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## ARTICLES

### THE REVOLUTION IN WELFARE ADMINISTRATION: RULES, DISCRETION, AND ENTREPRENEURIAL GOVERNMENT

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*In this Article, Professor Diller examines the tremendous changes in the administrative structure of the welfare system that have occurred since 1996. The new administrative model emerging from welfare reform eschews reliance on rules and instead invests ground-level agency personnel with substantial discretion. This shift redistributes power between welfare recipients and administrators. Central authorities continue to maintain control by channeling the discretion that ground-level officials exercise in order to achieve particular outcomes. This channeling takes place through a variety of means, including performance-based evaluation systems and efforts to redefine the institutional culture of welfare offices. These techniques are part of a broad trend in public administration that seeks to make government agencies function like entrepreneurial organizations. This new model raises serious questions of public accountability. In the new system of welfare administration, critical policy choices are reflected in incentive and evaluation systems rather than formal rules. As policy decisions are made in ways that are less visible, there are fewer opportunities for public input. Moreover, in the new regime the efficacy of administrative hearings as a means of holding agencies accountable to recipients is diminished. Professor Diller suggests several possible means of facilitating public participation and fair treatment in this area. He concludes by urging that scholars, policymakers, and advocates focus their attention on developing new mechanisms to provide effective public participation in administrative policymaking and implementation.*

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## INTRODUCTION

Since the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) in 1996,<sup>1</sup> public discourse about welfare reform has been dominated by the tremendous decline in welfare rolls. Nationally, the number of recipients of Aid to Families with Dependent Children (AFDC) and its successor program, Temporary Assistance to Needy Families (TANF), declined forty-two percent between 1993 and 1998.<sup>2</sup> This decline is generally presented as proof that welfare reform is a great success. Welfare reform is indeed a success if reduction of the welfare rolls is seen as the principal goal. If, however, the goal is improvement of the circumstances in which poor mothers and children live, the evidence is much more ambiguous.<sup>3</sup> Although many former recipients are working, there has been little decline in the overall levels of poverty and there is growing evidence that significant numbers of families are experiencing greater hardship. Despite the robust economy, there has been an increase in the number of households with incomes below fifty percent of the poverty level.<sup>4</sup> In recent years, the average disposable income of the poorest single-parent families actually has declined.<sup>5</sup> Substantial numbers of former recipients report hardships in meeting basic needs.<sup>6</sup>

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<sup>1</sup> Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

<sup>2</sup> Associated Press, *See the Drop in the Rolls* (Sept. 1, 1998) <<http://www.nytimes.com/library/politics/090198welfare-map.html>>.

<sup>3</sup> See Jason DeParle, *Bold Effort Leaves Much Unchanged for the Poor*, N.Y. Times, Dec. 30, 1999, at A1 (concluding that Wisconsin welfare reforms have made "less of a difference in the lives of the poor . . . than much of the public imagined").

<sup>4</sup> See Arloc Sherman, *Childrens' Defense Fund, Extreme Child Poverty Rises Sharply in 1997*, at 3-4 (1999) (reporting 26% increase in number of children in households with incomes that are less than half of poverty level). In Wisconsin, which has experienced the largest decline in its welfare rolls, 50% of former recipients reported that they did not have more money after leaving welfare. See Department of Workforce Dev., State of Wis., *Survey of Those Leaving AFDC or W-2 January to March 1998: Preliminary Report 12* (1999) [hereinafter *Wisconsin Survey*].

<sup>5</sup> See Wendell Primus et al., *The Initial Impacts of Welfare Reform on the Incomes of Single-Mother Families 9* (1999) (presenting statistical data on average incomes of single-mother families). The poorest quintile experienced an average annual loss of \$577 between 1995 and 1997, a drop of 6.7%. See *id.*

<sup>6</sup> According to one national study, one-third of former recipients had to cut the size of meals or skip meals entirely because of lack of money, and more than one-third reported an inability to meet housing costs at some point over the previous year. See Pamela Loprest, *Families Who Left Welfare: Who Are They and How Are They Doing?* 20 (1999). In Wisconsin, the findings were similar. Of former recipients, 37% were behind on their rent and 32% reported having run out of money with which to buy food. See *Wisconsin Survey*, *supra* note 4, at 12-13. Both of these indicators of financial distress were significantly higher among those who had left welfare than among those who still received benefits. See *id.*; see also Mary Corcoran et al., *Food Insufficiency and Material Hardship in*

One of the most surprising things about the way welfare reform has unfolded is that many of the issues important to both the proponents and opponents of reform have not, to date, had a major impact, or have had impacts that are different from those predicted. Despite the enormous attention they received, measures to stem "illegitimacy" have proven largely irrelevant to the process of welfare reform.<sup>7</sup> The focus on out-of-wedlock births has had little impact because few states have chosen to make this issue a major element in their policies.<sup>8</sup> The introduction of time limits on receipt of benefits was a central part of the debate, yet caseloads have tumbled even though in most states recipients have not yet reached the time limits.<sup>9</sup> The shift from an entitlement program to a block grant has had major ramifications but not those that were foreseen. Many observers, myself included,<sup>10</sup> predicted that the imposition of work requirements, coupled with fixed caps on federal funding, would quickly lead to a funding crisis. In actuality, by linking funding levels to amounts for past periods with

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Post-TANF Welfare Families, 60 Ohio St. L.J. 1395, 1412 (1999) (concluding that large numbers of former welfare recipients "do not consistently meet their families' basic needs for food, shelter, and utilities"); David Kocieniewski, Study Finds Mixed Results in Reducing Welfare Roles, N.Y. Times, Oct. 22, 1999, at B6 (reporting that in New Jersey, two-thirds of former recipients remain below poverty line, and "half have experienced serious housing problems and have been evicted, forced to stay in homeless shelters or moved in with friends or family members"). One major study, conducted jointly by programs at the University of California at Berkeley and Yale University, found that welfare reform was pushing children into poor and substandard child care settings. See Growing Up in Poverty Project, Remember the Children: Mothers Balance Work and Child Care Under Welfare Reform 84-89 (2000) [hereinafter Remember the Children].

On the other hand, there are indications of some positive effects. See Virginia Knox et al., Manpower Demonstration Research Corp., Reforming Welfare and Rewarding Work: A Summary of the Final Report on the Minnesota Family Investment Program (2000) <<http://www.mdrc.org/Reports2000/MFIP/MFIPSummary.htm>> (finding that Minnesota Family Investment Program had succeeded in increasing employment, reducing poverty, and by some measures, reducing dependence on welfare benefits).

<sup>7</sup> See Pub. L. No. 104-193, § 101, 110 Stat. 2110, 2110-12 (1996) (congressional findings stressing negative consequences of out-of-wedlock child bearing); Newt Gingrich & Dick Arme, Contract with America 65-71 (1994) (presenting links between illegitimacy and poverty as rationale for proposed welfare reform).

<sup>8</sup> See Thomas Gais & Cathy Johnson, Welfare Reform, Management Systems, and Their Implication for Children, 60 Ohio St. L.J. 1327, 1338-39 (1999) ("[A]side from family caps . . . the states have done relatively little to change marital or reproductive behavior.").

<sup>9</sup> Large numbers of Temporary Assistance to Needy Families (TANF) recipients will begin to hit the time limits between 2001 and 2003. See Local Welfare Reform Implementation: Baseline Data, Work and Employment, Child Care, Transportation, Data and Program Evaluation, Surv. Notes (American Pub. Human Servs. Ass'n, Washington, D.C.), Vol. 1, Nos. 8 & 9, at 1, 2 (1999).

<sup>10</sup> See Matthew Diller, What's Doing in Federal Welfare Reform: Here Come the Block Grants, in Poverty Newsl. (Poverty Law Section, Ass'n of Am. Law Sch.), Sept. 1995, at 1.

high caseloads, the funding formula has resulted in huge surpluses at the state level.<sup>11</sup>

It is likely that there is no single explanation for the decline in caseloads.<sup>12</sup> A significant portion of the reduction is undoubtedly due to the strength of the economy and increases in the minimum wage.<sup>13</sup> However, changes in welfare programs clearly have played a major role. The Council of Economic Advisors has estimated that the shift from AFDC to state TANF programs is responsible for one-third of the decline in the rolls after 1996.<sup>14</sup>

The question, then, is what is it about welfare reform that has caused the rolls to plummet? Surprisingly, this question is not easily answered. It is likely that state work requirements have had an impact. Few states, however, actually have created large-scale work programs for welfare recipients. Declining benefit levels, "family cap" policies, and other changes in policy all have had some impact on the trend.<sup>15</sup> But it is hard to attribute the massive decline in the rolls to these factors: Benefit levels have not plummeted and many states have not adopted family cap rules.

Instead, it appears likely that, to the extent that welfare reform has led to a decline in the benefit rolls, its impact is largely due to changes that are more diffuse yet more profound than specific changes in policy. In fact, welfare reform has led to a quiet revolution in the way that public benefit programs are administered on the ground level.

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<sup>11</sup> See Robert Pear, *States Declining to Draw Billions in Welfare Money*, N.Y. Times, Feb. 8, 1999, at A1 (reporting that most states did not use full allotment of federal welfare grants last year).

<sup>12</sup> See Primus et al., *supra* note 5, at 27-35 (reviewing studies examining reasons for decline in welfare caseloads).

<sup>13</sup> The Council of Economic Advisors has estimated that, between 1993 and 1996, the strong labor market accounted for 26-36% of the decline in caseloads and 8-10% of the decline during the subsequent period. See Council of Econ. Advisors, *The Effects of Welfare Policy and the Economic Expansion on Welfare Caseloads: An Update 2* (1999). The Council attributes an additional 10% of the decline to increases in the federal and state minimum wages. See *id.*

<sup>14</sup> See *id.*

<sup>15</sup> The Council of Economic Advisors developed a model that attempted to disaggregate the effects of different changes in policy. See *id.* at 11-13, 17-18. The model showed that time limits had not altered national caseloads, that family caps tended to *increase* welfare participation, and that work exemption policies had no effect. See *id.* at 17-18. Strict sanction policies were associated with declines in caseloads. See *id.* at 18. The Council cautioned, however, that "[i]n most models that were estimated, a large share of the variation over time could not be explained." *Id.* at 23. The Council noted that it did not attempt to determine the impact of a number of common elements of welfare reform, and that a model that did not attempt to identify specific policy variables better explained the overall trends. See *id.* at 12. Taken as a whole, these findings illustrate the lack of a clear explanation for how welfare reform has led to declining case loads.

These changes have made it more difficult for individuals both to obtain benefits and to retain their eligibility for benefits. They also have shifted the messages communicated by administrators. This shift in messages reflects a profound change in the ideology of public benefit programs and in the image of recipients that they convey.

Observers of the welfare system long have recognized the central importance of administration in the operation of assistance programs.<sup>16</sup> The bureaucracy and administrator's conceptions of their missions have a vital impact on the accessibility of benefits and on the social messages that are communicated by benefit programs. One of the most striking things about the process of welfare reform is that reformers have not overlooked these points. Many states explicitly have targeted the organization and culture of welfare offices for reform.<sup>17</sup> The basic paradigm that has dominated welfare administration for the past thirty years is gradually being displaced. Since the 1960s, the welfare system has operated through a legal-bureaucratic model. Under this model, administrators dispensed benefits in accordance with a fixed set of generally applicable rules. Recipients had a legal entitlement to receipt of benefits and could challenge adverse decisions both administratively and in court. This model is rapidly disintegrating.

The administrative regimes that are replacing this paradigm tend to have a number of common characteristics. The new regimes tend to give much greater power to ground-level employees. These em-

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<sup>16</sup> See Evelyn Z. Brodtkin, *The False Promise of Administrative Reform: Implementing Quality Control in Welfare* (1986); Joel F. Handler & Ellen Jane Hollingsworth, *The "Deserving Poor": A Study of Welfare Administration* (1971); Michael Lipsky, *Street Level Bureaucracy* (1980); see also Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (1983) [hereinafter Mashaw, *Bureaucratic Justice*] (studying administration of disability benefit programs); Anna Lou Dehavenon, *Charles Dickens Meets Franz Kafka: The Maladministration of New York City's Public Assistance Programs*, 17 N.Y.U. Rev. L. & Soc. Change 231 (1989-1990) (lamenting "byzantine bureaucracy," which causes ineffective administration of public assistance); Jerry Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 Cornell L. Rev. 772 (1974) [hereinafter Mashaw, *Management Side*] (examining due process implications of welfare administration management systems); Jerry Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia*, 57 Va. L. Rev. 818 (1971) (describing potential impact of program that would unify administration of welfare benefits); William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 Yale L.J. 1198 (1983) (proposing that more informal, decentralized administration of welfare could be more effective).

<sup>17</sup> One study found that, in the period after July 1995, 88% of counties surveyed reported major changes in the organizational structure and functions of welfare offices. See *Local Welfare Reform: Organizational Structure, Services and Devolution of Authority*, Surv. Notes (American Pub. Human Servs. Ass'n, Washington, D.C.), Vol. 1, Nos. 6 & 7, at 1, 6 (1999).

ployees are accorded broad discretion to make judgments in individual cases. They are encouraged to influence recipients through persuasion and advice and have broader powers to sanction recipients viewed as uncooperative. A system that was principally legal in nature is becoming delegalized, shorn of the rules and procedures that characterize a system of laws.

The accretion of power by ground-level workers may suggest a weakening of control by central authorities. Central authorities, however, have ceded less control than it may appear. Although ground-level workers have much greater authority in relation to recipients, central decisionmakers structure and channel the discretion that is exercised. By manipulating the institutional culture of welfare offices, higher-level decisionmakers can steer the direction of the system as a whole, even when they no longer exert direct control.

This combination of discretion and control is an outgrowth of a broad movement toward the use of private sector management techniques in public administration. In essence, this movement seeks to refashion instruments of government to resemble entrepreneurial organizations that strive to achieve results and customer satisfaction, rather than to improve the performance of particular administrative tasks.

In the field of welfare, this new administrative model communicates very different messages about benefit administration and about those who receive benefits. Under this vision, the public benefits agency views itself as a corporation selling a product; the product in this case is "self-sufficiency." The role of the agency is to cajole people to forego benefits for which they may be eligible. This new model suggests that welfare receipt is a habit that the recipients must kick. Freeing oneself from welfare is presented as analogous to quitting smoking. It is implicitly and often explicitly based on a theory of cultural dependency. This theory posits that recipients are too depressed and unmotivated to take control of their lives and therefore need a strong dose of both exhortation and threats to get them moving. This view implicitly rejects the idea that welfare recipients face external obstacles to achieving self-sufficiency, including underlying economic conditions and barriers to work such as lack of skills, training, education, and child care.

At the same time that the new administrative regime emphasizes the accountability of welfare recipients to administrators, it substantially undercuts the degree to which administrators are accountable to the public and to the individuals whose lives they directly affect. The legal system has developed mechanisms for holding administrators accountable for the policies that they issue and the decisions that they

make. The devices of notice and comment provide for public participation and input into rules before they are issued. The availability of judicial review both reinforces the notice and comment process and provides a measure of substantive review of agency policies. In the new regime, the means by which central administrators direct the agency are frequently not set forth in rules that are subject to these forms of oversight. The system of tangible and intangible incentives through which they exert control is largely insulated from existing means of public input and scrutiny.

In addition, in the new system that is emerging, individual hearings are a less effective means of allowing individuals to contest individual determinations. Many actions taken by workers are not "determinations" that are subject to review. When workers dispense advice, encouragement, and information, or withhold any of these "benefits," the hearing process provides little recourse for unfair treatment. Moreover, in the absence of rules, the new administrative regime provides no assurance of equal treatment. Indeed, the only existing study of the issue found startling disparities between the treatment of African-American and white recipients.<sup>18</sup>

Regardless of whether one agrees with the goals and philosophy of welfare reform, the lack of accountability and potential for unfairness in the new administrative regime are causes for concern. One can favor the new emphasis on work in many TANF programs and still value fair process and public participation in administrative decisionmaking.

As government shifts the way in which it operates, the relevance and effectiveness of existing forms of accountability need to be reevaluated. It well may be that new forms of public input and oversight must be developed. In the rush to examine the results of welfare reform, these questions have received inadequate attention. This Article concludes by offering some possible directions that new forms of accountability might take and proposing that additional study of existing mechanisms and models from analogous fields should be undertaken.

Part I identifies the ways in which methods of ground-level administration embody substantive policy choices in public benefit programs. Because of the decentralized nature of administration in this field, implementation and policy are closely intertwined. Moreover,

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<sup>18</sup> See Susan T. Gooden, *All Things Not Being Equal: Differences in Caseworker Support Toward Black and White Welfare Clients*, 4 *Harv. J. Afr. Am. Pub. Pol'y* 23, 32 (1998) (finding, for example, that "caseworkers encourage education investment among white welfare recipients, but not black welfare recipients"); see also *infra* text accompanying notes 430-34 (discussing these findings).



methods of administration reflect particular conceptions of the purposes and goals of public benefit programs and, correspondingly, assumptions about the nature of poverty and the people whom the programs serve. This Part also describes the two paradigms of benefit administration that have been dominant since the New Deal. The social work model perceived public benefit administration as calling for the exercise of professional judgment, as caseworkers were expected to monitor and supervise the home conditions of recipients. Beginning in the 1960s, the social work model was supplanted by a legal-bureaucratic model, which relied on fixed rules rather than professional judgment. The legal-bureaucratic model emphasized uniformity and predictability rather than individualization.

Part II outlines the new administrative paradigm that is emerging from the process of welfare reform. This new approach is characterized by a return to discretionary forms of administration and an increase in the power that ground-level administrators wield over benefit recipients. Many states using this new approach to ground-level administration deliberately have set out to change the culture of welfare administration as a means of changing the attitudes of recipients. By increasing the authority and discretion of ground-level administrators, reformers have reenvisioned the role of agency personnel as motivators, guides, and overseers of recipients, constantly promoting the message of self-sufficiency. Part II also points out that central authorities seek to direct the system as a whole through the use of funding incentives, training, and performance-based evaluation, rather than through reliance on fixed rules. These techniques are an outgrowth of the movement to incorporate private sector management techniques into the field of government administration.

Part III discusses the implications of these developments in terms of public accountability. The new entrepreneurial model of benefit administration renders many of the existing means of holding administrators accountable to the public either irrelevant or ineffectual. Further, under the new model, discretion is not checked by the norms and ethos of professionalism, which served as a restraint on the social work model. The Article concludes by calling for further study and consideration of new forms of accountability that can serve to make the new administrative model open to public scrutiny and participation.

## I

THE IMPORTANCE OF GROUND-LEVEL BUREAUCRACY  
IN WELFARE ADMINISTRATION*A. Institutional Culture: The Connection Between Administration  
and Policy*

It is difficult to conceive of an area in which the distance between grand policy decisions and ground-level implementation is as vast as in the welfare system. Policy decisions made at the federal level are filtered through a long and decentralized chain down to the welfare centers operated by states or localities. Accordingly, administration, particularly at the ground level, assumes a role of great importance.<sup>19</sup> Policies are implemented through the aggregate actions of literally thousands of officials who take actions with respect to individual cases. This decentralization and fragmentation of administration greatly attenuates the impact that high-level policy decisions have in practice.<sup>20</sup> Reform legislation can come and go with little actually changing on the ground.<sup>21</sup>

For this reason, administration cannot be separated easily from policy. The way that welfare offices are structured and operate becomes as much an instrument of welfare policy as eligibility rules and requirements.<sup>22</sup> An example can serve to illustrate this point. Assume that a decision has been made to reduce the benefit rolls by ten percent. This goal may be accomplished through a variety of means. First, policymakers could change eligibility requirements so that fewer people qualify for assistance. Second, they could lower benefit levels, rendering some individuals financially ineligible and leading others to forego benefits altogether. Third, they could impose conditions on receipt of benefits that similarly render some potential recipients ineligi-

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<sup>19</sup> Indeed, political scientists have pointed out that implementation is an often neglected yet critical component of policy. See Jeffrey L. Pressman & Aaron Wildavsky, *Implementation: How Great Expectations in Washington Are Dashed in Oakland* xxi (3d ed. 1984) ("Implementation in recent years has been much discussed but rarely studied."); James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* 11 (1989) (asserting that traditional focus on "structure, purpose, and resources" of organizations has "caused us to lose sight of what [they] *do* and how the doing . . . is related to attaining goals").

<sup>20</sup> For a discussion of the decentralized and fragmented nature of the American welfare system, see generally Joel F. Handler, *Down from Bureaucracy: The Ambiguity of Privatization and Empowerment* (1996).

<sup>21</sup> See Lipsky, *supra* note 16, at 22 (referring to power of lower-level workers to thwart reform in welfare system).

<sup>22</sup> Michael Lipsky's seminal article, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 Soc. Serv. Rev. 3 (1984), identifies the extent to which basic decisions about public benefits can be embodied in decisions that, at first blush, appear to be solely administrative in nature.

ble or that deter people from applying. Each of these approaches, however, would lead to a public and visible decision to reduce or cut the benefit program itself.

Policymakers, however, can accomplish the same end without changing a single eligibility condition or requirement by making administrative adjustments that have the same effect. For example, they simply could open the welfare centers an hour later each morning and close them an hour earlier. They could relocate centers from poor neighborhoods to central downtown locations. They could multiply the number of appointments necessary to establish eligibility. Carrying this logic further, officials could increase the amount of time applicants must wait for appointments, remove some of the chairs from the waiting rooms, add pages to the application forms, reduce the number and variety of foreign language interpreters, and so forth. With each of these measures a few more people would drop by the wayside, unable to complete the application process successfully. Soon, a reduction in the rolls could be achieved without any alteration of basic eligibility criteria or benefit levels.<sup>23</sup> Indeed, almost all of the decisions of this nature can be made and implemented without passing any law or promulgating any regulation.

Conversely, administrators bent on expanding the reach of public benefit programs can adopt measures that may increase their caseloads greatly without changing eligibility standards. Steps to reduce paperwork, ease verification requirements, expand business hours, and cut the time spent in waiting rooms can result in higher percentages of eligible people actually making it onto the public benefit rolls. It is not difficult to find examples of this kind of administration geared at program expansion. At the same time that the federal government and the states are emphasizing reduction in the welfare caseloads, the Health Care Finance Agency (HCFA) has launched an effort to expand enrollment in Medicaid and the Child Health Insurance Program (CHIP).<sup>24</sup> HCFA is encouraging states to simplify Medicaid and CHIP application forms, to expand the locations at which individuals may enroll, and to accept applications through the

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<sup>23</sup> See Susan Bennett, *No Relief but upon the Terms of Coming into the House—Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter System*, 104 *Yale L.J.* 2157, 2160, 2175-82 (1995) (describing how these kinds of mechanisms are used to regulate flow into homeless shelter system in District of Columbia).

<sup>24</sup> See Health Care Fin. Agency, Letter to State Health Officials (Jan. 23, 1998) <<http://www.hcfa.gov/init/choutrch.htm>> (identifying commitment to enrolling uninsured children in Medicaid and the Child Health Insurance Program (CHIP) and identifying outreach as "high priority for the President, First Lady, and Department of Health and Human Services").

mail.<sup>25</sup> HCFA is also easing financial eligibility requirements by permitting states to award eligibility for fixed twelve-month periods, regardless of changes in circumstances.<sup>26</sup> This approach is similar to the one taken in the "Motor Voter Law," which authorizes voter registration at motor vehicle departments and other public offices.<sup>27</sup>

Some of these administrative levers can be pulled by central offices. Application forms, for example, may be standardized. The siting of offices may be a decision that is made at the county or state level, relatively close to the administrative center. Other administrative decisions, like the number of chairs in the waiting room, are less likely to be dictated from above.

At the heart of the administrative system are the innumerable interactions that caseworkers have with recipients and potential recipients.<sup>28</sup> These interactions are vitally important. Do caseworkers explain the eligibility rules and requirements of the program? If so, how is the explanation provided, and what elements are emphasized? Do caseworkers inform people of other benefits and services to which they may be entitled? Do the workers help applicants obtain necessary documents and forms? Do they allow individuals more time or a second chance to obtain necessary documents? Do they return phone calls? Do they convey signals of approval or disapproval to the clients with whom they deal?<sup>29</sup>

Welfare bureaucracies can, and frequently have, established rules concerning many of these points. For example, regulations can be promulgated requiring the provision of assistance in completing forms or obtaining documents.<sup>30</sup> But the adoption of such rules will not, of its own accord, necessarily lead to changed behavior on the ground

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<sup>25</sup> See *id.*

<sup>26</sup> See *id.* The Health Care Finance Agency (HCFA) has also alerted the states to the possibility of establishing telephone hotlines, translating forms into appropriate languages, using advertising, and placing eligibility workers in hospitals and health centers. See *id.* attachment C. The agency also has advised states to attempt to "de-stigmatize" Medicaid by renaming programs with more upbeat titles, such as "Dr. Dynasaur" or "KIDMED," as a means of promoting a positive image of the program. See *id.* HCFA has suggested that states convince businesses and foundations to offer incentives such as coupons, food, merchandise, or movie passes to families that apply for aid. See *id.*

<sup>27</sup> See National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-1 to -10 (1994 & Supp. IV 1998).

<sup>28</sup> See Yeheskel Hasenfeld, *The Nature of Human Service Organizations*, in *Human Services as Complex Organizations* 3, 17 (Yeheskel Hasenfeld ed., 1992) ("[C]lient-worker relations are at the core of human service organizations.").

<sup>29</sup> See Lipsky, *supra* note 16, at 60-70 (discussing forms of control that street-level bureaucrats exercise over clients).

<sup>30</sup> See, e.g., *Stipulation and Order of Settlement*, *Robinson v. Grinker*, Index No. 40610/87 (N.Y. Sup. Ct. Sept. 29, 1993) (requiring workers to assist applicants in establishing eligibility) (on file with the *New York University Law Review*); 20 C.F.R. § 404.1512(d)

level. Getting thousands of workers to change the way they do business, even in minor ways, can be a daunting task.<sup>31</sup> Lower-level workers inevitably will manage to retain some degree of discretion. As one commentator put it, “[m]anagers try to restrict workers’ discretion in order to secure certain results, but street-level bureaucrats often regard such efforts as illegitimate and to some degree resist them successfully.”<sup>32</sup>

In essence, the question is one of how the workers view their roles. This self-conception is in turn influenced by the interaction of a variety of factors including the preexisting views of workers; the formal goals and rules of the program; the agency’s history, structure, and traditions; and the regime of incentives under which workers operate.<sup>33</sup> In addition, workers rely on coping mechanisms to make their jobs easier. They tend to make decisions and to adopt routines that make it possible for them to process large numbers of cases.<sup>34</sup> All of these factors establish an institutional culture that informs the manner in which workers perform countless activities for which there can be no fixed rules.<sup>35</sup> Indeed, this institutional culture can render formal rules superfluous or ineffective.<sup>36</sup>

The upshot of this discussion is that any analysis of welfare policy that does not take into account issues of ground-level administration

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(2000) (requiring that personnel handling applications for Social Security disability benefits make “every reasonable effort” to obtain information from claimants’ treating physicians).

<sup>31</sup> See Lipsky, *supra* note 16, at 13 (“[T]he position of street-level bureaucrats regularly permits them to make policy with respect to significant aspects of their interactions with citizens.”); Hasenfeld, *supra* note 28, at 18 (“[T]he more rules and regulations the organization promulgates the greater the opportunities for the workers to deviate from them, and the greater the difficulty of monitoring them.”). See generally Herbert Simon, *Administrative Behavior* (2d. ed. 1957) (examining how principles of human behavior influence functioning of business and governmental organizations).

<sup>32</sup> Lipsky, *supra* note 16, at 19 (describing in detail capacity and opportunities of lower-level workers to resist change that limits their autonomy).

<sup>33</sup> See *id.* at 27 (noting that environment in which street-level bureaucrats operate conditions way in which they perceive problems and formulate solutions).

<sup>34</sup> As Evelyn Brodtkin has put it, “[c]aseworkers, like other lower-level bureaucrats, do not do just what they want or just what they are told to want. They do what they can.” Evelyn Z. Brodtkin, *Inside the Welfare Contract: Discretion and Accountability in State Welfare Administration*, 71 Soc. Serv. Rev. 1, 24 (1997); see also Lipsky, *supra* note 16, at 133-56 (describing how street-level bureaucrats routinize their work). Institutional culture, as I use the term, is therefore broader than the ideology or value systems that caseworkers bring to bear on their work. It encompasses the material constraints and incentives under which such workers operate.

<sup>35</sup> See Wilson, *supra* note 19, at 27 (describing organizational culture as “a distinctive way of viewing and reacting to the bureaucratic world—that shapes whatever discretionary authority . . . the operators may have”).

<sup>36</sup> See *id.* at 333-36 (discussing how rules that seek to reduce bureaucrats’ individual discretion can be frustrated by other incentives).

is incomplete. The institutional culture of welfare offices is a key part of welfare policy.

### *B. Paradigms of Welfare Administration*

Ground-level administration is especially important as a means of setting the tone for public benefit programs. The structure and atmosphere of welfare offices sends a message to both clients and the public about the social significance of assistance programs and those who rely on them.<sup>37</sup> Benefit programs can stigmatize, sending a message that recipients are failures who are a drain on society. Conversely, programs can confer benefits in a dignified manner that suggests recipients are worthy of respect. Communicating these messages is a central aspect of American social policy.<sup>38</sup> This social policy sorts those in need into different programs that are funded and administered in different ways. This differentiation enables our society to fine-tune the social judgment that is imposed on each category and establishes what amounts to a hierarchy of programs.<sup>39</sup>

These programs are administered through a number of different paradigms—ways of thinking about the task of dispensing benefits.<sup>40</sup> These paradigms implicitly reflect understandings and judgments about the purposes of the government benefit program in question, the obstacles or threats to the program, and the nature of the clientele whom the program serves. In sum, these paradigms are value-laden and are part and parcel of the social judgments embodied in these programs.

This Section describes the characteristics of the two paradigms that have dominated welfare administration since the 1930s—the social work model, and its successor, the legal-bureaucratic model.

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<sup>37</sup> See Hasenfeld, *supra* note 28, at 11 (“[H]uman service organizations are also ‘moral entrepreneurs,’ influencing public conceptions via the moral categorization of their clients.”).

<sup>38</sup> Murray Edelman has identified this “expressive function” of administrative agencies. See Murray Edelman, *The Symbolic Uses of Politics* 56 (2d ed. 1985).

<sup>39</sup> See Matthew Diller, *Entitlement & Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. Rev. 361, 372-74 (1996) (describing “complex pecking order” of public assistance categories that reflect society’s moral judgment of relative worth); Joel F. Handler, “Constructing the Political Spectacle”: The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History, 56 Brook. L. Rev. 899, 944 (1990) (“[T]he evolution of welfare policy has been, in large part, the process of creating and revising the moral classifications of the poor.”).

<sup>40</sup> See Mashaw, *supra* note 16, at 23-34 (describing three administrative paradigms used by benefit programs).

### 1. *The Social Work Model*

During the New Deal, when the overarching structure of contemporary American social policy was established, and in the years that followed, the AFDC program was administered through a social work paradigm. This paradigm focused on the professional judgment of administrators. During the New Deal the problems of poor women and children were championed by social workers.<sup>41</sup> These social workers brought to bear a casework methodology to the problems of the poor. The issue of income maintenance for poor families was viewed as an outgrowth of the field of child welfare.<sup>42</sup> This orientation was carried over into the AFDC program. Under the child welfare model, the social worker worked with the family to alleviate material, psychological, and moral conditions that placed children at risk.<sup>43</sup> Mothers' pensions and AFDC benefits provided a stream of income that social workers could use to help stabilize and support poor families. Under this approach, each family was viewed as a unique case. Assistance workers viewed their role as working with and supervising the mother to ensure that the children were raised properly.<sup>44</sup>

The substantive rules of the AFDC program reflected this vision of public benefits. Eligibility requirements called for broad subjective assessments. The most famous of these were the "suitable home" provisions adopted by many states. Many states used suitable home requirements to limit eligibility to homes in which the parent or caretaker was of worthy moral character.<sup>45</sup> Once a case was accepted,

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<sup>41</sup> See Linda Gordon, *Pitied but Not Entitled: Single Mothers and the History of Welfare 1890-1935*, at 67-108 (1994). William Simon has described and championed the social work model for the delivery of public benefits. See William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 Md. L. Rev. 1, 37 (1985); Simon, *supra* note 16, at 1200.

