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Reconciling Welfare Devolution and Due Process Protection

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RECONCILING WELFARE DEVOLUTION AND DUE PROCESS PROTECTION

A Response to Professor Cimini

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INTRODUCTION

Professor Cimini argues that the 1996 Personal Responsibility and Work Opportunity Reconciliation Act[1] (PRWORA or Welfare Reform Act) represents a progression from public assistance as a federal statutory entitlement to a contractual model of welfare receipt.[2] In Professor Cimini's words, the Aid to Families with Dependent Children (AFDC) program created a legitimate expectation of benefits for those meeting statutory eligibility requirements.[3] Further, because these benefits were construed as "constitutionally protected property, recipients of such benefits were entitled to due process protections . . . ."[4] The Welfare Reform Act moved public assistance towards a "devolved contractual model,"[5] with a concomitant lessening of government accountability and due process safeguards for welfare recipients.[6] Although Professor Cimini laments this erosion, she simultaneously finds seeds of salvation in the devolved contractual model, arguing that it will protect welfare recipients from the arbitrary exercise of power by state welfare administrations.[7]

This response takes the view that Professor Cimini's argument—that both implied and express contracts govern the TANF recipient-government benefit exchange and can serve as the bases of due process protection[8]—is a plausible tool to serve as a counter to the revo-

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1. Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C. (Supp. V 1999).

2. Christine Cimini, *The New Contract: Welfare Reform, Devolution, and Due Process*, 61 MD. L. REV. 246, 249 (2002).

3. *Id.*; *see also* 42 U.S.C. § 602(a)(10)(A) (1994) (amended 1996) (providing that all eligible families shall receive aid under the AFDC program).

4. Cimini, *supra* note 2, at 250.

5. *Id.* at 249.

6. *Id.* at pt. II.

7. *Id.* at pt. III.

8. *Id.* at pts. III.A.3 and III.B.

cation of entitlement rights wrought by the Welfare Reform Act.[9] She argues for a broader conception of entitlement based on the property rights inherent in contracts.[10] However, Professor Cimini's strategy of redress may be based on a too optimistic reading of political will and legal predisposition. My observation is that the political environment, as well as the body of state court and mixed federal court welfare policy decisions, do not bode well for the likelihood that the courts will embrace Professor Cimini's more expansive view of entitlement.

I. THE ACCOUNTABILITY PROBLEM POSED BY WELFARE DEVOLUTION

The American social compact has been altered, if not broken. Social welfare policy discourse varies from those who think recipients should do more for aid receipt[11] to those who question whether there is enough of a social compact between government and its less-well-off citizens.[12]

The Temporary Assistance for Needy Families program (TANF), created under the 1996 Welfare Reform Act,[13] does not have the entitlement underpinnings of AFDC. Cash assistance is now conditional, subject to work requirements, time limits, and behavioral and other stipulations.[14]

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9. The conception of an entitlement based upon property rights was put forth by Charles A. Reich in *The New Property*, 73 YALE L.J. 733, 785-86 (1964), and *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965), which assert that "society has obligations to provide support, and the individual is entitled to that support as of right." Reich, *Individual Rights and Social Welfare*, *supra*, at 1256.

10. Cimini, *supra* note 2, at pt. III.

11. *See generally* MARVIN OLASKY, THE TRAGEDY OF AMERICAN COMPASSION (1992) (analyzing the history of philanthropy in America, and advocating an approach to poverty and homelessness that emphasizes respect and individual responsibility).

