DIFFUSION OF LOCAL REGULATORY INNOVATIONS: THE SAN FRANCISCO CEDAW ORDINANCE AND THE NEW YORK CITY HUMAN RIGHTS INITIATIVE

Stacy Laira Lozner

San Francisco was the first city in the country to address public sector discrimination through a local ordinance inspired by the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This Note situates the San Francisco CEDAW ordinance within developing experimentation in the field of domestic regulatory law. Its participatory approach to public problem solving engages citizens and governmental actors in the formulation of regulatory solutions, requiring city agencies to assess their practices in order to identify discriminatory trends or patterns in terms of gender, race, and other identities, and to remedy any discriminatory practices identified. As other cities—most notably New York City—consider enacting a similar ordinance, effective strategies for diffusion of San Francisco's regulatory innovation must be considered. Communication and information pooling between participants in the San Francisco process and innovators in other localities are essential to the success of subsequent CEDAW ordinance experiments. However, this Note argues that mere replication of San Francisco's regulatory design will be unworkable. Other cities must tailor their ordinances to local political and social contexts.

INTRODUCTION

In 1998 San Francisco became the first city in the country to experiment with a regulatory design inspired by the United Nations human rights regime—in particular, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[1]—through the passage of a local ordinance.[2] The San Francisco CEDAW ordinance promotes the "equitable treatment of all persons" by the city government, based on an analysis of "data collected about who receives services, how effective these services are, what funds are being expended and whether services and programs [meet] the needs of the population served."[3] The ordinance requires city agencies to assess their practices in order to identify discriminatory trends or patterns with regard to gender, race, and other identities. At the completion of these assessments, agencies must craft solutions aiming to end any discriminatory practices identified.

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1. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981). The United States has not yet ratified CEDAW. See infra note 50.

2. S.F., Cal., Admin. Code ch. 12K (2001).

3. Ann Lehman & Carol Sacco, San Francisco Comm'n and Dep't on the Status of Women, A Report on Girls in San Francisco: Benchmarks for the Future, Executive Summary 6 (2003), available at http://sfgov.org/site/uploadedfiles/dosw/reports/48_dsw_report.pdf (on file with the *Columbia Law Review*).

The San Francisco CEDAW ordinance responds not only to needs within San Francisco, but also to recent experimentation within the field of domestic regulatory law.[4] As regulatory agencies have been increasingly criticized as unresponsive to public needs and limited by the adversarial nature of agency decisionmaking,[5] appeals for regulatory reform have been "procedural" in nature, urging agencies to make decisionmaking procedures "more transparent" and "politically responsive."[6] The CEDAW ordinance can be situated within the framework of one regulatory innovation addressing these shortcomings—participatory problem solving.[7] Participatory problem solving places "an emphasis on what is perhaps the central reality of public problem-solving for the foreseeable future—namely, its collaborative nature, its reliance on a wide array of third parties in addition to government to address public problems and pursue public purposes."[8] It attempts "to institutionalize the ongoing participation of ordinary citizens, most often in their role as consumers of public goods, in the direct determination of what those goods are and how they should be best provided."[9] In participatory problem solving, citizen participation—and the public pressure it generates—provides an incentive structure, as well as an information base, for the data gathering and analysis essential to formulating effective regulatory solutions. Participatory problem solving thus requires broad participation, provisional

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4. As one commentator has observed, "[r]egulation is currently under attack from all quarters as inefficient, ineffective, and undemocratic. That the rule-making process is ossified, that implementation is inconsistent, and that enforcement is at best sporadic are by now uncontroversial claims." Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1, 3 (1997).

5. See Cary Coglianese, Empirical Analysis and Administrative Law, 2002 U. Ill. L. Rev. 1111, 1112 ("According to some, government regulatory agencies have grown unresponsive and 'ossified,' failing to achieve the public goals that they were established to serve."); Robert A. Kagan, Adversarial Legalism and American Government, 10 J. Pub. Pol'y Analysis & Mgmt. 369, 375–79 (1991) (noting that adversarial legalism "breeds legal deadlock and socially harmful inertia"); Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385, 1385 (1992) ("During the last fifteen years the rulemaking process has become increasingly rigid and burdensome.").

6. Coglianese, supra note 5, at 1112; see Sheila Jasanoff, Negotiation or Cost-Benefit Analysis: A Middle Road for U.S. Policy?, Envtl. F., July 1983, at 37, 43.

7. A participatory problem-solving approach is: "(1) problem-oriented in defining . . . equity (both normatively and strategically) as an on-going institutional dynamic, (2) innovative in developing relationships, spaces or structures for on-going problem solving, and (3) collaborative across professional, disciplinary, and institutional boundaries." Susan Sturm, Lawyers and the Practice of Workplace Equity, 2002 Wis. L. Rev. 277, 299 [hereinafter Sturm, Workplace Equity]. For further reading on participatory governance and corresponding structures of accountability, see generally Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267 (1998).

8. Lester M. Salamon, The New Governance and the Tools of Public Action: An Introduction, 28 Fordham Urb. L.J. 1611, 1623 (2001).

9. Archon Fung & Erik Olin Wright, Thinking About Empowered Participatory Governance [hereinafter Fung & Wright, Empowered Participatory Governance], *in* Deepening Democracy: Institutional Innovations in Empowered Participatory Governance 3, 22 (Archon Fung & Erik Olin Wright eds., 2003) [hereinafter Deepening Democracy].

solutions, the sharing of regulatory responsibility across the public-private divide, and a flexible, engaged agency.[10]

While San Francisco has elected to address public sector discrimination through traditional antidiscrimination laws, the city has also pioneered regulation based on this model of participatory problem solving. The enactment of the San Francisco CEDAW ordinance signaled the institutionalization of an ongoing process that utilizes information gathering and critical analysis about agency practices to expose problems and to formulate potential responses. Monitoring, reporting requirements, and public participation provide the means for agency accountability. Public participation not only enabled learning to take place through public hearings before the ordinance was enacted, but also sustains political pressure in order to provoke agency action should it not occur through the deliberative process the ordinance establishes. Indeed, the San Francisco ordinance belies traditional criticisms of collaborative governance,[11] successfully linking aspirational standards to a system of problem solving by granting specificity to general norms, creating a dynamic system of collaboration between nonprofits and local government, and using formal law to legitimate informal law.[12]

The San Francisco CEDAW ordinance is suggestive of a more general model of local regulation of public sector discrimination. However, it is also quite specifically tailored to the social and political context of San Francisco. While other cities seeking to enact a CEDAW ordinance might simply propose to adopt the San Francisco ordinance itself, as this Note argues, a cookie-cutter approach to diffusion of the San Francisco ordinance would preclude the element of context-specificity that is integral to San Francisco's innovation. Although "[n]ot every regulatory problem can be solved using the same decision-making process or conducted according to the same script,"[13] cities seeking to implement a similar regulatory scheme will benefit from critical reflection upon the San Francisco experiment. Communication and information pooling between participants in the San Francisco process and innovators in other localities may improve the quality of subsequent CEDAW ordinance experiments.[14]

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10. Freeman, supra note 4, at 22.

11. See infra Part II.B.

12. See infra Part I.B.

13. Freeman, supra note 4, at 92–93.

14. The San Francisco Comm'n on the Status of Women (COSW) makes available on the internet the text of the ordinance, its Gender Analysis Guidelines, progress reports on agency implementation, the CEDAW Task Force meeting minutes, the city's Five Year CEDAW Action Plan, and other relevant documents at http://www.ci.sf.ca.us/site/cosw_index.asp?id=10848 and http://www.sfgov.org/site/dosw_page.asp?id=19725 (on file with the *Columbia Law Review*). For discussion of the role played by the COSW in the San Francisco CEDAW ordinance experiment, see infra Part II.

However, simple replication of San Francisco's regulatory scheme will be unworkable.[15]

This Note advocates participatory problem solving as a way forward, while posing the question of how to think about one regulatory innovation in a way that helps to make good decisions in the context of another. Part I of this Note examines the emerging model of participatory problem solving. Part II explores the structure of the San Francisco CEDAW ordinance, characterizing its approach to addressing public sector discrimination as an experiment in participatory problem solving. Part III contemplates the implementation of similar legislation in other cities throughout the United States, and in New York City in particular, arguing against a model of diffusion through replication. Finally, this Note concludes that while other cities will undoubtedly benefit from the work that has been done in San Francisco, the San Francisco regulatory model cannot merely be replicated, but must be locally adapted such that it is responsive both to local needs and political realities.

I. The Emerging Model of Participatory Problem Solving

Recent scholarship has described the emergence of new, more complicated, and less obvious forms of discrimination.[16] While "first-generation" discrimination—or "deliberate exclusion or marginalization because of . . . race, ethnicity, national origin, sex, age, religion, sexual orientation, or disability"—is (ideally) straightforwardly addressed through litigation and the prohibition of disparate treatment, "second-generation" discrimination is characterized by "[s]tructures of decision-making, patterns of interaction, and cultural norms . . . that are not immediately discernible at the level of the individual."[17] Shifting patterns of exclusion and bias, then, require "a move beyond the traditional civil rights paradigm, which focused on articulating formal rights enforced ex-

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15. See Archon Fung, Creating Deliberative Publics: Governance After Devolution and Democratic Centralism 19 (Dec. 2, 1999), available at http://www.archonfung.net/papers/DemocPublic.pdf (on file with the *Columbia Law Review*) [hereinafter Fung, Creating Deliberative Publics].

16. Sturm, Workplace Equity, supra note 7, at 277; see also Susan Sturm, Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations, 1 U. Pa. J. Lab. & Emp. L. 639, 641 (1998) [hereinafter Sturm, Race, Gender, and the Law] ("[T]he dynamics and patterns of racial and gender exclusion or bias have . . . changed considerably.").

17. Sturm, Workplace Equity, supra note 7, at 285–86. For example, "[i]n a society that disparages overt manifestations of racism, racist actors often mask their racist intent, making it hard for victims of racism to prove unlawful discrimination." Darren Lenard Hutchinson, Factless Jurisprudence, 34 Colum. Hum. Rts. L. Rev. 615, 625 (2003); see also Theodore Eisenberg & Sheri Lynn Johnson, The Effects of Intent: Do We Know How Legal Standards Work?, 76 Cornell L. Rev. 1151, 1169 (1991) ("Where discrimination is illegal or socially disapproved, social scientists predict that it will be practiced only when it is possible to do so covertly and indirectly.").

ternally through after-the-fact, formal legal processes."[18] Indeed, the complexities of second-generation discrimination necessitate that courts and government agencies move away from the type of specific and inflexible rules that presently typify our legal system.[19]

Part I.A of this Note briefly addresses the limitations of traditional regulatory mechanisms in responding to systemic public sector discrimination. Part I.B differentiates participatory problem solving from other methods of regulation within the field of collaborative governance. Part I.C then elaborates on the emerging model of participatory problem solving, which holds promise for local regulation of public sector discrimination.