<sup>42</sup> See Winifred Bell, *Aid to Dependent Children 25 (1965)* ("The Mothers' Pension programs were traditionally viewed as child welfare measures. They were staffed, to the extent possible, by workers trained in this specialty.").

<sup>43</sup> See Gordon, *supra* note 41, at 175.

<sup>44</sup> See Bell, *supra* note 42, at 153-54 ("[I]t was assumed that social workers with their primary reliance on social casework would dominate and guide [Aid to Dependent Children].").

William Simon points out that this was not the only strand in social workers' thought about public assistance. See Simon, *supra* note 41, at 1. There were influential social workers who repudiated moral supervision and favored a more rights-oriented approach. See *id.* These social workers were influential in the Federal Bureau of Public Assistance, leading to tension between federal and state administrators during the 1940s and 1950s.

<sup>45</sup> See Bell, *supra* note 42, at 29. The American Public Welfare Association (APWA) drafted a model state Aid to Families with Dependent Children (AFDC) law. See *id.* at 29, 204 n.22. The APWA explained the suitable home provision as follows: "The maintenance of proper home environment for dependent children is vital to the success of any child welfare program. The provision for assistance under this Act affords a unique opportunity to raise the standards of home care. This feature should be stressed in the drafting of this legislation." *Id.* at 30.

the suitable home requirement served as a basis for continued oversight of the family's life, necessitating home visits and other means of surveillance.<sup>46</sup> In addition, programs relied on individual budgeting to establish the size of each family's grant, and caseworkers were given broad discretion to determine what each family needed. Grant levels varied with the ages of the children, the household's rent, and the family's need for special grants to buy winter clothing or furniture.<sup>47</sup>

This social work model reached its apogee in the early 1960s. In 1956, Congress amended the Social Security Act to make explicit the authority of states to use AFDC funds for services as well as cash assistance.<sup>48</sup> States responded by revising their programs to reemphasize the central role of individualized casework.<sup>49</sup> Welfare caseworkers were envisioned as possessing a "wide knowledge of social and economic factors, . . . an intimate acquaintance with community resources [and] an understanding of human motivations and skill in effecting change in individual behavior and adjustment."<sup>50</sup> Around the same time, welfare agencies were renamed "departments of social services," emphasizing the package of services rather than cash assistance that recipients would be offered. In 1962, Congress further amended the Social Security Act to reflect this shift in emphasis, providing heightened federal funding for social services and professional staff training.<sup>51</sup>

The vision and rhetoric of the social work model should not be confused with its reality. In her classic study, Winifred Bell showed how states used broad and vague eligibility rules systematically to exclude black families from the program.<sup>52</sup> The welfare rights activists in the late 1960s demonstrated that individualized grants short-changed recipients because workers selectively disclosed the availability of special grants to recipients.<sup>53</sup> Moreover, for all the emphasis on

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<sup>46</sup> See *id.* at 48.

<sup>47</sup> See Gordon, *supra* note 41, at 295 ("ADC designers preferred a family budgeting system to a flat rate because budgeting required casework in which a social worker would help a mother define the family's particular needs and manage the household economy in the most effective way."). "

<sup>48</sup> Social Security Amendments of 1956, ch. 836 § 312(a), 70 Stat. 807, 848-49 (1956) (repealed 1996).

<sup>49</sup> See Bell, *supra* note 42, at 155.

<sup>50</sup> *Id.*

<sup>51</sup> Public Welfare Amendments of 1962, Pub. L. No. 87-543, 76 Stat. 172 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.); see also Mary Jo Bane & David T. Ellwood, *Welfare Realities: From Rhetoric to Reform 8-11* (1994) (describing impact of 1962 amendments).

<sup>52</sup> See Bell, *supra* note 42, at 181-86.

<sup>53</sup> See Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973*, at 46 (1993) ("Some caseworkers would extend special benefits liberally; a caseworker concerned about the public fisc or distrustful of the recipient could deny the



services and casework, it is not clear that either were provided in a systematic way. Understaffed and underfunded, welfare agencies often substituted categorical rules for individualized determinations.<sup>54</sup>

## 2. *The Legal-Bureaucratic Model*

In the late 1960s, the social work model came under attack from both liberals and conservatives. By the early 1970s, a new administrative framework had emerged, one that stressed formal rules of general applicability rather than professional judgment. The system also emphasized centralization over localism, as the federal government took a more active role in establishing both substantive rules and procedural requirements. The welfare system was thus reconceived as a hierarchically ordered legal system, rather than a platform for thousands of individualized professional judgments.<sup>55</sup>

Liberals attacked the social work paradigm on a number of levels. They focused on the ways in which broad discretionary rules left recipients at the mercy of caseworkers.<sup>56</sup> They pointed out that discretion was exercised in patterns that disadvantaged racial minorities.<sup>57</sup> In addition, they attacked the social work model on equity grounds, pointing out that similarly situated individuals often received very different treatment. Liberal critics increasingly perceived the individualized casework approach of the social work profession as a formula for continuous and demeaning oversight and supervision of recipients. They perceived the home visit, a core element of the casework model,

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recipient's requests for special grants. These discretionary grants . . . varied widely among recipients with the same level of need.").

<sup>54</sup> Writing in 1965, Winifred Bell reported that "[i]n reality the complexity and pressure of eligibility determination leave welfare workers little time or energy to listen thoughtfully to troubled families." Bell, *supra* note 42, at 157-58. In describing how the state of Louisiana simply decided to close down the AFDC program when the cotton crop needed harvesting, Bell writes that "[w]elfare workers may have wished to evaluate individual circumstances, including day care arrangements, the mother's health, or even her success in competing for employment. But the pressing need for overworked staff was simple and straightforward rules." *Id.* at 46.

<sup>55</sup> See Simon, *supra* note 16, at 1215 (discussing repudiation of social work model).

<sup>56</sup> See Yeheskel Hasenfeld, *Power in Social Work Practice*, 61 Soc. Serv. Rev. 469, 469-83 (1987) (describing imbalance of power between client and caseworker).

<sup>57</sup> See Bell, *supra* note 42, at 181-86 (describing methods that excluded African-Americans from coverage); Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 Yale L.J. 1347, 1347 (1963) (describing "midnight raids" against welfare recipients that implicitly disadvantaged racial minorities); Edward V. Sparer, *The Role of the Welfare Client's Lawyer*, 12 UCLA L. Rev. 361, 367-68 (1965) (same).

as little different from a police search.<sup>58</sup> At the same time, conservatives had little use for social workers and their do-gooder ideology.<sup>59</sup>

In addition to these objections to the social work model, the rapid expansion of the welfare rolls in the late 1960s exerted enormous pressure on administrators. The pretense of service became increasingly difficult to maintain as caseloads expanded.<sup>60</sup> Welfare agencies responded by separating the function of dispensing cash assistance from that of providing services and counseling, thus ending the integrated approach of the social work model.<sup>61</sup> Once severed, the counseling function almost completely withered away.<sup>62</sup>

Further, the individualized approach to budgeting was time-consuming and expensive to administer. The decentralized decisionmaking of the social work model made it difficult for central administrators to exert control. As the pressure to contain costs increased, administrators resorted to uniform rules that made costs more predictable and controllable. Thus, the system of individualized grants gave way to flat grants—uniform amounts intended to meet all needs.<sup>63</sup> Flat grants not only eliminated the administrative necessity of calculating individual budgets, but it also permitted central authorities to control the outflow of money better. Once in place, flat grants were more easily cut: Since flat grants do not represent any particular items of need, their inadequacy is less apparent to outside observers.

Finally, the courts began to impose a bureaucratic framework on the welfare system that was at odds with the social work model. In *King v. Smith*,<sup>64</sup> the Court struck down Alabama's "substitute father" rule, a doctrine that effectively meant that if a single mother were sexually active, the family would be ineligible for benefits. *King* laid the foundation for the conception of welfare as an individual entitle-

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<sup>58</sup> Ultimately, the Supreme Court disagreed. See *Wyman v. James*, 400 U.S. 309, 326 (1971). But the home visit was abandoned nonetheless.

<sup>59</sup> See Bane & Ellwood, *supra* note 51, at 15 (describing conservatives' distrust of social workers).

<sup>60</sup> See James T. Patterson, *America's Struggle Against Poverty 1900-1985*, at 171 (1986) (noting that number of Americans on public assistance rose from 7.1 million in 1960 to 14.4 million in 1974).

<sup>61</sup> See Simon, *supra* note 16, at 1215. In 1972, the Department of Health, Education and Welfare mandated this separation of functions. See *Separation of Services from Assistance Payments*, 37 Fed. Reg. 11,059, 11,060 (1972); Simon, *supra* note 16, at 1215.

<sup>62</sup> See Bane & Ellwood, *supra* note 51, at 14-15 (describing "a shift in social services clientele away from public assistance recipients and a slowdown in the growth of services").

<sup>63</sup> See *Rosado v. Wyman*, 397 U.S. 397, 416-17 (1970) (describing substitution of flat grants for individualized grants in New York City).

<sup>64</sup> 392 U.S. 309 (1968).

ment.<sup>65</sup> The Court concluded that a provision of the Social Security Act requiring prompt payment of benefits to all eligible individuals had the effect of making eligibility standards legally enforceable rights.<sup>66</sup> Moreover, the Court's discussion of suitable home and "substitute father" rules strongly suggested that morality tests were invalid under federal welfare law.<sup>67</sup>

The Supreme Court's decision in *Goldberg v. Kelly*<sup>68</sup> carried forward the framework developed in *King*. With the mandate that recipients be offered quasi-judicial hearings prior to the termination of assistance, the adoption of a legal model was complete. Welfare benefits were to be dispensed pursuant to fixed rules of eligibility. Individuals could challenge the application of these rules through administrative and judicial proceedings. In viewing welfare as a form of property protected by the Due Process Clause, the Supreme Court implicitly rejected the premise that the judgment and discretion of social workers should drive the system. The *King* and *Goldberg* cases were brought by legal services attorneys as part of a deliberate effort to alter the imbalance of power between welfare caseworkers and recipients.<sup>69</sup>

Under attack by liberals and conservatives and repudiated by the courts, the social work model gave way to a model predicated on detailed rules of general applicability issued by central authorities. Social workers ceded the task of determining eligibility to clerks.<sup>70</sup> Under this new framework, the job of welfare workers is to apply these fixed rules; no professional judgment or discretion is considered necessary.<sup>71</sup> Higher levels of authority establish routines of administration so that the worker simply applies a series of rules. Clients can dispute the application or interpretation of rules by seeking a hearing, modeled along the lines of a judicial proceeding, and may ultimately seek review in court. Thus, the legal-bureaucratic model conceives of welfare administration as a machine-like process of matching up applicants and recipients with the applicable rules and of producing uni-

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<sup>65</sup> See R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights 65-132* (1994) (discussing impact of *King* and later cases on welfare system).

<sup>66</sup> See *King*, 392 U.S. at 317; see also Ira C. Lupu, *Welfare and Federalism: AFDC Eligibility Policies and the Scope of State Discretion*, 57 B.U. L. Rev. 1, 3-11 (1977) (discussing possible interpretations of *King*).

<sup>67</sup> See *King*, 392 U.S. at 325-26.

<sup>68</sup> 397 U.S. 254 (1970).

<sup>69</sup> See Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 Stan. L. Rev. 509, 562-63 (1984) (explaining that *Goldberg* was litigated with intent of helping organizers of welfare rights movement by enabling recipients to organize without fear of retaliation).

<sup>70</sup> See Simon, *supra* note 16, at 1214-16.

<sup>71</sup> See *id.*

form results. In this process, the ground-level administrator is more akin to an assembly line worker than a professional.

C. Rules vs. Discretion: *Evaluating Competing Administrative Models*

Much debate has been generated over the question of whether the social work paradigm was better or worse for recipients than the paradigm that succeeded it.<sup>72</sup> Much of the debate has centered on the dichotomy between discretionary and rule-based systems.<sup>73</sup> William Simon, the most vocal proponent of the social work model, has argued that reliance on a professional ethos is preferable to fixed rules that are incapable of adaptation to unique circumstances.<sup>74</sup> He contends that the reliance on rules led to an accretion of formal eligibility requirements that made the application process both more complex and more burdensome, and less responsive to client needs.<sup>75</sup> Simon, and others, have pointed out how the rise of a rule-based system was accompanied by the establishment of a rigorous quality assurance sys-

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<sup>72</sup> Compare Simon, *supra* note 16, at 1200 (arguing for vision of welfare administration "in many respects similar" to social work model), with Handler & Hollingsworth, *supra* note 16, at 208 ("[T]he most serious and intractable problem in welfare administration arises out of . . . the discretionary distribution of benefits.").

<sup>73</sup> The rules-versus-discretion problem is a classic conundrum addressed by many legal theorists in the context of judicial and administrative decisionmaking. See generally Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* 25-26 (1969) (outlining values and dangers of discretion in government and law); Ronald Dworkin, *Law's Empire* 144-47 (1986) (striving to find right balance between cases decided by law and cases calling for judicial legislation); Ronald Dworkin, *Taking Rights Seriously* 17-39 (1977) (outlining theory of law based on rules, principles, policies, and standards); Joel F. Handler, *The Conditions of Discretion: Autonomy, Community, Bureaucracy* 143-44 (1986) (arguing for emphasis on individual considerations rather than abstract rules); Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* at xv (1991) (outlining distinction between rule-based and discretionary decisionmaking and arguing that rules are "crude probabilistic generalizations" that may produce "suboptimal or even plainly erroneous" results); *The Uses of Discretion* 3-4 (Keith Hawkins ed., 1992) (describing various tensions and interrelations shared by rules and discretion); Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 *Colum. L. Rev.* 359, 361, 398-99 (1975) (arguing for acceptance of discretion in judicial decisionmaking); Edward L. Rubin, *Discretion and Its Discontents*, 72 *Chi.-Kent L. Rev.* 1299, 1299-1312 (1997) (suggesting that term "discretion" is rather empty concept); Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 *Admin. L. Rev.* 429 (1999) (analyzing nature of discretion found in administrative agencies); Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 *Hastings L.J.* 231, 277-79 (1990) (reformulating questions about judicial discretion and seeking to develop new approach to thinking about discretion). The debate between proponents of the social work and legal paradigms of welfare administration is an application of this larger dilemma in the structuring of social institutions.

<sup>74</sup> See Simon, *supra* note 16, at 1219-22.

<sup>75</sup> See *id.*

tem, which policed the actions of welfare workers to enforce strict application of picayune bureaucratic requirements.<sup>76</sup> By replacing social workers with clerks, Simon argues, the service ethos was lost as the locus of decisionmaking authority shifted upwards, and workers became disengaged from their jobs.<sup>77</sup> Clients were left to face an uncaring, impenetrable wall of bureaucracy. In essence, Simon argues that the welfare system adopted Franz Kafka's model of government, rather than that of Max Weber.<sup>78</sup>

In response, proponents of the legal model cite the administrative failings of the earlier system, in which clients lived under a tyranny of caseworkers.<sup>79</sup> Without fixed rules, caseworkers were given free rein to act on their biases and opinions. Moreover, the paternalism of the system was seen as fostering dependency, as clients were compelled to strive for the approval of the caseworker.<sup>80</sup>

The debate over which system is inherently preferable may distract attention from several larger truths. First, the differences between the two paradigms are not absolute, but rather differences in emphasis. All discretionary systems have some rules, and all rule-based systems have elements of discretion.<sup>81</sup> The differences in emphasis not only reflect the relative balance between discretionary and rule-based decisionmaking in a given administrative scheme, but also the presentation of the scheme. Discretionary systems are those systems that are structured so as to be perceived as according decisionmakers latitude. Rule-based systems are designed to appear as if

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<sup>76</sup> See *id.* at 1207-13. The terminology "quality control" suggests the assembly-line view of benefit administration. Indeed, the search for "incorrect" determinations is rooted in an assumption that decisions are either right or wrong, rather than matters of judgment. See Mashaw, *Bureaucratic Justice*, *supra* note 16, at 25 (noting that administrative goal in ideal conception of bureaucracy is to develop system for distinguishing between true and false claims).

<sup>77</sup> See Simon, *supra* note 16, at 1214-16 (stating that supervisors have replaced workers with people "socialized to think of the role as characterized by routine, unreflective judgment and responsibility only to hierarchical organizational authority").

<sup>78</sup> See *id.* at 1216. "routine, unreflective judgment" rather than "complex, particularized judgments").

<sup>79</sup> See Sparer, *supra* note 57, at 363-66 (arguing that rights-based approach protects clients from arbitrary and unchecked decisionmaking by caseworkers).

<sup>80</sup> See Handler & Hollingsworth, *supra* note 16, at 129 (noting that "social workers often report an ingratiating, embarrassing type of dependency").

<sup>81</sup> As Carl Schneider has put it: "[I]n the world in which we live, there typically is not a choice between discretion and rules, but rather a choice between different mixes of discretion and rules." Carl E. Schneider, *Discretion and Rules: A Lawyer's View*, in *The Uses of Discretion*, *supra* note 73, at 47, 49; see also Davis, *supra* note 73, at 17 (noting that "[e]very governmental and legal system in world history has involved both rules and discretion").

driven by fixed standards. In each instance, however, the reality is more nuanced.

Second, neither the professional nor the bureaucratic model is necessarily either harsh or lenient. It is possible to administer either model in a variety of ways. It may be true that a harsh and punitive approach to the social work model produces a system that looks very different from an equally harsh version of the bureaucratic model, but as the debate in the literature illustrates, the choice between them is a matter of picking one's poison. At the same time, each of the models could be administered in a much more expansive way. The key variables are the attitude that is communicated to those who work in the system and the incentives under which they operate.<sup>82</sup>

Beginning in the 1970s, the quality assurance regime established a strong bias in favor of strict administration in the AFDC program: States were subject to financial penalties for high payment error rates, including errors in paperwork, leading to an intense focus on preventing overpayments.<sup>83</sup> In contrast, client-initiated appeals did not exert a counterbalancing influence. In general, workers were not held accountable for decisions overturned through administrative appeals. Thus, hearing decisions have not translated into greater compliance or changes in practices at the ground level.<sup>84</sup> In fact, the hearing process could even establish perverse incentives. Rather than trying to correct their mistakes, ground-level workers can avoid work by telling clients that if they disagree they can seek a hearing.

But it is not difficult to find an example of a much more leniently run public benefit program that is structured along bureaucratic lines. Up until the late 1970s, the Social Security Administration operated through a legal-bureaucratic model that was infused with a sense that its mission was to dispense benefits rather than erect obstacles.<sup>85</sup> The

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<sup>82</sup> See Brodtkin, *supra* note 34, at 4 ("[D]iscretion is axiomatically neither good nor bad but contingent on contextual conditions.").

<sup>83</sup> See Brodtkin, *supra* note 16, at 9-11, 94-100 (noting that quality control restrictions imposed on AFDC punished states for overpayment and payment to ineligible recipients, but not for underpayment or exclusion of eligible beneficiaries); Timothy J. Casey & Mary R. Mannix, *Quality Control in Public Assistance: Victimizing the Poor Through One-Sided Accountability*, 22 *Clearinghouse Rev.* 1381, 1381-83 (1989) (analyzing the effects of penalties levied against states for overpayment).

<sup>84</sup> See Task Force on Admin. Adjudication, *Report of the New York State Bar Association* 167-84 (1988) (criticizing local agencies for not revising practices in light of reversals of their determinations at fair hearings); see also Mashaw, *Management Side*, *supra* note 16, at 776-791 (discussing inadequacy of appeal procedures as means of ensuring accurate, fair, and timely adjudication by lower-level administrative decisionmakers).

<sup>85</sup> See Martha Derthick, *Policy Making for Social Security* 30-32 (1979) (describing how Social Security Administration inculcated ethos among its staff that stressed client service). In the late 1970s, this vision began to founder. As the disability benefit rolls began to expand, pressure to deny benefits began to flow from the top. See, e.g., *Schweiker v.*

Social Security Administration took care to convey to its staff and the public that recipients were entitled to their benefits as of right, pursuant to a uniform set of national standards.<sup>86</sup> Bureaucracy is not necessarily inconsistent with service.

Lastly, the issue of whether benefit administration will be lenient or harsh is not the only thing, and perhaps not the main thing, at issue in the selection of administrative models. The administrative models used are part of the means by which public benefit programs communicate messages to recipients and to society in general. Different administrative models are built on different assumptions about the purpose of benefit programs and the problems that they are meant to address. This symbolic aspect of administration animates many of the strong views held on the subject.

The social work paradigm was built on a treatment model—the idea that poor families need some kind of therapeutic or rehabilitative intervention in order to function properly.<sup>87</sup> During the ascendancy of the social work model, the goal was not to rehabilitate mothers into the workforce, but to provide ongoing supervision to ensure that children would be raised properly and would integrate into the social and economic mainstream.<sup>88</sup> This supervision focused on the recipient's character and morals, as well as skills.<sup>89</sup> The implicit message was that poor mothers need guidance and assistance in order to raise their children and that poverty stems from conditions in the home, rather than from broader economic or social forces. Although some social work theorists attempted to shift the footing of the model to one that was therapeutic, without being paternalistic,<sup>90</sup> the social work model was not easily recast and continued to focus on rehabilitation.

Although this description sounds like an old poor law conception of poverty as stemming from the weak moral character and indolence

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Chilicky, 487 U.S. 412, 415-17 (1988) (describing impact of push to deny claims); *Dixon v. Shalala*, 54 F.3d 1019 (2d Cir. 1995) (holding that Department of Health and Human Services' covert policy of denying benefits to disability claimants was invalid).

<sup>86</sup> See Derthick, *supra* note 85, at 32.

<sup>87</sup> See Gordon, *supra* note 41, at 175.

<sup>88</sup> See *id.* at 89, 98-108 (noting emphasis social work organizations placed on protecting children rather than promoting women's careers).

<sup>89</sup> See *id.* at 175.

<sup>90</sup> See Simon, *supra* note 41, at 19-20. Simon describes the work of progressive social workers who sought to deemphasize moral supervision, while still expecting workers to discuss their beliefs and judgments with clients. Such discussion was intended to "challenge[ ] the client to develop her own formulations" and to "make it possible for the client to see the worker as a distinct individual capable of empathizing and feeling solidarity with her." *Id.* at 19. In other words, they sought to recast the social worker as a friend rather than a supervisor. Given the imbalance of power between the worker and the client, it is difficult to envision this approach working in practice. See Gordon, *supra* note 41, at 164 ("[E]galitarian empathy remained difficult to achieve in casework relations.").

of the poor, the assumptions of the framers of the social work model were not necessarily as harsh. While poor mothers needed professional guidance, social work theorists did not conceive of them as simply lazy or immoral. The reemphasis on service in the late 1950s and early 1960s tracked the rise of cultural theories of poverty— notions that cultural and social conditions create pockets of poverty in an otherwise prosperous country.<sup>91</sup> Under these views, the failings were not necessarily individual, even though professional guidance and services could help to overcome the cultural deficits.<sup>92</sup>

In contrast, the legal-bureaucratic model emphasized the notion of entitlement—the idea that recipients have a right to benefits when they meet specified eligibility criteria.<sup>93</sup> It was built on the belief that poor people should be accorded the security that comes with property ownership.<sup>94</sup> The reliance on formal rules rather than discretionary judgment is intended to enable clients to predict and rely on the availability of benefits. The model views the principal task of welfare agencies as dispensing benefits rather than supervising recipients. It rests on a view of poverty that focuses on structural economic issues, rather than individual failings: Poor families simply need money, not beneficent guidance and a package of services. Under this view, cultural theories of poverty appear as warmed-over poor law thinking that exalts the role of “helping” professionals.<sup>95</sup> The legal-bureau-

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<sup>91</sup> See, e.g., Michael Harrington, *The Other America: Poverty in the United States* 158-74 (1962) (discussing “two nations” of affluence and poverty in America in 1950s and 1960s); Oscar Lewis, *The Children of Sanchez: Autobiography of a Mexican Family* (1961) (reciting story of poor family surrounded by rapid social and economic change in Mexico City); Oscar Lewis, *La Vida: A Puerto Rican Family in the Culture of Poverty—San Juan and New York* (1966) (providing history of Puerto Rican family living in poverty in New York and San Juan); see also Michael B. Katz, *The Undeserving Poor: From the War on Poverty to the War on Welfare* 16-23 (1989) (discussing Harrington’s and Lewis’s definitions of “culture of poverty”).

<sup>92</sup> President Kennedy linked the emphasis on service to changes in the causes of poverty. He stated that since the New Deal, the causes of poverty had shifted from unemployment and economic depression to social causes, such as “ill health, faulty education, domestic discord, racial discrimination, or inadequate skills.” John F. Kennedy, *Special Message to the Congress on Public Welfare*, Pub. Papers 98, 99 (1962). Kennedy concluded that the assistance check must be supplemented by “positive services and solutions.” *Id.* To encourage states to provide these services, he proposed heightened federal funding for “rehabilitation, social work and other service costs” to enable states to provide “more comprehensive and effective services to rehabilitate those on welfare.” *Id.* at 100. See generally June Axinn & Herman Levin, *Social Welfare: A History of the American Response to Need* 236-42 (1997) (discussing shift in early 1960s to new view of, and response to, poverty).

<sup>93</sup> Charles Reich first articulated the entitlement theory of public benefits. See Charles A. Reich, *The New Property*, 73 *Yale L.J.* 733 (1964).

<sup>94</sup> See *id.* at 785-86.

<sup>95</sup> See Katz, *supra* note 91, at 20-23, 29.



cratic model is thus intended to dispense with the paternalistic and demeaning features of the social work model and to convey a message that people in poverty can manage their own lives.

The fact that the legal-bureaucratic model could be and often was administered in a harsh and demeaning manner reflects the fact that the view of poverty as rooted in structural economic issues remained controversial. Societal conflicts over the causes and nature of poverty continued to play themselves out in the arena of ground-level administration.<sup>96</sup> The traditional fear and suspicion of the poor infiltrated and sometimes permeated offices designed to operate on legal-bureaucratic lines.<sup>97</sup> These values also were asserted through the quality assurance process that operated as a sub rosa means of enforcing an administrative regime tilted toward the denial rather than the granting of benefits.<sup>98</sup> On the surface, the entitlement idea appeared to dominate, while the reality was more complex.

Methods of administration are intertwined with a much larger cluster of issues. They are linked to the purposes of the program being administered, which in turn is linked to a conception of the problem that the program addresses. The eclipse of the social work model reflected a change in the public's views about the poor. As set forth below, the process of welfare reform has led to another dramatic shift in the dominant administrative paradigm. This shift reflects a continuing transition in views of poverty and attitudes towards poor families.

## II

### WELFARE REFORM AND SHIFTING MODELS OF ADMINISTRATION

#### A. *The Return to Discretion*

The increasing discontent with the welfare system in the 1980s and 1990s was accompanied by a critique of welfare administration. While liberal critics argued that the legal-bureaucratic model had become legalistic and overly rule-bound,<sup>99</sup> others critiqued it from a dif-

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<sup>96</sup> See Handler, *supra* note 20, at 43 (noting how conflict over social programs is shifted downward as higher-level decisionmakers agree on vague generalities and let lower-level actors grapple with difficult issues).

<sup>97</sup> See Dehavenon, *supra* note 16, at 247-48 (discussing "verification extremism" as part of system that made workers "trigger-happy to deny").

<sup>98</sup> See *supra* notes 83-84 and accompanying text.

<sup>99</sup> See Bennett, *supra* note 23, at 2159, 2164-71 (discussing "verification extremism" as involving excessive bureaucratic demands for information); Dehavenon, *supra* note 16, at 233 ("People on [public assistance] face an enormous and byzantine bureaucracy administered according to a mind-boggling array of rules." (footnotes omitted)); Simon, *supra* note 16, at 1198-99 (noting influence of law and management professions on welfare system through orientation to formal rules and bureaucratization). Mary Jo Bane and David Ell-

ferent vantage point. Conservatives took issue with the stress on benefit payment. To them, the emphasis on entitlement communicated a message that recipients had rights, but no obligations.<sup>100</sup> They saw the concept of entitlement that lay at the heart of the model as vitiating attempts to make demands on recipients.<sup>101</sup>

The statutory framework for the TANF program jettisons the foundation of the legal-bureaucratic model at its very outset. Section 103(a)(1) of PRWORA states that "[t]his part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part."<sup>102</sup> In fact, the statute itself contains no requirements that any families receive anything at all.<sup>103</sup> It omits the requirement that formed the basis of *King v. Smith*<sup>104</sup>—that eligible families be paid. It also greatly restricts the ability of the federal government to impose requirements through regulation.<sup>105</sup> If the legal-

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wood critiqued the emphasis of administration on eligibility determinations rather than on supporting recipients' efforts to achieve self-sufficiency. See Bane & Ellwood, *supra* note 51, at 125-26.

<sup>100</sup> See, e.g., Lawrence Mead, *Beyond Entitlement: The Social Obligations of Citizenship* 3-4 (1986) (arguing that poor have too many entitlements and not enough obligations); see also Diller, *supra* note 39, at 457-58 (discussing symbolic dimension of welfare as entitlement).

<sup>101</sup> Stuart Butler and Anna Kondratas argued that the system of establishing fixed eligibility criteria and investing individuals who meet the criteria with an entitlement to benefits has made it less acceptable for providers of welfare to pass judgment on the conduct of those receiving assistance. See Stuart Butler & Anna Kondratas, *Out of the Poverty Trap: A Conservative Strategy for Welfare Reform* 13-14 (1987). Lawrence Mead, similarly, has called for a return to "paternalism"—the use of public benefit programs as a lever to promote socially desirable behavior and as a means of supervising the poor. See Lawrence M. Mead, *The Rise of Paternalism*, in *The New Paternalism: Supervisory Approaches to Poverty* 1, 5 (Lawrence M. Mead ed., 1997) [hereinafter Mead, *Rise of Paternalism*]. This supervisory approach, he explains, requires proactive administration. The goal is to "supervise behavior, largely outside institutional walls, something that can only be done by routines where staff members check up on clients." *Id.* at 21. Under this approach, administrative functions expand rather than contract: The "*policy itself* is administrative." *Id.*; see also Lawrence M. Mead, *Welfare Employment*, in *The New Paternalism*, *supra*, at 39, 61 [hereinafter Mead, *Welfare Employment*] ("Welfare reform turns out to involve not so much a change in the formal policies of welfare as the reinvention of welfare administration.").

<sup>102</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103(a)(1), 110 Stat. 2105, 2112 (codified at 42 U.S.C. § 601(b) (Supp. IV 1998)).

<sup>103</sup> Federal law requires states to submit outlines of programs for providing assistance to needy families, but contains no provisions that require states to provide for any particular individuals. See 42 U.S.C. § 602(a)(1).

<sup>104</sup> 392 U.S. 309 (1968).

<sup>105</sup> See 42 U.S.C. § 617 ("No officer or employee of the Federal government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part.").

bureaucratic model were to persist, it would do so as a result of choices made by the states.<sup>106</sup>

Following the enactment of PRWORA in 1996, states have transformed ground-level welfare administration to a far greater extent than most people thought possible.<sup>107</sup> In large part, these changes stem from the fact that state and local governments are placing great emphasis on changing the "culture" of welfare, and the "message" of the programs. They have realized that changing the message requires altering the pattern of interactions between workers and clients.<sup>108</sup> Because PRWORA largely permits states to design their own programs, there has been no uniform response to welfare reform. To make matters more complex, many states have given counties broad leeway to establish administrative structures and to define open-ended terms. Some states and counties further have devolved welfare administration to private contractors. The result is an explosion of a variety of models as different agencies mix and match a wide array of possibilities. Accordingly, all generalizations about welfare administration must be advanced somewhat tentatively and with the understanding that there are likely to be counterexamples for each example offered. Nonetheless, it is possible to discern a number of trends in implementation of the statute. One pronounced trend is the return to administrative schemes that emphasize discretionary rather than rule-based decisionmaking.