12. *See* Frances Fox Piven & Richard A. Cloward, *The Contemporary Relief Debate*, *in* THE MEAN SEASON: THE ATTACK ON THE WELFARE STATE 45, 45-47 (Fred Block et al. eds., 1987) (criticizing the conservative attack on the welfare system, and arguing that sufficient public support for such programs exists and should be reflected in government policy); *see also* FRANCES FOX PIVEN & RICHARD A. CLOWARD, THE BREAKING OF THE AMERICAN SOCIAL COMPACT 17-84 (reprint. 1997) (1967) (discussing how the decline of unions in the post-industrial era, the rise of "identity politics," and "attacks on social welfare programs" result in a weakened "social compact"); THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE 136-66, 228-49 (1995) (arguing that the Social Security Act's establishment of public assistance and social insurance programs "add up to . . . [an] incomplete version of a modern 'welfare state'" compared to European countries).

13. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C. (Supp. V 1999)).

14. 42 U.S.C. §§ 602, 604, 608.

As Professor Cimini notes in her discussion of the importance of *Goldberg v. Kelly*,[15] the entitlement core of AFDC evolved over time.[16] A variety of welfare case decisions by the activist Warren Court expanded the meaning of entitlement to more of an absolute right, not just a legal obligation dependent on eligibility.[17] This expansion, however, occurred in a political environment more focused on creating opportunity for all, much different from the current environment's emphasis on individual responsibility.[18]

Politicians and scholars now decry the harmful societal effects of an entitlement or income-by-right ideology.[19] Similarly, a case can be made that consistent with the larger political environment, the Burger and Rehnquist Courts, and lower federal courts, substantially narrowed the rights of welfare recipients.[20] One interpretation of the

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15. 397 U.S. 254 (1970).

16. *See* Cimini, *supra* note 2, at pt. I.A (discussing the entitlement analysis adopted by the Supreme Court in *Goldberg v. Kelly*).

17. *See* R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS 83-102 (1994) (discussing relevant Warren Court cases striking down restrictions on AFDC). For a discussion of the limitations of the Warren Court in providing the welfare poor equal protection, see ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION 84-98 (1997).

18. *See* MELNICK, *supra* note 17, at 36-38 (discussing the movement from the activism of the Warren Court to the expansion of federal governmental responsibility); *see also* GARETH DAVIES, FROM OPPORTUNITY TO ENTITLEMENT: THE TRANSFORMATION AND DECLINE OF GREAT SOCIETY LIBERALISM 34 (1996) (discussing the declared purpose of the Economic Opportunity Act of 1964, which was to open "to everyone the opportunity for education and training, the opportunity to work, and the opportunity to live in decency and dignity"). The framework of America's limited social welfare state was laid with many of the New Deal safety net programs and expanded through President Lyndon Johnson's Great Society programs. *Id.* at 14; *see also* SKOCPOL, *supra* note 12, at 209-10 (describing the "War on Poverty's" expansion of New Deal programs).

19. *See generally* DAVIES, *supra* note 18 (chronicling the rise of entitlement liberalism); LAWRENCE M. MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP (1986) (suggesting that the permissive, rather than authoritative, nature of social programs in America since the 1960s is to blame for the problems of poverty and unemployment that confront the disadvantaged); CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980, at 9 (1984) (arguing that modern welfare programs encourage the poor to "behave in the short term in ways that [are] destructive in the long term," and attempting to solve the "moral dilemma" of poverty). Theda Skocpol argues that the New Deal era's "bifurcation of social insurance and public assistance" programs set up a framework for ongoing welfare debate about dependency and work. This bifurcation made it easier for traditional welfare programs like AFDC to fall under attack. Theda Skocpol, *The Limits of the New Deal System and the Roots of Contemporary Welfare Dilemmas*, *in* THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 293, 295-98, 307-11 (Margaret Weir et al. eds., 1988).

