

The Privatization of Social Service Programs

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The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PWRORA)¹ represented a major shift in the national welfare system. It allows states the option of providing welfare-related services to the impoverished through contracts with charitable, religious, or private organizations.² Although private entities have performed and administered welfare services throughout the years, the passage of PWRORA caused an unprecedented increase of this phenomenon. To some, this is evidence that the welfare system to this point was a failure. Others believe that it merely confirmed the inadequacy of a system in great need of repair. Regardless of the rationale behind its genesis, the proverbial baton was passed from the government to the private sector with the intent of affecting substantive welfare reform.

The wielding of power by private entities was a marked change from the initial administration of the welfare program (at least in theory). Social welfare policy had been under the purview of the administrative government.³ Since welfare programs involve “adequate food, adequate clothing, adequate shelter, and minimal preventive public health care,” the government was seen as the likely facilitator of these programs.⁴ After all, the demand for “a decent chance at a reasonably healthy and active life” needs to be satisfied by an entity elected and accountable to the citizenry. The government needs to satisfy the demand for social justice and guarantee

¹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L.No. 104-193, 110 Stat. 2105.

² 42 U.S.C § 604(a) (West 2003).

³ Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. Rev. 1739, 1740 (2002).

⁴ Henry Shue, *Basic Rights: Subsistence, Influence, and U.S. Foreign Policy* 23, (1996).

basic subsistence rights.⁵ However, it must be stated that in practice, the government has not always been the primary provider of social services.⁶ Many faith-based programs and non-profit organizations have delivered welfare services to American citizens with and without finances provided by the government and private donations.⁷ Nonetheless, the impression was that the government should, and must, provide social services to the citizenry.

However, as the political climate shifted during the 1940's, a new agenda surfaced admonishing the omnipresence and amount of power the government possessed.⁸ During World War II, relationships between government and industry were forged, which led to government employees receiving funding through contracts and grants.⁹ Today, federal grant and contract relationships are based on this template developed during wartime.¹⁰ This model reflected the nation's embrace of political and economic developments such as free trade, market integration, and deregulation.¹¹ Additionally, cynicism about the capabilities of government has surfaced, and a simultaneous endorsement of private entities to provide efficient services.¹² Succinctly stated, these various developments simply reflected an ideological predilection for private over

⁵ *Id.* at 27.

⁶ Michele Estrin Gilman, "Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses, 55 Vand. L. Rev. 799, 823 (2002).

⁷ Sheila Kamerman & Alfred Kahn, *Privatization, Contracting, And Reform Of Child And Family Social Services 3*, Prepared for the Finance Project (1998).

⁸ Dru Stevenson, *Privatization Of Welfare Services: Delegation By Commercial Contract*, 45 Ariz. L. Rev. 83, 86 (2003).

⁹ Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 Admin. L. Rev. 859, 864 (2000).

¹⁰ *Id.*

¹¹ Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 Harv. L. Rev. 1285, 1292 (2003).

¹² Pamela Winston et al., *Privatization of Welfare Services: A Review of the Literature*, Mathematica Policy Research, Inc., at <http://www.mathematica-mpr.com/PDFs/privatization.pdf> (May 2002).

public and market over non-economic standards.¹³ As evidence of the realization of this goal, contracted “employees” of the federal government began to exceed persons officially hired.¹⁴ Further, the enactment of an amendment¹⁵ in the Social Security Act in 1967 permitted the government to purchase social services from private agencies for recipients of AFDC.¹⁶ Additionally, Title XX of the Social Security Act¹⁷ expanded eligibility criteria for receipt of social services, further encouraging the contracting between agencies and private entities.¹⁸ This “privatization,” or ceding of government tasks to the private sector, was a burgeoning occurrence.

However, after 1996, privatization occurred at an accelerated pace. This is due the fact that PWRORA allows states to design their own welfare programs. Thus, the administration of these programs was bestowed upon the states. In turn, the states were explicitly given the option to delegate its welfare service responsibilities to private organizations. Since the states are given fixed block grants for the Temporary Assistance for Needy Families (TANF) Program under the Act, they have the choice to allocate this money for welfare programs.¹⁹ The Act, under TANF, represents the boldest assertion by the federal government that it intends to increasingly rely on private entities to further its welfare goals.²⁰ State governments have readily supported its newfound discretion because they are under the impression that privatizing social service

¹³ *Id.*

¹⁴ Stevenson, *supra* note 6, at 87.

¹⁵ Pub. L. No. 90-36.

¹⁶ *Id.*

¹⁷ Social Services Amendments of 1974, Pub.L.No. 93-647, 88 Stat. 2337.

¹⁸ Kamerman & Kahn, *supra* note 7, at 3.

¹⁹ Gilman, *supra* note 5, at 571.