This trend is comprised of several elements. First, programs are adopting substantive measures that call for discretionary decisions. As welfare programs assume roles that are more active than simply dispensing benefits, the number of judgment calls that must be made is bound to increase. However, rather than disguising this increase in discretion, many programs are emphasizing it. Second, many states

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<sup>106</sup> Federal law does require that state plans "set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment, including an explanation of how the State will provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process." *Id.* § 602(a)(1)(B)(iii). Thus, states are not permitted entirely to do away with fixed rules and standards. It is not clear, however, whether or how this requirement can be enforced.

<sup>107</sup> See Richard P. Nathan & Thomas L. Gais, *Implementing the Personal Responsibility Act of 1996: A First Look* 4-5 (1999) (noting pervasive and unexpected nature of state reorganization of welfare programs under Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)).

<sup>108</sup> See Janet Quint et al., *Big Cities and Welfare Reform: Early Implementation and Ethnographic Findings from a Project on Devolution and Urban Change 99* (1999) (reporting that "DPSS [Department of Public Social Services] officials [in Los Angeles] say that if welfare reform is to be successful in Los Angeles County, the mind-set of eligibility workers, and the culture and environment of the eligibility offices that shape that mind-set, must undergo a fundamental transformation").

have made sanctions more potent, thus shifting the balance of power between workers and recipients. Third, a number of programs are moving away from the specialization of welfare workers by function. Increasing the number of roles that each worker plays makes them more powerful figures in the lives of recipients. When these components are considered together, it is apparent that ground-level administration is undergoing a major restructuring. The model that characterized welfare administration after 1970 is rapidly ceasing to exist.<sup>109</sup>

### *1. Substantive Measures That Increase Evaluative Judgments*

*a. Work Requirements.* PRWORA contains two forms of work requirements. It requires that increasing proportions of the recipients engage in work activities for specified numbers of hours,<sup>110</sup> and it mandates that all recipients who have received benefits for two years must work.<sup>111</sup> Although work requirements are not new, the requirements of the earlier law, reflected in the JOBS program, only affected a small portion of the caseload.<sup>112</sup>

The administration of work requirements almost always calls for a variety of discretionary decisions. Work requirements call for judgments about whether the client can work, what activities should be required, whether the client has access to suitable child care, whether a recipient was justified in quitting a job, and whether the client has good excuses for missing appointments or assignments. Although many of these decisions can be channeled through general rules or standards, there almost always will be some evaluative judgment to be

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<sup>109</sup> Lawrence Mead claims that this shift in framework need not be accompanied by the abandonment of a rule-based bureaucratic system. See Mead, *Rise of Paternalism*, *supra* note 101, at 7. Thus, he distinguishes the "new" paternalism from the "old" on the ground that "[a]ccess to aid is still determined on a rule-based, largely nondiscretionary basis." *Id.* But as discussed in Part II.B.1, *infra*, a supervisory approach needs supervisors. Ground-level workers almost inevitably accrue discretion and power over recipients in exercising the parental role upon which paternalism is built. Indeed, Mead's description of case management reveals the greatly expanded role of ground-level workers and the discretion that they exercise. See Mead, *Welfare Employment*, *supra* note 101, at 61-63 (describing good case management as analogous to good parenting).

<sup>110</sup> See 42 U.S.C. § 607.

<sup>111</sup> See *id.* § 602(a)(1)(A)(ii). For a discussion of PRWORA's work requirements, see Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 *Stan. L. & Pol'y Rev.* 19, 23-25 (1998) (discussing work requirements adopted by PRWORA).

<sup>112</sup> Under the Family Support Act of 1988, states were required to place 20% of the nonexempt caseload in work or training assignments known as JOBS. See Family Support Act of 1988, Pub. L. No. 100-485, §§ 201-204, 102 Stat. 2343, 2356-81 (repealed 1996). Because about half of all recipients were exempt, the actual mandate was close to 10%. See Diller, *supra* note 111, at 34 n.47.

made in each case.<sup>113</sup> As one Miami caseworker told a researcher, “[t]hey make the rule, but you can add to it, subtract from it, as long as you don’t break it.”<sup>114</sup> It is difficult for a program to make these determinations without functioning as a *de facto* supervisor over the recipient.

Rather than obscuring the evaluative nature of these decisions, many states have chosen to emphasize the role of worker discretion. In Wisconsin, for example, each recipient is assigned to a “Financial and Employment Planner” (FEP) who determines which of four tracks of work requirements will be applicable to the client.<sup>115</sup> The FEP is given broad discretion to decide whether the recipient should be excused from work due to factors such as lack of child care, or whether to assign an individual to a subsidized job.<sup>116</sup> In Oregon, most categorical exemptions have been eliminated, but exemptions from work requirements can be granted by caseworkers if the worker and the recipient agree upon the exemption in writing.<sup>117</sup> Many workers administering the welfare-to-work activities in Miami reported that they use their discretion in individual circumstances, such as extending time frames for completion of activities or encouraging clients to obtain doctors’ notes.<sup>118</sup>

In other programs, the criteria governing work requirements are articulated in a more rule-like form. For example, California permits counties to determine the content of work requirements and to establish policies on exemptions for “good cause.”<sup>119</sup> In Los Angeles, the grounds for exemption are spelled out “with little room for staff discretion.”<sup>120</sup> Nonetheless, discretion inevitably infiltrates the process as decisions must be made about excuses for missing appointments, the availability of child care, and other aspects of the work requirements. Administration of rigorous work requirements inevitably expands the number of judgment calls that workers must make and the degree of ongoing oversight that they exercise over recipients.

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<sup>113</sup> Evelyn Brodtkin’s study of caseworker-client interaction in the JOBS program in Chicago demonstrates the large number of discretionary determinations inherent in welfare work programs. See Brodtkin, *supra* note 34, at 3-6.

<sup>114</sup> Quint et al., *supra* note 108, at 135.

<sup>115</sup> See Thomas Kaplan, *Wisconsin’s W-2 Program: Welfare as We Might Come to Know It 1* (1998).

<sup>116</sup> See *id.* at 9.

<sup>117</sup> See Pamela A. Holcomb et al., *Building an Employment Focused Welfare System: Work First and Other Work-Oriented Strategies in Five States 31* (1998).

<sup>118</sup> See Quint et al., *supra* note 108, at 135. In Philadelphia, employment specialists are accorded more freedom “to pay attention to individual situations and to use discretion in applying guidelines” than are eligibility workers. *Id.* at 164.

<sup>119</sup> *Id.* at 79-80.

<sup>120</sup> *Id.* at 91.

*b. Time Limits.* A second aspect of PRWORA that challenges the legal-bureaucratic model is the time limits on benefit receipt. Federal law limits benefit receipt to five years and permits states to impose shorter time limits, as twenty states have done.<sup>121</sup> Time limits expand worker discretion in two ways. First, application of exemption and extension policies frequently requires workers to make evaluative judgments. Second, workers exercise discretion in determining the information about time limit policies that they convey to clients and the manner and tone that they use in such discussions.

PRWORA permits states to grant hardship exemptions or extensions to up to twenty percent of the caseload.<sup>122</sup> Although states could implement this exemption policy through fixed rules, on its face the policy calls for a judgment about the worthiness of the recipient and the degree of harm the recipient will face upon termination. A number of states have adopted exemption or extension policies that explicitly call for evaluative judgments. For example, in Wisconsin, there are few situations in which an exemption "must" be granted, but many more in which an extension or exemption is permitted.<sup>123</sup> Connecticut grants six-month extensions to its twenty-one-month time limit upon a showing that a client has made a "good faith effort" to find employment, or if circumstances beyond her control limit her ability to work.<sup>124</sup> In Nebraska, caseworkers who determine whether recipients are eligible for hardship exemptions have expressed concern about the subjectivity of such determinations.<sup>125</sup>

The reliance on a discretionary standard has the advantage of enabling the state to be strategic about exemptions from time limits. The state can preserve the threat of time limits by not promising exemptions to any defined group, while retaining the ability to grant ex-

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<sup>121</sup> See 42 U.S.C. § 608(a)(7) (Supp. IV 1998); Liz Schott, *State Choices on Time Limit Policies in TANF-Funded Programs* (Sept. 1, 1998) <<http://www.cbpp.org/9-1-98wel.htm>>; Liz Schott, *Ways That States Can Serve Families That Reach Welfare Time Limits 1* (June 21, 2000) <<http://www.cbpp.org/6-21-00wel.pdf>> [hereinafter Schott, *Ways to Serve Families*].

<sup>122</sup> See 42 U.S.C. § 608(a)(7)(C).

<sup>123</sup> See Holcomb et al., *supra* note 117, at 41 (noting that Wisconsin permits extension on case-by-case basis to recipients who have complied with program requirements and have made diligent efforts to find work).

<sup>124</sup> See Dan Bloom et al., *Jobs First: Early Implementation of Connecticut's Welfare Reform Initiative* 56, 58 (1998). In Connecticut, workers look to such factors as a history of sanctions in order to determine the client's good faith. See *id.* at 69; see also Emily Bazelon & Tamara Watts, *Welfare Time Limits on the Ground: An Empirical Study of Connecticut's Jobs First Program*, 32 Conn. L. Rev. 717, 757-59 (2000) (noting that lack of guidelines gave caseworkers "unbounded discretion" in making good cause determinations concerning extension of time limit).

<sup>125</sup> See Alicia Meckstroth et al., *Implementing Welfare Reform in Nebraska: Accomplishments, Challenges, and Opportunities for Improvement* 92 (1999).

emptions in particular cases and reassuring the public that the limits will not be overly harsh.<sup>126</sup> Thus, discretion is a way of coping with the central tension in time limits: how to make them effective as a means of diverting people from the benefit rolls, while at the same time protecting those who cannot find work within the mandated period.<sup>127</sup>

This discussion points out that the messages that workers convey about time limits can be complex. Fine-tuning this message depends not simply on how exemption and extension policies are designed, but on how workers explain the policies to recipients.<sup>128</sup> If workers refer to the time limit only occasionally as a remote event subject to exemptions, the time limit may not loom large in the administration of the program. However, if workers constantly harp on the issue, emphasizing to recipients that the clock is ticking and omitting any reference to exemptions, time limits can serve as a powerful disincentive to benefit receipt.<sup>129</sup> For example, in Ohio, workers are instructed to stress that the "clock is ticking whether you believe it or not."<sup>130</sup> Most workers never mention that the time limit is subject to a number of exemptions and to extension.<sup>131</sup> Researchers found that in New Haven, Connecticut, workers conveyed the impression that clients who cooperated were likely to receive extensions, while workers in the Manchester, Connecticut office were more likely to make the extension policy sound unpredictable.<sup>132</sup>

Under a legal-bureaucratic model, the deliberate withholding of information about program standards in order to create an erroneous impression that time limits are absolute would be plainly improper.

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<sup>126</sup> See Dan Bloom & David Butler, *Implementing Time-Limited Welfare: Experiences in Three States* 38 (1995).

<sup>127</sup> See *id.*

<sup>128</sup> Studies of time-limited welfare programs emphasize this point. For example, one study of experimental time limits adopted in three state AFDC programs notes:

By sending a clear message that welfare is temporary, all three states hope to motivate AFDC recipients to prepare for work, find jobs, and leave the rolls . . . [I]t seems apparent that clear communication is critical to implementing the strategy as well as possible: Recipients must understand and believe the new message.

*Id.* at 55.

<sup>129</sup> See Bloom et al., *supra* note 124, at 29 ("[T]he way staff discuss the extension policy may shape clients' views about whether the time limit is 'for real.'").

<sup>130</sup> Quint et al., *supra* note 108, at 55.

<sup>131</sup> See *id.* One county commissioner explained that if exemptions were mentioned, families would believe that they would get them. See *id.* Similarly, workers in Miami-Dade County report that they do not tell recipients about the possibility of "hardship" exemptions in order to make sure that recipients do not count on an exemption. See *id.* at 120.

<sup>132</sup> See Bloom et al., *supra* note 124, at 29.

The fact that workers feel free to manipulate information in order to influence client behavior shows how far administration has strayed from the precepts of that model.

Finally, time limits can serve as a justification for policies that would otherwise appear harsh or mean-spirited. For example, a push to get recipients into low-paying, dead-end jobs can be justified as a means of preventing them from exhausting their period of eligibility. Thus, time limits can get workers to undertake actions that they may otherwise view as unfair and get recipients to accept these actions in the name of preserving their eligibility for benefits in the future. In sum, time limits have important ramifications for the administration of benefit programs that are distinct from actually cutting off benefits when a recipient's time expires. They can change the shape and tone of a program, even if no one is ever actually cut off due to such limit, and can increase greatly the power and role of ground-level administrators.

*c. Diversion Programs.* In addition to implementing work requirements and time limits, states have taken a number of other programmatic initiatives that call for more evaluative decisions by ground-level personnel. Foremost among these initiatives is the adoption by most states of "diversion" policies—policies that seek to dissuade potentially eligible individuals from applying for benefits.<sup>133</sup> Although they have received far less attention than work requirements and time limits, diversion programs play a critical role in the process of welfare reform: They limit the number of people coming onto the welfare rolls. Diversion programs, at their best, can offer assistance that enables individuals to overcome a one-time crisis and avoid ongoing welfare receipt. At their worst, they can amount to a series of barriers that erect an impenetrable wall that blocks individuals from obtaining much-needed benefits.<sup>134</sup>

The concept of diversion is difficult to square with the message of the legal-bureaucratic model. Under the entitlement regime, an official practice of discouraging applicants appears as a subterfuge that undermines clients' rights to benefits. From this perspective, such practices are a form of "bureaucratic disentanglement," a way in which

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<sup>133</sup> See Kathleen A. Maloy et al., *A Description and Assessment of State Approaches to Diversion Programs and Activities Under Welfare Reform* ch. 1 (Aug. 1998) <<http://www.aspe.hhs.gov/hsp/isp/diverzn/chptone.htm>> (noting that at least 31 states have implemented some form of diversion program).

<sup>134</sup> See Barbara Vobejda & Judith Havemann, *States' Welfare Shift: Stop It Before It Starts*, *Wash. Post*, Aug. 12, 1998, at A1 (describing welfare officials' efforts to prevent families "from ever getting on the rolls").



administrative practices can prevent individuals from obtaining benefits that they have a legal right to receive.<sup>135</sup>

On a more concrete level, diversion programs tend to increase the discretion of ground-level welfare workers. At the outset of the application process, an individual seeking benefits is met by a caseworker who can wield considerable influence and power in determining whether an application for benefits even will be filed.

Twenty states operate programs under which applicants can receive lump-sum payments in lieu of ongoing assistance.<sup>136</sup> The theory behind these programs is that in some instances, a one-time payment can meet a particular need that will enable the family to support itself.<sup>137</sup> Although there is a broad range in the design of these programs, they tend to require a showing of a specific nonrecurring need.<sup>138</sup> Almost all of these programs impose penalties on individuals who receive lump sums but then apply for assistance.<sup>139</sup> Seventeen states impose either variable or fixed periods of TANF ineligibility.<sup>140</sup> Clearly, the decision to receive a lump-sum payment comes with a certain risk. If the payment does not in fact resolve the individual's problem, the consequences can be dire.

In a number of states, caseworkers explicitly are given discretion to determine whether applicants should be offered lump-sum payments.<sup>141</sup> In other states, caseworkers are instructed to engage in a "collaborative" process with the applicant to determine whether a lump-sum payment is appropriate.<sup>142</sup> Caseworkers sometimes exercise discretion in determining the amount of lump-sum diversion payments. In Maryland, for example, caseworkers and their supervisors are authorized to approve payment of lump sums equivalent to a year of TANF benefits in instances in which they find compelling needs.<sup>143</sup> In West Virginia, caseworkers are authorized to negotiate the amount

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<sup>135</sup> See Lipsky, *supra* note 22, at 8-9 (discussing bureaucratic disenfranchisement).

<sup>136</sup> See Maloy et al., *supra* note 133, ch. 1.

<sup>137</sup> See *id.* ch. 2.

<sup>138</sup> See *id.*

<sup>139</sup> See *id.*

<sup>140</sup> See *id.* In many of these states, the period is the lump sum divided by the monthly benefit rate. In Idaho, Iowa, Montana, Rhode Island, and Virginia, the period of ineligibility is a multiple of this amount. Thus, if the benefit rate is \$500 a month, receipt of a \$1000 lump sum could lead to a four-month ineligibility period. See *id.* In Idaho, Nevada, and West Virginia, the lump-sum payment is counted toward the time limit on benefits. See *id.*

<sup>141</sup> The states employing this approach are Alaska, California, Idaho, Maryland, Rhode Island, and Wisconsin. See *id.*

<sup>142</sup> Florida, Nevada, Utah, Virginia, and West Virginia use this approach. See *id.*

<sup>143</sup> See *id.*

of the expense with sellers of goods or services in order to keep costs down.<sup>144</sup>

A second widespread form of diversion is the requirement that applicants conduct a job search while their applications are pending. Requirements range from two to six weeks of job search and from two to forty employer contacts prior to receipt of ongoing benefits.<sup>145</sup> Job search requirements are not different in theory than other work requirements, except that the program obligations start before any benefits are paid. Thus, it emphasizes the responsibilities of the individual, rather than the assistance provided by the program.

Although there is a great deal of variation in the structure of applicant job search requirements, a number of states give caseworkers considerable discretion in deciding who must participate and what they must do. The most comprehensive study of diversion programs concludes that "applicant job search programs are characterized by considerable devolution of decisionmaking to local offices and by substantial worker discretion."<sup>146</sup> For example, eight of the sixteen states that require job searches exempt applicants who are not deemed to be "job-ready."<sup>147</sup> In many of these states, caseworkers make this determination based on their own evaluation of the applicant's circumstances and work history.<sup>148</sup> In ten states, workers have discretion to make exceptions even when an individual does not fall into a formal exemption category.<sup>149</sup>

In terms of the content of job search requirements, nine states have given counties and local offices authority to establish the requirements.<sup>150</sup> For example, Oregon mandates that nonexempt applicants must engage in up to thirty days of searching, but the local offices can set the amount of time applicants must spend and the number of employers they must contact.<sup>151</sup> Applicants who fail to meet the requirements can be excused for "good cause" in most states.<sup>152</sup>

It is easy to imagine how applicant job searches and lump-sum payments can be combined to form a powerful tool. Applicants can be confronted with a choice: Take one thousand dollars now and be

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<sup>144</sup> See *id.*

<sup>145</sup> See *id.* ch. 4.

<sup>146</sup> *Id.*

<sup>147</sup> These states are Alabama, Arkansas, Arizona, Georgia, Missouri, Nevada, Oklahoma, and Wisconsin. See *id.*

<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

<sup>150</sup> These states are Alabama, Georgia, Idaho, Maryland, New York, Ohio, Oklahoma, Oregon, and Wisconsin. See *id.* ch. 4 tbl.I-2.

<sup>151</sup> See *id.* ch. 4.

<sup>152</sup> See *id.*

barred from ongoing benefits for several months, or receive nothing now, start the job search program, and obtain monthly benefits after a month or more when your application is approved. To date, however, only five states have adopted both of these diversion techniques.<sup>153</sup>

A final component of many diversion programs is a focus on alternative resources available to applicants. This form of diversion is implemented by explicitly changing the interaction between workers and clients.<sup>154</sup> Seven states ask caseworkers to discuss alternatives to welfare with applicants.<sup>155</sup> Although this policy sounds like a requirement that workers have a benevolent chat with applicants about why they are seeking assistance and any sources of income they may have overlooked, it can amount to much more. In some cases, these policies may authorize workers to hassle applicants by cross-examining them about the availability of assistance from relatives, friends, or charitable sources such as food banks. Potential applicants can be left with the impression that they are not permitted to apply for benefits until these other avenues of support have been exhausted.<sup>156</sup>

In its more benevolent forms, an emphasis on alternative resources requires the worker to conduct much more wide-ranging discussions than before and to have a much greater familiarity with community resources and services.<sup>157</sup> The approach calls for a conversation, rather than an interview, to obtain information and to complete forms.<sup>158</sup> In its more aggressive forms, the focus on alternative resources can give workers broad license to determine who may apply for benefits.<sup>159</sup> Moreover, this license can be a form of complete power as individuals who are dissuaded from filing an application never receive a denial of benefits and thus cannot pursue an appeal.<sup>160</sup>

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<sup>153</sup> The five states are Arkansas, Idaho, Maryland, Ohio, and Wisconsin. See *id.* tbl.I-2.

<sup>154</sup> See *id.* ch. 3.

<sup>155</sup> The seven states are Florida, Idaho, Maryland, Montana, New York, Texas, and Wisconsin. See *id.*

<sup>156</sup> See, e.g., *Reynolds v. Giuliani*, 35 F. Supp. 2d 331, 344 (S.D.N.Y.) (noting evidence indicating that food stamp applicants were referred to charitable food sources as replacement for expedited food stamp benefits), modified in part, 43 F. Supp. 2d 492 (S.D.N.Y. 1999). But see Maloy et al., *supra* note 133, at ch. 3 (stating that

[I]n most states, efforts to link applicants with alternative resources are likely to affect only those applicants who have a relatively minor, short-term need . . . . Applicants . . . [with] more serious needs are as likely to . . . receive TANF benefits as they would have [been] prior to the shift to an approach involving a more concerted effort to . . . link applicants with the appropriate alternative resources.).

<sup>157</sup> See Maloy et al., *supra* note 133, at ch. 3.

<sup>158</sup> See *id.*

<sup>159</sup> See *infra* text accompanying notes 162-73.

<sup>160</sup> See Food & Nutrition Serv., U.S. Dep't of Agric., New York Program Access Review November-December 1998, at 7-8 (1999) (noting that potential applicants who were per-

The City of New York implements an extreme form of this type of diversion. The United States Department of Agriculture (USDA) investigated New York City's diversion program as part of its mandate to oversee implementation of the Food Stamp program.<sup>161</sup> The USDA concluded that New York's welfare offices, called "Job Centers," did not permit applicants to apply for benefits on the same day that they contacted the offices.<sup>162</sup> Instead, they were required to complete a "job profile" and meet with a financial planner, ostensibly to assist the agency in determining whether applicants had alternative sources of income.<sup>163</sup> Applicants were told to reappear on another date to file an application.<sup>164</sup> Individuals were then pressured to withdraw their job profiles and abandon their attempt to secure benefits.<sup>165</sup> A court found evidence that at one Job Center, about half of the individuals withdrew their applications for assistance.<sup>166</sup> Others were deemed to have abandoned the profile because they did not have complete documentation.<sup>167</sup>

New York City also required that applicants go through at least five separate appointments before an application would be considered complete, including meetings with a "financial planner," an "employment planner," and a "social service planner."<sup>168</sup> Individuals who arrived at one of these offices after 11 a.m. were told that they were too late and would have to return the following day.<sup>169</sup>

The USDA concluded that these practices violated federal requirements, establishing that individuals have the right to apply for food stamps and the right to receive written denials that they can chal-

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sueded to withdraw applications for food stamps were never told, and were in fact unaware, that they were forfeiting their rights to hearings).

<sup>161</sup> See *id.* at 2; see also *Reynolds*, 35 F. Supp. 2d at 348 (temporarily enjoining conversion of welfare centers into "job centers" in New York City); Rachel Swarns, *New York City Admits Turning Away Poor*, N.Y. Times, Jan. 22, 1999, at B3 (describing New York City's diversion practices); Rachel Swarns, *Stiff Rules Gut Welfare Rolls at Two Offices*, N.Y. Times, June 22, 1998, at A1 [hereinafter Swarns, *Stiff Rules*] (same).

<sup>162</sup> See Food & Nutrition Serv., *supra* note 160, at 6.

<sup>163</sup> See *Reynolds*, 35 F. Supp. 2d at 335.

<sup>164</sup> See Food & Nutrition Serv., *supra* note 160, at 10.

<sup>165</sup> See *id.* at 6.

<sup>166</sup> See *Reynolds*, 35 F. Supp. 2d at 343.

<sup>167</sup> See Food & Nutrition Serv., *supra* note 160, at 11. In *Reynolds*, the court found that, in one center, 84% of individuals seeking assistance were turned away without having filed a formal application. See *Reynolds*, 35 F. Supp. 2d at 343. Some agency employees spent two to three hours trying to talk applicants into withdrawing their job profiles. See *id.*

<sup>168</sup> *Reynolds*, 35 F. Supp. 2d at 335.

<sup>169</sup> See *Reynolds*, 35 F. Supp. 2d at 345.

lenge on appeal.<sup>170</sup> A federal district court ultimately agreed, enjoining implementation of the program.<sup>171</sup> Although New York employed the same practices for TANF benefits,<sup>172</sup> no federal regulations or laws require that applications be accepted and processed. New York's practices may have been extreme, but they illustrate the potential course of diversion programs in effect around the country.<sup>173</sup>

## 2. *Strengthening Sanctions*

Although sanctions—financial penalties for violation of program rules—were a feature of the AFDC program for some time, TANF programs both have expanded the list of sanctionable conduct and raised the level of punishment when sanctions are imposed. As a result, sanctions play a much larger role in many TANF programs than they did in AFDC.<sup>174</sup>

Work requirements generate a steady stream of opportunities for the imposition of sanctions. These opportunities include the failure to show up for screening or assessment interviews, counseling sessions, medical exams, job searches or other activities intended to enable recipients to find employment, or workfare assignments. In addition, TANF programs may impose a variety of other requirements, such as obligations to cooperate in child support collection, to provide children with immunizations, to ensure that children attend school, to work towards a high school diploma, or to participate in substance abuse treatment.<sup>175</sup>

Many states also have required recipients to enter into "personal responsibility agreements," and have subjected them to sanction for violation of the agreements, even if no program rules have been vio-

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<sup>170</sup> See Food & Nutrition Serv., *supra* note 160, at 6-8. The United States Department of Agriculture also expressed concern about many reports of "rude or unprofessional treatment" of applicants at city welfare offices. *Id.* at 21.

<sup>171</sup> See *Reynolds*, 35 F. Supp. 2d at 348. The court found that, rather than processing applications for emergency food stamps, workers were simply referring applicants to food pantries. See *id.* at 344.

<sup>172</sup> See Swarns, *Stiff Rules*, *supra* note 161, at A1 (describing diversion practices in New York City in context of welfare applications).

<sup>173</sup> See Nathan & Gais, *supra* note 107, at 28 (noting that some states and localities "may use diversion to erect a fortress-like welfare system instead of expanding the options available to families").

<sup>174</sup> See Holcomb et al., *supra* note 117, at 41.

<sup>175</sup> See 42 U.S.C. §§ 604(i)-(j), 608(a)(2)-(3) (Supp. IV 1998); Office of Inspector Gen., U.S. Dep't of Health & Human Servs., *Temporary Assistance for Needy Families: Improving the Effectiveness and Efficiency of Client Sanctions* 5 (1999) (noting that states may develop variety of programs to encourage self-sufficiency). See generally Jan Kaplan, *The Use of Sanctions Under TANF*, Issue Notes (Welfare Info. Network), Apr. 1999 <[http://www.welfareinfo.org/sanctionissue\\_notes.htm](http://www.welfareinfo.org/sanctionissue_notes.htm)> (describing various states' sanctions policies).

lated.<sup>176</sup> Responsibility “agreements,” in effect, permit administrators to create new sanctionable offenses.<sup>177</sup> Indeed, failure to sign the agreement itself can be sanctionable.<sup>178</sup> Although denoted “agreements” or “contracts,” recipients have little leverage in any negotiation. For the most part, such agreements are simply an additional set of rules laid down by the agency or its workers.<sup>179</sup> For example, in West Virginia, personal responsibility “contracts” can include commitments that parents attend parenting classes and seek training for skills like “business etiquette and family budgeting.”<sup>180</sup>

In addition to creating more opportunities for sanctions, many states sanction more severely. Under the AFDC program, sanctions consisted of the removal of the adult from the household budget for a fixed period of time.<sup>181</sup> In addition, food stamps were not subject to AFDC sanctions, and the decrease of AFDC income could have lead to an increase in food stamps that partially offset the loss in cash benefits. Under PRWORA, states are required to impose sanctions for violations of work requirements that, at a minimum, are equal to the noncompliant adult’s pro rata share of the household’s benefits.<sup>182</sup> States are permitted, however, to impose stricter sanctions and to apply sanctions in food stamps as well.<sup>183</sup>

Many states have exercised this freedom to impose more severe sanctions. In total, about half of the states have adopted some form of “full family” sanction, meaning that the entire family loses benefits when the head of the household is deemed noncompliant.<sup>184</sup> Thirteen

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<sup>176</sup> See 42 U.S.C. § 608(b).

<sup>177</sup> See David Fein & Wang Lee, *The ABC Evaluation: Carrying and Using the Stick: Financial Sanctions in Delaware’s A Better Chance Program* 3-4 (1999) (describing sanctions for noncompliance with “Contracts of Mutual Responsibilities” that recipients must sign to receive cash benefits in Delaware); Nathan & Gais, *supra* note 107, at 28-29 (noting that individualized and open-ended character of personal responsibility agreements give local offices and front-line workers increased discretion).

<sup>178</sup> See Fein & Lee, *supra* note 177, at 3-4.

<sup>179</sup> As one recipient who was interviewed by researchers in Philadelphia put it: “You had to agree to it. If you didn’t, they cut everything. You had to sign the paper.” Quint et al., *supra* note 108, at 158 (noting that in reality, recipients have little input). The agreements also may contain commitments by the agency, but these are generally not enforceable in any meaningful way. Although the agency can sanction recipients, recipients have no comparable remedy.

<sup>180</sup> Nathan & Gais, *supra* note 107, at 29 (internal quotation marks omitted).

<sup>181</sup> See 42 U.S.C. § 602(a)(19)(G) (1994) (repealed 1996).

<sup>182</sup> See *id.* § 607(e) (Supp. IV 1998).

<sup>183</sup> See 7 U.S.C. §§ 2015(d), 2015(i), 2017(d) (1994 & Supp. IV 1998); see also 42 U.S.C. § 1396u-1(b)(3) (authorizing states to terminate Medicaid benefits of adult individuals whose TANF benefits are terminated for noncompliance with work requirements).

<sup>184</sup> See Holcomb et al., *supra* note 117, at 37. Robert Rector and Sarah Youssef list 33 states that employ full family sanctions. See Robert Rector & Sarah Youssef, *The Determinants of Welfare Caseload Decline* 2 (1999).

states have opted to impose full family sanctions for initial violations of work requirements.<sup>185</sup> Other states have imposed such sanctions for second or third violations. For example, in Georgia, families that receive two sanctions are banned permanently from receiving benefits.<sup>186</sup> Massachusetts imposes an adult-only sanction for three months, followed by a full family sanction if the individual still has not complied.<sup>187</sup> The full family sanction dramatically raises the stakes for families facing the possibility of sanction.<sup>188</sup> In addition, past sanctions may be cited as a basis for denial of requests for extensions or exemptions from time limits.<sup>189</sup>

Studies show that while some states have relatively low sanction rates, others dramatically have expanded the use of sanctions.<sup>190</sup> In fact, at least one study has found that the variation in sanctioning is a principal cause of the variation in caseloads among the states, suggesting that sanctions are a pivotal aspect of welfare reform.<sup>191</sup> Dur-

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<sup>185</sup> See National Governors' Ass'n, Round Two Summary of Selected Elements of State Programs for Temporary Assistance for Needy Families (1999) <<http://www.nga.org/CBP/Activities/welfare-reform.asp>>.

<sup>186</sup> See Barbara Vobejda & Judith Havemann, Sanctions: A Force Behind Falling Welfare Rolls; States Are Cutting Off Tens of Thousands Who Won't Seek Work or Follow Rules, Wash. Post, Mar. 23, 1998, at A10. —

<sup>187</sup> See Holcomb et al., *supra* note 117, at 37.

