

Are Rights Efficient? Challenging the Managerial Critique of Individual Rights

David A. Super†

TABLE OF CONTENTS

Introduction.....	1053
I. Individual Rights in the Adversarial, Economic, and Bureaucratic Contexts.....	1061
A. Individual Rights and the Theory of the Adversary System.....	1063
1. Advantages of Adversarial Procedures	1063
a. Accuracy and Impartiality	1065
b. Policy Innovation.....	1067
c. The Integrity of the Adjudicatory Process.....	1068
d. Negotiation and Accommodation	1069
e. Legitimacy and Acceptance.....	1070
2. The Disentitlement Movement and Critiques of Adversarial Procedures	1071
a. Narrow Self-Interest	1071
b. Manipulation of Evidence.....	1072
c. Social Comity	1072
d. Social and Economic Inequalities.....	1073
B. The Economic Efficiency of Individual Rights	1074
C. Criticism of Entitlements to Public Assistance.....	1077
1. Weaknesses of the Anti-Entitlement Narrative	1077
2. Confounding Substantive and Structural Changes	1078
II. The Impact and Limits of Enforceable Rights in Public-Benefit Programs	1081
A. Origins of Legal Entitlement as a Management Tool.....	1082

Copyright © 2005 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

† Associate Professor of Law, University of Maryland School of Law. Suggestions from Richard Boldt, Bob Condlin, Tim Jost, Doug Rendleman, Joan Shaughnessy, Brad Wendel, and Greg Young greatly improved this article. The author appreciates the research assistance of Angela Ayers. The author is deeply indebted to Rachel Anderson and her colleagues at the *California Law Review* for their insightful and meticulous editing of this article. The author is grateful to the University of Maryland School of Law for its generous support of this research.

B.	Legal Entitlements' Impact on Political Control of Public-Benefits Policy	1085
1.	The Promise and Limits of Procedural Due Process	1086
2.	The Limited Role of Affirmative Litigation Under Public-Benefits Entitlements	1089
3.	The Paucity of Legal Assistance to Public-Benefits Claimants.....	1093
4.	Entitlement Systems' Tolerance for Administrative Flexibility	1096
C.	The Rise of Counter-Entitlements	1097
1.	The Rise of Counter-Entitlements in Public-Benefits Programs.....	1100
2.	The Programmatic Impact of a Powerful Counter-Entitlement: The Case of the Food Stamp Quality Control System.....	1104
a.	The Operation of the Food Stamp Quality Control System	1105
b.	How QC Skewed Incentives in the Food Stamp Program.....	1109
c.	The Results of the Counter-Entitlement's Dominance.....	1110
d.	The Political Character of Responses to the Food Stamp Quality Control's Problems.....	1113
3.	Making Counter-Entitlements Work	1114
III.	Controlling Public-Benefit Programs Without Enforceable Rights	1117
A.	Returning to Discretionary Program Administration.....	1119
B.	Governing Through Automated Systems.....	1123
C.	Governing Through Contractual Provisions	1127
IV.	Choosing Between Entitlement and Non-Entitlement Systems	1129
A.	Skewed Incentives Resulting from Disentitlement.....	1129
B.	Non-Entitlement Programs' Lack of Reliable Data on Impacts on Claimants.....	1132
C.	Non-Entitlement Programs' Unequal Treatment Among Groups of Low-Income Families.....	1133
V.	Entitlement and Non-Entitlement Systems in Other Areas of Law	1135
	Conclusion	1141

Are Rights Efficient? Challenging the Managerial Critique of Individual Rights

David A. Super

This Article contends that enforceable individual rights can improve the efficiency of government operations. The last decade has seen enforceable individual rights eliminated in a wide range of areas, from welfare to the treatment of immigrants and prisoners in U.S. jails to, most recently, the treatment of prisoners in Abu Ghraib and elsewhere overseas. In most instances, opponents of enforceable individual rights have quarreled little with the substantive norms underlying these rights. Instead, they have argued that enforceable legal rights would unduly burden government administration. Supporters of individual rights have tended to concede that they are inefficient, arguing instead that other values justify the imposition.

In fact, enforceable individual rights operate very much like privatized audits of program operations. Most government programs have multiple, partially inconsistent goals. Agency leaders typically communicate the importance of their goals by auditing the performance of line workers. A single audit, however, has difficulty enforcing multiple, partially conflicting goals simultaneously. Requiring line staff to respond both to pressure from auditors enforcing one set of norms and to individual rights vindicating competing norms is likely to produce the best balance between the two.

This Article analyzes the jurisprudential foundations of the adversary system of justice to find support for the proposition that competing pressures on behalf of contrasting positions tend to produce an optimal balance. The Article then illustrates how the adversary system has worked successfully in public-benefit programs and highlights the difficulties of achieving similar results through the command-and-control mechanisms that typically replace individual-rights regimes.

INTRODUCTION

Skepticism about government officials' reliability in applying social norms absent pressure from those most affected is at the foundation of the adversary system in Anglo-American law. We do not trust an investigating

magistrate to look out for our rights as scrupulously as we would ourselves before a neutral judge or jury.

This same skepticism gave rise to the individual-rights revolution in administrative law in the late 1960s and early 1970s.¹ If we do not trust investigating magistrates to enforce norms designed to secure our well-being, surely we do not trust government bureaucrats to do so. The rights revolution manifested itself in two primary ways: by giving individuals the right to sue to enforce statutory requirements on agencies² and by giving individuals administrative procedures to challenge agencies' actions against them.³

From the beginning, the individual-rights revolution had its critics.⁴ The thrust of this criticism was twofold. First, critics disputed the premise that the government cannot be expected to honor behavioral norms without being subject to an adversarial process.⁵ Second, critics asserted that enforcing norms through individual rights has heavy costs in the form of lost managerial efficiency of government programs.⁶ Doctrinally, these critiques provided the basis of two of the three prongs of the central due-process calculus in *Mathews v. Eldridge*.⁷ These criticisms also have

1. See, e.g., Jerry L. Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia*, 57 VA. L. REV. 818 (1971); Joel Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479 (1966).

2. See, e.g., *Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268 (1969) (allowing public-housing tenants to sue to enforce federal program requirements); *King v. Smith*, 392 U.S. 309 (1968) (same for public-assistance claimants); *J.I. Case v. Borak*, 377 U.S. 426 (1964) (same for stockholders asserting rights under federal securities laws).

3. See, e.g., *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1 (1978) (requiring a municipal utility to allow its customers hearings in which they could challenge terminations of service); *Goss v. Lopez*, 419 U.S. 565 (1975) (same for public-school students facing suspensions); *Perry v. Sindermann*, 408 U.S. 593 (1972) (same for public employees challenging terminations); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (same for convicts challenging parole revocations); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (same for welfare recipients).

4. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 272 (1970) (Black, J., dissenting) (predicting grave administrative burdens from giving welfare recipients pre-termination hearings); *Wheeler v. Montgomery*, 397 U.S. 280 (1970) (Burger, C.J., dissenting) (finding administrative hearings unnecessarily costly).

5. See, e.g., THOMAS SOWELL, *THE VISION OF THE ANOINTED: SELF-CONGRATULATION AS A BASIS FOR SOCIAL POLICY* 206 (1995) (arguing that the imposition of "due process" requirements by courts on institutions such as schools arbitrarily assumes that what is beneficial in one kind of institution is beneficial in a very different one); see also Frank Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 112 (arguing that the government's failure to provide reliable procedures to enforce a norm should be taken as a substantive decision about the value of that norm).

6. See, e.g., *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2682 (2004) (Thomas, J., dissenting) (arguing that judicial second guessing of a detention while hostilities continue would defeat the "unity, secrecy, and dispatch" important to warmaking); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 25.3, 662-64 (6th ed. 2003) (suggesting that the cost of procedural rights could be quantified and offered as a premium to persons willing to interact with the government without those rights); SOWELL, *supra* note 5, at 105, 224-25 (criticizing views of procedural costs as "incidental" and the pursuit of "perfect justice" without regard to its costs).

7. 424 U.S. 319, 335 (1976) (explaining that when courts evaluate "the risk of an erroneous deprivation . . . through the procedures used, and the probable value, if any, of additional or substitute

figured prominently in the Court's decisions declining to imply private rights of action to enforce statutes and regulations.⁸ In Congress, these criticisms have fueled a movement over the past decade to eliminate the enforceable rights of several politically weak groups, including immigrants,⁹ prisoners,¹⁰ welfare recipients,¹¹ parents in troubled families,¹² and persons suspected of a connection to terrorism.¹³

Responses to these attacks on the individual-rights revolution have, in turn, taken two primary forms. First, champions of individual rights have emphasized the importance of those rights, sometimes finding substantive value in the procedures of individual adjudication.¹⁴ Second, they have

procedural safeguards," they are essentially comparing the reliability of the more adversarial procedure a litigant is proposing with that of the bureaucracy's self-regulation—and noting that when courts explore "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail," they are evaluating the greater managerial cost of enforcing the norm as an individual right). The third factor, the individual interest at stake, is essentially a measure of how important it is to force the government to accept whatever loss of efficiency is involved.

8. *E.g.*, *Blessing v. Freestone*, 520 U.S. 329 (1997) (finding no private right of action under a statute requiring states to provide child support enforcement services); *Suter v. Artist M.*, 503 U.S. 347 (1992) (finding requirements in child-welfare statute unenforceable by families); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981) (requiring clear evidence of congressional intent before finding enforceable rights in statute setting out program's goals).

9. Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1210 [hereinafter "AEDPA"]; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 [hereinafter "IIRIRA"] (codified at scattered sections of 8 U.S.C.). For example, AEDPA prohibits the courts from considering pleas for political or religious asylum from those that entered the United States "without inspection"—i.e., those that entered the country without passing through an official port of entry. 8 U.S.C. § 1251(d) (2000). IIRIRA denies immigrants the benefit of state and local confidentiality rules (e.g., those implemented in connection with public-health programs) that limit the reporting of confidential information to federal immigration authorities. 8 U.S.C. § 1373 (2000).

