new accountability strategies.⁴⁴ Indeed, with increasingly few outlets for promoting the dignity-based interests of marginalized sectors *within* institutional regulatory spaces, new efforts are underway to create *extra-institutional* spaces in which poor people's voices, concerns, and proposed solutions can be meaningfully heard.⁴⁵ Such civil society initiatives have nonetheless to date remained almost entirely unrecognized by and marginalized from institutional processes of new governance performance review. As such, despite the enormous potential they offer, they have had little practical effect on altering regulatory conduct and hence improving the performance of anti-poverty programs from a human dignity vantage.

A national recommitment to poverty alleviation in the United States would seek to remedy this important regulatory failure. Guided by a renewed U.S. interest in collecting and reporting performance indicators for government programs, such a policy would constructively draw together the best features of new governance and new accountability regimes, thereby redressing the deficiencies that invariably arise when each operates to the exclusion of the other. Specifically, it would tie together the performance-based orchestrating structures of new governance regulatory regimes with the critical information inputs produced by grassroots new accountability movements, themselves equally committed to meaningful, participatory engagement in results-oriented performance monitoring and rights-based assessment or review. By doing so, a twenty-first century groundwork may be laid for politically recommitting as a nation to what President Johnson, forty years ago, aptly called "the great unfinished work of our society."⁴⁶

To this end, this Article proceeds in four parts. Part I turns back to the key motivating understandings that animated the early War on Poverty, and specifically its most currently underappreciated or misunderstood component: the policy of MFP. It recalls, in this regard, the underlying conceptual and policy motivations that insisted that MFP be part of a national strategy against poverty, and why it was understood that a program based on legislatively mandated entitlements programs alone would not be capable of eliminating the complex sources of poverty in America's many communities. It concludes that while the MFP policy was, in practice, used in ways unanticipated by the original drafters, that historical fact does not diminish the modern relevance of full stakeholder participation in social welfare policy design. Nor does it speak to how the

43. See *supra* note 24 and accompanying text.

44. See Part III *infra*.

45. See discussion *infra* Part III.B.

46. LBJ Special Message to Congress, *supra* note 5, at 376.

concept of MFP would predictably be used today, particularly under a different structure, given key changes in the political and regulatory environment of the twenty-first century.

Parts II and III directly address these key political and regulatory changes. Part II begins by reviewing the oft-noted and widely celebrated paradigm shift in U.S. regulatory law from one of top-down command-and-control regulation to more decentralized new governance or reflexive law regimes. In reviewing this shift, Part II highlights not only the theory and policy-based arguments supporting it, but also the principal shortcomings repeatedly identified in the practical roll-out and implementation of such regimes, particularly those governing housing, welfare, health care, job training, and other forms of social assistance that have the greatest impact on the poor. It takes the 1996 Welfare Reform Act as its analytical point of departure.

Part III then turns to the far less examined – yet equally important – paradigm shift in the rights-based strategies of historically marginalized groups, including those of the poor. While the late 1960s was characterized by both an increasing centralization of regulatory control over social welfare policies and an ever more absolutist rights discourse from organizations of the poor,⁴⁷ the 1990s and early twenty-first century has brought with them a radical reversal of both trends. This reversal likewise reflects a changing global marketplace and the new democratic opportunities and challenges that accompany it. Within this environment, a new movement of the poor has emerged that is demanding not nonnegotiable material entitlements, but rather voice and participation in the decisionmaking processes that determine the content of social welfare policies that affect them. That is, human rights law, and the subsidiarity-based institutional framework it represents, is being used by the poor precisely to overcome, from below, the democratic deficiencies that scholars and stakeholders have long noted in the day-to-day administration of new governance regulatory regimes. These include, most notably, the limited opportunities for low-income beneficiaries to participate as full stakeholders, the lack of performance-based indicators and benchmarks that can serve as a metric for human well-being (rather than numerical service delivery targets), and the inadequacy of federal orchestration of locally-devolved authority.

These public accountability failures have been identified across the regulatory spectrum. Given this, academic assessments of PRWORA regularly conclude with a call for further study of new forms of public accountability that can bring the practice of new governance better into line with its celebrated theory.⁴⁸ In the welfare law context, such assessments

47. See, e.g., FELICIA KORNBLUH, *THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* (2007) (discussing the era of anti-poverty activism in the 1960s).

48. See, e.g., Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000) (urging that scholars, policymakers, and advocates focus their attention on developing new mechanisms to provide effective public participation in administrative policymaking and implementation); Michele Estrin

have nevertheless tended to focus on narrow court-centric legal protections for individual recipients: enhanced due process requirements, increased resort to fair hearings, and the identification of new individual causes of action against service providers.⁴⁹ While these legalistic appeals – reminiscent of the prior legal-bureaucratic model – are sounded by legal academics from above, it is nevertheless grassroots organizations of the poor from below, using trans-jurisdictional human rights strategies and resources, that are engaging in innovative strategies on their own terms to fill the accountability void. They are doing so by demanding the opening of new spaces in which they can insert their voice and be heard as full democratic stakeholders in the policy-based decisionmaking that affects them.

Indeed, under such banners as “don’t talk about us, talk *with* us”⁵⁰ and “nothing about us, without us,”⁵¹ organizations of those historically marginalized from political processes are seeking ways to make themselves heard, building institutional commitments and demanding participation within them. They want to speak for themselves, not, as has typically been expected of them, through lawyers, social workers, planners, politicians, academics, or other advocates seeking to speak in representation of their interests.⁵² They wish to reclaim a space for themselves, to cast off notions

Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569 (2001); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003).

49. See, e.g., Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169 (1994); Gilman, *supra* note 48, at 569; David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231 (1998); Vicki Lens, *Bureaucratic Disentitlement After Welfare Reform: Are Fair Hearings the Cure?*, 12 GEO. J. ON POVERTY L. & POL’Y 13 (2005).

50. This is the identifying phrase of Picture the Homeless, a U.S.-based advocacy group founded and led by homeless people in New York City who aim to make homelessness visible to America. See PICTURE THE HOMELESS, HOMELESS PEOPLE COUNT 6 (2007). The organization’s mission statement affirms, “We refuse to accept being neglected, and we demand that our voices and experience are heard at all levels of decision-making that impact us.” *Id.*

51. “Nothing about us, without us” is the organizational refrain used by the global disability community in insisting on broad and active participation of persons with disabilities in the drafting, implementation, and monitoring of the new U.N. Convention on the Rights of Persons with Disabilities and its implementing legislation in nations around the world. See Tara J. Melish, *The U.N. Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14(2) HUM. RTS. BRIEF 37, 43-44 (2007). International recognition of this direct participation imperative is reflected in articles 4.3 and 33.3 of the Convention, which require States Parties to “closely consult with and actively involve” persons with disabilities and their representative organizations in the implementation and development of legislation and policies to give effect to the Convention, as well as in its monitoring and supervision. *Id.*; Convention on the Rights of Persons with Disabilities arts. 4.3 & 33.3, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006) [hereinafter *Disability Convention*].

52. An extensive literature on the “theoretics of practice” movement deals with the importance of giving voice to poor clients in the courtroom representation process, allowing them to participate more directly in defining case tasks and strategies, as a means of promoting client autonomy and political strength. See, e.g., Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1988); Anthony V. Alfieri, *Reconstructing Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV.

of their “inability” or “dependence,” and instead compel the public and government actors to see them as human beings with dignity, agency, and a drive to be treated on the basis of equal opportunity – not charity or paternalism. If there is to be a solution to poverty’s many indignities and practical day-to-day barriers to opportunity, they insist, it will not come exclusively through case-by-case client representation in judicial proceedings nor through national or local legislation framed without their active participation and input. Rather, it must include them, as those best situated to identify the most pervasive and abusive problems experienced by the poor in their distinct communities, to locate their immediate as well as structural causes, and hence to provide a roadmap of potential responsive solutions at both the micro and macro levels. Local and national organizations of the poor are thus increasingly taking up the self-organizing banner of human rights law, its instrumental focus on participation, transparency, non-discrimination, and accountability and a corresponding insistence that they be heard as essential stakeholders in democratic self-governance.

While the power and plurality of these voices are increasingly, if abstractly, being acknowledged in constructivist and legal process accounts of international law and jurisgenerative norm theory,⁵³ they nevertheless continue to be largely neglected in the more domestically-insular fields of social welfare policy, domestic legislation, and regulatory law, particularly in relation to low income groups. As such, the fact that this “new accountability” model merges so closely with that of “new governance” has yet to draw the attention it deserves. It is to this important disconnect, and its relevance to promoting a new national poverty infrastructure in the United States, that this Article responds.

Toward this end, Part IV proposes a set of nationally-orchestrated institutional accountability and performance review arrangements designed to draw together the principle tenets and subsidiarity orientations of both new governance and new accountability theory. These include: (1) a federally-articulated *national commitment to poverty alleviation*, backed by a legislatively determined set of poverty reduction targets and institutional incentive regimes; (2) a *national office on poverty alleviation*, housed in the Executive Office of the President and mandated to orchestrate national implementation of the poverty reduction targets at local, state, and national levels; and (3) a *national monitoring body*, ideally in the form of a national human rights commission, designed to stimulate participatory engagement by affected communities in all aspects of local

485 (1995). This article does not address this literature directly given its principal focus on the construction of institutional spaces *outside* the courtroom context, spaces in which the poor can express their voice and relate their personal narratives to a larger community audience.

53. See, e.g., Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT’L L. 301, 308 (2007) (“[T]he important points for the current generation of international law theorists are that we need to think of international law as a global interplay of plural voices, many of which are not associated with the state, and that we need to focus on how norms articulated by a wide variety of communities end up having important impact in actual practice, regardless of the degree of coercive power those communities wield.”).

and federal achievement of poverty reduction targets and plans of action. Through these, it is concluded, the outlines of a normatively-coherent and stakeholder-centered twenty-first century Nationwide War on the Sources of Poverty may begin to be seen – one that can realistically, even wholeheartedly, be embraced by advocates across the national political spectrum as part of a collective project to reduce poverty and grow opportunity throughout the nation.

Such a participatory project, it may be concluded, would serve to emphasize the continuing relevance of *Goldberg v. Kelly* and, specifically, its imperative of ensuring the participation of the poor in decisions affecting livelihood rights. It would compellingly recall, in this regard, what Lucie White identified twenty years ago as that decision's most enduring legacy: an acknowledgment that public or private "hand-outs," no matter how reliable, can never alleviate "the frustration and insecurity – the injustice – of poverty. Rather, the deepest injustice of poverty will be alleviated only as poor people secure the power to help decide what the substance of the state's welfare policy should be."⁵⁴

I. MAXIMUM FEASIBLE PARTICIPATION: THE POLICY CONCEPT AND EARLY IMPLEMENTATION STRATEGY

It might be assumed that no one in America could quarrel with the idea that "maximum feasible participation" (MFP) of affected residents and communities should be the basis of all policymaking in the United States. Indeed, as U.S. schoolchildren are taught, it is upon this very notion that American democracy is conceptually founded. And yet, the idea that poor communities should be explicitly included in the implementation and administration of anti-poverty policies and programs has, with the brief exception of the 1960s, never been readily embraced in the United States, where suspicions about the motivations, capacities, and competences of the poor have long led to their social marginalization and political invisibility.⁵⁵

Ironically, the 1960s experiment with community action based on MFP of the poor only further hardened those suspicions for many. Former Secretary of Health and Human Services in the George W. Bush administration, Tommy Thompson, has claimed, for example, that welfare rights activists in the 1960s and 70s "succeeded only in persuading him that the [United States] was a society in trouble. . . . turn[ing] him into a life-long opponent of public aid programs."⁵⁶ Even those who today seek to

54. Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 877 (1990).

55. See generally MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA (1996) (discussing historical treatment of the poor in the United States).

56. KORNBLUH, *supra* note 49, at 10; see also Norman Atkins, *Governor Get-A-Job: Tommy Thompson*, N.Y. TIMES MAGAZINE, at 22 (Jan. 15, 1995) (discussing Thompson's welfare reform philosophy and policies as Governor of Wisconsin). Following the logic popularized by Ronald Reagan in the 1980s and recurrent in policy debate today that "We fought a war on poverty and poverty won," proponents of this view tend to understand the policy as

recover the national anti-poverty commitment of the sixties by invoking the legislative successes of the early War on Poverty, steer markedly clear of any reference to “maximum feasible participation,” a policy that remains crippled by its association with the militant tactics of the early national welfare rights movement in the United States.⁵⁷ Its legacy continues to haunt current national debates on social welfare policy and poverty alleviation.

Within this context, any call for a return to the MFP policy commitments of the 1960s must necessarily explain to a predictably reluctant policy audience two core questions: What is its practical utility? That is, how can participation of the poor contribute to the achievement of measurable poverty reductions? And, second, given traditional forms of democratic participation, such as the periodic electoral vote, how can such participation operationally be structured such that it complements, rather than antagonizes, the role of elected representative government in policymaking?

In answering these questions, it is useful to begin by looking backward, re-shining a light on the critical concept of “maximum feasible participation,” as it was used in the 1964 Economic Opportunity Act and as it appears to have been understood by its drafters, sponsors, and promoters. The following three sections thus address, respectively, the theory that motivated the early MFP policy, the structure that policy was given in the War on Poverty, and what appears to have gone wrong in translating that theory into measurable achievements in the 1960s social environment. It concludes that the fact that the MFP policy was, in practice, used in ways unanticipated by the original drafters does not diminish the continuing vitality of the policy concept nor does it speak to how that concept would, with greater forethought and planning, predictably be used under a *different* structure and in a *different* policy environment, such as today’s.

A. The Policy Concept: Why Participation of the Poor Matters

There is, in fact, little consensus on the precise origins of the term “maximum feasible participation” nor on the precise meaning attached to it

contributing to an entitlement-based activist attitude among the poor, giving rise to a welfare rights movement intent on rejecting work responsibilities in favor of permanent dependence on government aid. Consequently, they tend to conclude that government involvement in anti-poverty programs is counter-productive and leads only to dependency and depravity. Government should, instead, get out of the poverty-alleviation business, focus on creating national wealth and sustained economic growth upon which all boats will float, and leave poverty-alleviation programs to the charitable hand of the private sector.

57. See, e.g., CTR. FOR AM. PROGRESS, *supra* note 22 (failing to mention the need for participation of the poor, even while invoking successes of the War on Poverty); David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541 (2008) (arguing that pursuit of a participatory, decentralized anti-poverty program is a luxury the poor can ill-afford, and that a more centralized entitlement approach to poverty law should be pursued).

in the 1964 Economic Opportunity Act,⁵⁸ by either the members of the Administration task force that drafted it⁵⁹ or its congressional sponsors. Indeed, there is no explicit legislative history considering the phrase nor, curiously, was there any public discussion of the participation clause in the five months between President Johnson's commendation of the bill to Congress and its passage.⁶⁰ Even the drafters of the bill recalled no discussion of the term in the task force deliberations giving rise to the Act, inserting it only after a member recognized that it had been invoked several times by another in an all-night drafting session.⁶¹

And, yet, as has been observed, "the idea was in the air." Indeed, "maximum feasible participation" was reflective of a coherent and powerful idea that had increasingly been circulating through the theory-based literature, non-profit advocacy and philanthropic world, and U.S. foreign development assistance community in the late 1950s⁶² and that, by the early 1960s, had worked its way into national policy.⁶³ The concept was simple: those most affected by social disadvantage – "the indigenous disadvantaged" – were necessarily better positioned to understand poverty's causes, to identify the most effective solutions to them, and to advocate their own communities' interests than were "outside" middle-class professional reformers lacking any direct experience with those conditions. In this way, maximizing the participation of the poor in poverty alleviation efforts was understood to be imperative both *instrumentally*, as a means of ensuring program adaptability and responsiveness, and *intrinsically*, as a means of building the dignity, confidence, and initiative required to sustain proactive engagement in community self-help initiatives.

58. Other perhaps than recognition that it is "clearly a lawyer's term." MOYNIHAN, *supra* note 6, at xvi.

59. Convened in January 1964 by President Johnson and led by Sargent Shriver, former head of the Peace Corps, this Cabinet-level task force included key members of the U.S. Department of Labor, the Bureau of Budget, the Council of Economic Advisors, and a number of new administration members coming directly from philanthropic foundations and academia who had been leading advocates of community action. *See generally id.* (discussing personal role in task force while serving in Labor Department).

60. Lillian Rubin, *Maximum Feasible Participation: The Origins, Implications, and Present Status*, 385 ANNALS AM. ACAD. POL. & SOC. SCI. 14, at 15-16 (1969).

61. *Id.* at 16 (quoting Adam Yarmolinsky, *The Origin of Maximum Feasible Participation*, SOCIAL SCIENCES FORUM, Fall-Winter, 1966-67 at 19). Another task force member recalled: "The clause . . . relating to participation of the poor was inserted with virtually no discussion in the task force and none at all on Capitol Hill. . . . I cannot say that I was aware of the implications of the clause. It just seemed to me like an idea that nobody could quarrel with." *Id.*

62. For excellent discussions of each of these, see PETER MARRIS & MARTIN REIN, *DILEMMAS OF SOCIAL REFORM* (1967); Rubin, *supra* note 60; and MOYNIHAN, *supra* note 6.

63. This is hardly surprising, given the flocking of professional reformers and intellectuals to Washington to serve in the Kennedy and Johnson administrations. The idea of community action with citizen participation and the imperative of mobilizing those most affected by social problems to address them themselves had been a core part of the Ford Foundation's Grey Areas Projects, Mobilization for Youth and President Kennedy's Committee on Juvenile Delinquency and Youth Crime, from which many of the drafters of the EOA had come. *See MOYNIHAN, supra* note 6, at 38-74.

This idea responded, in turn, to two core assumptions about poverty increasingly espoused across the policy, advocacy, and philanthropic sectors in the late 1950s and early 1960s.⁶⁴ The first related to a new understanding of poverty's causes. Stimulated by the persistence, yet growing invisibility of what Michael Harrington called the "huge, enormous, and intolerable fact of poverty in America," afflicting some forty to fifty million people, or over one quarter of the population,⁶⁵ a new theory of poverty was emerging. That theory sought to explain poverty's massive persistence in the United States despite the successes of the 1930s and 1940s in achieving an important patchwork of New Deal social welfare legislation, an active philanthropic sector, and unprecedented American prosperity and economic growth in the 1950s.

Articulated by academics such as Charles Ohlin, Richard Cloward, and Michael Harrington, the theory focused not on personal pathology or simple lack of household income as the cause of poverty, as did dominant contemporary accounts,⁶⁶ but rather on the "culture" or "cycle of poverty" that kept the poor trapped in conditions that prevented them from accessing opportunities available to others.⁶⁷ In this context, poverty was caused both by a structural breakdown in the distribution of opportunities and by the devastated environments in which poor populations, as a result of this breakdown, were increasingly ghettoized and isolated. These conditions constituted a vicious cycle of poverty in which a series of interdependent causes kept the poor in a downward spiral, from which they could not escape. Thus, substandard and slum housing, inadequate diets, poor education, and lack of access to health care, meant that the poor were sick more frequently and longer than any other group of society,

64. MARRIS & REIN, *supra* note 62, at 36 ("[I]n the summer of 1964, on the eve of President Johnson's campaign against poverty . . . [t]here was then more of a consensus of purpose than at any time before or will likely be again.").

65. See HARRINGTON, *supra* note 6, at 1-2. Focusing on "The Problem of Poverty in America," the 1964 Annual Report of the President's Council of Economic Advisers alternatively reported this number at thirty-three to thirty-five million people, representing one-fifth of all families and nearly one-fifth of the total U.S. population. COUNCIL OF ECON. ADVISERS, ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISERS 59 (1964), available at http://fraser.stlouisfed.org/publications/ERP/issue/1208/download/5639/ERP_ARCEA_1964.pdf.

66. Prior to the post-war affluence of the 1950s and early 1960s, poverty in the United States could still credibly be attributed to the economic effects of the Great Depression. By the early 1960s that view became increasingly difficult to sustain. See, e.g., JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 293 (1958) (discussing "new" poverty); HARRINGTON, *supra* note 6, at 7-14. There was growing disillusionment, in this sense, with the Eisenhower administration's hands-off approach to domestic social problems in the 1950s, one based on the idea that economic growth would itself, by diffusing prosperity, reduce inequalities and resolve social problems. See MARRIS & REIN, *supra* note 61, at 11. There was likewise growing discontent with the "social work model" that had prevailed since the 1930s, which tended to view poverty as largely a pathological condition within the home. See *infra* note 163.

67. Reflecting the influence it had on the Kennedy and Johnson administrations, the concept of The Poverty Cycle and the need for "a coordinated attack" to break it was set forth in detail in the "Program for a Concerted Assault on Poverty," a 1963 Staff Memorandum of the White House Council of Economic Advisors which served as a critical input in the drafting of the EOA. MOYNIHAN, *supra* note 6, at 79.

leading to lost wages and loss of stable work, which meant they could not in turn pay for good housing, a nutritious diet, or doctors, hence reinitiating the cycle.⁶⁸ Breaking the poverty cycle meant that effective interventions could not focus on single issue areas in isolation; rather, given the complexity and interdependency of poverty's many causes, interventions had to be dynamic, multifaceted, targeted at causes rather than mere consequences, and – given limited available resources – systematically coordinated among a variety of cooperating public and private institutions, all concerting community resources in a coherent attack on a commonly understood enemy.⁶⁹

The second core assumption about poverty related to growing disquietude about existing institutions – specifically, their bureaucracy, inflexibility, and unresponsiveness to the problems of the poor. Social agencies of the era were thus perceived as operating in narrow issue silos, with limited vision, no coordination, and under bureaucratic blueprints that frequently bore little correlation to the diversity and complexity of needs faced by the actual communities purportedly served.⁷⁰ To restore their relevance, it was believed, America's broken institutions “had to be turned outward again, to look afresh at the needs they should be serving.”⁷¹ This, it was understood, required not only a more rigorous results-oriented experimental approach,⁷² but also the active and regularized participation of those most affected by poverty in project design, implementation, and monitoring. Such persons, it was understood, were in the best position to serve as a check on institutional conduct. Their participatory engagement would ensure that programs were in fact responding flexibly to changing community needs and priorities, being communicated in effective and culturally appropriate ways, and leading to actual measurable improvements in the lived realities of impoverished communities.⁷³

68. HARRINGTON, *supra* note 6, at 15.

69. This understanding appeared prominently in Johnson Administration messaging about the Act. *See, e.g.*, LBJ Special Message to Congress, *supra* note 5 at 380 (“Poverty is deeply rooted and its causes are many.”); *id.* at 379 (“[P]overty is not a simple or an easy enemy. It cannot be driven from the land by a single attack on a single front.”); *id.* at 377 (“[The Act] charts a new course. It strikes at the causes, not just the consequences of poverty.”); *id.* at 379 (underscoring that poverty “[cannot] be conquered by government alone” and hence calling for full participation of all segments of society in bringing their collective energies to bear on “our common enemy” of poverty).

70. *See, e.g.*, MARRIS & REIN, *supra* note 61, at 41-53 (discussing perceived problems and growing disenchantment).

71. *Id.* at 53.

72. Demanding rigorous research and analysis, this approach was the basis of the community action demonstration projects that provided the blueprint for Title II. For general discussion of these demonstration projects, *see id.*

73. *See generally* LBJ Special Message to Congress, *supra* note 5, at 378 (recognizing that community action plans would be “based on the fact that local citizens best understand their own problems, and know best how to deal with those problems,” allowing “components and emphasis [to] differ as needs differ”); *id.* at 380 (recognizing importance of flexible responsiveness to changing circumstances and noting that “[a]s conditions change, and as experience illuminates our difficulties, we will be prepared to modify our strategy”). Many of the drafters of Title II had been closely involved in the demonstration projects of the Ford Foundation and President’s Committee and had become convinced that the poor could often

At the same time, cycle of poverty theory recognized that the downward spiral created by lack of opportunity had a crushing effect on communities, leading to a social disintegration that bred apathy, fatalism, and an oppression of spirit that robbed communities of the *will* to respond.⁷⁴ Breaking the cycle of poverty thus required not only programs that could provide new and real opportunities, but also programs that could regenerate a will to respond to them. Engagement and active participation were, again, seen as the solution. Indeed, by increasing individuals' sense of their own dignity, worth, and importance in democratic society, such participation would return a sense of purpose and initiative to devastated communities, motivating them to mobilize their internal resources, knowledge, and ingenuity to engage in real self-help.⁷⁵

Equally important, participatory engagement was understood as a means of building the political power required to ensure that the interests of the poor were in fact adequately represented in institutional decisionmaking. This was true both within private social service agencies, which too often represented the interests of donors and middle-class taxpayers, and in political governance more generally, where the poor had always lacked effective voice.⁷⁶ It was increasingly recognized, in this regard, that new mechanisms had to be created through which the interests of the poor could be made powerful enough to force concessions and establish a new order of priorities. Programs which emphasized the active participation of members of affected groups in self-help and in the design and administration of programs thus came to be seen as a priority. As

help each other more effectively than a social worker from a different culture. See MARRIS & REIN, *supra* note 61, at 215 (noting positive experience of use of non-professionals in social work with street gangs).

74. See, e.g., HARRINGTON, *supra* note 6, at 15 ("The individual cannot usually break out of this vicious circle. Neither can the group, for it lacks the social energy and political strength to turn its misery into a cause."); MARRIS & REIN, *supra* note 61, at 188. In this regard, Michael Harrington contrasted the "old" generalized poor of the 1930s, who had together organized to demand New Deal legislation, and the "new" invisible poor of the 1960s who, largely unhelpt by that legislation, were isolated, unorganized, political invisible, and increasingly despondent. HARRINGTON, *supra* note 6, at 8-9.

75. Title II of the final Act explicitly referenced this community competence thesis. See Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 205(d), 78 Stat. 508, 518 (repealed 1981) (mandating "special consideration to programs which give promise of effecting a permanent increase in the capacity of individuals, groups, and communities to deal with their problems without further assistance"); see also U.S. CMTY ACTION PROGRAM, COMMUNITY ACTION PROGRAM GUIDE: INSTRUCTIONS FOR APPLICANTS 7 (1965) [hereinafter "CAP Guide"] (identifying same as "[t]he long-range objective of every [CAP]" and noting that "[p]overty is a condition of need, helplessness, and hopelessness"). For most of its drafting stage, the Act was in fact titled the "Human Resources Development Act of 1964." See MOYNIHAN, *supra* note 6, at 88-89.

76. When advised by Horace Buzby not to pursue a program for the poor, but rather one for the middle class given that "that is where the votes are," President Johnson reportedly replied: "35 million poor in America don't have a single lobbyist. The motor companies have them, the telephone companies have them. I'm going to be the lobbyist for the poor. And they're going to get a voice through me and the Congress. And that is why I'm going to send this bill up." See Interview by Lynn Neary with Larry Levinson, Partner, Piper Rudnick, LLP (National Public Radio broadcast Jan. 7, 2008).

Attorney General Robert F. Kennedy declared in a statement prepared by one of the drafters of the Economic Opportunity Act:

[The existing social welfare structure] plans programs for the poor, not with them. Part of the sense of helplessness and futility comes from the feeling of powerlessness to affect the operations of these organizations. The CAPs must basically change these organizations by building into the program real representation of the poor. This bill calls for the 'maximum feasible participation of the residents.' *This means the involvement of the poor in planning and implementing programs: giving them a real voice in their institutions.*⁷⁷

A particular concern of the drafters of Title II in this regard was that historically marginalized groups, especially unorganized poor blacks in the South, would be prevented by the local power structure from participating in the benefits of federal community action funds. Thus, while an early White House draft of the bill had provided for "appropriate representation of and participation by the key governmental agencies, community, and neighborhood groups, and key professional and other organizations in the area," the Task Force drafters amended the language of Title II to provide for the "maximum feasible participation of the residents of the areas and the members of the groups" served.⁷⁸ By doing so, they explicitly sought to preserve the authority of Washington to intervene in exclusionary programs on the grounds that the participation requirements of the legislation were not being met.⁷⁹

There were thus several distinct meanings and intents behind the insertion of the MFP language by Title II's drafters. These included improving the responsiveness and innovativeness of social agencies, promoting community self-help, incentivizing effective coordination of public and private resources, creating community-based jobs, and building the political power of the poor to better represent their own interests. All of these motivations were, in turn, based on "the peculiarly American tradition of democracy" that the federal government had an essential role to play in facilitating and incentivizing local action, but that the ultimate objective of such support was the strengthening of local capacity to deal with each community's own problems, at their source.⁸⁰ As such, federal funding was designed to be withdrawn from CAPs as soon as practicable,

77. MOYNIHAN, *supra* note 6, at 90-91 (emphasis added).

78. *Id.* at 86-87.

79. *See, e.g.*, CAP Guide, *supra* note 75, at 11 (specifying requirement that all CAP applicants execute form assuring full program compliance with Civil Rights Act of 1964).

80. *See* Marris & Rein, *supra* note 61, at 8-9 (noting that social reformers of era understood that any reform proposal had to be reconciled "with that peculiarly American tradition of democracy, which believes profoundly in the vitality of local autonomy as an expression of personal freedom" and thus "[e]ven problems common to the whole society tend to be seen as a complex of local difficulties, to which *national policy should offer support rather than direction*") (emphasis added).

with full responsibilities turned over to localities.⁸¹ The federal role from then on out, it was understood, would be limited to national orchestration of local experiences and transferable learning processes, ensuring that best and worst practices were shared across jurisdictions in a continually self-strengthening and effectively coordinated national project of poverty alleviation.⁸²

B. Structuring a Participatory Framework for Poverty Alleviation

The question remained: how would such participatory engagement be structured? Drawing on prior public and private sector experiences with community action demonstration projects,⁸³ the plan was organized to have two distinct framework parts: one was designed to facilitate broad participation from below, through the creation of community action agencies (CAAs); the other sought to orchestrate their activities within a new federal coordinating entity from above, the Office of Economic Opportunity (OEO).

The structure of both was guided by a distinct goal: the need for effective *institutional coordination*. Indeed, it is important to underscore that this primary goal was key to Federal government endorsement of the War on Poverty. It had in fact been the foundation stone upon which the Bureau of Budget and the Council of Economic Advisors had insisted that CAPs be the basis of the anti-poverty agenda, countering the Labor Department's preference for an employment strategy.⁸⁴ CAPs were seen, in this regard, as

81. CAP Guide, *supra* note 75, at 7 ("The long range objective of every [CAP] is to effect a permanent increase in the capacity of individuals, groups, and communities afflicted by poverty to deal effectively with their own problems so that they need no further assistance.") (emphasis added); see also *id.* at 8-9 (except in exceptionally justified circumstances, level of federal assistance to CAP agency costs to be reduced from 90 to 50 percent after August 20, 1966, with goal of full replacement by non-federal sources as soon as practicable) ("Federal assistance is intended to supplement and raise existing levels of local support for action against poverty, not to replace it.").

82. In presenting his plan to Congress, Johnson explained this long-term orchestration role in the following way: "We are fully aware that this program will not eliminate all the poverty in America in a few months or a few years. . . . But this program will . . . give us the chance to test our weapons, to try our energy and ideas and imagination for the many battles yet to come. As conditions change, and as experience illuminates our difficulties, we will be prepared to modify our strategy." LBJ Special Message to Congress, *supra* note 5, at 380.

83. Both the Ford Foundation's Grey Areas Project and the President's Committee on Juvenile Delinquency and Youth Crime had offered funding for the establishment of demonstration "community action" agencies. The President's Committee had additionally created a Special Executive Committee, designed to serve as a Cabinet-level pressure group for coherent reform and empowered to draw together the many Federal departments, institutes, and bureaus relevant to its purview. Chaired by the Attorney General, its mandate included "review[ing], evaluat[ing] and promot[ing] the co-ordination of the activities of Federal departments and agencies," "stimulat[ing] experimentation, innovation and improvement in Federal programmes," "encourag[ing] co-operation and the sharing of information between Federal agencies and state, local and private organizations," and "mak[ing] recommendations." See MARRIS & REIN, *supra* note 61, at 22.

84. It was precisely to mediate these "warring principalities" that President Johnson appointed Sargent Shriver, a neutral party, to head the Task Force mandated to draw up the

a cost-effective means of ensuring comprehensive planning, coordination of resources, and targeted evaluation in anti-poverty efforts, thereby "impos[ing] order . . . on the chaos of government programs that had descended on the American city."⁸⁵ The fact that it could be done from the bottom-up, while protecting the interests of the President and carrying out the intent of Congress, only made it more attractive.

Provided for in section 202 of the EOA, the first framework part of Title II thus authorized the establishment of a broad set of new non-profit community action agencies (CAAs), "the prime offensive weapon in the war on poverty."⁸⁶ Recognizing that neither private agencies nor state or local government had the coordinating capacity to run these programs alone, CAAs were to be federally created entities, entitled to federal funding for ninety percent of their program costs for the first two years of operation, after which the percentage of federal funds would decrease.⁸⁷ The remaining costs were to be contributed from community resources. The program was, in this way, structured to incentivize the increasing coordination of resources from public and private stakeholders at the community level, such that community action programs would become locally self-sustaining.

Administration of the new agencies was nevertheless to be entirely local from the start. The only condition on agency structure was that CAPs could not be administered by political parties and must be "developed, conducted, and administered with the maximum feasible participation of residents of the areas and members of the groups served."⁸⁸ The precise meaning of this latter phrase was not specified in the legislative text. As conflicts grew over what it mandated, the Office of Economic Opportunity issued *Instructions to Applicants*, which sought to give the MFP mandate as expansive a meaning as possible.⁸⁹ It nonetheless issued advice to CAAs informally, recommending a tripartite structure for CAA Boards, with one-third members elected from local government, one third from the private sector, and one-third from members of the groups served. CAAs were, in this way, to coordinate the input of *all* community stakeholders in local efforts to break the cycle of poverty.

Finally, in structuring CAAs, a decision had to be made about how much federal oversight there would be over program design and monitoring of results. Although rigorous planning, evaluation, and demonstration components had been part of the initial drafting design of CAPs, with an estimation that it would take at least a year for any adequate

Economic Opportunity Act. Shriver mediated by adopting a portion of everyone's program: the Labor Department's employment program became Title I of the Bill, the Budget Bureau's CAP program became Title II. MOYNIHAN, *supra* note 6, at xv.

85. MOYNIHAN, *supra* note 6, at 78.

86. *Id.* at 153 (quoting OEO Director).

87. Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 208(a), 78 Stat. 508, 519 (repealed 1981).

88. *Id.* at 516, § 202(a)(3-4) (defining "community action program").

89. See CAP Guide, *supra* note 75, at 16-18 (defining "means to ensure participation" and "minimum standards for representation").

plan to be assembled, the final bill abandoned any significant requirements in these respects.⁹⁰ Rather, to receive funds an applicant need only show that the proposed program involves “activities of sufficient scope and size to give promise of progress toward elimination of poverty or a cause or causes of poverty. . . .”⁹¹ Application funding decisions were, consequently, structured to be based primarily on state need, not on project quality or expected impact.⁹² Characterized by some as a retreat from rational planning,⁹³ this decision responded to Washington concerns that federal funds in the War on Poverty be distributed quickly and with as little bureaucratic oversight as possible. This would both ensure rapid receipt by the neediest of communities (who might otherwise be disadvantaged in funding decisions by comprehensive planning requirements) and, more coarsely, allow the hopefully dramatic results of the anti-poverty campaign to influence the upcoming election cycle.⁹⁴

For similar reasons, early provisions requiring that CAPs be “broadly representative of the community” and that result-oriented research and analysis be integrated into program design were likewise abandoned in the drafting and legislative approval processes.⁹⁵ Both omissions served to significantly loosen the discretion of the OEO Director to disperse federal monies rapidly to a broad array of often quickly assembled and loosely justified project proposals.⁹⁶

The second essential framework part of the MFP program was the creation of an Office of Economic Opportunity (OEO), designed to ensure that this highly decentralized structure of the War on Poverty did not “degenerate into a series of uncoordinated and unrelated efforts.”⁹⁷ Mandated to coordinate all elements of that war and to serve more generally as a national headquarters on poverty alleviation, its responsibilities were substantial. Not only did it have direct administration responsibilities over nine of the eleven new programs created by the EOA, including Community Action, but it was also responsible for coordinating the full set of anti-poverty programs administered by other Federal departments and agencies.⁹⁸ To give it the stature necessary to accomplish

90. See MARRIS & REIN, *supra* note 61, at 212 (“The methodical exploration of means was overtake in impatience to put them to use.”); MOYNIHAN, *supra* note 6, at 82-83.

91. Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 202(a)(2), 78 Stat. 508, 516 (repealed 1981) (emphasis added).

92. MARRIS & REIN, *supra* note 61, at 211-213 (recording five basic questions for an acceptable plan and noting that 80 percent of federal CAP funding was mandatorily to be allotted to states in proportion to the numbers receiving public assistance, numbers of unemployed, and numbers of children in families with incomes below \$1,000; the remaining 20 percent could be distributed at the discretion of the OEO Administrator).

93. *Id.* at 213.

94. MOYNIHAN, *supra* note 6, at 82 (recalling concerns of Shriver); see generally *id.* at 93 (“Congress . . . wanted action without too much forethought, preparation, planning, negotiating, agreeing, staging. That is what it got.”).

95. See, e.g., *id.* at 92.

96. *Id.* at 93, 95-96; MARRIS & REIN, *supra* note 61, at 214.

97. See LBJ Special Message to Congress, *supra* note 5.

98. See Stephen J. Pollak, *Economic Opportunity Act of 1964*, in MAJOR ACTS OF CONGRESS 220, 220 (Brian K. Landsberg ed., 2004) (specifying EOA programs and OEO mandate);

these broad interagency coordination ends, the OEO was to be located in the Executive Office of the President and chaired by the President's personal Chief of Staff for the War on Poverty. It was also to be assisted by an Economic Opportunity Council, which, chaired by the OEO director, was to be composed of all members of the President's Cabinet and "such other agency heads as the President may designate."⁹⁹ Through this national orchestrating structure, the OEO was to ensure that all national anti-poverty efforts were effectively coordinated in taking forward the nation's fight against "the paradox of poverty amidst plenty."¹⁰⁰

Despite this extensive mandate, the OEO's orchestration role with respect to CAPs was in fact quite limited. This limited role resulted from Congress's removal of the comprehensive planning, "broadly representative," and research and analysis requirements from CAP application criteria. Indeed, without a basis for systematic appraisal of what was happening on the ground (and with all of the other direct program administration responsibilities with which it was encumbered), the OEO could not effectively engage in one of its most important orchestration roles: coordinating data on comparative CAP effectiveness and sharing best practices as the basis for promoting innovative experimentation, enhancing responsiveness, and maximizing the achievement of program goals. This gap left the OEO's orchestration role with respect to CAPs largely limited to dueling with states and localities about whether MFP meant controlling or noncontrolling representation by the poor on CAP boards.¹⁰¹ As militant activists increasingly demanded the latter and gained the OEO's backing, a collision course with the political establishment was set in motion.

C. Assessing Outcomes: What Went Wrong

Predictably, community interest in CAPs exploded with the 1964 announcement of federal funding for community-based efforts to break the cycle of poverty. The OEO responded by moving swiftly to fund new applications, with over 1,600 CAAs established by 1968, covering two-thirds of the nation's counties. Many of these programs brought important concrete benefits to their communities.¹⁰² Yet critiques of CAPs were just as

MOYNIHAN, *supra* note 6, at 100 (noting two programs immediately turned over to other departments); Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 604(a), 78 Stat. 508, 531 (repealed 1981) (recognizing "coordination of antipoverty efforts by all segments of the federal Government" as key function of the OEO Director).

99. Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 604, 78 Stat. 508, 531 (repealed 1981). The Act also established within the OEO a National Advisory Council, chaired by the OEO Director and composed by representatives of the public. *Id.* at 531, § 605.

100. *Id.* at 508, § 2 (declaring it to be "the policy of the United States to eliminate the paradox of poverty in the midst of plenty in this Nation . . ." and, the purpose of the Act to be "to strengthen, supplement, and coordinate efforts in furtherance of that policy").

101. See, e.g., MOYNIHAN, *supra* note 6, at 131, 144-47, 154 (noting political battles for control of CAPs).

102. See *supra* note 32 and accompanying text.

strong, with contemporary observers noting they produced few actual real benefits for communities and little actual participation, were “rent with endless quarrels” and petty infighting, and in fact made “organized ‘ghetto’ political activity” more difficult, not less.¹⁰³ Regardless, by early 1965 battles over who wielded ultimate control over community decisionmaking authority and use of poverty funds had unleashed a monumental clash between CAPs and the formal political establishment. Consequently, by 1967 federal funding of the most active CAPs had been withdrawn and new restrictions on their activities and memberships were being added by Congress.¹⁰⁴ By 1974, the Office of Economic Opportunity was itself dismantled, its programs distributed to other federal agencies, and the War on Poverty was at a decisive end.¹⁰⁵

What lessons should one draw from this? The lesson that should *not* be drawn, I argue, is that pursuing new institutional channels for ensuring the participation of the poor in poverty alleviation efforts is an unfruitful path, destined only to lead to conflict and confrontation. Such a lesson could only be drawn by conflating participation with a particular historically contingent set of social protest tactics and with a particular structure of sanctioned community participation. The better lesson, I contend, is that the *structure* of a program and, specifically, the *relationship between that structure and the social context in which it is embedded*, is fundamental to the success of any democratic reform project.