20. *See* Sullivan v. Stroop, 496 U.S. 478, 485 (1990) (supporting the Secretary of Health and Human Services' position that "child support payments" referred exclusively to payment from absent parents); Bowen v. Gilliard, 483 U.S. 587, 608 (1987) (holding that the statute in question reduced AFDC benefits, but the reduction did not constitute a taking); Burns v. Alcala, 420 U.S. 575, 586-87 (1975) (interpreting the Social Security Act to include

Welfare Reform Act is that it was the culmination of decades-long attacks on the welfare state.[21] One can also construe the granting of section 115 waivers in the early 1990s to states by the federal government for welfare reform experimentation as license for the states to require more obligations of recipients, the entitlement status of AFDC notwithstanding.[22] The Welfare Reform Act, with its fundamental changes, was a runaway train that could not be stopped.[23]

Views vary on the role government should take in solving social problems. In the 1960s a dominant value was providing a social safety net for those whom opportunity had not.[24] In the 1990s dominant social and cultural values emphasized individual responsibility.[25] Conservatives felt that government policy had gone far "beyond entitlement" in its social welfare programs, with a concomitant decline in individual responsibility and obligation.[26] Their perception was that an entitlement to welfare created a class of people dependent on government largesse.[27]

On the one hand, in looking at the erosion of recipient rights produced since 1996, PRWORA detractors might contend that the AFDC entitlement model had an important virtue. That is, because of its virtual guarantee that those meeting the conditions of eligibility

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optional, not mandatory, pregnancy benefits). For a discussion of these cases as well as lower court decisions, see MELNICK, *supra* note 17, at 97-108.

21. *See, e.g.*, MEAD, *supra* note 19, at 91-119 (recounting the debate over welfare support without a work requirement that ran throughout welfare reform attempts between 1969 and 1979).

22. *See* U.S. GENERAL ACCOUNTING OFFICE, WELFARE WAIVERS IMPLEMENTATION: STATES WORK TO CHANGE WELFARE CULTURE, COMMUNITY INVOLVEMENT, AND SERVICE DELIVERY (1996) (examining reform efforts in Florida, Indiana, New Jersey, Virginia, and Wisconsin that include time-limited benefits, work requirements, and family caps).

23. *See* David T. Ellwood, *Welfare Reform as I Knew It*, AM. PROSPECT, May 1, 1996, *available at* http://www.prospect.org/print/v7/26/ellwood-d.html (discussing how President Clinton lost control of the reform effort in 1995 and 1996 after the defeat of his Personal Responsibility Act in 1994).

24. *See* MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 80-81 (1989) (describing President Johnson's "War on Poverty" as designed to provide opportunity in the areas of juvenile delinquency, civil rights, job training, and education); WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE 319-23 (6th ed. 1999) (describing the objectives of AFDC and the increase in federal funding and support for welfare reform).

25. *See* TRATTNER, *supra* note 24, at 376-77 (describing the 1990 welfare reform efforts to require job training and placement).

26. *See* MEAD, *supra* note 19, at 49-54 (placing the onus for failed efforts to help the poor on a lack of obligation instilled in recipients through the failure to address "behavioral problems among the poor").

27. *Cf.* MURRAY, *supra* note 19, at 67-68, 148-53 (describing the expansion of federal aid and a study finding that providing payments to individuals with incomes below a certain level resulted in reduced work efforts by the individuals).

would receive government assistance, AFDC provided protections from arbitrary or unfair administrative decisions.[28] As Professor Cimini observes, no such accountability mechanisms are mandated or exist to protect public assistance recipients under the Welfare Reform Act.[29] States can reduce or terminate recipient benefits, without due process safeguards, for noncompliance with the two federally mandated or four optional participation requirements.[30] In addition, states have imposed their own conditions of participation.[31] Though most states have some type of grievance procedure for sanction appeals, there is large variation among the states in this regard.[32] This variation ranges from refusing to grant extensions for failure to comply with program requirements to requiring a strict review procedure before a sanction can be imposed.[33]

On the other hand, PRWORA champions might argue that AFDC had the vice of the PRWORA virtue. AFDC's entitlement feature devalued individual responsibility.[34] The three-decade reform impetus that culminated in the Welfare Reform Act had this concern at its core. Robert Rector asserts that the intent of welfare reform was to "shift the focus from material to behavioral poverty" and that full-

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28. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 263-64 (1970) (finding that heightened due process protections of a pre-termination evidentiary hearing are necessary when the benefits at stake involve the fulfillment of essential human needs); *see also* Cimini, *supra* note 2, at pt. II (describing the shift from an entitlement program to a discretionary program and the accompanying reduction in procedural safeguards).