10. AEDPA, *supra* note 9; Prison Litigation Reform Act, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321-66 to 1321-77 [hereinafter "PLRA"]. The AEDPA generally forbids a prisoner from filing a second petition for habeas corpus even if his or her first petition was denied on arcane procedural grounds the prisoner lacked the sophistication to anticipate. 28 U.S.C. § 2244(b) (2000). The PRLA denies prisoners consideration on the merits of suits seeking to enforce the Eighth and Fourteenth Amendments without payment of unaffordable filing fees if the prisoner has had three prior suits dismissed. 28 U.S.C. § 1915(g) (2000).

11. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of titles 7, 8, and 42 of the U.S. Code) [hereinafter "PRWORA"]. PRWORA explicitly forbids interpreting any of its provisions to confer any rights to individuals or families. 42 U.S.C. § 601(b) (2000).

12. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.) [hereinafter "ASFA"]. For example, ASFA requires states to act to terminate the parental rights of any parent whose child has been in foster care for fifteen months, thus eliminating any right to an individualized determination of whether the parent is making progress toward being able to regain custody of the child. 42 U.S.C. § 675(5)(E) (2000).

13. USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 18 and 28 U.S.C.).

14. *See, e.g.*, Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 888-91 (1981) (arguing that due-process law ought to vindicate the individual's right to participate in decisions affecting her in important ways without regard to the presence of a

sought to rebut assertions that government agencies can be counted upon to conform to legal norms without giving individuals the ability to enforce those norms.¹⁵ These arguments, too, correspond broadly to two of the *Mathews v. Eldridge* factors: the individual interest and the risk of erroneous deprivation. For the most part, however, champions of individual rights have implicitly conceded their opponents' contention that interposing individual rights has a cost in terms of the efficiency of the underlying government activity.¹⁶

This Article argues that both critics and defenders of individual rights have seriously underestimated the contributions a rights-based system can make to the efficiency and effectiveness of governmental activities.¹⁷ Specifically, it argues that most significant government activities have

positive entitlement); Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process, in Due Process: Nomos XVIII* 126 (J.R. Pennock & J. Chapman eds., 1977) (arguing that legal processes implement "process values" such as participatory governance, procedural rationality, and humanness); Richard B. Saphire, *Specifying Due Process Values*, 127 U. PA. L. REV. 111 (1978) (same); Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values"*, 60 CORNELL L. REV. 1, 4 (1974) (same); William W. Van Alstyne, *Cracks in the "New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 484 (1977) (asserting a general right to be free of arbitrary governmental behavior without regard to whether the interests affected can be characterized as entitlements).

15. See, e.g., Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1202-12 (2000) (arguing the collapse of norms of professionalism within public-benefit agencies creates grave risks for relying upon administrative discretion to produce fair decisions); Joel F. Handler, Comment, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law*, 92 YALE L.J. 1270, 1271-76 (1983) (listing factors likely to distort decision making in public-benefits offices); Jerry L. 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) (same).

16. Paradoxically, the role of private enforcement of government-set norms has gained more acceptance in areas where private individuals' own interests are not at stake. See, e.g., Pamela H. Bucy, *Growing Pains: Using the False Claims Act to Combat Health Care Fraud*, 51 ALA. L. REV. 57 (1999) (extolling the virtues of statutes allowing unaffected individuals to sue for wrongs committed against government programs); Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315 (2001) (discussing qui tam and similar remedies allowing private parties to assert claims on behalf of the government against third parties); Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627 (2001) (same).

17. This article focuses on individual rights' impact upon the implementation of public policies once these policies are set. A separate reason to grant individuals enforceable rights is to induce them to participate in the framing of those policies. Without the prospect of such rights, individuals may conclude the potential value of any policies they could influence through participation—once discounted by the likelihood of underenforcement—is outweighed by the costs of that participation. As a result, a narrow minority with concentrated individual interests might dominate policymaking and frustrate the popular will. See, e.g., ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 265-74 (1957) (explaining why the majority may rationally abstain from voting despite having opinions on pending issues, leaving control to a narrow economic minority); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 60-65 (1971) (describing the dominance of small groups in a range of policy areas). These effects are distinct, however, from those that form the primary focus of this article: the implementation of whatever norms the government has selected for its programs.

multiple purposes. Accordingly, efficiency depends not on maximizing adherence to any single goal but on balancing several competing objectives.¹⁸ An efficiently managed program gives sway to each objective in proportion to its importance and weighs the advancement of one goal against the impairment of another. A program may forego a slight advancement of its primary purpose to prevent a major loss in achieving one of its secondary goals. Thus, even a business whose primary strategy focuses on pleasing its customers will not give away unlimited amounts of its product or require its employees to tolerate customers' physical assaults: cost containment and employee morale may be subordinate goals, but they are not irrelevant to profitability.¹⁹ Similarly, even if leaders, to advance the prime objective of security, are prepared to countenance the abusive interrogation of a terrorist who knows the location of a "ticking bomb," the competing objectives of community relations and military discipline clearly dictated a different treatment for the accused petty criminals that comprised much of Abu Ghraib's population.

Maintaining the optimal balance among competing goals requires a steady flow of information between senior managers and line employees. Senior managers must indicate their preferences in ways that line employees can understand. Senior managers also must learn how line employees are resolving problems, both to ensure that employees are adhering to policy and to allow managers to identify any unintended consequences of policy so that they may timely readjust the definition and priority of the program's goals. Although the chain of command presumably provides the primary conduit for this flow of information, fear of admitting errors, confused incentives, limited competence, and garbled transmission all can interfere with middle managers' reliability as sources of information for

18. See STEVEN BRINT, *IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE* 84-85 (1994) (arguing that modern professionals have imbued society with a strong preference for synthesizing and balancing competing ideas rather than committing absolutely to any one concept); see also Edward V. Sparer, *The Role of the Welfare Client's Lawyer*, 12 *UCLA L. REV.* 361, 375 (1965) (arguing that, without pressure from claimants' advocates, program administrators experience strong incentives to reduce costs that are rarely balanced by pressures to achieve the substantive purposes of those programs).

19. Although it is customary to assume that commitment to a primary goal must permeate all actions of an enterprise's managers and staff, success actually rests primarily upon a relative handful of decisions. See MARSHALL SASHKIN & KENNETH J. KISER, *TOTAL QUALITY MANAGEMENT* 52 (1991). For example, removing any problematic employee may enhance productivity, but most problems typically can be traced to a small number of disruptive workers. Once those malefactors are removed, the marginal value of firing other ineffectual staff may be relatively slight and may be outweighed by the damage to morale and the costs of hiring replacements. Similarly, while all customers may be welcome, a business's success is likely to turn on securing a relative handful of large contracts. Managers may exhort their employees to increase sales ever further, but in fact may be unwilling to expend many advertising resources to pursue more small customers.

either senior managers or line workers.²⁰ As a result, large programs with important objectives often supplement this information with some form of audit. Most commonly, each major objective is backed with some form of an auditing system.²¹ This Article argues that the administration of major government benefit programs can be understood as the interaction of complex schemes of auditing systems each supporting one of the program's various objectives.

Just as individual rights against excessively mean administration of a program are termed "entitlements,"²² auditing systems that seek to restrain excessively generous administration of a program conduct can be termed "counter-entitlements."²³ A counter-entitlement, for example, seeks to deter a government worker from giving benefits to an ineligible claimant out of sympathy. Inducing the line employees that distribute government benefits ("eligibility workers") to balance a program's multiple objectives appropriately requires striking the proper balance between the pressures they feel from each of these audit systems, between entitlements and counter-entitlements.

A regime of individual legal rights provides the functional equivalent of an audit of line employees' compliance with a particular set of objectives. Instead of criticism in a report ("audit exceptions"), which line employees may contest, this system produces claims of rights violations, which line employees also may contest. Individual rights may offer more reliability and lower cost than a traditional audit system, with "auditors" highly motivated to provide information on the program's shortcomings. Although claimants pressing these rights do not typically intend to provide management information, that often is their function.

20. Cf. NICCOLÒ MACHIAVELLI, *THE PRINCE* (1532), reprinted in *THE PORTABLE MACHIAVELLI* 77, 155-57 (Peter Bondanella & Mark Musa trans., 1979) (warning princes to aggressively seek out information to avoid being misled by flatterers in their employ).

21. A single common auditing system may be appropriate for measuring achievement of several relatively similar objectives—e.g., near-term considerations such as the rate and direct costs of production. When asked to measure several disparate aspects of work, such as the rate of production and the long-term cost of customer annoyance due to shipping errors, auditors may have difficulty determining which goals to emphasize.

22. The term "entitlement" has psychological, economic, procedural, and political meanings in addition to the legal and managerial ones examined here. See David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 640-58 (2004) [hereinafter Super, *Political Economy*].

23. A counter-entitlement is a device for giving incentives to program administrators and individual eligibility workers to deny benefits to claimants where doing so will serve other important public policies. Typically, counter-entitlements resemble specialized forms of audits. Where a claimant does not have any of the characteristics (such as income or resources exceeding the program's limits or a refusal to comply with a work requirement) to which the counter-entitlement is sensitive, only the entitlement will act on eligibility workers and the claim will be honored. Where, however, the individual is ineligible, the counter-entitlement will defeat the entitlement and result in the denial of benefits. In close cases, eligibility workers and local administrators will have to weigh the claimant's arguments against their desire to avoid the consequences of running afoul of the counter-entitlement.

If policymakers believe a program's operations are tilting too strongly in favor of the norms that the individual rights enforce, eliminating the enforceability of those rights is rarely the most efficient response—just as a business that feels it has been overemphasizing cost at the expense of quality will not cease its financial audits. Instead, the most reliable ways of achieving the new, preferred balance among objectives are to trim back the substance of the norms that individuals may enforce or to strengthen the audit systems enforcing the competing programmatic objectives that policymakers believe are being undervalued.

This is not to deny, of course, that some rights-based regimes do undermine efficiency. Any system can be designed badly. But in an era of increasingly complex governmental functions, rights-based systems can be an effective component of the communications between managers and line staff. Conversely, the current tendency toward eliminating enforceable rights poses the grave danger that public administration will drift far from the goals of policymakers and the electorate .