In this regard, it is important to note that while the MFP policy suffered serious shortcomings in its design, those shortcomings derived not from the participatory theory that commended that design, but rather from the failure to take contemporary social context into account while giving substance to that theory. In this respect, the drafters of the MFP policy appeared strangely oblivious to the key social trends that characterized the 1960s political environment: the increasing militancy and rights absolutism of the civil and welfare rights movements and, correspondingly, the progressive shift in the U.S. regulatory apparatus toward a more centralized legal-bureaucratic model that, eschewing the emphasis on discretion, flexibility, and experimentalism of the prior social work model, favored federally-defined and rigidly-enforced uniform rules. Neither of these trends was amenable to the decentralized, coordinated, cooperative, and flexibly responsive policy orientation on which the MFP

103. See, e.g., MOYNIHAN, *supra* note 6, at 137, 130-142; Miller & Roby, *supra* note 33.

104. See, e.g., Economic Opportunity (Green and Quie) Amendments of 1967, Pub. L. No. 90-222, 81 Stat. 672 (repealed 1981).

105. See Headstart, Economic Opportunity, and Community Partnership Act of 1974, Pub. L. No. 93-644, 88 Stat. 2291 Economic Opportunity Act (repealed 1981) (dismantling Office of Economic Opportunity and replacing it with Community Services Administration). In 1981, the first year of the Reagan administration, the Economic Opportunity Act was repealed and the Community Services Administration was abolished. Community Services Block Grant Act, Pub. L. No. 97-35, §683(a), 95 Stat. 511, 519 (codified as amended at 42 U.S.C. § 9901 (2006)). It was replaced by the Community Services Block Grant, which delegated responsibility for the administration of Community Action Agencies to the states. *Id.* §§ 671-83.

model was conceptually based. That this discrepancy was not taken into explicit account by the MFP sponsors demonstrates major shortcomings in their process of thinking about effective and sustainable real-world reform in the 1960s U.S. political context.¹⁰⁶

It has been noted, in this regard, that the Johnson administration's principal failure rested in not being more forthrightly aware that there were at least four distinct conceptions of MFP circulating amongst social actors at the time, each in potential direct tension with the others.¹⁰⁷ Official Washington had one conception. It focused on *institutional cooperation* and the cooperative division of labor between stakeholders at all levels of society, all designed to assist government in the common consensual project of poverty alleviation. Social service and philanthropic agencies, for their part, tended to see MFP as a way to improve program effectiveness, especially by opening new *sub-professional work opportunities* for the poor at the community level.¹⁰⁸ Under this view, the poor need not participate at the programming stage, but rather principally in street-level implementation.¹⁰⁹ The rising civil and welfare rights movements, by contrast, understood MFP in stark power terms: it meant the *redistribution of power* to the poor through majority control of decisionmaking authority.¹¹⁰ State and local governments, intent on retaining their own legitimate decisionmaking authority, were unyielding to this view. They saw MFP as a directive for *formal representation* of the poor in CAAs, bringing more stakeholders to the table *without* relinquishing local government's primary authority over how community funds were to be allocated.¹¹¹

106. See, e.g., MOYNIHAN, *supra* note 6, at 168 ("a good many men [in government] did inexcusably sloppy work"); Rubin, *supra* note 60, at 28 (attributing this surprising omission to "preconceptions about poverty, race, and welfare that grip American thought and distort our vision").

107. See, e.g., MOYNIHAN, *supra* note 6, at xvii (noting feeling in 1964, while still in government, "that official Washington had an entirely different, almost antithetical view of the style and function of 'community action' from that of its proponents in the field"). In contrast to the characterization used here, Moynihan characterized these four conceptions as: *organizing* the power structure, *expanding* the power structure, *confronting* the power structure, and *assisting* the power structure. See *id.* at 168.

108. See Rubin, *supra* note 60, at 22-24.

109. Increasingly disenchanted with the growing militancy of CAPs, the Budget Bureau (initially CAPs strongest champion in government) made clear to the OEO in 1965 that "it would prefer less emphasis on policy-making by the poor in planning community projects. 'Maximum feasible participation' by the poor in the anti-poverty program is called for by the law. In the bureau's view, this means primarily *using the poor to carry out the program, not to design it.*" See MOYNIHAN, *supra* note 6, at 145 (quoting Joseph A. Loftus, *Wide Policy Role for Poor Opposed by Budget Bureau*, N.Y. TIMES, Nov. 5, 1965, at 1) (emphasis added).

110. See, e.g., *id.* at 182-83 (noting that "in reality this took the form of denying the legitimacy of those institutions of electoral representation that had developed over the years – indeed, the centuries – and which nominally *did* provide community control.").

111. One task force member commented:

I had never really conceived that it [participation] would mean control by the poor of the community action organization itself. . . . I expected that the poor would be represented on the community action organization but that such representation would be something in the order of 15 to 25% of

The problem is that CAAs, as a single institutional entity, could not serve all of these important functions at once. In particular, they could not redistribute controlling decisionmaking authority to one social constituency *and* act as an apolitical arbiter of conflicting community interests and priorities.¹¹² By embedding CAAs with the mandate to do both, rather than recognizing the necessary conflicts of interest from which all policy evolves, a clash between two different conceptions of democratic accountability was set in motion in which the MFP policy was not to survive.

Within this context, it has been noted, “[t]he task of government . . . was first to discern these four different meanings, to make sure they were understood by those who had to make decisions about them, and to keep all concerned alert to the dangers of not keeping the distinctions clearly enough in mind.”¹¹³ The lesson to be drawn, then, is not that MFP as a policy priority was destined to fail in the political context of the 1960s. Rather, it is that the participatory policy concept was not given a design structure in which it *could* succeed in that context. That is, a *different* design structure and implementation strategy would have been necessary to ensure that each of the independently important functions participation was understood to serve could be given autonomous expression in community-based anti-poverty efforts.

This point is crucial as it underscores the opportunities available for reembracing the MFP priority today as the basis of a new national poverty commitment. The key to such a re-embrace, I argue, is a careful thinking about how to *structure* such a policy, both at the national and subnational levels, such that it maximizes both the instrumental and intrinsic benefits of participation, while avoiding foreseeable pitfalls in inter-social relations and competing accounts of democratic legitimacy. This requires, in turn, making sure that the chosen design structure and implementation strategy is compatible with the dominant methodologies and frameworks through which modern society operates.

The next two Parts examine precisely these dominant methodologies in modern U.S. society. Part II focuses on the U.S. regulatory apparatus and how it operates today with respect to social welfare programs. In particular, it examines the modern shift away from the earlier “legal-bureaucratic” model toward a more flexible and results-oriented “new governance” model that, in its operational design, largely replicates the principles upon which the early MFP concept was conceived. Part III then turns to the new methodologies of U.S. social movements of the poor, emphasizing the shift from the confrontational rights-absolutism of the 1960s to a modern “new accountability” framework that is likewise operationally rooted in the same set of motivating principles that gave rise

the board . . . Moreover, I don't think it ever occurred to me, or to many others, that the representatives of the poor must necessarily be poor themselves.

Rubin, *supra* note 60, at 21-22 (emphasis in original).

112. MARRIS & REIN, *supra* note 62, at 216-17.

113. MOYNIHAN, *supra* note 6, at 168.

to the early MFP policy. These include decentralization and broad stakeholder participation, flexible results-oriented policy planning, coordinated public-private partnerships, innovation and competitive experimentalism, rigorous monitoring and performance evaluation, and nationally-orchestrated incentive systems around defined performance goals. While neither paradigm in its isolated operation can effectively achieve all of these principles, as the analysis below underscores, when brought together in constructive synergy, each functions to redress the major deficiencies of the other. How they can be brought together in an effective modern design structure is taken up in Part IV.

II. "NEW GOVERNANCE" AND SOCIAL WELFARE REGULATION: FROM FIXED MATERIAL ENTITLEMENTS TO COMPETITIVE DISCRETION

A. Regulation in the 21st Century: Embracing a New Governance Model

A vast literature has emerged over the last decade and a half on the rise of new governance theory in regulatory law. Indeed, new governance has become the darling child of both administration officials and prominent academics since the early 1990s.¹¹⁴ It is now a dominant model in fields as diverse as environmental law,¹¹⁵ occupational safety and health administration,¹¹⁶ welfare administration,¹¹⁷ labor and employment discrimination law,¹¹⁸ vocational training,¹¹⁹ health care,¹²⁰ prison and school

114. It is reflected in the Clinton Administration's unleashing of an ambitious federal reform agenda, the National Performance Review (NPR), in March 1993. The NPR was renamed the National Partnership for Reinventing Government in 1995, undertaking a series of aggressive reforms under the leadership of Vice-President Gore. Initiatives for increased non-governmental participation in public regulatory processes have nevertheless been made since the early 1970s, particularly in the environmental programs. See Roger C. Cramton, *The Why, Where, and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972).

115. See, e.g., DEWITT JOHN, *CIVIC ENVIRONMENTALISM: ALTERNATIVES TO REGULATION IN STATES AND COMMUNITIES* (1994); Neil Gunningham & Darren Sinclair, *Regulatory Pluralism: Designing Policy Mixes for Environmental Protection*, 21 LAW & POL'Y 49 (1999); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227 (1994-1995).

116. See, e.g., OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, OSHA 2003-2008 STRATEGIC MANAGEMENT PLAN, <http://www.osha.gov/StratPlanPublic/strategicmanagementplan-final.html> (last visited Feb. 2, 2010); JOSEPH V. REES, *REFORMING THE WORKPLACE* 134-74 (1988); Cary Coglianese et al., *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection*, 55 ADMIN. L. REV. 705 (2003).

117. See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 and 42 U.S.C.); Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739 (2002); Joel F. Handler, *U.S. Welfare Reform: The Big Experiment*, in *GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS* 215 (Jonathan Zeitlin & David M. Trubek eds., 2003).

118. See, e.g., Orly Lobel, *Orchestrated Experimentalism in the Regulation of Work*, 101 MICH. L. REV. 2146 (2003); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated*

administration,¹²¹ community policing,¹²² housing,¹²³ securities regulation,¹²⁴ and digital technology law.¹²⁵

As has been widely noted, new governance as a regulatory approach represents a response to the bureaucratic command-and-control regulatory model that emerged in the 1930s and 1940s out of the New Deal and that, in the social welfare field, replaced the “social work” or “rehabilitation” model from the 1970s onward.¹²⁶ This model was characterized by top-down rule promulgation, expert agency control, and adversarial enforcement activities. While that broader model was undoubtedly responsive to the times – representing the need to consolidate widely dispersed powers and centralize government activities in response to the economic and social tumult of world war and the Great Depression – the changing backdrop of the twenty-first century, with its increased global market competition, breakdown of information and communication barriers, and increased market complexity, diversity and volatility, has revealed deep clefts in the effectiveness of the New Deal model. As such,

Governance, 81 WASH. U. L.Q. 487 (2003); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); David M. Trubek & James S. Mosher, *New Governance, Employment Policy, and the European Social Model*, in GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS 33 (Jonathan Zeitlin & David M. Trubek eds., 2003).

119. See, e.g., Workforce Investment Act of 1998, Pub. L. No. 105-220, 112 Stat. 936 (codified as amended in scattered sections of 29 U.S.C. and 20 U.S.C.); Nan Ellis, *Individual Training Accounts Under the Workforce Investment Act of 1998: Is Choice a Good Thing?*, 8 GEO. J. ON POVERTY L. & POL’Y 235 (2001).

120. See, e.g., Louise G. Trubek & Maya Das, *Achieving Equality: Healthcare Governance in Transition*, 29 AM. J.L. & MED. 395 (2003).

121. See, e.g., Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000); Liebman & Sabel, *supra* note 36; Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805 (1989-1990).

122. See, e.g., Archon Fung, *Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing*, 29 POL. & SOC’Y 73 (2001); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 817 (1999).

123. See, e.g., Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1047-53 (2004).

124. See, e.g., Albert J. Boro, Jr., Comment, *Banking Disclosure Regimes for Regulating Speculative Behavior*, 74 CAL. L. REV. 431 (1986).

125. See, e.g., E-Government Act of 2002, § 202, 116 Stat. 2899, 2911 (codified as amended in scattered sections of 44 U.S.C.); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004); Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353 (2004); Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277 (1998).

126. Three central paradigms have dominated United States social welfare policy since its overarching structure was first established in the 1935 Social Security Act, a hallmark of President Roosevelt’s New Deal revolution. These include the “social work” or “rehabilitation” model (1935-1970), the “legal-bureaucratic” model (1970-1996) and, most recently, the “new governance” model. See, e.g., Diller, *supra* note 48, at 1135-40 (distinguishing “social work” and “legal-bureaucratic” models); Amy Mulzer, Note, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs*, 36 COLUM. HUM. RTS. L. REV. 663, 667-71 (2005).

new forms of regulatory governance have emerged.¹²⁷

These new models seek to draw on “leaner” private sector management techniques that emphasize efficiency scale, competition, flexibility, stakeholder negotiation, and continuously revised performance measures in public administration.¹²⁸ They tend to eschew reliance on formal rules, investing local administrators and an increasingly privatized set of agents with substantial discretion in determining the means through which goal-specific performance indicators will be met. At the same time, they seek to retain democratic legitimacy by incorporating new mechanisms of stakeholder participation and public accountability, principally through incentive and result-based performance evaluation systems that impose information-generation and disclosure requirements on service-delivery entities and reward them for meeting performance benchmarks. It is believed that financial incentives, together with stakeholder-accessible performance evaluation, will lead to greater local competition, the scaling up of best practices, and the potential for constant renewal and responsiveness to changing circumstances and the diversity of local needs. State-society interactions within new governance regimes are hence redefined under an entrepreneurial model, with multiple stakeholders assuming traditional roles of governance.¹²⁹

The academic literature has been sanguine, even exultant about this shift, characterizing it at times in full Fukuyaman relish as an end-of-history moment in its capacity for continual self-renewal and renovation.¹³⁰ Commentators have proposed a myriad of theoretical models to reflect this practical shift, including “reflexive law,” “collaborative governance,” “decentered regulation,” and “democratic experimentalism.”¹³¹ International financial institutions and national civil service sectors, for their part, embrace the model under a “new public management” rubric,¹³²

127. See, e.g., President William J. Clinton, Remarks Announcing the Initiative to Streamline Government (Mar. 3, 1993) <http://govinfo.library.unt.edu/npr/library/speeches/030393.html> (last visited Mar. 19, 2009) [hereinafter Clinton Remarks] (noting that many important federal programs were initiated when state institutional capacity was weak, but that “times change and in many cases state and local governments are now better suited to handle these programs”).

128. For an excellent summary of this model, see for example Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004). See also sources cited *supra* at nn.114-125.

129. The central organizing principles of the model have thus been defined as: decentralization and subsidiarity; increased stakeholder collaboration and participation of nonstate actors; the diversification and pluralization of solutions; increased performance-based competition; integration of policy domains; flexibility and noncoerciveness; fallibility, adaptability and dynamic learning; and legal orchestration among proliferated norm-generating entities. See Lobel, *supra* note 123, at 348, 371-404.

130. See, e.g., *id.*

131. Others include “soft law,” “outsourcing regulation,” “reconstitutive law,” “revitalizing regulation,” “regulatory pluralism,” “meta-regulation,” “negotiated governance,” “responsive regulation,” and “post-regulatory law.” For citations to intellectual authors of these and other recent scholarly theories on new governance, see *id.* at 346-47 and accompanying notes.

132. See, e.g., MICHAEL BARZELAY, *THE NEW PUBLIC MANAGEMENT: IMPROVING RESEARCH AND POLICY DIALOGUE* 3-5 (2001); DONALD F. KETTL, *THE GLOBAL PUBLIC MANAGEMENT*

while the European Union applies it as a supranational governance tool through the Open Method of Coordination.¹³³ Noting this convergence in contemporary legal thought and administrative practice, one commentator has systematized the vast literature on new governance approaches, integrating it usefully into a single framework she calls the “Renew Deal” school.¹³⁴ This theoretically-integrated model reflects new governance in its purest state. Promising important improvements in the way services are delivered, public and private practices are monitored, and externalities are addressed around the nation, it represents a compelling articulation of how government may ideally organize itself and its functions to maximize both economic efficiency and democratic legitimacy.

Yet, the approach, while tantalizing in theory, rarely lives up to its promise in practical application, particularly as viewed within discrete regulatory regimes and from the lens of democratic theory. This is perhaps nowhere more true than in the social welfare field, where it must interface with, and ultimately absorb, traditional fears and suspicions of the poor that are deeply enmeshed in the cultural and political landscape.¹³⁵ The 1996 Welfare Reform Law, while based decisively in new governance theory, has thus come under blistering attacks from the poor and their advocates as constituting a new “war against the poor.”¹³⁶ This is especially true in its growing use of sanctions to restrict access to benefits and the increasing trend toward linking the welfare system with the criminal justice system.¹³⁷ Because these critiques call into question the fidelity of recent welfare reform policies to the organizing principles of new governance theory from which they gave rise, it is useful to break those principles down to see where the public accountability failures are arising and where performance has been subpar. This should, in turn, reveal

REVOLUTION: A REPORT ON THE TRANSFORMATION OF GOVERNANCE 3-4 (2000); Nick Manning, *The New Public Management and its Legacy*, WORLD BANK, <http://web.archive.org/web/20051112074952/www1.worldbank.org/publicsector/civilservice/debate1.htm>.

133. See Kenneth A. Armstrong, *Tackling Social Exclusion Through OMC: Reshaping the Boundaries of EU Governance*, in 6 *THE STATE OF THE EUROPEAN UNION: LAW, POLITICS AND SOCIETY* 170, 190-93 (Tanja A. Börzel & Rachel A. Cichowski eds., 2003); David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination*, 11 *EUR. L.J.* 343 (2005).

134. Lobel, *supra* note 118, at 347 (proposing a “theoretically-integrated, Renew Deal model”).

135. See KATZ *supra* note 55, at 12-13 (discussing stigma historically attached to the label “pauper,” including criminality, prostitution, delinquency, corruption, drunkenness, and general threats to the social order); see also J. GILLIN, *POVERTY AND DEPENDENCY* 21-22 (3d ed. 1937); C. HENDERSON, *INTRODUCTION TO THE STUDY OF DEPENDENT, DEFECTIVE, AND DELINQUENT CLASSES* 10 (2nd ed. 1906); J. HANDLER & E. HOLLINGSWORTH, *THE “DESERVING POOR”: A STUDY OF WELFARE ADMINISTRATION* 17 (1971); J. LOWELL, *PUBLIC RELIEF AND PRIVATE CHARITY* 111 (Arno Press & The New York Times 1971) (1884); H. RODGERS, JR., *POVERTY AMID PLENTY: A POLITICAL AND ECONOMIC ANALYSIS* 3 (1979).

136. See, e.g., Betty Reid Mandell, *Welfare Reform: The War Against the Poor*, *NEW POL.*, Winter 2001, at 37.

137. For an important recent look at this growing linkage between the welfare and criminal justice systems, see Kaaryn Gustafson, *The Criminalization of Poverty*, 99 *J. CRIM. L. & CRIMINOLOGY* 643 (2009).

important clues as to how such failures can be redressed through supplementary processes and procedures.

B. New Governance and Welfare Regulation: The 1996 Welfare Reform Law

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),¹³⁸ under the promise that it would "end welfare as we know it."¹³⁹ The impetus was a sense that welfare was "broken" – that it had become a bureaucratic machine that created and sustained dependency. A complete overhaul was thus needed, one that would change welfare administration from the inside out, making it leaner, more responsive, more efficient, and more results-oriented. Most importantly for its supporters, it had to be capable of breaking the cycle of dependency that, conservative critics argued, the legal-bureaucratic model had entrenched since its triumph in the 1970s over the social work model.¹⁴⁰ Getting recipients off public assistance and into the labor market was thus to be the central guiding norm animating government assistance.

New governance theory was the ready model, already a part of the Clinton administration's ambitious federal reform agenda under the National Partnership for Reinventing Government, formerly the National Performance Review.¹⁴¹ In creating that agenda, President Clinton announced: "Our goal is to make the entire federal government less expensive and more efficient, and to change the culture of our national bureaucracy away from complacency and entitlement toward initiative and empowerment."¹⁴² Given new governance's emphasis on cultural change, private sector management techniques, private responsibility, decentralization, and paring back of government functions, it was a model that could be embraced both by liberal-leaning Democrats and conservative Republicans who favored lower levels of federal involvement in social policy issues across the board. To understand the way that new governance theory has influenced U.S. welfare regulation, it is thus useful to look at the PRWORA, as implemented, with respect to the principal organizing tenets of the new governance model.

138. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 and 42 U.S.C.).

139. President Bill Clinton had made this a campaign promise in 1992. See Jason DeParle, *The Clinton Welfare Bill: A Long, Stormy Journey*, N.Y. TIMES, July 15, 1994, at A1.

140. For fuller discussions of the "social work" and "legal bureaucratic" models of welfare administration, see sources cited in *supra* note 126.

141. See Clinton Remarks, *supra* note 127.

142. *Id.*; see also ALBERT GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: REPORT OF THE NATIONAL PERFORMANCE REVIEW (1993) (defining agenda as "cutting red tape," "putting customers first," "empowering employees to get results" and "cutting back to basics").

1. Decentralization, Subsidiarity, and Public-Private Partnerships

A central tenet of new governance derives from the principle of subsidiarity: the idea that decisionmaking authority should be designed to take place at the level closest to the individual affected by it, with higher-order authorities intervening only to the extent necessary to strengthen lower-order capacities to meet common standards and community goals on their own.¹⁴³ New governance thus proceeds under the conviction, congruent with modern localist discourses,¹⁴⁴ that the federal government should not be in the business of making detailed regulatory decisions that can better be made at the local level, where they can more authentically accord with local understandings, mores, economic shifts, and particularized conditions. Rather, central authorities should be required to leave administrative and programmatic details to local discretion, leaving the widest possible margin for local authorities to fill in the details of broadly defined goals or policies. Federal involvement can thus be kept as lean and efficient as possible, while maximizing the space for local innovation and competitive experimentation.

Accordingly, new governance advocates a movement “downward and outward,” with responsibilities increasingly transferred away from centralized federal bureaucracies toward the states and localities and to the private sector, including private businesses and nonprofits.¹⁴⁵ Decentralization and private-public partnerships are thus a central core of new governance theory, emanating from the conviction that centralized regulatory control stifles innovation, competition, creativity, economic efficiency, and local responsiveness.¹⁴⁶

The PRWORA follows this model closely. Devolution to states and localities and privatization of welfare administration and service delivery are two of its most notable features. Indeed, under PRWORA, Aid to Families with Dependent Children (AFDC), the federal aid program established by the 1935 Social Security Act as a federally-guaranteed entitlement to all eligible recipients, was abolished. It was replaced by

143. That principle, with an historical provenance tracing back to the polity theory of classical Greece, “requires that problems be solved where they occur, by those who understand them best, and by those who are most affected by them.” Dinah Shelton, *Subsidiarity, Democracy and Human Rights*, in *BROADENING THE FRONTIERS OF HUMAN RIGHTS: ESSAYS IN HONOUR OF ASBJORN EIDE* 43, 43 (Donna Gomien ed., 1993) (citing J.E. Linnan, *Subsidiarity, Collegiality, Catholic Diversity, and Their Relevance to Apostolic Visitations*, 49 *THE JURIST* 399, 403 (1989)); see also Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 *AM. J. INT’L L.* 38, n.1 (2003). This approach is based both on the instrumental fact that information quality and responsive flexibility is generally highest at the level closest to the problem source and, equally, on the intrinsic value benefit to individual dignity and agency that comes from solving problems locally.

144. See, e.g., Matthew Parlow, *A Localist’s Case for Decentralizing Immigration Policy*, 84 *DENV. U. L. REV.* 1061 (2007).

145. Lobel, *supra* note 130, at 345.

146. For a view that economic efficiency does not always create better outcomes, see ELLIOTT D. SCLAR, *YOU DON’T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION* (2000).

block grants under the Temporary Assistance for Needy Families (TANF) program, to be administered entirely by the states with minimal federal oversight.¹⁴⁷ States were thus to have a virtual free hand at reinventing welfare administration at the local level, where it could theoretically be most responsive to community needs and changing priorities. There is, as a result, today no single model of welfare in any state under TANF.¹⁴⁸

Many states have in fact chosen to go even further down the path of devolution, leaving a wide range of welfare decisions to their counties and hence further localizing and diversifying welfare administration models. The States of California, Colorado, Maryland, Minnesota, New York, North Carolina, and Ohio, for example, immediately gave discretion to local counties to shape their own cash assistance programs under TANF.¹⁴⁹ At the same time, many states and counties have further devolved welfare administration to private contractors of services. This has particularly been true of parts of TANF related to case management, job placement, job search, child care, transportation, and training services.¹⁵⁰ These services are increasingly contracted out to private companies who are then held to the same performance measures that states and counties would otherwise be subject, albeit without federal regulatory standards or safeguards as to how those performance measures are met. In some states, county-specific privatization of welfare administration has in fact been state mandated where county-level public agencies have failed to meet certain performance measures.¹⁵¹

Such diversification of public and private models is the goal of new governance. It is believed that it leads to greater competition, greater efficiency and opportunities for scaling up, more responsiveness, and better processes for learning and sharing knowledge. The resulting devolution nevertheless raises a series of accountability questions, particularly with respect to consistency, fairness, choice of indicators, minimum standards, and protection against discretion-related abuses. Given that devolution may either increase or decrease responsiveness and accountability depending on how it is administered – from both above and

147. See 42 U.S.C. § 617 (“No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part.”).

148. Diller, *supra* note 48, at 1147 (noting vast diversity of models).

149. See L. JEROME GALLAGHER, ET AL., THE URBAN INSTITUTE, ONE YEAR AFTER FEDERAL WELFARE REFORM: A DESCRIPTION OF STATE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) DECISIONS AS OF OCTOBER 1997, at VII-3-4 (referring to tables VII.1-2) (1998).

150. The fact that total transfer of welfare administration to private contractors has not taken place in more states and localities has been attributed to the fact that the “Clinton Administration . . . refused to permit nongovernmental personnel to make eligibility determinations for food stamps and Medicaid.” Diller, *supra* note 48, at 1181.

151. In Wisconsin, for example, welfare administration in Milwaukee, where more than sixty percent of the state’s recipients live, was handed over to six non-profit and for-profit operators after the county was unable to meet certain performance standards including a projected decline in caseloads. See THOMAS KAPLAN, WISCONSIN’S W-2 PROGRAM: WELFARE AS WE MIGHT COME TO KNOW IT 14, 17 (1998); Melissa Kwaterski Scanlan, *The End of Welfare and Constitutional Protections for the Poor: A Case Study of the Wisconsin Works Program and Due Process Rights*, 13 BERKELEY WOMEN’S L.J. 153, 155-56 (1998).

below – it is important to review devolutionary welfare reform from other angles of new governance theory.

2. From Fixed Rules to Performance-Based Competitive Discretion

A second principal tenet of new governance, closely related to the first, reflects an aversion to fixed rules imposed from the center. Rather, flexibility and local discretion in meeting broadly-articulated public goals is deemed the more efficient and effective model. This preference is responsive to a growing sense that public administration should be results-oriented, rather than rule-oriented, and that compliance with fixed rules does not always lead to better outcomes.¹⁵² Since it is improved outcomes that we ultimately care about – and the rules only a means toward achieving them – we should focus on the outcomes and allow the rules to take a plurality of forms according to locally-assessed needs and particularized circumstances.¹⁵³

Under this view, incorporated into U.S. public administration through the Government Performance and Results Act of 1993, the federal government should avoid instructing regulated entities on “what” or “what not” to do, i.e., stipulating means and tasks. Rather, it should seek to hold them to certain result-oriented performance goals: improved test scores, increased job placements, reduced welfare rolls.¹⁵⁴ The regulated entity, whether public or private, would then be held to performance-based standards to meet those goals, flexibly and competitively, by whatever means it considered most effective. Programs that do not meet such performance standards would then be subject to certain sanctions, such as financial penalty, mandatory redesign, or termination.¹⁵⁵ Consistent with this approach, all federal agencies are today required to prepare an annual performance plan with respect to each program activity in its budget, plans that must include measurable performance goals, performance indicators, and a basis for comparing actual results with the performance goals.¹⁵⁶ In

152. See, e.g., DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 138-65 (1992) (arguing that government agencies should be driven by missions that they seek to accomplish and should evaluate their success in terms of results, rather than completion of tasks); MICHAEL BARZELAY, *BREAKING THROUGH BUREAUCRACY: A NEW VISION FOR MANAGING IN GOVERNMENT* (1992) (similar).

153. This, of course, makes the process of adequately defining the desired “outcomes,” with the full participation of stakeholders, extremely critical to the democratic “success” of the model.

154. Pub. L. No. 103-62, §§ 3(a), 4(b), 107 Stat. 285, 286-87 (codified as amended at 31 U.S.C. § 1115-1116(a), (b) (2000)).

155. Under the policy framework of Results Oriented Management Accountability (“ROMA”), created under the Government Performance and Results Act, these latter two consequences apply to the community action programs that survive Johnson’s War on Poverty. As a mandatory reporting framework, ROMA requires CAP agencies to terminate or redesign programs that do not verify specific, measurable permanent changes in client or customer behavior, as documented in client files.

156. These performance-based plans must be provided to the Office of Management and

this way, new governance seeks to promote diversification, pluralization of solutions, and increased competition at the local level, all in the service of common publicly-ratified outcomes.¹⁵⁷

This shift is widely viewed as a decisive departure from the New Deal command-and-control regulatory model – or, more accurate to the welfare administration context, the legal-bureaucratic model that prevailed from the end of the 1960s through 1996.¹⁵⁸ Designed to constrain the arbitrariness and discrimination that often accompanied individualized professional discretion under the prior “social work model,” especially in contexts where race and poverty-based animus was high, that regulatory model aimed to standardize tasks and routinize activities across regulatory entities. Correspondingly, it favored federally-guaranteed entitlement and fixed eligibility standards of general applicability, any arbitrary application of which could be legally challenged in fair hearings before quasi-judicial bodies.¹⁵⁹ The model thus emphasized fixed rules over discretion, centralization over localism, entitlement over reward, and a bureaucratic rather than skilled-professional interface. In adopting the new governance model, the literature of the U.S. Department of Health and Human Services thus describes the change from AFDC to TANF block grants as a shift from a program driven by “absolute rules and policies for compliance,” toward one characterized as “flexible [with] open policies for results.”¹⁶⁰

Yet, while the shift from fixed-rules to competitive discretion opens important spaces for local experimentation in achieving certain desirable results, it also raises the specter of arbitrary decisionmaking and weakened accountability structures, in which power relationships between ground-level administrators and benefit recipients are increasingly mismatched. This is true not only because welfare under PRWORA is no longer a federal entitlement, owed to every eligible individual under state-administered plans and demandable as such, but also because the discretion given to local administrators over eligibility and sanctions now extends far down the food-chain and, most significantly, is linked to result-oriented performance indicators that measure welfare-roll *reduction*, not client-

Budget and Congress each year. See Pub. L. No. 103-62, §§ 3(a), 4(b), 107 Stat. 285, 286-87 (codified as amended at 31 U.S.C. § 1115-1116(a), (b) (2000)) (specifying contents of performance plans). The Government Accounting Office has likewise submitted a report to Congress calling for a more comprehensive national indicators assessment.

157. This is generally done through the use of funding incentives, culture-change trainings, and performance-based evaluation. See discussion *infra* at Part II.B.3.

158. See *supra* text accompanying note 126.

159. Indeed, rejecting the “treatment” or “rehabilitation” focus of the prior supervisory model, it proceeded under the straightforward understanding that poor families need money, not moral guidance, and how they spent it was their own business. The job of the welfare bureaucrat, now “more akin to an assembly line worker than a professional,” was thus limited and defined: verify recipient eligibility in line with objective, predefined criteria, and dispense money. See Diller, *supra* note 48, at 1139-40 (describing model as a “machine-like process of matching up applicants and recipients with the applicable rules and of producing uniform results”).

160. *Id.* at 1168 (citing OFFICE OF FAMILY ASSISTANCE, U.S. DEP’T OF HEALTH & HUMAN SERVS., CULTURE CHANGE TRAINING STRATEGY PROJECT REPORT 4-1 (1996)).

centered fairness, personal needs, or overall human welfare.¹⁶¹ It is this issue of power relationships that stands as a central challenge to entrepreneurial-focused new governance models in a wide diversity of fields, particularly with respect to economically marginal segments of the population and others without preferential access to information and financial markets.

In this regard, it is important to recall that the shift in social welfare policy toward the legal-bureaucratic model in the late 1960s was directed precisely to avoid the arbitrariness, subjectivity, and consequent discretionary abuses of the prior social-work model that had prevailed from the mid-thirties.¹⁶² That model had invested near total discretion in local-level professional caseworkers, who were empowered to make individual benefit determinations on the basis of their own "client need" perceptions, stereotypes, cultural understandings, and sense of whether an applicant was of worthy moral character.¹⁶³ The legal-bureaucratic model sought to avoid the built-in potential for arbitrariness in this subjective approach, requiring that states set objective need-based rules to govern eligibility, rules to which they could then be held by recipients in individual fair hearings and by federal agencies in broader conformity or

161. It has been noted, for example, that Georgia's heralded eighty percent decline in TANF caseload between 2004 and 2006 was linked to new application procedures that, by increasing denials for procedural reasons unrelated to need, cut application approval rates in half. See LIZ SCHOTT, CTR. ON BUDGET & POLICY PRIORITIES, GEORGIA'S INCREASED TANF WORK PARTICIPATION RATE IS DRIVEN BY SHARP CASELOAD DECLINE (2009), <http://www.cbpp.org/files/3-6-07tanf.pdf>. The same was true with respect to New York City's sixty-one percent decline in TANF caseload from 1997 to 2008. See FED. OF PROTESTANT WELFARE AGENCIES, THE STATE OF NEW YORK'S SOCIAL SAFETY NET FOR TODAY'S HARD TIMES 7 (2009), http://www.fpwa.org/binary-data/FPWA_BINARY/file/000/000/127-3.pdf.

162. These abusive applications, increasingly challenged in popular movements of the 1960s and, in many cases, struck down by the U.S. Supreme Court, included racially discriminatory and selective provision of grant information, demeaning and moralistic oversight of spending and lifestyle choices, and invasive intrusions on privacy through home-visits, man-in-the-house rules, midnight raids, and other invasive verification procedures designed to distinguish between morally "deserving" and "undeserving" households. These abuses only increased with the growing African-Americanization of the welfare rolls in the 1960s. See, e.g., MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, at 46 (1993) (describing wide variation in allocation of discretionary grants among recipients with the same level of need); WINIFRED BELL, AID TO DEPENDENT CHILDREN 181-86 (1965) (describing methods that excluded African-Americans from coverage); Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347, 1347 (1963) (describing midnight raids against welfare recipients that implicitly disadvantaged racial minorities).

163. Reaching its apogee in the early 1960s, the "social work model" embraced a casework methodology in which a professional social worker worked with poor mothers under a "treatment" or "rehabilitation" approach in which they sought to impart the skills, tools, and material resources necessary to create safe and moral home environments for children. With an emphasis on partnership and taking individualized needs and circumstances into account, the model eschewed one-size-fits-all solutions. Rather, it called for broad subjective assessments of family needs and discretionary assistance in line with professional judgment and integrated service-delivery goals. For a strong defense of this professional discretionary model, see William Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

practice hearings.¹⁶⁴

The move back towards discretion and flexibility in PRWORA responds to certain inefficiencies and false incentives in the legal-bureaucratic model,¹⁶⁵ and a sense that welfare reform requires a new “change in culture” (“from complacency to initiative”) in the way welfare is administered – both for recipients and administrators. Entitlements and fixed rules, it is said, foster dependency and sap initiative.

In an effort to reinvigorate the “competitive spirit” of both recipients and administrators, PRWORA thus proceeds along four interrelated lines, each aimed toward the replacement of rules for low-level discretion. First, it removes the federal entitlement aspect of welfare, preventing recipients from claiming a “right” to anything and administrators from dispensing benefits as a “right.” It then grants broad discretion to ground-level welfare workers to deny benefits or remove people from the rolls for a series of non-need-based reasons, including work or life-style training requirements, aggressive use of sanctions for minimal infringements thereof (to “motivate” recipients),¹⁶⁶ life-time limits,¹⁶⁷ and diversionary programs that seek to dissuade, sometimes quite abusively, potentially eligible individuals from applying for benefits.¹⁶⁸ Third, those discretionary decisions are then tied to roll-reduction benchmarks and performance-monitoring systems, such that workers in fact face institutional incentives to deny benefits, sanction, or otherwise dissuade eligible individuals from applying.¹⁶⁹ Given their operation to restrain excessively generous

164. PRWORA does require that state plans “set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment, including an explanation of how the State will provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process.” 42 U.S.C. § 602(a)(1)(B)(iii) (2006). Nonetheless, it is not clear how this can be enforced. These “criteria” remain, moreover, subject to the flexible approach that invests substantial discretion in ground-level administrators to deny assistance for a wide variety of non-need-related factors, such as sanctions, diversion programs, time-limits, and other factors that help them achieve their incentive-based goals of competitive roll reduction.

165. Indeed, a seemingly rational response to the rampant abuses of the social-work model, the legal-bureaucratic model itself came under growing attack through the 1980s and 1990s from conservative and liberal critics alike. While liberals argued that the model had become “legalistic and overly rule-bound,” conservative critics denounced the entitlement culture it had created, which, they argued, sustained dependency, and in which recipients were seen to have “rights, but no obligations.” Diller, *supra* note 48, at 1145-46.

166. In fact, during a study of one three-month period in 1998, “almost forty-percent of recipients who left welfare did so because of sanctions.” See Diller, *supra* note 48, at 1159-60 (citing Barbara Vobejda & Judith Havemann, *Sanctions: A Force Behind Falling Welfare Rolls; States Are Cutting Off Tens of Thousands Who Won't Seek Work or Follow Rules*, WASH. POST, Mar. 23, 1998, at A1).

167. PRWORA limits benefit receipt to five years and permits states to impose shorter time limits. 42 U.S.C. § 608(a)(7) (2006).

168. These built-in aspects of PRWORA expand worker discretion significantly by investing the worker with power over whether to apply exemptions in any particular case and what information to convey to clients. See, e.g., Emily Bazelon & Tamara Watts, *Welfare Time Limits on the Ground: An Empirical Study of Connecticut's Jobs First Program*, 32 CONN. L. REV. 717, 757-59 (2000) (noting that lack of guidelines gave caseworkers “unbounded discretion” in making good cause determinations concerning extension of time limits).

169. See, e.g., Stephanie Mencimer, *Brave New Welfare*, MOTHER JONES, Jan.-Feb. 2009

administration of a program, David Super refers to these types of performance incentives and auditing systems as “counter-entitlements.”¹⁷⁰ And, fourth, a federal “culture change” promotion program seeks to assist local workers by channeling the exercise of their discretion toward acting as coaches, motivators, and cheerleaders for “self-sufficiency.” As one commentator has summarized, “workers are given license to exhort, advise, and ultimately threaten clients, while clients are disabused of the notion that they have rights and can make demands.”¹⁷¹

While this informalization of the welfare exchange may help some recipients – and has, indeed, led to significant declines in the national welfare rolls – it also opens the door to new types of arbitrary administration and unbalanced power relationships, as decisions are increasingly made at levels so low as to evade traditional public oversight mechanisms.¹⁷² Indeed, clients are dropped from the rolls for such “offenses” as a family member missing a single appointment for a job interview or may be denied benefits for a series of reasons unrelated to need.¹⁷³ National and state-level surveys conducted by the Department of Health and Human Services in fact reveal that a substantial fraction of families may remain eligible for assistance at the time their case is closed.¹⁷⁴ While ground-level workers can, within certain limits, make discretionary

(documenting instances in which caseworkers falsely tell welfare applicants that eligibility rules prevent them from applying for assistance if, for example, they are pregnant or have not been surgically sterilized).

170. See David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CAL. L. REV. 1051, 1058 (2005).

171. Diller, *supra* note 48, at 1219 (“Although cloaked in the rhetoric of ‘partnership’ and ‘empowerment,’ the new system of welfare administration substantially redistributes power between clients and ground-level workers. Workers are given license to exhort, advise, and ultimately threaten clients, while clients are disabused of the notion that they have rights and can make demands.”).