29. Cimini, *supra* note 2, at pt. II.

30. 42 U.S.C. § 607(e) (Supp. V 1999) (providing for the elimination or reduction of TANF funds to families in which an individual refuses to work as required by statute); *id.* § 608(a)(2) (providing for the elimination or reduction of TANF funds to the family of an individual who fails to cooperate with the state in establishing paternity or obtaining child support). The optional participation requirements for which sanctions can be imposed include failure to comply with an individual responsibility plan, *id.* § 608(b)(3), failure to work toward receiving a high school diploma or its equivalent, *id.* § 604(j), failure to ensure school attendance by children, *id.* § 604(i), and a positive controlled substance test, 21 U.S.C. § 862b (2000).

31. *See, e.g.*, STATE POLICY DOCUMENTATION PROJECT, REQUIRED SEQUENCE OF WORK ACTIVITIES, *available at* http://www.spdp.org/tanf/work.htm (last visited Jan. 22, 2002) (providing a listing of states that require individuals subject to the work requirement to participate in enumerated work activities). For a list of tables produced by the State Policy Documentation Project that study the state welfare programs, see generally STATE POLICY DOCUMENTATION PROJECT, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES, *available at* http://www.spdp.org/tanf/work.htm (last visited Jan. 22, 2002).

32. For a discussion of this variance, see Ladonna Pavetti & Dan Bloom, *State Sanctions and Time Limits*, *in* THE NEW WORLD OF WELFARE 245, 245-64 (Rebecca Blank & Ron Haskins eds., 2001).

33. *Id.* at 252-53.

34. *See* Cimini, *supra* note 2, at pt. I.B (describing the motivation for the Welfare Reform Act).

check sanctions are an important part of state arsenals in moving people off the rolls.[35] Professor Cimini's unease that the result of the Welfare Reform Act's devolved contractual model is to deprive recipients of due process protections is well grounded.[36]

Empirical evidence supports Professor Cimini's claim that the absence of automatic administrative review procedures can cause recipients to suffer the abuse of arbitrary and unfair decisions.[37] Yet possibly, the lessening of recipient rights witnessed in the increased discretion of state devolution was an implicit intent of the PRWORA.[38] There is no question that states are utilizing the wide latitude the Welfare Reform Act gives them. For example, one three-city study found that only twelve percent of sanctions were for not taking a job or participating in a job related activity, one of the two federally mandated sanctions.[39]

II. RESORTING TO THE PROPERTY RIGHTS OF CONTRACTS AS A SOLUTION

As Professor Cimini asserts, the dominant features of the devolved contractual model under TANF are too few rules and too much agency discretion.[40] This is clearly the case in the area of sanctions.

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35. Robert Rector, *Comment*, *in* THE NEW WORLD OF WELFARE, *supra* note 32, at 264, 265-66.

36. *See* Cimini, *supra* note 2, at pt. II (discussing the dangers posed by the increased discretion of welfare workers to fair and equal welfare services).

37. *See, e.g.*, U.S. DEP'T OF HEALTH & HUMAN SERVICES, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES: EDUCATING CLIENTS ABOUT SANCTIONS (1999) (examining how eight states inform clients about sanctions).

38. Lawrence Mead notes that the WRA

> claims to devolve responsibility for welfare to the states, but it also levies on them unprecedented mandates to raise participation in work activities and toughen child support enforcement. . . . In short, some dimensions of the act weaken federal mandates and funding, whereas others strengthen them. What ties it all together is a determination to hold both states and recipients responsible for good outcomes.

