



## **Uncharted Terrain: The Intersection of Privatization and Welfare**

**By Henry Freedman, Mary R. Mannix, Marc Cohan, and Rebecca Scharf**

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**Welfare Law Center  
275 Seventh Avenue, Suite 1205, New York, NY 10001-6708  
Telephone: 212-633-6967 • Fax: 212-633-6371 • E-Mail: [wlc@welfarelaw.org](mailto:wlc@welfarelaw.org)  
Websites: [www.welfarelaw.org](http://www.welfarelaw.org) / [www.lincproject.org](http://www.lincproject.org)**

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We work with advocates and low-income organizations across the country to advance our goals, and use a range of strategies, including litigation and other legal representation; policy advocacy; and support for grassroots low-income organizations, primarily delivered through our Low Income Networking and Communications (LINC) Project, a technology capacity-building initiative.

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# Uncharted Terrain: The Intersection of Privatization and Welfare

*By Henry Freedman, Mary R. Mannix, Marc Cohan, and Rebecca Scharf*

Welfare, a mainstay of legal services practice, is cutting edge again. Clients need help negotiating a system that devolution, discretion, and privatization have changed radically. Public officials need help in this new environment to “get it right,” so that programs achieve the laudable goals ascribed to them.

Privatization creates special challenges for welfare advocates. New players, ranging from neighborhood nonprofit organizations to churches to multinational corporations, are making decisions that affect clients’ vital interests. New legal issues, ranging from state action to public contracting compliance, can arise. Accountability and transparency, difficult to achieve in the governance of traditional welfare programs, become even more elusive. We urge that legal services programs, in deciding how to allocate their precious

resources, undertake advocacy involving welfare privatization or at least consider doing so. We know that many variables, as well as local circumstances, determine legal services priorities. Welfare programs, however, are the safety net of last resort for many clients; absent vigorous advocacy on their behalf, pressures to cut public expenditures and contractors’ special interests may shape these programs’ overarching policies and daily practices, while the voices and rights of legal services clients are ignored.

In this article we review welfare privatization, identify some of the major issues and challenges for the advocacy community, highlight some experiences in particular states, and discuss some of the tools and strategies advocates may wish to use.

## I. Trends in Privatization of Welfare Programs

Privatization generally refers to the array of strategies—such as contracting for services, the use of vouchers, and sale of public assets—to transfer responsibility for activities or functions from the government to the private sector. The trend toward privatization has affected a wide range of government services from education and corrections to municipal services and

beyond. As summarized below, private entities have long had a role in the delivery of welfare and social services. That role has shifted over time as the government’s role has evolved, and changes made by the 1996 federal welfare law created a favorable climate for greater privatization.<sup>1</sup>

### A. Role of Private Entities Before 1996

Both government and the private sector have been involved in providing for families’ basic needs since colonial days. More than a century before the American Revolution, private

administration of welfare ranged from direct aid to placing children in private apprenticeships until they reached their majority, and private charities were extensively involved in providing

aid well into the twentieth century.<sup>2</sup>

The pendulum swung entirely to public administration of welfare programs with the enactment of the Aid to Families with Dependent Children (AFDC) program as part of the Social Security Act of 1935.<sup>3</sup> AFDC, the predominant needs-based cash assistance welfare program for families until 1996, required administration by a single state agency or by all political subdivisions in the state supervised by a single state agency.<sup>4</sup> It also required statewide uniformity in program administration.<sup>5</sup> In 1939 Congress amended the Act to require merit selection of employees.<sup>6</sup>

Over the ensuing decades private agencies focused on providing services, often without regard to financial need.<sup>7</sup> Religious charities began receiving increased public funds for services.<sup>8</sup> The Kennedy administration's 1962 AFDC legislation increased the role of contracted services from nonprofit agencies, and spending on services rose again after Congress

added Title XX to the Social Security Act in 1981.<sup>9</sup>

Traditional social service providers offered counseling, training, child care, and welfare-to-work services. For-profit companies expanded into new areas of government contracting, such as child support enforcement. Some, already giants in other fields such as defense contracting, moved into government services in general, including welfare. Public officials' focus on privatization turned from a desire to expand available services to reducing costs.<sup>10</sup>

In the early 1990s another profoundly important trend developed—the focus on measuring performance, whether by public agencies or private contractors, and, in the case of private contractors, basing payment upon performance results. For example, Maine adopted legislation that required all contracts to purchase social services to be “based on measurable performance indicators and desired outcomes....”<sup>11</sup>

## **B. The 1996 Federal Welfare Law Changes and Subsequent Developments**

Privatization took on new significance in 1996 after Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act, which, among other changes, replaced AFDC with the Temporary Assistance for Needy Families (TANF) block grant.<sup>12</sup> The radical restructuring of the state's role, the increased emphasis on programs and services to move people into employment, the growing role of discretion in welfare administration, and the elimination of the six-decade-old requirements for public administration and statewide uniformity, taken together, created a new environment conducive to increased

privatization.

As to elimination of the public administration requirement, the Act explicitly authorizes states to use TANF funds “*to administer the TANF program through contracts with charitable, religious, or private organizations*, and to provide individuals with vouchers redeemable by such organizations.”<sup>13</sup> Much of this provision and the public debates over it focused the new policy on contracting with religious organizations.<sup>14</sup> “Private” was clearly understood to include “for-profit.”

The cumulative result of these changes has been profound. A recent study of administrative

implementation of changes in welfare programs observed:

More important than the overall movements toward greater reliance on nonprofits, for-profits, state labor departments, or some other type of institutions has been the shift toward greater dependence on all of these institutional types—often within the same state and locality. Making these systems work demands enormous investments in staff training, information systems, contract negotiations, as well as informal adjustments and trust-building among diverse state agencies, different levels of government, service providers, and community organizations.<sup>15</sup>

The elimination of the statewide uniformity requirement and the growth of privatization and discretion in welfare administration interact in a variety of ways.<sup>16</sup> For example:

- They encourage local experimentation. Ohio sought guidance from Wendy’s fast-food-chain franchise model and then opted to treat each county as a franchisee working with an account manager at the state level. The local “franchisee” contracts for purchase of services from a variety of entities.<sup>17</sup>
- They raise the prospect of increased local arbitrariness or lawlessness. Scholars studying the Minnesota program found the uneven enforcement of sanctions by counties around the state “troubling, even in a state that emphasizes local discretion.”<sup>18</sup> Even more troubling, a study in Virginia found that discretion within a county TANF program

was exercised in a racially discriminatory manner.<sup>19</sup>

Beginning in the mid-1990s several major initiatives took welfare privatization to new lengths.