172. The TANF rolls have indeed declined almost continuously since PRWORA was enacted. From 1996 to 2008 the monthly average of 4.4 million enrolled families declined to 1.7 million. The Department of Health and Human Services documents this participation rate as declining from eighty-four percent of eligible families in 1995, the last full year of AFDC, to forty percent of eligible families in 2005. U.S. DEP’T OF HEALTH AND HUM. SERVS., INDICATORS OF WELFARE DEPENDENCE: ANNUAL REPORT TO CONGRESS 2008, tbl. IND 4-a, *available at* <http://aspe.hhs.gov/hsp/indicators08/ch2.shtml#ind4>. Given increases in unemployment and significant increases in applications for food stamps during the very same period, it appears that decreased participation of families in TANF is not due to decreased family poverty, but rather to disincentives to application. See, e.g., Mencimer, *supra* note 169, at 41 (noting that nearly 11 million more people received food stamps in 2008 than did in 2000, even as TANF receipt declined by forty percent, while reporting a ninety percent decline in adults receiving benefits in Georgia – down to fewer than 2,500 in 2008 from 28,000 in 2004 – and an eighty percent decline in Louisiana, Texas, and Illinois since January 2001).

173. Life-time limits apply, moreover, even where a former recipient has no chance of success on the competitive job market.

174. U.S. DEP’T HEALTH & HUMAN SERVS., INDICATORS OF WELFARE DEPENDENCE ANNUAL REPORT TO CONGRESS 2008, at tbl. IND 10a, *available at* <http://aspe.hhs.gov/hsp/indicators08/ch2.shtml#ind10>. For summary of key findings of surveys, see H. COMM. ON WAYS & MEANS, 110TH CONG., BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 2008, at 7:84-7:86 (2008), *available at* <http://waysandmeans.house.gov/Documents.asp?section=2168>.

decisions to avoid such abusive results,¹⁷⁵ they also have the unfettered power not to do so, a power supported by significant financial and institutional incentives. This makes seeking the approval of the caseworker imperative and, coordinately, questioning or challenging her perilous.¹⁷⁶ As Diller notes, "In the new regime, recipients must recognize the greatly enhanced position of the worker, or risk the consequences."¹⁷⁷

From this perspective, while the move from fixed rules to caseworker discretion has in fact served certain formally-sanctioned ends – i.e., national welfare roll reduction – it is not clear at all that it has improved client welfare. Stories from the grassroots, and national statistical surveys, make plain that it has not.¹⁷⁸ The failure of the program to systematically measure performance indicators related to human well-being and security speaks to this power of flexible discretion to breed arbitrariness and abuse – at least in the absence of more human-friendly performance measures and other framework accountability mechanisms.

3. Orchestration through Performance Monitoring

The third principal tenet of new governance – legal orchestration – is perhaps the most operationally important feature of the model and, when effectively deployed, can serve as a powerful mechanism for channeling discretion toward desired ends at the local level. Specifically, it can function to avoid or minimize the arbitrariness that may result from decentralized, results-oriented policies. Indeed, as Professor Lobel has noted – and President Johnson put into practice through his creation of a national Office of Economic Opportunity – legal orchestration is what "renders all other aspects of the governance model meaningful, separating the model from flat processes of devolution and deregulation."¹⁷⁹ Following the subsidiarity principle,¹⁸⁰ legal orchestration thus functions to prevent the isolation or abandonment of decentralized initiatives, ensuring that

175. See Diller, *supra* note 48, at 1166. Noting the positive side of the shift to discretion, Diller observes that "[a] system in which workers can help clients find jobs and obtain necessary supports such as child care and transportation has advantages over a system in which workers simply complete paperwork." Nevertheless, "[u]nless agencies provide workers with the tools and resources to enable them to offer meaningful assistance . . . these benefits are likely to be more rhetorical than real." *Id.* at 1166.

176. See, e.g., Mencimer, *supra* note 169, at 42 (documenting requests for sex made to recipients by male caseworkers).

177. Diller, *supra* note 48, at 1166; see also *id.* at 1172 (observing that welfare thereby moves closer to the uncertainty of low-wage, at-will employment, with powerful caseworkers able to make eligibility determinations largely without oversight or accountability to the client).

178. See, e.g., statistics cited at note 24, *supra*.

179. Lobel, *supra* note 130, at 400.

180. Indeed, just as subsidiarity does not tolerate preemption of smaller social or political units, neither does it support wholesale devolution to them. See generally Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103 (2001) (arguing that the "compassionate conservatism" platform of the Republican party purports to enact the lessons of Catholic teachings on subsidiarity, but in so doing advocates wholesale devolution to local authorities, neglecting subsidiarity's core focus on assistance from higher authorities).

they are linked together within a supportive federal framework. Through this framework, national and regional authorities can observe the plurality of proliferating practices that emerge in the market, intervening with a facilitative hand for purposes of “scaling up, facilitating innovation, standardizing good practices . . . researching and replicating success stories from local or private levels,”¹⁸¹ and communicating information to all stakeholders transparently and comprehensively. In this way, it is said, orchestration has the potential to result in a “virtuous cycle of innovation and improvement.”¹⁸²

Such orchestration generally involves three principal types of activities: (a) goal articulation and identification of performance indicators; (b) performance monitoring and incentivizing through federal supports; and, (c) the channeling of local discretion through training programs and public outreach. We look at each in the context of the 1996 welfare reform.

a) Performance Goals, Indicators, and Targets

Successful orchestration of an increasingly decentralized and pluralized marketplace generally requires that a common set of goals, objectives, or policy outcomes are identified and assumed as a community project. To ensure progressive achievement of these common goals, a set of performance indicators must then be developed to measure intrajurisdictional outcomes and, correspondingly, to assess the relative “success” or “failure” of different models in the market.¹⁸³ These are often accompanied by “targets” designed to incentivize a given level of performance achievement within a defined timeline. Such a performance-based model means, of course, that the adequacy of the process for determining performance measures is of vital importance to the democratic legitimacy of the larger governance project. Otherwise, orchestration may

181. Lobel, *supra* note 128, at 401.

182. PAUL OSTERMAN ET AL., WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET 178 (2001). In promoting the National Policy on Reinventing Government, President Clinton acknowledged this federal duty as “put[ting] the M back in the OMB [Office of Management and Budget].” Clinton Remarks, *supra* note 127. That is, government must be given a greater role in “managing” or coordinating change at the local level, even while allowing precise means to be determined by local administrators and workers. The federal government’s role is thus “less one of direct action than one of providing financial support, strategic direction, and leadership for other governmental actors. . . . mobilizing resources, encouraging experimentation, facilitating comparison and evaluation of alternative approaches, and diffusing the best practices.” OSTERMAN, *supra*, at 151.

183. Performance indicators are established in a wide variety of recent U.S. statutes. *See, e.g.*, Workforce Investment Act of 1998, 29 U.S.C. § 2871 (2006) (listing core performance indicators to be used to evaluate state workforce investment activities). The U.S. Government Accountability Office (GAO) is in fact exploring options for the creation of a National Indicator System to help the U.S. assess its position and progress, both nationally and within the larger world. *See generally* GAO, INFORMING OUR NATION: IMPROVING HOW TO UNDERSTAND AND ASSESS THE USA’S POSITION AND PROGRESS (2004) (report to Congress) [hereinafter GAO, INFORMING OUR NATION] (surveying current state of practice in indicator systems worldwide and discussing options for Congress to consider in identifying an organization to develop and implement a national system).

function to be jurispathic,¹⁸⁴ closing off spaces for legitimate or sanctioned participation of particular actors and thus contributing to democratically distorted policy outcomes or mis-signals to the “market” on what constitutes policy-based success. In the public policy sphere, this will occur most frequently where policy goals are identified in ways that do not authentically correspond to improvements in human well-being, or are oriented too much toward economic criteria rather than social ones.¹⁸⁵

In the welfare context, identifying the primary “goal” of public policy has been a perennial and hotly contested challenge over the last four decades.¹⁸⁶ As Professor Edelman has noted, the contest has revolved around two competing “stories” of U.S. poverty: the “structural” and the “pathological.”¹⁸⁷ The structural story sees welfare recipients as facing external obstacles to achieving self-sufficiency, including underlying economic conditions and barriers to work such as lack of skills, racial and ethnic discrimination, training, education, child care, and lack of reasonable accommodation. “It says people are willing to work if jobs are available for which they are qualified, if they are better off working than not working, and if they can find care for their children while they are at work.”¹⁸⁸ Under this view, the “goal” of welfare policy might be said to be removing structural barriers to opportunity. Performance indicators would then measure such factors as the number of available jobs, the number of people in training programs and their success rate in finding and staying in jobs over time, the ratio of child care need to provision, and other similar indicators of opportunity or well-being.

184. Robert M. Cover, *The Supreme Court, 1982 Term – Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 40-44 (1983) (coining term “jurispathic” to represent the violence of state-sanctioned legal ordering upon other non-state-sanctioned normative orders).

185. The European Union engages in an intergovernmental means of governance called the Open Method of Coordination (OMC), which is based on soft law mechanisms such as guidelines and indicators, benchmarking and sharing of best practices. *See generally* Trubek & Trubek, *supra* note 133 (discussing the OMC in relation to European integration). While the OMC has proved quite successful in many areas, such as employment law in the member states of the EU, *see, e.g., id.* at 350-51, it has been argued that the quality of the indicators in the field of social protection is not high enough and that this has limited the effectiveness of the OMC process in that area. *See, e.g.,* Council of European Municipalities and Regions, *Summary of Key Recommendations from CEMR for the Streamlining of the OMC in Social Fields*, Part 3, http://www.ccre.org/prises_de_positions_detail_en.htm?ID=52 (last visited Mar. 19, 2009) (noting that national level indicators sometimes fail to capture the diverse situations between and among different member states such that local level indicators more successfully reflect the realities of poverty). In this sense the choice of indicators is of vital consequence for new governance initiatives in all of its global manifestations.

186. This four-decade focus is owed to the fact that, until the 1960s, poverty in America was still broadly attributed to the Great Depression. By the 1960s, there was public recognition that poverty persisted even in times of great economic prosperity, and hence public tools needed to be employed to address it. *See supra* note 66 and accompanying text.

187. Edelman, *Silver Bullet*, *supra* note 8, at 1700-01; *see id.* at 1702 (coining terms and noting that, by 1993, the two stories “have been competing in a historical epoch of about three decades duration”). These stories may be contrasted to prominent economists’ views in the 1950s, including those of John Kenneth Galbraith, Milton Friedman, and Robert Theobald, who promoted a national guaranteed income or a close variant on very different grounds. *See infra* notes 249-250.

188. Edelman, *Silver Bullet*, *supra* note 8, at 1701.

The “pathological” story, by contrast, holds that the problem is the poor themselves: “they prefer to be dependent, will not work unless coerced, and have bad morals; government programs to help them just make matters worse, cementing them in their dependency with its associated depravity.”¹⁸⁹ President George H.W. Bush articulated this popular view in a 1991 speech, arguing that “programs intended to help people out of poverty invited dependency.”¹⁹⁰ Professor Diller has alternatively described the story as viewing recipients as “too depressed and unmotivated to take control of their lives and therefore need[ing] a strong dose of both exhortation and threats to get them moving.”¹⁹¹ Under this pathological view, the role of government is to get them, and keep them, off welfare as a way to break the cycle of dependency. “Success” of any welfare program, therefore, is measured by how quickly the number of welfare recipients in any single program declines.

The 1996 welfare reform represented in many ways the victory of this latter story in the construction of federal welfare policy.¹⁹² As a result, getting people off of welfare and into the workforce – to be “self-sufficient” or “personally responsible,” understood to mean off the public dole – was the primary goal articulated under the PRWORA.¹⁹³ Welfare roll reduction, as an easily measurable (if inadequate) proxy for that goal was, consequently, the most directly responsive indicator of a “successful” program. In recognizing this, the U.S. Department of Health and Human Services developed training materials for state welfare reform administrators in which it recommended that local welfare workers be told directly that their performance would be evaluated in accordance with the new goals of the program: “Your main objective is to get clients off of welfare and into the workforce and assist the clients in learning what it takes to maintain a job.”¹⁹⁴ Consequently, TANF caseload reduction has become the most common performance measure used by local welfare agencies. “Political leaders now compete for the largest declines in welfare enrollment. Where enrollment has not plummeted as quickly as elsewhere, welfare reform is deemed a failure.”¹⁹⁵

While other indicators of a successful program are likewise monitored – such as the number of former recipients now in jobs¹⁹⁶ – these indicators

189. *Id.* at 1700.

190. R.W. Apple, Jr., *Bush Says Largesse Won't Help Cities*, N.Y. TIMES, May 7, 1992, at A22 (quoting President George H.W. Bush).

191. Diller, *supra* note 48, at 1127.

192. Certain members of the Department of Health and Human Services consequently resigned in protest. See Peter Edelman, *Responding to the Wake-Up Call: A New Agenda for Poverty Lawyers*, 24 N.Y.U. REV. L. & SOC. CHANGE 547, 547 n.* (1998) (noting own resignation).

193. 42 U.S.C § 601 (2006) (naming purpose of TANF block grants as helping States to “end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage.”).

194. Diller, *supra* note 48, at 1168-69 (quoting OFFICE OF FAMILY ASSISTANCE, U.S. DEP'T OF HEALTH & HUMAN SERVS., CULTURE CHANGE TRAINING STRATEGY PROJECT REPORT at Course 1, mod. 2, p. 11-12 (1996)).

195. *Id.* at 1183.

196. *Id.* (“Almost as many TANF agencies report collecting data on job entries as on

do not tend to be tracked over time and do not measure the “quality” or “appropriateness” of the jobs or whether they have in fact led to improved outcomes for the job-holders and their families. At the same time, the economic security of the eligible recipients who are increasingly turned away from welfare programs through the increase in diversion policies generally are not tracked at all. This stands as a noteworthy omission in a regime centered on achieving positive “outcomes.” As Diller observes, “[t]he absence of performance measures for a subject can speak as clearly to the purposes of the program as their inclusion.”¹⁹⁷ In the case of welfare reform, with a federally-orchestrated goal of “jobs first” – measured principally through comparative caseload reduction – the question of whether people are better-off or worse-off in terms of their access to healthcare, food sources, appropriate jobs, education, and other general indicators of well-being simply is not deemed relevant to successful achievement of the primary goal of welfare reform. Accordingly, such outcomes are not measured as performance indicators for a “successful” program. This may be viewed as one of the system’s primary accountability failures. It is an area to which we will return below.

b) Information Disclosure and Incentive Systems

Once a clear goal or set of goals and corresponding performance indicators are identified, successful orchestration generally requires that a wider system of information-sharing be established through which performance indicators can be measured and comparative results assessed and communicated to all relevant stakeholders. Through funding incentives and other inducements to exemplary goal achievement, a competitive environment is thus stimulated in which stakeholders strive to achieve certain performance outcomes and vie for top-finisher status.

Under PRWORA, the federal government has sought to stimulate stakeholder competition around the primary goal of “welfare roll reduction” through three principal devices. First, it transformed welfare from an individual entitlement regime into a fixed block grant program.¹⁹⁸ Delinking welfare funding from actual numbers of eligible recipients, it thus functions to reward with windfall “profits” those states that reduce their rolls, while disadvantaging those that do not.¹⁹⁹ Second, it offers

caseload reduction.”).

197. *Id.* at 1186.

198. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 602 (2006).

199. Nationally, the number of recipients of AFDC and its successor, TANF, declined forty-two percent between 1993 and 1998. *See* Diller, *supra* note 48, at 1123. This occurred even while the number of households with incomes below fifty percent of the poverty level increased, even in the robust economy of the late nineties, and the average disposable income of the poorest single-parent families declined. *Id.* Indeed, the fact that declining TANF receipt does not correlate with actual decreases in need is underscored by the fact the numbers of those receiving food stamps – which were exempt from PRWORA and remain federally-guaranteed individual entitlements – has continued to increase, even as TANF receipt

federal financial incentives to the highest-scoring states on a series of performance measures contained in PRWORA.²⁰⁰ And, third, it creates an annual ranking system of states on those same issues, in an attempt to get them to compete for bragging rights and to avoid being judged the “worst” among peers.²⁰¹

For their part, states have tended to jump into the competition, often seeking to improve their own competitive edge by extending these incentive systems to their own localities and private service contractors. Many states have thus, for example, extended the block grant concept downward and outward, allowing local providers and private contractors to keep all or most of any block grant “savings” achieved through their own caseload reduction.

Significantly, *how* programs get roll numbers to decline is largely inconsequential to this competitive system: *means* are left to the discretion of the local welfare agency and *process* indicators are generally not measured.²⁰² What matters is that numbers *in fact* go down. The system thus, wittingly or unwittingly, creates incentives to reduce caseloads by any means possible, including through means that make it more difficult for “eligible” individuals to obtain benefits initially and to maintain eligibility once on the rolls.²⁰³ Programs that emphasize overzealous diversionary programs, abusive sanctions, and arbitrary barriers to eligibility may thus be held up as “successful” models to be emulated in a competitive system, with the government sharing such “success” stories, providing financial incentives, and seeking the “scaling up” of best practices.²⁰⁴

declined. See Mencimer, *supra* note 169, at 41. The Government Accountability Office found in 2006, moreover, that many states were moving federal welfare funds away from cash assistance to the poor, or even “work supports” like childcare, to plug holes in state budgets. *Id.* Notwithstanding, in twelve years federal regulators have cited states only 11 times for misusing their TANF block grant. *Id.* at 44 (noting that Georgia spokesman for administration for Children and Families noted “As far as the federal government is concerned, it’s not a big problem”).

200. See, e.g., 42 U.S.C. § 603(a)(4) (2006) (providing bonuses for “high performance” states).

201. 42 U.S.C.A. § 613(d)-(e) (providing for annual ranking of state work programs and for annual ranking of states by rate of out-of-wedlock births).

202. See text accompanying *infra* note 392 for more on process indicators.

203. See, e.g., Mulzer, *supra* note 126, at 689-700 (citing examples of stringent verification procedures that cause erroneous deprivations, discourage applications, and lead to routine invasion of claimants’ privacy); Mencimer, *supra* note 169, (citing examples of fraudulent requirements expressed to claimants to discourage them from applying, as well as procedures to prevent restoration of benefits once lost in Georgia, Texas, and Florida).

204. See Mencimer, *supra* note 169, at 43-44 (noting “rock star” status of Georgia commissioner for Department of Human Resources as a result of her “push to get virtually every adult off the state’s public assistance rolls”; noting also how Bush administration officials brought her to Washington for a photo-op and declared Georgia a model for other states); Diller, *supra* note 48, at 1183 (“Political leaders now compete for the largest declines in welfare enrollment. Where enrollment has not plummeted as quickly as elsewhere, welfare reform is deemed a failure. In fact, TANF caseload reduction is the most common performance measure used by local agencies.”). For statistics from states on bragging rights, see *id.* n.323.

This reality underscores the critical need to ensure that performance measures are designed in such a way that they in fact serve as a metric for human wellbeing, rather than simply for raw service (or non-service) delivery targets.²⁰⁵ While identification of such human-centered performance measures may be complex in practice, given the high number of variables often implicated, it is a central accountability challenge that new governance must confront.

c) Training and Outreach to Promote New Behaviors

The third mechanism through which legal orchestration is achieved involves training and outreach designed to change the culture of welfare administration agencies – shifting job perception from simple arms-length dispensers of checks to personal motivators for “self-sufficiency” – and hence to channel the way that discretion is exercised by ground-level employees within them. This emphasis on governing through the use of channeled discretion is prominent in many areas of public administration, an approach borrowed from developments in private sector management.²⁰⁶

The U.S. federal government has, correspondingly, played an active role in promoting its particular understanding of welfare reform through training and outreach programs directed to state and local-level welfare administration agencies. As has been noted, “Underpinning this approach is an assumption that the principal problem facing welfare recipients is perceptual: They believe they cannot succeed in the job market and this belief is itself the fundamental barrier to success.”²⁰⁷ Training and outreach has thus sought to encourage welfare workers to use their new broad discretion to “motivate” recipients or applicants out of the public-welfare system and toward “self-sufficiency.” This message was explained in a 1999 report on welfare reform in five major U.S. cities:

If recipients are to understand the importance of work and the reality of the time limits [in PRWORA], then *welfare agency staff members must deliver a very different message* than the one they gave to clients in the past. This new message – one that emphasizes the temporary nature of assistance and the responsibility of parents to support themselves and their children – must be communicated

205. A similar concern has been expressed in the criminal justice context where numbers of persons prosecuted often substitute for conceptions of “doing justice.” See Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL’Y REV. 1, 3 (2007) (expressing concern “about numbers becoming an end or target in criminal justice, becoming the value rather than serving as a technology toward higher aims and principles”).

206. See Super, *supra* note 170, at 1077. As mentioned, David Super refers to practices of this kind as “counter-entitlements” – auditing systems that seek to restrain excessively generous administration of a program. *Id.* at 1077 n.23.

207. Diller, *supra* note 48, at 1170.

clearly, consistently, and with considerable urgency.²⁰⁸

This message tracks that of the Department of Health and Human Services, which published a series of training materials in 1996 to accompany PRWORA and to serve as a prototype for the desired cultural transformation of state welfare agencies. *The Culture Change Training Strategy Project Report*, for example, proclaims that “the reinvention of welfare requires a radical organizational culture change that shifts the focus of AFDC/JOBS from an entitlement to temporary assistance leading to work.”²⁰⁹ It promotes the complete re-envisioning of the role of agency personnel, away from entitlement bureaucrats and toward motivators, guides, and overseers of recipients, constantly promoting the message of self-sufficiency.

This emphasis on the new role of welfare workers thus returns to core aspects of the social work model, particularly in the partnering relationship foreseen between social work professionals and individual welfare recipients in urging them to change their outlook on work, the home, and self-sufficiency.²¹⁰ As Professor Diller observes, as a strategy to change the expectations and “culture” of welfare recipients, these “materials train workers to be relentlessly upbeat about recipients’ prospects for work:” to “smile rather than frown,” to point out the positive rather than negative side of employment rates, to emphasize individual strengths rather than barriers to employment, to discuss the value of nondependence, and thereby to “assist clients in changing their viewpoints and accepting work as an ‘achievable means of self-sufficiency.’”²¹¹

These materials thus urge local agencies to transform their role, moving away from the provision of material assistance toward recipient motivation and the marketing of “personal responsibility.”²¹² The aim thereby is to encourage recipients to divert *themselves* out of the welfare system – either because they buy in to the marketing or, more likely, because of the new hurdles to obtaining benefits and/or retaining their eligibility for them. For example, recipients in many states are today required to sign “personal responsibility agreements,” breach of which constitute sanctionable offenses.²¹³ It is this below-the-surface set of

208. JANET QUINT ET AL., *BIG CITIES AND WELFARE REFORM: EARLY IMPLEMENTATION AND ETHNOGRAPHIC FINDINGS FROM A PROJECT ON DEVOLUTION AND URBAN CHANGE* 10 (1999). The report also notes statements by L.A. Department of Public Social Services officials that “if welfare reform is to be successful in Los Angeles County, the mind-set of eligibility workers, and the culture and environment of the eligibility offices that shape that mind-set, must undergo a fundamental transformation.” *Id.* at 99.

209. Diller, *supra* note 48, at 1167 (quoting OFFICE OF FAMILY ASSISTANCE, U.S. DEP’T OF HEALTH & HUMAN SERVS., *CULTURE CHANGE TRAINING STRATEGY PROJECT REPORT* 3-4 (1996)).

210. See *supra* text accompanying note 163.

211. Diller, *supra* note 48, at 1169 (citing various passages from Department of Health and Human Services training course materials).

212. *Id.* at 1170.

213. *Id.* at 1157-58. According to Diller,

Responsibility ‘agreements,’ in effect, permit administrators to create new sanctionable offenses. . . . For the most part, such agreements are simply

changes in the way welfare is locally administered by ground-level employees that, many believe, is primarily responsible for the rapid declines in the national welfare rolls.²¹⁴ While the legal-bureaucratic model sought to constrain this discretion,²¹⁵ new governance actively re-embraces it.

4. Pluralization (and "Softening") of Flexible Compliance Measures

A fourth organizing principle of the new governance model is a preference for so-called "cooperative" or "soft" methods of enforcement, rather than "hard" coercive sanctions, as the most effective means of influencing the administration of service provision. Thus, while federally-enforced civil fines, funding cuts, criminal prosecutions, injunctions, and other rule-based enforcement orders vis-à-vis service providers were the hallmark of command-and-control regulation, new governance advocates a shift away from such adversarial legalism toward greater constructive collaboration between partners. Voluntary codes of conduct, peer competition and pressure, self-adopted equal employment policies, codes, and diversity training programs are, therefore, preferred methods of ensuring administrative program compliance with general federal performance goals.²¹⁶ At the same time, there is a preference for leaving some practices unsanctioned or only partially regulated to encourage experimentation in preventive policymaking.²¹⁷

The theory behind this shift is that problem-solving in an increasingly complex world requires the identification of shared goals among a wide array of social actors. This, in turn, often requires abandoning entrenched positions that construct other actors as the problem rather than as partners in a solution. By removing the ability to construct adversarial positions, a

an additional set of rules laid down by the agency or its workers. For example, in West Virginia, personal responsibility 'contracts' can include commitments that parents attend parenting classes and seek training for skills like 'business etiquette and family budgeting.'

Id. at 1158.

214. It is also the way other "successful" national models of welfare administration, such as that of Japan, have sought to keep rolls down and welfare rates flat despite increasing income gaps and economic marginalization. These models have sought to ensure that welfare is seen not as an entitlement, but as a shameful handout, with city welfare workers empowered to impose discretionary obstacles on the application process and worker promotions tied to roll reduction quotas. See Norimitsu Onishi, *In Death Diary, Japan Welfare Is Cast as Killer*, N.Y. TIMES, Oct. 12, 2007, at A1.

215. See *supra* note 159.

216. See, e.g., Lobel, *supra* note 128, at 388-95, 419-21 (discussing shift toward flexibility and noncoerciveness in new governance regimes, including specifically in employment discrimination context).

217. See, e.g., *id.* at 421; Ian Ayres & John Braithwaite, *Partial-Industry Regulation: A Monopsony Standard for Consumer Protection*, 80 CAL. L. REV. 13, 14 (1992) (arguing superiority of "partial-industry regulation" over "all-or-nothing regulatory policies"). See also Mencimer, *supra* note 169, at 49 (noting federal regulators cited states only eleven times in twelve years for misusing their TANF block grant, even though Government Accountability Office has found significant diversion of funds).

climate of cooperation, it is believed, will be more effective in finding sustainable solutions to community problems.²¹⁸

This approach nonetheless represents a fundamental shift away from the adversarial legalism that has been central to recipient-agency interactions in the welfare context for years and a crucial way for recipients to assert power and accountability in the otherwise unequal welfare relationship. At the individual client level, such power has been asserted through the increasing use of “fair hearings” since the late 1960s to contest arbitrary agency decisions and to give recipients voice in the process.²¹⁹ At the systems level, it has occurred through federal conformity hearings and practice suits that have challenged broader system-wide decisions with arbitrary effects on the poor.²²⁰ Both mechanisms relied in large part on the federal entitlement nature of welfare under AFDC and the substantive federal requirements it imposed on state plans to administer it.

PRWORA, by contrast, has moved in the direction of noncoercive enforcement mechanisms. This is evident both in PRWORA’s emphasis on incentive systems, state performance rankings, and competition for bragging rights and, coordinately, in its effort to defederalize and delegatize welfare assistance. The effect of the latter has been to weaken or remove the prior tools used by recipients to coerce state compliance with federal rules. Indeed, from 1935 to 1996, welfare was deemed an entitlement to which all eligible recipients were entitled as a matter of federal law.²²¹ The 1996 statutory framework for the TANF program jettisons this foundation of the legal-bureaucratic model. Under the title “no individual entitlement,” PRWORA expressly stipulates that the TANF framework “shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.”²²²

218. Lobel, *supra* note 128, at 377. This approach is nonetheless linked to an assumption that the goals of welfare administration are readily definable and free of significant conflicts, which they are not.

219. See, e.g., Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1246 (1965) (“[Social Security] Act requires that states afford an opportunity for a fair hearing to any individual whose claim is denied or not acted upon with reasonable promptness . . .”); A. Delafield Smith, *Public Assistance as a Social Obligation*, 63 HARV. L. REV. 266, 266-68 (1949) (“All three of the federal [public assistance] titles require the state, as one of the conditions of the federal grants, to give the applicant the opportunity of a fair hearing before the state administrative agency.”).

220. See KORNBLUH, *supra* note 47, at 173-74 (discussing NWRO’s use of conformity hearings in late 1960s and early 1970s). But see NICK KOTZ & MARY LYNN KOTZ, *PASSION FOR EQUALITY: GEORGE A. WILEY AND THE MOVEMENT 197* (1977) (noting that HEW brought few enforcement actions to bring state welfare rules into conformity with federal regulations, even as it found, in 1966, that 39 of 50 states were operating their welfare systems out of compliance with those regulations – granting the least amount of money to the fewest possible people).

221. The federal entitlement nature of welfare under AFDC, established in the 1935 Social Security Act, was confirmed by the U.S. Supreme Court in *King v. Smith*, 392 U.S. 309 (1968). While states were granted substantial discretion in setting local levels of need, *id.* at 318 (citing H.R. Rep. No. 74-615 at 24 (1935); S. Rep. No. 74-628 at 36 (1935)), federal law required that those meeting eligibility requirements be paid and that any adverse decision could be challenged through an administrative fair hearing process. See 42 U.S.C. § 602(a)(4) (1994) (repealed 1997).

222. 42 U.S.C. § 601(b) (2006).

Accordingly, to the extent that any legal entitlement to welfare is retained, it is a state entitlement that can be raised, lowered, or rescinded by state legislatures at will, without federal regulatory oversight.²²³

These changes have had significant consequences for the accountability of service providers to recipients. Defederalization makes it far harder, for example, to challenge state welfare abuses through traditional adversarial means. Federal conformity hearings cannot proceed in the absence of standards to which states must conform. Practice suits are extremely difficult to bring, while fair hearings are individual-oriented and, as discussed, far less effective where welfare workers have control over a wide variety of welfare tasks and hence enhanced leverage over beneficiaries.²²⁴ While most states offer state-level procedural protections for administrative abuse through their own Administrative Procedure Acts ("APAs"), state APA provisions generally do not extend to the localities and private contractors to which welfare administration is increasingly devolved.²²⁵

5. Stakeholder Participation

Such weakening of traditional accountability tools and changes in client-administrator power relationships raise substantial issues for the fifth, and final, organizing principle of new governance: increased stakeholder participation. Indeed, one of the most attractive ideas underlying new governance theory and policy is that it opens the door for greater civil society participation in the crafting of social policies and public policy decisionmaking, thus pluralizing the exercise of normative authority. As one commentator has enthused, "[n]ew governance policies seek to enable individuals and organizations to act as private attorney generals and to block watch public action."²²⁶ The idea is that those affected by public policies – its stakeholders – can play a decisive role in monitoring public action to ensure that it meets community standards.²²⁷

223. See Diller, *supra* note 48, at 1146 (noting that PROWORA not only lacks any requirement that eligible families be paid, but also greatly restricts the federal government's ability to regulate how welfare is provided).

224. This systematic removal of "coercive" federal enforcement mechanisms from the reach of recipients and their advocates must, however, be contrasted with the *addition* of coercive enforcement mechanisms (i.e., sanctions) directed at recipients themselves. Thus, just as recipient's own power is diminished vis-à-vis local administrators, the power of administrators to remove them from welfare rolls through coercive sanctions is enhanced. The implications for accountability have been severe.

225. The Model State Administrative Procedure Act ("MSAPA"), for example, "exclud[es] political subdivision and administrative units of subdivision from definition of 'agency' for purposes of state administrative procedure." Diller, *supra* note 48, at 1190 n.358 (citing MSAPA, § 1-102(1) (1981), 15 U.L.A. 10-11 (1990)).

226. Lobel, *supra* note 8, at 375 (citing unpublished manuscript of Peter Dobkin Hall).

227. Cf. *id.* at 374 ("Multiparty involvement is understood as a way of creating norms, cultivating reform, and managing new market realities. . . . [T]he overall goal of participation is broader than ensuring the achievement of policy goals; it enhances the ability of citizens to participate in political and civil life.").

Accounts of increased stakeholder participation have been particularly strong in the field of environmental regulation where federal environmental statutes – such as the National Environmental Policy Act (“NEPA”) and Endangered Species Act – have created important mechanisms that multiply and pluralize opportunities for stakeholder participation. One of these involves the NEPA requirement – increasingly included in state environmental protection acts as well – that an environmental impact statement (“EIS”) be prepared whenever a proposed action may have a “significant” effect on the environment.²²⁸ New outlets for stakeholder participation are thus created in monitoring agency decisions, ensuring that EISs are completed, and challenging agency decisions through legal action where they are insufficient. Other celebrated examples from the United States of increasing stakeholder participation include programs in E-Government, business-consumer initiatives to promote fair labor practices, and the emergence of multistate working groups on environmental performance.²²⁹ In the European Union context, the Open Method of Coordination is a noteworthy example.²³⁰

Each of these initiatives nonetheless begs the question: *Who* participates? While new governance models have opened spaces for a wide variety of social actors, particularly those with preferential access to information and financial markets, they have not tended to be successful in opening spaces for the economically marginal segments of the population, who continue to lack a voice in framing the social policies that affect them.²³¹ The success of EISs in promoting environmental goals – issues that tend to attract more affluent social constituencies – have led to calls, for example, for the broadening of EISs to include Housing Impact Assessments.²³² Triggered wherever a proposed action would have a significant effect on housing availability, accessibility, quality or adequacy, such assessments would open a particularly important participatory space

228. 42 U.S.C. § 4332(2)(C)(i) (2006). While NEPA mandates that an EIS be prepared, it nevertheless entails no corresponding requirement that the assessment actually be taken into account.

229. One such example is the Multi-State Working Group on Environmental Performance (“MSWG”), organized in 1996 among regulators, businesses, environmentalists, and scholars focused on studying environmental management systems and their potential to achieve environmental results. See *Welcome to the Multi-State Working Group on Environmental Performance*, <http://www.mswg.org> (last visited Feb. 2, 2010).

230. See Trubek & Trubek, *supra* note 133.

231. The World Bank has noted, for example, a concern that “the views of poor people and other marginalized groups [as distinct from less marginalized groups in civil society] have not been adequately reflected in poverty reduction strategies.” The Bank attributes this to the fact that “direct engagement of poor people takes more time than existing planning cycles allow, and empowerment of the most vulnerable members of society is fundamentally difficult to do” given that “[v]ulnerable, marginalized, and disempowered populations generally have less voice, fewer assets, weaker networks, and suffer more from the effects of non-income poverty than the average poor person.” WORLD BANK & INT’L MONETARY FUND, 2005 REVIEW OF THE POVERTY REDUCTION STRATEGY APPROACH: BALANCING ACCOUNTABILITIES AND SCALING UP RESULTS 51, ¶ 73 (2006) [hereinafter PRSA REVIEW].

232. See Tim Iglesias, *Housing Impact Assessments: Opening New Doors for State Housing Regulation While Localism Persists*, 82 OR. L. REV. 433 (2003).

for low-income housing residents and the homeless to influence *ex ante* the design and implementation of public policy affecting them. EISs have nonetheless to date tended to be interpreted narrowly so as to preclude consideration of such social impacts.²³³

The question of *who participates* is even more stark and disconcerting in the welfare reform context. With a business-model emphasis on growing public-private partnerships, "stakeholder participation" in welfare reform has tended to be confined to the increasing involvement of *service delivery providers* – schools, prisons, job centers, and the larger business community that will be the source of new jobs – not *service consumers*. Welfare recipients, applicants, and potential applicants do not tend to be considered "stakeholders" in this project, at least not from the perspective of programmatic decisionmaking about welfare or at the level of policy design or implementation. Rather, they are deemed "partners" only at the individual level, in decisionmaking about how to navigate *within* the options already decided upon by *other* non-recipient stakeholders. This lack of voice is further exacerbated where localities or private contractors take over administration of TANF or supervise local administration, given the lack of applicability of even state APAs and public access laws to such entities.²³⁴

* * *

As the foregoing analysis demonstrates, there are multiple public accountability shortcomings to the actual implementation and roll-out of many new governance regimes, particularly as they affect low-income stakeholders. These shortcomings have generally resulted from the failure to ensure that all stakeholders have an active voice in first defining and then monitoring performance measures. In the welfare context, this unbalanced representation has allowed the goal of poverty alleviation to be dominated by and frequently conflated with that of welfare roll reduction, thereby serving the interests of those who seek to reduce or eliminate the role of the state in public service provision. The central challenge, then, is to reassess current models of regulatory governance to ensure that they are designed in a way that facilitates the participation and voice of all stakeholders, particularly in the definition and monitoring of the publicly-sanctioned goals to which new governance regimes are directed.

In this project, three questions must continually be asked: *Who* can realistically participate? *How* are national goals and performance indicators

233. *Id.*

234. See *supra* note 225. While a "number of states and localities have in fact established certain creative avenues for public participation in setting welfare policy," the reality of participation, as has been noted, frequently differs quite significantly from its appearance. See Diller, *supra* note 48, at 1213-15. This formal representation model, in which recipient groups have limited voice and control over the selection of program priorities and funding decisions, has tended to dominate the Community Action Program ("CAP") agencies that survived the dismantling of President Johnson's early War on Poverty.

initially defined and thereafter monitored? and *What roles* do local, state, and federal governments play in policing the boundaries? In the welfare context, review of these questions reveals three significant areas of concern: (1) the limited opportunities for low-income beneficiaries to participate as full stakeholders in institutional performance design, monitoring, and evaluation processes; (2) the lack of performance-based indicators and benchmarks that can serve as a metric for human well-being, rather than raw numerical service delivery targets; and (3) the inadequacy of federal orchestration of locally-devolved authority in achieving performance outcomes. Significantly, it is precisely to these issues that a growing movement from the grassroots, using interjurisdictional human rights and comparative law resources, seeks to respond. Given its aim of inserting itself into democratic processes to create new structures and relationships for holding power holders to account for the impacts of policies and practices on the rights of the socially disadvantaged, I call this the “New Accountability” movement.

II. “NEW ACCOUNTABILITY” AND SOCIAL MOVEMENTS OF THE POOR: FROM FIXED MATERIAL GOODS TO INCLUSIVE, RIGHTS-BASED PARTICIPATION

Just as regulatory understandings have shifted radically since the 1960s, so too have the strategies undertaken by those historically marginalized from institutional processes. This is evident upon reviewing the changing methodologies, rhetorical influences, and mobilization strategies of the U.S. welfare rights movement over the last forty to fifty years. What is revealed is a decisive shift away from nonnegotiable material demands and mass confrontation – the preferred tactics of 1960s activism – toward participatory and process-oriented ones that seek to address precisely the accountability shortcomings identified above: Who participates? How are those perspectives taken into account? What norms and standards guide the process? And what orchestrating role do state and federal governments play?

Significantly, while such movements generally reject the policies and practices of new governance regulatory regimes, such as PRWORA, as antipoor and exclusionary, their approaches and organizational tactics in fact closely overlap with those of new governance theory. They, too, emphasize the expansion and pluralization of stakeholder participation, the identification of national performance goals and targets, more flexible and cooperative approaches to achieving desired outcomes, the monitoring and assessment of comparative performance through indicators and benchmarks, and the identification of new oversight bodies and processes through which legal orchestration can be managed. It is through these performance-centered organizational tactics – themselves foundational to the structure and practice of modern human rights law – that the historically powerless today seek to reinsert themselves as full and equal stakeholders into the policymaking processes that affect their lives. This is particularly true as those processes affect core rights of access to adequate

housing, health care, education, nutrition, social security, and living-wage employment.

I call this tactical model the "New Accountability" movement. That nomenclature reflects the priority held within modern social movements for creating new tools and social arrangements through which historically marginalized groups can hold decisionmaking entities, both public and private, to more direct account for conduct that fails to meet minimum community standards of performance, transparency, and participatory engagement. They are doing so not through exclusive reliance on the formal police power, centralized regulatory rules, or lawyer-led judicial process, but rather through new strategies designed to more immediately leverage social and consumer power over the delivery of the goods and services necessary for human dignity and wellbeing.