Lawrence M. Mead, *The Politics of Conservative Welfare Reform*, *in* THE NEW WORLD OF WELFARE, *supra* note 32, at 201, 212 Others have pointed to the

> new flexibility to redesign the way they handle clients to introduce new organizations, with different missions and capacities, into welfare systems. These changes have altered the "signals" of welfare programs, that is, the basic messages about what the welfare program offers to clients as well as what it demands in return.

Thomas L. Gais et al., *Implementation of the Personal Responsibility Act of 1996*, *in* THE NEW WORLD OF WELFARE, *supra* note 32, at 35, 38.

39. Andrew Cherlin et al., *Sanctions and Case Closings for Noncompliance: Who Is Affected and Why* (Feb. 2001), *available at* http://www.jhu.edu/~welfare/18058_Welfare_Policy_Brief.pdf (describing types of sanctions mandated or allowed by federal law).

40. Cimini, *supra* note 2, at pt. II. It can be argued that even under the old AFDC system of moribund rule books there was too much administrative discretion. Discretion in

The Welfare Reform Act permits states to develop Individual Responsibility Plans "in consultation with the individual."[41] These plans allow states to impose penalties on those who fail "without good cause to comply with an individual responsibility plan signed by the individual."[42] Professor Cimini offers these written agreements, called Individual Responsibility Plans or Individual Responsibility Contracts in the states, as the foundation for a due process protection claim.[43]

Most states have adopted plans or contracts (IRPs).[44] These IRPs detail the assorted requirements for participation and, in some states, the assistance and support to be provided by the government.[45] The IRP is signed by both the recipient and the government agency caseworker.[46] Recipient noncompliance with IRP stipulations is cause for the state to reduce or terminate benefits.[47] Clearly, recipients are in a precarious position when it comes to state sanctions for noncompliance with provisions of the IRP. This is particularly true in states where the state responsibilities are not spelled out in the IRP.

Yet, it is in these IRPs that Professor Cimini finds a plausible basis of due process protection. Using social contract theory, as reflected in American governance documents and traditions and private law of contract norms, as the intellectual and legal bases of her argument, she makes the case that the IRP establishes an enforceable contract between government and recipient.[48] Thus, the property rights that reside in contracts entitle recipients to due process protections.[49]

Professor Cimini's argument about the mutuality of expectation and the affirmative obligation on the government is a persuasive one. Indeed, beginning in 1935 the safety net focus of social welfare policy

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welfare administration is not a new problem, although the lack of due process protection is. *See, e.g.*, MICHAEL LIPSKY, STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 3-4 (1980) (arguing that the discretionary administration of agency policy is the nature of street-level bureaucracy); *see also* Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3 (1984); Marcia K. Meyers et al., *On the Front Lines of Welfare Delivery: Are Workers Implementing Policy Reforms?*, 17 J. POL'Y ANALYSIS & MANAGEMENT 1 (1998).

41. 42 U.S.C. § 608(b)(2)(A) (Supp. V 1999).

42. *Id.* § 608(b)(3).

43. Cimini, *supra* note 2, at pt. III.B.2.

44. *See* STATE POLICY DOCUMENTATION PROJECT, PERSONAL RESPONSIBILITY CONTRACTS, *available at* http://www.spdp.org/tanf/prc/index.htm (last visited Nov. 26, 2001) (indicating that although states are not required to provide IRPs, thirty-five states require recipients or applicants to complete an IRP).

45. *See* 42 U.S.C. § 608(b)(2) (describing the suggested contents of an IRP).

46. For an example of such an IRP, see Cimini, *supra* note 2, App. 1.

47. 42 U.S.C. § 608(b)(3).

48. *See* Cimini, *supra* note 2, at pt. III.