²⁰ *Id.* at 594.

programs will allow the state to lower its budget by contracting for inexpensive and more effective welfare services.²¹

Although some believe that the abdication of authority to state governments was embraced by the states, others believe that these new responsibilities placed a financial burden on the state (and local governments).²² Thus, in an effort to budget, privatization was viewed by some scholars as a cheap alternative whose purpose was to slice federal debt. Nonetheless, privatization could be considered a viable alternative in a state budget situation because the local character of the monetary concerns allowed it to effectively utilize contracted aid.²³ Hired aid can realistically provide services on a smaller scale (i.e., state aid) as opposed to providing privatized services to the national government and its many provinces.²⁴ Although privatization exists in several forms, this paper will focus on the act of the government contracting out services that it is obligated to provide. This paper will explore the opposing arguments of privatization. Additionally, the paper will explore the legal issues affecting the recent privatization trend. Finally, the paper will focus on one state and two specific privatized programs within this state designed to aid in job placement and the homelessness situation.

Generally, privatization of services by the government includes: (1) contracting with a private organization to provide a service or part of a service; (2) allowing a company the exclusive right to provide a service within a certain area; (3) giving vouchers for social services to individuals that are redeemable on the open market; (4) financially subsidizing private organizations; (5) completely relinquishing responsibility for a service and allowing private

²¹ *Id.* at 572.

²² Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 Ariz. L. Rev. 83, 88 (2003).

²³ *Id.* at 88-89.

²⁴ *Id.* at 89.

sector to assume responsibility; (6) selling or leasing assets to private organizations; (7) allowing volunteers provide all or part of a government service; (8) allowing community groups to assume responsibility of a service or government asset that they benefit from; (9) private organizations building and operating public infrastructure and being reimbursed through user charges; and (10) deregulating a government service to allow private organization the ability to compete to provide the service.²⁵

These many facets of privatization have all come under fire at one time or another. As stated, this paper will focus on the “contracting out” type of privatization. However, it is worth noting that privatization encompasses a variety of actions.

Arguments Supporting Privatization

Proponents of privatization, regardless of type, argue that private entities can perform services with greater efficacy than the government at a reduced cost. They maintain that the ability to provide better services at a lower cost stems from the natural function of market forces. Competitive markets possess inherent incentives to produce services that are cost efficient and more effective.²⁶ Competition allows the government the option of taking its business (dollars or vouchers) elsewhere if the bid is too high or the service is inefficient.²⁷ If a private company’s proposal to receive a grant purports low operating costs and highly effective services (i.e., reduction of welfare rolls, faster results, positive experience for recipients), they will have a decided advantage against a company with less impressive results. Competition compels firms

²⁵ Michael D. Campbell, *A Guide to Developing Public-Private Partnerships in Child Support Enforcement*, Administration for Children and Families (1996), available at <http://www.acf.hhs.gov/programs/cse/rpt/pvt/ch2.htm>.

²⁶ Mark H. Moore, *Public Values in an Era of Privatization*, 116 Harv. L. Rev. 1212, 1223 (2003).

²⁷ Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 Harv. L. Rev. 1229, 1243 (2003).

to bid at low prices and the profit motive will spur the successful bidder to provide the service efficiently.²⁸ In addition, providers must administer an effective service to keep the recipients, as well as the government, satisfied. If welfare beneficiaries feel dissatisfied, public opinion will raise its collective voice to its representatives and contracts will not be renewed. The intensity of the competition is reflected in some contract proposals.

For example, Maximus, Inc., a private organization contracted by the government for various services, proposed to the state of Wisconsin that it could operate the state's welfare office at a 10% to 40% savings and guarantee a significant caseload reduction.²⁹ Thus, the company claimed it would spend less money and remove a significant amount of people from the welfare rolls. Further, it pledged to pay a year of welfare benefits to each extra recipient if it fails to reach the goal.³⁰ Unlike the government, who would maintain a monopoly over any specific welfare program, the insertion of the competition variable will increase accountability and encourage lower costs.

Moreover, government bureaucracy and excessive regulation stymie the efficiency and speed of programs (and increases costs). A bureaucracy is an administrative system in which there is a need to follow rigid or complex procedures.³¹ Since these types of procedures are in place in the United States system of government, it impedes effective action. Although, in theory, a bureaucracy is an implementation of a checks and balances system that is supposed to

²⁸ Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 Harv. L. Rev. 1422, 1444 (2003).

²⁹ Dave Leshner, *Privatization Emerges As New Welfare Option*, L.A. Times, Jan. 27, 1997, at 3.