While the struggle for greater accountability to the needs of the socially disadvantaged is certainly not new to social movement advocacy, what is new is the distinctly more pluralized (and privatized) set of mechanisms and relationships through which accountability is understood to be legitimately, even necessarily, pursued in the modern era. That is, the twenty-first century has brought changes that have rendered traditional tools of democratic accountability and older usages of rights language increasingly inadequate as a means for achieving the participatory relevance of the poor and other socially marginalized actors.²³⁵ These changes include, in particular, the increasing privatization of power that has accompanied economic globalization and the corresponding weakening of the centrality of the state in regulating conduct within territorial borders. Relying on new information-sharing technologies and rights methodologies, civil society actors have responded by seeking new ways to hold a broader array of public and private actors to more direct account for abusive and socially irresponsible behavior, including through the harnessing of consumer and investor leverage over private sector profits and public sector priorities.²³⁶ Indeed, disillusioned with both the money-driven limits of electoral politics and the jurisdictionally constrained role of the courts to protect the livelihood rights of the poor, social movements of the poor the world over have opted to seek new, more flexible and accessible spaces in which creative forms of *social* accountability can be explored.²³⁷

235. See discussion *infra* notes 289-305.

236. The new accountability movement may, in this way, be said to be directly responsive to four of the major defining political transformations of the late twentieth century: economic globalization, political democratization, the rapid breakdown of communication barriers across borders, and the growth and sophistication of human rights law and its implementing institutions. Each of these transformations has created the conditions enabling, even compelling, the new accountability movement's emergence. They have done so either by accentuating the growing inadequacies in the modern era of traditional accountability mechanisms or, alternatively, by providing marginalized communities with a new set of tools and comparative resources to confront and challenge those inadequacies directly.

237. It may be noted that this increased movement toward *social* accountability has been accompanied, particularly in newer and less institutionalized democracies, by a congruent

The “new accountability” nomenclature reflects in this regard the fact that accountability – and particularly how accountability systems are structured in a given society – speak directly to relationships of political power and access.²³⁸ *Who* in society, as a practical matter, can effectively influence decisionmaking processes? Accountability implies, in this sense, “that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.”²³⁹

Drawing on these core elements – especially those of information transparency, social actor responsibility, performance measures, and sanction – social movements of the poor are today engaging in a distinct type of self-advocacy in an effort to regain their participatory relevance. Using a new set of human rights methodologies, they are insisting on the right of those most affected by social welfare policy – the economically disadvantaged – to hold other community members and social actors to a set of rights-based *performance standards* related to progressive improvements in access to adequate housing, health care, food, education, employment, social security, and other rights; to *independently monitor and assess compliance* with those standards; and to impose some form of *penalty*

movement toward a complementary emphasis on *legal* accountability – that is, through the expansion of strategic litigation involving the rights to health, housing, food, employment, and access to water. *See, e.g.,* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW (Malcolm Langford ed., 2008); COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (V. Gauri & D. Brinks eds., 2008); INT’L COMM’N OF JURISTS, COURTS AND THE LEGAL ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMPARATIVE EXPERIENCES OF JUSTICIABILITY (2008); COURTS AND SOCIAL TRANSFORMATIONS IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? (Roberto Gargarella et al. eds., 2006). Much of this litigation is nonetheless strategically focused on opening participatory channels and spaces for the disadvantaged to engage decisionmakers directly in the construction of the public agenda.

238. *See* Mark Bovens, *New Forms of Accountability and EU-Governance*, 5 COMP. EUR. POL. 104, 105-08 (2007) (explaining that accountability has different meanings in different societies and political systems, usually blending elements of control, responsibility, and responsiveness).

239. Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 29 (2005). *See also* Anne Marie Goetz & Rob Jenkins, *Voice, Accountability, and Human Development: The Emergence of a New Agenda* (UNDP, Background Paper No. 2002/4, 2002), available at http://hdr.undp.org/en/reports/global/hdr2002/papers/Goetz-Jenkins_2002.pdf (defining accountability as the power of one social actor to demand that another social actor justifies his or her conduct through reason-giving and explanation (answerability) and/or the power to impose a penalty or sanction on that social actor for poor performance or for failure to adequately explain it (enforceability)).

This definition holds true, in principle, irrespective of the accountability model at issue. *See, e.g.,* Grant & Keohane, *supra*, at 29-43 (differentiating between “participation” and “delegation” models of accountability, each based on different conceptions of legitimacy); Bovens, *supra* note 238, at 107 (discussing “narrow” and “broad” readings); Manfred Elsig, *Changing Authorities and New Accountability in the World Trade Organization: Addressing a Research Gap* 18-19 (Swiss National Centre of Competition in Research (NCCR) Trade Regulation, Working Paper No. 2007/30, 2007), available at <http://ssrn.com/abstract=1048641> (recognizing internal and external forms of accountability).

or *sanction* where performance is objectively inadequate or where justificatory or process requirements are not met. To establish the normative and institutional framework within which to do this, new accountability draws directly on the substantive and procedural standards of international human rights law, particularly the legal process and accountability relationships it creates between distinct social actors, both public and private.²⁴⁰

"New accountability" thus differs from older and narrower models of rights-based organizing in four key respects: first, its expanded vision of the relevant set of public and private stakeholders understood as legitimate objects of accountability processes; second, the more sophisticated rights-based standards used to hold such stakeholders to account; third, the more direct role for ordinary people and their associations in demanding accountability across a more diverse set of jurisdictions; and, finally, the expanding repertoire of strategies, tactics, tools, and fora for exacting decisionmaking transparency and social sanction, the hallmarks of accountability.²⁴¹ Through pluralizing and expanding access to these sites – especially with respect to the practical operation of modern new governance regimes in the social welfare context – new accountability seeks to ensure that the needs, experiences, and priorities of those most affected by social welfare policy are taken directly into account as a mandatory part of policy formulation and assessment.

Looking at this "new accountability" movement in juxtaposition to the movement that arose in the context of the 1964 War on the Sources of Poverty reveals that we are, today, at a very different "moment." That moment, I argue, is one distinctly amenable to a modern reclaiming of the MFP ideology of the early War on Poverty. This reclaiming is made possible by the fact that the principle driving tenets of new accountability parallel so closely those of new governance. These, in turn, draw from the same motivating principles that gave rise to the early focus on maximizing the participatory relevance of the poor as the basis for an effective national attack on U.S. poverty.

Recognition of this overlap is critical for two reasons, both related to the future of poverty alleviation efforts in the United States. First, such recognition is operationally necessary to grasp how new accountability and new governance regimes may institutionally intersect, and thus how new

240. As has been said, "the *raison d'être* of the rights-based approach is *accountability*." MALCOLM LANGFORD, UNITED NATIONS, CLAIMING THE MILLENNIUM DEVELOPMENT GOALS: A HUMAN RIGHTS-BASED APPROACH 15 (2008). Although it is often claimed that human rights law applies to governments only, at its core human rights law is based on the notion that "[e]veryone has duties to the community in which alone the free and full development of his [or her] personality is possible." Universal Declaration of Human Rights art. 29(1), G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR] (emphasis added).

241. It has been noted that transparency and sanction lie at the heart of virtually all conceptions of accountability. See Andreas Schedler, *Conceptualizing Accountability*, in THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES 13, 14-17 (Andreas Schedler et al. eds., 1999).

governance regulatory regimes may constructively be altered to accommodate the positive influences and informational inputs of new accountability methodologies. Second, and just as critically, a firm understanding of the changing strategies of social movements of the poor in the twenty-first century – particularly in their shift from an absolutist “rule” focus to a more reflexive “process” orientation – is vital for a national coming-to-terms with the political legacy of the early War on the Sources of Poverty. Indeed, it is in many ways the political legacy of that war that has kept “poverty” and the “poor” (and discussions of social rights more generally) off the national political agenda for the last forty years.²⁴² A failure to confront this legacy directly, and correspondingly to create a thicker, more fact-driven historical narrative around it, will ensure continuing resistance to any political re-embrace of the participatory methodologies of the early War on the Sources of Poverty.

Accordingly, the following Part is divided into two Sections. The first looks to the early social welfare rights movement in the United States, the rights-based strategies and tactics it employed, and how those tactics contributed to the political backlash that continues to surround discussions of poverty and the rights of the poor in the nation. The second then looks at the new tactics and strategies employed by the emerging social welfare rights movement in the United States, what I call the “New Accountability” movement. These strategies draw on the tools and methodologies of international human rights law, in ascent around the world today. In so doing, they seek to recapture both the instrumentalist and intrinsic-value benefits of President Johnson’s early MFP policy, while forcing a new dignity-based focus to poverty alleviation programs and decisionmaking processes. It is these new accountability methodologies from “below,” I argue, that, in their increasing intersection with new governance regulatory policies from “above,” create the conditions for a renewed, participation-focused national commitment to poverty alleviation in the United States. Ensuring that this constructive intersection in fact takes place, however, will require the crafting of a new set of national institutions that have this linkage as their primary end.

A. The Early U.S. Welfare Rights Movement: 1964-1973

There have been a growing number of accounts of the early welfare rights movement in the United States,²⁴³ a movement that rose and fell in less than a decade. At its height in 1969, that movement had a dues-paying

242. Widely seen as a political liability, the plight of the U.S. poor has long been overlooked or ignored in political and media discussions of the economy in favor of a preferred focus on the “middle class.” See, e.g., Op-Ed., Barbara Ehrenreich, *Too Poor to Make the News*, N.Y. TIMES, June 14, 2009, at WK10 (highlighting noted lack of attention to the effects of the economic recession on the already poor); see also *supra* note 76.

243. See, e.g., KORNBLUH, *supra* note 47; PREMILLA NADASEN, *WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES* (2005); ANNELISE ORLECK, *STORMING CAESARS PALACE: HOW BLACK MOTHERS FOUGHT THEIR OWN WAR ON POVERTY* (2005).

membership base of over 20,000 welfare recipients, organized into community-based welfare rights organizations around the nation.²⁴⁴ By 1972, it was effectively moribund.²⁴⁵ While many have attributed this premature end to the growing African-Americanization of the rolls and rising U.S. commitments in Vietnam, each of which were important contributors to changing public attitudes about welfare support,²⁴⁶ one cannot overlook the role of the rights-based strategies used by the movement and their effects on public opinion. These strategies, in turn, cannot be separated from the historical epoch in which they arose.

The U.S. Welfare Rights Movement emerged formally in 1966, with the founding of the National Welfare Rights Organization ("NWRO") and coordinated marches across the country.²⁴⁷ This emergence, just two years after the federal "War on the Sources of Poverty" was announced in 1964, represented a convergence of historical stimuli and the changing map of legal, rhetorical, and material resources in the 1960s. These included the civil rights movement and its expanding use of rights language and civil disobedience strategies, the rising black power movement and early feminist discourse, and the dramatic rise in rights consciousness brought on by the popularization of rights language by the federal judiciary, led by the U.S. Supreme Court under Chief Justice Earl Warren. These factors, moreover, were set atop an expanding federal bureaucracy – increasingly seen as a neutral and solid bulwark against arbitrary abuses at the state and local levels – and a rapidly expanding post-WWII consumer economy and consumer-oriented culture. Within this framework, a growing sense had emerged across an increasing political spectrum in the late 1950s and early 1960s that citizenship in the new "affluent society"²⁴⁸ meant gaining access not only to its ballot boxes and courtrooms, but also to its consumer marketplaces.²⁴⁹ Low-income women thus increasingly argued that "full

244. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 295-96 (Vintage Books 1979) (noting there were 22,000 dues-paying members related to the movement); KORNBLUH, *supra* note 47, at 2 (reporting 20,000-30,000 card-carrying members and 540 local chapters). Some sources estimate that membership was as high as 75,000 members. See Tom Sparer, *The Right to Welfare, in THE RIGHTS OF AMERICANS* 65, 66 (Norman Dorsen ed., 1971).

245. See KORNBLUH, *supra* note 47, at 178-79 (noting that the movement began to collapse in the late summer and fall of 1968); KOTZ & KOTZ, *supra* note 220, at 290 (noting plummeting membership and financial support in 1972, resignation of NWRO executive director, and closing of office doors in 1975, with movement having "ended").

246. See, e.g., KORNBLUH, *supra* note 47, at 10 ("The War on Poverty had been lost, thanks to federal squeamishness about the conflicts it inevitably inspired as well as the costs of the war in Vietnam."); ORLECK, *supra* note 243, at 4 ("The War on Poverty, Martin Luther King Jr. famously said, was shot down on the battlefields of Vietnam."). See also MICHAEL HARRINGTON, *THE NEW AMERICAN POVERTY* 20-22, 31 (1984) (attributing failures to Vietnam War and lack of funding).

247. See KORNBLUH, *supra* note 47, at 38 (describing how organizers proclaimed June 30, 1966, a day of coordinated national actions, "[t]he Birth of the Movement," even as policy roots and grassroots sympathizers had been growing for years).

248. GALBRAITH *supra* note 65, at 293.

249. KORNBLUH, *supra* note 47, at 76 ("At the high point of the affluent society and the rights consciousness . . . [female welfare recipients thus] demanded the political and material goods they believed were available to everyone else in their country."). A range of prominent

citizenship" in the postwar United States "depended not only on having access to decent schooling for their children, but also on being able to feed and clothe their children decently, on having furniture in their homes, and on owning decent goods."²⁵⁰

The early U.S. welfare rights movement was, correspondingly, decidedly consumerist in orientation. This consumer orientation was itself a central feature of the "social work" paradigm that dominated welfare administration from the 1930s through the 1960s and, accordingly, structured the policy environment within which social movements operated.²⁵¹ This individual casework model saw poverty as stemming primarily from conditions within the home. The role of social workers, then, was to supervise mothers in "proper parenting" and "proper household spending" to ensure "proper family living."²⁵² These assessments included not only a mother's skills and character, but also the items she had in her home. Social workers were thus generally authorized to dispense to mothers the household items considered necessary for "normal family living."²⁵³ With the rise of rights consciousness and the consumerist culture of the 1950s and 1960s, this emphasis on consumer goods for "normal family living" and expert-identified "basic needs" provided a central organizing tool for welfare mothers intent on being treated "fairly" and with dignity in post-war, post-*Brown* society. Gaining immediate, mandatory access to government-provided hats, winter coats, shoes, linens, tables, beds, and other household items thus became a central organizing strategy for local groups of AFDC-recipient mothers in the mid-1960s.²⁵⁴

economists shared this sense. See, e.g., GALBRAITH, *supra* note 65, at 289-90, 293 (arguing that, given the inability of the private market to ensure productive jobs that could secure economic security to all, government had obligation to secure "reasonably satisfactory substitute for production as a source of income"); ROBERT THEOBALD, *FREE MEN AND FREE MARKETS* 3 (1963) (calling for guaranteed minimum income under U.S. Constitution); GALBRAITH, *supra* note 65, at 266-67 (2d ed. 1969) (advocating national guaranteed income). Cf. MILTON FRIEDMAN & ROSE FRIEDMAN, *CAPITALISM AND FREEDOM* 178 (1962) (advocating negative income tax or guaranteed income administered by Internal Revenue Service as alternative to government in-kind welfare programs).

250. KORNBLUH, *supra* note 47, at 40. For an argument that this broader understanding of civil rights to include economic rights and economic justice, particularly rights to work and just conditions of work, was apparent in the social mobilizations of the 1940s and 1950s, see RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007).

251. See generally LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1989-1935* (1994) (describing history of U.S. welfare administration since 1930s).

252. KORNBLUH, *supra* note 47, at 41-44.

253. This was true, for example, in New York State, which required that city welfare administrations keep public assistance recipients at a "minimum standard of health and decency." To fulfill this mandate, New York City issued to each caseworker a thick manual of procedures, which included lists of "minimum standards" containing items that every "adult woman" and "good home" must have for "normal family living." *Id.*

254. While these initiatives began in the early 1960s as individual letters sent to neighborhood welfare departments, small-scale initiatives, or even citywide school boycotts in an effort to get supplemental grants to keep schoolchildren warm and decently dressed, they were transformed into a nationwide strategy by 1966 and 1967 under the strategic direction of

The increasing material resources provided by President Johnson's "maximum feasible participation" plan, in turn, often made these organizing strategies possible. Indeed, the War on Poverty administrative apparatus provided vital financial assistance, including office space and staff, to neighborhood and community groups that functioned under the rubric of community action programs ("CAPs").²⁵⁵ These programs became critical loci of welfare recipient organizing in the mid-1960s,²⁵⁶ and were used by poor women's groups to gain voice and to initiate a wide variety of neighborhood-based nutrition, education, housing, and welfare programs.

Yet, while the War on the Sources of Poverty envisioned community groups working on locally-directed plans to address their own unique experiences with poverty – particularly through the development of local employment opportunities and locally-grown strategies for improving human capability and productivity²⁵⁷ – the actual operation of community action programs was, in practice, often redirected by nonrecipient, middle-class national welfare rights organizers to a largely contrary, even antagonistic, end: intentionally deluging local welfare offices with rights-based claims for the immediate, mandatory provision to every poor household of a defined set of government-provided consumer goods.²⁵⁸ This strategy, perilous as it might seem today, represented in many ways the clash between the federally-theorized War on the Sources of Poverty, with its emphasis on localism and cooperation, and the dominant paradigm of social movement organizing in the 1960s, with its focus on confrontation, group power, civil disobedience, and fixed federal government rules and solutions.

Indeed, by 1967, the National Welfare Rights Organization had established a National Action Plan pursued under the slogan "More Money, NOW!"²⁵⁹ This slogan reflected the particular organizing strategy proposed by liberal academics and espoused by national leaders of the new movement. While most member organizations of the NWRO were composed of women welfare recipients working on issues of immediate

the National Welfare Rights Organization. *Id.* at 44-48.

255. See discussion *supra* Part I.

256. Largely because of this, funding for CAP initiatives was often cut off early on. For more on the Nixon administration's practice of defunding CAPs, see JOAN HOFF, NIXON RECONSIDERED 60-65 (1994).

257. Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 202(a), 78 Stat. 508, 516 (repealed 1981) (defining "community action program").

258. See KORNBLUH, *supra* note 47, at 51-55 (noting conflict between defending War on Poverty legislation, which promised only the distant possibility of long-term benefits, and pursuing the immediate economic benefits of minimum standards campaigns, which could draw new people to campaigns).

259. *Id.* at 60. The progenitor of this slogan later reflected that it was "really good on the street for welfare recipients," although "kind of a crass message. . . . It didn't clothe the idea of basic needs, you know, with very much dignity." *Id.* At the first inaugural meeting of the NWRO in 1967, recipients were promised that through their membership they could gain "justice, dignity, democracy, and MORE MONEY NOW!" The 300 delegates chose four principles as the official goals of NWRO: Adequate Income, Dignity, Justice and Democracy. *Id.* at 60-61.

local concern to themselves and their families, the national offices were run predominantly by external activists and nonrecipient middle-class organizers, generally men. These organizers had a distinct and specific political agenda: they wanted a national guaranteed minimum income plan. Such a plan would replace locally-administered welfare for single mothers with a unified fixed-rule system that would “solve” the problem of poverty in the nation by legally guaranteeing to *all* poor people minimum income transfers irrespective of work.²⁶⁰

To do this, national organizers believed it was necessary to organize recipients into a benefits-based movement that, through confrontation, disruption, and the intentional creation of a national “crisis,” would overwhelm local and state administrative systems.²⁶¹ This “crisis strategy” aimed to get as many people on the public welfare rolls as possible, under the understanding that adding even a fraction of the qualified poor would create a bureaucratic and fiscal crisis in cities and states that would “impel federal action on a guaranteed minimum income plan.”²⁶² The *purpose* of organizing, then, was not to seek local solutions or to work cooperatively with local government on comprehensive, multisectoral anti-poverty plans with a variety of stakeholders. Rather, it was to instigate institutional overloads in city and state welfare offices around the country, using legal mechanisms and fixed-rights language in an effort to singularize a national response. In essence, the strategy flipped “maximum feasible participation” on its head, and it used the War on Poverty’s signature community action programs to do much of the heavy lifting.

This crisis strategy functioned through the synergy of two principal benefits-based organizing tools: fixed-rule “minimum standards” campaigns and administrative “fair hearings.”²⁶³ Organizers used these two tools – both appropriated directly from the welfare apparatus itself – to help public aid recipients get what they were told were their “full rights –

260. Prominent among this group were George Wiley, Richard Cloward, and Frances Fox Piven. See, e.g., Richard Cloward & Frances Fox Piven, *The Weight of the Poor: A Strategy to End Poverty*, THE NATION, May 2, 1966, at 510 (advancing the movement strategy). As Kornbluh explains in recognizing the gender politics of the issue, NWRO member groups did not definitively support a guaranteed minimum income plan. See KORNBLUH, *supra* note 47, at 50-51, 152-53, 168-69; see also *id.* at 89.

261. See PIVEN & CLOWARD, *supra* note 244, at 264-361 (1977) (discussing strategies of National Welfare Rights Organization in mid- to late-1960s, and decision of national leaders to adopt a “strategy of crisis” in which activists would intentionally drive-up welfare rolls in order create an institutional crisis that would force a “federal solution to poverty” and “major economic reforms at the national level,” although these remained unspecified). Piven and Cloward were the intellectual authors of this “strategy of crisis.” See Cloward & Piven, *supra* note 260.

262. KORNBLUH, *supra* note 47, at 37 (citing Piven & Cloward). Piven and Cloward estimated that, in 1966, three out of five poor people eligible for public assistance were not receiving it. See Cloward & Piven, *supra* note 256 at 511.

263. While both fixed-rule “minimum standards” and administrative “fair hearings” were part of the legal resource map of the New Deal regulatory state, neither was systematically utilized by recipients until the mid-1960s, when they converged with increasing rights consciousness and a greater reliance on national organizers and lawyers. See KORNBLUH, *supra* note 47, at 70-73.

what they are entitled to under the law, *immediately*.²⁶⁴ The “minimum standards” of the minimum-standards campaigns were, in fact, drawn directly from the caseworker manuals issued to social workers under the “social work” model. That model saw government-funded social workers as experts in “normal family living.” To aid caseworkers in determining what an AFDC mother might need to make her home more suitable for parenting, cities and states thus often issued caseworkers thick manuals of procedures, including lists of “minimum standards” that every “adult woman” and “good home” must have for “normal family living.”²⁶⁵ These items, which were numerous and specific²⁶⁶ – e.g., a “normal” family kitchen should include a dinette set, a paring knife, an egg beater of the “rotary type,” and a fruit reamer made of glass – could be added to a welfare client’s personalized budget at the discretion of a welfare caseworker, as could other “special items needed which are considered essential to clients’ comfort and wellbeing.”²⁶⁷

The content and even existence of these detailed lists were not, however, shared with recipients; they were kept undisclosed for the caseworker to dispense at his or her discretion in assessing a client’s need. Beginning in 1964, sympathetic social workers nevertheless began to share this “minimum standards” information with community organizers. Shocked by the detailed regulatory rules, yet keenly alert to their organizing potential, activists responded by quickly condensing the detailed information on minimum standards into simple and easy-to-read one-page checklists of material household demands. These were then circulated to statewide recipients to compare “what they *had*” versus “what they were *owed*.” As Kornbluh notes:

Clients who read the checklist learned about the minimum standards at a glance. Virtually all of them saw that there was a wide gap between what they had in their homes and the array of goods the welfare department – in manuals it did not share with its clients – claimed were necessary for families to live at a minimum

264. *Id.* at 26 (citing organizational materials of the People’s War Council Against Poverty, the precursor to the Executive Council of the NWRO, quoted in LARRY R. JACKSON, *PROTEST BY THE POOR* 124-25 (1974)) (emphasis added).

265. *Id.* at 44-45.

266. In New York City, for example, “[t]he manuals specified that each adult woman required one hat, one ‘Dressy dress,’ one girdle, two cotton dresses, three pairs of panties, and two pairs of stockings. For living room furniture, the manual specified a couch, which was to have a ‘new cotton linters mattress,’ and a ‘drop leaf or extension (wood)’ table. In the kitchen, ‘normal family living’ supposedly required a dinette set and, for cooking equipment, a paring knife, an egg beater of the ‘rotary type,’ and a fruit reamer made of glass. Minimum standards in the category called ‘General Furnishings’ included a shopping cart, alarm clock, towel rack, and toilet tissue holder, plus a ‘runner, 36” wide’ for the hallway, and a washable bathroom rug.” KORNBLUH, *supra* note 47, at 43-44.

267. *Id.* at 44 (“These ran the gamut from a special diet for a diabetic welfare recipient, to transportation for a doctor’s visit, housekeeping services for a recipient who was physically unable to do her or his own housekeeping, and babysitting or child care help for an ‘overburdened mother’ who was certified as such by a case supervisor.”).

standard of health and decency.²⁶⁸

....
[As one neighborhood activist recalled, when she and other people in her neighborhood saw the minimum standards checklists, we] "couldn't believe the things that were in [them]. Coats and sweaters. . . . *There was a law in the books that said you were entitled to these things and we were going to try to get them.*"²⁶⁹

NWRO members and their allies thereafter referred to virtually every contested action – especially denials of specific consumer goods or grant supplements – by a local caseworker or elected official as an "illegal" contravention of law, whether of state regulations, the Social Security Act, the U.S. Constitution, or human rights law. With this use of legal language as part of their day-to-day political strategies, recipients were then instructed to check off every item on the checklist that they did not have in their home and to send it in to the neighborhood welfare office under the demand (printed at the top of each checklist): "The following are the furniture and household supplies [and] items that I am lacking in my home and need in order to be brought up to minimum standards." Claiming it was "illegal" for caseworkers and bureaucrats to deny such "minimum" items to clients who asked for them, the forms continued: "I expect an answer to my request within one week."²⁷⁰

Where requests were not answered promptly with the receipt of the corresponding monetary sums, recipients were encouraged by organizers to aggressively pursue formal appeals of welfare department decisions through fair hearings.²⁷¹ These hearings – built into all three titles of the 1935 Social Security Act, including the forerunner to AFDC – required that states afford an opportunity for a fair hearing to any individual whose claim is denied or not acted upon with reasonable promptness. These hearings, though rarely used by clients of public assistance between 1935 and their "rediscovery" in the 1960s, quickly became a highly effective and coercive tool in securing benefits-based concessions from local and state welfare agencies.²⁷² As Kornbluh notes, they were "one of the few actions one could use to force the welfare department into a situation where it cost them more time, money and manpower" to schedule and staff the

268. *Id.* at 45.

269. *Id.* at 47 (emphasis added); *see also id.* at 56 (citing recipient who recalled being "shocked 'cause [this was a] legal fact sheet with all the items that you were entitled to . . . and you were just to check off if you needed these things. So we did.").

270. *Id.* at 46 (replicating one of the checklists from New York City).

271. Cloward & Piven, *supra* note 262. To carry out the strategy, Cloward and Piven (its intellectual authors) proposed three steps of national strategic action: advertise to the poor their "rights" to public assistance in terms they can understand; have organizers advocate for individual clients and coordinate demonstrations on common problems; and use lawyers to pursue formal appeals of welfare department decisions (e.g., through fair hearings) when informal means did not succeed. *Id.*

272. While New York City had a mere 188 fair hearings in 1964, in 1967 it had 4,233. KORNBLUH, *supra* note 47, at 73.

hearings, replace the caseworkers who left their regular jobs in order to participate, and transcribe the proceedings, "than it would cost the client organization."²⁷³

NWRO organizers thus urged recipients to keep request forms "pouring in," reminding members that their "success depends on *everyone* going to their hearing."²⁷⁴ In this way, they saw the hearings, combined with the minimum standards campaign, as a way to overwhelm state welfare departments with requests in much the same way that civil rights demonstrators had overwhelmed the Southern justice system. By securing large cash grants for members of welfare rights groups, they thus sought to increase NWRO membership, strengthening the organization's "muscle" and coming closer to a federal solution to poverty.

Yet, while the minimum standards campaign and general "crisis strategy" were highly successful as a way to secure millions of dollars of cash grants every month for NWRO members,²⁷⁵ they were a disaster for public relations and for winning the hearts and minds of America in a shared program of poverty alleviation. The increasingly belligerent, extreme, and confrontational demands for cash grants and consumer credit by the NWRO, especially in conjunction with its wholesale rejection of any work requirements for public assistance, created a strong backlash against welfare provision and AFDC recipients in particular. This was especially true as the economy turned sour in 1970, city budget deficits grew, and the war in Southeast Asia intensified. Thus, while politicians across the political spectrum largely supported a national minimum income plan up until 1968 – seeing it as an inevitable step forward whose "time had come" – by 1970 the entire idea was dropped in its tracks, its promoters transformed into political laughingstocks.²⁷⁶

The result was a growing view of AFDC recipients, predominantly poor women on welfare, as "undeserving" freeloaders, more interested in taking over buildings and staging political demonstrations than supporting themselves and their families through work. This, in turn, served to strengthen a growing (and still dominant) "rhetoric of poverty" that, on the one hand, locates responsibility for poverty in the lack of moral rectitude of the impoverished and, on the other, portrays society as helpless to address the underlying causes of poverty, seen as emanating from a lack of

273. *Id.* at 66 (citation omitted).

274. *Id.* at 75, 86 (alteration in original) (citation omitted).

275. By 1968, *The New York Times* reported that the campaign was costing New York City \$10 million per month, with each hearing costing the state \$300 per day. *Id.* at 85. As Kornbluh observes, welfare commissioners were eager to prevent fair hearings, often making them generous beyond the reckoning of low-income recipients. In New York city, ninety percent of appeals never went to hearing. "In the bulk of the cases, however, local Welfare Centers contacted the appellants (or sometimes their lawyers) and started offering them furniture, back-to-school clothes, other goods, and cash, as incentives to abandon their fair hearing requests. . . . Generally speaking, the longer clients held out and threatened the welfare department with a possible hearing, the more they got." *Id.* at 78.

276. *Id.* at 6-7, 154.

personal responsibility.²⁷⁷ This shift in public perception and growing anti-poverty mood, exacerbated by the increased violence and rioting of the 1960s, led to a host of benefit reductions and new eligibility standards across the nation, to investigations into roll fraud, and to the rise of a new grassroots conservative movement, especially among Republicans, that made welfare its major issue.²⁷⁸ With Earl Warren newly retired, this shift in public attitude was likewise reflected on the U.S. Supreme Court,²⁷⁹ which rejected NWRO claims in case after case starting in 1970.²⁸⁰ In so doing, it made clear that, from then forward, the U.S. Constitution guarantees no minimum level of adequate income,²⁸¹ that different categories of public assistance beneficiaries need not receive similar levels of entitlement,²⁸² and that work requirements as a condition of continued receipt of benefits is a lawful exercise of governmental authority.²⁸³

With these repeated legal defeats and the growing militancy of antiwelfare politicians and voters, NWRO membership plummeted as funding sources dried up and recipients lost faith in the possibility of further social change through current methodologies. By 1972, the NWRO was in financial crisis, and its leaders dissipated to other causes.²⁸⁴ By 1974, its national headquarters were closed permanently, as were many former member organizations. The late 1970s and 1980s were, consequently, a period of retrenchment for the poor, with decreased government funding and increased public hostility toward welfare recipients. This public hostility – increasingly fed by political-campaign rhetoric of widespread welfare fraud and the Cadillac-driving “welfare queen”²⁸⁵ together with unfavorable media images associating the poor with child neglect, sexual adventure, and self-indulgent sloth²⁸⁶ – led to growing calls for legislative reforms under AFDC at the state and national levels. While AFDC waivers were increasingly granted to states from the late 1980s onward,²⁸⁷ the backlash against the poor ultimately resulted in the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”),

277. See Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (1991).

278. See generally Gustafson, *supra* note 137 (documenting policy shift toward criminalization of welfare).

279. See generally William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001) (discussing evolving Supreme Court treatment of constitutional welfare rights).

280. See, e.g., *infra* notes 281-283. For broader discussion, see DAVIS, *supra* note 162 (discussing legal strategies and Supreme Court docket of welfare rights movement).

281. *Dandridge v. Williams*, 397 U.S. 471 (1970).

282. *Jefferson v. Hackney*, 406 U.S. 535 (1972).

283. *N.Y. State Dep't of Soc. Services v. Dublino*, 413 U.S. 405 (1973).

284. KORNBLUH, *supra* note 47, at 177-81.

285. See Gustafson, *supra* note 137.

286. Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159 (1995) (noting how media images of the poor shaped social perceptions of welfare and drove legislative debate in AFDC public policy issues in the late 1980s and early 1990s).

287. Susan Bennett & Kathleen A. Sullivan, *Disentitling the Poor: Waivers and “Welfare” Reform*, 26 MICH. J. L. REFORM 741 (1993).

terminating AFDC and replacing the federal entitlement program with state block grants, lifetime limits, and work requirements with inadequate or no exceptions for job availability, training, and daycare.

As a product of backlash, the PRWORA stands as the antithesis of the federal response sought by the early national welfare rights movement. It nonetheless reflects a decisive political turn away from command-and-control regulation and, particularly, the "culture of entitlement" that it supposedly generated among the poor. Political leaders today thus often continue to associate the welfare rights movement – with its focus on law, rights, consumption, and an expanding state – with what went wrong with postwar culture and social life.²⁸⁸

This continuing legacy, and its effects on social policy, defines the framework in which today's social welfare rights advocates must operate and seek recognition. It is an environment distinctly hostile to the poor, associating them with fraud, criminality, dependence, and irresponsible behavior and preferring that they remain invisible, shamed by their status, and outside the public square. It is, however, precisely this political exclusion from policy-making processes that has created the conditions for a new social welfare rights movement to emerge, albeit one with a very different set of methodologies and rights-based assumptions than its predecessor.

B. The Emerging Modern Social Welfare Rights Movement: Embracing the (Human Rights-Based) "New Accountability" Agenda

Although effectively defunct for three decades, a new modern social welfare rights movement has begun to emerge in the United States, stimulated by the "crisis" of accountability under PRWORA and its impacts on the marginalization and invisibility of the poor. This movement nonetheless derives its mobilizing logic and rhetorical support from a very different set of institutional, legal, and rhetorical resources. Indeed, while the early social welfare rights movement was based largely on confrontation, non-negotiable and absolutist legal demands for centrally-defined material entitlements, and reliance on a single-vision "federal solution" to poverty, the modern movement adopts a more place-based, process-oriented, and participatory approach to rights protection, more akin to the policy model upon which the early MFP program was conceived.

This new emphasis reflects a changing vision of the role of rights in consolidating citizenship and democratic self-governance in the twenty-first century political environment. Unlike the prior era, this environment is characterized not by an expanding federal bureaucracy, centralization of legal and regulatory authority, and broad distrust of local authority, but by their converse: the deconcentration of service delivery away from the state,

288. See, e.g., *supra* note 56 and accompanying text.

the softening of centralized regulatory rules, rising confidence in state and local capacity to protect rights, and a growing federal priority for maximizing governance efficiencies through incentive-based performance systems and competitive local experimentalism. Within this context, the federal government has increasingly devolved primary responsibility for both individual rights protection and social service provision back to state, local, and private capacities, deemed better suited and more responsive to the task.²⁸⁹ Accordingly, while the more fixed and absolutist vision of rights embraced by the NWRO and civil rights groups of the 1960s was undoubtedly responsive to the political environment of that era, it has proven increasingly anachronistic in the twenty-first century.

U.S. social movements of the poor have, correspondingly, been forced to look for a new set of legal resources and rights-based strategies for protecting their dignity interests that are more responsive to the complexities of the twenty-first century. They have done so not by turning back to the legalist and consumerist modalities of the 1960s "rights revolution." Nor, importantly, have they sought to replicate the equally narrow and absolutist methodologies of the international human rights movement of the 1980s and 1990s (even as they have turned increasingly from a "civil rights" to a "human rights" frame).²⁹⁰ Rather, recognizing the inadequacies of these "older" models to the modern era and its new democratic challenges, U.S. social movements of the poor have turned to the creative human rights strategies of a new movement.²⁹¹ That movement,

289. See generally Clinton Remarks, *supra* note 127 (noting that while many federal programs were initiated "to give the states time to develop an institutional capacity to administer them," "times change and in many cases State and local governments are now better suited to handle these programs"); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 489-504 (1977) (famously urging state courts to continue to expand strong individual rights protections under state constitutions given federal judicial "backsliding" and "pullback" in the 1970s under the U.S. Constitution and federal civil rights laws).

290. Indeed, both the 1960s U.S.-based "rights revolution" and the broader "international human rights movement" of the 1980s and 1990s tended to understand rights either as a fixed set of immediately demandable "goods" that government must provide to every individual on demand or as a set of nonnegotiable policy "trumps" on competing claims, unworthy of or unsusceptible to discussion. For general discussions of each, see GLENDON, RIGHTS TALK, *supra* note 35 (discussing U.S. "rights talk"); and Aryeh Neier, *Social and Economic Rights: A Critique*, 13(2) HUM. RTS. BRIEF 1 (2006) (employing dominant Western intellectual view of international human rights law).

291. New technologies, especially the internet and video-link communications, have dramatically facilitated the cross-border flow of comparative information and learning tools, enabling the sharing and reproduction of new tactics and strategies at an unprecedented rate. Social movements of the poor are thus increasingly integrated into a much larger transnational advocacy network. See generally MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998). These movements have responded by creatively learning from, adopting, and building upon the tactical successes and failures of their global counterparts, with some of the most important learning processes running from the global south to global north. Many of these new tactics are compiled in the excellent resource, THE NEW TACTICS IN HUMAN RIGHTS PROJECT, THE CTR. FOR VICTIMS OF TORTURE, *NEW TACTICS IN HUMAN RIGHTS: A RESOURCE FOR PRACTITIONERS* (2004) [hereinafter *NEW TACTICS*], http://www.newtactics.org/sites/newtactics.org/files/entire_workbook_english.pdf.

rising from the global grassroots, embraces a human rights-based "New Accountability" agenda for the twenty-first century.

Significantly, this new accountability agenda has been promoted most vigorously and creatively not by social movements in the United States, but rather by those in the more newly democratic nations of the world, particularly poorer ones transitioning away from authoritarian, apartheid, colonial, or neocolonial client-state regimes toward the promise of socially-inclusive, dignity-based, and participatory democracy.²⁹² It is in these contexts that human rights language and ideas were in many ways most thoroughly deconcentrated in the 1980s and 1990s,²⁹³ both by internal liberation or democracy movements mobilized to throw off oppressive rule and by the growing transnational advocacy network of activists organized to end the most repressive tactics of such regimes.²⁹⁴ Yet, largely because of this human rights deconcentration – and, specifically, the participatory and emancipatory agenda the human rights framework held forth for long marginalized, impoverished, and excluded majorities²⁹⁵ – it is also in these contexts that the liberal human rights paradigm promoted by leading Western-based international NGOs throughout the 1980s and 1990s has been most decisively contested. Indeed, given its growing unresponsiveness to contemporary social struggles on the ground, that paradigm is today in "crisis."²⁹⁶ It has, correspondingly, given way to a

292. Particular leadership in the new accountability movement has come from the newly democratic countries of Latin America, South Africa, and India.

293. The growing institutional sophistication of human rights law and its massive deconcentration into local discourses of the poor are, in fact, two of the most significant and defining developments of the late twentieth and early twenty-first centuries. An indication of this popular deconcentration lies in the almost uniform inclusion in national political constitutions drafted in the 1980s and 1990s of strong protections for internationally recognized human rights, including through direct reference to or constitutional incorporation of the core U.N. human rights treaties. For new constitutional provisions protecting economic, social, and cultural rights in the Americas, see, for example, PLATAFORMA INTERAMERICANA DE DERECHOS HUMANOS, DEMOCRACIA Y DESARROLLO (PIDHDD), COMPILACIÓN DE LA LEGISLACIÓN DE DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES EN EL MERCOSUR (2005) (providing information about Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay).

294. See generally KECK & SIKKINK, *supra* note 291 (discussing rise of transnational advocacy networks in 1980s and 1990s to combat human rights abuses of repressive regimes).

295. This emancipatory agenda lies in international human rights law's recognition of not only a core set of civil liberties and political rights, but, equally important, the right of "everyone" to "a standard of living adequate for the health and well-being of herself and her family, including food, clothing, housing and medical care and necessary social services." Universal Declaration of Human Rights, G.A. Res. 217A, art. 25, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948). By recognizing these core human needs as inherent rights, and insisting that they be ensured on a fair, equitable, reasonable, and nondiscriminatory basis to all, human rights law thus requires that priority attention be directed to monitoring and assessing the ways in which distinct policies and practices affect the enjoyment by all social actors of such rights. Accordingly, such rights have become a central lever through which marginal groups are pressing their poverty-eradication agendas before national and local decision makers.

296. See, e.g., Martín Abregú, *Human Rights for All: From the Struggle Against Authoritarianism to the Construction of an All-Inclusive Democracy – A View from the Southern Cone and Andean Region*, 5(8) SUR – INT'L J. HUM. RTS. 7, 8 (2008) (recognizing that the old human rights paradigm is in "crisis").

new, broader, more democratic understanding of human rights law that, in its key underlying assumptions, turns the previous paradigm largely on its head.