This Article shows that, in addition to the important roles assigned to them in constitutional theory,²⁴ enforceable individual rights can meaningfully enhance the efficiency of governmental operations in achieving the optimal balance among their competing values. Part I places this discussion into broader theoretical perspective, drawing on the principal jurisprudential arguments underlying American law's reliance on the adversarial model. A vision of entitlement structures as adversarial processes may be counterintuitive because we are accustomed to thinking of legal entitlements as imposing one-sided pressures on decision makers, without counterweights.²⁵ Upon showing that such counterweights do in fact exist for most major entitlements, this Article argues that “[i]f, as our adversary system presupposes, accurate and just results are most likely to be obtained

24. See, e.g., Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974) (inferring a requirement of a national forum for vindicating rights from the structure of the Constitution); Richard H. Fallon Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 979-84 (1994) (finding the availability of federal judicial fora constitutionally necessary to vindicate the substantive rights recognized in the Reconstruction Amendments); Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (finding some minimum level of access to judicial fora for enforcing rights essential to give the structure of law meaning); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 142-44 (1981) (finding that limits on the enforceability of rights implicitly burden the underlying substantive rights themselves).

25. Thus, for example, discussions of the “entitlement” to cash assistance that existed before 1996 assume that administrators were helpless, compelled to provide aid even to the most unworthy claimants. See, e.g., NANCY L. JOHNSON, BILL ARCHER, E. CLAY SHAW, JR., & J. DENNIS HASTERT, WELFARE REFORM HAS ALREADY ACHIEVED MAJOR SUCCESSSES: A HOUSE REPUBLICAN ASSESSMENT OF THE EFFECTS OF WELFARE REFORM 8-9 (1999) [hereinafter HOUSE REPUBLICANS].

through the equal contest of opposed interests,²⁶ we should exercise great caution in discarding entitlement structures when we seek to make complex adjustments among competing policies in public law.²⁷ Thus, this Article argues that augmenting, rather than abandoning, the adversary system that entitlements represent in the welfare system would more faithfully accommodate the increased emphasis on encouraging recipients to work with the continuing concern for low-income people. This Article is concerned solely with the relative efficiency of entitlement and non-entitlement structures in accommodating the competing programmatic objectives that policymakers have chosen.²⁸ It thus considers neither the substantive merits of those objectives nor the important dignitary goals that some procedural structures may serve.²⁹

Granting individuals enforceable rights against government agencies also places the evaluation of those agencies' performance partly in the hands of independent, self-interested actors in much the same way that markets rely upon self-interested consumer choices, rather than the puffery of enterprise managers, to evaluate the output of producers. Indeed, a rights-based regime represents a form of privatized performance evaluation. Accordingly, Part I also explores the commonalities between systems of individual rights and the principles that have led this country to prefer market mechanisms to command-and-control systems.

To make this discussion more concrete, Part II applies these principles to one of the earliest and best-known products of the current movement to abolish individual rights: the 1996 welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).³⁰ Part II examines whether eliminating the entitlement was the only or best way to accommodate the public's competing substantive objectives of stronger

26. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 28 (1981). This does not suggest, of course, that adversarial tensions will uniformly lead to optimal results, but rather that their results are likely, overall, to reflect consideration of the widest possible array of significant factors. Thus, "[t]hat *Marbury, Mapp*, and countless other decisions retain their vitality despite their obvious flaws is a necessary byproduct of the adversary system, in which both judges and the general public rely upon litigants to present 'all the relevant considerations.'" *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 718 (1977) (Rehnquist, J., dissenting). In the case of entitlements, the desired end may not be justice in the sense *Lassiter* meant it—an accurate application of an array of legal principles to the facts of particular cases—but it is likely to reflect the accommodation of competing policies, in view of the facts of particular claimants.

27. Thus, although a public benefit program could be structured in non-adversarial ways, doing so increases the risk that the administering agencies will neglect one or more of the goals it seeks to achieve.

28. Promoting recipients' sense of dignity or security may be an important substantive priority of some programs. See Super, *Political Economy*, *supra* note 22, at 640-44. If so, this may be an additional reason to incorporate individual rights into their structures. See *supra* note 17.

29. Other writers have developed extensive dignitary theories to support the extension of due process rights. See *supra* note 14.

30. See PRWORA, *supra* note 11.

incentives to work and the protection of low-income families.³¹ Because these objectives are likely to conflict when applied to many individual families, the management system should allow policymakers to express their preference for how the two ought to be reconciled, to monitor implementation, and to adjust the balance between them in light of experience.³²

Part III considers alternatives to entitlements for ensuring that a program's implementation accommodates its priorities in the manner senior policymakers prefer. It finds serious shortcomings in each of these alternatives. Part IV distills some basic principles to guide the choice between entitlement and non-entitlement structures. Finally, Part V briefly applies these lessons to the organization of other governmental activities, including health-care subsidies, immigration, and prisons. It also considers the possibility that, in some cases, eliminating the individual enforceability of substantive norms reflects a covert attempt to abandon norms that retain public support. This introduces a different kind of inefficiency in the political process.

I INDIVIDUAL RIGHTS IN THE ADVERSARIAL, ECONOMIC, AND BUREAUCRATIC CONTEXTS

All too often, discussions about whether to grant individuals the right to enforce norms that benefit them take place in a theoretical vacuum. Debates revolve around the substantive importance of the norms in question and policymakers' level of sympathy for the groups involved. Implicit in this is the assumption that enforceable rights serve only the interests of the prospective holders of those entitlements. Typically missing is an appreciation of the implications of individual rights on the substantive policies of government programs. Much of the analytical problem here stems

31. The House Republicans that led the fight to eliminate the entitlement to cash assistance cited their belief that an entitlement was incompatible with work requirements as their primary reason for eliminating it. See HOUSE REPUBLICANS, *supra* note 25, at 8-9. A leading private-sector advocate of the 1996 welfare law, on the other hand, called the entitlement "objectionable" but denied that its elimination was central to the goals of reform, which he characterized as promoting work. Robert Rector, Heritage Found., Backgrounder No. 1075, *Yet Another Sham Welfare Reform: Examining the NGA Plan 7* (Mar. 18, 1996), available at <http://www.heritage.org/research/welfare/bg1075.cfm>. No doubt others had other philosophical or practical reasons for opposing the entitlement to cash assistance. Nonetheless, its supposed inconsistency with promoting work was the central complaint of those most responsible for the legislation eliminating it.

32. If the consequences for local agency staff of denying benefits to claimants for not complying with work requirements are too great—if the entitlement is too strong—the work requirement will have little meaning. If, on the other hand, the consequences of providing benefits without requiring work are too great—if the counter-entitlement is too strong—the program will cease to provide a reliable safety net for those that are willing to work but unable to find employment. Indeed, a hyperactive counter-entitlement could undermine the very policy it seeks to implement: local offices not wanting to risk improper awards of benefits will deny many eligible, compliant claimants, making claimants skeptical about the value of complying with the work requirements.

from a failure to recognize that even when a program grants enforceable rights, these rights do not stand alone. Far less visible but crucial to programs' operations are audit systems enforcing other programmatic priorities that may conflict with those that individual rights may enforce. These audit systems may be termed "counter-entitlements." In a public-benefits program, a quality control (QC) system guards against inappropriate awards of benefits just as a legal entitlement—if conferred—may guard against inappropriate denials of benefits. In a police station, for example, political pressure to solve crimes guards against too lax an interrogation regime just as suspects' procedural rights guard against thuggish treatment. In prisons, state auditors may guard against spending money on unnecessarily generous treatment of prisoners just as the Eighth Amendment seeks to check brutality. In each case, the administration of the program will depend on the balance of pressures that frontline agency staff—such as welfare-eligibility workers, police officers, and prison guards—feel from the individual entitlements and these countervailing forces. When we abolish individual entitlements, the counter-entitlements typically remain in place. Thus, the result is that frontline staff face accountability for achieving some—but not all—of their programs' competing objectives.³³

The choice, then, is between a system that juxtaposes individual rights to enforce some norms with counter-entitlements to enforce others, on the one hand, and a program without enforceable rights that relies upon internal bureaucratic controls to guide frontline agency employees' exercise of discretion, on the other. This choice, as it happens, closely resembles other, better-understood choices in law, for it raises essentially the same issues as the choice between an adversarial decision-making system and a bureaucratic or directive one.

In addressing this choice, the Anglo-American legal system has shown a strong preference for adversarial processes. Even in disputes involving children, incompetents, and others incapable of representing themselves, the courts frequently appoint someone to represent their interests so that the disputes may be resolved adversarially. Similarly, a court allows persons contesting its jurisdiction to appear without waiving their objections so that it may have the benefit of adversarial debate in determining whether it may hear the case.

This Part places the disentitlement movement in broader theoretical context. Part I.A demonstrates parallels between the values underlying the adversary system of adjudication and those favoring individual rights. Correspondingly, it shows how debates over the continued vitality of the

33. In the long term, one may imagine that each of the program's policies will receive some vindication. Media exposés, special investigative commissions, and the like all are potential threats to officials that wholly neglect some programmatic policies. Whether the possibility for this sort of haphazard accountability suffices to counterbalance ongoing pressure is another matter.

adversary system provide important insights into the utility of affording individuals enforceable rights generally. Part I.B looks to the business world for further parallels. It finds that individuals asserting rights in public programs provide administrators with the same kinds of signals that consumers choosing where to spend their money send merchants and producers. Finally, Part I.C brings this discussion home to public-benefits law, a prominent area where many significant individual rights recently have been eliminated. It seeks to separate the core of the critique of entitlements from the overheated and analytically bankrupt rhetoric that the disentanglement movement has generated.

A. Individual Rights and the Theory of the Adversary System

The assault on legal entitlements, in public benefit programs and elsewhere, bears a close intellectual kinship to assaults on the adversary system. Accordingly, this Section considers the applicability of some of the major premises of the adversary system to the administration of government programs. Part I.A.1 reviews some of the principal arguments advanced in support of the adversary system and their analogues in the administration of government programs such as public benefits, immigration, domestic prisons, and the detention of other persons around the world. Part I.A.2 then considers whether some important critiques of the adversary system also caution against giving individuals the legal means to enforce the government's compliance with substantive norms.