³⁰ *Id.*

³¹ Joseph P. Pickett, *The American Heritage Dictionary of the English Language*, at <http://education.yahoo.com/reference/dictionary/entries/45/p0384500.html>.

ensure that government actions are subject to accountability.³² Unfortunately, the reality is that the system is a muddled mess of procedures.³³ The amount of time taken to fulfill the requirements of each procedure significantly lengthens the time an action can eventually be undertaken. Government actions and projects must go through several levels of approval, which also impose many review and acceptance restrictions.³⁴ Thus, decisions that need a prompt response (i.e., actions that provide subsistence rights) are caught in a logjam of red tape. For example, in 1994, New York City failed to process public assistance grants to its recipients in a timely fashion.³⁵ The case, which is undoubtedly one of many, highlighted the bureaucratic inefficiencies of the welfare system.³⁶ However, beside case law, there is very little empirical evidence of government inefficiency (as compared to private entities).³⁷

Besides the government's bureaucratic character, its agencies are not concerned with the bottom-line and the possibility of bankruptcy; thus, tend to be both less pioneering and more inefficient.³⁸ The prospect of failure motivates agents in a private setting in a manner that suggests that these organizations are more vulnerable than is a government enterprise. Private, for-profit firms organize themselves to maximize profits. Since the productivity of the workers

³² Richard Reeves & John Knell, *Battling the dreaded B-word*, *The Guardian*, March 21, 2001, at 4.

³³ Lorne Sossin, *The Criminalization And Administration Of The Homeless: Notes On The Possibilities And Limits Of Bureaucratic Engagement*, 22 *N.Y.U. Rev. L. & Soc. Change* 623, 626-27 (1996).

³⁴ Daniel L. Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 *New Eng. J. on Crim. & Civ. Confinement* 1, 43 (2003).

³⁵ *Brown v. Giuliani*, 158 F.R.D. 251 (E.D.N.Y. 1994).

³⁶ Maria Fazzolari, *The Brown v. Giuliani Injunction: Combating Bureaucratic Disentitlement*, 23 *Fordham Urb. L.J.* 413, 414 (1996).

³⁷ Demetra S. Nightingale, *Privatization of Public Social Services: A Background Paper*, prepared at the Urban Institute for U.S. Department of Labor, Office of the Assistant Secretary for Policy, under DOL Contract No. J-9-M-5-0048, October 15, 1997 <http://www.urban.org/url.cfm?ID=407023>

³⁸ Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 *Harv. L. Rev.* 1285, 1297-98 (2003).

in the private sector is tied to maximizing profit, an individual's job depends on the success of the company. Moreover, privatization advocates claim that government employees are inefficient, agencies are overstaffed, and productivity of private-sectors workers is naturally superior. Thus, the more productive an employee is, the more he/she is protecting their job. Further, private companies cut costs in labor expenses because they pay lower wages. They are not bound by civil practice concerns or government pay scales so they can hire less and pay less people.³⁹ As for non-profit organizations, they are motivated by the deeds accomplished. The reason for their existence is to aid those with low-incomes. Unlike the government, which is motivated by statutory obligations, non-profits have a higher (i.e., moral) obligation that will compel them to heights above and beyond government actions.

Also, private organizations (profit or non-profit) may achieve higher quality than the government because they operate on a smaller scale. It is easier to operate efficiently when an organization is streamlined. Unlike the government, private alternatives do not have to be concerned with affecting a larger entity when making decisions. State agencies must operate within the budgetary and philosophical restrictions of the state government. A private alternative need only be concerned with its own budgetary concerns. Moreover, private entities are given the freedom to pursue different philosophies. These entities can structure its programs so that particular aspects of each service are accentuated. For example, if a private entity providing job placement services feels that job rotations are invaluable, they may shift most of its focus to that area. The state government does not have that latitude because of governmental oversight and budgetary considerations.

³⁹ Low, *supra* note 24, at 44.

Advocates of privatization also allege that their system will advance pluralism.

Pluralism is defined as a condition in which numerous distinct ethnic, religious, or cultural groups are present and tolerated, and valued within a society.⁴⁰ In a social service context, a private entity may exhibit pluralistic characteristics. For example, it may share a bond (e.g., the founder was raised in that area) with the community or city, and thus value everyone residing within the region. This may lead to entities providing services to welfare recipients on a more efficient basis. Since the community will undoubtedly acknowledge this kinship, it may engender high levels of individual participation—thus, contributing to program efficiency.

Instead of individuals feeling like the government is taking care of them; they view the service as communal in nature where they are helping themselves. This encourages the perception of self-governance, mutual aid, and care for others, while possessing freedom from the controlling force of the government.⁴¹ Even if the state is pluralist and argues that it could operate in a similar fashion, it is constitutionally obligated not to discriminate and treat groups differently. Hence, unlike a private entity who can focus and cater to certain groups, the state cannot place its focus or concentrate on a particular problem, while neglecting another deserving group (at least, without invoking “state interest” and scrutiny issues). Pluralism is best utilized by a private entity with no such restrictions. It can maintain and cultivate cultural resources created within groups “distinct from the polity.”⁴²

⁴⁰ *The Oxford English Dictionary*, 1088 (R.W.W Burchfield ed., 1989).