A. *The Traditional Regulatory Model*

The "characteristically rule-based and rule-bound regulatory model" employed by agencies is known as command-and-control regulation.[20] This model addresses "problems . . . by imposing and enforcing, in top-down fashion, tough binding rules aimed principally at the largest and most visible categories of corporate targets, and secondarily at [government] agencies" and "relies primarily on fixed, highly prescriptive rules rather than flexible standards or adjustable goals and objectives."[21] Command-and-control regulation has been criticized as inadequate for "reshaping relationships, solving problems, and reallocating power,"[22] as

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18. Sturm, Race, Gender, and the Law, supra note 16, at 644; see also Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111, 1113 (1997) ("When the state regulates on the basis of 'facially neutral' criteria that have injurious effects on minorities or women, the Court . . . . will only strike down such regulation if it is shown to be adopted with discriminatory purpose . . . defined as tantamount to malice.").

19. Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458, 461 (2001) [hereinafter Sturm, Second Generation] ("The complex and dynamic problems inherent in second generation discrimination cases pose a serious challenge for a first generation system that relies solely on courts (or other external governmental institutions) to articulate and enforce specific, across-the-board rules."). The inadequacy of an adversarial litigation model has also been noted within the field of environmental regulation. See Sheila Foster, Environmental Justice in an Era of Devolved Collaboration, 26 Harv. Envtl. L. Rev. 459, 465 (2002) (arguing that "[t]raditional top-down, command-and-control strategies have worked well for the first generation of environmental problems . . . yet they have failed to deal with the current generation of environmental problems that are much more complex and diffuse").

20. Bradley C. Karkkainen, Environmental Lawyering in the Age of Collaboration, 2002 Wis. L. Rev. 555, 557.

21. Id.

22. Sturm, Race, Gender, and the Law, supra note 16, at 644; see also Freeman, supra note 4, at 13 ("In traditional rule making, interest groups, private parties, and local communities are experienced as a threat to the integrity and expertise of the agency. As a result, regulation overburdens agencies and undervalues the capacity of nongovernmental groups to participate in governance."); cf. Carrie Menkel-Meadow, The Trouble with the Adversary System in a Postmodern, Multicultural World, 38 Wm. & Mary L. Rev. 5, 31

specific and inflexible rules are not readily adaptable and thus are often poorly suited to unanticipated and complex contexts.[23]

B. *Collaborative Governance*

The field of collaborative governance is comprised of various regulatory methods, including negotiated rulemaking, alternative dispute resolution, stakeholder negotiation, and participatory problem solving.[24] However, unlike participatory problem solving, many of these methods of collaborative governance "primarily involve elites and experts, thus retaining the top-down quality typical of much [traditional] adversarial governance."[25]

Negotiated rulemaking, for example, involves the negotiation of government regulations by representatives from government, regulated entities, citizen groups, and other affected organizations prior to the agency's decision to issue a proposal for a new regulation. A negotiated rulemaking committee composed of the various stakeholders "meets in an effort to reach unanimous agreement on a proposed rule."[26] Negotiated regulation has been criticized for making agencies vulnerable to capture by private interests,[27] as well as for its tendency to replicate existing imbalances of power.[28] Scholars have also expressed concern that negotiated

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(1996) ("Third-party-imposed solutions seldom get at root-causes of conflicts or provide enduring solutions.").

23. See Sturm, Second Generation, supra note 19, at 461 ("Separating problem definition from its institutional context undermines the efficacy of the resulting legal norm as well as the remedy designed to achieve it.").

24. See Archon Fung & Erik Olin Wright, Countervailing Power in Empowered Participatory Governance, *in* Deepening Democracy, supra note 9, at 259, 262.

25. Id.

26. Coglianese, supra note 5, at 1131; see 5 U.S.C. §§ 564–565 (2000) (setting out procedures by which federal agencies can establish negotiated rulemaking committees). The Administrative Procedure Act requires agencies to publish a notice of a proposed rule, to allow interested persons to comment on the rule, and, upon issuance of the rule, to provide a statement of the basis and purpose for the final decision. Id. § 553(b)–(c). "[I]n 1990 Congress endorsed negotiated rulemaking as a means of addressing the propensity of the APA rulemaking process to 'cause parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation over agency rules.'" Mark Seidenfeld, Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation, 41 Wm. & Mary L. Rev. 411, 447 (2000) (quoting Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561–570).

27. See Seidenfeld, supra note 26, at 421 (noting "the potential for capture inherent in a cooperative regulatory system").

28. See Sturm, Race, Gender, and the Law, supra note 16, at 644 (stating that "valid criticisms of . . . negotiated rule making document the dangers of informal, unaccountable processes that tend to replicate existing power imbalances"); see also Richard L. Abel, The Contradictions of Informal Justice, *in* 1 The Politics of Informal Justice 267, 299 (Richard L. Abel ed., 1982) (arguing that "[t]he creation of informal institutions generally increases the quantity of state coercion available to the advantaged").

regulation substitutes consensus for public norms, thereby privatizing the agreements reached.[29]

C. *Participatory Problem Solving*

Critics of both command-and-control regulation and top-down methods of collaborative governance argue that "a model that views the administrative process as a problem-solving exercise in which parties share responsibility for all stages of the rule-making process, in which solutions are provisional, and in which the state plays an active, if varied, role" is both more effective and more legitimate.[30] This problem-solving regulatory approach embraces experimentation, encourages site-specific tailoring of regulations, and emphasizes the need for transparency and accountability throughout the decisionmaking and implementation processes.[31] Its aims include the production and dissemination of information about specific problems, institutional capacity building[32] with an emphasis on problem solving, and the development of systems of accountability.[33] Recently, this approach has been successfully incorpo-

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29. See Coglianese, supra note 5, at 1112 ("[Some] claim that the regulatory process . . . inhibit[s] the ability of government to develop more coherent and effective regulatory strategies.").

30. Freeman, supra note 4, at 6.

31. See Karkkainen, supra note 20, at 568 ("The new model . . . emphasizes locally or regionally tailored solutions within broader structures of coordination and public accountability . . . [and] embraces continuous experimentation, provisional policymaking, new learning, and dynamic, adaptive response mechanisms."); Sturm, Second Generation, supra note 19, at 463 (proposing structural regulatory approach that "encourages experimentation with respect to information gathering, organizational design, incentive structures, measures of effectiveness, and methods of institutionalizing accountability as part of an explicit system of legal regulation").

32. The term "capacity building" as used throughout this Note involves developing the abilities of regulatory actors to participate meaningfully in decisionmaking, gather and analyze data, benchmark best practices, and monitor effectively the regulatory regime in place.

33. See Sturm, Second Generation, supra note 19, at 555. It is important to note that this approach demands that the role of law and of lawyers be reframed, placing an emphasis on lawyers' ability to collaborate and innovate, as well as recognizing that "[l]aw does not function solely as a set of rules developed by external legal actors and imposed on everyone else," but "create[s] spaces for engagement about current practices in relation to aspirations that have been identified to be of public significance." Sturm, Workplace Equity, supra note 7, at 319; see also Menkel-Meadow, supra note 22, at 25 ("To accomplish such a reframing of attitudes and thought processes will require a great deal of re-education and reorientation; indeed, major cultural, not just ethical, change among lawyers is needed."). Within a problem-solving approach, "[lawyers'] roles and strategies emerge from a self-conscious attention to the relationship between legal advocacy and the dynamic character of the problems they must tackle. They participate in forming and adapting the regulatory architecture to permit and encourage this form of problem-solving." Sturm, Workplace Equity, supra note 7, at 284; see also Brandon Garrett, Remedying Racial Profiling, 33 Colum. Hum. Rts. L. Rev. 41, 145 (2001) (arguing that "lawyers must abandon their exclusive focus on litigation and must engage the community and other groups to help shape more creative remedies").

rated into local regulatory innovations.[34] These experiments in regulatory problem solving are founded upon public-private partnerships and based upon the recognition that neither nonprofits nor governmental agencies can solve community problems on their own.[35]

One criticism of participatory problem solving is that decisionmaking structures put in place by regulatory innovations are chaotic and unwieldy,[36] in that "[l]ines of authority and divisions of responsibility are often neither formal nor transparent," and "[r]oles, identities, and allegiances [may] become blurred in a jumble of hybrid public-private, national-and-local, inter-agency governance arrangements."[37] Another criticism is that government officials may be reluctant to share power and resistant to newly imposed accountability mechanisms.[38] This disinclination to allocate regulatory power traditionally hoarded by high-level officials may result in the recruitment and involvement of nongovernmental actors on the basis of past or promised political patronage. Thus, participation is often perceived as dependent upon political whim and existing social conditions, reinforcing and recapitulating social and economic disadvantages within the regulatory process.[39] While such tendencies may be checked by mechanisms of transparency and accountability, there is no guarantee that, if faced with an apathetic or uninformed public, government officials "may have an interest in building mechanisms of monitoring and transparent accountability that, while necessary for institu-

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34. See, e.g., Archon Fung, Deliberative Democracy, Chicago Style: Grass-Roots Governance in Policing and Public Education, *in* Deepening Democracy, supra note 9, at 111 (discussing "two recent institutional reforms [that] have remade Chicago's public school and police systems into the most formally participatory and deliberative departments of their kind in the United States"); Karkkainen, supra note 20, at 555 (noting that the "most significant trend" in environmental protection and natural resource management is "toward collaborative decision-making . . . at local and regional ecosystem scales"); Craig W. Thomas, Habitat Conservation Planning, *in* Deepening Democracy, supra note 9, at 144 (discussing the use of participatory problem solving in habitat conservation planning).

35. See Garrett, supra note 33, at 139–40; see generally Martha Minow, Partners, Not Rivals? Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious, 80 B.U. L. Rev. 1061 (2000) (explaining how, and why, lines between public and private, profit and nonprofit, and business and secular are "rapidly fading, shifting, and criss-crossing").

36. Karkkainen, supra note 20, at 569 (describing participatory problem solving as "typically messy, elaborate, cumbersome, ad-hoc, non-uniform, and defiantly unconventional").

37. Id.

38. See Fung, Creating Deliberative Publics, supra note 15, at 45 ("Officials . . . are accustomed not to open deliberation, but rather to the exercise of carefully husbanded political power or bureaucratic prerogative.").