The mere fact that our legal system typically opts for adversarial determinations of parties' rights, of course, does not mean that these customs must be followed slavishly in designing government programs. Our affinity for an adversarial process in our courts, of course, springs in part from a tradition both longer and stronger than that underlying the more bureaucratic methods in administrative law. The adversary system, however, has important advantages that deserve consideration before dismissing the entitlement/counter-entitlement model. Similarly, although our preference for relying on private, independent evaluations of governmental programs rather than agencies' self-appraisals is not dispositive, it does suggest that the burden of persuasion should fall on those urging passive faith that frontline government offices will correctly interpret and balance competing policy objectives.

1. Advantages of Adversarial Procedures

Many of the most compelling arguments for the adversary system are normative,³⁴ often locating it in several important constitutional provisions. The broadest of these is procedural due process's guarantee of fundamental

34. See, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 26-29 (1998).

fairness.³⁵ Although the Due Process Clause has been held not to compel the government to grant individual rights,³⁶ many of the values underlying procedural due process apply more generally to the government's relationship with the governed. Thus, for example, just as due-process considerations support an adversarial process in which both sides may pursue information independently,³⁷ so too the First Amendment has been famously described as seeking to promote a "marketplace of ideas."³⁸ The truth-finding capacity of debates about government programs will be enhanced if participants have access to sources of information other than the government's own accounts of programs' operations. Claims of individual rights violations can provide a valuable check on agencies' tendency to congratulate themselves.³⁹

The adversary system also gives individual members of society the opportunity to participate in the formulation of law. By making legal and normative arguments for a position, attempting to rebut the other side's arguments, and receiving a reasoned explanation for the outcome, a member of society can test society's fidelity to its stated norms and help buttress or dismantle that support. Similarly, a system of individual rights allows

35. *United States v. Wade*, 388 U.S. 218, 238 (1967) (finding that criminal defendants' right to an attorney aids law enforcement by helping to free erroneously arrested individuals, setting the police back on the trail of the guilty); *see also* *United States v. Ash*, 413 U.S. 300, 318 (1973) (describing the adversary system as seeking balance by allowing each side to gather its own information); *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (same); MARVIN FRANKEL, *PARTISAN JUSTICE* 12 (1980) (arguing that the adversary system includes cherished institutions and ideals because it embodies the right to be heard and is thought to assure truth and sound results); MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* §§ 2.01-2.08, 13-33 (2d ed. 2002); GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 122-23 (1978) (arguing that in recent years the Supreme Court has equated the adversarial trial with due process and that the adversarial trial now stands as a pillar of our constitutional system).

36. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (holding that defining property interests is ordinarily a matter for a state's substantive law).

37. *See* sources cited *supra* note 35.

38. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting, joined by Brandeis, J.) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . ."). *But see* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, 785-87 (2d ed. 1988) (arguing that this metaphor is historically unsupported and captures only a small part of the values that the First Amendment represents).

39. To be sure, persons dissatisfied with the operation of government programs can and do speak out against those programs independently of asserting legal rights. In practice, however, most individuals may judge the likely personal benefits from speaking out insufficient to justify its cost. *See OLSON, supra* note 17 (describing the calculus that causes most people to refrain from seeking to influence government policy). Moreover, many of the groups that have lost individual rights over the past decade are ill equipped to attract attention to their complaints in the absence of enforceable rights. Low-income recipients of public benefits, for example, may be unable to afford to make their voices heard. Immigrants who believe they were excluded or deported without proper attention to their pleas for asylum will no longer be here to complain—and, if their claims for asylum were justified, may be in grave peril. And most prisoners have little ability to voice their opinions in a way that will affect the public debate. *See Pell v. Procunier*, 417 U.S. 817 (1974) (allowing authorities to curtail prisoners' First Amendment rights to serve penological ends).

those whom government agencies affect to hold those agencies to their stated norms. To be sure, strict enforcement may lead to the abandonment of some norms.⁴⁰ Even then, however, the unsuccessful claimants will have been far more involved, and will have had far more opportunity to make appeals to fellow members of society than if the agency had covertly abandoned those norms by allowing its internal enforcement mechanisms to atrophy.⁴¹

Other arguments for an adversary system take a more practical approach and thus have more relevance for this inquiry. These arguments can be summarized as five broad assertions: (1) the adversary system is more effective at finding facts, (2) it promotes policy innovation, (3) it preserves the integrity of decision-making process, (4) it facilitates negotiation and accommodation, and (5) it gives participants a sense of the process's legitimacy. This Section addresses each of these contentions in order.

a. Accuracy and Impartiality

The adversary system's supporters emphasize its perceived strengths as a fact-finding method.⁴² Thus, one advantage of the adversarial system may be its accuracy: a government program cannot provide appropriate incentives to welfare recipients, for example, if it cannot reliably distinguish those who comply with its requirements from those who do not.⁴³

In particular, the adversary system best preserves the impartiality of the decision maker. People fear that even the most conscientious decision maker will tend to judge the merits of a dispute too early and fail to

40. One could argue that making norms enforceable creates a perverse incentive for government officials not to establish norms that protect the interests of those that might file claims. *See, e.g., Sandin v. Conner*, 515 U.S. 472 (1995) (declining to recognize norms in prison manuals as enforceable liberty interests under the Due Process Clause to avoid discouraging administrators from adopting protective provisions in their manuals). Frequently, however, the establishment of norms for government agencies is driven by larger forces that administrators cannot openly defy but may be able to quietly subvert by adopting and then failing to enforce norms.

41. *See, e.g.,* Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975) (noting that the public pays far more attention to substantive norms than to the procedures that enforce them).

42. *See, e.g.,* Mirjan Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975) (criticizing inadequate development of facts in civil-law systems); Benjamin Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 420-21 (1960) (same); John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 992-1007 (1990) (finding the inquisitorial approach hopelessly inconsistent with the American legal system). *But see* DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 98-103 (1988) (holding out hope that some aspects may be adapted).

43. The Court made this point in *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970), finding that without pre-termination hearings many eligible claimants would become so preoccupied with their immediate survival that they would not be able to demonstrate their eligibility.

complete a truly rigorous investigation.⁴⁴ Our society believes “that truth is likely to emerge more from bilateral investigation and presentation, motivated by the strong pull of self-interest, than from judicial investigation, motivated only by official duty.”⁴⁵ Deviations from the adversarial model thus risk corrupting even the best-intentioned decision makers. Professor Judith Resnik has demonstrated that even in the relatively well-ordered realm of pretrial development of litigation, judges that become actively involved are likely to form premature opinions about the merits and to develop favorable and unfavorable opinions of the parties.⁴⁶ This erodes the impartiality that is an essential feature of the adjudicatory process.⁴⁷ Judges’ reception of information about the merits unfiltered through the rules of evidence undermines the value of those rules.⁴⁸ Professor Resnik has also raised the danger that judges will develop their own agendas in the process, if not in favor of either party then at least in favor of an expeditious settlement; if the judge perceives one party to have obstructed those goals, the judge may have difficulty retaining equanimity toward that party.⁴⁹ These problems are compounded by the lack of public visibility and judicial review of pretrial managerial decisions.⁵⁰ More broadly, Professor Resnik has expressed concern about adding to judges’ already vast powers.⁵¹

Each of these concerns has a close analogue in government-program administration.⁵² Many of the decisions eligibility workers make are already highly subjective. For example, they may choose how to conduct interviews and which claimants’ documentation of eligibility to believe. Increasing these already vast powers poses a severe risk of corrupting

44. See FLEMING JAMES, JR., ET AL., CIVIL PROCEDURE § 1.2, at 5 (5th ed. 2001); Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30, 39-40 (Berman ed., 1961); Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 17-19 (1978).

45. JAMES ET AL., *supra* note 44.

46. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 426-27 (1982).

47. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 391 (1978).

48. Resnik, *supra* note 46, at 427.

49. *Id.* at 384-85.

50. *Id.* at 413-14.

51. *Id.* at 424-25.

52. For example, staff determining eligibility for public-assistance programs may be given the general goals of reducing the public-assistance rolls and increasing the level of employment by claimants that remain. The process of trying unsuccessfully to “divert” an applicant is likely to leave an eligibility worker with an opinion of whether the applicant was at fault for the failure, just as trial judges may come away from failed settlement negotiations with a strong sense of which party was obstructionist. This impression may be based on the merits but may also be based on whether the applicant was confident and articulate enough to express problems clearly (e.g., explaining her child’s special needs that make day-care services difficult to find). Agencies clearly want their eligibility workers to press claimants hard to abandon their applications for, or to quickly leave, cash assistance; this pressure is likely to lead to conflicts that will impair eligibility workers’ ability to fairly determine claimants’ eligibility.

decisions that have virtually no public visibility and, in a non-entitlement program, little opportunity for impartial review. By adding as complex and subjective a goal as progress toward self-sufficiency to the mission of public-assistance programs,⁵³ Congress dramatically expanded the range of eligibility workers' discretion. Disentitlement added to that already vast power.

b. Policy Innovation

An adversarial process also is likely to facilitate policy innovation. Different decision makers, bringing differing ideologies and confronting adversaries of differing skills and dispositions, are likely to produce a variety of results.⁵⁴ As the adversaries elevate these adjudications through the decision-making hierarchy, their relative merits can be compared. This is likely to present senior decision makers with alternatives they might not have developed on their own.⁵⁵ Thus, the litigation process has at least as much value for the advancement of public policy as for the private benefit of the parties.⁵⁶ As costly, and perhaps as politically embarrassing, as adjudicating immigrants' claims of asylum may be, the results of some of those adjudications are likely to enlighten senior policymakers about forms of political and religious oppression targeting small groups in countries they had generally believed to be free of human-rights violations. In the public-assistance sphere, federal food stamp regulations facilitate this process on an intrastate level by explicitly requiring states to compile fair hearing decisions and to make them available to the public.⁵⁷ Similarly, audits produce valuable information about the variety of enforcement when local

53. See 42 U.S.C. § 601(a)(2) (2000) (establishing "job preparation" and "work" as two of the primary purposes of the Temporary Assistance to Needy Families (TANF) block grant). The complexity of this concept can be seen from PRWORA's treatment of what compliance with a work requirement means. Participation in any of twelve different kinds of activities, ranging from education to unsubsidized employment, can count toward TANF's work participation rate. 42 U.S.C. § 607(d) (2000). Several of these activities, however, are disfavored by being subject to various quotas and limitations. *Id.* § 607(c)(1)(A), (B)(i), (2)(A), (D). For purposes of the requirement that adults work within twenty-four months of receiving aid, a different, state-crafted definition may apply. *Id.* § 602(a)(1)(A)(ii).