This shift follows changing historical circumstances.²⁹⁷ Indeed, the "old" human rights paradigm of the 1980s and 1990s was a direct product of its unique historical and political context: the post-Cold War democratic transition from authoritarian to liberal representative political systems. Within this context, a growing transnational advocacy network of activists, led by a small number of Western-based international human rights NGOs, constructed a particular discourse on international human rights law designed to maximally support what it understood as that law's primary objective: protecting individuals politically targeted by centralized and repressive state apparatuses from direct assaults on their bodily integrity and physical liberty. The resulting discourse was, responsively, state-centric and confrontational, individualistic and absolutist in its orientation, focused on a narrow set of liberties from state intervention, and based on a categorical assertion of universality that insisted that human rights – as fixed, internationally-determined rules for mandatory uniform compliance – had "to mean exactly the same thing every place in the world."²⁹⁸

By contrast, core human dignity claims that *were* thought to be the proper subject of local democratic processes and negotiation (including community-based priority-setting and targeted planning processes designed to take account of available resources, balancing against competing rights and interests, and differing local context and cultural interpretation) were claimed not to be real "rights," or at least not ones the international human rights movement should take up.²⁹⁹ This distinction, solidly entrenched in the public imagination through the 1980s and 1990s (and still dominant today in many contexts), was used to remove a vast sphere of dignity-centered human rights claims from the international

297. See Eugene Kamenka, *Human Rights, Peoples' Rights*, in *THE RIGHTS OF PEOPLES* 127 (James Crawford ed., 1988) ("All [human] rights arise in specific historical circumstances. They are claims made, conceded or granted by people who are themselves historically and socially shaped. . . . [T]hey cannot be divorced from social content and context.").

298. Neier, *supra* note 290, at 2. For a general discussion and critique of the central tenets of the earlier human rights discourse, see Cass R. Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727, 730 (1995). Sunstein describes the dominant criticisms against the individual rights discourse, including its rigidity, indeterminacy, excessive individualism, and a crowding out of attention to responsibility. See also GLENDON, *RIGHTS TALK*, *supra* note 35 (criticizing the narrowness of rights discourse in the United States); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002) (noting a similar critique of international human rights discourse).

299. See, e.g., Neier, *supra* note 290, at 2-3 (arguing that "human rights" are, by definition, not subject to compromise, balancing against competing rights, or resource constraints and concluding therefrom that it is therefore "dangerous" to recognize economic, social and cultural rights as "human rights" given that such rights are properly the object of political negotiation, democratic compromise, and resource availability); Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63, 67-71 (2004) (arguing that international human rights organizations should limit their powerful naming and shaming methodologies to abuses involving clear arbitrary or discriminatory conduct on the part of state actors).

human rights agenda.³⁰⁰

Yet, while this decidedly partial and distorting vision of international human rights law³⁰¹ might have made strategic sense in a post-Cold War political context characterized by highly centralized and physically repressive authoritarian states intent on retaining the power entrenched under Cold War superpower patronage, it has largely ceased to serve as a useful paradigm for enhancing human dignity and agency in a twenty-first century environment in which political liberalization and economic globalization have dominated trends in comparative national politics. Hallmarks of the late twentieth century, these dual processes have led to a situation in which power is increasingly *deconcentrated* away from centralized states toward weakly institutionalized local administrative units and ever more powerful *private actors*. Within this context, the “old” human rights paradigm has become ever less relevant to the increasingly sophisticated social movements rising in new democracies. This is particularly so as these movements seek to protect socially and economically disadvantaged communities from a growing range of abusive activities by private actors who operate increasingly beyond the reach of state control or through its economic capture.³⁰²

300. In particular, it was used to entrench a rigid dichotomy between a narrow set of civil and political liberties and a broader set of economic, social and cultural rights, the former defined as “human rights” and the latter as “development goals.” This distinction is only slowly being overcome today. U.S. legal academic commentary nevertheless regularly reifies it. See, e.g., Eric Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758 (2008) (reifying old stereotype that only “civil and political rights” are immediately enforceable human rights); James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217 (2005) (same). But see Tara J. Melish, *Rethinking the “Less as More” Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas*, 39 N.Y.U. J. INT’L L. & POL. 171 (2006) (arguing that the same spectrum of obligations and system-specific justiciability rules applies to all human rights norms, and hence distinctions between *rights* – as distinct from the discrete *claims* framed under them – are unwarranted).

301. International human rights treaty law explicitly recognizes the non-absoluteness of individual rights and the corresponding need for balancing competing rights, interests, and duties in a democratic society. See, e.g., Universal Declaration, *supra* note 240, art. 29 (recognizing that “[e]veryone has duties to the community” and that limitations on the enjoyment of rights are permissible so long as their purpose is “securing due recognition and respect for the rights and freedoms of others and of meeting the just requirement of morality, public order and the general welfare in a democratic society”); American Convention on Human Rights art. 32, Nov. 22, 1969, 1144 U.N.T.S. 123 (similar); African Charter on Human and People’s Rights art. 27-29 (similar).

302. Indeed, the democratic transition of the 1980s and 1990s was accompanied by widespread hopes and political assurances from the West that the vote, free expression, free assembly, and other liberal democratic staples of representative government would translate directly into human development improvements for poor and excluded majorities, including better access to education, employment, health care, and land resources. Instead, through government “capture” by more powerful groups, widespread corruption, and continuing anti-poor bias, decisions on how to spend public funds, deliver services, administer justice, and regulate economic activity continued to be controlled by the most powerful social groups, with little change to the unequal power distributions and historic marginality of groups with little electoral power. See generally Cass R. Sunstein, *Against Positive Rights*, 2 E. EUR. CONST. REV. 35 (1993) (adding voice to growing numbers of international experts in eighties and nineties arguing that the new democratic constitutions of transitional states should limit

Community-based citizens groups, consumer organizations, workers, poor mothers, indigenous peoples, the landless, and other historically marginalized groups have responded by seeking to seize back the mantle of human rights from the old “international human rights movement.” They have done so not by rejecting the utility of international human rights law to their struggles, but rather by reconceptualizing that law under a broader, more democratic and more participation-based understanding of it and its relevance to community problem-solving and participatory engagement in democratic self-governance.³⁰³ That understanding is one that does not conceive rights as absolute “trumps” on, or morally superior to, local political process and community priority-setting, but rather as a *framework set of tools* through which the least economically and politically powerful can insist that their voices and dignity-based interests be assured active and targeted consideration in the achievement of community-defined goals and priorities.³⁰⁴

Indeed, borne in the more democratized, privatized, and rights-sensitive context of the late twentieth century, this new movement aims to move beyond the rigid antagonism of the old state-centric rights paradigm of demand and protest – a model better suited to the centralized legal bureaucracies of the 1960s and 1970s or struggles against the repressive, authoritarian, and neocolonial regimes of the 1980s and 1990s. Instead, it embraces a new participatory paradigm of *meaningful, rights-based*

themselves to traditional civil and political liberties against the state and strong market economy protections, and that this would be sufficient to ensure improved human wellbeing without the need for more direct protections thereof); *but see* CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 222 (2001) (recognizing that correlation may not hold true where the poor and marginalized lack political power, and thus that additional rights-based tools may be necessary).

303. Human rights law – whether presented in treaty form, legislative or constitutional enactments, or the softer pronouncements of the Universal Declaration of Human Rights – has indeed emerged as the common language and principal point of leverage of new accountability, including in those nations like the United States that have ratified fewer human rights treaties. For example, the mission statement of the U.S.-based Poor People’s Economic Human Rights Campaign – a broad coalition of over one hundred anti-poverty groups – draws explicitly on the Universal Declaration of Human Rights:

We are committed to uniting the poor as the leadership base for a broad movement to abolish poverty everywhere and forever. We work to accomplish this aim through the promotion of economic human rights, named in the Universal Declaration of Human Rights as Articles 23, 25, and 26. These articles state our right to such provisions as housing, health care, a living wage job, and education.

Poor People’s Economic Human Rights Campaign, *About the Campaign: Mission Statement*, <http://old.economichumanrights.org/about/about.html> (last visited Feb. 13, 2010).

304. In many ways, this instrumental conception returns to the *original* post-WWII understanding of international human rights law. As Eleanor Roosevelt stressed in presenting the newly adopted Universal Declaration to communities around the world, the Declaration’s principal value lay in putting rights “in [the] hands” of local groups to act on in local context: “Without concerted citizen action to uphold the[se rights] close to home [in neighborhoods, schools, factories, farms, and offices], we shall look in vain for progress in the larger world.” Eleanor Roosevelt, *Remarks at the Presentation of In Your Hands: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights* (Mar. 27, 1958), *available at* <http://www.udhr.org/history/inyour.htm>.

*engagement in the construction of the public agenda.*³⁰⁵

Drawing on the core human rights principles of participation, dignity, non-discrimination, transparency, and accountability, this model insists that a rights perspective be directly incorporated into the design, implementation, and monitoring of the full range of policies and practices that proliferate in the larger marketplace – especially those that affect core rights of access to adequate food, housing, health care, education, and employment. Such a rights perspective requires not only that a set of dignity-based indicators be established through which successful performance can be monitored and assessed, but also that all stakeholders have the genuine right to meaningfully influence or share control over budgetary priority-setting, substantive policy-making and assessment, resource allocation, and ensuring fair and equitable access to public goods and services through participatory monitoring processes and performance-based incentive systems.³⁰⁶

By embracing this more process-oriented *human rights-based approach* to community problem-solving (rather than a *fixed rule* conception of human rights law), new accountability seeks to pry open spaces for negotiated settlement and policy engagement with government actors in the practical achievement of community-defined goals and priorities, such as poverty alleviation, local corruption, improved educational opportunities, the removal of discrimination in housing opportunities, and improved access to quality health care for all social groups. Equally important, it seeks to imagine and then establish parallel *de facto* accountability systems for private actors. It does so on the clear understanding that poverty is not only, or even principally, about lack of material resources. It is, at its core, about lack of power, voice, and inclusive participation in democratic governance.³⁰⁷

Within this context, the new accountability movement understands that the role of government has likewise changed. That role is one in which government is expected to serve as much as a *manager* of accountability processes between private actors (both national and transnational) as the direct *object* of democratic accountability by citizens for its own

305. Abregú, *supra* note 296.

306. See PRSA REVIEW, *supra* note 231, at 44 n.63 (defining participation as “the process through which stakeholders (those affected by the outcome of reform or capable [of] affecting the reform) influence or share control over setting priorities, making policy, allocating resources, and ensuring access to public goods and services”).

307. This observation has been made particularly powerfully in the work of Amartya Sen, Jean Drèze, Frances Moore Lappe, Joseph Collins, and Philip Alston in the context of global hunger and food poverty. See, e.g., JEAN DRÈZE & AMARTYA SEN, HUNGER AND PUBLIC ACTION (1989); Philip Alston, *International Law and the Human Right to Food*, in THE RIGHT TO FOOD 20 (P. Alston & K. Tomaševski eds., 1984) (“Those groups which are completely excluded from the decision-making processes affecting them are unlikely to maintain access to adequate food for very long.”). It has likewise been recognized expressly by the U.N. Development Program for over a decade. See, e.g., UNDP, HUMAN DEVELOPMENT REPORT 2006: BEYOND SCARCITY: POWER, POVERTY AND THE GLOBAL WATER CRISIS (2006) (arguing that power and inequality are at heart of global water crisis, not scarcity); UNDP, HUMAN DEVELOPMENT REPORT 2000: HUMAN RIGHTS AND HUMAN DEVELOPMENT (2000).

performance. That is, government is increasingly expected to play an orchestration role in encouraging, facilitating, and coordinating the outputs of performance-based accountability processes at multiple levels of social organization and responsibility. By moving these processes “downward” and “outward,” partnering the public and private sectors in common pursuit of a shared set of goals, and insisting on a federally-orchestrated institutional structure of facilitative support and assistance, new accountability thus embraces a stakeholder-centered, performance-based, and experimentalist model of human rights achievement that, in its core organizing principles, closely approximates not only the driving tenets of the early War on Poverty MFP policy but also those of modern regulatory new governance theory.

It is this overlap that lays the policy foundation for renewing a national recommitment to poverty alleviation today in the United States. This policy foundation is made operative by the fact that U.S.-based social movements of the poor, in responding to their own realities of growing social marginalization and political exclusion, have increasingly adopted the tactics and strategies of new accountability.³⁰⁸ In particular, the impacts of PRWORA on poor U.S. communities has triggered the recrudescence of a new movement of grassroots leaders from the ranks of the nation’s poor, one made up of hundreds of grassroots organizations.³⁰⁹ This movement rejects the dominant tactics of its 1960s predecessors, with their focus on fixed, immediate demands for government-provided consumer goods, top-down income transfers, and other silo-based approaches as a solution to poverty.³¹⁰ Instead, it embraces community-led, place-based, and results-oriented strategies that, drawing on human rights principles and insisting on voice and agency as democratic prerogatives in the formulation of anti-poverty policies and targeted plans of action, take the improvement of human dignity and community well-being as their central goals.

To understand precisely how the positive dignity-centered influences of these new accountability methodologies can be incorporated constructively into the more efficiency-oriented administrative arrangements of new governance regimes (including those of PRWORA), it is therefore useful to take a closer look at the principal motivating tenets

308. See *supra* note 291. This slower uptake in the United States is largely a reflection of both the nation’s legalistic and court-centric culture, which defaults to legal adversarialism in the resolution of disputes, as well as the professional divide that persists between many “social welfare” and “human rights” advocacy groups, although this is changing. For perspectives of leaders of U.S.-based human rights organizations that, unlike their global counterparts, still resist recognizing economic and social rights as full human rights, see Neier, *supra* note 290; and Roth, *supra* note 293.

309. Many of these are formally organized under the loose coordination of the Poor People’s Economic Human Rights Campaign (PPEHRC), a national coordinating body created in 1998 by poor people’s groups largely as a response to the 1996 Welfare Reform Law. For member organizations, see <http://www.economichumanrights.org/members.html> (last visited Feb. 2, 2010).

310. See, e.g., PPEHRC Mission Statement, <http://www.ussf2007.org/en/node/2211> (last visited Feb. 2, 2010) (“We do not seek pity. We do seek power to end conditions that threaten all of us with economic human rights violations . . .”).

and impulses that drive new accountability theory. As with new governance, and like the early MFP policy, these include a policy focus on decentralized decisionmaking processes and public-private partnerships, the opening of new spaces for pluralized stakeholder participation, performance monitoring and indicator-based targeting for the achievement of measurable results, the pluralization of competitive compliance incentives, and subsidiarity-based legal orchestration. Each is considered below.

1. Decentralization, Subsidiarity, and Public-Private Partnerships

The first core tenet of new accountability, like new governance, insists that social problem-solving should be designed to take place at the level closest to the affected individuals, where knowledge inputs are most immediate, solutions can be most responsive to locally-assessed needs and priorities, and public and private stakeholders can most easily and effectively be brought together in constructive partnerships. New accountability thus rejects the notion (common in earlier rights-based methodologies) that there is a single, fixed, rule-like definition of human rights that only external experts removed from domestic politics and local preferences are competent to define. Rather, it appreciates that the broad, universal values of dignity, fairness, flourishing, and opportunity that human rights represent can be instantiated in a wide diversity of ways and that these instantiations – each context-specific and the product of continual and evolving interest-based balancing and multi-party negotiation – should be determined in the first instance by affected communities themselves.

This emphasis on localism and place-based community organizing follows not only from the intrinsic-value or dignitary benefits of solving one's own problems when and where they occur, but from the instrumental fact that local needs are best appreciated by local actors and hence may be most effectively redressed by them through local processes of decision, targeting, partnership, and community resource mobilization. This is particularly so given the contextual and evolving nature of problems faced by distinct communities, requiring often unique and targeted solutions that one-size-fits-all solutions determined from above generally cannot fully accommodate. It was indeed precisely on this understanding that President Johnson himself based his call for community-based, long-range plans for fighting poverty – plans that were not to be “prepared in Washington and imposed upon hundreds of different situations,” but rather would be “based on the fact that local citizens best understand their own problems, and know best how to deal with those problems.”³¹¹

New accountability, like new governance, nevertheless recognizes that local communities cannot solve all problems by themselves. It also

311. See LBJ Special Message to Congress, *supra* note 5, at 378.

recognizes that smaller communities are not always willing or able to faithfully protect the dignity-based rights, liberties, and priorities of all of their inner members without outside assistance. New accountability thus draws directly on the principle of subsidiarity. Foundational to the structure and purposes of international human rights law,³¹² that principle insists not only that “problems [should] be solved where they occur, by those who understand them best, and by those who are most affected by them,”³¹³ but also that such problem-solving processes must occur *within* a national and international infrastructure of rights-based facilitative support, assistance, and positive orchestration designed to coordinate, oversee, and strengthen local self-governance capacity.³¹⁴ In structuring a relationship of mutual duties and responsibilities between all social stakeholders in organized society – both public and private – subsidiarity thus requires that broader systems of regular monitoring, communication, and orchestration be established, such that failures within smaller units can be promptly identified and appropriate positive assistance provided as needed.³¹⁵ This must be done without, however, arrogating tasks more properly performed through localized agency, competence, and resources.

Correspondingly, new accountability seeks to move problem-solving processes downward and outward, to the community level and sites of abuse, where affected individuals can speak for themselves and provide their own perspectives, solutions, and proposals for confronting the priority problems experienced in their unique communities. Unlike the social movements of the 1960s, it does not assume that the best solutions will come directly from the federal government, nor as any one-size-fits-all fix. Rather, it sees the federal government as a source of facilitative support and coordination, while training its eye on initiating and strengthening processes of human rights performance review at the local level, where

312. For a fuller discussion of subsidiarity as a structural principle of human rights law, see Carozza, *supra* note 143.

313. Shelton, *supra* note 143 (citing Linnan, *supra* note 143, at 403).

314. See Tara J. Melish, *From Paradox to Subsidiarity: The U.S. and Human Rights Treaty Bodies*, 34 YALE J. INT’L L. 389, 439 n.224 (2009) [hereinafter Melish, *From Paradox to Subsidiarity*] (“Subsidiarity represents in this way the constitutive scaffolding around what may usefully be visualized as a series of nested circles, with the individual human person sitting at the center, surrounded concentrically by progressively larger social groupings of family, civic solidarity associations, local government, nation-state, and, ultimately, intergovernmental bodies and transnational social networks.”).

315. International human rights law, accordingly, envisions a constitutive framework of monitoring, supervision, and facilitation that allows this subsidiary relationship to play itself out flexibly within a broad variety of institutional structures and mediating procedures. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, General Comment No. 1, *Reporting By State Parties*, ¶¶ 1-9, U.N. Doc. E/1989/22 (Feb. 24, 1989) (identifying subsidiarity-based objectives of periodic reporting, including stimulating and regularizing *domestic* monitoring, enforcement, and participatory self-appraisal processes) [hereinafter U.N. ECOSOC, General Comment No. 1]; Melish, *From Paradox to Subsidiarity*, *supra* note 314, at 442-43 (identifying subsidiarity-based institutional restraint doctrines in contentious procedures, including exhaustion-of-domestic-remedies rule, the margin of appreciation doctrine, “reasonableness” and other proportionality or interest-balancing tests, remedial deference doctrines, the fourth instance formula, and friendly-settlement and “good offices” conciliation).

individuals live and most directly interact.

New accountability thus entails a distinct form of problem-solving: one based on listening directly to those who experience the indignities of poverty and engaging them in sustained conversations about the most effective, practical ways to overcome the specific day-to-day barriers they face in meeting their basic needs of food, housing, health care, employment, income, and education. It aims, in this regard, to engage the poor in identifying the varied causes of impoverishment, as they experience it, and hence to establish a tactical map of the relationships that sustain distinct impoverishing situations in each community. From these tactical maps, responsibilities for eliminating causes can be determined, cross-sector and multiscale social alliances can be fostered, and monitoring and accountability structures can be created to ensure that the full scope of public duties and private responsibilities are fulfilled with respect to poverty alleviation efforts.³¹⁶

A centerpiece of the new accountability movement has correspondingly been the opening of new decentered spaces in which the disadvantaged can speak directly about their experiences with poverty on their own terms and in their own communities, albeit within a human rights framework.³¹⁷ A central tactic in this regard has been the holding of local and national public hearings on poverty. Poverty hearings are fora in which the poor come together to give direct testimony about their lived experiences with respect to a core set of economic, social, and cultural rights, to hear the experience of others, to be linked with similarly-minded organizations, and to propose targeted solutions – large and small – to the crisis of service delivery, economic planning, and arbitrary or discriminatory public and private action in the field of social and economic rights.³¹⁸

316. Like the early War on Poverty, new accountability thus appreciates that poverty is sustained by multiple relationships and interactions and caused by a multitude of reinforcing and interwoven barriers and constraints. Each of these sources – some local, some national; some based in policy, others in bias – may require a different strategy or tactic, and may require the participation of distinct sets of social actors to eradicate it. While the “social work model” focused attention too narrowly on intra-family and community deficits and the “legal-bureaucratic model” too narrowly on fixed federal income-based entitlements, new accountability sees poverty in its fuller complexity, seeking to attack it pragmatically and non-ideologically as such.

317. The human rights framework facilitates this process precisely because human rights are defined by reference to both the dignity-based needs of the individual – including food, housing, education, employment, and health care – and the corresponding obligations held to each individual by other socially-situated actors in the community.

318. See generally Global Call to Action Against Poverty, Women’s Tribunals/Poverty Hearings: Sharing People’s Voices at WSF, <http://www.whiteband.org/Action/take-action/gcap-mobilisation-2009/wsf-2009/women2019s-tribunals-poverty-hearings-dignity-forum-at-wsf> (last visited Feb. 14, 2010) (“The aim of these activities has been to provide a space for testimonies that highlight the plight of poverty, to give voice to those living in poverty, to explore the cause of this situation, to provide solutions anchored in local experiences and to demand for their implementation.”). A first iteration of this tactic in the U.S. context took the form of collecting testimonies at the local level, then sending them to the U.N. Office of the High Commissioner on Human Rights or one of the U.N. treaty bodies or special mandate procedures for validation and public exposure. This was done in an effort to

These hearings have arisen in a variety of jurisdictions.³¹⁹ In each, they respond directly to a sense that the poor are being “left out” of decisionmaking processes, denied a voice in charting the direction of policies that most affect them.³²⁰ They thus constitute an effort by marginal sectors to gain visibility and voice in monitoring and assessing the way that priorities are set, policy is made, resources are allocated, and access to public goods and services is assured. They also constitute an effort to recognize the multiplicity of social actors responsible for sustaining barriers to opportunity and conditions of poverty, while insisting upon the participatory relevance and agency of the poor in identifying the causes of poverty themselves. By doing so, poverty hearings aim to identify a tactical map of public and private responsibilities that can be socially enforced through a growing number of accountability arrangements and public-private partnerships.

One of the most exemplary of these initiatives came in 1998 in South Africa, when 10,000 mostly poor people from across the nation came together to participate in a series of ten open “National Speak Out on Poverty Hearings” (“Poverty Hearings”), held in each of the nine South African Provinces. Organized by the South African NGO Coalition (“SANGOCO”), the South African Human Rights Commission, and the Commission on Gender Equity, the hearings were intended to provide a platform for the poor to speak publicly and on an official record about the day-to-day barriers they faced in accessing their constitutional rights to land, sufficient food and water, adequate housing, access to health care services, social security, a healthy environment, education, and labor rights.³²¹ In so doing, the hearings were designed not only to recognize the dignity and agency of the poor in the new South Africa – affirming them as indispensable stakeholders in the larger process of local and national poverty alleviation – but also to provide an instrumental basis for constructing concrete, highly practical, and responsive “strategies to eradicate poverty and inequality” in the nation’s many communities.³²²

draw attention to the need for specific public policy reforms or to identify “best practices” and areas of common concern. Increasingly, however, in an effort to force open domestic spaces for participation, such testimonies are directed immediately toward national rather than international audiences.

319. In 2008 alone, poverty hearings were held in at least twelve countries. *See id.*

320. *See, e.g., id.; infra* notes 336-338.

321. *See* SANGOCO, NATIONAL SPEAK-OUT ON POVERTY HEARINGS: THE PEOPLE’S VOICES 7 (1998) (explaining that seven of the ten respective hearings were thematically organized around one of these core socio-economic rights recognized in the South African Constitution and in ratified human rights treaty law, while the remaining three were non-thematic, allowing participants to speak on the topics of their choosing). Nearly 600 people presented oral evidence over the thirty-five days of the hearings, while others participated through the presentation of written submissions, attendance at the hearings, or the mobilization of communities. *Id.* at 8.

322. As the final report explained:

The Poverty Hearings provide a platform for poor people in South Africa to share their perspectives on what economic and social rights mean for them, the obstacles and difficulties they experience in gaining access to these rights, their suggestions for overcoming these obstacles, and the

Such strategies would then lay the basis for creating a framework of action for bringing the full range of public and private stakeholders together in partnership around a coordinated national commitment to poverty alleviation.

Consistent with the new accountability agenda, the key features of the hearings were thus decentralized participation of those most affected by rights abuse; a space for listening to the suggestions and proposals for effective solutions from the affected themselves;³²³ a tactical mapping of barriers to opportunity and the establishment of an accountability plan for multiple sectors of society to put those recommendations into effect; and a monitoring system for ensuring that each set of public and private actors takes appropriate measures within their competence, supported by a national orchestration and accountability framework.

While rights-based community hearings, organized by and for the poor, are increasingly common around the world,³²⁴ the South African Poverty Hearings were exemplary in a number of regards. Perhaps most important was their effort to descriptively catalogue and closely detail the vast diversity and complexity of causes underlying day-to-day experiences with poverty in distinct local contexts. As testimony after testimony revealed, these causes lie as fully in private attitudes and social stereotypes, bureaucratic inertia and corruption, arbitrary rule enforcement, and indifference to the policy impacts on distinct groups as in lack of income in itself.³²⁵ Any effective plan to combat poverty, it was understood, must necessarily address the full range of these issues in ways that concretely correspond to local contexts.

At the same time, the hearings sought to create a multi-sectoral social accountability framework designed to bring all social stakeholders, both public and private, together in a common rights-based partnership to root out the many sources of poverty. The testimonies collected over the three months of hearings were thus used to draw up a multi-stakeholder National Poverty Commitment and National Plan of Action Around Poverty. These documents not only reflected all of the major themes discussed in the hearings, but also expressly recognized the roles and

role of government in promoting their rights. The hearings also allow us to identify the gaps between constitutional rights, laws and policies on the one hand, and people's lived realities and experiences on the other. . . . to transform the economic and social rights in the Constitution into tools of empowerment and mobilisation in the hands of the poor.

Id. at 63 (emphasis added).

323. As the final report made clear, "The piles of written testimony bore evidence of the fact that poverty is about dismal and ongoing drudgery, hunger and struggle. However, the testimonies also provided ample evidence of the ingenuity and creativity of people who survive against all odds." *Id.* at 1.

324. See *supra* note 319. For more on hearings in India centered on the right to food, for example, see Right to Food Campaign, <http://www.righttofoodindia.org/campaign/campaign.html>. In 2007 and 2008, moreover, women's tribunals took place in India, Peru, Egypt and the United States. See Global Call to Action Against Poverty, *supra* note 318.

325. SANGOCO, *supra* note 321 (documenting major themes of testimonies). This author attended the hearings and compiled written accounts (on file with Author).

responsibilities of the full range of social actors identified by hearing participants as contributing, in large or small ways, to the persistence of barriers to opportunity. Thus, under the title "Together We Ended Apartheid; Together We Can End Poverty," the National Poverty Commitment enumerated a concrete set of actions towards poverty eradication and the removal of the obstacles identified by the poor for "the public," "government officials," "politicians," "the private sector," "civil society" (NGOs, religious institutions, labor, etc.), and "the media."³²⁶ It correspondingly called upon all individuals in both government and throughout civil society to commit themselves to "take *individual responsibility* to ensure the fight against poverty becomes the nation's priority."³²⁷

These commitments were, in turn, reflected in the National Plan of Action Around Poverty, which was to be an on-going, comprehensive plan that included actions delegated to, or taken on by, groups at all levels of national organization and institutional affiliation. Every year, the progress made on each planned action was to be reviewed and – after acknowledging the gains made and identifying what remains to be done – the Plan was to be updated as a guide for the following year's activity.³²⁸ Correspondingly, in an effort "to take forward the struggle to end poverty,"³²⁹ the specific commitments undertaken by national stakeholders were likewise to be updated. In 2008, a follow-up set of Poverty Hearings was held in all nine provinces to determine the extent of progress made over the prior decade, and to give new life to the process by recognizing constructive learning processes.³³⁰

Finally, consistent with new accountability's insistence on the need for participatory local monitoring processes and national subsidiarity-based orchestration, an explicit compliance monitoring framework was envisioned. "Monitoring and Follow-up Committees" were thus to be established at local, provincial, and national levels.³³¹ As the organizers recognized, it is not what exactly each group is doing that is important, but rather that "at every single step groups [are] engaged in some action . . . [that] there is dialogue between government and civil society around the issue."³³² Accordingly, while local and provincial monitoring

326. *Id.* at 84-85.

327. *Id.* ("We the undersigned commit ourselves to the following actions towards poverty eradication: To take individual responsibility to ensure the fight against poverty becomes the nation's priority by . . . [engaging in enumerated actions, specific to each sector].").

328. *Id.* at 84.

329. *Id.*

330. According to Jacqui Boule, one of the original organizers, the 1998 hearings were successful "because they enabled people to think differently about the capabilities and abilities of the poor." Yet, they were not fully successful in getting decisionmakers to use the information gathered and in ensuring proper follow-up. The organizers are thus learning from their experience and spreading those lessons more broadly by organizing within an Africa-wide advocacy effort around the Millennium Development Goals. See Patrick Burnett, *Talking Poverty*, MAIL & GUARDIAN, July 29, 2008.

331. SANGOCO, *supra* note 321, at 84.

332. Interview with Jacqui Boule, Programs Dir. of SANGOCO, in Johannesburg, S. Afr.,

committees were to work cooperatively and strategically with community-level authorities and provincial government on removing identified obstacles to poverty eradication, national level groups such as SANGOCO, the War on Poverty Forum, and other NGOs would take on larger, more national policy-oriented issues.³³³

Moreover, to ensure national orchestration of these multi-scalar monitoring and follow-up processes, rights-based government statutory bodies such as the South African Human Rights Commission and Commission on Gender Equality agreed to oversee stakeholder compliance with the Commitment and Plan. Both entities committed to do so by coordinating stakeholder implementation reports and conducting a range of regularized monitoring procedures, such as periodic spot checks.³³⁴ Based on these collected inputs, the statutory bodies committed to provide a consolidated report on October 17 every year – International Poverty Eradication Day – describing the extent of national compliance with the Commitment.³³⁵

By creating this subsidiarity-based accountability framework around the articulated experience and solutions of the poor, the South African Poverty Hearings sought to upset the traditional balance of power in the nation, which had for too long functioned to exclude the poor from policymaking processes. As one organizer explained:

[A] lot of people feel that their voices . . . that they have been forgotten. The Poverty Hearings were really important in enabling people to feel that they haven't been forgotten, and providing a platform for them to express their views. . . . The thing about the poverty hearings is that they allowed people to speak who wouldn't usually get access to policy-makers because they've been so far removed from the process. . . . [Our concern is] *how do you give voice to people who have been marginalized from the process and get them back in.*³³⁶

That imperative of “getting marginal people back in” to the system lies at the heart of new accountability strategies and their strategic opening or appropriation of creative new political spaces for ensuring the poor have

(June 1998) [hereinafter Boule Interview] (on file with Author).

333. These included developing and lobbying for an anti-poverty budget, a women and children's budget, a public sector code of conduct, national credit-financing schemes, macro-economic strategies, and cancellation of the (internal) apartheid debt. *Id.*

334. SANGOCO, *supra* note 321, at 85.

335. *Id.* The South African Human Rights Commission in fact has a constitutionally-mandated role to play in rights-based poverty-alleviation efforts. See S. Afr. Const. 1996 § 184(3) (“Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.”).

336. Boule Interview, *supra* note 332.

meaningful voice. Likewise at new accountability's core lies recognition that responsibility for poverty alleviation and related human rights achievement does not rest exclusively with government or with the individual poor themselves. Rather, it rests with the full range of social stakeholders, including private institutions, business, the media, and the general public, all of whom share mutual social duties and responsibilities to root out the many barriers to opportunity, equality, and participation in organized society.

Although its antecedents were quite distinct, a similar process was recently organized in the United States, designed to reverse the invisibility that surrounds domestic poverty in national politics and media priorities and to give voice to those who experience human rights violations on a daily basis.³³⁷ Organized by the national coordination and local chapters of the Poor People's Economic Human Rights Campaign ("PPEHRC"), the National Truth Commission on Poverty was likewise the result of members' conviction that poverty will not be adequately addressed in the United States until the poor themselves are seen and heard as real people, not as mere statistics or stereotyped images. As PPEHRC's national coordinator explained: "We need to increase [the] visibility [of the poor] and put a face on poverty in America. What we intend to do, instead of throwing statistics out there, is show what these mothers and fathers and children look like. They look like the people that live next door."³³⁸

Symbolically held in Cleveland, Ohio – designated in 2004 as the nation's poorest big city – the U.S. poverty hearings aimed to use the fundamental rights enshrined in the Universal Declaration of Human Rights to mobilize action on and attention to poverty in the United States. The hearings were thus presided over by a set of independent national and international human rights experts,³³⁹ invited to listen to the testimony of

337. According to the Poor People's Economic Human Rights Campaign ("PPEHRC"):

Part of the reason . . . the poor are not surviving, is that our suffering has been made invisible. The poor have been disappeared from not only the welfare rolls and the workforce, but from the media and the political debates. Our stories are not told and our images are not seen. Our invisibility has allowed our situation to be ignored by our politicians, who have not placed a priority on addressing the increasing number of poor families and our worsening conditions. We know that in order to win this war and to survive, the faces of America's poor must be shown. If the general public knew our stories and saw our faces, we know that something would be done. The timing is critical. We need economic human rights to be a priority or many of us who have been abandoned by political parties in the past, simply will not make it.

PPEHRC, *Faces of the Fallen*, <http://old.economichumanrights.org/facepage/index.html> (last visited Mar. 28, 2010).

338. Diane Suchetka, *Who Are the Poor? Come to Tremont To Hear*, CLEVELAND PLAIN DEALER, July 14, 2006.

339. In addition to national leaders, the Commissioners included international experts such as Dr. Arjun Sengupta, U.N. Independent Expert on Extreme Poverty and Human Rights, and Nora Morales de Cortiñas, one of the Mothers of the Plaza de Mayo from Argentina. See PPEHRC, NATIONAL TRUTH COMMISSION: SHINING A LIGHT ON POVERTY IN THE U.S.A., PRELIMINARY REPORT 12-13 (2006).

poor people from across the United States regarding their personal experiences with rights abuses in six broad categories: the right to health care, the right to a living wage, the right to adequate housing, the right to water and basic utilities, the right to education, and freedom from unjust child removal from the home.³⁴⁰

Consistent with new accountability models, participants used the forum to speak specifically and concretely about their personal experiences with a wide range of abusive conduct that sustains barriers to opportunity and dignity in their daily lives. From these testimonies, a final report was prepared, designed to consolidate testimony, identify concrete causes of and responsibilities for social rights abuses, and thereby propose a tactical map for what could be done by distinct actors to prevent similar abuse from occurring in the future. The report's conclusions were then distributed broadly to PPEHRC's base organizations so that appropriate follow-up action could be taken locally.³⁴¹ In an effort to further localize and decentralize the hearing process, organizers also encouraged community leaders to sponsor their own similar, more targeted or issue-specific hearings at the state and local levels.³⁴² In this way, community-based organizations could develop and pursue their own context-specific plans of local action for confronting poverty's many sources, pressing human rights achievement to the front of local political agendas and ensuring the direct participation of as many stakeholders as possible.

This "downward" and localizing trend of new accountability movements aims not only to recognize the dignitary aspects of local participation, but also the instrumental fact that accountability arrangements and public-private partnerships can be established and managed more easily in community settings. Responsive action is, accordingly, most likely to take place at that level. It is also at the local level that concrete examples of abuse are most easily identified, tactical maps are most easily assembled, and responsive, practical action plans can be put together to directly address locally-identified priorities. Through day-to-day contacts, cross-sectoral allies may also be more effectively identified and brought together in productive alliances around concrete human rights goals. By moving downward, new accountability thus rejects the trap –

340. This testimony included, for example, the struggles of union representatives and the unemployed to secure a living wage, the experiences of small farming families struggling against big corporate agriculture, the loss of health care coverage after diagnosis with serious illness, problems with home ownership, the removal of children from the home because of conditions of poverty, the loss of water, and forcible evictions. *See id.* at 27-57 (providing excerpts of testimony).

341. Telephone interview with Mary Bricker-Jenkins, Coordinating Council Member, PPEHRC (Aug. 15, 2006).

342. On Sept. 25, 2008, for example, a follow-up public hearing on the human right to health was held in Brattleboro, Vermont, as part of a Health Care is a Human Right Campaign. Email from Jonathan Kissam, Coordinating Committee Member, Vermont Workers' Center (Sept. 11, 2008) (on file with Author) (inviting "testimony on experiences with the healthcare system from Windham County residents"). Similar public hearings on access to healthcare as a human right have likewise been held in other U.S. states and localities.

succumbed to by the NWRO in the 1960s – of sacrificing, in the name of higher-level systems reform, attention to the arbitrary and abusive practices experienced on a day-to-day basis at the local level, many of which constitute some of the most significant barriers of access to adequate housing, health, education, and food.

Indeed, as direct testimonies from socially disadvantaged groups consistently demonstrate, it is the abusive and arbitrary policies implemented by local level administrators, service providers, and private actors, particularly when given broad discretion to meet raw program targets, that so often create the most immediate barriers to individual dignity and family livelihood.³⁴³ When, for example, poor and inadequately housed women in the United States provided testimony in a regional consultation process on the concrete barriers they faced in accessing adequate housing, the testimonies revealed a priority focus not on access to housing stock generally, but rather on the arbitrary barriers to that access imposed by local actors. In particular, attention was centered on family separation rules in housing and domestic-violence shelters, child removal policies due to inadequate housing conditions, discrimination by landlords on the basis of sex, nationality, income and other arbitrary grounds, and loss of Section 8 vouchers for single instances of missed utility bills or for sheltering homeless family members.³⁴⁴ Recognition of these barriers is critical for establishing maximally responsive and effective rights-based plans of action in distinct and varied social contexts.

Similar testimonial accounts have been collected with respect to access to safe, affordable, and adequate housing in other subnational jurisdictions. From 2007 to 2008, for example, the Ontario Human Rights Commission undertook province-wide consultations on human rights and rental housing, collecting testimony from those affected about the extent of the problem and gathering their proposals for practical solutions.³⁴⁵ Thousands of people contributed testimony, either orally or in writing, to document the systemic and discriminatory barriers faced in accessing and maintaining adequate and affordable housing. Most commonly, these centered on inappropriate advertisements, discriminatory stereotypes, negative attitudes toward the poor, and the discriminatory impacts of screening requirements such as credit checks, guarantors, rent deposits, employment verification, and income requirements.³⁴⁶ Consistent with the

343. See, e.g., Mencimer, *supra* note 169 (documenting abuses by welfare caseworkers in Georgia, including the request for sex in exchange for assistance and the assertion of false eligibility restrictions, such as surgical sterility requirements and a prohibition on applying while pregnant).

344. Testimony provided to U.N. Special Rapporteur on Adequate Housing, Mr. Miloon Kothari, during the U.N. Consultation on Women and the Rights to Adequate Housing in North America, Washington DC, Oct. 15-17, 2005 (audio recording on file with Author).

345. ONT. HUMAN RIGHTS COMM'N, RIGHT AT HOME: REPORT ON THE CONSULTATION ON HUMAN RIGHTS AND RENTAL HOUSING IN ONTARIO 5 (May 2008), http://www.ohrc.on.ca/en/resources/discussion_consultation/housingconsultationreport/pdf.

346. *Id.* at 3-4.

new accountability agenda, the Commission not only collected the diverse testimonies in its final report, but also set out a framework of action proposing concrete measures to be taken by each set of relevant stakeholders.³⁴⁷ Echoing President Johnson's emphasis on the imperative of broad stakeholder participation in poverty alleviation efforts, it did so under the express recognition that, in protecting the right to housing, "We must all work together, through partnerships and creative solutions, to make the substantive and long-lasting changes that are warranted."³⁴⁸

These arbitrary abuses in the housing field parallel many of those named by TANF recipients under PRWORA. As addressed in Part II, clients have regularly been dropped from the public assistance rolls for such "offenses" as a family member missing a single appointment for a job interview, or denied benefits for a series of reasons entirely unrelated to need.³⁴⁹ Stringent eligibility verification procedures, meanwhile, "cause erroneous denials, lead to routine invasions of claimants' privacy, place heavy burdens on claimants, unnecessarily delay claimants' receipt of benefits, and discourage many eligible individuals from applying for welfare or completing the application process."³⁵⁰

Significantly, none of these regularized abuses are officially tracked as part of government-sponsored performance monitoring. New accountability seeks to fill this critical gap. It seeks to spotlight street-level abuses, publicly name unfair, arbitrary or unreasonable practices, identify those responsible, propose concrete and targeted solutions, and build strong public-private partnerships among allied stakeholders within a rights-centered and subsidiarity-based orchestrating structure. In so doing, it seeks to provide a critically necessary instrumental check on the practical implementation of new governance regulatory regimes, particularly as they affect the poor.