39. See Foster, supra note 19, at 487 ("Collaborative processes depend upon some degree of social capital among their potential participants, particularly at the local level."); Fung & Wright, Empowered Participatory Governance, supra note 9, at 33 ("The democratic character of processes and outcomes may be vulnerable to serious problems of power and domination inside deliberative arenas by powerful factions or elites.").

tional learning and experientially based deliberation, will inevitably publicize their failures and so bring painful criticism."[40]

However, while participatory problem-solving experiments may alter hierarchical regulatory structures and draw new parties into decisionmaking processes, they do not inevitably result in bedlam or regulatory devolution. Nor does participatory problem solving necessarily imply the abdication of governmental authority and control over regulatory processes.[41] Indeed, participatory problem solving takes seriously mechanisms of accountability, ensuring that while roles of various stakeholders within the process expand, regulatory reins are not handed over to private or nonprofit actors.[42] Furthermore, sharing such data and bringing community groups into the regulatory process may not only transform relations between agencies and the public, but also transform relations within agencies themselves.[43] This approach allows for context-specific regulation, as well as flexibility in determinations of compliance, acknowledging that both the roles and the needs of stakeholders may be transformed by the problem-solving process.[44] Such regulatory flexibility is an especially important component to consider in the design and implementation of antidiscrimination regulation, in which discretion is often essential to formulating a responsive and fair remedy.[45] Part II of this Note places the San Francisco CEDAW ordinance and the governance structure it has instituted within this developing regulatory approach.

II. The San Francisco CEDAW Ordinance: The Participatory Problem-Solving Model in Action

Participation both by government and nonprofit actors is integral to the success of the San Francisco CEDAW ordinance. Rather than maintain a reactive focus on post-violation remediation, as will be discussed below, the ordinance seeks to institutionalize a proactive response to discrimination, distinguished by the ongoing participation of local government, nonprofits, and citizens, as well as networking between localities.

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40. Fung, Creating Deliberative Publics, supra note 15, at 45.

41. See, e.g., Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1394 (2003) (arguing that public-private collaborations are "poorly characterized as government withdrawal or disinvolvement from an area of activity").

42. See Bradley C. Karkkainen, Archon Fung & Charles F. Sabel, After Backyard Environmentalism: Toward a Performance-Based Regime of Environmental Regulation, 44 Am. Behav. Scientist 692, 694 (2000) ("[U]nlike conventional hierarchical regulation, the new architecture features a collaborative and mutual accountability of center to localities, localities to center and to each other, and to the public generally.").

43. Id.

44. Freeman, supra note 4, at 27 ("Rather than assuming what quality is at the outset, a collaborative regime requires that critical reflection *about* quality be built into the rulemaking and implementation process.").

45. Sturm, Race, Gender, and the Law, supra note 16, at 674 ("An effective system of discrimination regulation would thus both permit and discipline the exercise of discretion to make it accountable, fair, and unbiased (as well as productive of information that can be used to inform subsequent decisions).").

Because the CEDAW ordinance is aimed at remedying discrimination—a systemic problem—it must rely on "interdisciplinary collaborations with multiple stakeholders to address problems that are not limited to the articulation of legal norms or the response to potential legal violations."[46] By "utilizing the state for what it does best—raising resources and setting broad societal directions—while using nonprofit organizations for what they do best—delivering services at a human scale and innovating in new fields—important public advantages can thus be gained."[47] Therefore, the San Francisco model benefits from "empower[ing] individuals, close to the points of action, who possess intimate knowledge about relevant situations," as they "may also know how best to improve the situation."[48]

Part II.A of this Note describes the efforts undertaken to draft and enact the CEDAW ordinance. Part II.B outlines the structure of the CEDAW ordinance and the processes of information gathering, policy analysis, and reporting that it establishes. Part II.C describes results of ordinance implementation to date.

A. *Background of the Ordinance*

The United States has not yet ratified CEDAW, and while it has ratified the Convention on the Elimination of All Forms of Racial Discrimination (CERD),[49] there has been no federal implementation of the treaty.[50] In 1998, however, San Francisco enacted local legislation to implement the principles of CEDAW.[51] The ordinance was amended in 2000 to reflect the principles of CERD.[52] The Women's Institute for

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46. Sturm, Workplace Equity, supra note 7, at 293–94.

47. Salamon, supra note 8, at 1634.

48. Fung & Wright, Empowered Participatory Governance, supra note 9, at 25; see also Archon Fung, Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing, 29 J. Pol'y & Soc'y 73, 75 (2001) (describing benefits of community participation in Chicago citywide decisionmaking).

49. International Convention on the Elimination of All Forms of Racial Discrimination, adopted Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195.

50. On July 30, 2002, CEDAW passed the Senate Foreign Relations Committee in a 12-7 vote; however, the treaty has yet to be voted upon by the entire Senate. See Press Release, Amnesty Int'l, Amnesty International Applauds Senate Committee Passage of Treaty on the Rights of Women (July 30, 2002), available at http://www.amnestyusa.org/news/2002/usa07302002.html (on file with the *Columbia Law Review*).

51. S.F., Cal., Admin. Code ch. 12K (2001).

52. Id. ch. 12K.3 ("In implementing CEDAW, the City recognizes the connection between racial discrimination, as articulated in the International Convention on the Elimination of All Forms of Racial Discrimination [CERD], and discrimination against women."); id. ch. 12K.1(e) ("[D]iscrimination based on gender is interconnected and often overlaps with discrimination based on race and other criteria."); id. ch. 12K.1(f)(3) (recognizing "the need to consider the intersection of gender and race in particular recognizing the unique experiences of women of color").

While the United States ratified CERD in 1994, there has been no federal implementation of the treaty. The State Department submitted its third periodic report documenting U.S. compliance with CERD in 1999. A 2000 report summarizing the initial, second, and third periodic reports of the United States is available at http://www.unhchr.

Leadership Development for Human Rights (WILD for Human Rights), the nonprofit organization primarily responsible for promoting the ordinance, identified four primary motivations behind local implementation of the CEDAW ordinance: It would (1) "demonstrate[ ] to elected federal officials . . . how critical ratification and implementation of CEDAW are to women in the United States,"[53] (2) serve to bring women's issues under the rubric of human rights,[54] (3) "bring[ ] the weight of international human rights into our communities [and] . . . provide[ ] us with mechanisms to adopt international success strategies and best practices here in the United States," and (4) provide our communities with "a proactive strategy to promote change, rather than a reactionary one."[55]

The San Francisco ordinance was brought about through the efforts of four partner organizations. In addition to WILD for Human Rights, Amnesty International USA Western Region, the Women's Foundation, and the San Francisco Commission on the Status of Women (COSW) led

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ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/4c02eba071d735f4c1256a1700588ba0/$FILE/G0044926.doc (on file with the *Columbia Law Review*). For information on the absence of specific legislation implementing the provisions of CERD within the United States, see Office of the High Comm'r for Human Rights, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America (2001), available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/001961f8a1ae7b29c1256aa9002ae228?Opendocument (on file with the *Columbia Law Review*). The last official U.S. periodic report was due in November 2003.

53. WILD for Human Rights, Local Implementation of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1999), at http://www.wildforhumanrights.org/local_implement%20_paper.html (on file with the *Columbia Law Review*) [hereinafter Local Implementation]. After signing the ordinance, Mayor Willie Brown Jr. commented that "[t]he United States is the only industrialized country in the world that has yet to ratify CEDAW . . . . We want to set an example for the rest of the nation because it is long overdue." Gretchen Sidhu, San Francisco Plunges Ahead in Adopting a CEDAW Treaty of Its Own, Chi. Trib., Aug. 2, 1998, at 8. Patricia Chang, president and chief executive officer of the city's Women's Foundation, explained that after the 1995 United Nations Fourth World Conference on Women in Beijing, "we decided to take a local-to-national strategy rather than waiting for the treaty to be adopted by the Senate and filter down to the local level." Rebecca Vesely, Women-U.S.: U.N. Women's Treaty Molds San Francisco Gov't, Inter Press Serv., July 26, 2002, available at 2002 WL 4914839. Amnesty Int'l USA's Women's Program has commented that "[l]ocal treaty implementation is an innovative strategy that enables activists to bypass federal resistance to international human rights standards, and instead focuses on putting these standards to work right in our own communities by making local governments accountable to them." Amnesty International USA's Women's Human Rights Program, Making Human Rights Meaningful in Our Communities, Interact, Summer 2003, at http://amnestyusa.org/women/cedaw_cerd.html (on file with the *Columbia Law Review*) [hereinafter Making Human Rights Meaningful]; see also Catherine Powell, Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States, 150 U. Pa. L. Rev. 245, 245–46 (2001) ("[I]n the absence of federal ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), San Francisco has incorporated 'principles of CEDAW' into binding local law." (footnotes omitted)).

54. Local Implementation, supra note 53.

55. Id.

the organizing efforts.[56] The ordinance was drafted by the COSW, the office of the San Francisco Board of Supervisors President Barbara Kaufman, and the city attorney,[57] and was enacted after a series of public hearings. These hearings signified to the Board of Supervisors, as well as to the coalition members, that the public was invested in the ordinance and would hold accountable the agencies participating in the process.[58]

The COSW was selected as the facilitation and monitoring body, and a CEDAW Task Force, composed of members from governmental and community organizations and empowered to carry out local implementation of the ordinance, was established by the legislation.[59] The COSW works with the Task Force to implement the processes established by the ordinance, resulting in a participatory regulatory scheme in which "both public and private actors share responsibilities."[60] The COSW and the Task Force work with city agencies to conduct gender analyses of the employment, funding allocation, and direct and indirect service delivery practices of their agencies, as well as to develop action plans to redress any discrimination found.[61] Additionally, the COSW and the Task Force provide human rights training to all participating agencies.

B. *Structure of the Ordinance*

The CEDAW ordinance is premised on the belief that "[a]dherence to the principles of CEDAW on the local level will especially promote equal access to and equity in health care, employment, economic development and educational opportunities for women and girls and will also address the continuing and critical problems of violence against women and girls."[62] It defines discrimination against women and girls as any

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56. Id.

57. Id.

58. One member of the New York City Human Rights Initiative Coalition has commented that the public hearings in San Francisco demonstrated that "people [were] interested in this enough that . . . there [would] be some interest when the reports [came] out." Interview A, in New York, N.Y. (Mar. 28, 2003) (on file with author). From February through April of 2003, the author conducted interviews with four participants in the San Francisco process as part of a Columbia Law School research seminar called Theory and Practice of Workplace Equity, taught by Professor Susan Sturm. Interviews were also conducted with four members of the New York City Human Rights Initiative Coalition, a coalition of local NGOs working to draft and enact similar legislation in New York City. See infra Part III. To preserve confidentiality, the interviewees have been kept anonymous. For the purposes of identification, each interview cited has been assigned a letter from A to D.