54. See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 662-72 (1981).

55. *Id.* at 672-80.

56. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089-90 (1984).

57. See 7 C.F.R. § 273.15(q)(5) (2004). States must remove information identifying the claimant and any other members of the public. *Id.* To the same effect, litigation challenging New York City's administration of the food stamp program caught the attention of federal administrators, who investigated and directed New York to make changes apart from those ordered by the court. *Compare Reynolds v. Giuliani*, 35 F. Supp. 2d 331 (S.D.N.Y. 1999) with NORTHEAST REGIONAL OFFICE, USDA, NEW YORK PROGRAM ACCESS REVIEW: NOVEMBER-DECEMBER 1998 (1999). Similar sequences have occurred elsewhere. See, e.g., *Harley v. Lyng*, 653 F. Supp. 266, 274 (E.D. Pa. 1986).

offices contest adverse findings to central managers.⁵⁸ With the uncertainties inherent in implementing complex sets of policies such as those required to administer a prison or to determine which immigrants face well-founded fears of oppression, developing policy through these adversarial processes should help policymakers identify and correct problems more rapidly.

c. The Integrity of the Adjudicatory Process

Adversarial processes also preserve the integrity of the decision-making process.⁵⁹ Professor Lon Fuller noted that adjudication is distinguished from other forms of social ordering, such as elections or contracts, in that it depends upon rational decision making.⁶⁰ Participants' interests may be affected adversely, but only as a result of reasoned arguments that they had the opportunity to meet.⁶¹ To assure that the results of an adjudication really are fair and rational, Professor Fuller identified four key elements that a process must include: (1) the claimant's participation through presentations of proof; (2) a principle of relevance that explains which proofs will be considered; (3) a claim of right (as distinguished from a naked demand or statement of interest); and (4) a decision maker's application of previously accepted principles in a transparent way to the proofs presented.⁶² The decision maker's reasoned opinions guide participants' future conduct and reduce the likelihood of further conflict by announcing a standard that allows observers to predict future decisions.⁶³ Several of these (admittedly somewhat idealized) characteristics of adjudication may appear in other decision-making processes, but if they are not assured, the participants cannot know to what extent their interests are being decided based on reasoned argument rather than whim or caprice.

Professor Fuller's procedural requirements, it should be noted, have no substantive content. The rules defining the parties' rights and obligations may be quite one-sided, yet the process can be expected to produce a reasoned application of whatever rights the parties do have if these standards are met. Thus, they could administer the most opulent social-benefit program or one conditioned on meeting the most stringent work requirements. The value of this procedural fairness can be seen by considering the case of a participant that seeks an exemption from a work requirement to complete an educational program. If the eligibility worker simply rejects the claimant's proposal, she may suspect that whim, indifference, or

58. See 7 C.F.R. § 275.12(e), (f) (2004) (establishing procedures for analysis of errors committed by local food stamp offices).

59. See FREEDMAN & SMITH, *supra* note 35, § 2.14, at 46-48.

60. Fuller, *supra* note 47, at 363-67.

61. *Id.* at 382.

62. *Id.* at 369.

63. *Id.* at 387-88.

personal animus led to the denial. The claimant may wait until the eligibility worker is on vacation and renew her request or otherwise contrive to present the request again to another agency staff person. In the meantime, the claimant may go through the motions of complying with the work requirement, but as long as she remains convinced that the training course is a better, and still potentially approvable, alternative means of obtaining permanent employment, her efforts are likely to be inferior. If, on the other hand, the claimant had received the opportunity to press the claim through an adversarial hearing and had been confronted with a rule, or a set of factual concerns about the training program, militating against the course's approval, she might have come to understand and to accept the agency's reasoning. Even if the claimant remained unconvinced, however, she would be far more likely to accept the irrevocability of the decision and move forward on that basis. In addition, her future interactions with the eligibility worker would be less likely to be tainted by the claimant's suspicions about the eligibility worker's motives. To be sure, even in a non-entitlement program, eligibility workers could, and many would, try to explain the basis for their decisions.⁶⁴ Human nature being what it is, however, if that explanation is purely voluntary and is immune from any test, the eligibility worker may formulate it incompletely, and the claimant may receive it skeptically.

d. Negotiation and Accommodation

A process that recognizes that adverse interests must be reconciled may provide the basis for negotiation and accommodation. PRWORA's advocates argued repeatedly that they were rewriting the "social contract" between welfare claimants and the government.⁶⁵ Indeed, the TANF statute discusses "individual responsibility plans," which, although apparently not enforceable against state agencies, nonetheless adopt the appearance of contracts and are enforceable against claimants.⁶⁶ A system that acknowledges some rights for claimants and provides them with some means for vindicating those rights could allow more meaningful negotiations, promoting accommodations between claimants' interests and the state's policy

64. Ideally, they would follow the model of what Professor Eisenberg calls the "consultative process." Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410 (1978). As Professor Eisenberg suggests, however, the primary situations in which it is appropriate to substitute this sort of process for a full adjudication are those in which a decision maker must simultaneously resolve the conflicting claims of a large number of persons, as they would in the case of farmers competing for a limited supply of irrigation water. *Id.* at 424. In those cases, adjudication may simply not be feasible. That generally is not the case in means-tested public-benefit programs.

65. See, e.g., LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* (1986); Amy L. Wax, *A Reciprocal Welfare Program*, 8 VA. J. SOC. POL'Y & L. 477, 485-86 (2001).

66. 42 U.S.C. § 608(b)(2), (3) (2000).

in insisting upon work. With a properly constructed counter-entitlement ensuring that the eligibility worker insists upon compliance with work requirements, an active give-and-take over the *manner* in which a claimant complies could prove fruitful. For example, a claimant who has been assigned to a welding training course to prepare her to work in high steel could both save the state money and expedite her own reemployment if she has some leverage to object that she experiences vertigo and would prefer to seek immediate work in a field where she already has experience.⁶⁷ A settlement reflecting the ideas of the claimant as well as the eligibility worker is likely to lead to a more desirable outcome than an unchallengeable decision of the eligibility worker.⁶⁸

e. Legitimacy and Acceptance

Finally, because adversarial processes are the norm in this country in so many contexts, they have become an important way to give participants a sense of a government process's legitimacy.⁶⁹ Achieving most programmatic goals—certainly the promotion of work—is likely to benefit from participants' sense that the expectations imposed on them result from a fair and deliberative process. Claimants believing that their views have not been taken seriously could easily become cynical, and this could undermine their success in pursuing required activities. Claimants that think they have been sanctioned out of pique or arbitrariness rather than for failing to work are less likely to see any benefit to complying with work requirements. The values of the adversary system, embodied in legal entitlements (for instance, the entitlement to receive benefits if one is in fact complying with work requirements), reflect and provide a practical response to the instinctive distrust of arbitrary governmental authority.⁷⁰

67. Similarly, state administrators may have decided to train welfare recipients to work in high steel without realizing that no skyscrapers are being built in a particular part of the state. A recipient preferring to seek work in a field where she already has skills is likely to have a stronger incentive to raise such an objection than an eligibility worker whose primary responsibility is to ensure that the recipient is engaged in *some* work activity.

68. *But see* Fiss, *supra* note 56 (expressing misgivings about settlements' success in achieving broad social goals).

69. *See generally* JOHN W. THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); Douglas R. Rendleman, *Bankruptcy Revision: Procedure and Process*, 53 N.C. L. REV. 1197 (1975). This argument differs from the third point made above—concerning the integrity of the adjudicative process—in that it depends not on the normative legitimacy of the process but on the actual perceptions (right or wrong) of an individual subject to that process.

70. *See* FREEDMAN & SMITH, *supra* note 35, § 2.13, at 45-46. Similarly, "individuals or groups should not be required to trust in or defer to the competence, resources, or enthusiasm of others in the protection or advancement" of their interests. Martin H. Redish, *The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953-1971*, 51 DEPAUL L. REV. 359, 366 (2001); *see also* Stephen Landsman, *The Decline of the Adversary System and the Changing Role of the Advocate in that System*, 18 SAN DIEGO L. REV. 251 (1981); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

2. *The Disentitlement Movement and Critiques of Adversarial Procedures*

Despite its long lineage in Anglo-American jurisprudence, the adversary system is not without its critics. Because many of the principal arguments in support of the adversary system also suggest advantages of entitlements, we should consider whether arguments against the adversary process might suggest disadvantages of entitlements. As it happens, many of the characteristics of the adversary process that have drawn criticism are absent, or are present only in muted form, in the context of entitlements.

Professor Martin Redish suggests that scholars have followed three main lines of assault against the adversary system, each broadly communitarian.⁷¹ First, some condemn the social costs they perceive the pursuit of narrow self-interest to cause.⁷² Second, some argue that an adversarial process encourages adversaries to manipulate the facts, thus undermining the search for truth.⁷³ Third, some fear the adversary system's emphasis on conflict is toxic to values of social comity.⁷⁴ Other scholars offer a fourth strain of criticism, related to the first: that adversarial processes magnify the effects of social and economic inequalities, allowing the rich and powerful to control the adjudicative process with superior resources.⁷⁵ Each of these views finds some resonance in arguments against entitlement structures for public-benefit programs. In the end, however, none proves especially compelling.

a. *Narrow Self-Interest*

Some have argued that entitlement programs encourage claimants to think about their narrow rights against the government rather than about how to become more self-sufficient.⁷⁶ Put crudely, entitlements might

71. See Redish, *supra* note 70. See generally, David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 83, 93-118 (David Luban ed., 1983) (canvassing arguments); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 *STAN. L. REV.* 589, 596-600 (1985) (criticizing the adversary system broadly); David Schuman, *Beyond the Waste Land: Law Practice in the 1990s*, 42 *HASTINGS L.J.* 1, 9 (1990) (condemning the adversary system generally as a moral "wasteland"). Some scholars accept the adversary system as a grim necessity in criminal proceedings but not in civil ones. See, e.g., John Langbein, *The German Advantage in Civil Procedure*, 52 *U. CHI. L. REV.* 823 (1985); Rhode, *supra*, at 640. Although the disentitlement movement has targeted many important interests—subsistence benefits, health care, prisoners' rights to humane treatment, etc.—arguments for changes in criminal procedure have been structurally different.