<sup>188</sup> Even though the family is not receiving benefits, the period during which the sanction is in effect still may be counted toward the family's time limit for receipt of benefits. See *id.* at 42 (noting that in Virginia, months during which full family sanction is in effect are, for purposes of time limit, still counted as months in which benefits were received).

<sup>189</sup> See Schott, Ways to Serve Families, *supra* note 121, at 14 (noting that Connecticut, Tennessee, and Virginia consider individual's sanction record in deciding whether to grant extension to time limit). In Connecticut, recipients who receive extensions to the 21-month time limit on benefits lose this extension if they are sanctioned. See Bazelon & Watts, *supra* note 124, at 757-58.

<sup>190</sup> See General Accounting Office, Report No. GAO/HEHS-97-74, Welfare Reform: States' Early Experiences with Benefit Termination 5 (May 1997) <<http://www.gao.gov>> (finding that some states limit number of sanctions while others heavily rely on sanctions to enforce compliance); Quint et al., *supra* note 108, at 129 (noting that workers impose sanctions in Miami at much higher rates than in past); Laura Meckler, Power to Punish: Welfare Rules Booting Thousands Out of System, Atlanta J. & Const., Mar. 29, 1999, at A1, 1999 WL 3759706 (reporting that in some states, sanctions are rarely used, while in others, half of those leaving welfare do so as result of sanctions); Vobejda & Havemann, *supra* note 186, at A1 (revealing that in some states, sanctions are largely responsible for declining caseloads). But cf. Nathan & Gais, *supra* note 107, at 31 (questioning whether there has been large increase in sanctions related to work requirement).

<sup>191</sup> See Rector & Youssef, *supra* note 184, at 3 (reporting that states with full-check sanctioning had average caseload decline of 41.8%, while states with delayed-check sanctioning had decline of just 28.3%; states with weak sanctioning had decline of 17.3%); Judith Havemann, Tough Steps Credited for Welfare Dip: Heritage Foundation Study Sees Economy Having Little Impact on Caseloads, Wash. Post, May 10, 1999, at A2 (reporting on finding that states that cut off benefits after one infraction experienced greater caseload declines than states with more lenient policies).

ing one three-month period, almost forty percent of recipients who left welfare nationally did so because of sanctions.<sup>192</sup>

One of the most comprehensive studies of sanctions focused on Delaware's "A Better Chance" (ABC) program, which emphasizes the aggressive use of sanctions to motivate recipients.<sup>193</sup> Delaware has created two principal kinds of sanctions. "Adult Responsibility" sanctions focus on noncompliance with "enhanced family functioning requirements" such as immunization, meeting with a family planner, attendance at parenting classes, and participation in substance abuse treatment.<sup>194</sup> The penalty was set at fifty dollars for the first month of noncompliance with an incremental increase of fifty dollars in each subsequent month of noncompliance.<sup>195</sup> In contrast, "Work and Training" sanctions focus on failure to participate in work-related activities or on failure of children to attend school. These sanctions take the form of a one-third reduction in the grant for two months, followed by a two-thirds reduction for two months if noncompliance continues, followed by permanent case closure if a recipient does not comply after four months.<sup>196</sup>

Researchers found that by June 1998, fifty-five percent of recipients who had been enrolled during ABC's first eighteen months had been sanctioned.<sup>197</sup> Of these, forty-five percent had their cases closed.<sup>198</sup> The study concluded that there was little evidence that the sanctions helped to bring about compliance and much evidence that recipients who are more socially and economically disadvantaged were sanctioned more frequently.<sup>199</sup> After other variables were taken into account, there were substantial differences in the implementation of sanctions in different welfare offices: "The findings suggest ABC sanctions are influenced by varied implementation and personal factors. That large office differences remain even after accounting for

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<sup>192</sup> See Vobejda & Havemann, *supra* note 186, at A1.

<sup>193</sup> See Fein & Lee, *supra* note 177, at 3-4 (discussing ABC Policy Manual and its emphasis on swift implementation of sanctions to promote compliance).

<sup>194</sup> See *id.* at 4-5.

<sup>195</sup> See *id.* at 4.

<sup>196</sup> See *id.* at 4-5. Delaware also has a third form of sanction that relates to the school attendance or work activity of teenagers. See *id.* at 5-6.

<sup>197</sup> See *id.* at 8. Fifty-two percent received work related sanctions and thirty-two percent received adult responsibility sanctions. Overlap between the two types of sanctions was common. See *id.* at 8.

<sup>198</sup> See *id.* at 23.

<sup>199</sup> See *id.* at 22, 38. The authors suggest that the sanctions failed to bring about compliance with program rules because recipients were unable to understand the rules and because their circumstances prevented them from complying. See *id.* at 38.



socioeconomic differences across offices is strong testimony to the advantage that local implementation matters.”<sup>200</sup>

### 3. *Integration of Functions*

One of the key steps in the transition from the social work to the legal-bureaucratic model of benefit administration was the separation of eligibility determination from counseling that took place in the early 1970s.<sup>201</sup> Although the counseling function largely disappeared, work requirements began to take its place. On the ground level, welfare work and training programs have tended to be administered by personnel separate from those who make eligibility determinations. Following this pattern, the JOBS program, established by the 1988 Family Support Act,<sup>202</sup> generally was administered by a separate set of workers.<sup>203</sup> Going further, some programs assigned the task of making initial eligibility determinations to specialists who had no responsibility for the maintenance of ongoing cases.<sup>204</sup> Thus, recipients typically dealt with a number of workers, each of whom had a narrow role.

Currently, many programs are rethinking this division of labor, and a trend is underway toward recombining administrative functions so that each worker has several roles. As a result, recipients are more likely to deal with fewer workers, thus enhancing the role of each in the life of the recipient. The result of this reintegration of functions is to further augment the relative power of workers to clients.

In many states, the replacement of AFDC with TANF has been accompanied by major administrative shake-ups. A number of states have given a single caseworker responsibility for diversion, eligibility determination, the development of employability plans, the monitoring of compliance, and the imposition of sanctions.<sup>205</sup> This aggregation has been undertaken in whole or in part in states such as Oregon,

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<sup>200</sup> *Id.* at 21-22. David Fein and Wang Lee attribute the likely causes of this variation to differences in staffing arrangements, office leadership, sanction procedures, and attitudes of staff. See *id.* at 22.

Researchers also found significant inconsistencies in the implementation of sanctions in Nebraska. See Meckstroth et al., *supra* note 125, at 89-91. A study by the policy research firm Mathematica found that “[s]ince case managers use their discretion in determining when it is appropriate to initiate the sanction process, they vary in the extent to which they apply sanctions.” *Id.* at 90.

<sup>201</sup> See *supra* text accompanying notes 61-62.

<sup>202</sup> Pub. L. No. 100-485, 102 Stat. 2343 (repealed 1996).

<sup>203</sup> See Holcomb et al., *supra* note 117, at 59 (noting that prior to welfare reform, interaction between income maintenance staff and welfare-to-work personnel was minimal).

<sup>204</sup> See Bane & Ellwood, *supra* note 51, at 3-5.

<sup>205</sup> See Holcomb et al., *supra* note 117, at 59-60 (reporting that some states have combined various case management functions into one staff position).

Massachusetts, and Wisconsin.<sup>206</sup> In Portland, for example, specialization has been retained, but the specialties have been redefined. Some staff, for example, concentrate on "hard-to-serve" recipients, while others focus on recipients in subsidized employment or recipients who are working and so no longer need cash assistance.<sup>207</sup> Utah, Kansas, West Virginia, and Tennessee have eliminated the dichotomy between eligibility and employment workers by combining the functions in case managers who perform both tasks.<sup>208</sup> In Rhode Island, eligibility technicians are being replaced by Family Independence Program Workers with responsibility for diversion, continuing eligibility reviews, assessment, work referrals, and monitoring compliance with work requirements.<sup>209</sup> Researchers report that "integrated case management" is a central feature of Nebraska's TANF program, as managers perform a wide range of activities designed to influence clients' behavior, including their participation in program activities, their receipt of services, and their transition to work.<sup>210</sup>

The movement toward integration of caseworker functions is not simply a reshuffling of tasks. One of the goals is to establish a relationship between workers and clients in which workers play a pivotal role in "managing" clients' cases. In Michigan, for example, "family independence specialists" are responsible for "assessing client needs, developing a trusting relationship with clients, advocating for and linking clients to resources, and motivating clients to become self-sufficient."<sup>211</sup> They are expected to work "holistically" with families.<sup>212</sup> In Wisconsin, the TANF caseworker was conceived as "a teacher, preacher, friend and cop—an all-purpose partner to guide poor parents into jobs."<sup>213</sup>

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<sup>206</sup> See *id.*

<sup>207</sup> See *id.* at 61.

<sup>208</sup> See Nathan & Gais, *supra* note 107, at 18.

<sup>209</sup> See *id.* at 19.

<sup>210</sup> See Meckstroth et al., *supra* note 125, at 17-18.

<sup>211</sup> Michigan Program on Poverty & Soc. Welfare Policy, What FIA Directors Have to Say About Welfare Reform 5 (1999) (describing Michigan's welfare system through interviews with directors of local Family Independence Agencies).

<sup>212</sup> See Kristin Seefeldt et al., Moving Toward a Vision of Family Independence: Local Managers' View of Michigan's Welfare Reforms 7 (1998) (detailing implementation of welfare reform at county level in Michigan from 1996 to 1997).

<sup>213</sup> Jason DeParle, For Caseworker, Helping Is a Frustrating Struggle, *N.Y. Times*, Dec. 10, 1999, at A1. Thomas Kaplan reports that Financial and Employment Planner (FEP) workers

determine individual employability plans, assign participants to levels of W-2 [work activity] and to particular assignments within each level, suggest appropriate resources in the community, motivate participants to comply with the letter and spirit of W-2, and sanction participants for failures to comply. If the FEPs work for public agencies, they determine eligibility for food stamps and

The creation of "case managers" also has been promoted by outside experts as a means of increasing participation in work programs.<sup>214</sup> For example, Cuyahoga County (which contains the city of Cleveland) hired the management consulting firm McKinsey & Co. to provide advice on reconfiguring welfare administration.<sup>215</sup> As a result of McKinsey's recommendations, the county created integrated case managers responsible for both eligibility and welfare-to-work functions.<sup>216</sup> Case managers working with TANF households that are subject to time limits have been titled "self-sufficiency coaches."<sup>217</sup>

Similarly, the Manpower Demonstration Research Corporation (MDRC), one of the nation's largest evaluators of social policy, has noted that "a system of *integrated case management* may be able to follow up more extensively" in monitoring participation in welfare-to-work activities.<sup>218</sup> The MDRC guide suggests that case managers "have an easier time communicating the sanction message" because the worker who concludes that a recipient is not cooperating can then implement the sanction herself.<sup>219</sup>

### B. *The Significance of the New Discretion*

The shift from the rule-based orientation of the legal-bureaucratic model to the discretion-laden regime that is emerging from welfare reform constitutes a major restructuring of the relationship between ground-level administrators and welfare clients. This Section considers this new relationship. It also examines the role that the relationship plays in the emergence of a new paradigm of welfare administration. This new paradigm is designed to communicate a different set

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Medicaid. In many W-2 agencies, FEPs are also responsible for initial sessions with prospective participants and for diversion to other programs.

Kaplan, *supra* note 115, at 27-28.

<sup>214</sup> See, e.g., Mead, *Welfare Employment*, *supra* note 101, at 61-63.

One Mathematica study notes that "*integrated case management*—in which one worker provides both case management services and traditional services related to eligibility determination—can lead to significantly higher monthly client participation rates in work-related program activities and considerable reductions in welfare caseloads, compared to typical case management approaches." Meckstroth et al., *supra* note 125, at 18 (internal citation omitted).

<sup>215</sup> See Quint et al., *supra* note 108, at 52.

<sup>216</sup> See *id.* at 53. McKinsey also recommended dispersing staff into neighborhood family service centers, which also would house representatives of other agencies and nonprofit service providers. See *id.*

<sup>217</sup> *Id.*

<sup>218</sup> Gayle Hamilton & Susan Scrivener, Manpower Demonstration Research Corp., *Promoting Participation: How to Increase Involvement in Welfare to Work Activities* 46 (1999). Hamilton and Scrivener do note, however, that when poorly organized, case management may not yield greater participation. See *id.* at 47.

<sup>219</sup> See *id.* at 48.

of social messages than either the social work or the legal-bureaucratic models and is based on a distinctive view of the causes and nature of poverty.

### 1. *The Creation of the Super Worker*

The imposition of work requirements and time limits, the creation of diversion programs, the strengthening of sanctions, and the reorganization of staff functions all have one consequence in common: They increase the authority and discretion of caseworkers. Taken in combination, these trends can produce situations in which workers are handed vast amounts of discretionary authority along with the power to enforce their determinations.<sup>220</sup> Although the devolution of welfare may have fragmented power among the federal government, the states, and the counties, there is a trend toward the concentration of power in the hands of ground-level administrators.

One of the critiques of the legal-bureaucratic model was that recipients were confronted with a huge and faceless bureaucracy. Now, the bureaucracy is much more likely to have a face—recipients are more likely to come into contact with a single individual who makes important decisions concerning their case, rather than simply a clerk who fills out forms. Although there typically is an imbalance of power between welfare workers and clients, this imbalance is much more extreme under the new regime.<sup>221</sup> As a result, the caseworker's outlook, opinions, and sensibilities will matter more. Through one or more interactions, caseworkers will form impressions of recipients that will guide their judgment on any number of issues: whether the individual should be offered a diversion payment, whether the individual is considered "work-ready" and should be assigned to work activities, what kind of work activities are appropriate, what information about other programs or opportunities should be provided, whether the individual is credible when she explains why she missed one or more appointments, and ultimately, whether the individual should receive an exemption or extension of a time limit.<sup>222</sup>

It might be expected that caseworkers would be resistant to these changes. As welfare agencies are asked to do more, the tasks of the

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<sup>220</sup> See Nathan & Gais, *supra* note 107, at 37 ("The biggest increase in discretion under the new regime for welfare policy . . . occurs at the *point of contact* between local workers in welfare systems and the individual applicant or recipient.").

<sup>221</sup> See Hasenfeld, *supra* note 28, at 19 ("By their very nature, human service organizations have considerable power over their clients.").

<sup>222</sup> The home visit is also staging a comeback. See Gais & Johnson, *supra* note 8, at 1349-50. In Michigan, family independence specialists who function as case managers are expected to make home calls. See Michigan Program on Poverty & Soc. Welfare Policy, *supra* note 211, at 5.

workers become more difficult and complex. Staff hired and trained as eligibility clerks may be ill-suited to fulfilling the role of "case manager."<sup>223</sup> The new substantive rules and administrative reorganizations easily could produce an atmosphere of confusion and chaos. A number of the studies reflect a degree of tension, confusion, and discomfort with the massive changes,<sup>224</sup> and even a degree of disagreement with the philosophy and goals of the programs they are expected to implement. For example, ground-level workers rarely place the stress on curbing out-of-wedlock births that was sought by congressional proponents of welfare reform.<sup>225</sup>

Other caseworkers have recognized that they are being handed greater power and freedom and have responded appreciatively. Researchers report that, in general, ground-level workers support the philosophy of welfare reform and the shift in their roles.<sup>226</sup> One case manager told researchers, "Now I have some leverage. I love it."<sup>227</sup> A county administrator in New York summed it up: "We now have permission to 'be real' with clients, to make them understand they have an obligation to work, to help themselves."<sup>228</sup>

Finally, from the standpoint of a recipient, the enhancement of the power of ground-level workers has potential benefits. Under the new system, a capable and skilled worker has a much greater ability to

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<sup>223</sup> See Meckstroth et al., *supra* note 125, at 43 (reporting that in Nebraska, "[m]any case managers are overwhelmed by their many and varied responsibilities"); Michigan Program on Poverty & Soc. Welfare Policy, *supra* note 211, at 5 (finding that shift in functions and office culture from eligibility determination to case management has not been smooth, as staff hired to process paperwork were being asked to perform social work functions); Seefeldt et al., *supra* note 212, at 60-61 (reporting that many supervisors in Michigan questioned whether current workers could become effective case managers).

<sup>224</sup> For example, one caseworker in Cleveland told a researcher, "Sometimes we don't know what the administration expects us to explain to each person. They're expecting us to be more than what we are. They're trying to make us social workers, family planners, accountants—all kinds of things that we're not. We're eligibility specialists." Quint et al., *supra* note 108, at 63. The study concludes that "trainers will need to address former income maintenance workers' anxieties about taking on 'social work' responsibilities that are more open-ended and less well-defined than the tasks to which they are accustomed." *Id.* at 68; see also *id.* at 62 (describing lack of training and constantly shifting rules in Cleveland); *id.* at 133-34 (describing increased workloads, constantly changing instructions, and administrative disorganization in Miami); *id.* at 167 (describing welfare reform in Philadelphia as placing "overwhelmingly heavy burden" on staff).

<sup>225</sup> Richard Nathan and Thomas Gais recount the explanation offered by a New York City welfare official who noted that most welfare workers are themselves single parents. See Nathan & Gais, *supra* note 107, at 7. Caseworkers also frequently disagreed with the decision of many programs to deemphasize education and training. See Quint et al., *supra* note 108, at 122.

<sup>226</sup> See Nathan & Gais, *supra* note 107, at 6.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* (citation omitted).

provide advice or assistance that could be of real use to clients.<sup>229</sup> A system in which workers can help clients find jobs and obtain necessary supports such as child care and transportation has advantages over a system in which workers simply complete paperwork.<sup>230</sup> Unless agencies provide workers with the tools and resources to enable them to offer meaningful assistance, however, these benefits are likely to be more rhetorical than real.<sup>231</sup>

However, the new discretionary system has its downside for clients as well. The increase in discretionary authority makes seeking the approval of the caseworker imperative.<sup>232</sup> If a caseworker forms a negative view of an individual, this outlook may influence any number of more specific determinations. The recipient who questions or challenges the worker does so at her peril. Even when a recipient can challenge a caseworker's determination at an administrative hearing, the recipient must be concerned about whether future determinations by that caseworker will be affected by the dispute. In the new regime, recipients must recognize the greatly enhanced position of the worker, or risk the consequences.

## 2. *The Message of the New Discretion*

The return to discretionary administration is part of an emphasis that many states have placed on changing the "message" of welfare.

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<sup>229</sup> See, e.g., DeParle, *supra* note 213, at A1.

<sup>230</sup> See Nathan & Gais, *supra* note 107, at 33.

<sup>231</sup> See Jason DeParle, *Flaws Emerge in Wis[consin] Welfare-to-Work Program*, Sunday Gazette-Mail (Charleston, W. Va.), Oct. 18, 1998, at 2B, available in 1998 WL 5977338 (noting "gaps" between theory of service provision and reality).

There are reasons to be concerned that in many places recipients are not being guided towards assistance for which they may qualify when they leave the welfare rolls. Participation rates in the Food Stamp and Medicaid programs have dropped significantly, even though the vast majority of former welfare recipients remain eligible for these programs. See General Accounting Office, Report No. GAO/HEHS-99-163, *Medicaid Enrollment: Amid Declines, State Efforts to Ensure Coverage After Welfare Reform Vary 33-34* (1999) (noting that welfare reform has made it more complicated for eligible low-income families to be covered under Medicaid, and that states have been challenged to identify families no longer on welfare but still Medicaid-eligible); Leighton Ku & Brian Bruen, *The Continuing Decline in Medicaid Coverage 1* (1999) (noting decline in Medicaid coverage after 1996); Sheila R. Zedlewski & Sarah Brauner, *Declines in Food Stamp and Welfare Participation: Is There a Connection?* 1 (1999) ("Many question whether there is a connection between reforms designed to move families into work and off the cash assistance rolls and recent drops in FSP [Food Stamp Program] participation."); Sara Rosenbaum & Kathleen A. Maloy, *The Law of Unintended Consequences: The 1996 Personal Responsibility and Work Opportunity Reconciliation Act and Its Impact on Medicaid for Families with Children*, 60 Ohio St. L.J. 1443 (1999) (describing link between welfare reform and declining Medicaid enrollment).

<sup>232</sup> See Hasenfeld, *supra* note 28, at 18 ("Discretion means that the clients become dependent on the goodwill of the workers, and thus vulnerable to abuse.").

States have concluded that changing substantive program policies is insufficient to bringing about fundamental change in the system. They have sought to design the administration of welfare to make ground-level workers become expositors of this new message. Seen in this light, it is clear that the revolution in welfare administration has a specific content—a set of assumptions about the nature of the “problem” that recipients face and that welfare is meant to address, and a message about the receipt of benefits that workers are expected to absorb and to communicate. As a major study of welfare reform in five large cities explained:

If recipients are to understand the importance of work and the reality of the time limits, then *welfare agency staff members must deliver a very different message* than the one they gave to clients in the past. This new message—one that emphasizes the temporary nature of assistance and the responsibility of parents to support themselves and their children—must be communicated clearly, consistently, and with considerable urgency.<sup>233</sup>

This goal of sending a message is an explicit objective in many states. For example, the draft Los Angeles plan to implement California’s TANF program states that applicants “must encounter a welfare system that speaks in one voice and delivers a clear message: ‘Your responsibility is to get a job, so that you will not continue to need public assistance. Our responsibility is to do everything possible to help you do that.’”<sup>234</sup>

In the belief that ground-level welfare workers are critical to creating and communicating this new culture, the Department of Health and Human Services (HHS) has published training materials, entitled the *Culture Change Training Strategy Project Report*, to serve as a prototype for states.<sup>235</sup> The materials proclaim that “[t]he reinvention of welfare requires a radical organizational culture change that shifts the focus of AFDC/JOBS from an entitlement to temporary assistance leading to work.”<sup>236</sup> The materials state that “training is a critical

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<sup>233</sup> Quint et al., *supra* note 108, at 10.

<sup>234</sup> *Id.* at 87.

<sup>235</sup> Administration for Children & Families, U.S. Dep’t of Health & Human Servs., *Culture Change Training Strategy Project Report* (1996) [hereinafter *Culture Change Report*]. The report, which was written by a consulting firm, is the product of a 15-member task force on “culture change” convened by the Administration for Children and Families and comprised mostly of state welfare officials.

The idea that welfare reform should communicate a message to recipients and that this can only be accomplished if staff similarly absorb and internalize this message was first developed by the work program in Riverside, California. See Joel Handler & Yeheskel Hasenfeld, *We the Poor People: Work, Poverty, and Welfare 77-78* (1997).

<sup>236</sup> 1 *Culture Change Report*, *supra* note 235, at 3-4.

component and foundation for instituting welfare culture change.”<sup>237</sup> In essence, the materials envision a concentrated reeducation program designed not to teach workers new rules and procedures, but rather a different way of thinking about welfare and about their jobs. The materials are more a form of ideological indoctrination than a “how to” manual. In a number of ways, they serve as a distillation of the trends in welfare administration that can be seen in the states and articulate a philosophy that connects them. The materials seek to redefine the goals and vocabulary of welfare administration. For example, they contain a “Culture Change Top Ten” that identifies the objectives of the effort. The list characterizes the AFDC system as being “focused on paper,” while the new system should be “focused on people.”<sup>238</sup> While the list describes the AFDC program as driven by “absolute rules and policies for compliance,” the new system is characterized as “flexible [with] open policies for results.”<sup>239</sup>

The materials follow up the “Culture Change Top Ten” with a list of eight specific “Culture Change Accomplishments” considered desirable.<sup>240</sup> Most of these “accomplishments” consist of transforming recipient-worker contacts, which formerly centered on relating information, into joint activities between the worker and the recipient. For example, under the old system a client would report to the worker any changes in circumstance, while under the new system the “Eligibility Worker and client jointly implement and monitor the self-sufficiency plan.”<sup>241</sup>

The training intended to bring about this transformation includes units such as “The Dynamics of Change” in which workers are taught that resistance to change is a natural reaction and are assisted in overcoming this response.<sup>242</sup> The materials recommend telling workers that their performance will be evaluated in accord with the new goals of the program:

[D]iverting clients to other programs, services, and governmental or non-governmental benefits, effectiveness in developing self-sufficiency plans, and accessing resources. Your main objective is to get clients off of welfare and into the workforce and assist the clients in

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<sup>237</sup> Id. at 1-3.

<sup>238</sup> Id. at 4-1.

<sup>239</sup> Id.

<sup>240</sup> See id. at 4-4.

<sup>241</sup> Id. The report elaborates on this goal, explaining that “[t]he worker will need to be skilled at understanding the client’s strengths, weaknesses and abilities in order to develop a plan which will be successful . . . .” Id. at 4-7 to -8.

<sup>242</sup> See 2 Culture Change Report, *supra* note 235, at Course 1, mod. 1, p. 11. Thus, workers are told of “four stages of change,” a process through which “denial” is transformed into “resolution” as change is embraced. See id.



learning what it takes to maintain a job. Work will be emphasized first.<sup>243</sup>

They also advise informing workers that “[t]here will be more discretion and flexibility in your job and you will have more interaction with the client and community resources including other agencies. As a worker, you will be more proactive and autonomous in making decisions.”<sup>244</sup>

The materials train workers to be relentlessly upbeat about recipients’ prospects for work. For example, they advise workers to smile rather than frown, and to point out that if the unemployment rate in an area is ten percent, then ninety percent of workers are employed.<sup>245</sup> The emphasis on diversion is explained as a means of giving “individuals the clear message that they have strengths and can use resources that will not foster dependency.”<sup>246</sup> After listing possible barriers to employment that may be cited by recipients, including ill health, lack of child care, lack of transportation, and poor jobs skills, the materials instruct workers to assist clients in changing their viewpoints and accepting work as an “achievable means of self-sufficiency.”<sup>247</sup>

Amidst the welter of slogans, flip charts, group activities, simulations, quizzes, and games<sup>248</sup> that make up the culture change teaching materials, several assumptions are apparent. First, clients are never referred to as having a “right” to anything. Although clients may be provided with assistance in various ways, there is nothing to indicate that a client can demand anything. Instead, the client is expected to participate in a “partnership” with a caseworker who has immense power and whose main objective is to get her off the benefit rolls. Clearly, the caseworker holds all the cards in this partnership.<sup>249</sup> A client who makes demands of the agency or possesses a sense of entitlement, runs the risk of being judged a bad “partner.”

Second, although the TANF agency may provide some material forms of assistance, the materials suggest that its principal role is a

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<sup>243</sup> Id. at Course 1, mod. 2, p. 11-12.

<sup>244</sup> Id. at Course 1, mod. 2, p. 12.

<sup>245</sup> See id. at Course 6, mod. 1, p. 9, Course 2, mod. 2, p. 7.

<sup>246</sup> Id. at Course 3, mod. 2, p. 11. A handout shows workers that the “typical outcome” of the intake/application interview has shifted from enrollment of the client in public assistance programs to client diversion. See id. at Course 3, mod. 2, p. 4.

<sup>247</sup> Id. at Course 2, mod. 2, pp. 6-7.

<sup>248</sup> See, e.g., id. at Course 1, mod. 1, p. 12 (“Wheel of Change—Game Show”); id. at Course 1, mod. 2, p. 18 (“Culture Change Pictionary”); id. at Course 3, mod. 2, p. 10 (“Beat the Clock”); id. at Course 4, mod. 4, p. 3 (“Bingo”).

<sup>249</sup> See Hasenfeld, *supra* note 28, at 19 (“Contract . . . assumes a certain degree of power balance that normally does not exist in client-worker relations.”).

motivational one—to get recipients to “buy in” to the philosophy of the program. Workers are explicitly trained in “marketing mutual responsibility,” motivating clients through a spirit of partnership to want a job.<sup>250</sup> The combination of smiles and upbeat encouragement about the client’s strengths and potential<sup>251</sup> is designed to convince clients that they can succeed in the job market, in the hope that this conviction will lead to success. As the materials put it, an approach that centers on problem solving “can alter the way individuals see themselves and how others see them, and in the end shapes patterns of behavior and relationships.”<sup>252</sup>

Underpinning this approach is an assumption that the principal problem facing welfare recipients is perceptual: They believe that they cannot succeed in the job market and this belief is itself the fundamental barrier to success. This assumption is essentially a restatement of the culture of dependency thesis—the idea that reliance on welfare is debilitating and fosters further dependency. Trainers are instructed to emphasize that “public sentiment indicates that the majority of people are no longer willing to tolerate having their tax dollars spent on welfare programs that foster lifelong, intergenerational habits of dependency.”<sup>253</sup> Workers are charged with the responsibility of breaking this dependency: “Policy changes might take time to implement, but front-line workers do not need to wait for new policy before changing the way they work with clients.”<sup>254</sup>

To the extent that services such as training or child care are provided, the assistance is viewed as a method of eliminating “excuses” for nonwork, rather than a means of meeting legitimate needs.<sup>255</sup> In accord with this view, the welfare worker appears as a kind of coach

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<sup>250</sup> 2 Culture Change Report, *supra* note 235, at Course 2, mod. 1, p. 1, 18.

<sup>251</sup> The materials list examples of “empowering” worker conduct, such as showing approval and smiling, and examples of conduct that “diminishes” the recipient, such as showing disapproval, remaining noncommittal, and frowning. See *id.* at Course 6, mod. 1, p. 9.

<sup>252</sup> *Id.* at Course 3, mod. 2, p. 11; see also *id.* at Course 6, mod. 1, p. 6 (“An empowered client . . . knows that he or she has the ability and responsibility to do what it takes to become successfully employed.”).

<sup>253</sup> *Id.* at Course 5, mod. 1, p. 3. The materials explain that “[w]hen people are treated as helpless individuals, they often develop ingrained helpless behaviors.” *Id.* at Course 3, mod. 2, p. 11. In one exercise, workers are instructed to relate an experience with a client who “sees receiving welfare as a lifestyle;” the trainer is directed to lead a discussion about the ways in which welfare workers fostered dependency. See *id.* at Course 5, mod. 1, p. 2.

<sup>254</sup> *Id.* at Course 5, mod. 1, p. 3.

<sup>255</sup> References to the services that clients may receive, such as child care, are scarce and frequently oblique. Thus, workers are directed to ensure cost-effectiveness “by delivering only those benefits and services that are needed for assisting the client in becoming employed.” *Id.* at Course 5, mod. 3, p. 6. The goal is to shrink the time over which services are received by accelerating the client’s move to employment. See *id.* at Course 5, mod. 3, p. 7. The client is charged with “the responsibility for increasing the cost-effectiveness of

whose goal is to get the client to "kick the habit," through a combination of exhortation, assistance, and threats.<sup>256</sup> In this sense, the old saw that welfare is a narcotic, is taken as literally true: The techniques used to combat addiction and substance abuse also are used to move people off of the welfare rolls. As the individual who personifies the agency's role in this new "partnership," and who functions as a combination of coach, confidante, and supervisor, the ground-level worker emerges as a pivotal figure.

Moreover, the materials make explicit the assumption that any job is better than no job, thus shunting aside questions about whether particular jobs are appropriate. Apparently, the pay cannot be too low, the hours too irregular, or the commute too far to make a job unsuitable. Recipients who are coached to believe that barriers are principally psychological may be in for a rude surprise when they enter the workforce. The evidence overwhelmingly demonstrates that many obstacles poor mothers encounter in the labor market are very real.<sup>257</sup>

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his/her self-sufficiency plan to assure that only those benefits and services needed to go to work are received." *Id.* at Course 5, mod. 3, p. 9.

<sup>256</sup> The materials studiously avoid discussion of sanctions, instead emphasizing that recipients must be informed of the "consequences" of lack of participation in work activities and other program requirements. See, e.g., *id.* at Course 2, mod. 1, p. 23.

<sup>257</sup> After studying 379 poor families in four cities, Kathryn Edin and Laura Lein concluded that

The primary lesson we have taken from their stories is not that the welfare system of the early 1990s engendered psychological dependency or encouraged the formation of a set of deviant behaviors. The real problem with the federal welfare system during these years was a labor-market problem. The mothers we interviewed had made repeated efforts to attain self-sufficiency through work, but the kind of jobs they could get paid too little, offered little security in the short term, and provided few opportunities over time.