59. S.F., Cal., Admin. Code ch. 12K.5 (2001).

60. Metzger, supra note 41, at 1395.

61. Press Release, WILD for Human Rights, Mayor Signs Historic Legislation Implementing International Women's Convention Within City (Apr. 14, 1998), available at http://www.wildforhumanrights.org/cedaw_press_release.html (on file with the *Columbia Law Review*). See infra Part II.B.3.

62. S.F., Cal., Admin. Code ch. 12K.1(c).

> distinction, exclusion or restriction made on the basis of sex that has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[63]

1. *CEDAW Task Force.* — One way in which the ordinance seeks to institutionalize the process it initiates is through the establishment of a CEDAW Task Force, which reports to the Mayor, the Board of Supervisors, and the COSW.[64] The purpose of the Task Force is to advise the Mayor, the Board of Supervisors, and the COSW on the local implementation of CEDAW.[65] The eleven members of the Task Force, as designated by the ordinance, include "elected officials, organized labor, government employees, and community advocates with expertise in economic justice, human rights, violence against women, and health."[66] Appointed Task Force members serve at the pleasure of their appointing authorities, and the term of each community member is limited to two years, though reappointment for consecutive terms is possible.[67]

A sunset provision in the ordinance mandated that the Task Force expire on December 31, 2002, unless renewed by the Board of Supervisors.[68] At a Task Force meeting in October 2002, it was decided that all sections of the ordinance referring to the current Task Force would be removed and replaced with language creating a CEDAW Committee. The Committee would have seven voting members and three nonvoting members. The Mayor, the President of the Board of Supervisors, and the Executive Director of the COSW would become ex officio, rather than voting, members. The seven voting members would include the President of the COSW and six community representatives. These community representatives—or at-large members—would be appointed, two each, by

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63. Id. ch. 12K.2(d).

64. Id. ch. 12K.5(a).

65. Id. ch. 12K.5(b).

66. San Francisco Comm'n on the Status of Women & CEDAW Task Force, A Gender Analysis: Implementing the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 2 (1999), available at http://www.sfgov.org/site/uploadedfiles/cosw/cedaw/pdf/cedaw.pdf (on file with the *Columbia Law Review*) [hereinafter Gender Analysis]. Specifically, the Task Force must include: the President of the Human Rights Commission or her designee; a staff member from the Mayor's office knowledgeable about the city's budget, designated by the Mayor; the head of the Department of Human Resources or her designee; the President of the Board of Supervisors or her designee; the President of the COSW or her designee; and six members from the community to be appointed by the COSW (including two representatives working in the field of international human rights, one representative knowledgeable about economic development and employment issues, one representative knowledgeable about health care issues, one representative knowledgeable about violence against women, and one representative knowledgeable about both city unions and women's issues). S.F., Cal., Admin. Code ch. 12K.5(d)(1).

67. S.F., Cal., Admin. Code ch. 12K.5(d)(4).

68. Id. ch. 12K.5(d)(3).

the President of the Board of Supervisors, the Mayor, and the COSW.[69] These changes took effect as part of the CEDAW Five Year Action Plan approved by the COSW on February 1, 2003, and the CEDAW Task Force expired on June 30, 2003.[70]

2. *Gender Analysis.* — The heart of the ordinance is the participatory process that it puts in place, requiring the city to integrate the human rights principles included in CEDAW and CERD into its policies, programs, and budgetary decisions.[71] To further this objective, city agencies are selected to undergo gender analysis and human rights training,[72] with the aim not to produce another departmental report, "but to put a process in motion that will integrate gender into policy decisions, program planning, and employment on an ongoing basis."[73] The COSW and the Task Force define gender analysis as a "framework for analyzing the cultural, economic, social, civil, legal, and political relations between women and men," noting that "[t]his framework takes into account the important links between gender and other social relations such as race, immigration status, language, sexual orientation, disability, age, and other attributes."[74] Through participation in the gender analysis, the agencies "become skeptics and form the habit of asking why problems occur, what larger social conditions contribute to the problem, and who can help assist in solving the problem."[75]

In March 1999, the COSW hired the consulting group Strategic Analysis for Gender Equity (SAGE) to work with the Task Force to develop and implement gender analysis guidelines together with agencies selected to undergo gender analysis.[76] The guidelines were developed through a participatory process, in which SAGE worked closely with the selected agencies, COSW staff members, the Task Force, organized labor, and community groups.[77] SAGE's role in developing the gender analysis guidelines was instrumental, since "[t]o monitor action units, central authorities must first develop metrics that indicate the quality of deliberative processes (e.g. reporting requirements) and also . . . . develop meth-

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69. San Francisco Comm'n on the Status of Women, CEDAW Task Force Meeting Minutes (Oct. 23, 2002), available at http://www.sfgov.org/site/dosw_page.asp?id=11245 (on file with the *Columbia Law Review*).

70. See San Francisco Comm'n on the Status of Women, CEDAW Action Plan (2003), available at http://sfgov.org/site/cosw_page.asp?id=17146 (on file with the *Columbia Law Review*).

71. S.F., Cal., Admin. Code ch. 12K.4(a).

72. Id. ch. 12K.4(a)–(b).

73. San Francisco CEDAW Task Force/Comm'n on the Status of Women, Guidelines for a Gender Analysis: Human Rights with a Gender Perspective 5 (2000), available at http://www.ci.sf.ca.us/site/uploadedfiles/cosw/cedaw/guidelines.pdf (on file with the *Columbia Law Review*) [hereinafter Guidelines].

74. Id. at 3.

75. Garrett, supra note 33, at 125.

76. Gender Analysis, supra note 66, at 3.

77. Id.

ods to collect this data."[78] While the process was participatory, one participant has described the role of the COSW in the initial stages of development and implementation as "very much the liaison" between SAGE and the agencies, "priming" the agencies, "translating [SAGE's] requests," and gathering information from them.[79]

While the ordinance itself details a framework within which City agencies are to conduct the gender analysis,[80] the process is elaborated upon further in *A Gender Analysis: Implementing the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, a manual made available by the COSW.[81] The gender analysis is intended to assist agencies in evaluating the needs of both the populations they serve and their employees, as well as to facilitate the integration of this information into the agencies' daily operations.[82]

The gender analysis, however, is only one component of a five-step process imposed by the ordinance, designed to lead city agencies "from data collection through implementation and monitoring."[83] The five-step process includes: (1) collecting disaggregated data[84] and reports, (2) conducting a gender analysis using human rights principles, (3) formulating recommendations, (4) implementing recommendations through an action plan, and (5) monitoring the action plan and CEDAW implementation.[85]

The process begins with each department undergoing human rights training so that agency staff can more effectively participate in the gender analysis.[86] Next, agencies review any information they have collected, including raw data on budget, services, and employment, as well as information from employee and community focus groups and surveys. Agencies then hold reflection and brainstorming sessions in which management

78. Fung, Creating Deliberative Publics, supra note 15, at 19.

79. Telephone Interview B (Apr. 10, 2003) (on file with author) [hereinafter Interview B] (interview with participant in the San Francisco CEDAW ordinance implementation process, see supra note 58).

80. S.F., Cal., Admin. Code ch. 12K.4(b) (2001).

81. Gender Analysis, supra note 66.

82. Id. at 2.

83. Guidelines, supra note 73, at 6.

84. The COSW and the Task Force define disaggregated data as "data collected and analyzed by categories," and call for collected data to include, whenever possible, "related categories of race, immigration status, language, sexual orientation, disability, age, and other attributes in order to understand and meet the specific needs of all women and men." Id. at 3.

85. Id. at 6.

86. While some agencies, such as the Arts Commission, trained their entire staff, others, including the Juvenile Probation Department, only permitted their "top management" to be trained. Interview B, supra note 79. The training has varied from agency to agency and is often performed by different individuals—COSW staff members or WILD for Human Rights participants. Id. While WILD for Human Rights trainers have tended to spend "more time and energy on the human rights framework and background," COSW trainers have often "focused a little more on the Guidelines" and "what the various steps [of the gender analysis] were." Id.

and staff analyze this information together, with technical assistance from the COSW. Ultimately, the gender analysis involves reviewing data to identify trends or patterns in terms of gender, race, and other identities, agency best practices, and agency practices that may limit the human rights of women and girls (including an analysis of why these practices exist).[87]

The COSW and the CEDAW Task Force have found "that the very process of conducting a CEDAW gender analysis created an awareness of and sensitivity to gender-related issues" at each of the agencies.[88] While agency staff varied in their understanding of human rights and gender issues,[89] they uniformly "appreciated the human rights 'pro-active' application as being more effective than a reactive discriminatory complaint driven approach."[90] However, in order to account for varying levels of familiarity with human rights issues and to make the gender analysis guidelines more user-friendly, they were revised after the completion of the initial two agency analyses.[91]

3. *Reporting*. — While the San Francisco ordinance seeks to secure compliance through reporting, monitoring, and capacity building, it does not contain a coercive threat. One criticism confronted by drafters of the San Francisco ordinance is that difficulties facing experiments in participatory problem solving—such as resistance to altered decisionmaking processes and failure to institutionalize changed practices—are potentially exacerbated when legislation does not explicitly provide for an enforcement mechanism. However, rather than rely upon theories of enforcement and compliance popular within domestic antidiscrimination law,[92] San Francisco has turned to the arena of international human rights—and in particular a normative model of compliance—for the importation of a regulatory norm.[93]

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87. Guidelines, supra note 73, at 9.

88. San Francisco CEDAW Task Force, Gender Analyses Report: An Overview of CEDAW Implementation in the City and County of San Francisco (2001), available at http://www.sfgov.org/site/dosw_page.asp?id=20401 (on file with the *Columbia Law Review*) [hereinafter Gender Analyses Report].

89. Id. ("While many appreciated a better understanding of what these issues mean and the history of where they come from, most people could not understand how it related to their work.").

90. Id.

91. Most notably, these revisions expanded the focus on budget analysis and increased the timeframe given to complete the analysis (from three weeks to one year). Id.

92. See, e.g., Sturm, Second Generation, supra note 19, at 475–79 ("That approach treats regulation as punishing violations of predefined legal rules and compliance as the absence of identifiable conduct violating those rules.").