72. SIMON, *supra* note 34, at 53-76; Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 *U. PA. L. REV.* 1031 (1975); Redish, *supra* note 70, at 361-62.

73. Redish, *supra* note 70, at 362.

74. *Id.*; see also *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (finding Congress's perceived interest in preventing veterans' disability cases from becoming adversarial a sufficient reason to uphold a statute effectively prohibiting the paid representation of veterans); FREEDMAN & SMITH, *supra* note 35, § 2.03, at 23-24; Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World*, 38 *WM. & MARY L. REV.* 5 (1996).

75. See FREEDMAN & SMITH, *supra* note 35, § 2.15, at 48-49; DAVID LUBAN, *LAWYERS AND JUSTICE* 64-66, 237-66 (1988).

76. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* 21, 26-29 (1983).

make people feel “entitled.”⁷⁷ This argument has several flaws. First, it assumes that the ability to question the application of rules will somehow negate the effects of those rules. An entitlement to a modest reward for a great deal of hard work is of no value to someone who has not performed the required work. (It is of little enough value even to those that have.) Second, the argument implicitly assumes that denying claimants the ability to assert claims under a program’s chosen rules will motivate them rather than demoralize them. This is implausible, and even the most ardent advocates for the new welfare order generally have avoided suggesting it.⁷⁸ Finally, the argument assumes that the extremely rare administrative hearings—and even rarer lawsuits—that occur in an entitlement system⁷⁹ will somehow transform the attitudes of the overwhelming majority of claimants that never participate in either.

b. Manipulation of Evidence

A legal entitlement does little to affect claimants’ incentives to deal truthfully with administrative agencies. For example, with or without entitlements, claimants’ ability to meet their basic needs will depend upon their ability to persuade agency staff that they have complied with a public-benefit program’s rules. In some instances, this may create a temptation to shade the truth where the claimant has not complied fully. This temptation, however, should not be noticeably different whether individual eligibility workers have absolute power or are subject to some form of review. Indeed, to the extent that claimants perceive a program without an entitlement as giving eligibility workers largely unfettered discretion, that program may create a wider array of troubling incentives; for instance, it might encourage claimants not just to misrepresent the facts but also to curry favor with the eligibility worker through a variety of other, perhaps illicit, means. Such an outcome is possible in an entitlement system, too, but the threat of a counter-entitlement is likely to render eligibility workers less susceptible to persuasion.

c. Social Comity

The public-benefits analogy to the communitarian critique of the adversarial process suggests that a regime of individual rights will interfere with the therapeutic, professional relationship between eligibility workers

77. See Super, *Political Economy*, *supra* note 22, at 643 (describing strengths and criticisms of “subjective entitlements”).

78. Indeed, even as PRWORA was increasing pressure on low-income people to work, it also included measures designed to increase the dignity of those families that did work. See, e.g., 7 U.S.C. § 2026(d) (2000) (allowing states to cash out food stamp benefits to households with substantial, sustained earnings).

79. See *infra* Part II.A.

and their clients.⁸⁰ This argument, however, cannot withstand scrutiny. Most obviously, the overwhelming majority of eligibility workers that administer cash-assistance and similar public-benefit programs are not in fact professionals.⁸¹ In addition, eligibility workers' incentives often are starkly inconsistent with those of claimants, largely precluding the development of the sort of sensitive professional relationships that an entitlement might theoretically disrupt.⁸² In contrast to eligibility workers, the idealized inquisitorial judge of the civil-law system is not held accountable to outside forces for achieving a certain number of particular results from her adjudications.⁸³

d. Social and Economic Inequalities

Finally, arguments that the adversary system produces unjust results because it gives the upper hand to those with the most resources does not apply to discussions of public-benefit entitlements without considerable irony. The forces advocating strong counter-entitlements—all those that have other agendas for funds that could be saved from reduced spending on a program—have far more numbers and resources than do claimants for a program's benefits and their allies.⁸⁴ Even before PRWORA, the counter-entitlement balancing the entitlement to Aid to Families with Dependent Children (AFDC) was far stronger than the entitlement, influencing agencies' behavior far more powerfully.⁸⁵ Thus, in a public-benefit program with a combination of entitlements and counter-entitlements, claimants will indeed be at a severe disadvantage. That disadvantage surely exists to an

80. See MASHAW, *supra* note 76, at 21, 26-29 (describing the "professional treatment" model of public-benefit programs).

81. See Diller, *supra* note 15, at 1208-09 (noting that the current welfare regime resembles the social-work model that prevailed until the 1960s, in its heavy reliance on professional discretion, but that it vests that discretion in eligibility workers that, unlike their predecessors, are not in fact social workers subject to a professional code of conduct).

82. See David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 844-48 (2004) [hereinafter Super, *Offering an Invisible Hand*] (describing pressure on eligibility workers to reduce caseloads).

83. See STEPHEN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* (1984); Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Legal Scholarship*, 82 NW. U. L. REV. 705 (1988); Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of the Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 91-98 (1992). Cf. *Stieberger v. Heckler*, 615 F. Supp. 1315, 1376-97 (S.D.N.Y. 1985) (finding unobjectionable the Social Security Administration's practice of scrutinizing more carefully the work of ALJs that allow more than a certain fraction of the claims they hear, *vacated on other grounds*, 801 F.2d 29 (2d Cir. 1986)).

84. But see OLSON, *supra* note 17, at 45-52, 165-67 (arguing that widely shared interests often do not achieve ascendancy in the political process because few individuals would benefit enough from the vindication of those interests to justify the costs of political action).

85. See Timothy J. Casey & Mary R. Mannix, *Quality Control in Public Assistance: Victimized the Poor Through One-sided Accountability*, 22 CLEARINGHOUSE REV. 1381, 1385 (1989); 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 (1989-90).

even greater degree in a non-entitlement system where local agencies' staff members feel unbalanced and often undisclosed⁸⁶ pressure to determine eligibility in a particular manner.⁸⁷

B. The Economic Efficiency of Individual Rights

In *The Vision of the Anointed*, Thomas Sowell complains that liberals seek to have third-party adjudicators "replace the systematic processes of the marketplace."⁸⁸ No doubt some do. It does not follow, however, that enforceable individual rights are incompatible with the efficient operation of markets. To the contrary, the concept of outside review of entities' compliance with norms is at the very heart of market economics. This section analyzes the similarities between market economies' reliance on self-interested consumers and rights-based regimes' reliance on affected individuals to make claims when government agencies violate behavioral norms.

In modern society, where organizations seek to accomplish complex tasks, incentives prove more reliable than compulsion to win the loyalty of line employees and solidify their identification with the organization's goals.⁸⁹ Incentives only work, however, if the organization has the capacity to distinguish between higher- and lower-achieving employees. In the first instance, this task is assigned to managers in the chain of command. A manager, however, is likely to face conflicted loyalties: criticizing staff members' performance implicitly reflects badly on their supervisor.⁹⁰ Moreover, the manager may have criteria for evaluation that differ substantially from those of the organization: a mediocre employee who is pleasant or who washes the manager's car, for example, may receive an excessively favorable evaluation. Thus, having some independent means of evaluation is vital to ensuring that the incentive structure promotes the organization's broader goals.⁹¹

Free markets can be seen as a way to maximize the independent evaluation of economic entities' work. In a planned economy, managers may be largely free to judge themselves, with predictable results. They may declare their lumpy sofas, fuzzy televisions, and unreliable cars as the

86. See Super, *Offering an Invisible Hand*, *supra* note 82, at 839-42 (describing the ease with which eligible claimants can be invisibly discouraged from receiving public benefits as one of the main appeals of current informal rationing devices).

87. See *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) (granting political officials broad leeway to apply pressure on administrative decision makers).

88. SOWELL, *supra* note 5, at 130.

89. *Id.*; see also JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* 130-39 (1967) (setting out a general theory of motivation).

90. See SASHKIN & KISER, *supra* note 19, at 62-67 (describing corrosive effects of fear on the reliability of managers' reports).

91. See POSNER, *supra* note 6, § 14.7, at 426-28 (discussing difficulties arising when ownership and control of corporations are separated).

best that can be produced. In a free market, self-interested consumers evaluate a company's products. If they can find better products elsewhere, the consumers issue what amounts to negative audit findings on the company's operations. Thus, when the collapse of communism opened Eastern Europe's markets, many factories whose self-evaluations had consistently found them performing well suddenly discovered that their output was wholly unacceptable to free consumers. Consumers' independent evaluations of quality and value discredited managers' self-evaluations.

Public agencies that are not subject to enforceable individual rights risk falling into the same trap as the self-congratulatory managers of Soviet-era factories. They may declare that they are treating prisoners humanely and honoring all legitimate claims for asylum or all genuine requests for food, but the lack of independent verification renders those assertions suspect. Even if other government agencies are charged with overseeing them, politics within the executive branch may effectively insulate an agency's actions.⁹²

Auditors can provide some verification of line managers' reports of their own behavior. Auditors' effectiveness, however, depends upon their motivation and independence. Auditors that are salaried employees of the entities they are asked to supervise may be pressured or co-opted in a number of ways.⁹³ Outside auditors working under contract may be immune from some of these influences, but as recent corporate-accounting scandals demonstrate, longstanding personal relationships and the desire to renew and expand contracts can severely impair even outside auditors' objectivity.

An outside reviewer entirely independent from the entity being evaluated will provide the most reliable appraisal. Market economies cast consumers in an analogous role, independent of producers and motivated to make whatever decisions will maximize their own utility. Because many government programs, from welfare to immigration to prisons, operate as effective monopolies, consumer choice cannot judge their effectiveness. On the other hand, allowing individuals whom those programs affect to assert claims when those programs violate important norms has many of the same virtues of a marketplace: persons independent from the agency in question who see its operation on the ground level are motivated by self-interest to identify its deficiencies.