49. *See* Cimini, *supra* note 2, at pt. III.B.2.

has implied a social contract between government and the poor.[50] However, much of the post-1960s discussion in the polity charges the government with doing too much.[51] The debate ensued as a result of demographic changes in the welfare population and concerns about the behavior of recipients.[52] Proposals for workfare, work first, wedfare, and marriage bonuses have been grounded in this view of what welfare receipt required of its recipients.[53] The discourse about mutuality has focused on shortcomings or lack of accountability of recipients, not government.[54]

III. POLITICAL WILL AND LEGAL DISPOSITION AS IMPEDIMENTS TO AN ENFORCEABLE CONTRACTS STRATEGY

The Welfare Reform Act is the triumph of behavior over need as a guiding philosophy in aiding the poor.[55] On the eve of TANF reauthorization it is not clear that the political support and public will exist to alter this outlook. To the extent that the courts reflect political winds, the shift to an enforceable contract basis for due process, from the previous legal entitlement grounds,[56] may not be successful in restoring the power imbalance between TANF recipients and government in welfare administration.[57]

The contracts route to due process protection may encounter difficulty on two fronts. First, politics informs welfare policy choices[58]

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50. *See* Cimini, *supra* note 2, at 276 (stating that the "New Deal marked the creation of a social contract on the federal level").

51. *See* TRATTNER, *supra* note 24, at 362-87 (discussing the conservative attack on the welfare system during the 1970s and 1980s).

52. *See* Skocpol, *supra* note 19, at 303-07 (discussing the erosion of support for AFDC as its population changed from white widows to blacks and single females).

53. *See* Douglas J. Besharov & Timothy S. Sullivan, *Welfare Reform and Marriage*, 125 PUB. INT. 81, 94 (1996) (arguing that marriage ought to be as emphasized as job training and work, and that changes in the welfare law are premised upon the idea that "they will encourage mothers to leave welfare for work").

54. *See* MEAD, *supra* note 19, at 3 (arguing that the welfare state is too permissive); MELNICK, *supra* note 17, at 280-81 (discussing how concerns of "fault, responsibility, and incentives" play an important role in discourse about entitlement programs as evidenced by 1980s reform efforts to modify recipients' behavior).

55. *See* JOEL F. HANDLER, THE POVERTY OF WELFARE REFORM 89-109 (1995) (arguing that current attempts to reform welfare "reflect a consensus that poverty is primarily behavioral rather than economic or environmental").

56. The Supreme Court recognized welfare as an entitlement in *Goldberg v. Kelly*, 397 U.S. 254 (1970). In this decision, the Court stated that welfare benefits are "more like 'property' than a 'gratuity.'" *Id.* at 262 n.8.

57. *See* BUSSIERE, *supra* note 17, at 167 (stating that beginning in the 1970s welfare reformers were left with "nothing to fall back on in the judicial arena").

58. *See* Joe Soss et al., *Setting the Terms of Relief: Explaining State Policy Choices in the Devolution Revolution*, 45 AM. J. POL. SCI. 378 (2001) (presenting a political analysis of state re-

and the political will is not in sync with this approach.[59] Second, the reception by the courts may be less than hospitable.[60]

Professor Cimini notes the emphasis on jobs and work requirements begun in the 1988 Family Support Act.[61] However, in the even earlier 1967 amendments to the Social Security Act,[62] Congress required states to expand their workforce participation requirements for single mothers receiving public assistance.[63] The 1967 Work Incentive Program (WIN) mandated that needy children could be removed from welfare rolls if the parent refused to participate in work training or employment.[64]

Politically, the entitlement model was under attack by both the executive and legislative branches well before the enactment of the Welfare Reform Act.[65] Presidents since 1935 warned of the negative effects of public assistance relief. Franklin Roosevelt cautioned in his 1935 State of the Union address that "to dole out relief in this way is to administer a narcotic . . . . It is in violation of the traditions of America. Work must be found for able-bodied but destitute workers."[66] Roosevelt's warning was a harbinger of the welfare reform rhetoric that followed in ensuing decades.[67]

President Clinton's pledge in a 1993 address to Congress to "end welfare as we know it" reflected a prevalent view among both liberals

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sponses to the new federal welfare policy environment); *see also* MARTIN GILENS, WHY AMERICANS HATE WELFARE 24-25 (1999) (asserting that while "social and political structures influence government policy," evidence also supports the notion that "public attitudes shape government policy in important ways").