⁴¹ Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 Harv. L. Rev. 1229, 1245 (2003).

⁴² *Id.* at 1245.

Finally, aside from efficiency, privatization stimulates new knowledge and communications by drawing “new blood” into businesses previously handled by government.⁴³ By simply allowing a fresh perspective, new and innovative ideas are a possibility. An entity with a business or faith-based background will approach the administration of social services in an unorthodox way. As previously stated, these entities have the financial freedom to experiment for the sake of innovating services that have previously not worked.

Argument against Privatization

Opponents against privatization attack the system on similar theories that privatization advocates invoke.⁴⁴ They claim that the much ballyhooed free-market economy, thriving with healthy competition, may not always exist. Privatization may simply supplant a government monopoly with a private monopoly.⁴⁵ However, if economic conditions support competition, the argument would be rendered moot. As the last statement suggests, most opponents do not have a problem with privatization per se, but are concerned about the negative results sometimes associated with privatization. This concern for the outcome is dubbed “consequentialist” concerns. Most arguments opponents of privatization levy are consequentialist in nature.

For this reason, consequentialists have very little objection to privatization if it results in cost savings without a simultaneous decline in quality.⁴⁶ Consequentialists do not delve into whether private entities are ill suited to administer social service programs. Instead, they monitor

⁴³ *Id.*

⁴⁴ Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 Harv. L. Rev. 1285, 1300 (2003).

⁴⁵ *Id.*

⁴⁶ Jody Freeman, *The Contracting State*, 28 Fla. St. U. L. Rev. 155, 170 (2000).

whether problems like lack of competition and opportunities for cost savings exist. If they are present, it is cause for concern because it may negatively affect privatization efforts. If privatization does not deliver on its main contention (lower cost and high quality), there is no counterargument for the proponents of privatization.

Another concern for opponents of privatization is the contractual portion of the privatization. The contract is often rife with unclear, amorphous, and general terms that detail directions and responsibilities.⁴⁷ Thus, the project will often take longer than anticipated. Specific tasks will be incorrectly performed or not at all. Private entities will interpret ambiguous language a certain way. Most often, its interpretation will not coincide with the government's vision of the program or service and tasks will have to be repeated or redone. These contracts are often left vague because the services to be performed are difficult to detail. Social service programs are challenging to categorize because of the nature of its function. Unlike a contract that calls for the construction of some infrastructure, these programs do not follow a mathematical formula. It is, by nature, a "social" service. Quality social service is difficult to convey in a contractual sense. Very few social service contracts can be designed to anticipate all contingencies and possible situations that may be encountered by a private entity. A human dimension brings with it a need for latitude. If something is rigid and unmoving, the needed flexibility to change errors will be nonexistent. Sometimes the contract must serve as an outline and certain guidelines are stipulated that allow for future changes.⁴⁸ Nonetheless, the benefits of vagueness still must be balanced with the need to monitor private entities. The opponents of privatization most likely would argue the latter outweighs the former.

⁴⁷ *Id.* at 170-71.

⁴⁸ *Id.* at 171.

Moreover, even if there are services easier to specify, agencies may nonetheless be unprepared to monitor performance.⁴⁹ The government may not be able to scrutinize the work of the private entities because of budgetary restrictions, unfamiliarity with contract management, and lack of priority.⁵⁰ The result of this lack of oversight is that it cannot determine whether the privatized service is performing adequately.⁵¹ In addition, as previously stated, the government may monitor inefficiently because the contract's characterizations were vague and unstructured.⁵² Moreover, the government has historically neglected to adequately monitor contracts governing the delivery of benefits.⁵³ Absent a possibility of vicarious liability claim, the government may be somewhat apathetic in monitoring contract compliance.

Closely tied to the monitoring issue is the accountability to the clients' that these entities serve. These entities are not pressured to ensure that the recipients receive quality services.⁵⁴ PRWORA states that private contractors providing social services are subject to the same accounting regulations as other government contractors.⁵⁵ Thus, they are only subject to audit for the use of the TANF funds.⁵⁶ Thus, these entities can separate its TANF funds from its own funds and avoid a full audit.⁵⁷ Since the trade-off was state flexibility, the deficiency of specific accountability mechanisms is the result.⁵⁸ Thus, without a comprehensive audit, the public is

⁴⁹ *Id.*

⁵⁰ *Id.* at 172.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 100.

⁵⁴ Gilman, *supra* note 6, at 814.