Kathryn Edin & Laura Lein, *Making Ends Meet: How Single Mothers Survive Welfare and Low-Wage Work* 220 (1997); see also Julia R. Henly, *Barriers to Finding and Maintaining Jobs: The Perspectives of Workers and Employers in the Low-Wage Labor Market*, in *Hard Labor: Women and Work in the Post-Welfare Era* 48 (Joel F. Handler & Lucie White eds., 1999) (arguing informal social networks are key to getting low-skill jobs, blocking many low-income women from employment). Henly writes that low-wage workers "face a labor market that provides few opportunities for economic security. Their jobs are low paying, offer limited benefits, and are frequently part-time and temporary in nature. Moreover, finding work in this labor market can be difficult." *Id.* at 70. She also notes that

[T]he role demands imposed by parenthood often conflict with the demands of the workplace. Managing these multiple and often conflicting demands is difficult for all working parents, but low-income parents face greater challenges because they have fewer resources to purchase support and because their jobs provide them less independence, authority, and flexibility to respond to competing demands.

*Id.*; see also Joel F. Handler, *Low-Wage Work "As We Know It": What's Wrong/What Can Be Done*, in *Hard Labor*, *supra*, at 3, 3-12 (discussing difficulties poor mothers face in labor market).

Finally, the relative balance of power between caseworkers and recipients under the new system is closely akin to the mismatch between managers and employees in low-wage jobs. The legal-bureaucratic framework provided a degree of order and predictability that frequently does not exist in the realm of low-wage, at-will employment. The fact that the welfare allowance was a more reliable source of income than a paycheck could be seen as a disincentive to leave the benefit rolls.<sup>258</sup> By making life on welfare risky and subject to the whims of powerful caseworkers, the welfare office may be moving closer to the workplace that most individuals face when they move from welfare to work.<sup>259</sup>

### *C. Managing the New Discretion: The Problem of Central Control*

The new administrative model emerging from the process of welfare reform bestows large amounts of discretionary authority on thousands of workers to make decisions that have major impacts on many lives. Such a system inevitably raises issues of central control—mechanisms that central authorities use to direct the activities of local offices and ground-level workers. On the face of it, ground-level discretion appears inconsistent with central control, but as discussed in this Section, this is not necessarily the case. In discretionary systems, control can be maintained indirectly as central administrators shape the context and climate in which discretion is exercised. The shift to discretionary administration has been accompanied by deliberate attempts to channel caseworker discretion in particular directions. Although such a system leaves plenty of room for individual inequities and arbitrary results, central managers can direct the flow of decisions in the aggregate. The new discretion is nowhere near as random and chaotic as it may appear.

This Section discusses the new emphasis on governing through the use of channeled discretion that is prominent in many areas of public administration. This approach is borrowed from developments in private sector management, and is referred to here as the trend toward entrepreneurial government. This Section looks at how this trend is affecting welfare administration. Seen as a whole, the new

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<sup>258</sup> Indeed, research has shown that recipients were often reluctant to give up a steady source of subsistence income for the vagaries of the low-wage labor market, which is characterized by unstable, short-term jobs. See Edin & Lein, *supra* note 257, at 63-64. For poor mothers, risk-avoidance is a critical survival strategy. See *id.* at 63 ("The mothers with whom we spoke were less interested in maximizing consumption than in minimizing the risk of economic disaster.").

<sup>259</sup> As noted above, critics of the legal-bureaucratic model complained that it provided too much security for recipients. See *supra* text accompanying notes 99-101.

model of welfare administration consists of two components: first, the grant of extensive discretionary authority to low-level administrators in their dealings with clients, and second, the use of elaborate mechanisms to channel and direct the way in which this discretion is exercised.

*1. Steering Discretion Through Techniques of Entrepreneurial Government*

Public benefit programs organized pursuant to a legal-bureaucratic model deal with the issue of central control in a relatively straightforward way. Central administrators issue generally applicable rules that bind lower-level workers. Most, if not all, of the difficult issues are considered to be resolved through the issuance of regulations, manuals, or other kinds of policy statements. Central authorities can monitor compliance through quality review systems, which conduct random or selective audits in order to minimize what are viewed as errors. To be sure, the legal-bureaucratic model is an archetype—no agency operates solely pursuant to rules. In practice, lower-level workers always will retain a measure of discretion and an ability to resist central authority.<sup>260</sup> As discussed above, institutional culture plays an important role even in legal-bureaucratic systems.<sup>261</sup> In such systems, however, the residual discretion retained by ground-level workers generally is perceived as a problem to be addressed through the issuance of more detailed rules and rigorous procedures to promote compliance.

In a discretionary regime, by definition, many issues cannot be resolved by simply looking to the rule book. Instead, such systems recognize that workers must make judgment calls; they must use subjective standards to evaluate ambiguous situations.<sup>262</sup> The fact that two workers well could reach different conclusions on an issue based on the same facts is accepted, rather than viewed as a problem. Indeed, since each case is viewed as unique, the problem of consistency, to a large extent, is assumed away. Clearly, in a discretionary system it matters a great deal who the workers are, and there may be substantial variation in the treatment of similar cases.

Nonetheless, in a discretionary system, central administrators need not cede all control over the direction and work of the agency to their subordinates. Although workers have fewer rule-based constraints on how they act with respect to particular cases, they operate

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<sup>260</sup> See *supra* text accompanying notes 28-36.

<sup>261</sup> See *supra* text accompanying notes 30-32.

<sup>262</sup> See *supra* text accompanying notes 41-47.

in a context that has been established by their superiors.<sup>263</sup> Viewed in the aggregate, decisions in discretionary systems are seldom truly random.<sup>264</sup> Generally, exercises of discretion have distinct patterns that, in effect, become the operative policy of the agency.<sup>265</sup> In discretionary regimes, power lies not in promulgating rules, but in the forces that shape and guide these patterns in discretionary decisionmaking.<sup>266</sup> In short, in the absence of rules, institutional culture becomes an even more critical force that drives the conduct of ground-level workers.

In the field of public administration there has been an explosion of interest in shaping and directing institutional culture as a means of channeling discretion.<sup>267</sup> Expositors of "entrepreneurial government" have advocated the use of private sector management techniques by public agencies.<sup>268</sup> The most visible manifestation of this movement has been the National Performance Review effort headed up by Vice

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<sup>263</sup> The importance of institutional structure and ethos has received renewed attention in recent years in the social sciences and law. See generally Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (1994) (arguing that institution deciding question of law or public policy is more determinative of outcome than individuals exercising discretion); *The New Institutionalism in Organizational Analysis* (Walter W. Powell & Paul J. DiMaggio eds., 1991) (examining origins, current status, and future developments of institutional theory).

<sup>264</sup> See M.P. Baumgartner, *The Myth of Discretion*, in *The Uses of Discretion*, *supra* note 73, at 129-30 (observing that sociological evidence demonstrates that exercise of discretion by officials "follows clear and specifiable principles and is remarkably consistent and patterned").

<sup>265</sup> See Lipsky, *supra* note 16, at 13 (stating that "street-level bureaucrats . . . exercise wide discretion in decisions about citizens with whom they interact. Then, when taken in concert, their individual actions add up to agency behavior.").

<sup>266</sup> See Rubin, *supra* note 73, at 1322. Rubin notes that discretion, in the sense of the complete freedom to make a choice, almost never exists in the administrative state: "The image of the bureaucrat who follows her own philosophy—emphatic, progressive, or pragmatic—is an unrealistic one." *Id.* at 1323. Rather, choices are guided by formal goals and informal agency norms. Because the term "discretion" conjures up this improbable scenario, Rubin advocates abandoning it in the analysis of the administrative state. According to Rubin, the distinction between "rules" and "discretion" is largely a difference in the means of supervising workers. See *id.* at 1304; see also Baumgartner, *supra* note 264, at 156-57 (arguing that exercise of discretion is controlled by social norms and values).

<sup>267</sup> Theorists of organizational behavior long have recognized the role of culture in the functioning of institutions. Herbert Simon observed the central importance of "identification" in organizational behavior. He noted that "[i]dentification is the process whereby the individual substitutes organizational objectives . . . for his own aims as the value-indices which determine his organizational decisions." Simon, *supra* note 31, at 218. He concluded that "a major problem in effective organization is to specialize and subdivide activities in such a manner that the psychological forces of identification will contribute to, rather than hinder, correct decision-making." *Id.* at 214.

<sup>268</sup> See generally Michael Barzelay, *Breaking Through Bureaucracy: A New Vision for Managing in Government* (1992) (arguing that bureaucratic form of government leads to misplaced accountability and inefficiency); David Osborne & Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector* (1992)

President Al Gore, which seeks to spur agencies to "reengineer" the way they do business.

Proponents of entrepreneurial government have argued that, rather than exerting direct authority over tasks performed by lower-level workers, central administrators should identify desired outcomes and shape the incentive structure so that workers strive to achieve these outcomes.<sup>269</sup> David Osborne and Ted Gaebler advise that government agencies should be driven by missions that they seek to accomplish and should evaluate their success in terms of results, rather than the completion of tasks.<sup>270</sup> To encourage this orientation, they argue that rewards and incentives should be restructured to focus on outcomes rather than effort.<sup>271</sup> This prescription is part of a broad movement toward performance-based evaluation.<sup>272</sup>

Concomitant with this emphasis on results rather than tasks, Osborne and Gaebler prescribe that front-line workers be given

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(arguing that traditional bureaucratic forms of government fail because they lack ability to respond to rapidly changing situations).

The most far reaching proposal to redesign the public sector to reflect developments in private sector management has been put forward by Michael Dorf and Charles Sabel, who argue that all of our basic governmental institutions and relationships should be reconceived. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267 (1998) [hereinafter Dorf & Sabel, *Democratic Experimentalism*] (promoting idea of "democratic experimentalism," which decentralizes government power and distributes it to citizens); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 Vand. L. Rev. 831 (2000) (arguing that drug treatment courts illustrate means by which all courts can be more experimentalist).

<sup>269</sup> See Osborne & Gaebler, *supra* note 268, at 138-65.

<sup>270</sup> See *id.* Michael Barzelay has offered many of the same recommendations. He argues that "bureaucratic" agencies should be supplanted by "customer-driven" agencies. According to Barzelay, a bureaucratic agency "defines itself both by the amount of resources it controls and by the tasks it performs." Barzelay, *supra* note 268, at 8. In contrast, a "customer-driven agency defines itself by the results it achieves." *Id.*

<sup>271</sup> See Osborne & Gaebler, *supra* note 268, at 139 ("Public entrepreneurs know that when institutions are funded according to inputs, they have little reason to strive for better performance. But when they are funded according to outcomes, they become obsessive about performance.").

<sup>272</sup> See, e.g., Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (codified as amended in scattered sections of 5 U.S.C., 31 U.S.C., and 39 U.S.C.) (requiring federal agencies to establish performance goals and measures of success in meeting these goals); Vice President Gore's National Partnership for Reinventing Government, *Managing for Results* (visited Aug. 10, 2000) <<http://www.npr.gov/initiati/mfr/>> (describing Results Act and providing current information on its implementation). See generally Harry P. Hatry, *Performance Measurement: Getting Results* (1999) (tracing development of performance measurement and providing advice on establishing performance measurement systems). [TS: this book is in the Columbia Social Science Library, but was in the bindery during C&S, please find it there, or order it via ILL]

greater discretion and trust in decisionmaking.<sup>273</sup> In their view, the locus of agency decisionmaking should be shifted downward to encourage innovation, staff loyalty, and a focus on results. To maintain control in such an environment, they argue that organizations must “articulate their missions, create internal cultures around their core values, and measure results.”<sup>274</sup> Similarly, Michael Barzelay has argued that central administrators should dispense with an obsolete focus on rules to control lower-level workers, and should rely instead on “winning adherence to norms.”<sup>275</sup> To win this allegiance, agencies should provide workers with education, coaching, feedback, and recognition designed to enable them to internalize the agency’s mission.<sup>276</sup>

These prescriptions are drawn from developments in private sector management that observers see as the emergence of a postindustrial form of business organization.<sup>277</sup> These new methods of business organization seek to “marry the flexibility, agility, creativity and leanness of the entrepreneurial form to the large corporation”<sup>278</sup> by stressing decentralization and results-oriented rather than rule-oriented management.<sup>279</sup> Proponents of entrepreneurial government view the dismantling of hierarchical bureaucratic government as analogous to creation of these more flexible and decentralized methods of production. In essence, they seek to remake government in the image of the contemporary corporation.

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<sup>273</sup> See Osborne & Gaebler, *supra* note 268, at 252-53. Osborne and Gaebler argue in favor of returning control to “those who work down where the rubber meets the road.” *Id.* at 254. Michael Barzelay offers a similar recommendation. See Barzelay, *supra* note 268, at 9 (“A customer-driven agency empowers front-line employees to make judgments about how to improve customer service and value.”).

<sup>274</sup> Osborne & Gaebler, *supra* note 268, at 254. Osborne and Gaebler explain that “shared values and missions take the place of rules and regulations as the glue that keeps employees in the same direction.” *Id.*

<sup>275</sup> Barzelay, *supra* note 268, at 125 (emphasis omitted).

<sup>276</sup> See *id.*

<sup>277</sup> See Michael J. Piore & Charles F. Sabel, *The Second Industrial Divide: Possibilities for Prosperity* 17 (1984) (describing emergence of “flexible specialization” that is supplanting mass production model of industrial organization); Rosabeth Moss Kanter, *The Future of Bureaucracy and Hierarchy in Organizational Theory: A Report from the Field*, in *Social Theory for a Changing Society* 63, 63-65 (Pierre Bourdieu & James S. Coleman eds., 1991) (contrasting traditional bureaucratic corporation with new forms of corporate structure adapted to compete in global markets driven by rapidly changing technologies).

<sup>278</sup> Kanter, *supra* note 277, at 65.

<sup>279</sup> See *id.* at 63-65, 74. Kanter contrasts the rigidity of hierarchically-managed bureaucratic companies with “flatter, more focused organizations stressing synergies, entrepreneurial enclaves . . . and strategic alliances.” *Id.* at 65. The new management model rewards outcomes, rather than adherence to rules and procedures. See *id.* at 74. Kanter also notes a trend towards creating market-like relationships within firms, by viewing some components as “customers” of other components. See *id.* at 68-69.



## 2. *Entrepreneurial Government and Welfare Administration*

The movement toward "entrepreneurial" government is having a major impact on the new discretionary regime of welfare administration.<sup>280</sup> The expansion of ground-level discretion is coupled with measures intended to influence and shape the way in which ground-level workers use their authority. In the new administrative regime, it is possible to identify a number of means that central decisionmakers use to steer the system as a whole. These mechanisms include deliberate attempts to inculcate welfare workers with a particular "culture," and the use of performance measures and incentives to evaluate and fund programs. In essence, central administrators are seeking to harness the institutional culture of welfare offices in a far more intensive and systematic way than previously has been attempted.

HHS's welfare "culture change" training materials are plainly an outgrowth of this "entrepreneurial" approach to administration.<sup>281</sup> The materials are intended to arrest the institutional culture that dominated the AFDC program and to establish a new ethos in the administrative culture of welfare.<sup>282</sup> This ethos embodies a series of assumptions about recipients, incorporates a view of the worker's role, and contains a vision of the agency's ultimate goal.<sup>283</sup> If effectively assimilated, the ethos would guide the ways in which workers exercise discretion in the innumerable situations with which they may be presented.

Welfare agencies have other tools that they can deploy to shape their institutional cultures and channel the exercise of discretion by their workers. The systems for evaluating workers and conferring approval on individuals and local offices also establish the content of policy. Organizational theory suggests that lower-level workers are motivated, or at least influenced, by their desire for approval, advancement, salary increases, job security, and the like.<sup>284</sup> All of these

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<sup>280</sup> David Riemer, Chief of Staff for the Mayor of Milwaukee, was among the first to draw an explicit link between the emerging theories of public administration and the process of welfare reform. In 1995, Riemer advocated a new "entrepreneurial model" of welfare administration, under which private agencies are given broad latitude in administering benefit programs and are compensated based on the achievement of results. See David R. Riemer, *Replacing Welfare with Work: The Case for an Employment Maintenance Model*, Focus (University of Wis.-Madison Inst. for Research on Poverty), Winter 1994-95, at 23.

<sup>281</sup> See *supra* text accompanying notes 235-48.

<sup>282</sup> Herbert Simon has identified training as a means of controlling the decisions of subordinates without directly exercising authority over them. See Simon, *supra* note 31, at 15 ("[T]raining prepares the organization member to reach satisfactory decisions himself, without the need for the constant exercise of authority or advice.").

<sup>283</sup> See *supra* text accompanying notes 235-56.

<sup>284</sup> See Simon, *supra* note 31, at 111 ("The members of an organization . . . contribute to the organization in return for inducements that the organization offers them.").

factors can be utilized by agencies to influence the atmosphere in which discretionary decisions are made.<sup>285</sup> In the area of welfare, the shift to discretion is also accompanied by an emphasis on performance-based evaluation.<sup>286</sup> By defining what outcomes will be rewarded, agencies can exert a strong influence over how workers exercise discretion.

The emphasis on "outcomes" in welfare administration starts from the top. PRWORA is heavily influenced by the new attention given to outcome-oriented public administration. Numerous provisions of the law are intended to provide states with incentives to achieve the "outcome" of caseload reduction. Thus, states are given fixed block grants, which give them increased financial stakes in reducing their caseloads.<sup>287</sup> States with increasing caseloads simply cannot turn to the federal government for more aid.<sup>288</sup> States with declining caseloads end up with a windfall of federal dollars. In contrast, under the AFDC system, federal funding was a function of benefit levels and enrollment—an increase in the caseload meant an increase in federal funding, and a decline would lead to a cut in funding.<sup>289</sup> In addition, PRWORA contains a number of "performance" measures under which high-scoring states are allocated additional

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<sup>285</sup> Thus, the culture change materials stress the importance of impressing workers with management's commitment to the initiative: "State/local agency administrators and managers must strongly commit to the Training Prototype implementation, be 'visible champions' of welfare reform culture change policies" and "must establish and articulate clear goals and tangible expectations for the . . . initiative." 1 Culture Change Report, *supra* note 235, at 6-4.

<sup>286</sup> See Jessica Yates, Performance Management in Human Services, in Issue Notes (Welfare Info. Network), Oct. 1997 <<http://www.welfareinfo.org/perfman.htm>> ("Under welfare reform, state and local governments are taking the lead in managing for performance.").

Welfare reform is not unique in this respect. Performance-based evaluation is becoming increasingly common in many areas of human service delivery. See Elisa Vinson, Urban Inst., Performance Contracting in Six State Human Services Agencies (1999) (examining six case studies).

<sup>287</sup> See 42 U.S.C.A. § 603 (West, Westlaw through May 26, 2000).

<sup>288</sup> PRWORA does permit states to seek additional federal money from a contingency fund if they qualify as "needy" and meet a heightened maintenance of effort requirement. See *id.* §§ 603(b), 609(a)(10).

<sup>289</sup> The effect was tempered by the fact that states bore a portion of the cost of any increase in expenditures. See 42 U.S.C. § 603(a) (1994), superseded by 42 U.S.C.A. § 603 (West, Westlaw through May 26, 2000) (establishing funding formula for AFDC program). Thus, states that raised benefit levels or expanded enrollment could not shift the cost entirely to the federal government.

money.<sup>290</sup> It also calls for annual rankings of states on several issues in an attempt to get states to compete for bragging rights.<sup>291</sup>

Perhaps most significantly, PRWORA contains a strong incentive for states to reduce their caseloads through administrative techniques, rather than by restricting formal eligibility standards. The law provides that by specified dates, particular percentages of recipients must be engaged in work activities as defined by the statute.<sup>292</sup> Thus, for the year 2000, forty percent of all heads of single-parent households must be working at least thirty hours per week.<sup>293</sup> PRWORA, however, permits states to reduce this percentage by the extent of the reduction in their caseloads after September 1995, provided that the reduction is not attributable to changes in eligibility standards.<sup>294</sup> This provision places a premium on achieving caseload reduction through means that make it more difficult for "eligible" individuals to obtain benefits initially and to maintain eligibility once on the rolls. Thus, the emphasis on diversion, sanctions, and changing the administrative culture coincide with the incentive structure of PRWORA.

The emphasis on results has filtered down to the county level as well. In a number of states, power has been shifted further downward to the county level, as have fiscal incentives designed to encourage caseload reduction.<sup>295</sup> For example, Ohio has replaced statewide regulation with a series of "partnership" agreements between the state

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<sup>290</sup> See 42 U.S.C.A. § 603(a)(2) (West, Westlaw through May 26, 2000) (providing for "illegitimacy" reduction bonus); id. § 603(a)(4) (providing for bonus for "high performance" states).

<sup>291</sup> See 42 U.S.C.A. § 613(d) (West, Westlaw through May 26, 2000) (providing for annual ranking of state work programs); id. § 613(e) (providing for annual ranking of states by rate of out-of-wedlock births).

<sup>292</sup> See 42 U.S.C.A. § 603(a)(5)(E)(iii)-(v) (West, Westlaw through May 26, 2000).

<sup>293</sup> See 42 U.S.C.A. § 607(a)(1) (West 1991 & Supp. 2000); id. § 607 (c)(1)(A).

<sup>294</sup> See id. § 607(b)(3). The burden of proving that declining enrollment was due to changes in program eligibility standards is placed on the federal government. See id. § 607(b)(3)(B).

<sup>295</sup> See American Pub. Welfare Ass'n, *Devolution of Administrative Authority to the Local Level: Welfare Reform Efforts in Five States 1* (1998) [hereinafter *Devolution to the Local Level*] (discussing devolution in Maryland, North Carolina, Ohio, Colorado, and Wisconsin). The extent of devolution to counties is limited by the fact that, in most states, counties had no role in administering the AFDC program. Thus, they are not easily inserted into TANF administration, as welfare centers are owned by the state and workers are state employees. Devolution is much more feasible in locations where the counties were previously involved in program administration.

In some states where counties are not part of TANF administration, devolution is accomplished through the establishment of regional districts or offices. See Meckstroth et al., *supra* note 125, at 25 (noting that implementation in Nebraska is decentralized to six autonomous regional service areas and further decentralized to local offices).

and the counties.<sup>296</sup> Plans for TANF administration are negotiated by the state and each county.<sup>297</sup> Counties that meet or exceed agreed-to performance measures or that achieve caseload reductions receive financial bonuses.<sup>298</sup> Counties that spend less than their allocated amounts can retain fifty percent of the difference.<sup>299</sup>

North Carolina permits counties to apply to the state TANF agency for permission to develop their own TANF plans that include outcome and performance goals.<sup>300</sup> Counties that are approved for this scheme must provide the state with monthly reports on their progress toward the stated goals.<sup>301</sup> In California, counties receive TANF funding in block grants from the state.<sup>302</sup> Counties retain one hundred percent of savings attributable to recipients leaving the rolls for employment or due to diversion.<sup>303</sup> Colorado also has adopted a system that provides for block grants to counties and accords them significant policymaking authority.<sup>304</sup> Even apart from these explicit delegations, local TANF offices may play a significant role in shaping the implementation of policy. According to one study, two-thirds of local TANF agencies reported that they collect data for use in performance measurement systems.<sup>305</sup>

Devolution to counties is also accompanied by a trend toward "privatization"—contracting out the administration of all or pieces of TANF programs.<sup>306</sup> Private contractors typically are reimbursed and

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<sup>296</sup> See Quint et al., *supra* note 108, at 50. For a good description of the structure of Ohio's TANF program, see Miriam S. Wilson & Charles F. Adams, Jr., *Welfare Reform: Ohio's Response*, 60 Ohio St. L.J. 1357, 1376-85 (1999). The Ohio system is explicitly modeled on the structure of the fast food restaurant franchise, Wendy's. See *id.* at 1373-76.

<sup>297</sup> See Quint et al., *supra* note 108, at 50.

<sup>298</sup> See *id.*

<sup>299</sup> See *id.*

<sup>300</sup> See *Devolution to the Local Level*, *supra* note 295, at 21-24.

<sup>301</sup> See *id.* at 24. Counties that meet the agreed performance standards can reduce their required level of spending in the following year. See *id.* at 25.

<sup>302</sup> See Quint et al., *supra* note 108, at 80.

<sup>303</sup> See *id.* California is unusual in that it requires a showing that former recipients remain employed for six months before the county is credited. See *id.*

<sup>304</sup> See Nancy Pindus et al., *Urban Inst., Income Support and Social Services for Low-Income People in Colorado 8-9* (1998).

<sup>305</sup> See *Local Welfare Reform Implementation*, *supra* note 9, at 14.

<sup>306</sup> For general discussions of privatization and welfare, see *Privatization and the Welfare State* (Sheila B. Kamerman & Alfred J. Kahn eds., 1989); Steven Rathgeb Smith & Michael Lipsky, *Nonprofits for Hire: The Welfare State in the Age of Contracting* (1993); David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 Brook. L. Rev. 231 (1998); Riemer, *supra* note 280. For discussions of the potential profits to be made through welfare administration, see Nina Bernstein, *Deletion of Word in Welfare Bill Opens Foster Care to Big Business*, N.Y. Times, May 4, 1997, at A1; Barbara Ehrenreich, *Spinning the Poor into Gold: How Corporations Seek to Profit from Welfare Reform*, Harper's Mag., Aug. 1997, at 44, 46.

evaluated pursuant to performance measures that emphasize outcomes. Welfare reform in Wisconsin illustrates the potential culmination of this trend.<sup>307</sup> After the legislature adopted the welfare reform package known as "W-2," all counties were permitted to implement W-2 for a specified period.<sup>308</sup> Those who met certain program standards, including a projected decline in caseloads, were permitted to operate the program for an additional time period.<sup>309</sup> In Milwaukee, where more than sixty percent of the state's recipients live, the county did not meet these standards, and its administration was handed over to six nonprofit and for-profit operators.<sup>310</sup> Both private and public W-2 agencies are subject to performance standards.<sup>311</sup> Moreover, the profit or loss of W-2 agencies is determined by the amounts that they expend for benefits, services, and administration.<sup>312</sup>

To date, few states or localities have opted for a total transfer to private contractors, most likely because the Clinton Administration has refused to permit nongovernmental personnel to make eligibility determinations for food stamps and Medicaid.<sup>313</sup> However, many jurisdictions have chosen to privatize parts of TANF administration, most typically case management, job placement, job search, and training services.<sup>314</sup> Such contracts are frequently "performance-based" in

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<sup>307</sup> See Kaplan, *supra* note 115, at 14 (describing administration of Wisconsin's program); Melissa Kwaterski Scanlan, *The End of Welfare and Constitutional Protections for the Poor: A Case Study of the Wisconsin Works Program and Due Process Rights*, 13 *Berkeley Women's L.J.* 153, 155 (1998) ("Wisconsin's deconstruction of welfare was one of the most dramatic attempts a state had made to reform the federal welfare program.").

<sup>308</sup> See Kaplan, *supra* note 115, at 14.

<sup>309</sup> See *id.*

<sup>310</sup> See *id.* at 14, 17.

<sup>311</sup> See Scanlan, *supra* note 307, at 165.

<sup>312</sup> See Legislative Audit Bureau, Wisconsin State Legislature, *Wisconsin Works (W-2) Expenditures 6-7, 11-12* (1999). Remaining funds are divided between the state and the contractor, with a portion earmarked for reinvestment in the community. See *id.* at 12. The contractor, however, bears the risk of a loss if the benefits that it pays exceed the contract amount. See *id.* at 12.

<sup>313</sup> The issue arose with regard to a request by the State of Texas to turn its entire system over to potential bidders, such as the Lockheed Martin Corporation and the Electronic Data Systems Corporation. See *White House Limits States in Privatizing Welfare*, *Wall St. J.*, May 5, 1997, at A20.

<sup>314</sup> Both nonprofit and for-profit contractors have been involved in this process. Two of the largest players in this field are Lockheed Martin and Maximus. See William D. Hartung & Jennifer Washburn, *From Warfare to Welfare: Lockheed Martin Wants to Make Huge Profits from Social Programs*, *Sun (Baltimore)*, Mar. 22, 1998, at F1 (noting Lockheed's push to profit from its large-scale welfare programs); Maximus, *Welfare Reform* (visited Aug. 12, 2000) <<http://www.maximus.com/wr.html>> (describing Maximus's welfare reform services).

that they peg contractor payment, in whole or in part, to some specified outcome or outcomes.<sup>315</sup>

For example, in New Jersey, TANF eligibility determinations are performed by county employees, but transportation, child care, job readiness, job search and placement, and skills development services are all contracted out to private providers.<sup>316</sup> The state requires that all of these service providers "specify outcomes achieved in fulfilling their contractual obligations" and thus bear the financial risks of being unable to demonstrate quantifiable positive outcomes.<sup>317</sup> In Dade County, Florida, all welfare-to-work operations have been contracted out to private service providers who are paid on a performance basis.<sup>318</sup> Service providers receive twenty percent of their payment upon placing an individual in a job and the final ten percent if the individual has retained the job for eight months.<sup>319</sup> Lockheed Martin is currently the largest contractor in Dade County. San Diego similarly has contracted out case management and employment services to three providers: Lockheed Martin, Maximus, and Catholic Charities.<sup>320</sup>

Privatization can be seen as the logical conclusion of the new model. In essence, government cedes tremendous power over how a program will be administered, with the belief that competition and performance incentives will spur the contractor to produce the desired outcomes.<sup>321</sup> Privatization becomes an attractive alternative when ends are viewed as more important than means and where the ends sought can be specified in advance and measured.<sup>322</sup> It may be that we never reach a point when welfare administration is handed over to private contractors in toto. But the fact that welfare administration frequently is considered a candidate for privatization is an indication of the shift away from the premises of the legal-bureaucratic model.

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<sup>315</sup> The Job Training Partnership Act of 1982, Pub. L. No. 97-300, 96 Stat. 1322 (codified as amended primarily in scattered sections of 29 U.S.C.), serves as the model for this system of service delivery. See John D. Donahue, *The Privatization Decision: Public Ends, Private Means* 179-211 (1989) (assessing Job Training Partnership Act).

<sup>316</sup> See Richard W. Roper, *A Shifting Landscape: Contracting for Welfare Services in New Jersey*, Rockefeller Rep., Dec. 23, 1998, at 4 (surveying impact of reforms on private providers of welfare services).

<sup>317</sup> See *id.* at 8-9.

<sup>318</sup> See Quint et al., *supra* note 108, at 118.

<sup>319</sup> See *id.* at 118-19.

<sup>320</sup> See Karen Kucher, *Welfare-to-Work Providers Chosen*, San Diego Union-Trib., Apr. 23, 1998, at B6. Arizona has established a pilot program under which Maximus operates a portion of the welfare system in Phoenix. See *Arizona Works Welfare Privatization Pilot Program Begins*, Las Vegas Rev.-J., Apr. 2, 1999, at 7B, available in 1999 WL 9280235.

<sup>321</sup> See Riemer, *supra* note 280.

<sup>322</sup> See Donahue, *supra* note 315, at 45, 80 ("[T]he more narrowly government cares about ends to the exclusion of means, the stronger becomes the case for employing profit-seekers rather than civil servants.").

The focus is no longer on delivering benefits and services to which individuals are entitled, but rather on achieving outcomes such as caseload reduction and employment.