Particularly severe problems arise in maintaining an organization's balance among competing priorities. Organizational structures typically

92. See, e.g., James Q. Wilson & Patricia Rachal, *Can the Government Regulate Itself?*, in *CORPORATE AND GOVERNMENTAL DEVIANCE: PROBLEMS OF ORGANIZATIONAL BEHAVIOR IN CONTEMPORARY SOCIETY* 309, 311-16 (M. David Ermann & Richard J. Lundman eds., 1978) (describing several examples of politically strong agencies resisting oversight designed to compel their compliance with norms to which they nominally were bound).

93. HAROLD J. LEAVITT ET AL., *THE ORGANIZATIONAL WORLD* 261 (1973).

make each employee responsible to only one supervisor;⁹⁴ guiding an organization to achieve multiple objectives simultaneously therefore requires multiple people in the chain of command to appreciate the proper balance among those objectives and to transmit that understanding to their subordinates.⁹⁵ Should any manager fail to do this, the parts of the organization under her authority will go awry. Auditors charged with enforcing multiple, sometimes contradictory norms may suffer similar difficulties in prioritizing among them in a way that sends meaningful messages to line employees.⁹⁶

Some norms, of course, do not lend themselves to enforcement through individual rights. For example, although all members of the community benefit from the avoidance of unnecessary expenditures, none benefit enough personally from an agency's frugality to have an interest in monitoring the agency's activities.⁹⁷ In these cases, independent audit systems may suffice. But where individuals' self-interest can be pressed into service to monitor programs' operations, proponents of command-and-control systems bear the heavy burden of explaining why their approach is more efficient and reliable.

To be sure, systems of individual rights require the government to hire someone to adjudicate claims.⁹⁸ Agency staff also must spend time responding to claims and may take additional time documenting their actions in case of a subsequent challenge. These costs, however, all have their counterparts in a traditional auditing system: auditors must be hired, staff must spend time preparing for audits and disputing audit exceptions, and the prospect of an audit will induce staff to document their actions more carefully.

In sum, it is no small irony that the disentanglement movement comes at the same time another broad movement seeks to privatize many aspects of government administration.⁹⁹ Private business's claim to efficiency derives primarily from the independent assessments of performance that consumers provide and secondarily from audit systems designed to ensure that products are acceptable to consumers. The elimination of legal entitlements for persons whom government programs affect strips government programs of an analogous system of checks and balances. As a result, senior policy-

94. *Id.* at 258.

95. *Id.* at 261.

96. *See* POSNER, *supra* note 6, § 23.3, at 637-40 (describing the complex process of selecting cases to audit from diverse candidates).

97. *See* OLSON, *supra* note 17, at 123 (describing how the political process tends to undervalue policies providing diffuse benefits to large numbers of people). *But see supra* note 16.

98. *See* MASHAW, *supra* note 76, at 18-19 (describing the cost of the Social Security Administration's system for adjudicating disability claims).

99. *See generally* Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573 (2004) (comparing the effects of disentanglement and privatization, as well as devolution, in 1996 welfare law).

makers and the public they represent become increasingly vulnerable to the untested, self-serving accounts of line staff and managers.

C. *Criticism of Entitlements to Public Assistance*

Legislation eliminating enforceable rights for many immigrants, prisoners, and others has passed with relatively little controversy or public attention.¹⁰⁰ The arguments for and against preserving enforceable individual rights in those areas thus were not fully developed. The 1996 welfare law, however, came out of highly publicized, pitched battles over a two-year period. Its supporters thus were compelled to develop a relatively elaborate explanation for why a structure of individual rights was incompatible with the new substantive norms they sought to establish. Public-assistance programs therefore provide the ideal context for assessing arguments against individual rights generally. Two programs that the 1996 law affected most profoundly provide a useful contrast: cash assistance to low-income families and food stamps. The principal cash assistance program, Aid to Families with Dependent Children (AFDC),¹⁰¹ was repealed, with its funding diverted to the Temporary Assistance to Needy Families (TANF) block grant¹⁰² that explicitly disavowed any enforceable legal rights.¹⁰³ The food stamp program also saw its substantive norms change dramatically as Congress cut an estimated \$27.7 billion from the program over six years.¹⁰⁴ The food stamp program, however, retained legal rights through which individuals could enforce the government's compliance with these new, less generous norms.

1. *Weaknesses of the Anti-Entitlement Narrative*

The anti-entitlement narrative has two fundamental flaws. First, it grossly overstates the power of legal entitlements to interfere with the achievement of other programmatic goals. Specifically in the public-benefits context, it exaggerates entitlements' impact on program administration and fails to understand fundamental limitations on the leverage that entitlements provide claimants—including, most importantly, the power of counter-entitlements to balance pressures from legal entitlements. Second, the narrative minimizes the difficulties that non-entitlement programs face in reconciling competing substantive priorities.

100. David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 105 COLUM. L. REV. 2032, 2053-57 (2004) [hereinafter Super, *New Moralizers*].

101. 42 U.S.C. §§ 601-620 (1994) (repealed 1996).

102. 42 U.S.C. §§ 601-617 (2000).

103. 42 U.S.C. § 601(b) (2000).

104. See David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1299 n. 97, 1301 (2004) [hereinafter Super, *Quiet Revolution*].

Although criticism of legal entitlements commonly focuses on their supposed shortcomings, legal entitlements (and their offsetting counter-entitlements) play important roles in helping central administrators impress their policy choices on their local offices. Specifically, non-entitlement programs must find ways of replicating three major functions that a rights-based system performs: communicating policy to frontline eligibility staff, determining how that staff is in fact applying policy, and guarding against unintended disparate impacts upon vulnerable subpopulations of claimants. In addition, others interested in understanding a program—legislators, senior executive-branch officials, journalists, scholars, and taxpayers—must find alternative means of discerning what that program is doing. No longer can one learn what a program is doing simply by reading the U.S. Code, the Code of Federal Regulations, or even their state counterparts. The content of senior managers' guidance to their staff, the compliance of that staff with those directives, and any variations in the program's treatment of demographic, geographic, or other subpopulations of claimants must be gleaned elsewhere.¹⁰⁵

2. *Confounding Substantive and Structural Changes*

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)¹⁰⁶ transformed both the substantive goals and the legal structure of cash-assistance and child-care programs for low-income families. Substantively, it dramatically rearranged the programs' priorities, elevating work and other behavioral standards at the expense of meeting families' basic needs. Structurally, it replaced entitlements in federal law with non-entitlement benefits provided at the sole discretion of state and local officials.

Four prominent House Republicans captured the conventional wisdom about the relationship between these substantive and structural components:

Because recipients were guaranteed payments regardless of their behavior, entitlement policy permitted or even encouraged dependent behavior such as nonwork and nonmarital births.

105. The lack of transparency of a non-entitlement program, it should be noted, can afflict liberals, conservatives, and moderates alike because a legalistic structure is essentially content neutral. In an entitlement system, a liberal would determine the amount of benefits a program is providing in the same way a conservative would determine what work or other behavioral conditions attach to the program: by referring to the program's rules. If a program does not develop effective means of performing the functions traditionally handled by entitlements, no one can have any confidence that the program is performing as intended. Whatever one's perspective on the 1996 legislation's changes in programs' substantive priorities, it made the achievement of those priorities considerably more complicated by transforming cash-assistance programs' structures at the same time it was transforming their content. To date, however, most scholarship has focused on the substance of that legislation rather than the impact of the structural changes on adherence to its policies.

106. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

Moreover, as long as recipients had a legal right to benefits, it would be impossible to create the type of reciprocal welfare system conservatives wanted to establish. . . . Republicans saw clearly that entitlement blocked all serious steps toward creating a system based on work and individual responsibility. Hence the entitlement to cash welfare had to end.¹⁰⁷

To date, the assumption that the 1996 welfare law's substantive and structural themes are necessarily intertwined has gone surprisingly unquestioned. Most of the bill's supporters favor both; most of its opponents have qualms about both. Indeed, each side has taken some pains to conflate the two. PRWORA's supporters have found it advantageous to emphasize its substantive focus on work. President Clinton had campaigned heavily on a platform of "end[ing] welfare as we know it" but had been vague on the structure of the programs he would put in their place.¹⁰⁸ With polls showing overwhelming public support for work requirements, conservatives tended to treat the elimination of the entitlement as merely a necessary corollary of requiring claimants to work, with little impact on the availability of benefits to those willing to work.¹⁰⁹ Indeed, some treated it as a largely incidental matter.¹¹⁰

When moderate and conservative Democrats offered alternative legislation that increased work requirements while preserving a federal entitlement to cash assistance for those that complied, they focused almost exclusively on the work requirements—even though the continued entitlement was the main feature that distinguished it from the Republican bill.¹¹¹

107. House Republicans, *supra* note 25, at 8-9.

108. BILL CLINTON & AL GORE, *PUTTING PEOPLE FIRST: HOW WE CAN ALL CHANGE AMERICA* 164-65 (1992). Although President Clinton's campaign manifesto devoted five pages to a chapter on "welfare and work," *id.* at 164-68, after making some vague references to state control and promoting work, it shifted its focus away from cash-assistance programs to issues such as health care and family medical leave.

109. This approach presumably reflects conservatives' recognition that their mandate from the public did not extend to cutting off aid to needy families willing to work: "public opinion polls show that . . . voters [still] want the government to assist needy families," albeit subject to work requirements. DOUGLAS J. BESHAROV, *AM. ENTER. INST., STATE IMPLEMENTATION OF WORK REQUIREMENTS AND TIME LIMITS IN WELFARE PROGRAMS* (2002) (quoting fellow conservative commentator Lawrence Mead).

110. "[E]liminating entitlement status alone is not reform, or even a small part of reform. The impact of eliminating the entitlement nature of AFDC has been greatly overrated." RECTOR, *supra* note 31, at 7.