⁵⁵ *Id.*; See 42 U.S.C. § 604(a) (West Supp. III 1997).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 854.

unable to ascertain how the money is utilized. They are unable to have input in the decision-making process. For instance, contracts are normally awarded without any type notice and comment opportunity.⁵⁹ The recipients have no forum by which to express their views on the service.⁶⁰ Moreover, private companies do not have to disclose their operations to the public. This, according to privatization opponents, is an undesirable outcome.

Aside from accountability concerns, some individuals object to privatization of social services on ethical grounds. This group deviates from the consequentialists. They have a viscerally, negative reaction to the idea that some government functions--those they view as symbolically important or inherently governmental--might be contracted out to private parties, notwithstanding the possibility that private actors may perform those functions more cost-effectively.⁶¹ Essentially, these moral or ethical objectors believe the certain services are inherently the obligation of the state.⁶² For example, providing basic subsistence rights have historically been the function of the government. The government, by providing one with these basic rights, is providing an opportunity to support oneself. One of functions of democracy is to facilitate the alleviation of poverty and social exclusion through the preservation of these basic rights.⁶³ Although some functions (i.e., defense) are obviously conceded to be matters of the government, services that provide basic rights are less apparent. Of course, one who does not hold any value to a moral argument will claim that it is vacuous and improvable by any means of study. Although these arguments may be less persuasive than an empirical study supporting a

⁵⁹ Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 Harv. L. Rev. 1285, 1308 (2003).

⁶⁰ *Id.*

⁶¹ Jody Freeman, *The Contracting State*, 28 Fla. St. U. L. Rev. 155, 172 (2000).

⁶² *Id.* at 172.

⁶³ Richard Sandbrook, *Narrowing the Gap between Theory and Practice Paper*, Presented to the International IDEA Democracy Forum (2000).

privatization proponent's efficiency view, moral slants have always had a place in American discourse provided it satisfies certain conditions (i.e., the argument derives from a moral principle which is valid in this society).

Finally, opponents to privatization believe that the crux of the privatization proponents' argument: cost savings, efficiency, and healthy competition, is overstated, or simply does not exist. First, they claim that privatization will lead to fraud and corruption because of the lack of accountability. They maintain that private entities have financial reason to make eligible those most likely to succeed in a program while denying services to those who probability of success is low.⁶⁴ Thus, at-risk individuals will be denied eligibility because they pose a threat to the existence of the program. If they do not succeed in the program, the statistics denoting success will diminish and the private entity's business may be in jeopardy. This is especially the case when the payment structure is on a "fixed cost per client served."⁶⁵ In that case, a capped cost on a person may yield diminishing returns if it, for example, takes a person 8 months to find a job at a privatized job placement center when the programming cost is set at 5 months. Thus, the private entity can only receive or charge the government a certain amount of funding regardless of an individual's personalized timetable.

Although there is little, empirical evidence of corruption, an ample amount of anecdotal evidence exists.⁶⁶ For example, Maximus, Inc., the poster child of the large, extremely profitable, private entity had been audited for incorrectly billing service works.⁶⁷ They were also

⁶⁴ Gilman, *supra* note 5, at 597.

⁶⁵ *Id.*

⁶⁶ *Id.* at 601.

⁶⁷ Christopher Drew & Eric Lipton, *2 With Ties to Chief of Welfare Got Jobs with Major Contractor*, N.Y. Times, Apr. 21, 2000, at A1.

been accused of being bedfellows with public officials; thus, giving the impression that nepotism was present.⁶⁸ In fact, Maximus admitted that its hiring practices were guided by nepotism.⁶⁹ Since private entities become entrenched in social service politics, it is inevitable that relationships will be formed and “quid pro quo” becomes the standard.

As for the cost argument, critics contend that privatized services, not public services, will be more expensive to administer. They claim that there is the added expense of soliciting and monitoring that would enlarge the costs of privatization.⁷⁰ Closely associated with cost, the efficiency argument is also once under attack. Opponents claim that the structure of private entities more and more parallel government entities.⁷¹ There is some merit to this argument, as companies appear to adopt similar procedures and hierarchal structure as its public counterparts.⁷² As for the notion of a healthy competition, opponents contend that its intended result—prompt innovation, is a gross overstatement. Instead, they claim that once grants are awarded, subsequent grants are rubber-stamped.⁷³ Thus, there is no incentive to strive for new contracts because they are virtually guaranteed. Moreover, subsequent contracts are also given to the same private entity because they become highly familiarized with the social service, acquire expertise, and develop a rapport with government officials.⁷⁴ Further, they possess the capital to continue providing the social service. Therefore, the only competition existing is between the financially solvent private entities.

⁶⁸ Gilman, *supra* note 5, at 602.

⁶⁹ *Id.*

⁷⁰ *Id.* at 597.

⁷¹ *Id.*

⁷² Reeves & Knell, *supra* note 23, at 4.

⁷³ Michele Estrin Gilman, *Accountability in an Era of Privatized Welfare*, 89 Cal. L. Rev. 569, 596 (2001).