This discussion suggests that, while central administrators have ceded control over how individual recipients will be dealt with, they continue to steer the system as a whole. In the new regime that focuses on results, the most visible and quantifiable of outcomes become the most important. It is not surprising, therefore, that in welfare reform, caseload reduction has become the touchstone.<sup>323</sup> Political leaders now compete for the largest declines in welfare enrollment. Where enrollment has not plummeted as quickly as elsewhere, welfare reform is deemed a failure.<sup>324</sup> In fact, TANF caseload reduction is the most common performance measure used by local agencies.<sup>325</sup>

Attention is also paid to whether recipients who leave the rolls are employed.<sup>326</sup> Almost as many TANF agencies report collecting data on job entries as on caseload reduction.<sup>327</sup> Contractors who provide employment services frequently are compensated on this basis. But tracking what happens to former recipients over time is extremely difficult, and assessing whether they are in fact better off is a complex,

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<sup>323</sup> See Rudolph W. Giuliani, Remarks at the Manhattan Institute Conference: "The New Urban Paradigm" (June 21, 1999) <<http://www.ci.nyc.ny.us/html/om/html/99a/manhattanconference.html>> (describing success of welfare policies in terms of decline in caseload); Office of Governor George W. Bush, State of Tex., Strengthening Families: Welfare Reform (visited Aug. 9, 2000) <<http://www.governor.state.tx.us/Families/welfare.html>> (citing Heritage Foundation study identifying Texas as one of 10 states that have reduced welfare rolls greatly, to illustrate success of Governor Bush's programs); NATO Enlargement and Declining Welfare Roles [sic], White House at Work, July 7, 1997 <<http://www.whitehouse.gov/WH/Work/070797.html>> (citing "the largest welfare caseload decline in history and the lowest percentage of the population on welfare since 1970" as evidence that welfare reform "work[s]").

<sup>324</sup> See Robert E. Rector & Sarah E. Youssef, *The Impact of Welfare Reform: The Trend in State Caseloads 1985-1998*, at 105-06 (1999) (ranking states' TANF programs from "highly successful" to "poor" based on extent of caseload decline).

<sup>325</sup> See Local Welfare Reform Implementation, *supra* note 9, at 14.

<sup>326</sup> The Department of Health and Human Services (HHS) has defined the criteria for performance bonuses under TANF in terms of success in job entries for TANF recipients, job retention rates and earnings levels, and improvement in these areas. See Bonus to Reward States for High Performance, 64 Fed. Reg. 68,202, 68,224 (1999) (to be codified at 45 C.F.R. pt. 270) (proposed Dec. 6, 1999). It has proposed to add nonwork measures, including the rates of increase in formation of two-parent families, use of food stamps, and enrollment in Medicaid among the poor. See *id.* at 68,223-24. HHS has proposed to award bonuses to the 10 states ranking highest on each of these performance measures. See *id.* Although the total amount awarded, \$200 million annually, sounds impressive, the amounts will be small as there will be 70 separate bonus awards, reflecting the top 10 states in each of seven measurements. Of course, a state may qualify for awards in more than one category.

<sup>327</sup> See Local Welfare Reform Implementation, *supra* note 9, at 14.

value-laden task. It is rarely attempted.<sup>328</sup> Performance measures thus reflect the “work first” philosophy that underpins most state TANF programs: The goal is to get recipients off benefits and into jobs, with little concern about the quality of the jobs, the overall change in incomes, or the well-being of recipients.<sup>329</sup>

Those who are “diverted” from the rolls generally are not tracked at all.<sup>330</sup> The emphasis frequently placed on the fate of former recipients is therefore misleading. As diversion policies reduce the number of people coming on to the rolls, the number of recipients, and thus former recipients, shrinks as a proportion of the people who have sought or potentially need assistance. While agencies might have some incentive to achieve successful outcomes for recipients, they have little reason to be concerned about those who did not manage to become recipients in the first place.

Indeed, it may be that the limited nature of the objectives states have established for welfare reform is critical to the efficacy of the performance-based system of channeling discretion. If the identified goals were more complex, the power of performance-based evaluation would weaken. Workers and agencies can respond only to a limited number of incentives. Moreover, as the number of incentives increases, workers can choose to focus on some, rather than all, of the objectives. The more complicated the message, the less effective it is in guiding lower-level administrators. While performance-based government may be effective if the goal is defined in terms as simple and unequivocal as caseload reduction, the introduction of caveats and countervailing interests may render it ineffective as a means of establishing central control.<sup>331</sup>

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<sup>328</sup> Many programs use hourly wages of former recipients as a measure of program performance, but far fewer track job retention, returns to TANF rolls, earnings gains, or family well-being. See *id.* Some researchers have looked at these issues, but their studies are generally not part of performance measurement systems. See, e.g., *Remember the Children*, *supra* note 6 (assessing the impact of welfare reform on recipients’ well-being as reflected in such variables as financial security, family life, and health).

Wisconsin recently added performance measures on employment, wages, and job retention to the W-2 funding formulas. See *Standards Set to Make Sure Agencies Help W-2 Clients Get, Keep Jobs*, *Milwaukee J. Sentinel*, Nov. 16, 1999, at 3, available in 1999 WL 21550635. Agencies that do not meet specified thresholds will face competition at the end of the contract period. See *id.* The caseloads in Wisconsin, however, already have dropped so dramatically that relatively few individuals will benefit from these new standards.

<sup>329</sup> For discussions of the “work first” approach, see Holcomb et al., *supra* note 117.

<sup>330</sup> See *Local Welfare Reform Implementation*, *supra* note 9, at 12-15 (providing survey of localities concerning data collected in operation of TANF programs).

<sup>331</sup> Indeed, commentators have questioned whether private management techniques are helpful in administering many government programs precisely because the purposes of such programs are frequently complex. See, e.g., Donahue, *supra* note 315, at 82-83.



In addition, more complex or ambitious goals are difficult to reflect in performance measures. Numerical performance standards are generally a proxy for some desired result. If the result is difficult to attain, agencies will seek ways of meeting the numerical goals without necessarily achieving the real objective. For example, a welfare-to-work program may be able to achieve the goal of increasing employment by culling out recipients who are unlikely to work, rather than by actually assisting people in entering the job market.<sup>332</sup> Performance measurements can be designed to discourage this kind of effect, but such efforts may give rise to new distortions. While performance measures for trimming caseloads are easily designed and assessed, measurements for ambitious or abstract objectives can take years to develop and refine.<sup>333</sup>

This discussion suggests that the new discretion in welfare, to a large degree, is a tool that agencies control and use. The combination of ground-level discretion and indirect central control is important to the signals that the welfare system sends: The worker is presented to the client as a powerful figure vested with a large amount of discretionary authority. This presentation is designed to send a message to recipients and to society at large about welfare receipt: The recipient is needy, not in financial terms, but with respect to energy, motivation, and confidence. The message suggests that the recipient needs a paternal figure to provide guidance and supervision. Yet, at the same time, the worker is subject to a firm set of expectations fixed by central decisionmakers, and is expected to keep an eye firmly on the bottom line. Indeed, under the new regime, caseworker and client may be presented as "partners," but the relationship between them has been reconfigured to place the caseworker in an overwhelmingly dominant position.

Moreover, this administrative approach is linked to an assumption that the goals of welfare administration are readily definable and

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<sup>332</sup> This problem has plagued welfare-to-work and job training programs funded on the basis of performance. See Donahue, *supra* note 315, at 209 (arguing that performance incentives in Job Training Partnership Act encouraged programs to concentrate on those most likely to work in any event); Handler & Hasenfeld, *supra* note 235, at 60 (making same point with respect to welfare-to-work programs).

<sup>333</sup> See General Accounting Office, Report No. GAO/HEHS-98-6, *Social Service Privatization: Expansion Poses Challenges for Ensuring Accountability for Program Results* 15 (1997) (identifying issues faced by government agencies entering into and overseeing contracts with private providers of welfare services). The General Accounting Office has identified "the limited experiences of state and local governments" in writing performance standards as a significant problem. *Id.* at 17; see also Michael Cragg, *Performance Incentives in the Public Sector: Evidence from the Job Training Partnership Act*, 13 J.L. Econ. & Org. 147, 148 (1997) (noting that adoption of performance standards "runs the risk of encouraging moral hazard activities like cream skimming").

free of conflicts. It is thus tied to the current emphasis on reduction of caseloads. A concomitant emphasis on the income and well-being of poor families would vitiate the tools that central authorities use to control caseworkers. In sum, there is a reason why welfare administration has not previously been viewed as a business designed to yield a specific product.

The result of the new administrative regime is that welfare recipients have appeared to evaporate as rolls decline without large visible cuts in programs that would provoke controversy. A look beneath the surface reveals, however, that there are reasons to be concerned about how many former recipients are faring.<sup>334</sup> While some former recipients appear to be doing well, others are suffering increased rates of hardship, and poverty has intensified among the poorest of families.<sup>335</sup> Moreover, with the advent of diversion policies, many potential recipients are turned away.<sup>336</sup> In a regime centered on achieving "outcomes," the failure to track the results of diversion stands out as a noteworthy omission. The absence of performance measures for a subject can speak as clearly to the purposes of the program as their inclusion. Finally, it is not clear that this system can continue to produce the caseload declines that it has in the past. As the number of recipients has dropped, those remaining on welfare are likely to face serious obstacles to entering the workforce.<sup>337</sup> Moving these families off welfare is likely to be a much more difficult proposition.

### III

#### PUBLIC ACCOUNTABILITY

Much of the shift in welfare administration is articulated as an effort to hold recipients accountable for the assistance they receive by imposing obligations that must be fulfilled in exchange for benefits.<sup>338</sup> Ironically, the system designed to make recipients accountable substantially may undercut existing means of holding administrators ac-

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<sup>334</sup> See *supra* notes 3-6.

<sup>335</sup> See Primus et al., *supra* note 5, at 9; Wisconsin Survey, *supra* note 4, at 12.

<sup>336</sup> See *supra* text accompanying notes 133-73.

<sup>337</sup> See Jason DeParle, *Newest Challenge for Welfare: Helping the Hard-Core Jobless*, N.Y. Times, Nov. 20, 1997, at A1.

<sup>338</sup> See Mead, *Welfare Employment*, *supra* note 101, at 1-16 (arguing that welfare system fails to hold recipients accountable and that government should lead people to reform their conduct and hold employment). Indeed, the title of the 1996 welfare reform law, the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.), places "personal responsibility" at center stage. See generally Linda C. McClain, "Irresponsible" Reproduction, 47 *Hastings L.J.* 339 (1996) (discussing theme of irresponsibility in debate over welfare reform).

countable to the public. The problem of accountability to the public lies at the heart of American administrative law. Indeed, the mission of administrative law has been to regulate the processes used by governmental agencies to ensure that substantive policies are developed, adopted, and implemented in ways that are fair and that permit public input at various points.<sup>339</sup> Administrative law also addresses issues of accountability for individual determinations—ensuring that administrators treat individuals fairly. This aspect of accountability is usually conceived as an obligation to the individual affected by an administrative action or decision, but affected individuals clearly have an interest in broader policy issues as well. Moreover, the public may have an interest in ensuring the fairness of individual decisions.

As shown in this Part, the new regime has the potential to render existing mechanisms for establishing public accountability largely ineffective or irrelevant. Furthermore, the new administrative regime is not accountable in the way that the “old” discretionary system was. It does not rely on an independent professional ethos that serves to temper the authority of central administrators. The result is a system that, when fully operative, largely may be closed to outside input and oversight and in which key decisions may be made through obscure processes of which the public is largely unaware.

Finally, these problems of accountability, like the movement toward entrepreneurial government, extend beyond the field of welfare administration. Keith Werhan recently has described a broad movement toward “delegalizing” public administration through, *inter alia*, an increase in market-oriented incentive systems rather than regulation, the rise of negotiated rulemaking and alternative dispute resolution processes, and a relaxation of judicial review.<sup>340</sup> The issues of accountability raised by the use of “entrepreneurial government” in the welfare context are part of a broader trend.<sup>341</sup>

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<sup>339</sup> See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1670 (1975).

<sup>340</sup> See Keith Werhan, *Delegalizing Administrative Law*, 1996 U. Ill. L. Rev. 423, 424 (arguing that policymakers and judges are freeing agencies from binding norms that control process and content of decisionmaking); see also *The Province of Administrative Law* (Michael Taggart ed., 1997) (collecting essays examining impact of changes in public administration in United States, Canada, Britain, Australia, and New Zealand on administrative law in these nations). [auth: I'm not certain of what you want to convey through your parenthetical – please clarify].

<sup>341</sup> Some of these broader problems have been identified. See Alfred C. Amans, *Administrative Law for a New Century*, in *The Province of Administrative Law*, *supra* note 340, at 90, 117 (noting that new approaches can be counterproductive in shielding public decisions from procedural protections and failing to take into account new global realities, thereby causing inefficiencies); Patricia M. Wald, *Looking Forward to the Next Millennium: Social Previews to Legal Change*, 70 Temp. L. Rev. 1085, 1096-1103 (1997) (identify-

### A. Accountability and Administrative Law

The problem of administrative accountability was hotly debated during the New Deal when the modern administrative state developed.<sup>342</sup> Proponents of the New Deal agencies placed a premium on effectiveness rather than accountability, arguing that agencies should remain relatively unencumbered.<sup>343</sup> Critics argued that agencies had accumulated vast power that posed a threat to democracy.<sup>344</sup> They sought to create checks on administrative power so that agencies would be subject to rules and independent scrutiny.<sup>345</sup> For the critics, the chief threat was not inefficiency, but administrative absolutism.<sup>346</sup>

Ultimately, this clash was resolved by the adoption of the Administrative Procedure Act (APA) in 1946.<sup>347</sup> Although in many ways a compromise, the APA was intended to give a legal structure to the otherwise nonlegal functioning of agencies.<sup>348</sup> The processes man-

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ing legal issues raised by privatization). Compare Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. Pitt. L. Rev. 405, 409 (1996) (doubting whether concept of "customer service" is helpful to task of governance), with Marshall J. Breger, *Government Accountability in the Twenty-First Century*, 57 U. Pitt. L. Rev. 423, 441 (1996) (predicting that advances in technology and process of devolution will enable government officials to exercise discretion while maintaining accountability).

<sup>342</sup> See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1602-32 (1996) (reading legislative battle over passage of Administrative Procedure Act as component of wider political struggle between proponents and opponents of New Deal).

<sup>343</sup> See Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 Admin. L.J. Am. U. 89, 97 (1996) (noting that New Dealers believed traditional procedural safeguards were unnecessary and would slow government's capacity to act).

<sup>344</sup> See Shepherd, *supra* note 342, at 1590-92.

<sup>345</sup> For example, they resisted the combination of political functions within an agency as espoused by the New Dealers, maintaining that policymaking agencies should not adjudicate disputes concerning the policies that they establish. See Roscoe Pound, *Administrative Law* 80-81 (1942) (advocating institution of procedural safeguards designed to provide due process to persons affected by administrative action).

<sup>346</sup> See *id.* at 66-79 (rejecting argument that expediency is sufficient justification for administrative process); see also Douglas Yates, *Bureaucratic Democracy: The Search for Democracy and Efficiency in American Government* 9-10 (1982) (identifying tension between administrative efficiency and democratic values).

<sup>347</sup> Pub. L. No. 404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1994)).

<sup>348</sup> See Martin Shapiro, *APA: Past, Present, Future*, 72 Va. L. Rev. 447, 452 (1986) (characterizing Administrative Procedure Act (APA) as "a deal struck between opposing political forces"); see also McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. Econ. & Org. 180, 182-83 (1999) ("McNollgast" is an acronym for Mathew McCubbins, Roger Noll, and Barry Weingast) (arguing that, with erosion of their political coalition, New Dealers developed stake in administrative procedure). See generally Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 Va. L. Rev. 219 (1986) (discussing evolving roles of House Committee, Senate Committee, and Attorney General, which allowed for fully supported passage of APA); Shapiro, *supra* (discussing origins of APA and its role in bringing rule of law to administrative process).

dated by the APA provide points of public access to the administrative process that are more immediate and specific than the safeguard of general political oversight.<sup>349</sup> They are intended to structure the exercise of agency discretion in order to improve the quality of decisions, provide for public input, and maintain consistency in application.<sup>350</sup> By focusing primarily on process, rather than substance, the APA seeks to address accountability concerns while leaving agencies free to set policy and make decisions.

The mechanisms of notice and comment rulemaking and judicial review provide that generally applicable rules are given a public airing and can be tested through judicial review for compliance with legal standards and rationality.<sup>351</sup> The requirement that agencies explain their decisions and respond to comments is intended to improve the quality of decisions and to ensure that rules are based on appropriate considerations.<sup>352</sup> To be sure, the rigor of these APA constraints has fluctuated over time as views of agencies and courts have shifted,<sup>353</sup> but the APA provides a mechanism for holding administrators accountable to the public for the policies that they establish. Since programs administered through the legal-bureaucratic model rely heavily, by definition, on formal rules of general applicability, the procedures for rulemaking and judicial review of agency rules govern much of their policy-setting activities.<sup>354</sup>

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<sup>349</sup> Debate still continues over the proper scope and efficacy of political oversight. Compare *INS v. Chadha*, 462 U.S. 919, 958 (1983) (striking down legislative veto of administrative rules), with 5 U.S.C. §§ 801-808 (Supp. IV 1998) (requiring submission of "major" rules to Congress and 60-day waiting period prior to rules becoming effective). See generally Ronald A. Cass et al., *Administrative Law: Cases and Materials* 76 (3d ed. 1998) (discussing form of legislative oversight of administration).

<sup>350</sup> See Steven P. Croley, *The Administrative Procedure Act and Regulatory Reform: A Reconciliation*, 10 *Admin. L.J. Am. U.* 35, 40 & n.32 (1996) (describing APA's goals of openness, fairness, accountability, participation, and consistency in agency decisionmaking).

<sup>351</sup> See 5 U.S.C. §§ 553, 702-706 (1994); Seidenfeld, *supra* note 73, at 435 ("Rulemaking also creates the potential for more meaningful public participation in the policy making process, which again bolsters the democratic foundation of agency rules.").

<sup>352</sup> See 5 U.S.C. § 553(c).

<sup>353</sup> See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *Stan. L. Rev.* 1189, 1320-26 (1986) (noting shifting level of agency regulation during 1970s and 1980s); Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 *Tulsa L.J.* 221, 225-26 (1996) (discussing courts' decreased deference toward agency decisions in 1960s and 1970s).

<sup>354</sup> In the 1960s, observers criticized federal agencies for relying too much on adjudication rather than rulemaking as a vehicle for enunciating policy. See Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 *Tulsa L.J.* 185, 187-90 (1996) (describing criticism of agencies for failing to promulgate rules). The rise of the legal-bureaucratic model in welfare administration was a component of a larger trend in favor of the expanded use of rules. See *id.* at 190-91 (describing increase in use of rulemaking in 1960s and 1970s).

The protections of the APA are augmented by freedom of information laws and open meeting requirements that give the public access to basic information about the conduct of agencies.<sup>355</sup> The requirements of public access guard against the dangers of secret and thus unchecked government, and enable the public to gain information essential to monitoring the conduct of government.

The scheme established by the APA and related laws has been replicated at the state level through the enactment of state analogs to the APA and the Freedom of Information Act.<sup>356</sup> Thus, the principles reflected in the APA have created a framework that is in effect throughout our legal system and has become the dominant means of ensuring administrative accountability. With the enactment of PRWORA, the states have enormous freedom to design their own TANF programs.<sup>357</sup> Although legislative bodies design the overall shape of state programs, many issues are inevitably delegated to administrative agencies, including many of the tools that agencies are using to shape and manage the exercise of discretion. State agencies that either administer TANF or supervise local administration are generally bound by state APAs and public access laws. These laws, however, generally are not binding on localities or private contractors.<sup>358</sup>

The problem of accountability on the individual level generally has been addressed through the availability of individualized hearings that accord affected individuals an opportunity to contest the application of rules to their particular case.<sup>359</sup> These hearings have been required by statute and by the due process clause.<sup>360</sup> The guarantees of

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<sup>355</sup> See 5 U.S.C. § 552(a)-(b).

<sup>356</sup> For discussions of state APAs and open government laws, see generally Arthur Earl Bonfield, *State Administrative Rule Making* (1986) [hereinafter *Bonfield, State Rule Making*]; Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 Va. L. Rev. 297 (1986); Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 Geo. Wash. L. Rev. 720 (1981); Teresa Dale Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990s: An Analysis of State Sunshine Laws*, 71 Wash. U. L.Q. 1165 (1993).

The APAs in more than half of the states are based on the 1961 Model State APA. See Michael Asimow et al., *State and Federal Administrative Law* 5 (2d ed. 1998). In 1981, a new Model State APA was issued that has been adopted in some states. See *id.*

<sup>357</sup> See *supra* note 103.

<sup>358</sup> See Model State Administrative Procedure Act § 1-102(1) (1981), 15 U.L.A. 10-11 (1990) (excluding political subdivision and administrative units of subdivisions from definition of "agency" for purposes of state administrative procedure); Bonfield, *State Rule Making*, *supra* note 356, at 40-49 (describing coverage of state APAs).

<sup>359</sup> See 5 U.S.C. § 554(c).

<sup>360</sup> The APA sets forth procedures that are applicable when governing statutes provide for hearings "on the record." See *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 234 (1973).

due process spelled out in *Goldberg v. Kelly*<sup>361</sup> provide that the decisionmaker cannot have been involved in the initial decision, must provide reasons for his or her determination, and must base the decision on a record.<sup>362</sup> Moreover, recipients can call and confront witnesses and can appear through counsel.<sup>363</sup> Although *Goldberg* mandated that benefits continue to be paid during this hearing process, the idea of using hearings in public benefit programs as a means of correcting errors in individual cases long predates the decision in that case. In fact, as early as 1939, the Social Security Act provided for both hearings and judicial review of individual denials and terminations from Social Security benefits.<sup>364</sup> The reliance on hearings is so ingrained that Congress has provided for pretermination hearings even in situations in which the Court has concluded that they are not required by due process.<sup>365</sup>

This system of accountability has never been a panacea. Although the APA procedures governing rulemaking impose some constraints, they always have been limited. Under the federal statute, there is a long list of exceptions to the requirement of notice and comment procedure.<sup>366</sup> Even when applicable, the extent to which notice and comment procedures change final agency policies is open to question. Judicial review generally has accorded agencies a fair amount of deference and leeway.<sup>367</sup>

Although state APAs may contain fewer exemptions from notice and comment, the administrative culture is often quite different from

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<sup>361</sup> 397 U.S. 254 (1970).

<sup>362</sup> See *id.* at 271.

<sup>363</sup> See *id.* at 270.

<sup>364</sup> See 42 U.S.C. § 405(h) (1994).

<sup>365</sup> For example, Congress provided for such a right in the context of Social Security disability benefits, see 42 U.S.C. § 423(g), even though the Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), held that the Due Process Clause did not prohibit the Social Security Administration from terminating benefits prior to holding a hearing, see *id.* at 346.

<sup>366</sup> See 5 U.S.C. § 553(b) (1994) (granting exemptions, *inter alia*, "to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice; or when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

<sup>367</sup> See *Chevron v. National Resources Defense Council*, 467 U.S. 837, 866 (1984) (announcing that, where statutory mandate is unclear, courts must defer to agency interpretation if not unreasonable). Several commentators have argued that the provisions of the APA relating to rulemaking provide only loose checks on administrators. See Rabin, *supra* note 353, at 1265 ("[T]he APA rulemaking scheme is notable primarily for the absence of constraint it places on agency officials."); Shapiro, *supra* note 348, at 453 (declaring provisions relating to rulemaking "an almost total victory for the liberal New Deal forces"). Over the years, however, courts have toughened these requirements. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 34 (1983) (requiring Department of Transportation to provide adequate explanation before rescinding passive restraint requirement).

that of federal agencies.<sup>368</sup> As compared with their federal counterparts, state agencies are generally less professionalized, less well-financed, less technically proficient, and more closely associated with partisan politics.<sup>369</sup> They therefore may be less willing or able to analyze and respond to public comments than federal agencies.

Moreover, the mechanisms for ensuring that agency workers adhere to publicly promulgated rules have long been inadequate. APAs never have provided an effective means for establishing public oversight of agency practices when actual practices depart from written policies. The principal form of public accountability for such *de facto* policies is through the practice lawsuit—litigation seeking a judicial remedy for agency practices that systematically violate formal policies.<sup>370</sup> Such litigation is extremely difficult to bring as plaintiffs must establish not only that agency personnel are making errors, but that these errors are attributable to the agency's central authorities in some way.<sup>371</sup> Absent such a connection, the errors will appear to be isolated mistakes that should be corrected through the individual hearing process.

Finally, observers have pointed out that the protections accorded by individual administrative hearings are frequently an inadequate means of redressing unfair and inequitable administration even in in-

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<sup>368</sup> See Arthur Earl Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 *Tex. L. Rev.* 95, 103 (1982) (arguing for teaching of state and federal administrative law, necessary partly because of differences between federal and state agencies and processes); Donald W. Brodie & Hans A. Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 *Ariz. St. L.J.* 537, 539 (1977) (noting such differences as allocation of power, political accountability, legal authority, staff composition, and resources).

<sup>369</sup> See Bonfield, *supra* note 368, at 127 ("Because they are smaller, more poorly financed, and less technically competent, state agency staffs are often characterized by somewhat less professionalism than the staffs of most federal agencies."). Bonfield points out that the comparative smallness of state agencies makes some forms of public participation, such as oral hearings in rulemaking, easier than in the federal government context. See *id.* at 128.

<sup>370</sup> Examples of such litigation also can be found in the context of the disability benefit programs administered by the Social Security Administration. See, e.g., *Bowen v. City of New York*, 476 U.S. 467 (1986) (holding that unpublished policy allowing for denial of benefits based on presumptive ability to work was illegal); *Dixon v. Shalala*, 54 F.3d 1019 (2d Cir. 1995) (challenging systematic clandestine practices used in deciding applications for disability benefits); *Schoolcraft v. Sullivan*, 971 F.2d 81 (8th Cir. 1992) (challenging practices of state-level adjudicators who determined claims for benefits based on alcoholism); *Mental Health Ass'n v. Heckler*, 720 F.2d 965 (8th Cir. 1983) (challenging systematic agency departure from its regulations in adjudicating claims for disability benefits based on mental impairments); see also *Brown v. Giuliani*, 158 F.R.D. 251 (E.D.N.Y. 1994) (challenging pattern of delay in issuance of emergency welfare grants).

<sup>371</sup> See Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 *Mich. L. Rev.* 1401, 1422-23 (1995) (book review).



dividual cases.<sup>372</sup> A system that relies on individuals to come forward and assert grievances presupposes that individuals have knowledge of their rights, can identify wrongs, and are aware of the remedies.<sup>373</sup> Each of these conditions is frequently lacking in the public benefit programs arena.<sup>374</sup>

Over the years, however, these devices have been used to provide public access and input into administrative policymaking and application while leaving agencies with sufficient freedom to carry out their missions. While the balance between accountability and effectiveness shifts continually, federal and state APAs, together with the Due Process Clause,<sup>375</sup> provide a framework within which these issues are addressed.

### *B. Accountability and Discretion*

Discretionary systems of administration raise even greater issues of public accountability than do systems based on a legal-bureaucratic model. By definition, discretionary systems provide ground-level workers with considerable leeway. On one level, the whole question of accountability lies outside of a paradigm predicated on discretion. As Joel Handler has emphasized, discretionary systems are built on trust.<sup>376</sup> But trust need not be reflexive. There must be reasons to accord trust and these reasons serve to address the concerns that give rise to a need for accountability. Concerns about accountability in a discretionary system may be allayed by institutional or cultural constraints that circumscribe the conduct of officials. This Section examines how the ethos of professionalism served to allay concerns about accountability under the social work model. It also points out how the new regime of welfare administration features discretion that is similar to the social work model, but lacks the constraining influence of professional ethos and culture.

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<sup>372</sup> See Handler, *supra* note 73, at 2-40 (describing failure of procedural due process as remedy for administrative inequity).

<sup>373</sup> See *id.* at 5, 29-32 (discussing barriers to individuals asserting their rights).

<sup>374</sup> See *id.*

<sup>375</sup> It is axiomatic that due process protections apply to the application of policy in individual cases rather than to the policymaking process itself. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) ("Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole.").

<sup>376</sup> See Joel F. Handler, *Dependency and Discretion, in Human Services as Complex Organizations*, *supra* note 28, at 276, 284-86.

### 1. *Accountability and the Social Work Model*

The social work model for welfare administration rested on trust in the judgment of social workers.<sup>377</sup> It was part of the faith that society places in many professions that deal in human services, including lawyers, physicians, and teachers.<sup>378</sup> This faith is based on the notion that professionals possess expertise that makes it difficult for non-professionals to second-guess their decisions.<sup>379</sup> In using this specialized knowledge, the professional is guided by an ethos and a set of professional norms that are ingrained during the training process and reinforced by the activities of professional associations.<sup>380</sup> In general, these professional norms contain an ideal of service—an ethic under which the professional is not self-interested.<sup>381</sup> Instead, the professional is supposed to be loyal to the interests of others, and to use his or her judgment to attain the goals of someone else.<sup>382</sup> The ideology of professionalism rests on the idea that professional knowledge and professional norms transcend specific people and circumstances to create what amounts to a social institution.<sup>383</sup> Professionals are ac-

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<sup>377</sup> See Simon, *supra* note 16, at 1200, 1242. In a broader sense, it was based on the belief that the need for expertise necessitates and justifies administrative discretion. See James M. Landis, *The Administrative Process* 23-24 (1938) (emphasizing need for administrative expertise in effectively regulating increasingly complex society).

<sup>378</sup> For fuller discussions of the role of professionalism in society, see generally Burton J. Bledstein, *The Culture of Professionalism: The Middle Class and the Development of Higher Education in America* (1976) (describing continuity of cultural responses to culture of professionalism during 19th and 20th centuries); Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (1977) (examining how professions organized themselves to attain market power); Talcott Parsons, *Essays in Sociological Theory* 34-49 (1954) (explaining the importance of professionalism in contemporary Western society); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229, 1238-40 (1995) (discussing reasons for professionals' "autonomy from government, and to some extent, market regulation").

<sup>379</sup> See Pearce, *supra* note 378, at 1238-40 ("The esoteric nature of the knowledge ma[kes] it very difficult . . . to evaluate the profession's work.").

<sup>380</sup> See Larson, *supra* note 378, at 14, 210-12 (stressing importance of training and licensing as means of standardizing professional services); Simon, *supra* note 16, at 1242 (stating that

[P]ublic officials can be trusted to adhere to applicable standards when they are socialized through professional training to do so, when they are active participants in a vital professional culture, when they are subject to pressure from peers to do so, when they have a duty to justify their decisions to citizens affected by them and when they receive relatively high status and reward).

<sup>381</sup> See Parsons, *supra* note 378, at 35 (noting "disinterestedness" of professionals).

<sup>382</sup> See *id.* ("The professional man is not thought of as engaged in the pursuit of his personal profit, but in performing services to his patients or clients, or to impersonal values like the advancement of science.").

<sup>383</sup> See Larson, *supra* note 378, at 184-85 (discussing how professionalization of groups such as social workers and teachers checks power of bureaucratic institutions in which such professionals work).

corded trust because they are viewed as part of a social institution that operates according to a larger set of norms and principles. The trust placed in individuals is an extension of the trust placed in the profession.

Under the social work model, welfare administration was seen as calling for this kind of professional treatment. Specific rules of general applicability were viewed as both unnecessary and inappropriate; instead, the social worker was seen as drawing on the knowledge and norms of the profession to respond to each case individually.<sup>384</sup> Although most caseworkers were not in fact social workers, the social work profession dominated the administration and established the values and tone of the process. Under this regime, the grant of discretion was legitimated by professionalism. Discretion did not mean permission to act arbitrarily; it meant the latitude to apply professional standards and judgment. Moreover, the existence of an external set of professional standards served as a check on the authority of central administrators. Although there were few rules that could be subjected to notice and comment or judicial review, the authority of administrators was constrained by professional standards.

## 2. *Accountability and the New Administrative Regime*

The return to discretion in welfare administration appears problematic on several levels. First, although the functions performed by the new welfare workers may be as discretionary as those performed under the old social work regime, there has been no movement towards reinserting social workers into the process.<sup>385</sup> The new forms of administration are based on discretion without the constraining and reassuring institution of professionalism. There is no external preexisting set of professional norms that guide today's workers in making determinations. Indeed, in many places, welfare workers are not required to have completed any schooling beyond high school. For some jobs, two or four years of college may be necessary.<sup>386</sup> But there is no training process akin to that which generally accompanies entry

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<sup>384</sup> See *supra* text accompanying notes 41-54.