- In 1997 Wisconsin contracted with for-profit, nonprofit, and county agencies for the entire operation of Wisconsin Works, or W-2, the program that replaced cash assistance with a “pay-for-performance” program. This was the first time that private entities, including both for-profit companies such as Maximus and nonprofit organizations, made financial eligibility determinations.<sup>20</sup>
- Arizona entered into a contract with Maximus for a pilot project that began in 1999; under the project Maximus administers a TANF program with separate rules.<sup>21</sup>
- Texas sought to have the winning contractor determine eligibility for a host of benefits. Bidders included teams composed of major corporations and state agencies. The proposal engendered substantial political opposition and could not be implemented because the U.S. Department of Agriculture and Department of Health and Human Services did not grant the necessary food stamp and Medicaid waivers.<sup>22</sup>
- Florida adopted legislation in 2000 that created Workforce Florida Inc., a nonprofit corporation with primary responsibility for the state’s work-force-related programs, including the work-related TANF programs. Workforce Florida has the authority to make all work-force policy for the state.<sup>23</sup>

Privatization has also encountered occasional

setbacks. Most notably, in Mississippi “pressing administrative and implementation issues ultimately compelled the state to recapture many welfare system functions initially devolved to the private sector.”<sup>24</sup> On the other hand, President Bush’s continued interest in expanding “charitable choice” into areas beyond TANF may induce more religious entities to become involved.<sup>25</sup>

As of the fall of 2001, we were not aware of

any comprehensive inventory of the extent to which states and counties have contracted with private entities to deliver or administer TANF programs, although the limited information available to date suggests that privatization typically involves welfare-to-work programs and related services. A forthcoming report from the U.S. General Accounting Office will examine the extent of contracting with TANF funds.<sup>26</sup>

## II. The Welfare Privatization Debate: Key Players, Pros and Cons, and Recent Experience

The extent to which TANF programs should be privatized is the subject of intense ongoing debate among social policy experts, academics, administrators, advocates, legislators, and private entities. Efforts to privatize core TANF functions such as eligibility determinations and

to contract with for-profit corporations have sparked the most public opposition. In the following discussion we highlight the role of some key players in the debate, the arguments for and against privatization, and the recent experience with privatization.

### A. Key Players

The large for-profit entities that now see welfare programs as a vast new source of business and the nonprofit entities that have historically been involved in delivering government services are the most obvious key players. Many advocates and their allies are concerned that the growing engagement of for-profit entities, driven as they are by the bottom line, will distort the TANF program’s mission to serve needy individuals.<sup>27</sup> Major contractors include

- Affiliated Computer Services Inc., which bought Lockheed Martin IMS in the summer of 2001 for \$825 million. According to this contractor, “IMS partners with more than

230 state and local government agencies in 45 U.S. States, the District of Columbia, Canada, Australia, and Europe. IMS specializes in child support enforcement, welfare and workforce services, child care management, electronic toll collection....”<sup>28</sup>

- Citicorp Services Inc., which is a subsidiary of Citigroup and is the largest operator of electronic benefit transfer programs; it has contracts in more than thirty states. On July 26, 2001, it signed a contract worth hundreds of millions of dollars to deliver food stamps and cash benefits throughout California. It was the sole bidder.<sup>29</sup>

- Maximus, which its founder established specifically to contract with governments for welfare and other services.<sup>30</sup> In the three months ending in June 2001, Maximus' "government operations group" reported monthly revenues of more than \$24 million.<sup>31</sup> The company, which has eighteen welfare-to-work program offices and five disability service offices in ten states, also contracts for child care administration, managed care enrollment, and federal social security disability case management, assessment, and treatment referral services.<sup>32</sup>

Nonprofit entities that administer TANF services range from large organizations that have long delivered social services to small local organizations, and they may be more likely than for-profit entities to share the governmental mission of assisting low-income families. Many small nonprofit entities have secured contracts from public agencies. Indeed, legal services offices have themselves become contractors, obtaining TANF or other public funding for welfare-to-work services.<sup>33</sup> Traditional faith-based organizations are receiving many contracts; examples include \$2.6 million to Catholic Charities in San Diego, California, for CalWORKs (California Work Opportunities and Responsibility for Kids) welfare-to-work services over seventeen months and \$366,000 to Northern Valley Catholic Charities in Shasta County, California, for a mandatory community service program.<sup>34</sup> As the opportunities for

welfare privatization expand, questions about the organizational capacity of many smaller entities to do the job well may be increasingly important. Many smaller nonprofit entities that are not capitalized to compete with for-profit companies for the larger contracts now being put out to bid are working instead as subcontractors to for-profit businesses.<sup>35</sup>

Public employee unions, including the American Federation of State, County, and Municipal Employees and Service Employees International Union, also have gotten into the act. They argue that the government and its public employee union members are most appropriately entrusted with carrying out core public functions and with calling attention to the need to invest in effective approaches to improving welfare administration.<sup>36</sup>

Advocates for low-income people hitherto have not been so involved, according to preliminary Welfare Law Center inquiries. While advocates have joined coalitions to oppose the more extreme proposals to privatize eligibility determinations, they appear less involved in implementing privatization. This is not surprising given the challenges of limited resources and competing demands to address a wide array of issues affecting low-income people, the proliferation of contracts in some places, government contracting often raising barriers to public participation, and difficult questions as to strategies to pursue.

## **B. The Arguments for and against Privatization**

The privatization debate typically involves two related issues: how best to deliver cost-effective, high-quality services and how to

promote accountability and democratic participation in decisions related to governmental programs. Low-income individuals



obviously have a high stake in both issues. While most have far too frequently experienced poorly administered public systems, that experience alone does not justify privatization over other reforms and investments in publicly administered systems.

## **1. Delivering Cost-Effective, High-Quality Services**

The arguments in favor of privatization center on the notion that privatization promotes competition in the provision of services and that competition will result in improved services delivered more efficiently and effectively. Concerns that government has done a poor job administering programs, that bureaucratic red tape stifles effective administration and innovation, and that rigid civil service rules hinder administrators' ability to hire, retain, and compensate talented staff typically drive privatization proposals. Some argue that privatization will reduce the costs of delivering services. Government officials sometimes see privatization as a solution to budget pressures that prevent the hiring of staff or as a relief from costly new initiatives or as a way to secure specialized skills. Privatization proponents often have a philosophy that favors market-based approaches over governmental solutions.<sup>37</sup>

Critics challenge the notion that privatization is the way to achieve cost-effective service delivery. They contest the assumption that market-based competition, a predicate for the claimed benefits of privatization, exists in the welfare and related social services area; they point out that the factors necessary for true competition are generally absent. These factors include multiple buyers and sellers (sometimes requests for proposals elicit only one bid), low costs associated with entering the field, adequate

information to allow potential bidders to make accurate determinations of cost, and a standard product.<sup>38</sup>