2. From Fixed Rules to Participatory Monitoring of Rights-Based Standards and Safeguard Policies

The second organizing principle of new accountability, closely related to the first, is that the rights of the poor cannot be protected through government provision of fixed income or material goods alone, no matter how reliable. The causes of poverty are too complex and their sources too varied. Thus, while the 1960s welfare rights movement, operating under the mantra "More Money, NOW!," focused on gaining immediate access to bureaucratically defined "minimum standards" for good family living,³⁵¹ new accountability movements of the poor today organize under the participatory mantra "don't talk about us, talk *with* us"³⁵² and "nothing

347. *Id.* at 85-96.

348. *Id.* at 85.

349. *See supra* notes 203-204.

350. *See* Mulzer, *supra* note 126, at 689.

351. KORNBLUH, *supra* note 47, at 41-48, 60.

352. *See supra* note 50.

about us, without us.”³⁵³ In so doing, they seek meaningful participation in setting the standards through which the substance of social welfare policy is made and, correspondingly, through which stakeholder behavior is determined to meet minimum community expectations of adequacy, responsiveness, fairness, and accountability.

Drawing on human rights principles and methodologies, these standards tend to focus on ensuring that a core set of substantive and procedural safeguard policies are rigorously followed in decisionmaking processes that affect the enjoyment of livelihood rights. Four of the most common safeguard policies in this regard include ensuring the following: one, that all civil society actors are able to effectively participate in the design, monitoring, assessment, and implementation of policy; two, that disparate impacts do not fall on discrete social groups, especially the most vulnerable; three, that policy is reasonably targeted to ensure the progressive realization of the full enjoyment of rights by all social sectors on a non-discriminatory basis; and, four, that failures in the achievement of outcome-oriented targets are fully justified by reason-giving and explanation in transparent, evidence-based processes that take account of the full availability of human, financial, technological, and social resources in the community.

By insisting on the observance and active monitoring of such standards, modern social movements of the poor thus seek to participate in how budget priorities are set, how housing projects are approved, how targets are monitored, and how ten-year plans are assessed. Likewise, they want to ensure that social impact assessments are completed before project, licensing, or funding decisions are made, assuring thereby that their views, interests, and expertise are taken actively into account in policymaking processes.

Such direct participatory engagement is necessary, new accountability insists, both at the design stage of policy planning (to ensure effective targeting of the needs of all social actors, particularly the most vulnerable) and, equally important, in the implementation and monitoring phase. Vulnerable groups can thereby directly “block watch” policy performance, monitoring its practical impacts on distinct social groups and its achievement of dignity-enhancing outcomes. Accountability processes can then be established through which performance failures or backsliding can be immediately brought to public attention, transparent explanations can be required, and better targeted, more responsive policies can be offered to replace those whose performance has been deficient.

By putting people’s participation and active engagement in democratic rights-based decisionmaking at its center, new accountability thus rejects a construction of human rights that views rights as having a necessarily fixed, rule-like, unitary content that is universal and constant across jurisdictions. Such was the dominant view under both the legal-bureaucratic model of the 1970s and the equally rigid human rights model

353. See *supra* note 51.

of the 1980s and 1990s, frequently perceived as elitist, narrow, insensitive, and even irrelevant to real human needs on the ground, especially of the poor.³⁵⁴ Rather, new accountability seeks to return to what may be said to be human rights law's single, primary aim: to protect and enhance the *participatory agency* of individuals to stand up and defend their *own* rights when threatened by external actors, whether public or private.³⁵⁵ The international human rights architecture has correspondingly made protecting and promoting the right to participatory inclusion in decisionmaking processes an increasing priority in its work, recognizing it as "an integral component of any policy, programme or strategy developed to discharge governmental [human rights] obligations"³⁵⁶

In innovating new processes through which these principles can be ensured, new accountability movements are learning from each other's successes across the globe. Participatory budgeting processes, for example, have been developed in Porto Alegre, Brazil, and increasingly replicated and built upon in localities around the world.³⁵⁷ In these processes, local

354. See generally MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* (2002) (discussing criticisms of Western dominated human rights movement); see also, Makau Mutua, *Savages, Victims, and Saviors: the Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001); Kennedy, *supra* note 298. Such narrow views risk not only impoverishing the human rights discourse, but rendering it irrelevant or inapplicable to vast areas of human suffering and arbitrary or abusive conduct. The historic absence of the poor from the "international" construction of rights meaning has meant that "human rights" have often had little meaning for their day-to-day realities. New accountability seeks to reverse this.

355. See, e.g., Michael Ignatieff, *Human Rights as Politics*, in *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 4 (Amy Gutmann ed., 2001) ("We know from historical experience that when human beings have defensible rights – when their agency as individuals is protected and enhanced – they are less likely to be abused and oppressed."); Philip Alston, *International Law and the Human Right to Food*, in *THE RIGHT TO FOOD* 9, 62 (Philip Alston & Katarina Tomasevski eds., 1984) (noting that human rights law aims to "develop in all people the belief that they possess certain inalienable rights and that they are entitled, perhaps even obliged, to do all in their power to realize those rights for themselves") (emphasis added); see also Roosevelt, "In Your Hands," *supra* note 304 (declaring to communities that the UDHR is now "[i]n your hands" and calling for "concerted citizen action to uphold them close to home"); TARA MELISH, *HUMAN RIGHTS TO FOOD IN GUATEMALA: FROM RHETORIC TO REALITY* 157 (1997) (discussing crucial mobilizing role of human rights law in encouraging marginal communities to organize themselves, engage systems and structures of abuse, insert themselves into the decisionmaking processes that affect their lives, and to otherwise make use of all available means to take action against poverty and its underlying determinants themselves).

356. U.N. ECOSOC, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14, *The Right to the Highest Attainable Standard of Health*, ¶ 54, 22d Sess., U.N. Doc. E/C.12/2000/4 (2000) ("[T]he right of individuals and groups to participate in decision making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental [human rights] obligations") [hereinafter U.N. ECOSOC, General Comment 14]; see also *id.* ("Effective provision of health services can only be assured if people's participation is secured by States.") (emphasis added); U.N. ECOSOC, Comm. on Econ., Soc. & Cultural Rights, Annex III, General Comment No. 4, *The Right to Adequate Housing*, ¶ 9, 6th Sess., U.N. Doc. E/1992/23 (1991) ("[T]he right to participate in public decision-making – is indispensable if the right to adequate housing is to be realized and maintained by all groups in society.").

357. In 2008, the United Kingdom in fact unveiled a draft National Strategy on Participatory Budgeting, subtitled "Giving More People a Say in Local Spending." For more on this important initiative, see DEP'T FOR CMTYS. & LOCAL GOV'T, PARTICIPATORY BUDGETING: A DRAFT NATIONAL STRATEGY (2008), available at

communities determine a ranking of the priority issues they want city or local budgets to focus on – from improvements in access to potable water, sanitation, or education to those involving employment, transportation or health care.³⁵⁸ Considered binding on local legislators and city planners (who have in fact accepted them as such), these priorities are then monitored by citizens' groups over the annual budgetary cycle. Such citizen monitoring, together with the informed debate the production of transparent, empirical data produces, allows shifts in priorities to evolve as problems are addressed, new problems emerge, and democratic decisions are made about how best to address local needs within the practical constraint of available human, financial, and informational resources.

Other participation-enhancing tactics have likewise been broadly shared by large numbers of civil society organizations, including the organized use of civil society "report cards", "testing" processes, shadow reports, social auditing and certification schemes, and development of alternative budgets.³⁵⁹ While many of these auditing and certification processes have initially been developed in the environmental arena, they are increasingly being used in the labor, education, health, and other fields by new accountability movements.³⁶⁰ This is done in a concerted effort to engage ordinary people in directly monitoring the quality and impacts of a range of public services by both public and private actors. By explicitly identifying areas of satisfactory and unsatisfactory service delivery, competitively rating providers, and then assessing "grades," rankings, or minimum standards for social certification, social movements of the poor create new and consumer-driven accountability frameworks that can impel direct rights-based improvements in public service delivery and access.³⁶¹ Such participatory rights-based projects aim thereby to reverse the "powerlessness [that] results in a failure to include poor people systematically in the generation of information and adjustment of policies and actions which affect them," ensuring that the "long route" of traditional accountability (citizen monitoring of policy delivery) is effectively supplemented with the "shorter route" of consumer monitoring of service delivery.³⁶²

<http://www.communities.gov.uk/publications/communities/participatorybudgeting>.

358. See, e.g., Boaventura de Sousa Santos, *Participatory Budgeting in Porto Alegre: Toward a Redistributive Democracy*, 26 POL. & SOC'Y 461 (1998); Nilüfer Cagatay et al., *Budgets As If People Mattered: Democratizing Macroeconomic Policies* (SEPED Conference Paper Series No. 4, 2000), available at http://www.iskran.ru/cd_data/disk2/rr/044.pdf.

359. See, e.g., NEW TACTICS, *supra* note 291, at 107 (discussing testing processes).

360. *Id.* at 130-31 (documenting work of the Commission for the Verification of Corporate Codes of Conduct (Coverco), which "conducts long-term, intensive independent monitoring of labor conditions in Guatemalan apparel factories and agricultural export industries").

361. See, e.g., Rob Jenkins & Anne Marie Goetz, *Accounts and Accountability: Theoretical Implications of the Right-to-Information Movement in India*, 20 THIRD WORLD Q. 603, 618 (1999) (discussing use of "report card" method in which public opinion surveys are conducted in low income neighborhoods to report on the perceived quality and appropriateness of a range of public services, without significant financial cost, and then to use such results as social leverage for improving service delivery performance).

362. PRSA REVIEW, *supra* note 231, at 51, ¶ 73 & n.83.

Within this framework, new accountability likewise focuses on engaging directly with legislative and executive authorities at the initial stages of policy development and implementation. New accountability movements are thus engaged in a series of efforts to institutionalize processes of participatory review of jurisdiction-specific laws, policies, and practices to ensure their consistency with human rights standards. In many jurisdictions, this takes the form of procedural safeguards requiring, for example, the completion of “poverty impact assessments” (or poverty proofing),³⁶³ “human rights impact assessments,” “social and environmental impact assessments,” “social audits,” and “equality impact assessments” before laws, policies, or projects are implemented that could significantly and adversely affect the local population. They also include notice and comment processes under administrative procedure acts, mandatory consultation procedures with affected communities, and free, informed prior consent guarantees.³⁶⁴

Each of these rights-based procedural requirements seeks to ensure direct civil society participation in the monitoring and review of policies *before* they are implemented. They thus serve as critical *ex ante* accountability tools, allowing civil society actors to affirmatively halt implementation processes where negative or disparate impacts are perceived and/or to require corrective policy modification before harmful impacts are experienced by socially vulnerable or less advantaged groups.

In the United States, recent efforts have similarly been underway to ensure that participatory processes of rights-based review are regularized in state and local legislative processes. In 2002, for example, the Philadelphia-based Kensington Welfare Rights Union³⁶⁵ partnered with the Pennsylvania chapter of the National Association of Social Workers to submit draft language for a Pennsylvania General Assembly resolution proposing a study on how universal human rights standards could be integrated into the laws and policies of Pennsylvania.³⁶⁶ Following state-

363. Poverty proofing has been defined as “the process by which Government Departments, local authorities and State agencies assess policies and programmes at design and review stages in relation to the likely impact they will have or have had on poverty and on inequalities which are likely to lead to poverty, with a view to poverty reduction.” OFFICE FOR SOCIAL INCLUSION, GOV’T OF NORTHERN IRELAND, POVERTY PROOFING GUIDELINES ¶ 3.1 (2005).

364. The imposition of such requirements has been particularly prevalent in situations where private business activities, public development projects, or extractive industries threaten to cause significant harm to the rights to health, housing, property, privacy, and culture of surrounding communities. *See, e.g.,* Saramaka v. Suriname, 2008 Inter-Am. C. H.R. (ser. C) No. 172 (Nov. 28, 2007); López Ostra v. Spain, 20 Eur. Ct. H.R. 277 (1995); U.N. Hum. Rts. Comm., Länsman et al. v. Finland, Comm. No. 511/1992 (1994).

365. KWRU was founded in 1991 by six homeless women in Philadelphia, who shared a common need for adequate housing and common commitment to helping homeless families like theirs stay together and find homes of their own, where they can live dignified lives outside shelter systems. It was the founding organization of the PPEHRC. *See* www.aboutus.org/KWRU.org.

366. Bricker-Jenkins Interview, *supra* note 341. The resolution passed unanimously after a series of preliminary town meetings to mobilize support for the legislation. *See id.*; *see also* NELL MCNAMARA & DOUG SCHENKELBERG, HEARTLAND ALLIANCE FOR HUMAN NEEDS &

wide hearings with the poor on the effects of state laws on their everyday lives, a 2004 House committee report found significant holes in state law and policies with respect to the enjoyment by state citizens of the individual rights to healthcare, nutrition, housing, quality education, and sustainable employment at a living wage.³⁶⁷ It correspondingly issued recommendations to the legislature and other social stakeholders for addressing them.³⁶⁸ In 2005, a similar human rights bill was proposed in the Massachusetts legislature seeking to establish a special commission to review the integration of international human rights standards in the commonwealth's laws and policies, including through a series of public hearings in which the full participation of affected stakeholders would be assured.³⁶⁹

In calling for meaningful participation as an alternative to fixed rules, new accountability is nonetheless highly wary of what has come to be known as the "participation industry," often called the fastest growing sector of the aid, development, and governance business. Development aid institutions have responded to criticism that their policies are anti-poor with efforts to enhance "voice" and "stakeholder participation," particularly "participation of the poor."³⁷⁰ Consequently, there has been a proliferation of efforts initiated by government agencies, NGOs, private sector businesses, and intergovernmental bodies to ensure "consultations" and "focus groups" with affected communities, the inclusion of a "representative" of marginalized groups on an advisory committee or board, or the creation of self-help groups or users' associations under program guidelines. Such "stakeholder participation" has become a core element of new governance and new management models. Yet, as these models have proliferated, many of their participation exercises have been discredited as mere tokenism. Where the voices and preferences of the poor are simply provided a formal outlet without any corresponding power to effect policy choices, influence decisions, or hold actors to

HUMAN RIGHTS, EXTREME POVERTY AND HUMAN RIGHTS: A PRIMER 15 (2007).

367. See PA. GEN. ASSEMBLY, REPORT OF THE SELECT COMMITTEE ON HOUSE RESOLUTION 144 INVESTIGATING THE INTEGRATION OF HUMAN RIGHTS STANDARDS IN PENNSYLVANIA LAWS AND POLICIES (Nov. 30, 2004).

368. See *id.* In issuing the recommendations, the report concluded that "for development of economic and social policy to address the issues brought forth in these hearings, it is critical to define human economic rights as those basic individual rights to healthcare, nutrition, housing, quality education and sustainable employment at a living wage." *Id.* The task of new accountability is to mobilize civil society participation and oversight to ensure that these recommendations are turned into concrete measures and policy changes.

369. H.R. 706, 184th Sess. (Mass. 2005). If passed, the bill would have incorporated principles of international human rights treaties into state law and authorized state legislatures to investigate human rights abuses in Massachusetts through a series of public hearings in which the full participation of all affected stakeholders would have been assured. See MASS. CEDAW PROJECT, HUMAN RIGHTS FOR ALL (April 2005), available at <http://www.suffolk.edu/files/cwhhr/endorsement.pdf> (endorsing the initiative).

370. See, e.g., THE WORLD BANK GROUP, THE WORLD BANK PARTICIPATION SOURCEBOOK, 145-46 (1996); DEPT OF INT'L DEVELOPMENT UK, TECHNICAL NOTE ON ENHANCING STAKEHOLDER PARTICIPATION IN AID ACTIVITIES (1995), <http://www.euforic.org/gb/stake2.htm>.

account, “stakeholder participation” and “voice” may become political tools that operate in practice to further marginalize the interests of the poor.³⁷¹

New accountability movements have, correspondingly, increasingly insisted on creating new mechanisms through which they may *independently* monitor the performance of decisionmakers and hold them to account – not by invitation, but by their own power to identify minimum standards of appropriate community conduct (consistent with human rights values) and to exert social sanction where performance does not meet those standards.³⁷² This independent accounting role is an essential element of new accountability. Indeed, it is the key to its ability to serve as an effective check on the increasing discretion and power of service providers under new governance regimes.

3. Accountability Through Performance Monitoring

A third core tenet of new accountability likewise parallels that of new governance, while also serving as a functional check on the latter’s day-to-day operation. That tenet lies in its priority for results-oriented and evidence-based performance monitoring. While new governance tends to use performance monitoring as a tool of *orchestration*, new accountability uses it as a tool of *accountability*. In so doing, it seeks to ensure not only that the policy goals chosen by decisionmaking authorities in the social welfare field reflect how well people affected are in fact *faring* in meeting their basic needs in the areas of health care, employment, jobs, housing, and food, but also that any policy measures chosen in pursuit of those goals in fact lead to enhanced human dignity outcomes and empirically verifiable reductions in barriers to social and economic opportunity (not just raw program efficiency goals).

To do this, new accountability relies on the tools of human rights law and, specifically, on the international duty of states to ensure that their regulatory systems are designed and operating in ways through which constant *improvements* in the enjoyment of the full range of internationally recognized human rights can reliably be achieved across social sectors. Under this duty – widely known as the duty of progressive realization – regulatory systems must be designed to ensure that any unjustified backtracking, arbitrary impact, or insufficient progress in such achievement is immediately recognized, assessed for its causes, and replaced by more effective and responsive alternative means of rights achievement. New accountability methods tend, therefore, to be less concerned with the precise means chosen to achieve any particular socially-

371. See generally PRSA REVIEW, *supra* note 231, at 44 n.63 (defining “participation” as “the process through which stakeholders (those affected by the outcome of reform or capable [of] affecting the reform) *influence or share control over* setting priorities, making policy, allocating resources, and ensuring access to public goods and services.”) (emphasis added).

372. See, e.g., *supra* text accompanying notes 239-240.

sanctioned end, than with the *progress* (or lack thereof) that is in fact being made on core human rights indicators, particularly for the most vulnerable. In this way, new accountability embraces a highly pragmatic, non-ideological and evidence-based framework that seeks to work not in opposition to, but rather in engaged cooperation with, other social stakeholders in continually innovating more effective and responsive policies for rights-based achievement in the social welfare context.

Long spurned by older human rights movements as antithetical to the claimed absolutism and immediacy of human rights law, performance monitoring and its associated concepts of “progressive realization” and maximum and targeted usage of “all available resources” are in fact core to the international law of human rights and its subsidiary structure. Correspondingly, every human rights treaty establishes a procedure through which state parties commit to prepare and submit reports – generally within a year of ratification, and thereafter every two, four or five years – describing the concrete measures they have taken to give effect to the rights enshrined therein, the actual progress achieved in ensuring the enjoyment of those rights, and any setbacks encountered in the process.³⁷³

These reporting processes are designed to serve a variety of participation-enhancing, accountability, and outcome-based achievement ends. In particular, by requiring states to report transparently on the measures they have adopted and to monitor their success in achieving human rights-based improvements, such processes aim to facilitate “public scrutiny of government policies with respect to protected rights,” and thereby to encourage “the involvement of the various economic, social and cultural sectors of society in the formulation, implementation and review of the relevant policies.”³⁷⁴

Indeed, by tracking outcomes and achievement over time, civil society monitors put themselves in the position of being able to pinpoint public policy successes and failures. Diagnosing the causes of any concerns, they can thus be ready with informed alternatives when unjustified backtracking, arbitrary practices, or insufficient progress occurs in any given area, thereby ensuring program responsiveness, innovation, and flexibility to real needs on the ground. Because it serves so many important instrumental objectives, performance monitoring has in fact been called “an integral part of any process designed to promote accepted goals of public policy.”³⁷⁵ Accordingly, it is an operational priority not only of human rights and new accountability initiatives, but also of new governance and new public management models, which likewise privilege good governance techniques and rational, evidence-based policy planning

373. See, e.g., International Covenant on Civil and Political Rights art. 40, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (“The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and *on the progress made in the enjoyment of those rights.*”) (emphasis added).

374. U.N. ECOSOC, General Comment No. 1, *supra* note 315, ¶ 5.

375. *Id.* ¶ 3.

and program design.³⁷⁶ It also corresponds to the innovation-centered, experimental demonstration model on which the early MFP was conceived.

Within this framework, performance monitoring entails three distinct stages: (a) goal articulation accompanied by indicator identification, baseline assessment, and benchmark setting; (b) the adoption of targeted plans of action and assurances as to the transparency and accessibility of related informational inputs; and (c) training and outreach programs to promote behavioral or attitudinal changes. Where new accountability's embrace of performance monitoring differs from that of new governance is in *how* adequate performance is in fact assessed: What *kind* of performance is considered adequate? *Who* does the assessing? And, upon *what standards* or metrics is performance assessed?

a) Performance Goals, Indicators, and Targets

The first two steps in any performance monitoring system are, one, identification of the goals of positive performance and, two, the establishment of a set of indicators to measure whether progress is or is not being made toward those performance goals. Once performance goals and indicators are established, a baseline must then be determined to indicate one's measurement starting point and, ideally, a target or benchmark to indicate the level of performance expected by a given time. Such benchmarks represent the degree of progress that can reasonably be expected within a given timeframe, appreciating that the journey from baseline to ultimate goal will generally take time and must be balanced against competing commitments and parallel processes of progressive rights achievement. The use of targets in performance monitoring is nevertheless crucial for allowing collaborative and participatory processes of "scoping" and targeted planning to take place, through which community energies and resources can be focused on concrete, short-term advances in the achievement of larger, longer-term rights-based goals.³⁷⁷

As discussed above, the PRWORA new governance regime has determined that the overriding goal of welfare policy is to move people off welfare and into work.³⁷⁸ As such, it has established a set of performance indicators centered on rates of welfare enrollment and initial job placements for former recipients. New accountability, by contrast, sees its goal not as reducing welfare enrollment per se – a goal which provides little relevant information about how people are in fact *faring*. Rather, it sees its goal as ensuring that all individuals have adequate and reliable

376. The U.S. Government Accountability Office has, correspondingly, been exploring options for the creation of a National Indicator System to help the U.S. diagnose and assess its comparative position and progress, both domestically and internationally, in an effort to improve national performance in a range of important areas. See GAO, *INFORMING OUR NATION*, *supra* note 183.

377. See, e.g., U.N. ECOSOC, General Comment No. 14, *supra* note 356, ¶ 58 (describing "scoping" process before treaty body).

378. See *supra* Part II.A.

access to a core set of social rights, including the rights to adequate housing, health care, social insurance, education, labor protections, food, and clean water.

The challenge new accountability faces, then, is to establish a set of indicators that can accurately measure changes in levels of access to and enjoyment of these core rights. Because the “success” of public policy performance will largely be determined on the basis of how quickly indicators show improvement and benchmarks are met, the adequacy of the process for selecting performance indicators is of vital importance. Getting them wrong may contribute to distorted policy outcomes, or mis-signals to the “market” on what constitutes policy-based success – as has, by multiple accounts, been the case with PRWORA. It may also function to be jurispathetic, closing off spaces for legitimate or sanctioned participation of particular actors. Such an effect is most frequent where policy goals are identified in ways that are too oriented towards raw efficiency or economic rather than social criteria.³⁷⁹

This skewed indicator system has been the principal criticism leveled against dominant performance monitoring systems in the development, regulatory, and public management fields.³⁸⁰ These fields have tended to focus on indicators that measure macro changes in access to goods and services, but often miss the ways that public policies arbitrarily or irrationally impact individuals and particular disadvantaged groups. As such, new accountability initiatives – with the assistance of human rights institutions – have increasingly sought to alter the way indicators are selected and employed. They have done so not only by seeking to redefine the broader goals of performance systems (shifting toward a socially-oriented human rights framework), but also by *decentralizing the sites* in which performance indicators are selected and by *redefining the parameters* within which performance indicators should be defined.

With respect to the former, new accountability movements have found it increasingly necessary to appropriate the *situs* in which performance indicators are selected. Traditionally, it has been assumed that governments should define relevant indicators for national use. Experience has shown, however, that when governments are left to select and define their own indicators, those measurements often do not coincide with the real concerns and priorities of local populations. That is, the process runs the risk of measuring the wrong things – i.e., raw service delivery targets or narrow outcome indicators that tell a partial, even skewed story of what is in fact happening on the ground. In the U.S. context, this has been the case with both PRWORA and, according to many accounts, the No Child Left Behind Act.³⁸¹ The same may be true with respect to indicators generically

379. See *supra* text accompanying note 185.

380. Examples include the UNDP’s Human Development Index (HDI), the Millennium Development Goals progress reports, and the U.N. Development Assistance Framework (UNDAF).

381. It is in this regard that the “new accountability” discussed here differs from the new accountability used to describe local school governance structures in the U.S.: the latter is

determined by “international experts,” generally far removed from processes and priority problems on the ground.

New accountability movements have, correspondingly, stressed the importance of *decentralizing* indicator selection processes to local communities, especially as they relate to localized struggles for specific, priority policy changes in the health, education and housing fields. This work is perhaps best exemplified by the creative community work of the Participation and Practice of Rights Project, a new accountability initiative operating in economically-marginalized communities in Northern Belfast and North Inner City Dublin.³⁸² The Project works with communities to address abusive situations involving core human rights concerns that community members have identified as imposing the most significant barriers to dignity and equality in their day-to-day lives.³⁸³ Communities are then assisted in identifying and prioritizing a small set of human rights-based indicators that are capable of measuring progress on those concrete priority issues.³⁸⁴

Once such indicators are chosen, a baseline survey is undertaken and reasonable six and twelve-month benchmarks are set for assessing improved performance from that baseline. Communities then engage directly with relevant officials – such as those from the local ministries of housing, education or health – to achieve those targets, offering their own suggestions for best practices and effective means of speeding improved performance outcomes. In this way, they seek a cooperative, engaged relationship with public authorities and other stakeholders, with whom

based on indicators and benchmarks established administratively from above. See Liebman & Sabel, *supra* note 37, at 229-31.

382. The Project’s mission statement calls for “promot[ing] awareness of international human rights instruments and standards and support[ing] marginalized communities and groups to use them in accessing services and achieving equality.” See Participation and the Practice of Rights [PPR] Project, Home, <http://www.pprproject.org/> (last visited Mar. 19, 2009). It adopts an explicit human rights-based approach (HRBA) to poverty alleviation, seeking to “empower people to take full part in identifying the issues important to them, and help them to tackle the issues themselves. The HRBA works to ensure people in poverty are involved when decisions are made that affect their lives.” *Id.*

383. The PPR Project has to date worked with community groups to address the right to adequate housing, the improvement of mental health services for those at risk of suicide, the accessibility of taxis for persons with disabilities, access to health services by drug users, and the child’s right to play. The corresponding reports are available at PPR Project, PPR Resources and Publications, http://www.pprproject.org/index.php?option=com_content&task=view&id=27&Itemid=38 (last visited June 10, 2010).

384. With respect to the right to mental health, for example, the participating community identified indicators with respect to four priority issues: lack of follow-up appointments on discharge from hospital for persons with severe mental health issues; inadequate provision of medical information by general practitioners; lack of information on and access to complaints mechanisms; and lack of opportunities for participation in mental health decisionmaking. For the precise benchmarks set at six and twelve month intervals for each, see PPR PROJECT, RIGHTS IN ACTION: CHANGING MENTAL HEALTH SERVICES, MENTAL HEALTH FORUM REPORT 26-42 (2007), available at http://www.pprproject.org/images/documents/mh_transcript.pdf. See also PPR PROJECT, RIGHTS IN ACTION: CHANGING MENTAL HEALTH SERVICES: FINDINGS OF THE INTERNATIONAL PANEL 13 (2007), available at http://www.pprproject.org/images/documents/findings_mh.pdf.

they can work in constructive local partnership, using human rights based indicators that directly correspond to the issues most significant to them and their families. The process thus creates a direct form of accountability between historically marginalized communities and the agencies or institutions that have duties over the fair and equal provision of public services.³⁸⁵

Such projects have repeatedly yielded concrete results for underserved communities in accessing services in appropriate, nondiscriminatory, and non-arbitrary ways.³⁸⁶ They tend to show that when local people are involved in monitoring local issues using a cooperative, rights-based approach, especially where reasonable and concrete performance targets are set, responsible agencies engage in discussions on appropriate access to services from a rights perspective, yielding more accountable responses from the statutory agencies. At the same time, such initiatives demonstrate the imperative of decentralized, community-based processes for defining relevant human rights performance indicators. Such processes are necessary to ensure that indicators genuinely correspond to local populations' experiences with rights deprivations, and hence truly serve as a metric for human wellbeing and rights-based improvements in dignity and equality.

In addition to greater control over the selection of indicators used in local performance monitoring, new accountability movements have also sought an expansion in the scope and types of indicators used to measure rights-based progress. Such expansion has occurred along four distinct axes. First, new accountability movements have insisted on greater attention to *qualitative* indicators, rather than exclusively *quantitative* ones. That is, they have sought to have perceptions and testimonials of stakeholders, as collected through questionnaires, open interviews, and public testimonies, taken as fully into account in performance monitoring processes as more traditional statistical data collected in censuses or surveys.³⁸⁷ Failure to do this has been a particular concern with the

385. To increase the social leverage of disadvantaged communities in institutional engagement processes, the PPR Project invites participation from a broad spectrum of stakeholders, including international figures who – through their contacts, influence, stature or greater access to the media – may be able to exert distinct types of pressure on local authorities in cooperation with local communities. Thus, the indicators and benchmarks chosen by PPR groups are invariably presented in community-wide fora in which international experts are invited to preside as a panel, offer comments, and continue a longer-term monitoring process. See, e.g., PPR PROJECT, FINDINGS OF THE INTERNATIONAL PANEL, *supra* note 384.

386. For example, in response to the Mental Health initiative, the Health Minister agreed to implement a “Card Before You Leave” appointment system for mental health patients to ensure follow-up appointments are given within one week of discharge. The Minister likewise appointed a liaison to work on the issues identified by the group. See PPR Project, Call for Minister To Deliver on Promises To Put Service Users at Heart of Decision Making, PPR PROJECT E-BULLETIN 3-4 (July 2008).

387. See, e.g., Inter-Am. Comm’n on Hum. Rts., *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights*, OEA/Ser.L/V/II.132 doc. 14, ¶ 28 (2008) (“Specifically, quantitative social indicators derive from methods that chiefly collect information in a numeric format or in pre-coded categories, whereas in qualitative research,

PRWORA performance regime, which, especially as taken in conjunction with narrowly identified performance goals, has relied exclusively on limited statistical indicators – such as the raw number of TANF recipients or former recipients now in jobs. While such indicators are clearly important, they nevertheless cannot tell the full story of rights achievement and, depending on how they are supplemented by other indicators, may in fact mask serious abuses or even backward trends in human wellbeing. Thus, unemployment rates may fall, signaling success, even as poverty rates climb due to some other related but unmeasured cause, such as lack of minimum wage protections. More people may be off public assistance, but it may be the result of arbitrary rules and procedures or abusive conduct by street-level bureaucrats, rather than because former recipients are now self-sustaining. It is thus critical that additional performance measures are assessed to ensure that policies respect the rights and dignity-interests of those they purport to serve.

Another axis upon which new accountability has insisted that indicators be assessed derives from the conclusion of human rights bodies that all rights have core dimensions that correspond to their *availability*, *accessibility*, *adequacy*, and *quality* for distinct social actors.³⁸⁸ Accordingly, new accountability movements increasingly focus on identifying indicators that track improvements in each of these important dimensions. They also track those along the core human rights commitments of *nondiscrimination*, *participation*, and *accountability*.³⁸⁹

With respect to the duty of non-discrimination in particular, new accountability insists that all indicators be further disaggregated according to major prohibited grounds, such as sex, race, ethnicity, social status, and other categories, such as poverty. Such disaggregation is necessary to show the differential impacts of public policies on distinct groups, and hence to reveal where new policy interventions and targeted special measures may be required. A growing number of nations now require that these types of “equality impact assessments” and/or “poverty impact assessments” be conducted on all significant policy or legislative proposals before they come into effect.³⁹⁰ As of 1998, for example, all “significant policy proposals” in Northern Ireland are required to “indicate clearly the impact of the proposal on groups in poverty or at risk of falling into poverty” before they will be considered.³⁹¹

analysis techniques and procedures are far from standardized; rather, data analysis is intrinsic to the way in which the questions are framed, locations selected, and information harvested.”); ISOBEL FRYE, WHAT IS POVERTY? A QUALITATIVE REFLECTION OF PEOPLE’S EXPERIENCES OF POVERTY (2007).

388. See, e.g., U.N. ECOSOC, General Comment No. 14, *supra* note 356, ¶¶ 11-12.

389. See, e.g., *id.* ¶¶ 18-19, 59.

390. See, e.g., Equality Act, 2006, c. 3 (U.K.); Northern Ireland Act, 1998, c. 47, § 75 (requiring public bodies to give due regard to promoting equality of opportunity in all their functions); OFFICE FOR SOC. INCLUSION, GOV’T OF IR., GUIDELINES FOR POVERTY IMPACT ASSESSMENT (2008) [hereinafter PIA GUIDELINES].

391. See PIA GUIDELINES, *supra* note 390, at 7 (citing DEP’T OF THE TAOISEACH, GOV’T OF IR., CABINET HANDBOOK 19 (1998)).

Finally, new accountability has sought to focus performance monitoring attention not just on “outcome-indicators,” but on a fuller range of “process indicators” and “structural indicators.”³⁹² While outcome indicators, such as maternal mortality rates, HIV prevalence rates, or under and unemployment rates, are designed to measure the *impact* of programs, activities, and interventions on the enjoyment of specific rights, process indicators are designed to measure the *quality and extent* of efforts to implement rights. They do so by measuring the scope, coverage, and content of strategies, plans, programs, policies or other specific activities and interventions designed to accomplish the goals necessary for the realization of a specific right. Structural indicators, in turn, evaluate how a given government’s institutional apparatus and legal system are organized to perform human rights treaty obligations. They look at the existence of legal standards, strategies, plans of action, programs, policies and public agencies or institutions with an implementing capacity. It is only possible to see the full picture of a given jurisdiction’s efforts to achieve human rights protections through a concurrent examination of each of these sets of outcome, structural, and process indicators, especially as disaggregated across population sub-groups and with respect to the various dimensions of human rights achievement.

b) Information Transparency and Targeted Plans of Action

Just as important as identifying responsive rights-based indicators, however, is making sure that the measurements they produce can be used in ways that promote critical assessment and community debate around the appropriateness of current policies and practices. Indeed, performance monitoring and associated periodic reporting processes are designed precisely to ensure that all relevant stakeholders are “aware of the extent to which the various rights are, or are not, being enjoyed by all individuals,” thereby “facilitat[ing] public scrutiny of government policies” with respect to protected rights and “encourag[ing] the involvement of the various economic, social and cultural sectors of society in the formulation, implementation and review of the relevant policies.”³⁹³

Such policy engagement requires, in turn, that information about performance monitoring and how it was undertaken is fully transparent, publicly available, and accessible to all stakeholders in the marketplace. Indeed, such data sets “provide a basis on which [relevant stakeholders] can effectively evaluate the extent to which progress has been made,”

392. This work has been spearheaded by the former U.N. Special Rapporteur on the Right to the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, as part of an effort to steer the periodic reporting process away from over-reliance on development-based indicators. See, e.g., The Special Rapporteur of the Commission on Human Rights, Interim Report of the Special Rapporteur of the Commission on Human Rights on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, ¶¶ 6-35, delivered to the General Assembly, U.N. Doc. A/58/427 (Oct. 10, 2003).

393. U.N. ECOSOC, General Comment No. 1, *supra* note 315, ¶¶ 3, 5.

putting them in a position to be able to make informed judgments about how to fill gaps and accelerate progress.³⁹⁴ Where information is not accessible and transparent, the basis for engaged and evidence-based public debate is weakened. This may, in turn, lead to overly ideological policy positions or the privileging of other non-evidence-based considerations in public policymaking that do not in fact correspond to actual lived experience and hence do not contribute to progressive rights-based performance outcomes. As a non-ideological, practice-based movement, new accountability seeks to avoid such results, ensuring that policymaking corresponds to the factual circumstances and lived realities of actual stakeholders on the ground, as experienced and assessed by affected communities themselves.

By ensuring evidence-based research at the community level on relative human rights achievement, systems of rights-based performance monitoring thus serve as a critical means for negotiating and preparing targeted plans of action to address priority community concerns in the social welfare context, especially as they affect the least advantaged. Indeed, as has been noted, while performance monitoring is “designed to give a detailed overview of the existing situation, the principal value of such an overview is to provide the basis for the elaboration of clearly stated and carefully targeted policies.”³⁹⁵

Such “clearly stated and carefully targeted” plans of action serve a number of performance enhancing and accountability functions. On the performance end, by focusing public attention on a smaller set of specific actions targeted at community priorities and the livelihood needs of the most vulnerable, such plans facilitate the immediate mobilization of community energy and resources around concrete achievable ends. The attainment of such ends can, correspondingly, serve to mobilize imaginations and propel continuous coordinated action among a growing variety of stakeholders. This process is facilitated by the fact that such plans are designed to be highly flexible, capable of accommodating changing community needs and evolving priorities as well as incorporating comparative learning processes to maximize performance results. Reviewed and updated every several years, new targets and benchmarks can correspondingly be established as previous ones are met.

Perhaps most important for new accountability movements, however, are the accountability enhancing functions that such plans provide. Indeed, by concretely identifying the specific actions to be taken by distinct community stakeholders, such targeted plans create a critical framework within which social movements of the poor can hold distinct social actors to account for taking (or failing to take) identified actions. Within this context, where plans of action do *not* reflect the interests of the least advantaged, new accountability movements will seek formal explanations, justified in the empirical record, followed by appropriate revisions and

394. *Id.* ¶ 6.

395. *Id.* ¶ 4.

updates. Where such interests *are* reflected, they will engage in participatory monitoring processes to ensure that benchmarks and targets are in fact being met for rights-based improvements in performance, offering their active assistance and expertise throughout the process. In this way, social movements of the poor become integral participants in the process of negotiated public policymaking and democratic setting of the public agenda.

c) Training and Outreach to Promote New Behaviors

Finally, like new governance, new accountability appreciates that one of the most significant barriers to achieving rights-based performance goals lies in social attitudes. In particular, negative attitudes about the lifestyles and motivations of the poor as well as the responsibilities of the broader public and of service providers constitute major barriers to progress on poverty alleviation.³⁹⁶ Correspondingly, just as PRWORA authorities in the U.S. context have promoted cultural change trainings in an effort to channel the way discretion is exercised by ground-level employees in state and local-level welfare administration agencies, new accountability movements similarly seek to use institutional trainings and public outreach proactively to reverse the anti-poor bias and mistrust that often pervades service delivery to the poor. Accordingly, new accountability sees one of its central tasks as working with other stakeholders, through training and education, to change public attitudes about the poor. This is true both within the regulatory apparatus and for the public at large. With respect to the former, new accountability movements recognize that both anti-poor bias and ignorance about how human rights standards fit within new governance-styled performance monitoring mandates pervade government bureaucracy and many private service delivery entities. Indeed, it is precisely the volatile amalgam of anti-poor bias and broad discretion within performance-based incentive systems that has led to growing complaints of abuse in the welfare exchange.

As such, increasing attention has been placed on directing institutional human rights training programs, education and outreach to prisons, police forces, schools, welfare departments, and other service providers – stakeholders that exert significant power over marginalized populations and often have histories of abusive conduct toward them.³⁹⁷ They are doing so by seeking to change the culture of regulatory welfare agencies and

396. Reflecting these negative attitudes, three key shortcomings in U.S. approaches to poverty alleviation over the last forty years have been identified as (1) the erosion of the social compact on ensuring economic opportunity for all, in favor of an individualization of responsibility for poverty; (2) the limited sense of possibilities for public action in poverty-eradication programs; and (3) an inadequate attention to the variety of social actors responsible for poverty alleviation. See, e.g., Daniel P. Gitterman, *Confronting Poverty: What Role for Public Programs?: An Overview of Panel 1*, 10 EMP. RTS & EMP. POL'Y J. 9 (2006) (providing summary and transcript of commentary by national poverty experts Alice O'Connor, Peter Edelman, David Ellwood, and Sandy Darity).

397. See generally NEW TACTICS, *supra* note 291 (providing examples of trainings).

service providers, such that they are more amenable to human rights standards, indicators, and safeguard policies, especially as they relate to the principles of nondiscrimination, participation and accountability in social welfare policymaking.