93. As Kal Raustiala and Anne-Marie Slaughter have commented, "Explanations of why and when states comply with international law can help . . . provide critical policy guidance for the design of new institutions and agreements." Kal Raustiala & Anne-Marie Slaughter, International Law, International Relations and Compliance 538 (Princeton Law & Public Affairs Working Paper No. 02-2, 2002), available at http://ssrn.com/abstract_id=347260 (unpublished manuscript, on file with the *Columbia Law Review*). Though they were ostensibly writing about the impact of international compliance theory

A normative model of compliance contends that compliance is premised upon the "persuasive power of legitimate legal obligations" or, in other words, motivated by the internalization of rules and norms.[94] This approach to compliance strikes a balance between its coercive and constitutive powers.[95] Proponents of this model argue that "the discursive interpretation, elaboration, application, and enforcement of . . . rules, accomplished through mostly verbal interchange, is at the heart of the compliance process."[96] Norm internalization is facilitated by a series of repeated interactions that generate legal rules. Eventually, "this iterative process leads to the reconstitution of the interests and identities of the participants."[97] Compliance is thus promoted through participatory deliberation, mechanisms of transparency, and capacity building rather than coerced by anticipation of enforcement.[98]

The San Francisco CEDAW ordinance, then, like the United Nations human rights regime it is based upon, does not compel city agencies to follow through on their action plans, but, through monitoring and reporting requirements, seeks to "shape and transform" participants in the problem-solving process.[99] Each agency writes a report summarizing key findings in terms of its data and analysis to be viewed by the COSW and the CEDAW Task Force, as well as made available to the public.[100] The

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on future regulatory efforts within the international arena, the same could be said for the relevance of international compliance theory to domestic regulatory innovations. For criticisms of weak or deficient enforcement procedures directed towards the United Nations human rights regime, see Christof Heyns & Frans Viljoen, The Impact of the United Nations Human Rights Treaties on the Domestic Level, 23 Hum. Rts. Q. 483, 488 (2001).

94. Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, 111 Yale L.J. 1935, 1955 (2002).

95. See id. at 2020 (contending that observed compliance results from a number of factors including pressure to observe norms and recognition of legitimate legal obligations); Harold Hongju Koh, Why Do Nations Obey International Law?, 106 Yale L.J. 2599, 2659 (1997) (asserting that "transnational actors are more likely to comply with international law when they accept its legitimacy through some internal process").

96. Benedict Kingsbury, The Concept of Compliance as a Function of Competing Conceptions of International Law, 19 Mich. J. Int'l L. 345, 359 (1998). See generally Abram Chayes & Antonia Handler Chayes, On Compliance, 47 Int'l Org. 175 (1993) (discussing flexible framework for measuring overall compliance of nations with their international obligations).

97. Hathaway, supra note 94, at 1960. "Even where ratification of [a] treaty is not motivated by commitment to the norms embodied in the treaty, the act of ratification and the continued fact of membership in the treaty regime may also serve to slowly transform the country's practices as it gradually internalizes the norms expressed." Id. at 2022.

98. Raustiala & Slaughter, supra note 93, at 543.

99. Harold Hongju Koh, The 1998 Frankel Lecture: Bringing International Law Home, 35 Hous. L. Rev. 623, 629 (1998).

100. Guidelines, supra note 73, at 9. The ordinance's reporting requirement is one means of achieving regulatory accountability and also encourages participation. Indeed, "[a]dministrative reporting requirements build routines for deliberation and oblige it by requiring local units to submit plans, usually in standardized formats, that document their proposals and justifications." Fung, Creating Deliberative Publics, supra note 15, at 18.

Task Force makes recommendations for each agency based on these reports, and the agencies are also instructed to seek input from the public, unions, and community groups.[101] Using this feedback, each agency must next formulate recommendations for agency change.[102] The COSW staff works with each agency to develop this action plan, which should include an outline of specific steps to be taken, delegation of identified tasks, a detailed budget, identification of human resources needed, and a time frame for implementation.[103]

This action plan is then submitted to the San Francisco Board of Supervisors and the CEDAW Task Force, and a public hearing is scheduled before the Finance Committee of the Board of Supervisors. Lastly, the Task Force establishes a timetable for review and monitoring of action plan implementation.[104] The designated CEDAW ordinance liaison from each agency must report annually to the Task Force on the progress and implementation of its action plan. The Task Force, in turn, reports every six months to the Mayor, the Board of Supervisors, and the COSW on developments in the local implementation of CEDAW.[105]

C. *Results of Ordinance Implementation to Date*

Although a detailed study of the effects in San Francisco of CEDAW ordinance implementation to date is beyond the scope of this Note, a close read of the reports made available both by the COSW and participating agencies indicates that agencies have taken concrete and significant steps in response to completed gender analyses. However, this does not mean that the city has fully and adequately responded to the mandate of the ordinance. Individual agencies have developed and implemented action plans generated in collaboration with the COSW and the CEDAW Task Force, but it appears that some have chosen merely to add services

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101. Public participation in the regulatory process "fosters a type of citizenship and buy-in that result when members of the public take the time to be involved in making their government work and seeing the decisions made" and "provides direct accountability since the agency has to tell the people what it is up to and justify why it is taking the action it is." Philip J. Harter, In Search of Goldilocks: Democracy, Participation, and Government, 10 Penn St. Envtl. L. Rev. 113, 119 (2002). Unfortunately, one key participant in the San Francisco implementation process has stated that so much energy went into creating the Guidelines for Gender Analysis "that it did not go into educating the public." Interview B, supra note 79. As a result, "even a great majority of people who know [what] CEDAW [is] don't understand what it means or know what the human rights framework is." Id.

102. Guidelines, supra note 73, at 13–14. Initially, the question of whether the agencies themselves would look at the data they had gathered, as well as the analyses they had performed, and make their own recommendations—as opposed to the COSW doing this for them—was controversial. Ultimately, "the departments did make their own recommendations, although they did it sometimes with a lot of help from [the COSW] and then [the COSW] did often either critique their recommendations or come up with [its] own." Interview B, supra note 79.

103. Guidelines, supra note 73, at 14.

104. Id. at 13–14.

105. Id. at 15.

rather than to change their practices. Finally, while recent citywide policy and budget analyses reflect an attempt to bring all city agencies into the gender analysis process, the city has not yet institutionalized a comprehensive mechanism for data gathering and analysis, nor for benchmarking best practices.

1. *Gender Analyses of Individual Agencies.* — The first two city agencies selected to undergo gender analysis were the Department of Public Works and the Juvenile Probation Department. The next four agencies selected were the Adult Probation Department, Arts Commission, Department of the Environment, and Rent Stabilization Board.[106] These initial analyses revealed a need for education on human rights within the agencies,[107] an absence of comprehensive data helpful in assessing gender equity,[108] a lack of effective recruitment efforts for a diverse workforce,[109] a need to create meaningful work-life policies,[110] and a need to provide "professional development and training opportunities" for all employees.[111]

A review of agency action plans suggests that the agencies were responsive to these inadequacies. The Rent Board, for example, planned to revise its service evaluation form to reflect disaggregated data, to track service recipients in order to conduct analyses along race and gender lines, and to add domestic violence to its violence prevention employee policy.[112] Recommendations for Adult Probation Department practices included increasing training for Domestic Violence Probation Officers, tracking domestic violence cases and re-offenses, and evaluating its communication with victims and survivors of domestic violence.[113] And fi-

106. Gender Analyses Report, supra note 88.

107. Gender Analysis, supra note 66, at 6.

108. Id. Interestingly, a recently defeated ballot initiative in California, Proposition 54, proposed to ban the collection of some disaggregated data. Proposition 54, also known as the Racial Privacy Initiative, would have prohibited state and local governments "from classifying people according to race, ethnicity, color or national origin, with certain exceptions, such as for medical research or to meet court decrees and federal requirements." Jim Sanders, Racial Data Battle Line Drawn, Sacramento Bee, Aug. 10, 2003, available at http://www.sacbee.com/content/politics/story/7198564p-8145418c.html (on file with the *Columbia Law Review*); see also Cal. Proposition 54, Classification by Race, Ethnicity, Color, or National Origin (defeated 2003) (to have been enacted as Cal. Const. art. I, § 32), available at http://holmes.uchastings.edu/initiatives.pdf/933.pdf (on file with the *Columbia Law Review*). The initiative was defeated on October 7, 2003. Rebecca Trounson & Nancy Vogel, Propositions 53 and 54: Both Ballot Measures Go Down in Defeat, L.A. Times, Oct. 8, 2003, at A26.

109. "Each of the six departmental gender analyses exposed the fact that the City and County of San Francisco lacks an energetic recruitment process." Gender Analyses Report, supra note 88.

110. Importantly, available data illustrated that "when work-life policies are in place, they are very effective in the retention of valuable employees, boosting morale, and offering flexibility in both staffing and customer service and cost savings." Id.

111. Id. at 3.

112. Id. at 7–8.

113. Id. at 10–12.

nally, the Juvenile Probation Department sought to explore the possibility of creating an on-site girls' unit staffed by employees trained to work exclusively with young women, increase mental health assessment and services for detained girls, and provide additional gender-specific services for young women (including services for "mental health, sexual assault, domestic violence, parenting and pregnancy prevention, delinquency prevention . . . , substance abuse prevention, education, and transition planning").[114]

As noted above, the fact that most of the agencies had not previously collected comprehensive data—and those that did found it difficult to disaggregate the data by gender, race, and other attributes—posed a major obstacle to gender analysis participants.[115] The COSW and the CEDAW Task Force found that the "lack of detailed and comprehensive data made it impossible to determine if there is bias or even trends in usage that accompany gender differences."[116] Agency staff also raised concerns about the legality of asking for the sort of confidential information necessary to disaggregate data, and it has since been decided that "[s]ome legal and political issues must be studied before data collection practices can change citywide."[117] This is a problem that San Francisco has yet to solve, and it should be addressed earlier and more explicitly in jurisdictions seeking to enact similar legislation.

2. *Citywide Policy Reports*. — Implementation of the CEDAW ordinance and the gender analysis process it establishes prompted the COSW to undertake two citywide policy analysis initiatives. The first study and subsequent report focused on work-life policies and practices in city agencies, and the second study and report identified the particular needs of girls within San Francisco.

a. *Work-Life Policies and Practices*. — The COSW surveyed sixty-two city agencies on their work-life policies and practices in January 2001, and forty-one agencies responded.[118] The survey defined work-life policy as "any program that increases an organization's ability to integrate the needs of work and personal life (e.g., self-care, health care, child care, elder care, domestic partner care, education and study, personal life interests)."[119] In September 2001 the COSW issued the *Work-Life Policies & Practices Survey Report*, an in depth analysis of the survey results.[120] The purpose of the study was to assess existing work-life policies and programs

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114. Id. at 13.

115. Gender Analysis, supra note 66, at 4.

116. Id.

117. San Francisco Comm'n on the Status of Women, CEDAW Task Force Meeting Minutes (July 20, 2000), at http://www.sfgov.org/site/cosw_archive_index.asp?id=11333 (on file with the *Columbia Law Review*).

118. See Ann Lehman & Jennifer Mitchell, San Francisco Dep't on the Status of Women, Work-Life Policies & Practices Survey Report 15 (2001), available at http://www.sfgov.org/site/cosw_page.asp?id=10798 (on file with the *Columbia Law Review*).