59. *See infra* text accompanying note 71 (discussing public expectations).

60. *See infra* notes 74-79 and accompanying text (discussing courts' possible treatment of due process rights connected to social service or welfare programs).

61. Cimini, *supra* note 2, at 257 (discussing the obligations imposed on recipients through the Family Support Act of 1988).

62. 42 U.S.C. § 630 (1988) (repealed 1990).

63. *See id.* §§ 630-632.

64. *See* TRATTNER, *supra* note 24, at 330 (stating that the Work Incentive program, which "disqualified adults and older out-of-school children from A.F.D.C. payments if they refused to accept employment or participate in training programs," was based upon the resurgent notion that poverty was the product of individuals, not the political economy).

65. Piven & Cloward, *supra* note 12, at 87 (discussing 1981 AFDC changes proposed by the Reagan administration and approved by Congress that resulted in the termination of payments to 400,000 working mothers).

66. Franklin D. Roosevelt, State of the Union Address (1935), *available at* http://www.albany.edu/faculty/gz580/his101/su35fdr.html.

67. For an analysis of the emphases Presidents from Franklin Roosevelt to William Clinton have put on welfare reform in their public addresses, see Cheryl M. Miller, *Presidential Advocacy of Welfare Reform: from Roosevelt to Clinton*, *in* 8 NATIONAL POLITICAL SCIENCE REVIEW, THE POLITICS OF THE BLACK "NATION": A TWENTY-FIVE-YEAR RETROSPECTIVE 171 (Georgia A. Persons ed., 2001).

and conservatives.[68] Unlike social insurance programs,[69] welfare payments are not "earned" and thus do not easily fall in the contractual model in the minds of the public or elected officials.[70] Inasmuch as an obligation, contractual or otherwise, is expected by welfare recipients, the public expects more from these recipients than from the beneficiaries of social insurance programs.[71] There will have to be a sea of change in public opinion to shift welfare discourse away from the problem of whether recipients "deserve" benefits to the problem of state welfare agencies not honoring their obligations to recipients.

Let me express this observation more bluntly. The public perception is that the drastic caseload reduction since the enactment of the Welfare Reform Act is an indicator of success, whatever the employment or economic status of welfare leavers.[72] Given the prevalence of the view that people should be working, not receiving public assistance, it will be difficult to get the problem of arbitrary or capricious benefit cuts on the radar screen of the public and institutional elites.[73]

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68. In 1993 President Clinton did not give a State of the Union Address in January. Instead, on February 17, 1993 he gave a "New Direction Address before a Joint Session of Congress," where he made this comment. William J. Clinton, Address Before a Joint Session of Congress on Administration Goals (Feb. 17, 1993), *available at* http://www.c-span.org/executive/stateofunion/sou93_trans.asp.

69. Piven & Cloward, *supra* note 12, at 46 (asserting that programs for the elderly "enjoy virtually unanimous favor"); GILENS, *supra* note 58, at 27 (finding that strong support for social spending exists "with regard to the elderly, health care, education, and child care").

70. *See* HANDLER, *supra* note 55, at 30-31 (discussing the conservative view that there is a "moral responsibility" to work, and those who do not work are therefore "undeserving" of social welfare benefits).

71. Welfare recipients, because they are deemed undeserving of welfare benefits, must meet mandatory work requirements in order to receive benefits. *See* 42 U.S.C. § 607 (Supp. V 1999) (outlining the terms of the mandatory work requirement); *see also* JOEL F. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY 132-42 (1991) (describing the recent history and implementation of mandatory work requirements).