Critics also contend that the quality of services may actually decline under privatization and that cost overruns, waste and abuse, hidden costs to the government (including the costs of effective contract management and oversight), and the potential for the contract process being tainted with corruption and favoritism undermine cost efficiency.<sup>39</sup> When for-profit entities are involved, the overarching profit motive raises the specters of shortcuts that reduce or deny services and "creaming," or serving the easiest to serve.<sup>40</sup>

Some suggest that the public sector is better at performing the complex tasks associated with delivery of social services in the pursuit of broad social goals and that this indeed is a core function of government, while the private sector may be better able to handle clearly identifiable, standardized tasks such as data processing and computer systems design.<sup>41</sup> Thus advocates and others have heightened concerns about efforts to privatize key functions, such as eligibility determinations, sanction determinations, and policy making.<sup>42</sup>

## **2. Accountability and the Public's Ability to Participate in Government**

How are welfare administration decisions and policies made? How can beneficiaries secure fair treatment and enforce rights to benefits and services? Privatization restructures the framework for welfare program delivery, changing it from a rule-bound system—one subject to administrative law, under which program beneficiaries have clear legal rights, including due process rights—to a contract-bound system in which program beneficiaries'

rights and role are very unsettled.<sup>43</sup>

Proponents argue that privatization enhances local control over service delivery by decreasing the role of more centralized government bureaucracies and bringing the provision of services down to the community level where local entities are more in touch with local citizens and responsive to their needs.<sup>44</sup> Critics point out that large for-profit entities are the antithesis of local control and have huge corporate structures unresponsive to local needs. Even when local entities or nonprofit groups provide benefits and services, the adequacy of their accountability measures to assure community input and acceptable performance, and in particular whether they protect clients' rights, is questionable.

A recent General Accounting Office report identified several concerns, such as an agency's lack of expertise in negotiating clear and specific contracts that assure adequate performance. The report noted that "monitoring contractors' performance was often the weakest link in the privatization process."<sup>45</sup> An

examination of welfare-to-work contracts in Baltimore bears out these observations. In Baltimore flaws throughout the contract process resulted in \$60 million worth of contracts producing only 2,000 jobs for more than 10,000 TANF recipients. This eye-opening look at the contract process reveals the formidable task that governments take on when they contract out for services.<sup>46</sup>

Many also question whether privatization can protect welfare recipients' rights. How do private entities determine clients' eligibility for services? Do they offer a dispute resolution process? The General Accounting Office notes the importance of such procedures in contracts and of other practices such as securing government agency approval of sanctions when the privatized program is responsible for such decisions. However, the General Accounting Office recognizes that implementing client protections can be difficult given governments' limited capacities to negotiate and monitor contracts.

### **C. The Experience with Welfare Privatization**

While there have been some limited studies of specific privatization efforts, there has not been any overall evaluation of the effects of privatization, and a comprehensive effort may not be realistic.<sup>47</sup> Evaluations of welfare reform implementation typically examine a system in which privatization is only one of numerous elements. Examinations of specific welfare privatization efforts are, however, instructive in considering other privatization proposals.

First, the Wisconsin privatization experience shows the significance of a

contract's financial incentives. The initial Wisconsin contracts allowed agencies to retain a portion of unspent funds as profits, both unrestricted and restricted (the latter had to be spent on TANF individuals).<sup>48</sup> This linking of financial incentives to unspent funds generated much criticism from advocates, including those of low-income groups, and others. During the initial contract period \$238 million out of \$651 million budgeted remained unspent because of declining caseloads, and contracting agencies retained some \$65 million in unrestricted profits. Private contractors were not required to

disclose how they spent these profits.<sup>49</sup> The retention of profits was very troubling to many in the face of evidence that the Wisconsin welfare reform effort was not moving families out of poverty, that a wide variation in sanction rates raised questions of equitable treatment, and that low-income people found it difficult to access Medicaid and food stamp benefits.<sup>50</sup> Criticism of this payment structure led the state to change future contract terms so that incentive payments were related to specified performance measures.

Second, certain private entities engaged in financial mismanagement and irregularities, which led the Wisconsin Legislative Audit Bureau to recommend that future contracts allow the state to revoke the right of first selection for entities that fail to comply with financial and other requirements.<sup>51</sup> Third, contracting out oversight responsibility for Milwaukee County, which serves most of the state's TANF population, to the Private Industry Council resulted in criticism that the Private Industry Council performed poorly and that the state did not make sure that the council was fulfilling its responsibilities.

A preliminary report on the Arizona

TANF pilot project that involved three factors noted that determining the separate effect of any one of the factors was not possible. The factors were (1) privatized TANF intake, eligibility, and employment programs; (2) specific performance incentives; and (3) significant changes in welfare program rules. Nonetheless, the report noted that "there is no strong evidence that welfare families are either better off or worse off under privatized TANF."<sup>52</sup> Maximus, the for-profit contractor operating the pilot project, recently received a \$1 million incentive payment for meeting or exceeding contract performance measures.<sup>53</sup> According to Arizona advocates, during the summer of 2001 the Arizona Works Procurement Board voted not to expand the project to another county because of contract disputes about the reimbursement rates for eligibility determination.<sup>54</sup>

Other reports compile press and other accounts of troubled privatization efforts, primarily involving for-profit companies administering welfare programs. These reports cite examples of poor performance, financial irregularities, and dissatisfied program beneficiaries.<sup>55</sup>

### III. Strategies for Advocates

Privatization will likely remain part of the landscape of welfare program administration for the foreseeable future. Because the question of privatized versus government delivery is so entwined with questions of the quality of welfare program administration and protecting welfare recipients' interests, advocates cannot ignore the challenge of developing strategies for making a difference in clients' lives under a privatized welfare regime.

To serve most effectively, advocates must consider the consequences of the shift in the legal ground rules from those derived from administrative law to those based on contract law. Many of the legal issues regarding protecting the interests of low-income individuals under this new framework remain unsettled. While advocates have a wide range of legal and other tools to consider (including policy advocacy, coalition building, community

education, working with the media, monitoring, and litigation), part of the challenge is to determine what tools make the most difference for low-income clients. The advocacy opportunities and the appropriate strategies depend on factors unique to each state or locality—state and local law, the political environment, and the strength of potential allies. In deciding how to approach welfare privatization, advocates should also consider whether advocacy in the context of other privatization initiatives (e.g., Medicaid, child welfare, and electronic benefits transfer) offers useful lessons. In the following sections we delineate possible advocacy strategies.

Advocacy around these new issues can be rewarding for advocates in field offices, specialized legal programs, policy advocacy organizations, and law school clinics. First, involvement in the early stages of privatization is a unique opportunity to shape the program for clients and establish the parameters for privatization if the initiative proceeds. Second, little law is established in this area; advocates thus have an opportunity to make significant contributions to the development of legal doctrine. Third, many jurisdictions are likely to be experimenting with privatization and the models advocates help shape may be replicated elsewhere. Lessons learned from unsuccessful experiences may be helpful similarly in avoiding failures.