⁷⁴ *Id.* at 599.

Consequently, mass entry into a market occupied by these entities is virtually barred. Many of the would-be competition gracefully bow out because of their inability to outbid these entities. The whole notion of a healthy competition in the free-market economy is overstated and conflicts with privatization proponents' assertions. The presence of these conglomerates is also likely to discourage smaller nonprofit providers from bidding for contracts, further reducing competition.⁷⁵ Instead of competing with giants such as Maximus or Lockheed Martin, smaller competitors are given scraps. Essentially, they provide specific services while the financially strong entities administer entire social service programs.⁷⁶

Tied to this notion of competition, or lack thereof, is the problem of measuring effectiveness and success. If performance cannot be adequately measured, there is no basis by which to compare competitors for competition purposes.⁷⁷ There is a human dimension to the work being performed. These entities are not shingling a roof or paving a road, they are providing people with homes, jobs, and sustenance. For the former two situations, accomplishing this goal is necessitated by a multifaceted assessment of an individual's skills, financial situation, social situation, and external influences.⁷⁸ These evaluations involve a human element, which by nature, makes it unpredictable and challenging to assess.⁷⁹ Moreover, how can one's "happiness" with the service be adequately measured. Again, empirical data does not usually report participants' well-being. Even though the rolls may be shrinking, it is not indicative of the recipient's personal reaction to program. Any number of factors can explain why the program is

⁷⁵ *Id.*

⁷⁶ *Id.* at 600.

⁷⁷ *Id.* at 600.

⁷⁸ *Id.*

⁷⁹ Nina Bernstein, *Charity Begins at the Rule Book*, N.Y. Times, Dec. 24, 2000, § 4, at 5.

“working.” Nevertheless, whether these sides are in agreement or not, there are other concerns regarding the privatization issue—namely, the legality of delegation.

Legal Concerns of Privatization

The United States Constitution explicitly states, “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”⁸⁰ However, implicit in that statement is the notion that the legislature is allowed to delegate some power. In *Polish National Alliance of U.S. v. N.L.R.B.*,⁸¹ the court stated that Congress has the power of passing judgment upon the needs of a complex society.⁸² This power includes the authority to avail itself of the necessary resources of flexibility and practicality to perform its function.⁸³ However, this type of exercise of delegation was not always viewed favorably by the courts. In *Carter v. Carter Coal Co.*,⁸⁴ the Supreme Court rebuked private entity delegation because of its Due Process implications.⁸⁵ Welfare services applicants usually have a right to a hearing if they are denied benefits or have a conflict.⁸⁶ When private entities are administering services, there is a concern whether a fair hearing or other recourse are available.⁸⁷ Further, the Court believed that powers exercised by non-elected entities on the citizenry might signal the erosion of the democratic system.⁸⁸ Private entities escape accountability because there is no effective check on their actions. If their

⁸⁰ U.S. Const. art. I, § 1.

⁸¹ 322 U.S. 643, 650 (1944)

⁸² *Id.*

⁸³ *Currin v. Wallace*, 306 U.S. 1, 15 (1939).

⁸⁴ 298 U.S. 238 (1936).

⁸⁵ *Id.* at 311.

⁸⁶ *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

⁸⁷ Dru Stevenson, *Delegation by Commercial Contract*, 45 Ariz. L. Rev. 83, 102 (2003).

⁸⁸ *Id.* at 96.

performances are sub-par, there is no mechanism to vote them out. Moreover, privatized businesses are mostly out of the glare of the public eye and voters will be unaware of their actions.⁸⁹

Even if their actions were observed and reviewed by entities accountable to the public, the issue remaining is the type of review needed. Meticulous review would seem to emasculate the utility of delegation because the primary function of delegating power is allowing another party to do something that you did not do.⁹⁰ An in-depth review would bring added responsibilities on the entity delegating. Indeed, opponents of privatization further their “cost” arguments by contending that the added costs of review and monitoring private entities make privatization less attractive.⁹¹ These costs, they claim, are rarely included when assessing the costs of privatization.⁹²

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Although, the courts' did endorse private delegation, it is subjected it to heightened scrutiny by the courts because of the aforementioned Due Process and accountability issues. In 1997, the Texas Supreme court developed a test for evaluating delegations to private parties. The factors were created from an amalgamation of inquires and research from various scholars and legal pundits.⁹³ The factors are as follows:

- (1) Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government;
- (2) Are the persons affected by the private

⁸⁹ *Id.* at 102.

⁹⁰ *Id.*

⁹¹ *Id.* at 102-03.

⁹² *Id.* at 103.