119. Id. at 8.

120. Id. at 7.

within city agencies, to evaluate both the advantages and disadvantages of these practices, and to raise awareness about them.[121] The report does not make recommendations as to best practices, noting that such proposals will be included in a future report, along with "an assessment of employees' needs for work-life programs."[122]

The COSW's analysis of survey data highlights four key points concerning the relationship between work-life and family-friendly policies; the viability of telecommuting; gendered implications of work-life policies; and the connection between organizational culture and work-life practices.[123] First, the benefits of work-life policies are not limited to employees with families, but instead help all employees "to deal with the stresses they confront in their lives and the impacts those stresses have on their job performance."[124] Second, as many agencies expressed concern for the liability and management issues raised by telecommuting, the report recognizes that to institute successful work-life policies, agencies must cultivate "cultures of flexibility" and "look beyond any one [work-life] practice."[125] Third, although child rearing and housework primarily remain the responsibility of women, work-life policies "help women and men to challenge assumptions of a gender-based division of labor."[126] And fourth, while agencies should strive to maintain flexibility, a systematic—and not merely ad hoc—approach to work-life practices promotes the success of work-life policies.[127]

b. *Girls in San Francisco.* — The COSW completed *A Report on Girls in San Francisco: Benchmarks for the Future* in April 2003.[128] While the report acknowledges that it is only a first step in identifying and addressing the varied needs of girls in San Francisco, it aims to serve as "a catalyst for change" and "a stimulus for policy research and implementation."[129] It seeks to offer "a detailed and comprehensive description of the status of girls in San Francisco" and "to provide a benchmark against which subsequent progress can be measured."[130] The report was also intended to serve as "a single resource for information about girls," making the information it gathered more standardized than information gathered from "[myriad] different agencies, each with [its] own data collection methods," and more readily accessible.[131]

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121. Id.
122. Id.
123. Id. at 13–14.
124. Id. at 13.
125. Id.
126. Id. at 13–14.
127. Id.
128. Lehman & Sacco, supra note 3. Impetus for the report was also provided by the Out of Sight/Out of Mind Girls in the Juvenile Justice System (1996–1998) Task Force, which was staffed by the Department on the Status of Women. Id. at 4.
129. Id. at 16.
130. Id.
131. Id.

The report found that minority girls in San Francisco are disproportionately represented in both the child welfare and juvenile justice systems.[132] The COSW declined to make final recommendations on how the city should respond to this finding, though stating that there exists "a clear need to review existing services available and their effectiveness for this population of girls," as well as for the child welfare and juvenile justice systems to "coordinate [their] services and resources."[133]

3. *Gender Analyses of Budget Cuts.* — In response to the positive changes effected by participating agencies, the San Francisco Board of Supervisors recently passed the CEDAW Gender Analysis Resolution, urging city agencies to conduct a gender analysis of their budget cuts.[134] The resolution requests that city agencies, "to the extent possible, . . . quantify the impact of the proposed ten percent Fiscal Year 03–04 budget cuts on employment and services to the public, aggregated by gender, race, and other identities" prior to passing the information along to the Board of Supervisors and the COSW.[135]

The CEDAW Gender Analysis Resolution marks the city's first effort to draw all of its agencies into the gender analysis process.[136] This resolution is also significant in that, rather than set aside the directive of the ordinance due to current budget crises, it highlights the unwavering commitment of the city government to the CEDAW ordinance and the issues it addresses in the face of the economic difficulties plaguing the city.[137]

The COSW has received responses to the resolution from sixteen agencies, two of which—the Department of Human Services and the Department on the Status of Women—noted that women, and in particular, women of color, would be "severely affected" by the proposed budget cuts.[138] However, the majority of responsive agencies "did not think the

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132. Id.

133. Id.

134. Res. 249-03 (S.F. Bd. Supervisors 2003), available at http://www.sfgov.org/site/uploadedfiles/bdsupvrs/resolutions03/r0249-03.pdf (on file with the *Columbia Law Review*) [hereinafter Resolution]. Additionally, a bill has been introduced in the California state legislature proposing that the legislature "enact legislation to adopt the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to ensure that state departments and agencies adhere to its principles in the implementation of state policies and programs." A.B. 1342, 2003 Assem., Reg. Sess. (Cal. 2003), available at http://www.leginfo.ca.gov/pub/bill/asm/ab_1301-1350/ab_1342_bill_20030221_introduced.pdf (on file with the *Columbia Law Review*).

135. Resolution, supra note 134.

136. See id. (urging "all city departments" to quantify the impact of budget cuts).

137. See Rachel Gordon, City's Budget Woes May Lead to State of Emergency, Mayor Says, S.F. Chron., Jan. 31, 2003, at E3 (describing city budget crisis and predicting future cuts in jobs and services); Rachel Gordon, Mayor Signs $4.9 Billion S.F. Budget, S.F. Chron., Aug. 1, 2003, at A25 (detailing layoffs, pay cuts, and increases in fees for city services under mayor's new spending plan).

138. San Francisco Comm'n on the Status of Women, Summary of CEDAW Gender Analyses of Budget Cuts 2 (2003), at http://www.sfgov.org/site/dosw_page.asp?id=19721 (on file with the *Columbia Law Review*). The sixteen responsive agencies are the Arts Commission; Board of Supervisors; Department of Building Inspection; Ethics

budget cuts would have a disparate impact on any gender, race or other identities," nor did they anticipate any major layoffs or reductions in services.[139] In total, based on information provided by the sixteen reporting agencies, sixty-five women and fifty men—"primarily employees of color"—will be laid off, and services to women, seniors, and limited- and non-English speakers will be impacted.[140]

III. The New York City Human Rights Initiative: Diffusion of the San Francisco Model

San Francisco's CEDAW ordinance experiment has encouraged efforts to pass similar legislation in Los Angeles, San Jose, Santa Rosa, Seattle, Chicago, Atlanta, Boston, and New York City.[141] This Part contemplates diffusion of the San Francisco model, urging cities implementing similar legislation to ensure the context-specificity of the regulatory scheme they seek to establish. Part III.A examines one possible diffusion strategy for implementation of a similar ordinance in New York City, in order to illustrate the shortcomings of diffusion through replication. Part III.B then begins the crucial task of formulating questions about the San Francisco CEDAW ordinance that may be helpful to other cities in developing a successful strategy for diffusion.

A. *Pitfalls of Diffusion Through Replication*

1. *The New York City Human Rights Initiative.* — In New York City, a coalition of nonprofit organizations (the Coalition) seeks to enact an ordinance similar to that of San Francisco, tentatively titled "The New York City Human Rights Initiative." The Coalition is currently coordinated by Amnesty International's USA's Women's Program, the Urban Justice Center's Human Rights Project, the Women of Color Policy Network at New York University's Robert F. Wagner Graduate School of Public Service, the NOW Legal Defense and Education Fund, and the American Civil Liberties Union, and is collaborating with members of the New York City Council in hopes of introducing the legislation there within the

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Commission; Fine Arts Museum of San Francisco; Human Rights Commission; Department of Human Services; Medical Examiner; Police Department; Port of San Francisco; Department of Parking & Traffic; Department on the Status of Women; Adult Probation; San Francisco International Airport; San Francisco Redevelopment Agency; and Department of the Environment. Id. at 2–3.

139. Id. at 2.

140. Id. at 3.

141. WILD for Human Rights, CEDAW Around the U.S., available at http://www.wildforhumanrights.org/cedaw_around_us.html (last visited Feb. 1, 2004) (on file with the *Columbia Law Review*). On December 19, 2003, the Los Angeles City Council unanimously passed a CEDAW ordinance aiming "to identify discrimination in employment practices, budget allocation and in the provision of direct and indirect services to residents of the city and to remedy that discrimination." Press Release, Los Angeles Councilmember Eric Garcetti, Garcetti Wins Unanimous Passage of Women's Rights Policy (Dec. 19, 2003) (on file with the *Columbia Law Review*).

year.[142] The Coalition is also "conducting workshops and presentations to educate local grass roots and advocacy organizations about the campaign . . . as well as soliciting input from these groups as to what they would like this legislation to achieve."[143] It is hoped that the ordinance will "provide specific guidelines and tools that incorporate human rights principles, create preventative measures, enable more effective public participation and, ultimately, improve the quality of life for all New Yorkers."[144]

While it is not yet possible to study the New York Human Rights Initiative, as efforts to draft and enact the ordinance are ongoing, it is helpful to consider one aspect of the Coalition's strategy for diffusion of the San Francisco model. In particular, this section focuses on the Coalition's eventual selection of a facilitation and monitoring body for the ordinance. The facilitation and monitoring body, located within city government, would be responsible for assisting agencies in ordinance implementation, as well as for monitoring the adequacy of their responses. This selection process is especially important because the COSW, in its role as the facilitator and monitor of the San Francisco CEDAW ordinance, served as the engine of the entire regulatory endeavor. One possible strategy would target the New York City Commission on Human Rights as a potential site;[145] however, the apparent incompatibility of the agency's rule-enforcement culture and the participatory problem-solving approach of the proposed ordinance cannot be overlooked.

2. *Current Role of the New York City Commission on Human Rights*. — The New York City Commission on Human Rights (CCHR) and the City Law Department are the two local agencies granted authority to prevent and remedy discrimination by the New York City Human Rights Law.[146]

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142. Making Human Rights Meaningful, supra note 53.

143. Id.

144. Id.

145. Interview C, in New York, N.Y. (Apr. 11, 2003) (on file with author) (interview with member of the New York City Human Rights Initiative Coalition, see supra note 58).

146. Comm. on Civil Rights, Assoc. of the Bar of the City of N.Y., It Is Time to Enforce the Law: A Report on Fulfilling the Promise of the New York City Human Rights Law 1 (2001), available at http://www.abcny.org/rep_report.html (on file with the *Columbia Law Review*) [hereinafter ABCNY Report]. The New York City Human Rights Law is codified in the New York City Administrative Code. N.Y. City, N.Y., Admin. Code tit. 8 (2001). At the state level, agencies empowered to prevent and remedy discrimination include the New York State Division on Human Rights and the New York State Attorney General's Office. Federally, discrimination is dealt with by the Equal Employment Opportunity Commission, the Department of Housing and Urban Development, the Civil Rights Division of the Department of Justice, the United States Attorney's Office for the Southern and Eastern Districts of New York, and the Office of Civil Rights in various federal agencies (including Education and Health and Human Services). See ABCNY Report, supra, at 1–2 & n.3.