To be sure, advocacy in this area is not easy. Not only are the legal issues difficult, but also the practical challenges are formidable. The contracting process can involve dozens of contracts, making involvement difficult for advocates with limited resources, even assuming they have access to relevant documents. Key decisions are often made out of the public eye with advocates becoming aware of repercussions only later when clients report problems. Advocates may need to develop new skills to work most effectively in a contract-based environment. They may be leery of involvement in a resource-intensive process, such as developing contracts and monitoring implementation, where their ability to achieve constructive improvements is unclear. Nonetheless, advocates have already worked creatively to make a difference, and this work should encourage the broader community. For example, Wisconsin public interest lawyers have tackled privatization initiatives with strategies such as strengthening nonprofit entities that provide services, working with collaborative groups of stakeholders to identify problems and solutions, and monitoring.<sup>56</sup> Florida advocates, seeking to secure due process protections for low-income clients in work-force programs, recently persuaded the state agency to instruct private regional work-force entities to adopt dispute resolution procedures.<sup>57</sup>

## **A. Policy Advocacy**

Policy advocacy, as we use the term here, includes addressing policy issues at all levels of government through means other than litigation

or individual representation. It can involve coalition building, community education, and advising low-income groups. It can be conducted

in collaboration, as appropriate, with organized labor, academics, grass-roots organizations, good-government groups, and nonprofit social service providers. While each partner has its own constituency and agendas, the challenge for the legal services advocate is to forge or become part of a coalition that has as a prominent feature protecting the interests of welfare applicants and recipients.

### **1. Whether and How to Privatize**

The state or local government's process for deciding whether to privatize may be advocates' first opportunity to become involved. In some states, large, well-funded private contractors touting their successes in other jurisdictions are major players seeking policy change; in other places, smaller nonprofit entities may be key actors. Advocates may wish to oppose privatization altogether, limit it to certain activities, or focus solely on assuring protections for low-income clients.

If privatization appears certain to go forward, or if that is a course advocates favor, advocates likely want clear criteria established to determine the circumstances for privatization to occur, what functions are privatized, what the process is, and what performance standards are in the contracts.<sup>58</sup> Public involvement can be built in, with requirements for notice and comment for major policies, advisory boards that include program participants and advocates, and town meetings. Start-up through pilot projects can be mandated. For example, Arizona used a pilot program, created a procurement board with various stakeholders, including community-based organizations, participating, and required independent evaluations.<sup>59</sup>

Success depends on having access to the governmental actors' planning. Accessing that

information can involve diverse tools such as monitoring plans submitted to legislative bodies, attendance at public meetings, analyzing information obtained through litigation, and working with public sector unions.<sup>60</sup> Accessing information can also be accomplished through an advisory committee or through a "community congress," which would meet regularly to receive input from TANF recipients, legal services organizations, policy advocates, and low-income groups.<sup>61</sup> The advisory committee can collect relevant research and then provide input into the proposed requests for proposals, standards for performance, and contract performance monitoring. Such a committee would also increase the active participation of the affected community residents.

In California a legal services advocate was invited to serve as a client representative on a state committee established to oversee the design and implementation of California's electronic benefit payment system. He and other advocates also met periodically with key state officials and achieved notable results: the final contract with Citibank requires that persons be available by phone to answer questions in six languages and that the automated voice response system have twelve languages. Final rules are expected to establish standards on error resolution—a problem that advocates learned from other states.<sup>62</sup>

We must remember that the legislature's or agency's goals, which may include efficiency, cost saving, and the acquisition of specialized expertise, are not antithetical to the advocate's interests in insuring fairness for the clients. However, without advocates' involvement, the legislature or agency is unlikely to give priority to issues of fairness and due process or build protections into the authorizing legislation or policy to protect clients' rights after the

contracts are awarded. Points that advocates may want to pursue include

- *Retention of Eligibility Determinations by Governmental Actors.* To argue for due process protections and to affect the outcome through traditional advocacy are far easier where the governmental actor retains responsibility for deciding whether to grant or terminate benefits, to impose a sanction, or to deny supportive services.
- *Requiring Governmental Oversight.* An essential element in protecting clients' interests in a privatized welfare system is ensuring that the governmental actor is required to review private agency performance rigorously.<sup>63</sup> The governmental actor may mandate audits and reports or empower other branches of government to exercise oversight over the contractor as if the contractor were a government agency. For example, Florida vests its auditor general with authority to audit the private Workforce Florida Inc. and provides that "the Office of Program Policy Analysis and Government Accountability, pursuant to its authority or at the direction of the Legislative Auditing Committee, may review the systems and controls related to performance outcomes and quality of services of Workforce Florida, Inc."<sup>64</sup>
- *Adoption of Due Process Protections.* Due process protections (notice, review of adverse determinations by an impartial official, administrative appeal process) are critical. Advocates have identified problems in this regard in Wisconsin's fully privatized welfare system, even though the state agency retains some right to review decisions.<sup>65</sup>

## 2. The Formation of the Contract

Concerns regarding public contract formation are typically over protecting the taxpayer and the prospective contractor. As one commentator notes, "Rules governing public procurement are implemented principally to protect the integrity of the competitive process. They are not intended or designed as a means of soliciting public input into policy."<sup>66</sup>

Nonetheless, advocates can ensure that the strategy of contracting out supports their clients' goals for the program. For example, although many welfare-to-work programs may be driven by national and state performance requirements, other goals, such as reduction in poverty or the creation of a well-trained work force to meet the needs of the local economy, can be enforced through performance standards. Research and experience have shown that requests for proposals that do not contain sufficient detail regarding expectations have later led to disputes and inefficiencies.<sup>67</sup> The private agency should be required to include in its request for proposals a provision for performance measures for different types of populations. The private agency also should receive financial incentives to serve those who are hardest to serve.<sup>68</sup>

Much potential harm can be avoided if advocates are able to ensure that the legal rights and remedies available for welfare recipients and the responsibilities and penalties for the private actor's noncompliance are clearly set forth during contract negotiations. Moreover, advocates should work to develop both mechanisms that identify when contractors are failing to fulfill their obligations and remedies that compel compliance.

Advocates who want to help shape the process to ensure that the best possible services are being delivered to those in poverty must

- *Learn the Process.* Most jurisdictions have a procurement process that may or may not

conform to the American Bar Association Model Procurement Code.<sup>69</sup> Whatever the process in the advocate's jurisdiction may be, the advocate should learn which contracts are subject to the procurement process; the stages of the process; the opportunities for input; and who must sign off on the contract. The last is of particular importance since independent review by a different branch of government may serve as a check on the process.