72. There is a great deal of disagreement about how leavers have fared. *See* Jared Bernstein & Mark Greenberg, *Reforming Welfare Reform*, AM. PROSPECT, Jan. 1, 2001, *available at* http://www.prospect.org/print/V12/1/bernstein-j.html (concluding that in terms of earnings and overall impacts on families, the 1996 welfare reform efforts have not disadvantaged the poor to the extent opponents of that reform predicted); Lawrence Mead, *Welfare Reform: Meaning and Effects*, POL'Y CURRENTS (American Political Science Assoc., Ind.), Summer 2001, at 10-11 (listing various outcomes of welfare reform that indicate uncertainty about its ultimate success or failure); ROBERT F. SCHOENI & REBECCA M. BLANK, WHAT HAS WELFARE REFORM ACCOMPLISHED? (Nat'l Bureau of Econ. Research, Working Paper No. 7627, 2000) (evaluating the success of welfare reform based on factors such as welfare participation, labor market involvement, earnings, and family formation, and concluding that welfare reform reduced welfare participation and increased earnings).

73. *Cf.* GARY BRYNER, POLITICS AND PUBLIC MORALITY: THE GREAT AMERICAN WELFARE REFORM DEBATE 32-36 (1998) (noting that although the general public is unhappy with the welfare system, welfare reform has never been a dominant domestic issue); GILENS, *supra* note 58, at 24-26 (claiming that history reveals that public attitudes foreshadow govern-

What of court reception to the claim that IRPs, as "legally cognizable contracts," endow recipients with property rights subject to Fourteenth Amendment protections? If due process protection is to be gained in this manner, it will be very important to choose the right case to pursue it.

A further problem in court review may be posed by the increasing privatization of social services and welfare administration under TANF noted by Professor Cimini.[74] This administrative complexity may make it more difficult for recipients to prevail in the courts arguing a due process right based on contractual obligations. Professor Cimini offers both the "public forum" and "entanglement" exceptions as ways to hold states liable for the actions of those to whom they delegate welfare administration.[75] However, both principles have a mixed record of acceptance by the courts.[76]

The federal courts have a varied and conflicting record in protecting the rights of welfare recipients. The Court that decreed *Goldberg v. Kelly*,[77] ruled in the same year in *Dandridge v. Williams*,[78] that welfare was not a constitutional right.[79] In his *Goldberg* dissent, Justice Black stated that "new experiments in carrying out welfare programs should not be frozen into the constitutional structure but should be left to legislative determination."[80] A case brought along the lines outlined by Professor Cimini may receive a similarly constructed response, rather than the hoped for goal of restoring due process protections to welfare administration.

CONCLUSION

Since the enactment of the 1996 Welfare Reform Act, the procedural protections and legitimate expectations affirmed under *Goldberg v. Kelly* have eroded. Professor Cimini offers a potent strategy of how to regain procedural protection in benefit reduction and termination decisions. Pending a court challenge, it remains to be seen if a prop-

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ment policy 66% of the time, and that Americans are "hostile toward . . . government responsibility for social welfare").

74. *See* Cimini, *supra* note 2, at 263. An explication of these issues is found in Barbara Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 FORDHAM URB. L.J. 1559 (2001).

75. Cimini, supra note 2, at 291.

76. *Id.* at n.255.

77. 397 U.S. 254 (1970).

78. 397 U.S. 471 (1970).

79. *See id.* at 484. For a discussion of this case, see BUSSIERE, *supra* note 17, at 107-11, 146-50.

80. *Goldberg*, 397 U.S. at 279 (Black, J., dissenting).

erty claim of legally cognizable contracts can provide a new and solid legal tool for due process protection. Ironically, *Goldberg v. Kelly* might even serve as a precedent in that it mandated a hearing before benefit termination.[81] In this comment, I have focused on the political and legal impediments this suggested strategy of ensuring due process may encounter.

81. *Goldberg*, 397 U.S. at 264.