While the New York State Human Rights Law prohibits discrimination in employment, housing, and public accommodations on the basis of age, race, creed, color, national origin, sex, or marital status, N.Y. Exec. Law §§ 290–301 (McKinney 2001), the New York City Human Rights Law offers broader protections, prohibiting discrimination on the basis of actual or perceived race, color, creed, age, national origin, alienage or citizenship,

The New York City Human Rights Law grants the CCHR the "power to eliminate and prevent discrimination from playing any role in actions relating to employment, public accommodations, and housing and other real estate."[147] The CCHR investigates and prosecutes an average of approximately 1000 complaints per year of discrimination in employment, housing, and public accommodations, as well as bias-related harassment.[148] In addition, the CCHR "initiates investigations and prosecutions of systemic [City] Human Rights Law violations."[149] The Law De-

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gender, sexual orientation, disability, marital status, or arrest record. N.Y. City, N.Y., Admin. Code § 8-101. Although the New York City Human Rights Law provides more expansive protection against discrimination than state or federal law, local antidiscrimination laws are often underenforced and thus ineffective. See generally Chad A. Readler, Note, Local Government Anti-Discrimination Laws: Do They Make a Difference?, 31 U. Mich. J.L. Reform 777 (1998) (arguing that local government human rights agencies are rarely used and have a limited impact due to underfunding and lack of appropriate remedial regimes).

147. N.Y. City, N.Y., Admin. Code § 8-101. Amendments to the law in 1991, 1993, 2001, 2002, and 2003 broadened its protections, making them more robust than those contained in federal law. The 1991 amendments increased the reach of

> reasonable accommodation and other disability protections; the scope of vicarious liability for acts of employees and agents; the circumstances under which punitive damages are imposed; the imposition of individual liability for one's own discriminatory acts; the allocation of burdens in disparate impact cases; the scope of public accommodations coverage; and a limitation on housing units excluded from coverage under the statute.

ABCNY Report, supra note 146, at 4–5. The 1993 amendments expanded the remedies available for incidents of bias-related violence and harassment. See New York, N.Y., Local Law No. 11 (1993), available at http://home.nyc.gov/html/cchr/pdf/ammend1993.pdf (on file with the *Columbia Law Review*). The 2001 amendment expanded the law to prohibit employment discrimination against victims of domestic violence. See New York, N.Y., Local Law No. 1 (2001), available at http://home.nyc.gov/html/cchr/pdf/ammend2001.pdf (on file with the *Columbia Law Review*). The 2002 amendment broadened the law's gender-based protection, making clear that discrimination based on an individual's actual or perceived sex, and discrimination based on an individual's gender identity, self-image, appearance, behavior, or expression violates the New York City Human Rights Law. See New York, N.Y., Local Law No. 3 (2002), available at http://home.nyc.gov/html/cchr/pdf/ammend2002.pdf (on file with the *Columbia Law Review*). Finally, the 2003 amendment altered the law to require reasonable accommodation in employment of needs of victims of domestic violence, sex offenses, or stalking. See New York, N.Y., Local Law No. 75 (2003), available at http://home.nyc.gov/html/cchr/pdf/ammend2003.pdf (on file with the *Columbia Law Review*).

148. City of New York, Mayor's Management Report 193 (Fiscal Year 2003), available at http://www.nyc.gov/html/ops/pdf/2003_mmr/0903_mmr.pdf (on file with the *Columbia Law Review*).

149. Id. In fiscal year 2003, the CCHR's annual caseload was lowered by 79%, to 738 cases, including 291 new cases filed. Id. The agency "closed 3,076 cases, more than doubling the 1,305 cases closed in Fiscal 2002." Id. During fiscal year 2003, the CCHR settled 153 cases, negotiated 121 accessibility modifications, and "referred 21 cases in which probable cause for discrimination ha[d] been found to the Office of Administrative Trials and Hearings." Id. at 194.

partment is exclusively responsible for cultivating and prosecuting cases of pattern-and-practice discrimination.[150]

In 2001, the Committee on Civil Rights of the Association of the Bar of the City of New York (ABCNY) issued a report detailing the prevalence of discrimination in the City, the crippled state of the CCHR, and the need for major reform within the agency.[151] The report described the CCHR as crippled by budget cuts, understaffed, and overworked. It went on to outline the failures of the agency—including insufficient information gathering and a limited capacity for deterrence—as well as to make suggestions for its rejuvenation. Suggestions for improving the CCHR included more vigorous enforcement of the City Human Rights Law, a focus on the development and prosecution of systemic discrimination cases, better collaboration between city agencies, and increased publicity around the City Human Rights Law and the role of the CCHR. The authors emphatically supported reframing discrimination as a law enforcement issue,[152] arguing that the threat of sanction is necessary to improve deterrence.[153]

In response to the severity of the criticisms leveled by the ABCNY report, Mayor Michael R. Bloomberg signaled a commitment to revitalizing the CCHR and to preventing and combating discrimination within the city by revamping the CCHR, increasing its budget,[154] and responding to several of the proposals put forward in the ABCNY report.[155] The Mayor was particularly enthusiastic about appointing Patricia L. Gatling

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150. N.Y. City, N.Y., Admin. Code § 8-401.

151. See generally ABCNY Report, supra note 146.

152. Id. at 31 ("Only in the discrimination area is the typical [enforcement] approach one of 'all carrot' [and no stick]. This . . . has not had an impact on reducing or remedying discrimination, and there is no reason to expect that it will."). The report concluded that, "One lesson stands out: it is impossible to prevent and remedy discrimination effectively unless the tools employed in the effort include a sustained commitment to confront discrimination as a law enforcement problem as serious as any other." Id. at 3.

153. Id. ("[A] credible threat that the law is going to be enforced is essential to creating a deterrent that actually contributes to modifying behavior.").

154. Michael Cooper, Languishing Civil Rights Agency Gets New Life Under Bloomberg, N.Y. Times, Jan. 3, 2003, at A1 ("Mayor Michael R. Bloomberg has doubled the number of investigators and increased the budget of the [Human Rights Commission]."). While the agency's budget remains only one hundredth of one percent of the city's annual budget, the increase has permitted the CCHR to hire six new attorneys, which has been instrumental in reducing the agency's backlog of complaints. Sam Dolnick, Rights Revival? One City Agency That Didn't Take a Budget Cut, Village Voice, May 8–14, 2002, at 24 ("[T]he commission's budget is tiny—$7.8 million, only one hundredth of 1 percent of the city's budget.").

155. See Cooper, supra note 154 ("Mr. Bloomberg has made the commission a priority from the start."); Dolnick, supra note 154 ("In a dramatic departure from his predecessor's strategy, Bloomberg has proposed a modest budget increase in the [CCHR's] law enforcement budget . . . ."); Editorial, Mike Spends More . . . , N.Y. Post, Jan. 6, 2003, at 24 [hereinafter Post Editorial] ("[E]ven as city agencies across the board . . . are being forced to tighten their belts, Mayor Bloomberg is pumping up—of all things—the Human Rights Commission.").

to chair the CCHR, characterizing her as an experienced prosecutor determined to get serious about enforcement of the City Human Rights Law.[156] Commissioner Gatling echoed Mayor Bloomberg's public resolve to strengthen the city's antidiscrimination measures, informing the City Council that "[c]reating and maintaining an open city in terms of housing, lending, employment, and public accommodations is a critical part of attracting businesses and individuals to New York City and keeping them here."[157]

In February 2002, when Commissioner Gatling was appointed, the CCHR had a backlog of approximately 5000 cases. Within a year she and her staff were able to cut that figure down to under 1000.[158] Mayor Bloomberg has attributed this success to the CCHR's commitment to "thoroughly reviewing the merits of all 5,000 cases, retraining attorneys and investigators, and beginning complaint investigations at the intake stage, rather than waiting several months until all legal documents are received."[159] To the extent that concerns about the agency's performance remain,[160] those concerns would be built into the Coalition's selec-

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156. Prior to serving as Commissioner of the CCHR, Commissioner Gatling served as a Special Attorney General and First Assistant District Attorney for Brooklyn. Press Release, New York City Commission on Human Rights, New NYC Human Rights Commissioner Announces Intensified Focus on Enforcement: Pro-Active Investigations, Educational Outreach, Litigation to Deter Human Rights Abuses (Mar. 4, 2002) (on file with the *Columbia Law Review*). See Post Editorial, supra note 155 ("It speaks volumes about Bloomberg's priorities that in announcing his choices last January of several agency heads, he deemed the selection of Patricia Gatling to chair the [Human Rights] commission 'the most important appointment today' . . . .").

157. Dolnick, supra note 154 (quoting Commissioner Patricia L. Gatling).

158. Cooper, supra note 154.

159. Press Release, New York City Office of the Mayor, Mayor Michael R. Bloomberg Outlines Public Safety and Quality of Life Accomplishments in 2002: City Drives Crime Lower and Quality of Life Higher Despite Budget Cuts and Threat of Terrorism (Dec. 17, 2002), available at http://nyc.gov/html/om/html/2002b/pr333-02.html (on file with the *Columbia Law Review*).

160. For example, a recent report by the Women of Color Policy Network in New York City asserts that current antidiscrimination laws and policies continue to overlook issues faced by women of color, in part, because they do not account for the intersection of race and gender discrimination. According to the report, 81% of poor women in the city are women of color; black and Latina women have the highest average unemployment rates of any group; black females have the highest female arrest rate; and black and Puerto Rican women account for 80% of HIV-related deaths. Walter Stafford & Diana Salas, Women of Color Policy Network, Women of Color in New York City: Still Invisible in Policy iii–iv (2003), available at http://www.nyu.edu/wagner/wocpn/invisibleNew1.pdf (on file with the Columbia Law Review) (the Women of Color Policy Network was established by the Roundtable of Institutions of People of Color, a coalition of nonprofits from Asian, black, Hispanic, and Native American communities, and is housed at the Robert F. Wagner Graduate School of Public Service at New York University). The issues relevant to women of color, who constitute two-thirds of all women in the city, id. at iii, "'slip through the cracks' of legal protection, and the gender components of racism and the race components of sexism remain hidden." Paulette M. Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 Duke L.J. 365, 374 (quoting Slipping Through the Cracks: The Status of Black Women (J. Malveaux & M. Simms, eds.,

tion of the CCHR as the facilitation and monitoring body for the ordinance. More importantly, the Mayor's endorsement of an enforcement approach and the presence of a prosecutor at the helm of the agency clearly signal the regulatory strategy the agency is likely to pursue under current leadership.

3. *The CCHR as Facilitation and Monitoring Body*. — In drafting the New York City Human Rights Initiative, the question of where to locate the facilitation and monitoring body for the ordinance is an important one, and one that must be situated within the political landscape of the city. While the impulse to identify the most prominent agency in the city dealing with the regulatory issue at stake—here, human rights—and designate it as the facilitator and monitor is understandable, this strategy would fail to account for the incongruity of the CCHR's culture and the philosophy of governance essential to the ordinance. In particular, the CCHR's prosecutorial responsibilities would pose a potential role conflict should it serve as the facilitator of a collaborative problem-solving initiative.