- *Involve Allies.* As with the policy process, collaboration with allies most concerned with the prospect of privatized services can be critical to affecting outcomes. Contract procurement is typically an unobserved process, not subject to scrutiny, except by other entities that are themselves not subject to public scrutiny. Attention from good-government groups, labor unions, the media, and nonprofit organizations may influence the approval process or cause the governmental entity to rethink the process.
- *Acquire Information About the Proposed Contractor.* Scrutiny of existing contracts in other jurisdictions may influence the

decision whether to privatize the service and whether to award the contract to a particular provider.

### **3. Monitoring Contract Performance Effectively**

While the advocate may not become aware of a contract until after the ink has dried, much effective work may still be possible. The advocate can seek access to contract-related materials. Traditional access to information such as that found under the federal Freedom of Information Act is no longer clearly available, nor is information to determine the effectiveness of the systems created under contract.<sup>70</sup> Advocates can push for public dissemination of requests for proposals, contracts with primary vendors, independent evaluations, and periodic reports from the contractor, particularly those used to justify payments or bonuses. Such dissemination may be fostered by creating reporting requirements for local governments, appointing an ombudsperson with powers of inquiry, and conducting public hearings.<sup>71</sup>

## **B. Litigation**

Whether litigation can shape privatization or address problems resulting from privatization is uncertain. Advocates need to consider the following issues.

### **1. Using Litigation to Shape Privatization**

Because much of the process of welfare services privatization unfolds behind the scenes between parties other than low-income

recipients and their representatives, and because courts are often loathe to look behind a governmental actor's decision to privatize services, litigation is rarely the most effective tool to shape or prevent privatization.<sup>72</sup> However, by familiarizing themselves with local laws and contracting procedures, advocates can have success with litigation. For example, in *Giles v. Horn*, plaintiffs challenged contracts for CalWORKs case management services entered into between San Diego County and private contractors.<sup>73</sup> The county's charter required it,

before entering into a contract, to determine that the contractor could provide the services more economically and efficiently than county employees. The court found that the board of supervisors did not have the power to create exceptions to the county charter. It further found that the purported exceptions did not apply to the CalWORKs case management contract and that a state statute barred the wholesale contracting out of case management in the welfare system to independent contractors. The court ordered defendants to terminate the contracts.<sup>74</sup>

A taxpayer lawsuit can serve as an additional litigation handle, but it is likely to be successful only where the contract violates a constitutional or statutory protection.<sup>75</sup> In certain situations, litigation over contract formation may take place between branches of government. For example, in New York City, the city comptroller delayed the city's entry into several welfare-to-work contracts and, although ultimately unsuccessful on appeal, succeeded in forcing media attention on the contracting process.<sup>76</sup>

## 2. Protecting Individual Rights

The legal rights of recipients of privatized TANF services vary considerably with the action challenged and the role of the private actor. For example, until 1996, eligibility and benefit processing was the work of a single state agency. Now some states and localities are contracting out such work. Below are some issues to consider before commencing a challenge under this emerging paradigm.

### *a. State Action*

Due process and other constitutional protections apply only to state actors.<sup>77</sup> Administrative procedure acts and public information laws are similarly commonly

inapplicable to private contractors. The challenge thus is to convince the court to treat the contractor as a state actor. A complete discussion of the various tests to determine when there is state action is beyond the scope of this article.<sup>78</sup> However, the closer the private entity's function is to one that (1) would have been actionable if performed by a governmental entity and (2) was traditionally and *exclusively* performed by the state, the more likely that the court will find the entity to be a state actor.<sup>79</sup> Applying this analysis, aggrieved applicants and recipients should be able to challenge eligibility determinations and sanctions rendered by private contractors to the same extent as when those decisions are undertaken by a local governmental actor.

### *b. Contract Remedies*

Litigation concerning the obligations of the private contractor may also be difficult because the welfare applicant or recipient is not a party to the contract.<sup>80</sup> However, the client may argue that she is an intended third-party beneficiary of the contract and therefore possesses certain rights.<sup>81</sup>

### *c. Direct Challenges that Implicate Privatization*

Litigation that attacks the legality of welfare agency practices may directly or indirectly involve private entities and expose their role in contributing to the challenged practices. For example, a Massachusetts lawsuit against the welfare agency and a private contractor responsible for disability determinations claimed that the benefits of class members were improperly denied, reduced, or terminated as a result of illegal denials of disability exemptions. The court granted preliminary relief barring the agency from



reducing or terminating grants for those whose disability exemption denials led to impositions of time limits or work sanctions until after the current contractor reviewed the exemption request. The court found that the contractor denied exemptions because of class members' failure to respond to a confusing letter and that denying exemptions for this reason violated the state requirement for fair and equitable administration. While the lawsuit was targeted primarily at the state agency, it also exposed problems with the contractor.<sup>82</sup> Plaintiffs entered into a separate settlement with the contractor in which it agreed not to seek state contracts for five years.<sup>83</sup>

Another successful Massachusetts lawsuit against the TANF and child support enforcement agencies secured procedures to assure that sanctioned individuals who wanted to cooperate with child support enforcement could get their sanctions lifted. After the state contracted with Maximus for child support

enforcement services, erroneous sanctions increased, compounding problems for individuals who could not get the state agencies to lift the sanctions. Once the lawsuit was filed and before the final settlement was reached, the defendant agencies agreed to rescind sanctions involving Maximus. The state subsequently terminated its contract with Maximus but did not publicize its reasons.<sup>84</sup>

Notwithstanding these successes, postviolation litigation may be very unsatisfying since, in addition to the other impediments to litigation, advocates bear the burden of convincing a court that plaintiffs have legally enforceable rights against the private actor. Instead, to the extent possible, advocates should take steps to ensure that the legal rights and remedies available to welfare applicants or recipients, along with the private actor's responsibilities and penalties for noncompliance, are clearly set forth during contract negotiations.

## IV. Conclusion

Private entities will continue to be major players in welfare programs for the foreseeable future, and legal services advocates will be representing clients who depend upon fair treatment from those entities. The Welfare Law Center is devoting its energy to working with

local advocates on issues arising from increased devolution, discretion, and privatization in each community, sharing strategies for seeking more positive outcomes, and developing plans to respond in their communities.

### Authors:

The authors are on the staff of the Welfare Law Center, 275 Seventh Ave., Suite 1205, New York, NY 10001; 212.633.6867; [www.welfarelaw.org](http://www.welfarelaw.org). Henry Freedman ([freedman@welfarelaw.org](mailto:freedman@welfarelaw.org)) is executive director; Mary R. Mannix ([mannix@welfarelaw.org](mailto:mannix@welfarelaw.org)) is program director; Marc Cohan ([cohan@welfarelaw.org](mailto:cohan@welfarelaw.org)) is director of litigation; Rebecca Scharf ([scharf@welfarelaw.org](mailto:scharf@welfarelaw.org)) is senior attorney.