⁹³ *Tex. Boll Weevil Eradication Found., Inc. v. Lewellyn*, 952 S.W.2d 454, 472 (Tex. 1997).

delegate's actions adequately represented in the decision making process; (3) Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individual;(4) Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function; (5)Is the private delegate empowered to define criminal acts or impose criminal sanctions; (6)Is the delegation narrow in duration, extent, and subject matter; (7). Does the private delegate possess special qualifications or training for the task delegated to it; and (8) has the Legislature provided sufficient standards to guide the private delegate in its work⁹⁴

Although not all the factors relate to public assistance (notably three and five), the rest can, and are very instrumental in determining whether certain authority can have been delegated. They serve as checks on the scope of authority, accountability to the public and federal government, and expertise on the part of the private entity. However, the issue remaining is that private entities are still free from constitutional constraints (such as due process). The State Action doctrine is the test that determines whether the actor is a government actor. If one is a government actor, constitutional obligations arise. When a government actor is not involved in the alleged wrongdoing, the constitution is not applicable. Instead, violations are applied to state and federal law. Thus, if a private entity provider of social services commits a wrongful action, the plaintiff cannot invoke constitutional protections. State action is clearly present when a state employee, acting in its official capacity, deprives an individual of constitutional rights.⁹⁵ The Supreme Court has held that private social service providers are not state actors, even where they

⁹⁴ *Id.* at 473.

⁹⁵ Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 81 Cal. L. Rev. 569, 611-12 (2001).

are funded and regulated by the government.⁹⁶ However, the Supreme Court, on occasion, has categorized private actors as state actors for constitutional purposes (these instances are rare).⁹⁷

Nonetheless, power is abdicated and given to private entities. Without state actor obligations, liability for actions is effectively diminished. However, state action can exist if the governmental entity delegating authority mandated that the private entity follow specific guidelines.⁹⁸ However, due to the goals of privatization –namely, innovation and efficiency, private entities are given a considerable amount of deference and autonomy.⁹⁹ Thus, it is unlikely that explicit directives will be imposed on private actors as it will retard and conflict with the aims of privatization. As a result, private entities can successfully wage non-state actor arguments.

Aside from constitutional due process rights, individuals may have protection via state and federal laws governing TANF.¹⁰⁰ Many of these statutes provide for an opportunity to receive notice and obtain a hearing.¹⁰¹ The drawback to these laws is that the rights are generally not enforceable.¹⁰² The courts have held that absent an explicit provision for private enforcement, there is no enforcement. Courts have struck down the theory that an implied right of action exists. Unfortunately, most of the laws do not contain an explicit right to enforce these procedural protections. Welfare beneficiaries may be able to sue private providers under a third-

⁹⁶ *Id.*

⁹⁷ Freeman, 116 Harv. L. Rev. 1285, 1304-05 (2003).

⁹⁸ Gilman, *supra* note 5, at 571.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

party beneficiary theory.¹⁰³ The goal is to compel compliance with the terms of the contract between the government and the private entity. Beneficiaries in privatized jurisdictions may have an additional avenue to enforce their process rights by claiming that the contract expressly required the private contractor to adhere to specified due process norms.

Regrettably, a third-party suit may be ineffective. The theory's drawing power is that one is suing to enforce compliance of contract provisions. However, if the provisions are unfavorable, this theory will be rendered useless. In many cases, the provisions may not be favorable because the bargaining power of the individuals is nonexistent. They are recipients, and thus did not have any input in the creation of the contract. Moreover, their representatives, the government, may have had to concede to many unfavorable demands because of the bargaining strength of the private entity. Moreover, the simple insertion of a provision in the contract barring third part suits will effectively take away a potential suit. Accordingly, just as TANF recipients are largely at the mercy of the political process to grant those entitlements and due process rights, they are at the mercy of contracting parties to define and/or grant them contractual rights. Although these legal issues swirl around world of privatization, many states nonetheless, have, embraced the system.

Virginia's efforts at Privatization

Virginia is widely considered the most innovative and effective state implementing privatization programs.¹⁰⁴ For decades, Virginia has been at the forefront for privatizing social service programs. In 1995, Virginia's Commonwealth Competition Council was created pursuant to the

¹⁰³ *Id.*

¹⁰⁴ *Welcome to Privatization 1999*, the Reason Public Policy Institute's 13th Annual Report on Privatization, at <http://www.rppi.org/apr99.html>.

Virginia Government Competition Act of 1995.¹⁰⁵ Its purpose is to seek efficient government by developing privatization methods and techniques.¹⁰⁶ The Council has developed an automated comprehensive cost analysis program called "COMPETE," a decision-making tool used to make a fair and objective evaluation when comparing government costs to private costs. This system revolutionized the evaluation procedure for privatization and served as a catalyst for the implementation of many sound social service programs in the commonwealth.