Indeed, rights-based performance monitoring can be effective only if the personnel working in the public and private institutions being monitored understand the process and, particularly, the relevance of human rights law to their daily routines and bureaucratic functions. Such personnel may in fact be highly sympathetic to human rights values in principle – consistent with U.S. public perception as a whole³⁹⁸ – but unaware of how *concretely* to translate those values into their day-to-day bureaucratic tasks and work duties. Others may be more hostile, taking a more confrontational or dismissive approach, often due to a misperception of what human rights law is or what human rights entitlements entail. Both categories of personnel require rights-based education and outreach. A core purpose of such outreach, from new accountability's perspective, is to make clear to agency personnel that the human rights framework being advanced is not the "old" confrontational one of militant demand and protest around rigidly defined rules and material entitlements. Rather, it is an engaged one of working collaboratively and in partnership with elected authorities and other community stakeholders to achieve improved human dignity outcomes through, in particular, the incorporation of human rights safeguards and principled rights-based policymaking into public administration and private decisionmaking processes.

On a broader level, new accountability movements likewise seek proactively to alter attitudes about the poor among the public at large. They are doing so in recognition of the fact that if *they* don't do so, no one else will. In the United States, these attitudes have tended to portray the poor as socially and morally irresponsible, lazy and unmotivated to work, and prone to criminality.³⁹⁹ New accountability movements seek to change this public perception by making the voices of the poor heard and their faces seen. They have used truth commissions and other public fora as a means of drawing attention to their personal stories and hence educating the public as to who precisely "the poor" are in the United States, the breadth and diversity of their experience, and the nature of the varied public policy choices that maintain so many in or at the brink of poverty.⁴⁰⁰

398. National public opinion polls, for example, suggest that eighty percent of Americans believe that human rights inhere in every human being, irrespective of whether the government ratifies human rights treaties. See BELDEN RUSSONELLO & STEWART, *THE OPPORTUNITY AGENDA, HUMAN RIGHTS IN THE UNITED STATES: FINDINGS FROM A NATIONAL SURVEY* 12 (2007).

399. See, e.g., *supra* note 135.

400. See, e.g., *supra* note 337 (quoting PPEHRC on the purposes of U.S. truth commission on poverty).

4. Pluralization (and “Hardening”) of Flexible Enforcement Incentives

A fourth organizing principle of new accountability, shared in many ways with new governance theory, is a healthy skepticism about over-reliance on coercive, legal-adversarial enforcement mechanisms. Such skepticism stems not from a rejection of standard legal-adversarial accountability tools, such as administrative hearings and other forms of judicial process, but rather from a more realistic appraisal of the practical limits of their effectiveness in securing comprehensive and lasting solutions to the multitude of ways in which the poor are kept in impoverishing and abusive relationships.⁴⁰¹ New accountability recognizes that there are an abundance of ways that the organized public can exert its power over abusive social actors and that, often, these social sanctions are just as powerful as their court-centric counterparts, while being far less costly and far more accessible to the poor.

Thus, just as new governance models advocate a shift toward voluntary codes of conduct, peer competition and pressure, self-adopted equal employment policies, diversity training programs, and a host of other “voluntary” and “collaborative” methods of compliance control,⁴⁰² new accountability likewise embraces these new forms of more flexible and voluntary self-regulation. It then, however, seeks to take them a step further by *hardening* the “soft” incentives that new governance models prefer – transforming them into socially *enforceable* commitments.⁴⁰³

This hardening is not necessarily achieved through new forms of state legal regulation, but rather through a more concrete set of mechanisms for achieving *de facto* accountability. Such *de facto* accountability tools are defined not by formal law *per se*, but by the practical power to impose a sanction where conduct is inadequate. In this way, new accountability seeks to harness the expressive power of human rights law, using the financial and political leverage of rights-sensitive citizens and consumers to establish a regime of increasingly persuasive incentives (of both a negative and positive variety) for promoting minimum levels of rights-respecting behavior by a wide range of public and private actors.

401. See White, *Paradox*, *supra* note 54, at 868-69 (challenging notion that a legal remedy, designed by lawyers and not the poor who use the system, can ever be the final or even partial solution, and noting that fair hearings do not grant clients the right to mold welfare bureaucracies to their needs, only to challenge the bureaucracy’s mistakes and excesses; even then, hearings correct mistakes only after they occur and only for one client at a time). This does not mean that new accountability movements do not seek to use strategic litigation in conjunction with broader processes of socio-political engagement in a variety of decisionmaking fields. See *supra* note 237.

402. See *supra* text accompanying note 217.

403. As has been noted, “That businesses speak of corporate social responsibility rather than corporate accountability is not a mere difference of terminology. It is based upon the understanding that measures taken to mitigate the ill-effects of business activity fall into the category of voluntary action, commitments which are not to be enforced.” Goetz & Jenkins, *supra* note 239, at 8.

In promoting this model, new accountability movements appreciate the difference between “hard” and “soft” incentives. In particular, they understand the imperative of hardening the soft incentives traditionally associated with human rights law, particularly in the social welfare field. “Hard” incentives have been described as those that score high on three distinct dimensions of enforceability: obligation, precision, and delegation. That is, they derive from obligations that are *binding* on distinct social actors, that are *precisely defined* in terms of the concrete conduct required of those actors, and that are backed by *strictly enforced sanctions* for compliance and non-compliance.⁴⁰⁴

New accountability movements correspondingly seek to emphasize each of these three dimensions in their work. Thus, in its reliance on human rights language and methodologies, new accountability underscores the fully binding nature of the obligations human rights norms impose on the full range of social actors. These obligations, it is stressed, do not derive exclusively from formal law, such as ratified treaties, nor are they imposed exclusively on government actors. Rather, they derive just as robustly from the *moral and political* responsibilities imposed by human rights values on members of organized, just society, a conception that resonates widely in the twenty-first century public imagination.⁴⁰⁵ By emphasizing this reciprocal framework of stakeholder rights and duties, new accountability thus provides a critical set of legal resources through which individual and collective rights-holders can make reasonable and recognized demands on other social actors to engage in specified rights-protective conduct.⁴⁰⁶ Where such rights protective action is not taken or where such failure is not sufficiently justified through appropriate and transparent reason-giving and explanation, the human rights framework allows rights-holders to hold corresponding duty-bearers to account by imposing on the wrongdoer a set of negative incentives or sanctions. Such sanctions can be of a moral, political, financial or legal nature.

In so doing, new accountability movements appreciate that the practical enforceability of human rights obligations depends in large part on how precisely they can be defined in terms of the verifiable conduct required of distinct social actors. As such, attention has been targeted within new accountability on those dimensions of human rights duties that can be defined at the very highest level of precision. The result has been a strategic focus on a core set of *procedural* safeguards or *process-oriented* duties with which social actors must comply as a necessary part of rights protection efforts. Such duties include, for example, requirements that

404. See Emilie M. Hafner-Burton & Mark A. Pollack, *Mainstreaming Gender in the European Union: Getting the Incentives Right* (Jean Monnet Working Paper No. 08/08, 2008) (defining “hard incentive”); see also Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421 (2000).

405. See *supra* note 398.

406. See generally Clarence Dias, *The Legal Resources Approach*, in *FOOD AS A HUMAN RIGHT* 175, 176-77 (Asbjørn Eide et. al., eds., 1984).

business, government, and other institutional actors engage in mandatory consultation or free, informed prior consent procedures with affected communities, that they observe notice and comment processes under administrative procedure acts, and that they complete “social and environmental impact assessments,” “social audits” “equality impact assessments,” “poverty impact assessments,” or “human rights impact assessments” before projects are commenced that could significantly and adversely affect vulnerable populations.⁴⁰⁷ These process-oriented dimensions of human rights duties are particularly powerful in their operation as *ex ante* accountability tools. Unlike their *ex post* counterparts, which require justification of conduct after harmful action may have occurred, these critical tools subject decisionmaking processes to questioning before final actions are undertaken and hence play a vital role in safeguarding vulnerable populations from avoidable harm and ensuring their active participation in the decisionmaking processes that affect them. They are thus a particular priority of new accountability movements.

Equally important for hardening human rights incentives, new accountability methodologies have sought to delegate or assign to particular individuals or entities specific responsibilities for ensuring compliance with both procedural safeguards and reasonable performance targets or benchmarks in rights achievement. Through such delegations, discrete individuals or entities can be required to affirmatively justify underperformance and, where such explanations are inadequate, face real interest-based financial, political, or reputational consequences for their failures. Such consequences may include the threat of institutional funding cuts, consumer boycotts of offending businesses, political naming and shaming campaigns or – where responsibilities have been administratively assigned within institutions or government to managers or other individuals – pay cuts, loss of promotion, or ineligibility for other valuable individual employment benefits. These “hard” incentives have repeatedly been shown to be the most effective way to modify behavior within and across institutions.⁴⁰⁸

Finally, to ensure that the threat of reputational, economic, or political costs is in fact capable of influencing interest-based decisionmaking processes, new accountability movements have increasingly constructed new institutional and extrainstitutional regimes designed to back those threats up. Consisting of a wide range of rights-based certification initiatives, social auditing schemes, report card systems, and other performance-based grading arrangements, these regimes aim to ensure that rights-related behavior is regularly monitored and assessed for compliance with human rights standards. In so doing, they aim to ensure that best and worst performers are publicly and transparently named, that processes exist through which consumers are provided valuable

407. See *supra* text accompanying notes 363-364.

408. See, e.g., Hafner-Burton & Pollack, *supra* note 404 (analyzing comparative performance incentives used in public sector gender mainstreaming initiatives).

information about which businesses comply or fail to comply with minimum standards of human rights protections, and – most importantly – that all such information is widely and transparently accessible to the broad range of citizens and consumers that are in a position to act on it in making choices about how to spend their money, support political candidates, pursue their interests, and otherwise organize their day-to-day lives.

In this regard, replicating the competitive performance systems already in widespread use through new governance and new public management regimes around the world, new accountability supplements its attention to “negative incentives” with a congruent attention to “positive incentives.” Through the latter, strong reputational and financial benefits may be set up to accrue to those entities and individuals who demonstrate compliance with human rights standards. Modeled on many current mainstreaming or participation-enhancing efforts in the corporate and public management contexts,⁴⁰⁹ these incentives seek to tie performance to pay bonuses, funding, institutional benefits, and individual promotions within institutions, as well as to create a competitive environment for achieving rights-related goals as quickly and effectively as possible. By tying real financial, political, reputational benefits to positive performance and to superior scores in competitive systems of rights-based performance review, new accountability seeks to reward social actors for exceeding minimum standards and for establishing new industry or community standards in acceptable levels of rights protections. In this way, it seeks to ensure the increasing incorporation of human dignity concerns in the formulation and implementation of public policies affecting the poor.

5. Orchestration Among Proliferating Stakeholder Participants

The final core tenet of new accountability, as with new governance, is legal orchestration. Indispensable to all subsidiarity-based institutional frameworks, legal orchestration ensures that the decentralized information-gathering and decisionmaking processes that new accountability unleashes are linked together within a supportive “higher” frame. That higher frame is one that can intervene with a facilitative hand for purposes of gathering, coordinating, sorting, and repackaging the expanse of information generated by decentralized norm-generating processes around the nation – facilitating innovation, standardizing good

409. A significant example is the development of Poverty Reduction Strategy Paper (PRSP) processes in the mid-1990s to assist in poverty reduction and the attainment of the Millennium Development Goals. Under this mechanism, states must prepare national poverty reduction strategies – with mandatory requirements on broad processes of consultation and civil society participation – before a loan or grant is extended by the World Bank. By tying failure to engage in such participatory processes and impact assessments to real financial consequences for states, PRSPs have served as a critical and powerful stimulant to governments to ensure participatory poverty-reduction strategy processes at the domestic level. See PRSA REVIEW, *supra* note 231, at 51.

practices, researching and replicating success stories from local or private levels, assisting in scaling-up, and communicating information to all stakeholders transparently and comprehensively.

In the human rights field, this role tends to be played at the national level by a National Office on Human Rights, generally in cooperation with a National Human Rights Institution. Significantly, the United States has no corresponding set of institutions. This vacuum has been perhaps new accountability's greatest weakness in the U.S. context. Indeed, without a national orchestrating structure – such as exists with respect to new governance regimes – community-based new accountability movements in the United States have tended to remain isolated and unconnected in their work. While national clearinghouse NGOs, such as the U.S. Human Rights Network and the Poor People's Economic Human Rights Campaign, have stepped in to play a limited orchestration role, as non-governmental umbrella groups, they cannot ensure that regulatory agencies in fact take the inputs generated by new accountability into regular constructive account. Indeed, without an effective national orchestrating body to connect localized rights-based performance review and accountability data with broader processes of institutional reform and policy development, new accountability processes have remained cut off from the formal institutional structures of government. This disconnect limits the ability of the new accountability movement in the U.S. to have significant impact on the formulation of major public policies or on the competitive performance monitoring of the welfare regulatory apparatus. It is a gap that urgently needs to be filled.

Notably, this gap exists despite the fact that a national infrastructure for indicator-based competitive performance review already exists in the United States. Under the 1993 Government Performance Results Act, every federal agency is today mandated to prepare an annual performance plan with respect to each program activity in its budget. Such plans must include measurable performance goals, performance indicators, and a basis for comparing actual results with the performance goals.⁴¹⁰ Notwithstanding, no corresponding mandate exists to require full and effective stakeholder participation in the process of *choosing* relevant performance goals and indicators. As such, no institutional process exists to recognize the critical data points that new accountability is producing, nor to transform them into measurable indicators for use in rating the “performance success” of social welfare programs.⁴¹¹ Such data points aim

410. All U.S. federal agencies are required to provide performance-based plans to the Office of Management and Budget and Congress each year. *See* Government Performance and Results Act of 1993, Pub. L. No. 103-62, §§ 3(a), 4(b), 107 Stat. 285, 286-87 (codified as amended at 31 U.S.C. § 1115-1116, (b) (2000)) (specifying contents of performance plans). The Government Accounting Office has likewise submitted a report to Congress calling for a more comprehensive national indicators assessment. *See* GAO, *INFORMING OUR NATION*, *supra* note 183.

411. The result of such narrow performance measure selection processes is that regulators and politicians repeatedly declare local applications of PRWORA and similar programs performance “successes,” even as those applications lead to measurable (but officially

to ensure that the “end result” of programs is not simply to meet raw service delivery targets, but rather to reduce poverty and to improve human wellbeing.

Significantly, while this gap remains notably unfilled at the federal level, state and local governments are increasingly being pressed by civil society to create their own orchestration systems around local human rights achievement and poverty alleviation. Illinois, for its part, has recently created a state-level Commission on the Elimination of Poverty with a mandate to collect views and testimonies from local communities on how to cut extreme poverty in half by 2015.⁴¹² Following the conviction that “[f]ull participation in civic life cannot be achieved without those things that protect and preserve human dignity and make for a healthy life, including adequate nutrition and housing, meaningful work, safe communities, health care, and education,”⁴¹³ the Commission is to sponsor community-based hearings across the state designed to collect and consolidate the experiences, perspectives, and suggestions of stakeholders on the most effective ways of eliminating barriers in access to food, housing, work, health, and education. By coordinating these informational inputs and ensuring that they are widely accessible to state decisionmaking processes, the Commission can serve as an important orchestrating institution with respect to state-wide efforts at poverty alleviation.

Connecticut, too, has established a Commission on Health Equity, based on the conviction that “[e]qual enjoyment of the highest attainable standard of health is a human right and a priority of the state.”⁴¹⁴ With the mission of eliminating disparities in health status and improving the quality of health for all the state’s residents, it is likewise mandated to act in an orchestration role by conducting hearings, undertaking interviews, and receiving testimony on the barriers to equal enjoyment of good health experienced by inhabitants.⁴¹⁵ The Commission is to use these informational inputs to identify policy solutions to the state’s significant disparities and inequities in accessing the right to adequate health.⁴¹⁶ Cities and states are, correspondingly, increasingly holding their own local hearings with disadvantaged communities to discuss the impacts of programs on the rights to health, employment, housing, and nutrition, and to seek responsive solutions, within a human rights framework. Public hearings on poverty have taken place in Alabama, Colorado, Delaware, the District of Columbia, Michigan, Pennsylvania, and Vermont.⁴¹⁷

unmeasured) declines in human wellbeing. *See supra* notes 199-204.

412. The Commission on the Elimination of Poverty Act, 2008 Ill. Legis. Serv. 95-833 (West).

413. *Id.*

414. 2008 Conn. Pub. Acts 08-171, available at <http://www.cga.ct.gov/2008/ACT/PA/2008PA-00171-R00SB-00681-PA.htm>.

415. *Id.* at § 1(a)-(e).

416. *Id.*

417. *See* JODIE LEVIN-EPSTEIN & KRISTEN MICHELLE GORZELANY, CLASP & SPOTLIGHT ON POVERTY AND OPPORTUNITY, SEIZING THE MOMENT: STATE GOVERNMENTS AND THE NEW COMMITMENT TO REDUCE POVERTY IN AMERICA 10-32 (2008),

Civil society groups have likewise sought to bind city and local governments to regularized human rights self-performance assessments and audits. Local governments have been urged to adopt ordinances or resolutions that mandate city-orchestrated periodic performance review of human rights progress and commitments. These are designed to assess, through participatory, multistakeholder processes, how well city governments are standing up to human rights standards, and what they can do better. The most notable advances have been in San Francisco,⁴¹⁸ Berkeley,⁴¹⁹ and New York City,⁴²⁰ with other initiatives being pressed in Los Angeles, Eugene, Seattle, and elsewhere. By orchestrating city policy around regularized institutional human rights self-analysis, such initiatives have led to important concrete changes in the way that policies are designed and implemented, especially with respect to their impacts on distinct social groups, such as women and racial minorities.⁴²¹ Equally important, they have served to raise awareness among city employees of what human rights mean in their own local contexts and daily work plans.

<http://www.aecf.org/~media/Pubs/Topics/Economic%20Security/Family%20Economic%20Supports/SeizingtheMomentStateGovernmentsandtheNewComm/Seizing%20the%20Moment.pdf>.

418. For a copy of the San Francisco city ordinance, see SAN FRANCISCO, CAL., ADMINISTRATIVE CODE, ch. 12K (2001), available at <http://muni.sfgov.org/site/uploadedfiles/cosw/cedaw/pdf/appenda.pdf>. The San Francisco initiative represents an experiment in localized replication of U.N. periodic reporting, constructive dialogue, and expert recommendation processes, undertaken with dramatic positive benefits. It specifically establishes a local CEDAW Task Force, composed of eleven elected representatives from both government and civil society, to work with the Human Rights Commission and city departments to identify discrimination against women and girls and to implement human rights principles at the city level. See generally Stacy Laira Lozner, Note, *Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative*, 104 COLUM. L. REV. 768 (2004).

419. On February 27, 2007, the Berkeley City Council adopted a resolution requiring the City Manager to supervise a periodic reporting process on the city's progress in eliminating racial discrimination, in accordance with the ICERD. See Berkeley, Cal., Eliminating Racial Discrimination, Resolution 63,596-N.S. (2007). The Office of the City Manager thereupon created a template and sent it to every city agency in Berkeley, seeking information on racial discrimination. The first Berkeley City report, submitted on June 26, 2007, was sent to the Attorney General of California as well as to the U.N. CERD Committee in anticipation of its February 2008 review of the United States' record under the CERD.

420. In New York City, a bill was introduced to the New York City Council in late 2004 to turn CEDAW and CERD into statewide principles of governance. See NYCHRI.org, Human Rights GOAL (Government Operations Audit Law), <http://www.nychri.org/HumanRightsinGovernmentOperationsAuditLawHumanRightsGOAL.htm> (last visited Feb. 14, 2010). The bill would require that city government departments and programs review their policies and programs to determine their effects on women and racial minorities and to report on those impacts for review by a city task force. It would also authorize local human rights commissions to interpret and apply the principles in cases over which they exercised jurisdiction. For information on the New York City Human Rights Initiative (NYCHRI), see NYCHRI, <http://www.nychri.org> (last visited Feb. 14, 2010).

421. WOMEN'S INST. FOR LEADERSHIP DEV. FOR HUMAN RIGHTS, RESPECT, PROTECT, FULFILL: RAISING THE BAR ON WOMEN'S RIGHTS IN SAN FRANCISCO 7 (2008) (documenting concrete changes, such as agreement by the San Francisco Department of Public Works to consider how the placement of street lights impacts the safety of women and the implementation of flexible work policies by the Department of the Environment).

It is precisely these sorts of local-level orchestration systems that merit replication not only in other local U.S. jurisdictions, but also at the state and ultimately federal levels. As orchestration systems replicate, what is nonetheless imperative is that they preserve at every scale the right of civil society actors to submit their independent assessments, testimonies, and solutions, and thus to be in a position to contribute directly to the process of naming reforms and holding social actors to account. Within this structure, "higher level" authorities play an essential coordinating, facilitating, and orchestrating role: cataloguing abuses, sharing comparative experience, and attending to the issues that cannot be resolved through local action alone.

IV. BRIDGING THE "NEW GOVERNANCE" AND "NEW ACCOUNTABILITY" DIVIDE: STRUCTURING A PARTICIPATION-BASED 21ST CENTURY WAR ON THE SOURCES OF POVERTY

The question that remains to be answered, in light of the full discussion above, is how can these two frameworks of action be brought together in constructive synergy to mount a participation-based twenty-first century War on the Sources of Poverty? As I have sought to demonstrate, new governance and new accountability, as theory-based frameworks of action, share largely the same set of underlying tenets and subsidiary orientations. Both embrace decentralized decisionmaking and broad stakeholder participation, expanded public-private partnerships, flexible results-oriented policy planning, innovation and competitive experimentalism, rigorous performance monitoring and evaluation, and nationally orchestrated incentive systems around defined performance goals.

Yet, despite these strong similarities and overlapping goals, the two frameworks of action – one promoted from within the regulatory infrastructure, the other promoted from without – have in practice operated in almost entire isolation from one another. As a result, neither has benefited from the other's complementary check and balance, with negative implications for the performance of both. Thus, while new governance-led regulatory institutions, such as the U.S. Department of Health and Human Services, are mandated to gather comparative performance data on state-by-state welfare roll reduction rates, numbers of former recipients in work, and other related statistics, there is, with few exceptions, no parallel structure or effort to collect performance indicators designed to measure how well people are in fact *faring* in meeting their basic human welfare and dignity needs.

That is, are those who have been moved "from welfare to work" in fact doing *better*? Are they in fact accessing sufficient food, adequate housing, education, childcare, and job skills? Do they have heat in their homes *and* sufficient food for the household? If so, what worked for them and what strategies can they share with others? If not, what are the barriers they are facing, and what are their *own* ideas on how those barriers can best be lifted, or at least lowered, in their own communities? These are the sorts of

information data points and progress indicators that are relevant to genuine multisectoral, anti-poverty initiatives. They aim to ensure that the “end result” of programs is not simply to meet raw service delivery targets, but rather to reduce poverty and to improve human wellbeing.

Critically, these dignity-based data points are precisely the types of indicators privileged by new accountability movements in their own information-gathering and advocacy work. Poor people’s organizations in the United States, as around the world, have thus made a priority of opening spaces in which the disadvantaged can document their personal experiences with poverty and poverty programs and create new types of quantitative and qualitative indicators for measuring the relative “success” of such programs from the vantage of actual improvements in human wellbeing.⁴²²

Yet, despite the growing mobilization of civil society groups to produce such information, there is no current institutional mechanism in place for ensuring that such valuable testimonies, proposals, indicators, and experiences in fact penetrate regulatory policy-making and administrative programs for the poor. It is here, then, that the central regulatory challenge for the future lies: how to institutionally link the human rights-based indicators, standards, and knowledge reservoir of new accountability – data points that seek to measure and assess human wellbeing in terms that reflect the dignity-based perspectives of those in poverty themselves – with the broader institutionalized processes of new governance-based regulatory administration, competitive performance review, and decisionmaking processes. The current lack of any effective mechanism to do this reflects a deep failure in federal orchestration policy in the social welfare field, underscoring the weaknesses of its accountability framework and its continuing sidelining of the poor as equal stakeholders in poverty alleviation programs.

It is nonetheless precisely in this orchestration failure that the lessons of the early War on the Sources of Poverty – and particularly its MFP policy – become so critical. Indeed, the early national commitment to poverty alleviation in the United States was based on a core understanding that U.S. poverty could not effectively be addressed without *equal attention* to ensuring, on the one hand, broad and regularized participation of the poor in the design, implementation, and monitoring of anti-poverty programs that affect them and, on the other, national-level orchestration of those very activities. Such orchestration was to be pursued with a view to supporting community-level initiatives, sharing best practices, fostering competitive experimentation, and promoting comparative learning processes to allow scaling up and continual institutional innovation.

Both new governance and new accountability regimes fully embrace these orchestration and participation-enhancing objectives, understanding each as core to their very operational identity. The convergence of the two regimes in the twenty-first century political and regulatory environment

422. See *supra* text accompanying notes 317-348.

thus provides a solid foundation for recapturing the core elements of the early MFP policy. This is especially so as that policy is capable of being directly incorporated into already operating indicator-based performance monitoring and competitive evaluation systems that rely on stakeholder participation and national orchestration to achieve program goals and priorities effectively.

A full reembrace of this participatory orientation in the modern U.S. context will nonetheless require that lessons be learned from the early War on Poverty experience. Indeed, that War's MFP policy fell short of expectations, quickly unraveling, not because of its conceptual priority for participatory engagement of the poor, but rather because the design structure for its implementation machinery failed to take sufficient account of the political and regulatory context in which the policy was in fact embedded.⁴²³ The key lesson to be derived from this experience is that any attempt to reinstate a MFP policy as the basis of a modern attack on national poverty will require that a *unique* design structure be employed, one which not only steers clear of its predecessor's key design shortcomings⁴²⁴ but that better and more instrumentally corresponds to the actual regulatory and political context of the twenty-first century.

Such a structure, I submit, would seek to build upon and reinforce the best features of modern new governance regulatory regimes (i.e., their institutionalized systems of competitive performance review) and the best features of new accountability systems (in particular, their production of densely valuable first-hand information on poverty's day-to-day causes, the relationships that sustain them, and the rights-based indicators that can measure them). It would then bring these best features together – using each to shore up the deficiencies of the other – through the coordinated work of two new nationwide *orchestrating* bodies: a National Office on Poverty Alleviation and a National Human Rights Commission. Both would operate, in turn, under the directive mandate of an executively-declared and legislatively-authorized National Commitment to Poverty Alleviation, accompanied by a set of national poverty reduction targets. Each of these three essential orchestrating arrangements, starting with the latter, is considered below.

A. National Poverty Alleviation Commitment

As experience suggests, a fully coordinated nationwide effort to eliminate the causes and sources of poverty must begin with a clearly articulated national policy commitment to that goal.⁴²⁵ Thus, just as the U.S.

423. See *supra* discussion in Part I.C.

424. These design shortcomings included, in particular, the over-investiture of conflicting representation mandates in local CAPs, the administrative overload of the OEO, and the effective removal of the OEO's orchestration role with respect to CAP learning processes and competitive performance evaluation. See *supra* discussion in Part I.B and I.C.

425 See CTR. FOR AM. PROGRESS, *supra* note 22, at 16 (noting that poverty rates in the United States have not appreciably declined since the last time poverty alleviation was made

Congress declared in 1964 that the elimination of poverty in the nation was to be “the policy of the United States”⁴²⁶ – and just as a growing number of U.S. states are legislatively or constitutionally declaring poverty elimination to be a fundamental policy and goal of state government,⁴²⁷ so too must the current Congress and Executive jumpstart a national initiative by declaring the nationwide coordination of efforts to lift barriers to economic opportunity and security to be “the policy of the United States of America.”⁴²⁸

Such a policy commitment, issued both through executive order and congressional act or resolution, would serve to establish the goal of poverty alleviation as a moral and political imperative for the nation, directing all public action toward that end. It would, in this regard, serve to reinforce and mobilize the already strong national public conviction that poverty is either “the single most important priority” facing the nation or a “top priority” for Congress and the President.⁴²⁹ Such a national policy commitment would not only establish a nationwide institutional orchestrating structure to carry it into effect, but would have three additional constitutive parts: First, it would set out a concrete set of poverty reduction goals and performance targets for the nation affirmatively to meet within specified timeframes. Second, affirming the need for “maximum feasible participation” of affected communities, it would identify the broad range of public and private stakeholders responsible for eliminating poverty in the United States, calling them to concerted action. And finally, it would expressly endorse a rights-based approach to poverty alleviation.

an explicit national priority – i.e., during Johnson’s War on Poverty.

426. The U.S. Congress declared in the Economic Opportunity Act of 1964:

The United States can achieve its full economic and social potential as a nation only if every individual has the opportunity to contribute to the full extent of his capabilities and to participate in the workings of our society. *It is, therefore, the policy of the United States* to eliminate the paradox of poverty in the midst of plenty in this Nation by opening to everyone the opportunity for education and training, the opportunity to work, and the opportunity to live in decency and dignity. It is the purpose of this Act to strengthen, supplement, and coordinate efforts in furtherance of that policy.

Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 2, 78 Stat. 508, 508 (repealed 1981) (emphasis added).

427. See, e.g., ILL. CONST. pmbl. (naming poverty elimination as a fundamental goal of state government).

428. Correlatively, in 1992 President Bill Clinton issued an Executive Order declaring that “[i]t shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.” Exec. Order No. 13,107, §1, 63 Fed. Reg. 68,991, 68,991 (Dec. 15, 1998) (emphasis added).

429. See *supra* note 23; see also WorldPublicOpinion.org, *Obama, McCain Supporters Agree Government Responsible for Ensuring Basic Healthcare, Food, and Education Needs*, <http://www.worldpublicopinion.org/pipa/articles/brunitedstatescanadara/553.php> (last visited Feb. 8, 2010) (national poll suggesting population wants government to spend more time – and more money – addressing issues of poverty in the United States).

1. National Poverty Reduction Targets

Given modern priorities for performance-based incentive systems, a twenty-first century national poverty commitment would appear incomplete, even toothless, without an express set of accompanying national poverty reduction targets to measure and competitively assess performance outcomes.⁴³⁰ Such targets, increasingly used by U.S. states and nations around the world, function to break broader social goals down into achievable pieces, around which stakeholder attention can be concretely and sustainably focused and against which progress can be measured and, correspondingly, the effectiveness of comparative policies transparently assessed.⁴³¹ Poverty reduction targets thus facilitate the establishment of a competitive, incentive-based system around the achievement of poverty reduction goals, while allowing for local diversity, decentralized experimentation, negotiated cross-sectoral solutions, and responsive innovation in decisions about *how* precisely to achieve those goals. In this sense, targets operate by being generally agnostic about *which* policies should be enacted in any given context, leaving such decisions to localized democratic negotiation, comparative learning experiences, and creative experimentation.

Reflecting the growing trend toward the national embrace of performance targets, in 2008 the United States House of Representatives took its first tentative step toward adopting a National Poverty Reduction Target by endorsing a national policy goal of cutting poverty in half over the next ten years.⁴³² Such a goal should explicitly be incorporated into a U.S. policy on poverty alleviation. Indeed, by establishing such a goal at the national level, the United States would encourage states and localities to set their own targets (accompanied by renewable two or five year action plans), promoting thereby a competitive race *to the top* in who can most quickly and effectively reduce poverty rates. In so doing, a renewed and continuous dialogue would be encouraged at all levels of society and

430. Cf. CTR. FOR AM. PROGRESS, *supra* note 43, at 16 (recommending that the next President begin his or her term with an executive order declaring the goal of cutting poverty in half in ten years and send such legislation to Congress).

431. As Jodie Levin-Epstein has noted, such targets have "four 'S' strengths:"

[A poverty reduction target] offers a *shared* vision that establishes the intent to tackle poverty; a *simple* metric whose simplicity fosters transparency and is readily understood by both policymakers and the public; a *silo-busting* tool, since reaching the target invariably requires cross-agency work; and a *solution-building* environment, since if a proposal is rejected or a program fails to work, another solution needs to take its place. Further, since a target is typically in place for the long term – a decade or more – it can, if used effectively, contribute to sustained attention.

Jodie Levin-Epstein, *Sustaining Anti-Poverty Solutions: Keep an Eye on the Prize*, NFG Rep. 19, 20 (Fall 2008), available at <http://www.nfg.org/index.php?ht=a/GetDocumentAction/i/3571>.

432. H.R. Con. Res. 198, 110th Cong. (2008) ("[I]t is the sense of Congress that the United States should set a national goal of cutting poverty in half over the next 10 years.")

across the political spectrum about what poverty means, what the best policies and practices are to address it in distinct contexts, which indicators most accurately measure it, and how comparative experiences of policy success and failure can most meaningfully be shared.

In fact, pressed by civil society advocates from below, U.S. states and localities are increasingly setting their own state poverty reduction strategies and targets. With ten doing so over the last three years, twelve states have now established statewide antipoverty initiatives.⁴³³ Eight of these have in fact established, or are in the process of establishing, poverty reduction targets.⁴³⁴ Connecticut, the first to do so, committed in 2004 to reducing child poverty by fifty percent in ten years.⁴³⁵ Minnesota committed to *ending* poverty by 2020.⁴³⁶ A national poverty reduction target would establish a supportive frame in which these state-level policies would be encouraged, incentivized, and scaled-up where appropriate.

It bears mention in this regard that, in failing to establish a national poverty reduction strategy or target, the United States remains decidedly behind its international peers. Indeed, increasing numbers of nations, both rich and poor, have adopted national poverty reduction strategies and plans of action. Many of these set hard poverty-reduction targets within distinct time intervals and follow up with periodic progress reports on how effectively those targets are being met. The European Union, for example, requires all twenty-seven of its Member States to prepare National Antipoverty Strategy Papers and Social Exclusion Strategy Papers, and to report annually on progress in achieving antipoverty goals through the Open Method of Coordination.⁴³⁷ Ireland, a leader in the field, created a National Anti-Poverty Strategy as early as 1997, through which it committed to “reduce, or ideally eliminate (consistent) poverty” by 2007.⁴³⁸

433. LEVIN-EPSTEIN & GORZELANY, *supra* note, at 1.

434. These include Connecticut, Delaware, Illinois, Louisiana, Maine, Minnesota, Oregon, and Vermont. *See id.* at 9, 13-32.

435. *Id.* at 13.

436. *Id.* at 25.

437. *See, e.g.,* Isabelle Maquet & David Stanton, *Income Indicators for the EU's Social Inclusion Strategy*, at 2-3, http://www.welfareacademy.org/pubs/international/oecdumd/asp_papers/papers/Income%20Indicators%20in%20the%20EU%20%2030%20April%2009.pdf (last visited May 7, 2010); *see also* The Lisbon Strategy, <http://www.eapn.ie/policy/55> (last visited May 7, 2010) (undertaking made by EU Heads of State in March 2000 to “make a decisive impact on the eradication of poverty” by 2010, including by establishing an EU Inclusion Strategy built around National Action Plans and the Open Method of Coordination (OMC)). The OMC involves (1) the agreement of Common Objectives at the EU level; (2) the development of Common Indicators to measure progress towards reaching these Objectives; (3) the development of National Plans for achieving such Objectives; (4) Peer Review of the National Plans; and (5) European Reports documenting the outcomes of the process. *Id.* Since 2006, the National Action Plans Against Poverty and Social Exclusion have become a distinct chapter within the National Reports on Strategies for Social Protection and Social Inclusion. *See* European Antipoverty Network Ireland, *Anti-Poverty Strategies*, <http://www.eapn.ie/eapn/policy/social-inclusion/anti-poverty-strategies> (last visited May 7, 2010).

438. GOV'T OF IR., *SHARING IN PROGRESS – NATIONAL ANTI-POVERTY STRATEGY* (1997) (establishing series of targets, including reducing proportion of Irish households determined to be “consistently poor” to less than five percent by 2004). *See also* European Anti-Poverty

Helped along by two-year plans of action, it succeeded in meeting its goal of reducing poverty by ten percent in ten years – from fifteen percent to less than five percent⁴³⁹ – and in 2007 adopted a new ten-year target and plan to reduce consistent poverty to below two percent in five years, while eliminating it by 2016.⁴⁴⁰

In 1999, the United Kingdom followed suit, establishing a target to end child poverty by 2020, while reducing it by twenty-five percent by 2005 and fifty percent by 2010.⁴⁴¹ By 2005, it had in fact reduced child poverty by twenty percent – a reduction that occurred, notably, during the same period in which the U.S. child poverty rate *increased* by twelve percent.⁴⁴² Similar strategies are being implemented in countries around the world. Canada is expected to announce a new National Poverty Reduction Strategy in 2010, following the lead of its many provinces which already have their own plans in place.⁴⁴³

The same is occurring in the poorest nations, especially through national target-based undertakings to reduce extreme poverty consistent with the U.N. Millennium Declaration and Millennium Development Goals (MDGs).⁴⁴⁴ Indeed, in 2008, 140 nations of the world reported to the United Nations on the national actions plans they have prepared and progress made in meeting the MDG poverty reduction targets.⁴⁴⁵ Similarly, all poor nations receiving concessional loans, grants, or loan forgiveness from the World Bank now complete Poverty Reduction Strategy Papers describing national plans of action for effectively reducing poverty as a national

Network Ireland, Anti-Poverty Strategies, <http://eapn.ie/eapn/policy/social-inclusion/anti-poverty-strategies> (describing aim of 1997 National Anti-Poverty Strategy).

439. Laurie Monsebraaten, *What the Poor Need: A Strategy*, TORONTO STAR, Sept. 20, 2006 at A1.

440. GOV'T OF IR., NATIONAL ACTION PLAN FOR SOCIAL INCLUSION 2007-2016, at 13 (2007) (establishing overall poverty goal "[t]o reduce the number of those experiencing consistent poverty to between 2% and 4% by 2012, with the aim of eliminating consistent poverty by 2016, under the revised definition"); *see also* GOV'T OF IR., TOWARDS 2016, TEN-YEAR FRAMEWORK SOCIAL PARTNERSHIP AGREEMENT 2006-2015 (2006); GOV'T OF IR., TRANSFORMING IRELAND – A BETTER QUALITY OF LIFE FOR ALL: IRELAND NATIONAL DEVELOPMENT PLAN 2007-2013 (2006).

441. *See* Tony Blair, Beveridge Lecture, Mar. 1999 www.bris.ac.uk/poverty/Publication_files/Tony%20Blair%20Child%20Poverty%20Speech.doc; *see also* Jane Waldfogel, Ctr. for Am. Progress, *Investing in Our Children: The U.S. can Learn from the U.K.*, July 30, 2007, http://www.americanprogress.org/issues/2007/07/investing_in_children.html (visited Mar. 28, 2010) (reviewing targets and observing that UK has reduced poverty by fifty percent since the start of its anti-poverty campaign – reducing numbers of children in absolute poverty before housing costs from 3.4 million in 1999 to 1.6 million in 2006).

442. Waldfogel, *supra* note 441.

443. The Canadian provinces of Newfoundland and Labrador, Prince Edward Island, Nova Scotia, New Brunswick, Québec, Ontario, Manitoba, and British Columbia all have poverty reduction strategies or campaigns. *See* Canadian Social Research, <http://www.canadiansocialresearch.net/antipoverty.htm#on> (last visited Mar. 28, 2010).

444. *See* United Nations Millennium Declaration, G.A. Res. 55/2, ¶ 19, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

445. *See* UNDP, Tracking the MDGs: Country Progress, http://www.undp.org/mdg/tracking_countryreports2.shtml (last visited Mar. 28, 2010).

priority.⁴⁴⁶ Aimed at reversing the powerlessness that results from the failure to include poor people systematically in the generation of information and adjustment of policies and actions that affect them, a requirement exists that these plans be prepared in active and regular consultation with the poorest social sectors in national society.⁴⁴⁷

All of these initiatives operate under a common idea: that sustained progress occurs best where clear targets are set, performance is measured, plans of action are made, and assessment thereof is both transparent and broadly participatory.

2. Broad Stakeholder Responsibility and Participatory Commitments

A twenty-first century national commitment to poverty alleviation would also – like its predecessor – feature a strong insistence on the need for broad stakeholder participation and expanded public-private partnerships in lifting the barriers to nation-wide poverty. Reflecting core new governance and new accountability precepts, it would thus expressly recognize that poverty reduction cannot be understood as the responsibility of either the government or the poor alone. Rather, it requires the “maximum feasible participation” of *all* stakeholders in society, operating in increasingly broad community partnerships. Such partnerships seek to take advantage of the full scope of human, financial, technological, and informational resources available, from the dense knowledge and expertise in local communities of poverty’s causes, to the entrepreneurial skills, ideas, and investment potential of private business, to the civic energies of private citizens, to the research capabilities of the nation’s universities and educational institutions.