## ENDNOTES

<sup>1</sup>For a broad historical perspective on the role of private entities in delivering social services, see Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 581–92 (2001). For a general review of social service privatization trends, see U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-98-6, SOCIAL SERVICES PRIVATIZATION: EXPANSION POSES CHALLENGES IN ENSURING ACCOUNTABILITY FOR PROGRAM RESULTS (1997).

<sup>2</sup>Moore v. Ganim, 660 A.2d 742, 753–54 (Conn. 1995).

<sup>3</sup>Social Security Act, Pub. L. No. 271, pt. IV (1935).

<sup>4</sup>*Id.* §§ 402(a)(1), (3).

<sup>5</sup>*Id.* § 402 (a).

<sup>6</sup>Social Security Act, Pub. L. No. 379, 76th Cong., 1st Sess., Sec. 401, *amending* 42 U.S.C. § 402(a)(5)(1939).

<sup>7</sup>GILBERT STEINER, SOCIAL INSECURITY: THE POLITICS OF WELFARE 11 (1966).

<sup>8</sup>*Id.* at 12–14.

<sup>9</sup>*Id.* at 15; Social Security Act, Pub. L. 97-35, Title XXIII, § 2352(a), *adding* 42 U.S.C. § 1397ff (1981).

<sup>10</sup>Marguerite G. Rosenthal, Public or Private Children’s Services? Privatization in Retrospect 7, at [www.epinet.org/real\\_media/010111/materials/rosenthal.pdf](http://www.epinet.org/real_media/010111/materials/rosenthal.pdf) (last visited Nov. 19, 2001).

<sup>11</sup>ME. REV. STAT., tit. 22 § 12(a)(West 2001), <http://janus.state.me.us/legis/statutes/22/title22sec12-a.html>; *see generally* BLAINE LINER ET AL., URBAN INST., MAKING RESULTS-BASED STATE GOVERNMENT WORK (2000) *available at* [www.urban.org.html](http://www.urban.org.html).

<sup>12</sup>Pub. L. No. 104-193, tit. I, *codified at* 42 U.S.C. §§ 401 *et seq.* (2001).

<sup>13</sup>Pub. L. 104-193, § 104 (emphasis added).

<sup>14</sup>For information on litigation involving faith-based initiatives, see links to press releases at [www.usc.edu/dept/LAS/religion\\_online/welfare/lawsuits.html](http://www.usc.edu/dept/LAS/religion_online/welfare/lawsuits.html) (last visited Nov. 19, 2001); *see also* Alex J. Luchenitser, *Casting Aside the Constitution: The Trend Toward Government Funding of Religious Social Service Providers*, in this issue.

<sup>15</sup>Thomas L. Gais et al., The Implementation of the Personal Responsibility Act of 1996, at 35 (2001) (on file with Henry Freedman et al.).

<sup>16</sup>For an extensive discussion of this transformation and its implications, see Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion and Entrepreneurial Government*, 75 N.Y.U. L. REV.1121 (2000).

<sup>17</sup>CAROL S. WEISSERT, *LEARNING FROM LEADERS* 25 (2000).

<sup>18</sup>*Id.* at 134.

<sup>19</sup>Susan T. Gooden, *All Things Not Being Equal: Differences in Caseworker Support Toward Black and White Welfare Clients*, 4 HARV. J. AFR. AM. PUB. POL'Y 23–33 (1998).

<sup>20</sup>For more on the Wisconsin experience, see Karyn Rotker et al., *Wisconsin Works—for Private Contractors, That Is*, in VOL. 35, CLEARINGHOUSE REV.(JAN. - FEB. 2002).

<sup>21</sup>For a summary of the Wisconsin, Arizona, and Texas initiatives, see Deborah Stein, Nat'l Ass'n of Child Advocates, *Health Action '99: Privatization of Social Services, Overview of Privatization of Basic Assistance Programs (Cash Assistance, Food Stamps, Medicaid, and Child Care)* (Jan. 1999) (on file with Henry Freedman et al.).

<sup>22</sup>*Id.*

<sup>23</sup>See Cindy Huddleston & Valerie Greenfield, *Privatization of TANF in Florida: A Cautionary Tale*, in VOL. 35, CLEARINGHOUSE REV.(JAN. - FEB. 2002). For brief background on Florida's 1997 privatization attempt, see Stein, *supra* note 21.

<sup>24</sup>SARAH F. LIEBSCHUTZ, *MANAGING WELFARE REFORM IN FIVE STATES* 43 (2000).

<sup>25</sup>See Matthew Diller, *Going Private—the Future of Social Welfare Policy?*, in VOL. 35, CLEARINGHOUSE REV.(JAN. - FEB. 2002), particularly the section headed “The White House Faith-Based and Community Organization Initiative.”

<sup>26</sup>The report will also examine the “mechanisms for overseeing procurement and contractor performance, and related findings of noncompliance identified by auditors, comptrollers, and others who have examined contracting and contracted services.” E-mail from Mark Ward, senior social policy analyst, U.S. General Accounting Office, to Gina Mannix, Welfare Law Center (Sept. 6, 2001).

<sup>27</sup>For the views of eighteen major nonprofit providers of social services expressing these concerns and articulating principles of privatization, see Shay Bilchik, ed., *The Prioritization of Social Services: Where Do We Set the Limits on a Market-Driven Social Services System?* (on file with Henry Freedman et al.).

<sup>28</sup>Press Release, Affiliated Computer Services Inc., *ACS Completes Acquisition of Lockheed Martin IMS* (Aug. 24, 2001), at [www.acs-inc.com/news/index.html](http://www.acs-inc.com/news/index.html) (last visited Dec. 17, 2001).

<sup>29</sup> Press Release, Consumers Union, California Signs Contract with Citicorp to Privatize Delivery of Food Stamps and Welfare Benefits (July 31, 2001), at [www.consumersunion.org/finance/ebtwc701.htm](http://www.consumersunion.org/finance/ebtwc701.htm).

<sup>30</sup> See [www.maximus.com/public/virtual/investor/gmission](http://www.maximus.com/public/virtual/investor/gmission). The slogan on Maximus' Web site is "helping government serve the people."

<sup>31</sup> Press Release, Maximus, Maximus Reports Record Revenues and Earnings: Net Income Increases 30% on 23% Revenue Growth (Aug. 2, 2001), at [www.maximus.com/public/virtual/news/8-2-2001](http://www.maximus.com/public/virtual/news/8-2-2001).

<sup>32</sup> Bill Berkowitz, Applied Research Ctr., Prospecting Among the Poor: Welfare Privatization (2001), at [www.arc.org/welfare/prospecting.html](http://www.arc.org/welfare/prospecting.html).