<sup>385</sup> Although both systems rely on discretion, the issues that are emphasized differ. The social work model focused on home conditions, while the new welfare system emphasizes employment and self-sufficiency.

<sup>386</sup> See, e.g., Kaplan, *supra* note 115, at 28 (noting that in Wisconsin, FEPs "often do not hold a college degree or professional certification"); Quint et al., *supra* note 103, at 67 (noting that eligibility workers in Cleveland are required to have high school diploma and two years of clerical experience while workers who administer JOBS program must have college degrees); *id.* at 100 (noting that in Los Angeles, eligibility workers must have associate's degree while those who administer work program have bachelor's degrees).

into a profession. In sum, there is no basis for reliance on professional judgment as a means of addressing concerns about accountability.

Second, trust in the professions has declined significantly since the mid-twentieth century when the social work model was at its peak.<sup>387</sup> Americans are much more skeptical of claims that professionals deserve autonomy because of their specialized knowledge and ethos. One only need consider the rise of managed health care to see how the medical profession has ceded power to outside control. In the field of education, there is a renewed emphasis on standardized testing that constrains the discretion of teachers to shape curriculum and methodology. The declining respect for the legal profession is another example of this trend.<sup>388</sup> It is not clear that the social work model of benefit administration could be reconstructed at this point, even if one desired to do so.

Although the means of establishing accountability that characterize the legal-bureaucratic model are still in place, their efficacy is limited in the new administrative system. Under the administrative framework emerging today, many important policy determinations are not embodied in written rules of general applicability. Instead, recipients are promised little that is concrete and specific, and workers are given a range of actions and leeway to select a course. If the key decisions are not contained in rules of general applicability, the notice and comment requirements do not provide an effective avenue for public input. Moreover, policymaking may be delegated to governmental or administrative levels at which notice and comment requirements are inapplicable or ineffective.<sup>389</sup>

In fact, most of the tools used by agencies to establish an institutional culture and to create incentives that guide discretion are not routinely subject to the process of notice and comment. Thus, contracts between states and localities or localities and private contractors, which shape the incentives that govern field offices, are seldom treated as substantive "rules" under the federal and state APAs.<sup>390</sup>

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<sup>387</sup> Indeed, in the 1960s, the "expertise" justification for administrative discretion generally began to give way to an emphasis on public participation in the policymaking process. See Stewart, *supra* note 339, at 1711-16.

<sup>388</sup> See Pearce, *supra* note 378, at 1257-63.

<sup>389</sup> See *supra* text accompanying notes 366-67.

<sup>390</sup> The federal APA defines "rule" broadly to include an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. § 551(4) (1994). This capacious definition well could be construed to include many of the instruments used to guide and manage discretion in TANF administration. The Model State APA contains a definition of "rule" that is similar to the federal definition. See Model State Administrative Procedure Act § 1-102(10) (1981), 15 U.L.A. 12 (1990).

The vehicles for establishing and regulating institutional culture are more likely to be viewed as housekeeping matters, dealing with the agency's procedures, internal management, or personnel policies, all of which are generally exempt from the requirements of notice and comment.<sup>391</sup> Administrative procedure acts and freedom of information laws are often not even applicable to private contractors or localities that now play important roles in administering the TANF program.<sup>392</sup>

For example, in *American Hospital Ass'n v. Bowen*,<sup>393</sup> the D.C. Circuit addressed the failure of the Department of Health and Human Services to undertake notice and comment in issuing utilization and quality control standards for peer review in the Medicare program.<sup>394</sup> Although *Bowen* dealt with the federal APA, rather than the state analogues that would be applicable to TANF administration, it provides the most thorough judicial discussion of the applicability of rulemaking procedures to performance-based contracts. Writing for the majority, Judge Wald concluded that the standards contained in contracts with Peer Review Organizations (PROs), including perform-

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<sup>391</sup> The federal APA exempts from notice and comment requirements all matters "relating to agency management or personnel or to public property, loans, grants, benefits or contracts." 5 U.S.C. § 553(a)(2). HHS long has maintained that it would waive all of these exemptions, except for the ones regarding agency management and personnel. See Public Participation in Rule Making, 36 Fed. Reg. 2532 (1971). The courts consistently have held HHS to be bound by this commitment. See, e.g., *Cubanski v. Heckler*, 781 F.2d 1421, 1428 (9th Cir. 1986) ("The Secretary's waiver has a binding effect independent of the APA, and would operate to invalidate a challenged substantive rule limiting benefits promulgated in violation of the requirements set out in the APA." (citation omitted)), vacated as moot, 485 U.S. 386 (1988).

The APA also exempts from notice and comment general statements of policy and rules of agency organization, procedure, and practice. See 5 U.S.C. § 553(b)(A). The 1931 Model State APA provides an exemption for rules relating solely to agency internal management. See Model State Administrative Procedure Act § 3-116(1), 15 U.L.A. 55.

<sup>392</sup> In *Forsham v. Harris*, 445 U.S. 169, 179-80 (1980), the Supreme Court adopted a narrow definition of "agency" for purposes of the federal Freedom of Information Act (FOIA). The Court held that grants of federal funds "generally do not create a partnership or joint venture with the recipient, nor do they serve to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision." *Id.* at 180; see also Nicole B. Cásarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. Mich. J.L. Reform 249, 279 (1995) (concluding that documents created and maintained by privatized prisons are largely inaccessible through FOIA); Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 Fed. Comm. L.J. 21, 58 (1999) (urging federal courts to "develop more flexible definitions of 'agency' and 'agency record' to protect public's right to information").

<sup>393</sup> 834 F.2d 1037 (D.C. Cir. 1987).

<sup>394</sup> See *id.* at 1041. HHS contracts with Peer Review Organizations (PROs) for the service of reviewing claims for Medicare reimbursements submitted by hospitals. See *id.*; see also Peer Review Improvement Act of 1982, 42 U.S.C. § 1320c-1 to -12 (1994).

ance objectives and criteria for selecting cases to be reviewed, were "rules" under the APA,<sup>395</sup> but that they were exempt from notice and comment because they were either general statements of policy or dealt with procedural matters.<sup>396</sup> In essence, the court did not perceive HHS's efforts to influence the conduct of hospitals through its contracts with PROs as equivalent to substantive regulation. *Bowen* suggests that plaintiffs well may encounter difficulties in persuading agencies and courts that efforts to influence the exercise of discretion are instruments of policy that are subject to notice and comment.<sup>397</sup>

In a regime of privatized welfare administration, government contracting policies and procedures potentially serve as one of the principal vehicles for ensuring fair process and public participation. Although many states have statutory provisions for the process of contracting out government services, these rules principally are intended to ensure the integrity of the competitive process, rather than as a means of soliciting input into policy.<sup>398</sup> Typically, they require public announcement of requests for bids, followed by the submission of sealed responses.<sup>399</sup> The Model Procurement Code for State and Local Governments provides for an administrative process for reviewing contract awards only at the behest of an "actual or prospective bidder, offeror, or contractor who is aggrieved."<sup>400</sup>

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<sup>395</sup> The court noted that it would not permit agencies to sidestep the APA by placing substantive rules in contracts. See *Bowen*, 834 F.2d at 1054.

<sup>396</sup> See *id.* at 1041. The court did not view requirements that PROs review all cases with specific diagnostic codes as having a substantive effect on the rights of hospitals. See *id.* at 1052. Similarly, it viewed performance objectives, such as to "reduce by 528 cases the incidence of unnecessary surgery or other invasive procedures," merely as statements of general policy. *Id.* at 1055 (internal quotation marks omitted). These provisions, however, are typical of the indirect means central administrators increasingly are using to influence discretionary decisions made by personnel in the field.

<sup>397</sup> See *id.* at 1056. Judge Wald, however, recognized that performance standards can have a major impact and did not rule out the possibility that a hospital could later demonstrate that the objectives in the contracts constituted "veiled attempts to change the substantive standards" that would trigger notice and comment requirements. *Id.* It is not clear, however, what such a showing would entail.

<sup>398</sup> The American Bar Association (ABA) has issued a model procurement statute for state and local government. See Model Procurement Code for State and Local Governments (1979) [hereinafter Model Procurement Code]. As of 1996, 16 states had adopted the ABA model. See Louis Del Duca et al., Annotations to the Model Procurement Code for State and Local Governments with Analytical Summary of State Enactments (3d ed. 1996); National Ass'n of State Purchasing Officials, State and Local Government Purchasing: Principles and Practice (5th ed. 1997) [hereinafter Government Purchasing]. See generally Ralph M. Kramer & Bart Grossman, Contracting for Social Services: Process Management and Resource Dependencies, 61 Soc. Serv. Rev. 32 (1987) (describing process of contracting out social services).

<sup>399</sup> See Model Procurement Code, *supra* note 398, § 3-202(3).

<sup>400</sup> *Id.* § 9-101; see also *id.* § 9-501 (regarding Procurement Appeals Board).

Government contracting procedures generally are not designed as a means of providing the public with a voice in the process of developing contract specifications, selecting a contractor, or enforcing contract terms.<sup>401</sup> For example, as a means of fostering competition, the National Association of State Procurement Officials (NASPO) recommends that bids be considered confidential until the bidding period is closed and that all information about the evaluation of bids and bidders be treated as confidential until an award is made.<sup>402</sup> Even after opening, disclosure obligations may be qualified by a desire to preserve bidders' proprietary information.<sup>403</sup> Moreover, in actuality, procedures well may fall short of those recommended by the Model Code and NASPO.<sup>404</sup> For example, in 1999, the City of New York awarded contracts worth almost \$500 million to private entities to provide job training and placement to welfare recipients, with almost no opportunity for public input.<sup>405</sup> There is currently a dispute over whether the

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<sup>401</sup> In many jurisdictions, the award of public contracts can be challenged in taxpayer suits, in which standing is based, for example, on a claim that the award will increase taxes. See Lewis J. Baker, *Procurement Disputes at the State and Local Level: A Hodgepodge of Remedies*, 25 Pub. Cont. L.J. 265, 291-93 (1996). The scope and availability of this remedy vary. See *Steeley v. Nolen*, 578 So. 2d 1278, 1279-80 (Ala. 1991) (holding that plaintiff has standing to challenge contract award despite delinquency in tax payments); *Alliance for Affordable Energy v. Council of New Orleans*, 677 So. 2d 424, 428-29 (La. 1996) (holding that taxpayers who allege that unlawful action would increase tax burden have standing to seek judicial restraint of unlawful actions by public officials); *Hillie v. City of Pontiac*, 335 N.W.2d 905, 905 (Mich. 1983) (holding that where complaints allege unlawful expenditures of public funds, plaintiffs have standing as taxpayers). A number of states, however, require that plaintiffs in such suits post a bond for the costs of the litigation. See, e.g., 65 Ill. Comp. Stat. Ann. 5/1-5-1 (West 1996). The rationale of taxpayer standing may make it difficult to argue that the government is not spending enough on benefits or services.

<sup>402</sup> See 1 *Government Purchasing*, supra note 398, at 55-56.

<sup>403</sup> See *id.* at 114 (noting that freedom of information can be "an impediment to public procurement unless the law of the jurisdiction recognizes and accommodates proprietary information"). Assuming that competition between welfare service providers develops, it is reasonable to expect providers to seek confidentiality as a means of preventing copying. See Merrill Goozner, *Welfare's Gold Rush: Private Sector Mining Hard for Reform Effort's Contracts*, Chi. Trib., June 29, 1997, § 5, at 1 (reporting that officials at Maximus and Lockheed decline to provide details about their programs on grounds that such information is proprietary).

<sup>404</sup> As Jody Freeman points out, at the federal level, contracts for the provision of services to the public are not generally subject to the same safeguards as the procurement of goods and services for use by an agency. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 596 n.216 (2000). In jurisdictions that draw this distinction, the procedural requirements for contracting out welfare administration are likely to be looser than general procurement requirements.

<sup>405</sup> See Kathleen McGowan, *Shhhh . . . We're Hunting Big Bucks, City Limits*, Dec. 6, 1999, at 1 ("On Tuesday, at a 10-minute public hearing, the city announced almost \$500 million worth of sensitive welfare-to-work job training and placement contracts, with no opportunity for public review and without a single whisper of public comment."). Maximus was the largest recipient of these funds, which were awarded through a process known as "negotiated acquisition" (whereby the agency itself negotiates a contract for ser-

contracts were entered into in violation of city procurement procedures.<sup>406</sup>

The new administrative regime also poses major challenges to ensuring fair treatment in individual cases. When PRWORA was enacted, the possibility arose that states would dispense with individual hearings entirely.<sup>407</sup> As a practical matter, states have not sought to do away with hearings. The trend toward caseworker discretion, however, further undermines the efficacy of hearings as an effective check on arbitrary or inequitable administration. As welfare workers undertake a broader range of activities, their conduct becomes more difficult to review through the hearing process. If the worker is seen as a "coach," rather than an adjudicator, the inadequacy of formal hearings becomes apparent. When a worker fails to tell a recipient about the availability of a benefit or program, or an exception to a requirement, the client has no way of discerning that the worker has done something wrong. Even if a recipient views a determination as "wrong," she may be deterred from seeking a hearing by the message that recipients have no right or entitlement to benefits and assistance.<sup>408</sup>

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vices) rather than through competitive bidding. See *id.*; see also Edward N. Costikyan & Leslie U. Cornfeld, NYC's New Procurement Structure: Birth of an Imperial Agency, N.Y. L.J., Oct. 22, 1990, at 1 (describing procurement provisions of New York City Charter, including negotiated acquisition process).

<sup>406</sup> See Nina Bernstein, *Welfare Plan in City Suffers a Setback*, N.Y. Times, Feb. 3, 2000, at B1. The City Comptroller complained about the fact that the contracts were not bid out and that they lacked specific information about the services to be provided. See *id.* The contracts provided for payments to Maximus in excess of the amount requested by the company, on the ground that a portion of the funds would be paid based on performance measures. See *id.* (noting that Maximus sought \$4175 per client and would have received \$5000). The Mayor has responded by dismissing the objections as politically motivated. See Eric Lipton, *Giuliani Defends Forgoing the Competitive Bidding Rules*, N.Y. Times, Feb. 4, 2000, at B3.

<sup>407</sup> Since PRWORA only requires some appeals process rather than an impartial hearing, and disclaims any federal "entitlement" to benefits, it appeared that states might attempt to eliminate their hearing systems. See 42 U.S.C. § 602(a)(1)(B)(iii) (Supp. IV 1998). However, as a number of commentators have pointed out, state eligibility criteria can give rise to property rights protected by due process. See Cynthia R. Farina, *On Misusing "Revolution" and "Reform": Procedural Due Process and the New Welfare Act*, 50 Admin. L. Rev. 591, 619-21 (1998). Although states are empowering their workers to make evaluative and discretionary decisions in administering the TANF program, they are not dispensing with eligibility standards altogether, and it is likely that TANF benefits still will be considered property interests under the test enunciated in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). See Scanlan, *supra* note 307, at 170-78 (arguing that Wisconsin Works contains sufficient eligibility requirements to give rise to property interests).

<sup>408</sup> As Joel Handler has noted in the context of special education:

[I]n order for due process procedures to work, there have to be complaining clients. Due process requires clients who must recognize and deal with their problems. Instead, we find, all too often, denial or self-blame. People who



Moreover, individual hearings are not comparative. In the absence of a rule dictating a particular administrative response, hearings do not provide a means of ensuring that similarly situated individuals are treated alike. The individual requesting the hearing has no means of finding out how others are being treated, and the matter may not even be considered relevant.

In observing client-caseworker interactions in a Chicago welfare-to-work program, Evelyn Brodtkin found that "clients have little capacity to hold the state accountable for providing any specific quality or content of services."<sup>409</sup> Although Brodtkin found that workers routinely failed to provide required information and assistance, clients had low expectations and thus were not likely to view adverse encounters with agency personnel as events for which they could seek remedies.<sup>410</sup> Since the caseworker is a client's primary source of information about program benefits, rules, and obligations, clients have little basis for doubting workers' statements or assertions about what is "possible" or available.<sup>411</sup> Brodtkin also found that clients feared retaliation if they were labeled "troublemakers."<sup>412</sup> All of these problems are present to some degree with remedial systems dependent on client-initiated grievances. However, they increase significantly as caseworkers are charged with functions that are broader and more amorphous.<sup>413</sup>

Diversion activities are generally beyond the reach of the hearing process as individuals who are diverted are not formally denied benefits and thus have no determinations from which to appeal. The techniques that workers use to dissuade applicants from pursuing benefits are almost entirely insulated from review through the hearing process.

Finally, in the new discretionary system, it is even more difficult to bring a "practice" lawsuit, as the content of programs are less likely to be embodied in rules. It is difficult to show that workers are systematically violating standards if those standards are not written down

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feel this way are not rights-bearing citizens. They are the ones who sign consent forms without questions.

Handler, *supra* note 73, at 73.

<sup>409</sup> Brodtkin, *supra* note 34, at 20.

<sup>410</sup> See *id.*

<sup>411</sup> See *Remember the Children*, *supra* note 6, at 69 (reporting that recipients' "knowledge of new welfare rules is fair to poor"); Quint et al., *supra* note 108, at 19-20 (finding that recipients often did not understand important elements of welfare reform and had little knowledge of services, such as transitional child care and Medicaid, for which they may be eligible after they leave welfare).

<sup>412</sup> Brodtkin, *supra* note 34, at 21.

<sup>413</sup> Handler notes that "[t]he wider the discretion and the more extensive the use of professional judgment or expertise, the more difficult it will be to use procedural rights." Handler, *supra* note 73, at 73.

as binding directives. Thus, *Reynolds v. Giuliani*<sup>414</sup> was predicated on the existence of detailed regulations governing the process for administering the Food Stamp and Medicaid programs.<sup>415</sup> Although the TANF program in New York was administered equally harshly, there was no written set of requirements that was violated.

In sum, the processes that hold benefits agencies publicly accountable are of limited value in the new regime of welfare administration. With the abandonment of both rules and professionalism, the welfare system may emerge less open to public input and oversight than it has ever been. In the new administrative system, there is little assurance that individuals are treated fairly, either in absolute terms or in relation to each other. What we may be left with then, is essentially the system that caused observers so much concern before the passage of the APA: government agencies that are handed broad delegations of authority by legislative bodies and that have control over the establishment and implementation of policy that is insulated from public scrutiny and input and largely impervious to judicial review.<sup>416</sup>

### *C. The Dangers of Administrative Absolutism and Unfair Treatment in the New Regime*

This discussion could be seen as begging the question of why accountability is important: Rather than ensuring that every client be treated in a particular way, the new administrative regime is geared to producing "results." It is difficult to argue with the proposition that "results" are important. At the same time, however, core values of our system of government suggest that in a democracy, means matter as well as ends.<sup>417</sup> One need not enter the debate over "dignitary"

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<sup>414</sup> 35 F. Supp. 2d 331 (S.D.N.Y.), modified in part, 43 F. Supp. 2d 492 (S.D.N.Y. 1999).

<sup>415</sup> See supra notes 161-71 and accompanying text.

<sup>416</sup> See, e.g., Pound, supra note 345, at 35-56 ("Control of an omniscient administrative hierarchy, accountable only to an ultimate administrative head, will prove as effective a means of absolute government as was formerly control of an army.").

<sup>417</sup> As Paul Starr has explained:

To be sure, government cannot be run "just like a business" in part because its more elaborate procedures are meant to produce something else besides the specific services that the private sector provides. Reviews by advisory committees and congressional hearings, designed to increase accountability or to give a fair hearing to complaints by clients, contractors, or employees, cannot be dismissed simply as a source of inefficiency. Democratic government cannot narrowly concern itself with getting the job done . . . .

Paul Starr, *The Meaning of Privatization*, 6 *Yale L. & Pol'y Rev.* 6, 38 (1988).

theories of due process to see the possible inequities of the new regime.<sup>418</sup>

On one level, means matter because the ends are not fixed exogenously.<sup>419</sup> In the new regime of managed discretion, someone must select the "results" that will be valued. In the arena of welfare policy, this is no easy task. The public is notoriously ambivalent about issues relating to poverty and welfare.<sup>420</sup> Although the relative strengths of these concerns may fluctuate, Americans both want people to leave the welfare rolls and want to prevent hardship, particularly among children.<sup>421</sup> The difficult issues in welfare policy relate to the balance between these concerns.<sup>422</sup> Although welfare policies may tilt one way or the other, they are almost always compromises that attempt to accommodate these conflicting goals.

Defining the goals of welfare administration requires coming to terms with these conflicting values. The objectives of successful welfare administration could be defined in any number of ways that reflect one or more of these underlying values. Reduction in caseloads are the current vogue, but other goals could include boosting employ-

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<sup>418</sup> There is an extensive literature arguing that fair process is a fundamental form of respect for humanity. See, e.g., Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. Rev. 885, 886-98 (1981) (outlining merits of dignitary theories of due process, which "focus[ ] on the degree to which decisional processes preserve and enhance human dignity and self-respect"); Jerry L. Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. Fla. L. Rev. 433, 438-42 (1987) (criticizing Supreme Court's due process approach as "assault[ing] generally held intuitions about the worth or significance of particular human interests" and advocating approach that is protective of privacy, legal intelligibility, and political equality); Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in *Due Process* 126, 127-51 (J. Roland Pennock & John W. Chapman eds., 1977) (stressing significance of humanistic aims of explanatory procedures and embracing "nonformality" as "the standpoint of an individual steadfastly demanding to be treated as an end and not solely as means"). The Supreme Court, however, has clung to an instrumentalist view of due process. See *Mathews v. Eldridge*, 424 U.S. 319, 340-49 (1976) (viewing due process solely as matter of correcting administrative error, rather than as means of according respect).

<sup>419</sup> See Mashaw, *supra* note 341, at 411 (noting interplay between how government functions and its goals).

<sup>420</sup> See Handler, *supra* note 20, at 42 ("Social welfare programs, especially when they are public, raise intense moral conflicts.").

<sup>421</sup> See David T. Ellwood, *Poor Support: Poverty in the American Family 19-20* (1988) (discussing "conflict between our desire to help those in need and our desire to encourage work and self-support").

<sup>422</sup> Many observers have noted the dilemmas raised by these competing goals. See *id.* ("When you give people money, food, or housing, you reduce the pressure on them to work and care for themselves."); Deborah A. Stone, *The Disabled State 17* (1984) (arguing that boundary between work-based and need-based distributive systems "is something that each society has to invent, to redesign in the face of changing social conditions, and to enforce"); Diller, *supra* note 39, at 370-71 (explaining that social welfare policy is attempt "to reconcile the tension between the principles of a market economy and the impulses to aid the needy").

ment, earnings, or total income. Each of these goals would lead to a different set of rewards and penalties.<sup>423</sup> Other outcomes that could be rewarded include reducing poverty, preventing evictions, reducing foster care placements, and so on. These goals could be combined in an almost infinite number of ways. They could be assessed on a short-term or on a long-term basis. Measurements could focus solely on clients served by the program, or could be broadened to include the broader pool of potential clients. Even the measurements themselves are subject to debate, as illustrated by the long-running dispute over the validity of the federal poverty standard.<sup>424</sup>

A focus on results requires a process for selecting and weighing among the many outcomes and measures that could be defined as goals. In the new regime of managed discretion, these decisions are likely to be made by administrators with little or no outside input. The key policy and value judgments are likely to be found in training materials, contracts for services, and program evaluation standards, all documents that are not ordinarily viewed as policy statements. All of the values that argue in favor of a public notice and comment process for regulations apply to the selection of "results" that will be valued in welfare reform. The quality of final policy may improve as outsiders point out factors that the agency may have overlooked or evaluated incorrectly. Public input may serve to counteract institutional biases in favor of results that are more easily achievable or measurable.<sup>425</sup> The participation of client groups or client advocates may inject an important perspective that is otherwise missing from the policymaking process. An opportunity for public review and input also may foster public debate that leads to more effective oversight by political leaders.<sup>426</sup>

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<sup>423</sup> For example, programs can be encouraged to promote employment without seeking to reduce caseloads. Indeed, financial work incentives may have precisely this effect: They make it easier for people to receive benefits and to work at the same time.

<sup>424</sup> See generally Focus (University of Wis.-Madison Inst. for Research on Poverty), Spring 1988 (featuring series of articles that discuss measurements of poverty).

<sup>425</sup> Cf. Stewart, *supra* note 339, at 1714-15 (noting that public input can balance tendency toward agency capture by regulated entities).

<sup>426</sup> Aspects of the new regime raise serious due process questions. It may be that the system of financial and other rewards used to promote the achievement of "results," such as declining caseloads, could so bias the administration of a program as to render its decisionmaking fundamentally unfair. Regimes in which the implementing agency or private provider can keep a portion of savings attributable to caseload reduction appear particularly problematic. Compare *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973) (holding that adjudication by decisionmaker with financial stake in outcome violates due process), and *Tumey v. Ohio*, 273 U.S. 510, 522-23 (1927) (same), with *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 247-52 (1980) (upholding scheme where administrative agency keeps fines that it imposes because connection between financial benefit and agency decisionmaker was attenuated and because decisionmaker was performing prosecutorial function); see also Eric D.

On an individual level, the new administrative model provides no assurance of fair or equal treatment.<sup>427</sup> Although central decisionmakers may manage the system in the aggregate, ground-level workers are accorded an extraordinary degree of latitude in their "partnerships" with clients. This system leaves individuals in need of assistance at the mercy of low-level bureaucrats who have no professional training and who operate under a regime in which the incentives are structured to favor caseload reduction. It is a recipe for unfair decisions concerning a host of issues that are of critical importance to applicants and recipients.<sup>428</sup>

The danger of unequal treatment is also great. Like the social work model in which systematic racism was perpetrated under the guise of professional judgment,<sup>429</sup> the new system easily can be corrupted by racial and other biases. Caseworkers given discretion to determine what kind of work can be expected or required of clients, to evaluate their need for supports such as child care and transportation assistance, and to decide on claims for exemptions, easily can be swayed by racial or ethnic stereotypes and other subtle or blatant biases.

There are relatively few data on how the new discretionary system affects subsets of recipients. At least one study has looked at patterns in discretionary decisionmaking in Virginia's TANF program and found evidence of startling disparities in treatment between Afri-

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Blumrosen & Eva S. Nilsen, *Contesting Government's Financial Interest in Drug Cases*, *Crim. Just.*, Winter 1999, at 4, 5-10 (arguing that civil forfeiture law permitting law enforcement agencies to retain seized assets violates due process); Warren L. Ratliff, *The Due Process Failure of America's Prison Privatization Statutes*, 21 *Seton Hall Legis. J.* 371, 393-97 (1997) (warning that financial incentives may render decisions by private prison administrators vulnerable to due process challenges).

A related question was raised by the Social Security Administration's practice of more rigorously scrutinizing the decisions of administrative law judges with high allowance rates. Compare *Association of Admin. Law Judges v. Heckler*, 594 F. Supp. 1132, 1142-43 (D.D.C. 1984) (finding that, in pressuring administrative law judges to deny claims, agency created atmosphere of unfairness that violated APA), with *Nash v. Bowen*, 869 F.2d 675, 676 (2d Cir. 1989) (upholding agency practices as measures designed to enhance "quality" of decisions).

<sup>427</sup> Discretionary systems are based on an ideal of individualized, rather than uniform, treatment. See Davis, *supra* note 73, at 17-19.

<sup>428</sup> See, e.g., *Reynolds v. Giuliani*, 35 F. Supp. 2d 331, 335-37 (S.D.N.Y.) (describing unfair diversion practices in New York City), modified in part, 43 F. Supp. 2d 492 (S.D.N.Y. 1999); Fein & Lee, *supra* note 177, at 38-40 (describing sanctioning practices in Delaware).

<sup>429</sup> See Bell, *supra* note 42, at 181-86 (describing how "suitable homes" requirements were "a very successful method of excluding a disproportionate share of Negro children").

can-American and white recipients.<sup>430</sup> Although the survey was extremely limited, it found that caseworkers encouraged many white recipients to pursue educational opportunities, while no black recipients were encouraged to do so.<sup>431</sup> Approximately half of the white recipients reported that caseworkers were willing to provide extraordinary assistance to overcome transportation barriers.<sup>432</sup> Although the black survey participants reported transportation problems comparable to those of the whites, none was offered the same level of assistance.<sup>433</sup> Black recipients were also less likely to receive notification of potential jobs from their caseworkers.<sup>434</sup>

Although the results of the Virginia study cannot be generalized, it illustrates how susceptible the new administrative regime is to systemic biases. From the standpoint of equal treatment, welfare systems that rely on internalized norms as a means of providing direction are courting disaster. As many scholars have shown, public perceptions of welfare are interwoven with attitudes about race.<sup>435</sup> In addition, there may be many other biases that are given free rein in such a system, including conceptions of gender roles and views of disabilities.<sup>436</sup>

#### D. "Entrepreneurial" Government as a Form of Accountability

Proponents of "entrepreneurial" government administration view their mission as an effort to make government more accountable, not less.<sup>437</sup> They claim that the process of devolution promotes accounta-

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<sup>430</sup> See Gooden, *supra* note 18, at 23. The survey looked at two Virginia counties. In both counties, most of the caseworkers were white, while a substantial portion of the recipients were African-American. See *id.* at 30-31.

<sup>431</sup> See *id.* at 28. In fact, the survey suggests that white recipients were encouraged to pursue degrees they did not want, while black recipients were prevented from completing programs that they had started. See *id.*

<sup>432</sup> See *id.* at 29 (referring to fact that whites were offered assistance to "obtain a driver's license, a vehicle or vehicle repairs").

<sup>433</sup> See *id.* (referring to fact that blacks were only offered gas vouchers).

<sup>434</sup> See *id.* at 31-32.

<sup>435</sup> See Martin Gilens, *Why Americans Hate Welfare: Race, Media and the Politics of Antipoverty Policy* 68 (1999) (describing surveys in which public viewed African-Americans as disproportionately poor and lazy); Dorothy Roberts, *The Value of Black Mothers' Work*, 26 Conn. L. Rev. 871, 873 (1994) ("The image of the lazy Black welfare queen who breeds children to fatten her allowance shapes public attitudes about welfare policy."); Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 Fordham Urb. L.J. 1159, 1163-68 (1995) (describing how media typically portrays welfare recipients as irresponsible African-Americans).

<sup>436</sup> See Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. Pa. L. Rev. 1249, 1264-66 (1983) (discussing how stereotypes about gender roles influenced implementation of Work Incentive Program in 1970s).

<sup>437</sup> See, e.g., Barzelay, *supra* note 268, at 127-30 (arguing that entrepreneurial model promotes accountability).

bility because decisions are made in smaller political units.<sup>438</sup> The involvement of lower levels of government and of private contractors can be viewed as widening the degree to which “mediating” institutions have input into the shape and content of government programs.<sup>439</sup> This diffusion of power is seen as opening up the process of government to a greater range of inputs. As explained below, these arguments conflate accountability with fragmentation. Proponents also depict an emphasis on results as a form of accountability.<sup>440</sup> In the area of welfare, however, this focus does little to address accountability concerns.

The question of whether smaller units of government are necessarily more democratic lies beyond the scope of this Article.<sup>441</sup> Certainly there are structural reasons to expect that poor people will fare better when decisions are made in larger political fora.<sup>442</sup> For our purposes, the critical point is that there is no reason to think that any of the smaller political or administrative units that make policy decisions in the TANF program are open to any greater outside input than a more centralized system. The fact that states, counties, and cities have gained authority under TANF, does not provide necessarily greater access to members of the public, including grassroots organizations, community institutions, and advocates for the poor.<sup>443</sup> Although these groups may be able to participate in the political process, that process generally has not been seen as sufficient to provide effective

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<sup>438</sup> See, e.g., Breger, *supra* note 341, at 430 (“[D]ecisions made closest to those affected are likely to be the best informed and certainly the most democratically based.”); Dorf & Sabel, *Democratic Experimentalism*, *supra* note 268, at 321 (“[L]ocal initiative increases the quality of services while bettering the conditions for their efficient organization and, in any case, augmenting the public accountability of the providers.”).