Indeed, in calling for his nationwide war on poverty, President Johnson expressly appealed to “American labor and American business, private institutions and private individuals” and “all the energy of our nation,” stressing the need for “their help, their support, and their full participation,” to bring to bear on “our common enemy” of poverty.⁴⁴⁸ President Roosevelt likewise called on all the American people to make the rights recognized in his politically-declared Second Bill of Rights a reality, understanding that without direct action and sustained political pressure by civil society the policies and practices of government were unlikely to meaningfully change.⁴⁴⁹

446. See WORLD BANK, POVERTY REDUCTION STRATEGIES, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPRS/0,,menuPK:384207~pagePK:149018~piPK:149093~theSitePK:384201,00.html> (last visited Feb. 8, 2010).

447. PRSA REVIEW, *supra* note 231, at 51, ¶ 73 (describing importance of participatory inclusion of the poor in poverty assessment processes).

448. LBJ Special Message to Congress, *supra* note 5, at 377. He did so by situating the public’s responsibility equally in “what is right” and “what is wise,” and by underscoring that increasing the opportunity of some would increase the prosperity of all through new industry, higher production, increased earnings and better income for all. *Id.*

449. See Franklin Delano Roosevelt, Message to the Congress on the State of the Union

A twenty-first century nationwide commitment to poverty alleviation would similarly recognize the imperative of sustained public action by all social stakeholders. It would call specifically on businesses, the media, civic solidarity groups, community-based organizations, politicians, private and religious institutions, the police, teachers, students, and the poor themselves to take direct action in eliminating the many sources of poverty, insisting that poverty cannot be wiped out without their creative leadership and active partnership. A commitment framed in this way would serve to mobilize not only civic imaginations but also concrete and coordinated actions across a diversity of policy spheres and narrow issue-silos.

3. Rights-Based Process Orientation

Equally important for promoting the participatory relevance of the poor and mobilizing the full range of social stakeholders, a twenty-first century national poverty commitment should expressly endorse a rights-based approach to poverty alleviation. In so doing, it should begin by providing a broad, capabilities-based definition of poverty. Such a definition would ideally draw directly on human rights standards and, specifically, on the imperative of ensuring the right of everyone to an adequate standard of living, including adequate housing, health care, food, education, and employment.⁴⁵⁰ In so doing, it would ensure that poverty was not defined as simple lack of adequate income, but rather as the lack of adequate access to the capabilities and inputs necessary for human dignity, equal opportunity, and full participation in civic life. As President Johnson himself declared in announcing his anti-poverty commitment to Congress,

The war on poverty is not a struggle simply to support people, to make them dependent on the generosity of others. It is a struggle to give people a chance . . . an effort to allow them to develop and use their capacities, as we have been allowed to develop and use ours, so that they can share, as others share, in the promise of this

Address, January 11, 1944, reprinted in CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* app. 1, at 235-44 (2004) [hereinafter *FDR State of the Union*].

450. Asserted as a "common standard of achievement" for all nations and for all peoples, the Universal Declaration of Human Rights recognizes the right of "[e]veryone" to "a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services." UDHR *supra* note 240, pmbl. & art. 25. See also *id.* art. 23-24 (likewise enshrining the rights of "[e]veryone" to work, free choice of employment, just conditions of work, equal pay for equal work, just and favorable remuneration, freedom of unionization, rest and leisure, education, culture); *id.* art. 25 (enshrining "the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control").

nation.⁴⁵¹

A growing number of U.S. states are declaring their own poverty elimination commitments in precisely such broad and human rights-based terms.⁴⁵² In giving content to its own constitutional mandate to eliminate poverty as a fundamental goal of state government, the Illinois legislature, for example, has recently proposed language declaring that the comprehensive plans developed to meet the state's poverty reduction targets must be "consistent with international human rights standards"⁴⁵³ and that "[f]ull participation in civic life cannot be achieved without those things that protect and preserve human dignity and make for a healthy life, including adequate nutrition and housing, meaningful work, safe communities, health care, and education."⁴⁵⁴ In so doing, it notes that "[t]he State of Illinois is a party to all international human rights treaties signed and ratified by the United States."⁴⁵⁵

By framing poverty elimination goals in broad, rights-based terms as the extension of human opportunities, capabilities, and participation in civic life, a national commitment to poverty alleviation would function to serve notice on government agencies, private service providers, and the broader public that the current focus of many anti-poverty initiatives on narrow income transfer programs – whether through direct welfare payments or earned income tax credits – is no longer acceptable as a national response to poverty.⁴⁵⁶ Rather, a more holistic and comprehensive set of policies is required to address the many barriers to economic opportunity faced by the nation's poor in accessing an adequate standard of living. An important set of directive principles to guide poverty alleviation efforts would thereby be established. These directive principles would serve to focus processes of competitive performance monitoring and assessment on measuring the comparative effectiveness of antipoverty policies and programs directly in terms of their impacts on improving individual and community access to adequate education, safe housing, meaningful work, health care, safe communities, adequate nutrition, and other essentials for a life of dignity for all persons within the nation on a fair and equal basis. This is not to say that traditional new governance indicators – like drops in welfare rate enrollment – should not likewise be measured and comparatively assessed. It is only to say that a fuller set of performance indicators must be contemplated to get a true sense of national achievement in eliminating the causes and sources of poverty.

451. LBJ Special Message to Congress, *supra* note 5.

452. See, e.g., LEVIN-EPSTEIN & GORZELANY, *supra* note 417.

453. Commission on the Elimination of Poverty Act, 20 ILL. COMP. STAT. ANN. 4080/10 (LexisNexis 2010).

454. *Id.* 4080/5.

455. *Id.*

456. David Ellwood notes that the increase in the Earned Income Tax Credit during the Clinton administration was greater than total spending on Aid to Families with Dependent Children ("AFDC") at both state and local levels. See Gitterman, *supra* note 396, at 21.

Perhaps most importantly in this regard, a national policy commitment to poverty alleviation that made express reference to human rights standards and achievement would constitute a direct political cue to Americans at all levels of society of the need to take direct action *themselves* in the fight against poverty.⁴⁵⁷ In particular, it would provide a critical set of participation and accountability enhancing tools for mobilizing community action to insist that public programs be planned, budgeted, and implemented consistent with human rights targets, standards, and safeguard policies.

It was, correspondingly, in reliance on this mobilizing capacity of rights that President Roosevelt tied his New Deal program to a politically-framed Second Bill of Rights for the United States. That Bill declared that all Americans are entitled to "the right to a useful and remunerative job," the "right to earn enough to provide adequate food and clothing and recreation," the "right of every family to a decent home," the "right to adequate medical care and the opportunity to achieve and enjoy good health," the "right to adequate protection from the economic fears of old age, sickness, accident, and unemployment," and the "right to a good education," among others.⁴⁵⁸ Asserting that "America's own rightful place in the world depends in large part upon how fully these and similar rights have been carried into practice for our citizens," the President called upon Congress "to explore the means for implementing this economic bill of rights – *for it is definitely the responsibility of the Congress to so do.*"⁴⁵⁹

A twenty-first century national commitment to poverty alleviation would make the same bold commitments to human rights achievement. In so doing, it would situate the imperative of poverty alleviation not only in faithful achievement of the ideals and mandates of national constitutional identity, as did President Johnson,⁴⁶⁰ but also in the core human rights commitments that underlie our identity as a rights-respecting nation. Indeed, not only do national public opinion polls suggest that roughly eighty percent of Americans believe that human rights inhere in every human being, regardless of government treaty commitments,⁴⁶¹ but a

457. See *supra* note 355.

458. FDR State of the Union, *supra* note 449 at 243.

459. *Id.* (emphasis added). He continued, "We cannot be content, no matter how high [our] general standard of living may be, if some fraction of our people – whether it be one-third or one-fifth or one-tenth – is ill-fed, ill-clothed, ill-housed, and insecure." *Id.* at 242.

460. In calling on Congress to implement the 1964 Economic Opportunity Act, for example, President Johnson referred specifically to its constitutional duty to "provide . . . for the general welfare of the United States." LBJ Special Message to Congress, *supra* note 5, at 380. He similarly identified his own protagonism as resting in the Executive duty to provide for the general welfare of the nation's people as a whole, and in particular the Executive's "special responsibility to the distressed and disinherited, the hungry and the hopeless of this abundant nation." *Id.* (emphasis added). In *Goldberg v. Kelly*, Justice Brennan similarly tied government duties with respect to poverty alleviation not only to the U.S. Constitution's directive to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity" but, more broadly, to "the nation's basic commitment [from its founding] . . . to foster the dignity and well-being of all persons within its borders." 397 U.S. at 264-65.

461. See BELDEN RUSSONELLO & STEWART, *supra* note 398, at 12.

significant majority “strongly believe” that equal access to quality public education, access to healthcare, living in a clean environment, fair pay for workers to meet the basic needs for food and housing, freedom from extreme poverty, and adequate housing are human rights to which all Americans are entitled.⁴⁶²

A national poverty alleviation commitment that expressly embraced these core economic, social and cultural rights – especially if symbolically accompanied by U.S. ratification of the International Covenant on Economic, Social and Cultural Rights and recognition of its basis in the U.S. Second Bill of Rights⁴⁶³ – would go a long way to reigniting the spirit of civil society to make these rights real in our local communities. Such commitments, it would need to be underscored, constitute key *process* undertakings, signaling to the nation our genuine commitment to strike out at the barriers to participation and economic opportunity throughout our society.⁴⁶⁴ They fit particularly comfortably with the growing sophistication and use of process-oriented new accountability methodologies.

B. National Office on Poverty Alleviation

To ensure sufficient national orchestration of the plurality of implementation initiatives that a decentralized, rights-based national anti-poverty commitment would unleash, a national commitment to poverty alleviation should also establish an executive focal point or headquarters on poverty alleviation. To inspire the attention and political gravitas it merits, that focal point should sit within the Executive Office of the President,⁴⁶⁵ operating as a fully staffed National Office on Poverty Alleviation (OPA).⁴⁶⁶ In that capacity, it would function to ensure that there

462. *Id.* at 3-4 (documenting poll support for each right at eighty-two percent, seventy-two percent, sixty-eight percent, sixty-eight percent, fifty-two percent, and fifty-one percent, respectively). See also SUNSTEIN, *supra* note 449, at 62-63 (noting a 1991 survey of U.S. citizens in which strong majorities identified adequate housing; a reasonable amount of leisure time; adequate provision for retirement years; an adequate standard of living; and adequate medical care as “a right to which he is entitled as a citizen,” and not as “a privilege that a person should have to earn”).

463. The United States signed the ICESCR in 1977. The United States played an active leadership role in the drafting of the Universal Declaration of Human Rights, from which the ICESCR was normatively derived. For discussion of that role, see MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 115-16 (2001).

464. See FDR State of the Union, *supra* note 449.

465. In 2008, Democratic presidential nominee Hillary Clinton called for a new Cabinet-level post focused on poverty as part of her campaign platform, together with setting a national goal of cutting child poverty in half by 2020 and ending child hunger by 2012. See LEVIN-EPSTEIN & GORZELANY, *supra* note 417, at 4 (citing Press Release, Giving Every Child a Chance, Hillary Clinton for President (Feb. 28, 2008)).

466. Cf. LBJ Special Message to Congress, *supra* note 5 (announcing establishment of an Office of Economic Opportunity to serve as a national headquarters for poverty alleviation, with the Office’s Director serving as the President’s “personal Chief of Staff for the War against poverty”). There is an increasing emphasis in international law and development theory on ensuring government focal points. Such focal points generally take the shape of a

is a single identifiable Executive office with recognized responsibility for orchestrating and overseeing the full range of national efforts on meeting national poverty reduction targets and that, correspondingly, can be held to public account for national progress and setbacks on that front.⁴⁶⁷

It is important to emphasize, in this regard, that the OPA would serve exclusively as an *orchestrating* body for national stakeholder efforts. That is, unlike President Johnson's Office of Economic Opportunity (OEO),⁴⁶⁸ the OPA would exercise neither administrative functions nor implementation responsibilities for any single poverty-related program or policy – outside those on transparency, capacity-building, and training. Rather, its purpose would be exclusively to “take care” that the nation's commitment to poverty alleviation was being appropriately implemented by all competent authorities and stakeholders in the domestic jurisdiction.⁴⁶⁹

There is currently no such single institution that has responsibility for comprehensive oversight of national social welfare policy. Rather, responsibilities are distributed among many different agencies and departments of government, all of which engage in their own issue-specific competitive performance review in pursuit of varying, not always consistent, goals. Thus, the Department of Health and Human Services oversees TANF policy, with welfare roll reduction and work as its central priorities. The U.S. Department of Agriculture oversees national food stamp policy, with its own set of performance indicators and competitive financial incentives. The Department of Housing and Urban Development oversees social welfare law in the housing field, and a host of similar performance review systems operate in other U.S. departments and agencies, all with their own sets of service delivery targets, indicators, and financial incentives.⁴⁷⁰

A National Office on Poverty Alleviation would serve to link the

dedicated office within government or other policy coordinating body. *See, e.g.*, Disability Convention, *supra* note 51, art. 33.1, (“States Parties . . . shall designate one or more focal points within government for matters relating to the implementation of the present Convention.”). On March 11, 2009, President Barack Obama issued an Executive Order establishing a White House Council on Women and Girls, to be situated within the Executive Office of the President, with the mandate to establish a coordinated Federal response. *See* Exec. Order No. 13,506, 74 Fed. 11271 (Mar. 16, 2009).

467. Some analysts have urged that *joint* responsibility for advancing a national poverty reduction target should lie with the Domestic Policy Council and National Economic Council, with each agency describing its action plan for advancing that goal in its annual budget justification. CTR. FOR AM. PROGRESS, *supra* note 22, at 16. To ensure that there is in fact an easily identifiable body that has orchestration of national efforts as its primary mandate, a single focal point within the White House may be the better option for enhanced public accountability. This is true even as that focal point would work closely with other more general advisory bodies having competence in the area.

468. The OEO was granted direct administration functions over a number of large federal anti-poverty programs. Together with the statutory limitations placed on its orchestration role over CAP performance, the extensiveness of this mandate played an important contributing role in the MFP policy's early demise. *See supra* discussion at Part I.B & I.C.

469. The U.S. Constitution vests the President with the power and duty to “take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 3.

470. This is required by the Government Performance and Results Act of 1993, 31 U.S.C. § 1115 (2006).

performance incentives and informational outputs of all of these programs. With a birds-eye view over the national performance monitoring system in the social welfare field, it would oversee the rationality of competitive performance regimes. Where program-specific financial incentives conflicted, the focal point would be mandated to intervene in an advisory capacity and mediate the conflict such that government incentives worked comprehensively toward the end of improving opportunity outcomes. In this respect, it would serve as a centralized clearinghouse for information generated from a variety of programs, agencies, and private sector sources, with dedicated staff responsible for analyzing data intersections, making recommendations, and ensuring that programs are working together toward the common end of improving livelihoods and opportunities.

At the same time, because the choice of indicators is so important to the success of any performance monitoring system, OPA would be tasked with overseeing the various indicators in use by federal departments and agencies around the nation. In this regard, it would engage in periodic public consultations and assessment reviews to determine whether new indicators should be proposed, and assemble both quantitative and qualitative indicators that could be compared across jurisdictions. Such sharing of comparative indicators would include those of other national jurisdictions engaged in national poverty reduction strategies, following the recommendations of the Government Accountability Office, which has favored the creation of a National Indicator System to help the U.S. assess its comparative position and progress on various economic indicators, both domestically and internationally.⁴⁷¹

Most important, the National Office would ensure that all resulting information was made public and transparent. All government agencies and departments would, for example, be required to submit to OPA their annual plans of action for achieving national poverty reduction targets. The National Office would compile, synthesize, monitor, assess, and transparently distribute the results for further public consumption. It would correspondingly report annually to Congress and to the nation on the measures taken by the full range of public and private stakeholders and the progress achieved in meeting national targets on poverty alleviation. In doing so, it would be competent to make recommendations on new poverty-related legislation or policies that might be required to fill gaps in coverage, eliminate duplication, or maximize administrative efficiencies. The resulting information could additionally be made available to the U.S. Department of State, which has taken lead responsibility in coordinating the preparation of treaty compliance reports to the United Nations, the OAS, and other international organizations.⁴⁷²

To assist the focal point in accessing this massive data set and in facilitating cross-agency collaborations, a coordination mechanism or

471. See GAO, *INFORMING OUR NATION*, *supra* note 183.

472. See generally Melish, *From Paradox to Subsidiarity*, *supra* note 314 (discussing U.S. human rights treaty practice).

mechanisms should likewise be created.⁴⁷³ Such a mechanism – in which the focal point director would sit or, ideally, chair – would ensure that representatives of the U.S. Departments of Housing and Urban Development, Health and Human Services, Agriculture, Labor, Justice, and the Interior, as well as of the Domestic Policy Council, the National Economic Council, and other relevant federal agencies were meeting on a regular basis to coordinate efforts and share ideas. This coordination mechanism (or a parallel one) might similarly include a range of state-level partners, including representatives of the National Governors Association Center for Best Practices, the National Conference of State Legislatures,⁴⁷⁴ and the U.S. Conference of Mayors, which have taken an increasingly active role in poverty matters over the last few years.⁴⁷⁵ It might also include rotating representatives of civil society organizations with particular expertise in poverty reduction strategies and in monitoring the performance of public and private service-delivery partners.⁴⁷⁶

By joining these groups together in active consultation surrounding best practices, reported concerns, incentive failures, and other practical matters related to the implementation of national poverty reduction targets and goals, the focal point would play a critical orchestration role in ensuring that efforts were appropriately coordinated and that learning processes were effectively being transferred from one agency or initiative to another through continual data collection and information exchange.⁴⁷⁷ In so doing, it would ensure that national efficiencies and productive performance outcomes were maximized across all levels of policy response.

At the same time, to ensure that planning processes around poverty

473. Cf. Disability Convention, *supra* note 51, art. 33.1 (“States Parties . . . shall give due consideration to the establishment or designation of a coordination mechanism within Government to facilitate related action in different sectors and at different levels.”).

474. In 2007 these two groups hosted a three-day institute to help state policymakers develop strategies to reduce child and family poverty. Teams, comprised of both executive and legislative branch officials worked together to develop action plans for their state, with Arizona, Colorado, Connecticut, Iowa, Illinois, Kansas, Michigan, Minnesota, Vermont, and Washington participating. See LEVIN-EPSTEIN & GORZELANY, *supra* note 417, at 5.

475. See, e.g., ANTONIO VILLARAIGOSA, TASKFORCE ON POVERTY, WORK, AND OPPORTUNITY, UNITED STATES CONFERENCE OF MAYORS, REPAIRING THE ECONOMIC LADDER: A TRANSFORMATIVE INVESTMENT STRATEGY TO REDUCE POVERTY AND EXPAND AMERICA’S MIDDLE CLASS (2007), available at <http://usmayors.org/chhs/VillaraigosaPovertyReport07.pdf> (proposing set of ambitious recommendations to reduce poverty); UNITED STATES CONFERENCE OF MAYORS, ADOPTED RESOLUTIONS TASK FORCE ON POVERTY, WORK AND OPPORTUNITY (2007).

476. Cf. Economic Opportunity Act of 1964, Pub. L. No. 88-452, §605, 78 Stat. 508, 531 (repealed 1981) (establishing a National Advisory Council composed of civil society representatives to review operations and activities of OEO and make appropriate recommendations to it). President Kennedy likewise, created an auxiliary Citizen’s Advisory Council to assist his Cabinet-level President’s Committee on Juvenile Delinquency, a direct predecessor to the War on Poverty. See MARRIS & REIN, *supra* note 62, at 22.

477. Cf. CTR. FOR AM. PROGRESS, *supra* note 22, at 16 (“The White House should issue an annual report, describing federal actions, state and local progress, the contributions of private actors, civil initiatives and voluntary efforts. The report should provide an annual scorecard of short-term and long-term measures of progress.”).

reduction targets were fully participatory and accessible to all stakeholders, including particularly to the least economically advantaged, the OPA would be mandated to ensure that training programs were available for public and private officials at the state, local and federal levels. Such trainings would emphasize both the instrumental and intrinsic importance of participation in program design, monitoring, and assessment processes as well as the need for planned public outreach and education on poverty and poverty reduction strategies.⁴⁷⁸

In addition to these core orchestration functions, the National Office would ideally also enjoy a discretionary project funding mandate. Such a mandate would differ significantly from Johnson's OEO, which funded up to ninety percent of CAAs operating budgets.⁴⁷⁹ Rather, OPA funding would be significantly more targeted and flexible, allowing grants to be made to innovative demonstration projects proposed by community groups, particularly where designed either to lift specific barriers to opportunity at the grassroots level or to ensure the participation of disadvantaged groups in processes to identify those barriers and propose effective ways to lift them.⁴⁸⁰ In this way, it would help innovate and share best practices in an effort to scale good programs up and outward.

In sum, through grants, technical assistance, information sharing, and competitive stimulation, the executive focal point on poverty alleviation would support and facilitate the plurality of experiments and innovative programs arising at state and local levels around the nation. This was, indeed, the central idea behind President Johnson's subsidiarity-based War on the Sources of Poverty. That initiative was not based on the notion that government would implement a single national program that would address the needs of all, nor that the government would leave everything to the local level. Rather, it understood the critical need for the establishment of a national headquarters for poverty alleviation that would facilitate the development and strengthening by "every American community . . . [of a] comprehensive plan to fight its own poverty."⁴⁸¹ Where commonalities were found, federal action could proceed on a national basis. But the solutions would arise from the ground, where poverty was experienced first-hand and where "the causes, not just the consequences of poverty" could best be identified.⁴⁸²

478. Cf. Exec. Order No. 13,107, §§ 2-4, 63 Fed. Reg. 68,991, 68,991-92 (Dec. 15, 1998) (1999) (defining the orchestration mandate of the Inter-Agency Working Group on Human Rights as "developing plans for public outreach and education concerning [human rights provisions]").

479. See Economic Opportunity Act of 1964, Pub. L. No. 88-452, §§204-08, 78 Stat. 508, 518-19 (repealed 1981).

480. It would, in this way, more closely approximate the discretionary funding mandate of the U.S. Department of Justice's Office on Violence Against Women. See Office on Violence Against Women, U.S. Dep't of Justice, Grant Programs, <http://www.ovw.usdoj.gov/ovwgrantprograms.htm>. Cf. CTR. FOR AM. PROGRESS, *supra* note 22, at 16 ("Congress should establish a fund for demonstration projects and innovative policy experiments. This new fund should be guided by a nonpartisan expert panel that would make recommendations for funding and evaluating new approaches.").

481. LBJ Special Message to Congress, *supra* note 5, at 377.

482. *Id.* at 375.

C. National Human Rights Commission⁴⁸³

While a National Office on Poverty Alleviation would orchestrate national *implementation* of poverty reduction efforts, an additional orchestration institution would be required to ensure that transparent *monitoring* processes were being independently undertaken around the nation on the impact of government policies on human rights, particularly of the most disadvantaged. Such monitoring processes would aim to ensure the adequacy and responsiveness of implementation efforts to real needs on the ground, as well as their programmatic consistency with human rights standards and safeguard policies. The importance of this monitoring function has been recognized around the world and is increasingly a requirement of human rights law and human rights treaty commitments.⁴⁸⁴ Most countries honor it by creating a national human rights commission or ombudsperson's office,⁴⁸⁵ bodies that can be further replicated within sub-national political units as close to the individual as necessary.

A United States Human Rights Commission (USHRC) would serve this national monitoring and orchestration role. It would be mandated to monitor indicators of progressive human rights achievement in the nation – including with respect to improved access by all social groups to the rights to education, housing, health care, food, and employment – and, equally important, to maximally promote the full participation of all stakeholders in the decisionmaking processes that affect such achievement. In so doing, it would understand its primary mandate as an orchestrator or amplifier of the voices at the local level most affected by human rights interferences, yet often least able to access regulatory governance structures. In particular, consistent with the new accountability agenda it would operate to ensure that disadvantaged communities had genuine access to and felt safe participating in local and national-level performance monitoring and that the informational inputs produced thereby were transparent, effectively coordinated, and locally and nationally accessible

483. This section draws heavily on a similar proposal made in Melish, *From Paradox to Subsidiarity*, *supra* note 314, at 458-61. The proposals therein were correspondingly drawn upon in the drafting of a domestic policy blueprint on human rights submitted to the incoming Obama administration in October 2008. See CATHERINE POWELL, AM. CONST. SOC'Y FOR LAW & POL., HUMAN RIGHTS AT HOME: A DOMESTIC POLICY BLUEPRINT FOR THE NEW ADMINISTRATION (2008) (citing article's proposals for the creation of two new U.S. human rights bodies dedicated, respectively, to the domestic implementation and monitoring of U.S. human rights commitments).

484. See, e.g., Disability Convention, *supra* note 51, art. 33.2 ("States Parties shall . . . maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.").

485. See, e.g., HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD (Hossain et al., eds., 2000) (compiling comparative experiences with national human rights monitoring and oversight bodies).

to all stakeholders.

To be maximally effective, the USHRC should be instituted and financed by the federal government, but functionally independent of the political branches, consistent with the Paris Principles.⁴⁸⁶ It can thereby act as a check on the nation's progress in implementing its human rights and poverty alleviation commitments – monitoring achievements, raising awareness, publicizing abusive conduct, and providing advice and recommendations to communities and national institutions. In this respect, while the proposed USHRC must remain wholly independent of political influences to maintain its credibility as a monitoring body, close coordination with the National Office on Poverty Alleviation is absolutely essential. Indeed, such a body will have at its disposal enormous amounts of human rights data and indicator assessments, as generated by multiple stakeholders around the nation. That information must be funneled in appropriate ways to the OPA, such that the two national orchestrating bodies can work collaboratively at the top of a national structure fully dedicated to national poverty alleviation and full rights-based participation in civic life.

As a formal matter, many U.S. states and cities do already have bodies called “human rights commissions” or “human relations commissions.”⁴⁸⁷ Few, however, interpret their mandate as extending beyond investigating complaints of discrimination on the basis of race, sex, disability, age, national origin and, sometimes, sexual orientation.⁴⁸⁸ The USHRC would serve to encourage states and localities to broaden their own mandates to encompass the full field of rights recognized in the Universal Declaration of Human Rights and the treaties ratified by the United States (or adopted by states and localities, where this has been done⁴⁸⁹), a field which necessarily includes the rights to education, health care, housing, food, employment, fair remuneration, and social assistance. In so doing, it would play a particularly important role in identifying and orchestrating the comparative use of performance indicators with respect to these rights, ensuring that such indicators were in fact being locally monitored by

486. Principles Relating to the Status of National Institutions (The Paris Principles), G.A. Res. 48/134, U.N. Doc. A/RES/48/134 (Dec. 20, 1993).

487. There reportedly are only three states – Alabama, Arkansas and Mississippi – that do not have any form of a state or local level human rights or human relations commission. Kenneth L. Saunders and Hyo Eun (April) Bang, *Historical Perspective on U.S. Human Rights Commissions* 13 (Harvard Kennedy Sch. Executive Session on Human Rights Commissions and Criminal Justice, No. 3, 2007).

488. The United States has a national Commission on Civil Rights with a similarly limited mandate. See <http://www.usccr.gov/>.

489. See, e.g., Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT'L L. 263, 274 nn.48-50 (2002) (noting that at least nineteen U.S. states or territories have adopted resolutions or instruments endorsing CEDAW or adopting it on behalf of their jurisdictions). On February 11, 2009, the Chicago City Council passed a resolution of support for the Convention on the Rights of the Child (CRC), in which the Mayor and City Council agreed to “advance policies and practices [that] are in harmony with the principles of the [CRC] in all city agencies and organizations that address issues directly affecting the City's children.” City of Chicago, Ill., Resolution Adopting the U.N. Convention on the Rights of the Child (Feb. 11, 2009) (on file with author).

citizens groups and incorporated into competitive local, state, and nationwide performance monitoring systems aimed at achieving distinct poverty reduction targets.

Within this process, the USHRC would have a broad promotional mandate.⁴⁹⁰ With respect to the national project on poverty alleviation and attainment of the national poverty reduction targets, several of its functions stand out in particular.

First, to ensure transparent national information about the types and frequency of human rights abuses occurring in distinct communities, particularly with respect to experiences with abusive, arbitrary or discriminatory situations related to housing, healthcare, education, social assistance or related matters, the HRC would collect statistics from local and state human rights commissions on the numbers and types of issues and complaints they were addressing, as well as from the new anti-poverty commissions being established in many states.⁴⁹¹ It would also serve as a clearinghouse of sorts for reports produced by civil society and new accountability movements on economic and social rights violations and strategies for resolving, remedying or overcoming them. Such information would then be synthesized by the USHRC and (subject to privacy constraints) made publicly available and accessible to the full range of social stakeholders for use in their own advocacy efforts.⁴⁹²

Where complaints revealed a pattern of abusive conduct, the USHRC could, moreover, engage in broader independent monitoring through investigations, surveys, inquiries, spot checks, and hearings in an effort to draw attention to the abuse and get the relevant parties involved in direct discussions about appropriate remedial action. In particular, periodic thematic hearings on a variety of rights including health, education, culture, housing, social assistance, and accessibility of public services for persons with disabilities would play an important role not only in drawing national attention to these issues, but also in promoting the direct input of civil society in confronting them.⁴⁹³ The USHRC could thereby work with

490. Paris Principles, *supra* note 486, Annex, Competence and responsibilities, ¶ 2 ("A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.").

491. See, e.g., LEVIN-EPSTEIN & GORZELANY, *supra* note 417 (discussing new state-wide anti-poverty initiatives and commissions).

492. Where local remedies were not available to confront abuse, the USHRC might, moreover, have the power to consider human rights complaints directly, investigating the claim, seeking mediation or conciliation to resolve the issues, or issuing recommendations to the parties and to relevant authorities on appropriate measures designed to remedy the situation or prevent similar abuses from recurring. See Paris Principles, *supra* note 486, Annex, Additional principles (recognizing principles concerning the status of commissions with quasi-judicial competence).

493. In the absence of a national human rights commission, the Inter-American Commission on Human Rights has been playing this role. In recent years it has held hearings on such issues as the right to adequate housing in the United States, human trafficking, and U.S. labor standards and treatment of undocumented workers. See Tara J. Melish, *The Inter-American Commission on Human Rights: Defending Social Rights through Case-Based Petitions*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW

and encourage less advantaged groups to come forward and speak on an official record about experiences with poverty and discrimination, encouraging them to offer their own solutions for eliminating arbitrary barriers to access and opportunity. Such hearings could be replicated at state and local levels, with the USHRC acting in a supportive role to facilitate information exchange and compilation into easily-shared and accessible formats. It could then host the outputs of these local consultations on its website, promoting media attention, broader stakeholder collaborations, creative brainstorming, and idea transfer.⁴⁹⁴ Such an independent space for civil society input is crucial for promoting broad and effective participatory governance.

Based on the extensive material available to it, the USHRC would also be mandated to issue relevant reports and guidelines on rights-respecting behavior by distinct social actors. Thus, for example, where a mass of information had been collected on national experiences with barriers to accessing adequate health care, the HRC could issue a report compiling testimonies and providing recommendations to relevant stakeholders in society and government. Like other NHRIs, it could issue nonbinding guidelines or guiding principles on appropriate conduct in the labor, education, health, or social security fields. Such recommendations or proposals could be directed not only to Congress, the legislatures of the many states, and the private sector, but also to the various agencies and departments of government with administrative responsibilities over public assistance, including TANF grants, food stamps, Section 8 housing vouchers, and job training programs.⁴⁹⁵

To further maximize its orchestration role, the USHRC might even be granted a mandate over economic and social rights similar to that of the South African Human Rights Commission. Enshrined in the Constitution itself, that mandate requires that all relevant organs of state provide the Human Rights Commission each year “with information on the measures that they have taken towards the realisation of the rights . . . concerning housing, health care, food, water, social security, education and the environment.”⁴⁹⁶ This information could then be compiled into a single annual public report that could be made accessible to the public as an accountability tool for ensuring appropriate action on the part of all relevant organs of government. This procedure might even be expanded through statute to include a request (tied to funding or other hard incentives) that other state and local stakeholders provide similar

339, 340 (M. Langford, ed., 2008).

494. The Paris Principles, *supra* note 486, ¶ 3, 3(f)-3(g) (affirming that NHRIs “shall” assist “in the formulation of programmes for the teaching of, and research into, human rights” and “publicize human rights . . . by increasing public awareness, especially through information and education and by making use of all press organs”).

495. *Id.* ¶ 3(a) (“A national institution shall, inter alia, have the following responsibilities: To submit to the Government, Parliament and any other competent body, on an advisory basis . . . opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights”).

496. S. Afr. Const. 1996 § 184(3).

information to the HRC each year. An organized civil society mobilized around a national poverty commitment would produce many voluntary participants in such a national endeavor, particularly if such participation became part of an organized civil society certification, auditing or report card scheme.

* * *

Taken together, these three national orchestration arrangements would function, I contend, as an effective national enabling framework for carrying forward a participation-based national recommitment to poverty alleviation in the United States. By drawing together the core tenets of new governance and new accountability, they would do so, moreover, in a way that not only could avoid the key political pitfalls of the early MFP policy, but could realistically, even wholeheartedly, be embraced by advocates across the national political spectrum.

CONCLUSION: RE-EMBRACING "MAXIMUM FEASIBLE PARTICIPATION" AS U.S. NATIONAL POLICY

This Article has aimed to demonstrate not only why a national recommitment to the participatory orientation of the early War on Poverty is important, but also why it would not be a particularly heavy political lift in the modern U.S. policy context. Skeptics may nevertheless still wonder, given the powerful political legacy left by the early MFP policy, whether sufficient political buy-in for such a project can in fact be assured today. Indeed, that legacy has effectively kept poverty alleviation off the national political agenda for the last forty years. Within this context, any call to affirmatively re-embrace the participatory, rights-based framework of Johnson's early MFP policy must explain not only why such a model would have a different impact today than it did in the 1960s, but also how, once such a program were put in place, appropriate buy-in by relevant actors could be assured.

There are, I would argue, three reasons why such buy-in should be expected, both from the regulatory apparatus and from affected communities. The first is straightforward. As a practical matter, such stakeholders are already highly familiar and largely comfortable with the model suggested here. Indeed, within the regulatory apparatus, the national infrastructure for competitive performance review is already firmly established in the United States. As described, under the 1993 Government Performance Results Act, every federal agency is today legally mandated to prepare an annual performance plan with respect to each program activity in its budget, a plan that must include measurable performance goals, performance indicators, and a basis for comparing

actual results with the performance goals.⁴⁹⁷ The same is true for countless state entities receiving federal funds for social welfare programs in a wide variety of fields, including education, jobs, job training, and nutritional assistance. Even modern-day CAP agencies around the nation operate under the Results-Oriented Management and Accountability (ROMA) system, a mandatory reporting framework that requires such agencies to terminate or redesign programs that do not verify specific, measurable permanent changes in client or customer behavior.

For their part, U.S. social movements of the poor are increasingly relying on the identification of rights-based indicators to monitor policy performance in a wide range of social welfare fields, including access to adequate and non-discriminatory health care, housing, and food resources. While this effort is still in its initial (some might say embryonic) stages, civil society organizations are increasingly comfortable with the methodologies of performance review, benchmarking, and auditing, and with working cooperatively with local policymakers around these targets as a means of effectively inserting themselves into decisionmaking processes that affect their lives. Consequently, the argument that either set of stakeholders would not embrace a MFP policy, structured in the form suggested here, would not seem to have much of a basis in the actual day-to-day practices such groups regularly engage in and readily accept.⁴⁹⁸

Second, much of the backlash to the early MFP policy can be attributed to the particular *structure* that policy was given in the 1960s political environment and, specifically, to the failure in its design to take account of the key social trends that characterized that era: the increasing militancy and rights absolutism of the civil and welfare rights movements and, correspondingly, the progressive shift in the U.S. regulatory apparatus toward a more centralized legal-bureaucratic model. As discussed, neither of these trends was amenable to the decentralized, coordinated, cooperative, and flexibly responsive policy orientation on which the MFP model had been conceived by its sponsors. In particular, as implemented, the early MFP policy was designed to operate principally through federal creation of a new set of community action agencies. These agencies were to function not only as the principal mechanism through which the active participation of the poor in antipoverty efforts was to be assured, but also as the *exclusive* mechanism through which federal War on Poverty funds were to be distributed. By investing such agencies with the dual mandate

497. See *supra* note 410 and accompanying text.

498. An indication of federal regulatory “buy-in” or amenability to such participatory antipoverty programs may be seen, for example, in the U.S. Department of Agriculture’s 2009 “listening sessions” organized across the country to solicit comments, suggestions, and ideas from a broad scope of stakeholders, including food stamp program participants, on what should be included in a Food and Nutrition Service comprehensive work plan for realizing President Obama’s 2008 campaign pledge to end childhood hunger by 2015. For text of USDA solicitation, see <http://www.fns.usda.gov/fns/ech/default.htm> (extending invitation to “stakeholders from many organizations including State Governments, local program offices, professional organizations, private industry and advocacy groups, as well as program participants, their families and other interested parties”) (last visited Mar. 28, 2010).

to at once zealously represent the interests of the poor *and* to apolitically arbitrate those of the broader community in policymaking decisions, without taking account of the necessary conflicts of interest from which all policy evolves, a clash between two different conceptions of democratic accountability was set in motion from which the early MFP policy was not to survive.

By contrast, the MFP policy espoused in this Article would embrace a fundamentally different structure and implementation strategy, one designed explicitly for compatibility with the dominant methodologies and organizational frameworks through which twenty-first century American society operates in practice. It would not aim in this regard to create *new* federally-certified entities to represent the interests of the poor. Rather, its focus would be on the development and expansion of transparent and participation-friendly *performance-based orchestration systems* through which the poor, using their *own* independent and diverse organizations, can autonomously voice their perspectives and pursue their plural interests on an equal basis with others. In this way, the focus is on affirmatively enlarging or pluralizing democratic spaces for participatory engagement, not on artificially limiting to a single forum the vehicle through which diverse and conflicting interests must be pursued. In sum, a modern MFP structure would be designed not only to be maximally compatible with and operationally complementary to the best features of modern new governance and new accountability regimes, but also to avoid the volatile clash between differing conceptions of democratic legitimacy that led to the early MFP policy's rapid political unraveling. It would, in this respect, avoid precisely the problems that critics of the early MFP have emphasized as core to their opposition to that policy.

Third, and perhaps most importantly, *rights understandings in the U.S. are changing*. Although this shift has been slower than in many other parts of the world, the primary conception of human rights no longer is one of strict demand and protest, of confrontation and absolute rules. Rather, it is one increasingly focused on democratic process, safeguards, interest-balancing, performance monitoring, negotiation, and expanded opportunities for participatory engagement. Recognition of this shift, especially among government policymakers and within professional academia, is critical. This is so as it allows the policy of MFP to be conceptually *delinked* from the dominant social movement tactics and rights absolutism of the 1960s. Such delinking permits, in turn, a more explicit appreciation that the motivating tenets of the early MFP policy – like those of both new governance and new accountability – resonate deeply with American cultural narrative and longstanding democratic traditions. In particular, they reflect America's obsessive faith in divided powers and fragmented authority; a democratic tradition that rejects patronizing government action and expects every citizen to play an autonomous part in the determination of his or her own affairs; and a practical insistence that

public policies be demonstrably rational, justified, and evidence-based.⁴⁹⁹

The MFP structure endorsed herein draws directly on these same commitments.⁵⁰⁰ Within this context, and together with a renewed U.S. interest in poverty reduction targets and indicator collection, the convergence of new governance and new accountability today thus provides a uniquely fertile environment for recommitting as a nation to that vital goal of eliminating the “paradox of poverty in the midst of plenty in this Nation.”⁵⁰¹ Indeed, as President Johnson affirmed in announcing his own War on the Sources of Poverty based on maximum feasible participation, “Today, for the first time in our history, we have the power to strike away the barriers to full participation in our society. Having the power, we have the duty.”⁵⁰²

499. MARRIS & REIN, *supra* note 63, at 7-9.

500. It is the same distinctively American commitment manifested in President Roosevelt’s practical, experimental approach to New Deal Programs in the 1930s. *See* SUNSTEIN, *supra* note 449, at 42 (“There was no simple or consistent theme to Roosevelt’s domestic policies. In the words of Robert Jackson, one of Roosevelt’s close advisers, ‘The New Deal was not a reform movement. It was an assembly of movements – sometimes inconsistent with each other.’ . . . Roosevelt was an experimenter, a pragmatist interested in results and solutions rather than theories and themes. ‘Take a method and try it. If it fails admit it frankly and try another. But above all, try something.’”).

501. Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 2, 78 Stat. 508, 508 (repealed 1981).

502. LBJ Special Message to Congress, *supra* note 5, at 380. *See also id.* (affirming “a total commitment by this President, and this Congress, and this nation, to pursue victory over the most ancient of [hu]mankind’s enemies”).