<sup>33</sup> E.g., Community Legal Services in Delaware has a performance-based contract to obtain expungements from criminal records to enable persons to obtain employment. Facsimile responding to Welfare Law Center inquiry from Deborah Gottschalk, attorney, Community Legal Services, to Welfare Law Center (July 27, 2001). Legal Action of Wisconsin operates a Legal Intervention for Employment Project funded by a grant from the Private Industry Council. See [www.legalaction.org/life.htm](http://www.legalaction.org/life.htm) (last visited Nov. 19, 2001).

<sup>34</sup> CAL. COUNCIL OF CHURCHES, CHARITABLE CHOICE SURVEY, [www.usc.edu/dept/LAS/religion\\_online/welfare/survey.html](http://www.usc.edu/dept/LAS/religion_online/welfare/survey.html) (last visited Nov. 19, 2001).

<sup>35</sup> Edward Skloot, Privatization, Competition and the Future of Human Services (Apr. 21, 1999) at <http://www.surdna.org/speeches/private.html> (speech delivered at the Annual Conference on Foundations); see also RICHARD W. ROPER, ROCKEFELLER INST. OF GOV'T, A SHIFTING LANDSCAPE: CONTRACTING FOR WELFARE SERVICES IN NEW JERSEY (1998) (Rockefeller Reports).

<sup>36</sup> See, e.g., Am. Fed'n of State, County & Mun. Employees, Safety Net for Sale, at [www.afscme.org/wrkplace/snettc.htm](http://www.afscme.org/wrkplace/snettc.htm) (last visited Nov. 20, 2001) (the AFSCME Web site includes detailed information on privatization generally and both public education and advocacy tools); *Privatization in Practice, Human Services, Proceedings: Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1435, 1436-41 (2001) (remarks of Anna Berger of the Service Employees International Union).

<sup>37</sup> See generally Demetra Smith Nightingale & Nancy Pindus, Urban Inst., Privatization of Public Social Services, A Background Paper (Oct. 15, 1997), at <http://www.urban.org.html>.

<sup>38</sup> For an analysis of this issue, see ASS'N OF CHILD ADVOCATES, DOES PRIVATIZATION OF HUMAN SERVICES PROVIDE THE BENEFITS OF MARKET COMPETITION? (2000), available at [www.childadvocacy.org](http://www.childadvocacy.org); see also GEN. ACCOUNTING OFFICE, *supra* note 1, at 12, 30.

<sup>39</sup> Am. Fed'n of State, County & Mun. Employees, *supra* note 36, gives examples in the social services context to counter what the authors describe as the "myths" of privatization. In New York City claims of corruption in the

contract process involving Maximus led to litigation challenging welfare-to-work contracts; the litigation was ultimately unsuccessful. For an account, see Berkowitz, *supra* note 32 (detailing a range of complaints about the performance of for-profit companies with welfare and related contracts). *See also* GEN. ACCOUNTING OFFICE, GAO/HEHS-99-41, SOCIAL SERVICES PRIVATIZATION: ETHICS AND ACCOUNTABILITY CHALLENGES IN STATE CONTRACTING (1999).

<sup>40</sup> Whether the contractor is a for-profit or nonprofit entity, the financial incentives built into the contract are of great importance. See the discussion of the Wisconsin W-2 experience *infra*. Of course, the program's incentive structure also affects administration by government agencies.

<sup>41</sup> Nightingale & Pindus, *supra* note 37, at 11; Gilman, *supra* note 1, at 598–99.

<sup>42</sup> GEN. ACCOUNTING OFFICE, *supra* note 1, at 16–17.

<sup>43</sup> For a general discussion, see, e.g., Diller, *supra* note 16; Gilman, *supra* note 1.

<sup>44</sup> Gilman, *supra* note 1, at 596.

<sup>45</sup> GEN. ACCOUNTING OFFICE, *supra* note 1, at 14.

<sup>46</sup> Barbara Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 18 FORDHAM URB. L.J.1559, 1602 (2001); *see also* Eileen P. Sweeney et al., *Language Matters: Designing State and County Contracts for Services Under Temporary Assistance for Needy Families*, in this issue.

<sup>47</sup> A General Accounting Office study reviewed privatization in child support enforcement, a related program. It concluded that, in three comparisons, privatized offices performed at least as well as and sometimes better than public child support enforcement agencies but cost-effectiveness results varied. U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-97-4, CHILD SUPPORT ENFORCEMENT: EARLY RESULTS ON COMPARABILITY OF PRIVATIZED AND PUBLIC OFFICES, (1996). For a discussion of how realistic comprehensive privatization efforts might be, see Jessica Yates, *Managing the Contracting Process for Results in Welfare Reform*, WIN ISSUE NOTES, Dec. 1998, at 5–6, at <http://www.welfareinfo.org/contractissue.htm>. For a discussion of privatization generally, see U.S. GEN. ACCOUNTING OFFICE, GAO/GGD 97-48, PRIVATIZATION: LESSONS LEARNED BY STATE AND LOCAL GOVERNMENTS (1997); *id.*, GAO/GGD -98-87, PRIVATIZATION: QUESTIONS STATE AND LOCAL DECISIONMAKERS USED WHEN CONSIDERING PRIVATIZATION OPTIONS (1998).

<sup>48</sup> WIS. LEGISLATIVE AUDIT BUREAU, 01-7, AN EVALUATION OF WISCONSIN WORKS (W-2) PROGRAM 5 (2001), *available at* [www.legis.state.wi.us/lab/windex.htm](http://www.legis.state.wi.us/lab/windex.htm). Advocates argue that planning for spending community reinvestment funds should include the public. *See* Wis. Council on Children & Families, *W-2 Surpluses and Community Input: Community Reinvestment Funds (CR)*, CAPITOL COMMENTS, Apr. 2000, at 3 (on file with Henry Freedman et al.). For another critical report *see* AM. FED'N OF STATE, COUNTY & MUN. EMPLOYEES LEGISLATIVE COUNCIL, PRIVATE PROFITS, PUBLIC NEEDS, *available at* [www.afscme.org/pol-leg/pppntc.htm](http://www.afscme.org/pol-leg/pppntc.htm) (last visited Nov. 19, 2001).

<sup>49</sup>WIS. LEGISLATIVE AUDIT BUREAU, *supra* note 48, at 5–6.

<sup>50</sup>*Id.* at 86; see Wis. Council on Children & Families, *Food Stamp Usage Down: Good News or Bad*, CAPITOL COMMENTS, Jan.–Feb. 2000, at 1 (on file with Henry Freedman et al.).

<sup>51</sup>WIS. LEGISLATIVE AUDIT BUREAU, *supra* note 48, at 42.