<sup>439</sup> See Peter L. Berger & Richard John Neuhaus, *To Empower People: From State to Civil Society* 163-64 (2d ed. 1996) (arguing that mediating structures are empowered when there is more involvement by “people-sized” institutions).

<sup>440</sup> See Osborne & Gaebler, *supra* note 268, at 141.

<sup>441</sup> Compare Daniel J. Elazar, *American Federalism: A View from the States* 204-07, 215-16 (1966) (referring to interest in “maximization of local control over the political and administrative decision-makers whose actions affect the lives of every citizen”), with Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 *Colum. L. Rev.* 552, 576 (1999) (“The idea that states are more likely to foster citizen participation simply because they are closer to the people than the national government is an unproven theoretical assumption . . .”).

<sup>442</sup> See Paul E. Peterson, *City Limits* 20-21, 128-29 (1981) (arguing that when policies are set at local level, competition between localities drives down generosity of programs that serve poor); Cashin, *supra* note 441, at 582-600 (arguing that well-off suburban voters dominate politics of many states but that such voters exert less complete control at federal level).

<sup>443</sup> See Handler, *supra* note 20, at 217 (“As far as the ordinary citizen or client is concerned, local government can be just as bureaucratic, just as unresponsive as state or federal government.”).

oversight of administration. Fragmentation of political responsibility does not provide the public with direct access to administrative policymaking.

In fact, fragmentation may serve to thwart rather than enhance public accountability. Devolution enables the higher levels of government to take symbolic action while foisting the difficult unresolved conflicts on lower levels, which can pass them on to still lower levels until they ultimately must be confronted by ground-level agency officials.<sup>444</sup> In such a system, the key conflicts are then resolved at administrative levels that operate largely beneath the level where public oversight is possible.<sup>445</sup> Congress and state legislatures, for example, can legislate time limits, subject to "hardship" exemptions,<sup>446</sup> thus enabling them to take credit for getting people off of welfare, while avoiding blame for any hardship suffered by individuals. Ultimately, the welfare centers or ground-level workers are left to make the determinations that define the content and meaning of the time limit policy.

This does not mean that important policy choices are completely handed over to the lower levels of the administrative ladder. Rather, key decisions are embodied in the tools that agencies use to create and shape the institutional environment in which discretion is exercised. These tools, such as training materials, incentive structures, and performance measures, are seldom the subject of political attention or debate. Indeed, as Michael Lipsky has pointed out, reliance on administrative mechanisms as a means of effectuating changes in the welfare system has proven attractive precisely because these mecha-

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<sup>444</sup> See *id.* at 42-46. Critics of the Supreme Court case law upholding congressional delegation of policymaking to administrative agencies often have made a similar point. See *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring) (arguing that Court should play more active role in ensuring that Congress does not avoid critical decisions by simply delegating them to agencies); John Hart Ely, *Democracy and Distrust* 131-32 (1980) (describing how congresspeople delegate important decisionmaking power to lower-level bureaucrats and agencies); David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* 8-10, 183-84 (1993) (describing how "delegation allows Congress to avoid taking a position on any controversial choice").

<sup>445</sup> Handler writes that

When [a legislature] has to deal with a problem, the next best strategy is to handle it minimally and symbolically; and this means delegating the problem back to its source—the local level. . . . The granting of discretion satisfies local jurisdictional interests and gets the politically controversial problem out of the legislature's hair. A successful delegation, from the standpoint of the legislature, is one that stays delegated. The problem is "resolved" at the local level and does not rise up and demand more legislative and political capital.

Handler, *supra* note 20, at 31.

<sup>446</sup> See, e.g., 42 U.S.C. § 608(a)(7) (Supp. IV 1998).



nisms are largely hidden from public view.<sup>447</sup> Moreover, fragmentation makes it more difficult for interested groups to monitor the implementation of welfare and to participate in whatever relevant political processes exist.

The increasing reliance on private contractors can be seen as a means of permitting greater local control and thereby diffusing power in the welfare system. Under one articulation of this vision, community-based nonprofits that have contracted to provide services are seen as transforming a large government program into a community controlled resource.<sup>448</sup> Although this kind of transformation may occur, it is not the only, and may not be the principal, outcome of privatizing welfare delivery. First, when privatization leads to administration by large national corporations, as is increasingly the case, it leads to centralization, rather than local control.<sup>449</sup>

Second, private contractors are generally subject to performance standards established externally. Thus, the incentives that will drive their exercise of discretion are largely dictated from above.<sup>450</sup> Steven Rathgeb Smith and Michael Lipsky's study of nonprofit social service contractors concluded that government contracts may transform the contractor to a greater extent than the contractor alters the program.<sup>451</sup> They found that the net effect may be to undermine the independence of the service provider: "While contracting may help

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<sup>447</sup> See Lipsky, *supra* note 22, at 5 (noting that techniques of "bureaucratic disentanglement" are obscure and indirect and thus likely to give rise to little opposition). Lipsky notes that such mechanisms appear as procedural or structural, rather than substantive, and thus do not trigger the attention and oversight of changes that are overtly substantive. See *id.* at 21-22.

<sup>448</sup> See Starr, *supra* note 417, at 28-30 (describing vision of privatization as return of power to communities).

<sup>449</sup> See Kennedy, *supra* note 306, at 262 ("['W]elfare reform' has meant that power devolved from a single national authority down to the states, then back up again to national corporations . . ."); see also Bernstein, *supra* note 306, at 26 (reporting that New York City terminated contracts with local nonprofit groups); Karen Kucher, *Welfare-to-Work Providers Chosen but Group Protests South Bay Selection*, *San Diego Union-Trib.*, Apr. 23, 1998, at B6 (describing selection of Maximus over local community groups in San Diego).

It may be that performance-based contracts favor large national corporations over small community-based groups because, in the long run, larger entities are better able to absorb the risk that such arrangements entail.

<sup>450</sup> Steven Rathgeb Smith and Michael Lipsky note that the effect of performance-based contracts under the Job Training Partnership Act was "essentially to remove the board of directors from any involvement in the program, since the board is incapable of influencing the program's goals and priorities." Smith & Lipsky, *supra* note 306, at 91. Rather than setting policy, the nonprofit boards ended up policing compliance with the performance measures. See *id.*

<sup>451</sup> See *id.* at 144 ("In the conflict between public agencies and nonprofit organizations in the character and allocation of services, government has the upper hand.").

expand services, it also undermines the role of nonprofit organizations as distinct entities separate from government and market organizations—the so-called mediating function of nonprofit organizations.”<sup>452</sup>

Thus, the arrangement may create the appearance of local or private control while the critical decisions are still made by central authorities. This appearance frustrates, rather than enhances, accountability as the public cannot discern which decisions have been made by the private entity and which are attributable to the government.<sup>453</sup> Government can distance itself from harsh implementation of policies at the same time that it mandates outcomes that reward or require such treatment and takes credit for declining caseloads. When problems arise, government officials and private contractors can point fingers at each other, leaving the public with little means of knowing who is really at fault.

Although privatization may lead to situations in which the contractor does wield sufficient power to shape and define critical aspects of a program, such independence is generally the result of a failure in the competitive process.<sup>454</sup> Lack of effective competition means that private service providers can make demands without risking loss of their contracts. Most proponents of privatization, however, would view this context as undesirable, as the benefits of privatization accrue largely through competition.<sup>455</sup> Finally, privatization may impair the flexibility and accountability of the government by conferring contractual rights on a wide variety of service providers. Once a contractor is in place, and the terms of the contract are established, the government has legal responsibilities to the provider that well may limit the ability of political leaders to change directions.<sup>456</sup>

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<sup>452</sup> *Id.* at 73.

<sup>453</sup> *See id.* at 210.

<sup>454</sup> Joel Handler has offered the following assessment of the practice of contracting out human services:

The experience of privatization, and especially contracting, is sobering. . . . [T]he important actors—both public and private—are able to reconstruct the contracting system to perpetuate the mutual, reciprocal benefits of organization survival. Private suppliers, whether profit or nonprofit, come to resemble public monopolies. In time, there is little competitive bidding, contracts are sometimes renegotiated, but rarely terminated.

Handler, *supra* note 20, at 217.

<sup>455</sup> *See* Donahue, *supra* note 315, at 83 (“The rationale for privatization is that competition among contractors will inspire more efficient procedures . . .”).

<sup>456</sup> *See* *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (holding federal government liable for breach of contract despite fact that statute precluded government from performing); *see also* Joshua Schwartz, The Status of the Sovereign Acts and Unmistakability Doctrines in the Wake of *Winstar*: An Interim Report, 51 Ala. L. Rev. 1177 (2000) (analyzing response of lower courts to Supreme Court’s fractured decision in *Winstar*).

The third possible way in which the new system promotes accountability is in its emphasis on results. This view of accountability grows out of the business analogy that underpins much of the recent thinking about public administration. Businesses are held accountable by consumers for the quality of the products or services that they produce. A poor product will result in weak sales. Proponents of entrepreneurial government argue that government agencies should identify "customers" and seek to provide the results sought by these customers.<sup>457</sup> Mechanisms should be created to penalize agencies for poor results and reward them for successful outcomes, thus creating a structure of incentives for agencies to meet the needs of customers.<sup>458</sup> Performance-based funding mechanisms are an attempt to replicate in the public sector the discipline that the competitive market imposes on business. Similarly, the threat of competition through privatization creates a market for the delivery of government services. Viewed in this light, the emphasis on results can be seen as a means of making government more effective, in the same way that the market makes private enterprise more efficient. Effectiveness and accountability, however, are distinct values.

Dissemination of information about the results of government activities undeniably does advance the goal of public oversight. The emphasis on results provides additional measurements upon which the public can evaluate government programs. Thus, to an extent, it does further accountability. Information about results, however, is not equivalent to access: It cannot serve as a surrogate for channels of public input and participation in decisionmaking. Rather, it is a tool that those who have access can use to make their input more effective. A system focused on "results" can be as closed to public oversight and participation as any other.

The ideal of "customer service" has the ring of an accountability concept, but is of limited help in the context of public benefit programs.<sup>459</sup> The relationship between government and welfare recipients is a far cry from that of a business and a customer. Recipients are "customers" in the sense that they receive services, but most programs seek to dissuade their patronage, rather than to court it. If the public is viewed as the customer, then it is not clear how the concept differs from the admonition that agencies are to serve the public. Moreover, in the area of welfare policy, the public is likely to have conflicting

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<sup>457</sup> See Barzelay, *supra* note 268, at 8 (highlighting advantages of "customer-driven agencies" over "bureaucratic agencies").

<sup>458</sup> See *id.* at 91-101 (outlining and providing solutions for "weak accountability").

<sup>459</sup> Jerry Mashaw has critiqued the analogy between business and government that underpins much of this approach to accountability. See Mashaw, *supra* note 341, at 410-15.

goals and interests that preclude any easy reliance on a notion of "customer service."<sup>460</sup>

In sum, while "entrepreneurial" government indeed may have many advantages over other models of administration in the area of welfare, it does not, by itself, fully address concerns about public accountability.

#### IV

#### RETHINKING ACCOUNTABILITY

Just as models of administration continue to shift and evolve, systems of accountability also must adapt to changing circumstances. As discussed above, existing means of holding agencies accountable are inadequate to deal with the forms of welfare administration that are emerging, and these forms do not themselves provide inadequate mechanisms for establishing accountability. Accordingly, it is necessary to focus on the question of whether the new system of welfare administration can be made more open to scrutiny and public input. As Jody Freeman recently has pointed out, in the new regime of mixed public and private governance, accountability may arise from an aggregate of "multiple and overlapping checks."<sup>461</sup> The efficacy of these checks is heavily dependent on the context in which they are created and used.

The use of traditional vehicles for public input may prove insufficient in the new regime. For example, the process of devolution may mean that many critical decisions are made at governmental levels that do not have a strong tradition of analyzing and assimilating comments through the rulemaking process.<sup>462</sup> Thus, expansion of notice and comment may not provide the same degree of public input that it would in other contexts.

This is not to suggest that notice and comment requirements are superfluous. Where they exist, they should be interpreted to cover the broad range of materials that agencies now use to set welfare policy, including contracts, "partnership agreements," and other basic documents that establish the parameters through which public or private entities provide welfare or related services.<sup>463</sup> This requirement

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<sup>460</sup> See *supra* text accompanying notes 420-22; Mashaw, *supra* note 341, at 410 (noting that idea of customer service is not helpful in dealing with tensions in underlying goals of programs such as Social Security disability benefits).

<sup>461</sup> See Freeman, *supra* note 404, at 665.

<sup>462</sup> See *supra* text accompanying note 369.

<sup>463</sup> Some have argued that the process of issuing regulations has "ossified" as Congress and the executive branch have added screeds of additional requirements. See Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 *Duke L.J.* 1385

should include performance-based systems of compensation or reimbursement, as the specified performance standards and measurements reflect critical normative judgments.

Similarly, mechanisms need to be developed to make the process of contracting with private entities to administer pieces of the welfare system open to substantive public input. Such input should begin with the framing of the request for proposals, which sets the parameters that private entities will have to meet.<sup>464</sup> Going further, contracts with private service providers can require various forms of public access and input into decisionmaking throughout the term of the agreement. Contract renewals also should be open to public input and scrutiny.<sup>465</sup>

In developing additional means of providing public input there may be existing models that can be drawn upon. A number of states and localities have in fact established creative avenues for public participation in setting welfare policy.<sup>466</sup> In some locations, advocates for welfare recipients fought successfully for a place at the table where decisions are made. For example, the City of Denver has a Welfare Reform Board, consisting of the Director of Human Services, appointees of the Mayor and the City Council, representatives of the business community, and service providers.<sup>467</sup> As the result of lobbying by welfare recipients, the Mayor appointed a former recipient to the

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(1991) (discussing ways to “deossify,” or reinvigorate, processes for establishing and changing informal administrative rules). It is not clear, however, that these problems are as prevalent at the state level where TANF programs are run.

<sup>464</sup> In San Diego, for example, the public was given an opportunity to express its view on the selection of Maximus as an area service provider, but only after the bidding process was concluded. See E-mail from Jack Schutzius, Service Employees International Union, to author (Jan. 21, 2000) (on file with the *New York University Law Review*); see also Kucher, *supra* note 449, at B6 (describing protest over selection of Maximus as provider of welfare-to-work services).

<sup>465</sup> Other aspects of the contracting process warrant attention. As the General Accounting Office has pointed out, in many states the rules preventing a “revolving door” between government service and the private sector are inadequate. See General Accounting Office, Report No. GAO/HEHS-99-41, *Social Service Privatization: Ethics and Accountability Challenges in State Contracting* 12 (1999) (“The lack of some states’ ethics provisions may result in conflicts of interest that adversely influence state contract award processes.”); see also Goozner, *supra* note 403, at 1 (reporting that “[d]ozens of public officials—many of whom spent the decade since the 1988 welfare reform law designing state or county pilot welfare-to-work programs—have jumped ship to help their new employers land contracts in the rapidly changing welfare arena”). This weakness undermines the ability of government to bargain with private contractors, as officials may seek to preserve or create employment opportunities for themselves.

<sup>466</sup> It well may be that these vehicles for public input were principally intended to assist in the initial design of TANF programs, rather than to play ongoing roles.

<sup>467</sup> See E-mail from Beth Kelly, People United for Families, Denver, Col., to author (Jan. 20, 2000) (on file with the *New York University Law Review*) (discussing opportunities for public input in promulgation of TANF rules).

Board.<sup>468</sup> In Cincinnati, representatives of the Childrens' Defense Fund and the local Legal Aid Society participated in the negotiations leading to the agreement between the county and the State governing administration of the TANF program.<sup>469</sup>

The Center for Community Change has funded community-based advocacy efforts that seek to inject the views of low-income communities into the process of welfare reform.<sup>470</sup> In 1997, the Center funded forty-four organizations in twenty-nine states to engage in grassroots organizing and policy advocacy around TANF implementation.<sup>471</sup> Although the total of \$1.4 million in funding is extremely small, and the projects only constitute a first step toward the creation of avenues of access to the process of setting policy in the TANF program, the projects may provide models that can be replicated more broadly.

The experience with these and other forms of participation needs to be collected and evaluated. It may be that the placement of one recipient on a board amounts to little more than symbolic tokenism, or that it has a significant impact on the decisionmaking. Despite the literally hundreds of studies now available of the myriad aspects of welfare reform,<sup>472</sup> few address these questions of process. The omission is glaring.

Study of public participation mechanisms must be sensitive to the fact that the reality of participation frequently differs from its appearance. For example, in Florida's Family Transition Program, a demonstration program under AFDC, a citizen Review Panel was entrusted with the task of reviewing findings that recipients who were unable to find jobs within a specified time period had failed to comply with pro-

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<sup>468</sup> See *id.*

<sup>469</sup> See E-mail from Katy Heins, Contact Center, Cincinnati, Ohio, to author (Jan. 20, 2000) (on file with the *New York University Law Review*). Ms. Heins reports that, when the agreement was renewed, no members of the public participated in the renewal process, except for during an opportunity to submit testimony to the County Commissioners on the final agreement. See *id.* She also notes that in neighboring counties, there was far less public input. See *id.*

Counties are required to involve community social service agencies in developing the implementation plans that form the basis of negotiation with the state. See Wilson & Adams, *supra* note 296, at 1382-83.

<sup>470</sup> The Center administers the Welfare Redesign Grants Pool established by a number of collaborating organizations, including the Center for Budget and Policy Priorities and the Center for Law and Social Change (CLASP). See Center for Community Change, *Making Welfare Reform Work Better: How Diverse Organizations Worked to Improve Their States' Welfare Policies 2* (1999), available at <<http://www.communitychange.org/>>.

<sup>471</sup> See *id.*

<sup>472</sup> See Welfare Information Network (visited Aug. 8, 2000) <<http://www.welfareinfo.org>> (providing links to studies and information on welfare reform).

gram rules and were therefore ineligible for public jobs.<sup>473</sup> Members of the panel were drawn from a cross section of the community and approximately a quarter of the members were former welfare recipients.<sup>474</sup> Despite the seeming independence of the panel, researchers concluded that, in practice, it was largely dependent on agency staff. Agency staff prepared written summaries of the information on each case and wrote up the panel's recommendations using forms that the staff had developed. The system principally served to validate the agency's view of clients as "noncompliant" and therefore ineligible for public jobs. The Review Panel served as a means of legitimating agency determinations rather than as a check on agency discretion.<sup>475</sup>

On the individual level, new mechanisms are needed to ensure fair treatment. Although individual hearings continue to provide an important source of redress, as a system of accountability, hearings are grossly inadequate. Several possibilities for supplementing the hearing system are apparent. Performance-based standards of payment or evaluation methods could include measures that focus on process as well as outcomes. Process measures should be designed to ensure consistency and that individuals are treated with respect. To facilitate this process, information on process as well as data relating to outcomes must be collected and maintained. Data should be gathered that would reveal any patterns of discrimination in administration.<sup>476</sup>

An additional possibility for promoting fair treatment is the use of testers. In recognition of the fact that much important information about program operations may not be susceptible to statistical quantification, TANF programs could employ testers who would pose as applicants and recipients in order to gather additional information. The results of such testing could be made publicly available. Conversations between workers and applicants are now supposed to be an im-

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<sup>473</sup> See Robin H. Rogers-Dillon & John David Skrentny, *Administering Success: The Legitimacy Imperative and the Implementation of Welfare Reform*, 46 *Soc. Probs.* 13, 14-15 (1999) (examining Florida program's citizen review panel and arguing that panel lacked strong independent function).

<sup>474</sup> See *id.* at 20.

<sup>475</sup> See *id.* at 20-21.

<sup>476</sup> Cf. Dorf & Sabel, *Democratic Experimentalism*, *supra* note 268, at 316-23 (arguing that free flow of information contributes to accountability); William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 *Colum. L. Rev.* 1701, 1801-19 (1999) (advocating disclosure requirements as means of furthering accountability to public). Although the disclosure of information plays a critical role in many accountability systems, the means and form of disclosure have a major impact on the effectiveness of such systems. Moreover, information is of use only if there are avenues through which members of the public can use the information. See *supra* notes 391-92 and accompanying text.

portant component of welfare policy. However, there is no way to determine from statistical data whether these conversations are being conducted fairly and appropriately. This problem is particularly acute with respect to diversion programs, where the individuals who are diverted may have no other contact with the welfare system. Testing both permits information to be collected and serves as a deterrent for inappropriate conduct.

Testing is a well-established technique for uncovering discrimination in the areas of commerce, housing, and employment.<sup>477</sup> As a result, there are existing procedures and practices for testing that could be adapted to the context of public benefit programs. The Northwest Federation of Community Organizations has designed a testing protocol for monitoring implementation of CHIP.<sup>478</sup> Using this protocol, researchers in Idaho uncovered evidence of systemic biases and hidden barriers in Idaho's CHIP program.<sup>479</sup>

Other possibilities exist. As in the long-term care system, programs can employ ombudsmen to help individuals resolve disputes with workers, or advocates who help applicants and recipients negotiate the administrative process.<sup>480</sup> Although nursing home

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<sup>477</sup> See A National Report Card on Discrimination in America: The Role of Testing (Michael Fix & Margery Austin Turner eds., 1998) (compiling essays on use of testing to uncover racial discrimination); see also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 368 (1982) (discussing testing for discrimination in housing); *Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1268-70 (D.C. Cir. 1994) (discussing testing for discrimination in employment); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817, 819 (1991) (using testers to uncover discrimination in car sales); Margery Austin Turner & Felicity Skidmore, *Introduction, Summary, and Recommendations*, in *Urban Inst., Mortgage Lending Discrimination: A Review of Existing Evidence* 1, 1-15 (Margery Austin Smith & Felicity Skidmore eds., 1999) (examining studies based on use of testers).

Roderic Boggs has noted that "[t]he broad areas of federal entitlement and grant programs, as well as government contracting programs, suggest numerous possibilities for the use of testing." Roderic V.O. Boggs, *The Future of Civil Rights Testing: Current Trends and New Directions*, in A National Report Card on Discrimination in America, *supra*, at 113, 120.

<sup>478</sup> Northwestern Fed'n of Community Orgs., *Breaking Barriers: A Grassroots Guide to Identifying Access to the Children's Health Insurance Program* (1999).

<sup>479</sup> See Idaho Community Action Network, *All Kids Need a Healthy Start: DH&W Doesn't Play Fair with Children's Health* (1999) <<http://www.nwco.org/Idaho/icnship.htm>> (reporting that testing revealed pattern of discrimination in processing applications for CHIP).

<sup>480</sup> See 42 U.S.C. § 3058g (1994) (requiring states to establish nursing home ombudsman systems); William F. Benson, *The Long-Term Care Ombudsman Program: A Model for Health Care Consumers*, in *Regulating Managed Care: Theory, Practice, and Future Options* 117, 119 (Stuart Altman et al. eds., 1999) (suggesting that ombudsmen be used to assist consumers in managed health care programs); John J. Regan, *When Nursing Home Patients Complain: The Ombudsman or the Patient Advocate*, 65 Geo. L.J. 691, 695 (1977) (contrasting ombudsman and patient advocate models); Louise G. Trubek, *The Social HMO for Low-Income Families: Consumer Protection and Community Participation*, 26



ombudsman programs have been criticized as ineffectual, there may be ways that the concept could be adapted and strengthened for use in the welfare system.<sup>481</sup>

Increased funding for legal services, together with the removal of restrictions on federal funding, should be viewed as a basic component of any strategy of enhancing accountability.<sup>482</sup> Legal services lawyers have both the skills and the independence to help individuals and to monitor the welfare system as a whole. Many vehicles for public access, such as notice and comment, are of little value to poor individuals and communities without access to legal representation. Absent such representation, input received from the public will not reflect fully the experiences and perspective of those most affected by welfare reform.

Traditional private law remedies also may play a role in establishing a system of accountability.<sup>483</sup> Thus, tort law may play a role in checking the power of administrators.<sup>484</sup> In the past, the doctrine of

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Seton Hall L. Rev. 1143, 1148 (1996) ("Ombudsman programs provide a person to whom or site where clients can voice dissatisfaction.").

<sup>481</sup> Critics have charged that nursing home ombudsman programs are too limited and are insufficiently aggressive in protecting residents' rights. See Elizabeth B. Herrington, Strengthening the Older Americans Act's Long-Term Care Protection Provisions: A Call for Further Improvement of Important State Ombudsman Programs, 5 Elder L.J. 321, 325 (1997) (arguing that "the currently operated ombudsman programs are not effective and, therefore, must be examined and altered in order to rectify the problems existing in nursing homes today").

<sup>482</sup> In 1995, Congress both slashed federal funding for legal services and imposed a series of restrictions that greatly reduce the ability of legal services programs to assist poor clients in dealing with systemic problems in welfare administration. The restrictions prohibit federally funded legal services offices from participating in class actions or challenging the legality of any welfare reform law or regulation. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1321-53 to -56 (1996); *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 759 (2d Cir. 1999) (affirming in part district court's denial of injunction sought by plaintiffs against enforcement of restrictions imposed by Congress and Legal Services Corporation on activities of entities receiving funding from Corporation), cert. granted, 120 S. Ct. 1553 (2000). See generally Symposium, The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions, 25 Fordham Urb. L.J. 279 (1998) (discussing issues confronted by lawyers working under congressional restrictions).

<sup>483</sup> See Freeman, *supra* note 404, at 588-91. In a privatized system, contracts serve as the governing source of rights and responsibilities. See *id.* at 667-69. Accordingly, principles of contract law may be of critical importance. For example, the contract law doctrines permitting enforcement by third party beneficiaries may be construed to confer rights on public assistance recipients in a privatized regime. See Restatement (Second) of Contracts §§ 302-315 (1981).

<sup>484</sup> For a thorough consideration of the use of tort law as a means of establishing accountability for the actions of street-level officials, see Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (1983). Schuck argues that tort liability should be placed on governmental entities, rather than individual officials. See *id.* at 100-13 ("[T]he values that underlie substantive rules of conduct are more strongly affirmed

qualified immunity established a major hurdle to findings of liability.<sup>485</sup> In *Richardson v. McNight*,<sup>486</sup> however, the Supreme Court held that guards in a privatized prison cannot avail themselves of this defense. The Court noted that immunity was unnecessary because the profit motive and pressures of a competitive marketplace would ensure that the guards would not be intimidated from zealously performing their duties by the threat of suit.<sup>487</sup> The reasoning of *Richardson* suggests that workers in privatized welfare systems similarly would not be immune from suit. Plaintiffs, however, still would have to establish that such workers are acting under color of state law for purposes of liability under 42 U.S.C. § 1983,<sup>488</sup> or would have to find a state law cause of action.<sup>489</sup>

The point is not that any of these possible means of promoting accountability necessarily should be adopted. It may be that, upon closer examination, each of them may be unsuitable or ineffective. Instead, the first step must be the recognition that there are major issues of accountability raised by the new regime of welfare administration and that there are a variety of ways in which these problems can be addressed. As a next step, academics, advocates, and policymakers need to focus on means of addressing the problems by looking at existing models, both in the context of welfare administration and in related areas, and by developing new means of ensuring public participation in administrative policymaking and fair treatment of individuals.<sup>490</sup>

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when the costs of wrongdoing are imposed upon the entity responsible for recruiting, training, guiding, constraining, managing, and disciplining actual violators, than when they are imposed upon individuals with little leverage upon reform.”); see also Freeman, *supra* note 404, at 588 (discussing possible role of private tort law and contract remedies in establishing accountability).

<sup>485</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (defining qualified immunity as protection from suit unless defendant violates clearly established right).

<sup>486</sup> 521 U.S. 399 (1997).

<sup>487</sup> See *id.* at 409-10.

<sup>488</sup> 42 U.S.C. § 1983 (Supp. IV 1998).

<sup>489</sup> In *Richardson*, the Court did not address the state action issue. See 532 U.S. at 413; cf. *Wyatt v. Cole*, 504 U.S. 158, 168 (1992) (holding that qualified immunity is not available to private defendants for purposes of § 1983 liability for invoking state replevin, garnishment, or attachment statute).

<sup>490</sup> See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1, 21-22 (1997) (suggesting alternative means of accountability to address deficiencies in rulemaking process at federal level).

Accountability regimes in other nations also may serve as models, as trends toward devolution and privatization have global elements. See *The Province of Administrative Law*, *supra* note 340 (collecting essays on shifting boundaries between public and private sectors in several countries).

## CONCLUSION

Welfare reform has brought a revolution in welfare administration. The model of benefit administration as a hierarchically ordered system of rules that provides predictability and uniformity of treatment is in the process of being abandoned. In its place, a system is emerging that combines lower-level worker discretion with mechanisms that central administrators use to control and shape the way in which discretion is exercised in the aggregate.

On one level, this development could be viewed simply as a reflection of shifting views of American institutions. As Theodore Marmor has observed in the context of health care policy, there is a cyclical history to management techniques, as managerial innovations are enthusiastically embraced and subsequently discarded in disappointment.<sup>491</sup> The same is true with respect to models of public administration. To oversimplify, the New Deal and postwar period can be seen as an era that exalted experts and during which administrative agencies were conceived of as expert tribunals.<sup>492</sup> In the late 1960s and in the 1970s, the romance with experts gave way to a fascination with lawyers and legal systems: Fair process and equal treatment became central concerns of administrative government.<sup>493</sup> Today, business people, rather than experts or lawyers, are thought of as the primary problemsolvers in society.<sup>494</sup> Put another way, the American romance with the Ph.D. gave way to a romance with the J.D. and then the M.B.A. The shift in welfare administration from a social work model to a legal-bureaucratic model, and now, to an entrepreneurial one, is in some respects simply a manifestation of this larger pattern.

On another level, the transitions also reflect shifting conceptions of the poor, of poverty, and of public benefit programs. Although cloaked in the rhetoric of "partnership" and "empowerment," the new

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<sup>491</sup> See Theodore R. Marmor, *Forecasting American Health Care: How We Got Here and Where We Might Be Going*, in *Healthy Markets? The New Competition in Medical Care* 367, 380-82 (Mark A. Peterson ed., 1998). Marmor cautions that "[a]s we operate in a world often characterized by management rhetoric and enthusiasm for market competition, we would be wise to remember the remarkably cyclical history of such enthusiasms. The heralded initiatives of one era regularly have given way to the enthusiasms of the next." *Id.* at 380. Marmor's point is not that such innovation is futile, but rather that expectations should be tempered. See *id.*

<sup>492</sup> See Rabin, *supra* note 353, at 1266-67 ("With the final legitimation of the New Deal came the acceptance of a central precept of public administration: faith in the ability of experts to develop effective solutions to the economic disruptions created by the market system."); cf. Stewart, *supra* note 339, at 1677-80 (describing view of agency discretion as legitimated by administrative expertise).

<sup>493</sup> See Stewart, *supra* note 339, at 1711-60.

<sup>494</sup> See Barzeley, *supra* note 268, at 121-23 (arguing that object of public agencies should shift from "administration" to "production").

system of welfare administration substantially redistributes power between clients and ground-level workers. Workers are given license to exhort, advise, and ultimately threaten clients, while clients are disabused of the notion that they have rights and can make demands. This regime is rooted on the assumption that recipients need a motivator to help overcome the psychological burden of dependency. Poverty, it seems, is mostly a state of mind. Regardless of the validity of this theory, the new administrative regime has demonstrated that it both can get people off the welfare rolls and do so without resort to means that are overtly draconian. The ultimate impact on poor families, however, remains far from clear.

In all of this, the question of accountability emerges as a central concern. Administrative law has developed mechanisms for providing outside input into the formulation of agency policies and decisions that reflect particular assumptions about how agencies are structured and how they make decisions. The new modes of welfare administration bypass or render ineffective critical components of this system of accountability. The adaptation of existing means of holding agencies accountable or the development of new mechanisms is a central challenge for welfare administration and for administrative law generally. Meeting this challenge requires sustained thought and study about the problems of public participation and individual fairness. To date, these issues have been overshadowed both in public discourse and in scholarly analysis by an emphasis on outcomes at the expense of process values. In American society, however, means, as well as ends, are vitally important.