Recently, New York City Council members have emphasized the importance of enforcement to lawmakers within the city, asserting that legislation without adequate enforcement lacks impact.[161] This concern with enforcement dovetails with recent statements by Mayor Bloomberg framing discrimination as a law enforcement issue and pledging to improve enforcement of the New York City Human Rights Law.[162] Bloomberg's appointment of CCHR Commissioner Gatling signified to many that "from now on the agency will be focusing on law enforcement rather than mediation or community relations."[163] This view of the appointment was strengthened by Gatling's pledge "to prosecute discriminators to the fullest extent of the law,"[164] and by her presence—along with police and fire officials—at the Mayor's year-end briefing on public safety.[165]

Although on its face the CCHR may appear to be the logical choice to serve as the facilitation and monitoring body for the ordinance, its self-

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1987)). The New York City Human Rights Initiative Coalition believes that "[c]ombining these two treaties will improve city policy for a broader cross-section of New Yorkers, and will be especially effective in countering discrimination against one of the most marginalized populations in the city: women of color." Making Human Rights Meaningful, supra note 53.

161. See Diane Cardwell, Little Things Mean a Lot to the Council, N.Y. Times, Oct. 28, 2002, at B1 ("But there is always the question of enforcement. 'A constant frustration is that you can legislate against something, but if there isn't the enforcement it doesn't make much difference . . . .'" (quoting New York City Council Speaker Gifford Miller)). One city council member has noted that "[i]n many cases, the laws need tightening and clarifying in order to become more enforceable, and with [a] lack of resources, we're always going to be competing one problem against another. But sometimes by tightening and clarifying the law, we can concentrate attention and resources on a problem." Id.

162. See Cooper, supra note 154.

163. Dolnick, supra note 154.

164. Id.

165. Cooper, supra note 154.

conception as primarily a law enforcement agency is inconsistent with the logic of participatory problem solving. The participatory problem-solving approach of the San Francisco CEDAW ordinance depends on the willingness of agencies to identify their problems and to involve a facilitating body in the development of action plans to remedy these problems. Agencies are unlikely to provide this information to a body empowered to use it against them in the context of a lawsuit. The enforcement model thus creates perverse incentives in information sharing.

This does not mean, however, that the CCHR has no role to play in this new regime. There are types of discrimination that the participatory problem-solving model is ill suited to address. This is particularly true where responsible actors are unwilling to remedy flagrant violations. In such contexts, there is a need for more traditional rule enforcement in order to set a normative floor through sanction, as well as to compensate victims. The CCHR is well situated to play that important role. It is improbable, however, that an agency with a law enforcement mandate would be the appropriate facilitation and monitoring body for an ordinance establishing a participatory problem-solving process. The New York Coalition must locate facilitation and monitoring responsibilities for the ordinance in an institution whose mission complements that of the regulatory scheme for which it will be responsible. And ultimately, regardless of what role the CCHR may play in implementing the ordinance, one of the challenges faced by the Coalition in the context of diffusion involves figuring out how adversarial and cooperative enforcement regimes can work together to promote equity.

B. *Developing a Strategy for Diffusion Through Contextualization*

Critical reflection is essential to the success of experiments in participatory problem solving and also to their diffusion. Unfortunately, many regulatory innovations are ad hoc, in that they are "undertaken not with any clear institutional blueprint," nor with the "conceptual vocabulary" of participatory problem solving.[166] "The strength of this 'muddling through' approach is that it responds flexibly, unconstrained by inappropriate preconceived notions."[167] On the other hand, "those who set the reform in motion and operate its machinery never quite step back to contemplate its deeper drivers (e.g. deliberation) and how those might be consolidated into a coherent system."[168]

Ongoing discussion between New York City Coalition members and participants in the San Francisco process has enabled the Coalition to anticipate and address many of the challenges that diffusion of the ordinance presents. Some members of the Coalition have found that when speaking to their counterparts in San Francisco, the "broad strokes" con-

166. Fung, Creating Deliberative Publics, supra note 15, at 44 (footnote omitted).
167. Id.
168. Id.

versations have been helpful; however, they also have found that "the more precise" the conversations about what occurred in San Francisco have become, "the less application" to New York City they have had.[169] Still, the process of extrapolating applicable lessons from the San Francisco experiment provides a necessary occasion for contextualization of the ordinance. Part III.B.1 of this Note plays out one example of critical reflection in which the Coalition could engage, identifying some of the factors that led the San Francisco participants to select the COSW as the facilitation and monitoring body for the ordinance. Part III.B.2 then poses a series of reflective questions that the Coalition—and others seeking to implement similar legislation—might ask in developing principles to guide the selection of a facilitation and monitoring body for the ordinance.

1. *Selecting a Facilitation and Monitoring Body in San Francisco.* — Just as the CCHR might appear to be the logical facilitation and monitoring body for an ordinance promoting human rights in New York City, the COSW seemingly makes sense as the home for an ordinance promoting gender equity in San Francisco. However, the COSW was selected as the facilitation and monitoring body for the San Francisco CEDAW ordinance not merely because of its commitment to women's issues, but on the basis of its long-standing ties to local human rights organizations and its status within the San Francisco government.

a. *Existing Relationships.* — The COSW was initially selected as the facilitation and monitoring body for the San Francisco CEDAW ordinance because some of the commissioners at the time had developed strong ties to local human rights organizations.[170] WILD for Human Rights and Amnesty International, in particular, approached the COSW and asked if it would be interested in working together with the nonprofit organizations involved to enact and implement the ordinance.[171]

b. *Status Within Government.* — Designating a city agency to be the facilitation and monitoring body for the ordinance was clearly strategic in that "government brings access,"[172] and the COSW was an ideal candidate due to its unique position within the San Francisco government. The COSW was started as part of the Human Rights Commission and then, in 1994, was separated and established as a chartered department.[173] This means that the agency does not exist at the pleasure of the mayor and that any challenge to its existence would need to be approved

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169. Interview D, in New York, N.Y. (Apr. 8, 2003) (on file with author) (interview with member of the New York City Human Rights Initiative Coalition, see supra note 58).

170. Interview B, supra note 79.

171. Id.

172. Id. One member of the COSW has commented that "working in city government you understand how city government works, who is in charge of what, what title means what, and who really knows what they are talking about." Id.

173. Id.

by voters. The COSW, then, is both more stable and less vulnerable than many other city agencies.[174]

Additionally, unlike most city agencies, the COSW is permitted independently to comment on legislation. In fact, the COSW is empowered to "[p]romote access and develop policy within City and County government agencies, insuring equality for women and girls," as well as to "[a]dvocate, monitor and propose legislation to improve the quality of women's and girl[s'] lives."[175] Aside from its role as policymaker, the COSW monitors complaints of unlawful and unequal treatment of women and provides "technical assistance, information and referral to individuals, community organizations, businesses and government, related to women's and young women's rights and services."[176] The COSW is not, however, responsible for enforcing any particular law.

The fact that the agency does not engage in rule enforcement, but is instead geared towards structural reform, has been instrumental throughout the CEDAW ordinance implementation process. The COSW has been able to leverage its status as a city agency to convince other agencies that the gender analysis process will work to their benefit. Moreover, the agency's history as an advocate and capacity-builder rather than an enforcer has allowed participating agencies to trust that the COSW is not there publicly to "audit them and make them look bad."[177] And while the COSW does have a coercive tool at its disposal—subpoena power—that power is used not to punish agencies' mistakes, but rather to require participation in information gathering. To date, the COSW has never had to use its subpoena power to obtain information in relation to implementation of the CEDAW ordinance.[178]

2. *Generating Process Principles.* — Participants in new jurisdictions—such as New York City—seeking to enact a similar ordinance do not need to have all the answers to the problems of diffusion up front. For example, successful implementation of the ordinance may require involvement of city agencies and community members in locating and defining the role of an appropriate facilitation and monitoring body as part of the drafting process.[179]

The types of questions that participants might ask in generating principles to guide the selection of a facilitation and monitoring body for the ordinance include the following: What existing agencies have both the credibility and political capital necessary to serve as the facilitation and

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174. Id.

175. San Francisco Comm'n on the Status of Women, What We Do, at http://www.sfgov.org/site/cosw_page.asp?id=10844 (last visited Feb. 1, 2004) (on file with the *Columbia Law Review*).

176. Id.

177. Interview B, supra note 79.

178. Id.

179. See Interview with Susan Sturm, Consultant to the New York City Human Rights Initiative Coalition, in New York, N.Y. (Jan. 10, 2004) (on file with the *Columbia Law Review*).

monitoring body for the ordinance? If a suitable agency is identified, does the agency successfully handle its current functions? Does the agency have a positive connection with the public? Another line of questioning might seek to identify which agencies, if any, are already involved in processes of information gathering and monitoring. Participants might also consider whether one agency should take on the dual roles of facilitation and monitoring, or if it is problematic for the facilitator of the implementation process to have a stake in the process it is responsible for monitoring. These questions are raised but not answered by the San Francisco CEDAW experiment, and future innovators must seek answers for themselves.

This Note declines to put forward specific proposals for diffusion of the San Francisco CEDAW ordinance—to do so would undercut the dynamic of flexibility and context-specificity that is so crucial to the processes the legislation seeks to initiate. However, a key principle for the diffusion of regulatory innovations emerging from an examination of the San Francisco model is that the drafting process itself must mirror the deliberative and participatory values of the regulation it seeks to enact. Moreover, drafting and implementation processes are not mutually exclusive: The exercise of drafting should not only reflect but also shape the norms of the regulatory regime to be implemented.

Conclusion

The San Francisco CEDAW ordinance brings together governmental and nongovernmental actors to foster creative solutions to the persistent problem of public sector discrimination. It promotes the equitable treatment of all persons by the city government, requiring city agencies to assess their hiring practices, provision of services, and budget decisions in order to identify discriminatory trends or patterns in terms of gender, race, and other identities.

The participatory approach to public problem solving adopted by the ordinance is both tailored to the political and social context of San Francisco and responsive to recent experimentation within the field of domestic regulatory law. The ordinance establishes processes of information gathering and analysis, reporting, and monitoring to achieve these ends. Public participation—through hearings, surveys, and representation on the CEDAW Task Force—provides the political pressure necessary to provoke agency action should it not occur through the deliberative processes the ordinance establishes.

Ongoing communication and information pooling between participants in the San Francisco process and innovators in other localities will benefit subsequent CEDAW ordinance experiments. However, mere replication of San Francisco's regulatory design will preclude their success. Should New York City—or other localities—decide to implement an ordi-

nance similar to San Francisco's, governmental and nongovernmental actors must cooperate in designing regulation that responds to local needs and reflects local political culture.