<sup>52</sup>BOB KORNFELD, EVALUATION OF THE ARIZONA WORKS PILOT PROGRAM—IMPACT STUDY INTERIM REPORT iii (2001).

<sup>53</sup>Press Release, Maximus, Maximus Earns \$1 Million Performance Bonus from State of Arizona (Sept. 19, 2001), at [www.maximus.com/public/virtual/news/9-17-2001](http://www.maximus.com/public/virtual/news/9-17-2001).

<sup>54</sup>E-mail from Eddie Sissons, William E. Morris Institute for Justice, to Gina Mannix, Welfare Law Center (July 27, 2001).

<sup>55</sup>Berkowitz, *supra* note 32; Am. Fed’n of State, County & Mun. Employees, *supra* note 38.

<sup>56</sup>*See, e.g.*, Louise Trubek, *Old Wine in New Bottles: Public Interest Lawyering in an Era of Privatization*, 28 FORDHAM URB. L.J.1739 (2001).

<sup>57</sup>*See* Huddleston & Greenfield, *supra* note 23.

<sup>58</sup>So long as the food stamp and Medicaid programs require public administration of eligibility determination and waivers are not granted too freely, the private role in welfare will probably be concentrated in the provision of employment and social services, collection of child support, and the like, and not eligibility determination or total program administration.

<sup>59</sup>ARIZ. REV. STAT. §§ 46-341 to 46-345 (2001).

<sup>60</sup>In New York City through pending litigation advocates first learned of the City administration’s plans to expand significantly the privatization of assessment services. Interview with Marc Cohan, director of litigation, Welfare Law Center, in New York, N.Y. (Oct. 29, 2001).

<sup>61</sup>Bezdek, *supra* note 46, at 1609. Such a model is built into Maine’s Temporary Assistance for Needy Families (TANF) legislation. ME. REV. STAT. ANN. tit. 22, § 3789-D, establishing the Maine Temporary Assistance for Needy Families Advisory Council which must include at least two TANF recipients and representatives of organized labor and women’s interests. <http://janus.state.me.us/legis/statutes/22/title22sec3789-D.html> (last visited 1/22/02).

<sup>62</sup>Telephone Interview with Brian Lawlor, regional counsel, Legal Services of Northern California (Oct. 23, 2001).

<sup>63</sup>Government officials complain of the difficulties they claim are inherent in “writing clear contracts with specific goals against which contractors can be held accountable.” U.S. GEN. ACCOUNTING OFFICE, SOCIAL SERVICE PRIVATIZATION: EXPANSION POSES CHALLENGES IN ENSURING ACCOUNTABILITY FOR PROGRAM RESULTS 12, 14 (1997).

<sup>64</sup>FLA. STAT. ANN. § 445.004 (West 2001).

<sup>65</sup>WIS. STAT. ANN. § 49.152 (West 2001); *see also* Rotker et al., *supra* note 20.

<sup>66</sup>Bezdek, *supra* note 46, at 1570.

<sup>67</sup>Yates, *supra* note 47, at 5–6.

<sup>68</sup>Baltimore contracts divided welfare recipients into three work categories—“job ready,” “hard-to-place,” and “severely challenged”—and required any request for proposals that purported to serve “hard-to-place” TANF recipients to provide outreach, case management, job retention, and postemployment services. Balt. Dep’t of Soc. Servs., Family Investment Program in Action 6 (1999). *But see* Bezdek, *supra* note 46, at 1581–1604, on Baltimore’s failure to achieve the results it sought through the contract process.

<sup>69</sup>Bezdek, *supra* note 46, at 1571; *see* AM. BAR ASS’N, MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS (2000).

<sup>70</sup>*See* Craig D. Feiser, *Protecting the Public Right to Know: The Debate Over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. U.L. REV. 825 (2000); *see also id.*, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities under Federal Law*, 52 FED. COMM. L.J. 21 (1999), for a discussion of the need for federal courts to adopt broader definitions of agency to allow for greater access to information to the public.

<sup>71</sup>*See* Bezdek, *supra* note 46, at 1608, for a discussion of ways to “incentivize” local governments and their contractual partners to give information about the contract process; Trubek, *supra* note 56, at 1746.

<sup>72</sup>Bezdek, *supra* note 46, at 1570.

<sup>73</sup>Giles v. Horn, No. 99-733081 (Cal. Super. Ct. San Diego County Oct. 24, 2000).

<sup>74</sup>Defendants are reportedly appealing the court’s order.

<sup>75</sup>Bezdek, *supra* note 46, at 1572.

<sup>76</sup>See, e.g., Eric Lipton, *Judge's Ruling Bars Contracts in Welfare Plan*, NY TIMES, Apr. 14, 2000, available at [www.legis.state.wi.us/senate/sen04/news/article2000-16.htm](http://www.legis.state.wi.us/senate/sen04/news/article2000-16.htm).

<sup>77</sup>See *The Civil Rights Cases*, 10 U.S. 3, 10-14 (1883); *Milburn v. Anne Arundel County Dep't of Soc. Servs.*, 871 F.2d 474 (4th Cir. 1989); see also *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), for a delineation of the Supreme Court's two-prong test for determining whether actions taken by a private entity should be considered "state action" for purposes of constitutional protections; David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231 (1998).

<sup>78</sup>For a more detailed discussion of the issue of state action as applied to privatization, see Steve Hitov & Gill Deford, *The Impact of Privatization on Litigation*, in this issue; Gilman, *supra* note 1, at 635; Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169 (1995).

<sup>79</sup>Gilman, *supra* note 1, at 612.

<sup>80</sup>*Id.* at 635.

<sup>81</sup>For a fuller discussion of third-party beneficiary rights, see Hitov & Deford, *supra* note 78; Gilman, *supra* note 1, at 635; see generally Ernest M. Jones, *Legal Protection of Third Party Beneficiaries: On Opening Courthouse Doors*, 46 U. CIN. L. REV. 313 (1977). A good analysis of these issues arises in the public housing context where tenants successfully obtained expanded rights. See, e.g., *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir. 1981).

<sup>82</sup>See Diller, *supra* note 16. Welfare advocates should look behind the private contractor and determine whether government officials contributed to any procedural malfeasance, such as failing to monitor private contractors.

<sup>83</sup>*Thibault v. Dep't of Transitional Assistance*, Civil Action No. SUCV97-04740C (Mass. Super. Ct. Suffolk County Dec. 29, 1998) (Clearinghouse No. 52,295); Telephone Interview with Brian Flynn, Greater Boston Legal Services (Nov. 5, 2001).

<sup>84</sup>*DeJesus v. Dep't of Revenue*, Civil Action No. 98-59946 (Mass. Super. Ct. Suffolk County Mar. 8, 1999) (Clearinghouse No. 52,293); Flynn, *supra* note 83.