An example of one of Virginia's innovative privatized welfare programs is the Freedom House. Freedom house is homeless shelter and advocacy shelter started twenty years ago. Freedom house provides the following: (1) A meal Program serving 300 individuals a day; (2) transitional programs with focus on workshops, shelters, and individualized support services; and (3) medical services that provide a maximum of 30-day additional care fatter hospital discharge. It primarily relies on volunteers to staff the organization and achieve it goals. Aside from volunteers, the organization relies upon tax-deductible grants and donations from private parties and government agencies. As one can see, the positive effects of privatization are obvious. Freedom House's philosophical leanings are present with the implementation of their transitional program. They believe that the homeless be given an opportunity to gradually assimilate. Instead of simply providing job and apartment placement, they believe that success will hinge on how individuals handle transition. This approach is a similar to The Virginia Department of Social Services, which manage and has implemented several transition-type programs. Thus, Freedom House, a privatized program, provides similar services. However, as

¹⁰⁵ Va. Code Ann. § 9341.

¹⁰⁶ *Freedom from Government Competition Act of 1997*, Legislative Hearing on H.R. 716, 1997 (testimony of Shirley Ybarra).

previously stated, one measure of effectiveness is the well-being of participants. *Please see appendix.

New York's effort at Privatization

America Works, Inc. is a program designed to aid in job placement for hard-to-employ individuals. It is a New York based firm with six locations (two of the six are not in New York). It is touted as the first, successful for-profit entity to administer a welfare-to-work business. Its innovative practices include a de-emphasis on academic curriculum or speculative, job-specific training.¹⁰⁷ Instead, the company specializes in giving people the tools to retain a *specific* job.¹⁰⁸ Essentially, America Works has a practical focus. It will intensely train individuals to be able to function in a work environment so they can search for specific employment. Initially, the individual participates in a one-week training program that focuses on basic, generic work skills and behaviors.¹⁰⁹ After completing this training, individuals complete a second round of training that is employer-specific. The rationale being that America Work's clients will possess a competitive advantage against outsiders because their skills are tailored toward the employer's line of work.¹¹⁰

After six weeks of training, they are able to search for work. They, however, no longer work from America Work's offices (except to utilize resources).¹¹¹ Once an individual obtains

¹⁰⁷ Dr. William B. Eimicke & Dr. Steven Cohen, *America Works' Criminal Justice Program: Providing Second Chances Through Work*, Civic Bulletin 29, at http://www.manhattan-institute.org/cb_29.pdf (Nov. 2002).

¹⁰⁸ *Id.*

¹⁰⁹ *How We Work? An Overview of America Works Services*, at <http://www.americaworks.com/how/> (last modified 2002).

¹¹⁰ *Id.*

¹¹¹ Eimicke & Cohen, *supra* note 107, at http://www.manhattan-institute.org/cb_29.pdf (Nov. 2002).

employment, they must attend post-job search counseling and advising. Although the employers pay the workers, America Works earns its income from government agencies. The amount of pay is determined by the length of job retention per individual. Thus, job retention allows America Works to earn revenue and increase profit. In this case, market forces do encourage efficiency and permanency. This program fits into the model or ideal view of privatization as argued by its proponents. The company has been successful since its inception 20 years ago, which even gives further credence to the lofty goals of privatization. *Please see appendix.

Conclusion

Whether privatized programs parallel its state programs in every respect is an issue ripe for debate, privatization will continue to garner much publicity. Some believe that there is an inherent duty for the government to provide these services. Further, they allege that the government's involvement will maximize efficiency and minimize corruption. Others believe that private entities are more efficient and save costs. In my opinion, the outcome should be the primary concern (consequentialist). I do not believe that privatization is immoral per se. However, regardless of the merits of these arguments, there is little empirical evidence to support either side. Although there is anecdotal evidence supporting both sides, it is not dispositive (i.e., does not provide a final resolution). Both factions need to generate and provide hard evidence in order to sway the public.

Moreover, each side has to develop standards for evaluation. As previously stated, social programs are complex systems and simply using a single variable as a measurement value can oversimplify the process. Using welfare roll decreases is not wise because the "leavers" may have been denied benefits or lost eligibility. Cost savings cannot be a sole standard of

measurement because social programs are created to aid people, not save money. It is irrelevant whether private entities performed a social service at a reduced price if the individuals were not helped. Thus, new standards need to be devised and should be program-specific. Perhaps, there should be combination with the inclusion of “well-being” surveys and/or studies.

America Works may adequately serve as a prototype for the “new” era of privatization. Its longevity is wholly determined by the permanency of its success rate. Performance objectives are possible to articulate in the social service context. If other programs are similarly set up, accountability and success can be achieved. However, it must be stated that privatization is not welfare’s savior. Other measures need to be taken to improve the welfare system. Perhaps an overhaul of the welfare system is in order. Although privatization is a step in the right direction, it should be used in conjunction with other improvements to truly reform the welfare state.

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