111. For example, Tennessee Representative Clement emphasized that the Democratic alternative to the Republican welfare bill would require recipients to complete a minimum number of hours of work or work-related activity each week to receive benefits:

We deny benefits to any recipient who refuses a job or refuses to look for a job. And in exchange, we remove all incentives that make welfare more attractive than work and remove the biggest barriers to work—health care and child care. In short, we guarantee recipients that if they will go to work we will provide the money and take all the necessary steps to ensure that recipients have a real opportunity to become self-sufficient.

141 CONG. REC. H3359 (daily ed. Mar. 21, 1995). Even more liberal Democrats either avoided discussing entitlements at all or emphasized how limited they were. *See id.* at H3363 (statement of Rep.

State officials charged with implementing the welfare law were equally vague about structural issues. Although united in their opposition to the legalistic model of public-benefit programs that had arisen in the 1960s,¹¹² with strong feelings about what the substantive requirements of cash-assistance programs ought to be, few seemed much concerned about what structure those programs ought to take.¹¹³

The legislation's critics have been more willing to discuss its structure, but largely because of the impossibility of mobilizing broad political opposition to its work requirements. Eyeing polls showing continued public interest in protecting low-income people from hardship,¹¹⁴ they condemned PRWORA for its abandonment of guarantees of aid.¹¹⁵ Subsequent scholarship, too, has failed to examine critically how the welfare law's elimination of entitlements advances or impedes its substantive purpose of making work a condition of receiving assistance. Most discussion of the entitlement to date has focused on its expressive character¹¹⁶ and its impact on the rights and well-being of low-income claimants.¹¹⁷

Hoyer) ("Our society cannot—and should not—afford a social welfare system without obligations."); 142 CONG. REC. S8525 (daily ed. July 23, 1996) (statement of Sen. Mikulski) (describing the Democratic alternative as "a time-limited and conditional entitlement" that "would have required all able-bodied adults to go to work.").

112. See, e.g., MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, at 10-21 (1993).

113. See, e.g., GERALD H. MILLER, BLOCK GRANTS: CHALLENGES AND OPPORTUNITIES (1995); GARY STANGLER, LIFEBOATS VS. SAFETY NETS: WHO RIDES . . . WHO SWIMS (1995).

114. E.g., STEVEN KULL, CTR. FOR THE STUDY OF PUB. ATTITUDES, FIGHTING POVERTY IN AMERICA: A STUDY OF AMERICAN POLICY ATTITUDES 2-3, 5, 7 (1994); R. KENT WEAVER, ENDING WELFARE AS WE KNOW IT 172-75 (2000).

115. For example, former Clinton Administration official Peter Edelman declared that:

[A]ny decent nation has to provide a safety net of assistance for its children. Flawed as it was, the previous system had that safety net. Benefits varied widely, but everywhere in America a family coming to a welfare office could get help if they met the federal requirements. This had been true for sixty years. Now no state had any federally defined obligation to help needy children.

PETER EDELMAN, SEARCHING FOR AMERICA'S HEART: RFK AND THE RENEWAL OF HOPE 140 (2001). Similarly, Senator Daniel Patrick Moynihan declared that PRWORA "terminates the basic Federal commitment of support for dependent children. [It puts] those children at risk with absolutely no evidence that this radical idea has even the slightest chance of success." 142 Cong. Rec. S9329 (daily ed. Aug. 1, 1996).

116. See generally Michaels, *supra* note 99.

117. See, e.g., EDELMAN, *supra* note 114; MICHAEL B. KATZ, THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE 328-40 (2001); Todd Cosenza, *Preserving Procedural Due Process for Legal Immigrants Receiving Food Stamps in Light of the Personal Responsibility Act of 1996*, 65 FORDHAM L. REV. 2065 (1997); Cynthia R. Farina, *On Misusing "Revolution" and "Reform": Procedural Due Process and the New Welfare Act*, 50 ADMIN. L. REV. 591, 618-23 (1998) (asserting that PRWORA's disclaimer of an entitlement to cash assistance was intended to eliminate private rights of action, not to disclaim the existence of a property interest sufficient to trigger due-process scrutiny); Rebecca Zietlow, *Two Wrongs Don't Add Up to Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures*, 45 AM. U. L. REV. 1111 (1996).

In fact, the question of whether a program should operate as an entitlement profoundly affects the program's management and its ability to achieve its substantive goals, at least as much as it affects the well-being of individual claimants. To analyze this question requires first an understanding of the true nature of substantive change in programs. Although often cast in terms of giving programs new substantive goals, even radical legislation far more typically readjusts the balance between preexisting programmatic goals. PRWORA did not eliminate the Aid to Families with Dependent Children (AFDC) program's goal of helping families meet basic needs: if it had, it would simply have terminated cash assistance outright.¹¹⁸ Nor did it originate the idea of moving families from welfare to work: the multi-billion-dollar Job Opportunities and Basic Skills (JOBS) program¹¹⁹ had been devoted to just that for the previous eight years. Instead, PRWORA elevated the priority of the latter objective relative to the former.

The question, then, is which programmatic structure most reliably adjusts a program's operations to reflect new substantive priorities. The two major alternatives are (1) a legal entitlement system in which claimants' assertion of positive rights helps shape the program's behavior and (2) a non-entitlement model in which directives from program administrators determine the program's content and operations.

II

THE IMPACT AND LIMITS OF ENFORCEABLE RIGHTS IN PUBLIC-BENEFIT PROGRAMS

A cornerstone of the argument against enforceable individual rights is the assertion that they invest claimants with so much power that they can crush state policies adverse to their interests. If this were true, then finding some alternative structure, even a profoundly flawed one, would be an urgent errand. Federal and state governments inevitably must accommodate competing policies in their programs; any structure that gave claimants, even very needy claimants, effective vetoes over those accommodations could not be sustained.

This Part analyzes the theory of overpowering legal entitlements and finds it gravely lacking. Part II.A explores the history of the legal entitlement not as a triumph of claimants' rights but rather as a device for improving program management. Part II.B criticizes the exaggerated assumptions underlying the omnipotent-entitlement theory: the effectiveness of administrative fair hearings and affirmative litigation in vindicating claimants' legal rights, the availability of legal counsel to vindicate those rights, and the system's resistance to change and experimentation. On the

118. Some commentators have proposed this. *E.g.*, CHARLES MURRAY, *LOSING GROUND* (1984).

119. 42 U.S.C. §§ 680-685 (1994).

other hand, Part II.C shows that elaborate, specialized audit systems that may be termed “counter-entitlements” are more than capable of giving substantive priorities antagonistic to claimants the upper hand over the claimant-friendly policies vindicated through legal entitlements. Thus, a shift in substantive priorities away from claimants’ interests—such as the 1996 welfare law’s work requirements or other programs’ efforts at cost-containment—can be supported structurally by augmenting or redirecting an existing counter-entitlement.

A. *Origins of Legal Entitlement as a Management Tool*

For all the centrality it has assumed in debates about public-welfare law, the legal entitlement is a remarkably recent contrivance. Thus, managing public-benefit programs without legal entitlements is not so much a new challenge as it is a rediscovered one. Prior to the 1960s, eligibility requirements for means-tested programs (those limited to claimants with incomes below specified levels) included a combination of objective and subjective components, many of which were established in a highly decentralized manner. Many means-tested programs—variously called general assistance (GA), general relief, home relief, etc.—were entirely creations of state or local governments. Even in the largest federal-state programs—Aid to Families with Dependent Children (AFDC)¹²⁰ and the programs for the aged,¹²¹ blind,¹²² and disabled¹²³ that Supplemental Security Income (SSI)¹²⁴ later replaced—states freely added eligibility conditions to those established in federal statutes and regulations. Many of those state-designed eligibility rules, in turn, effectively delegated authority to set eligibility requirements to local administrators or individual eligibility workers. Authorizing local offices to deny AFDC where the children did not live in a “suitable home” is effectively a delegation of authority to determine eligibility subjectively, without meaningful control from rules.¹²⁵ This is particularly true when the state makes no serious attempt to define a “suitable home.”

*King v. Smith*¹²⁶ started the systematic development of legal entitlements to public benefits. It interpreted the statutory requirement that “aid shall be paid promptly to all eligible persons that make application”¹²⁷ as

120. See 42 U.S.C. §§ 601-617 (1994) (repealed 1996).

121. See 42 U.S.C. §§ 301-306, nn.1381-1385 (2000) (now effective only in Guam, Puerto Rico, and the U.S. Virgin Islands).

122. See 42 U.S.C. §§ 1201-1206, nn.1381-1385 (2000) (now effective only in Guam, Puerto Rico, and the U.S. Virgin Islands).

123. See 42 U.S.C. §§ 1351-1355, nn.1381-1385 (2000) (now effective only in Guam, Puerto Rico, and the U.S. Virgin Islands).

124. See 42 U.S.C. §§ 1381-1383f (2000).

125. WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE 310-11 (5th ed. 1994).

126. 392 U.S. 309 (1968).

127. 42 U.S.C. § 602(a)(10)(A) (1994) (repealed 1996).

prohibiting state and local agencies from imposing their own additional conditions of eligibility (in that case a ban on aid to women with frequent male visitors). The application of these additional, generally subjective conditions of eligibility varied considerably by state, by locality within some states, and, in particular, by the race of the claimants.¹²⁸ *King* and its progeny made the process of establishing eligibility criteria for AFDC both more centralized and more objective. Indeed, since the more subjective criteria had been the ones set on the state and local levels, these two changes went largely hand in hand.

The *King* suit was brought by, and obviously benefited, low-income AFDC claimants. But it also highlighted and addressed several serious management problems in the program. First, the federal government was having great difficulty communicating its policies to the frontline eligibility workers charged with implementing them. Eight years earlier, the federal Secretary of Health, Education and Welfare had issued a ruling prohibiting similar sorts of rules,¹²⁹ and Congress had endorsed that judgment.¹³⁰ Yet those directives were having only limited impact on the local level. Moreover, central administrators had no good way of assessing compliance with their directives on the local level. They could examine state legislation,¹³¹ but they had little means for evaluating whether eligibility workers complied with that legislation or how they interpolated policy in the broad areas where that legislation was silent. Local agencies had no incentive to report details that could invite interventions from higher-level agencies.¹³² Claimants had neither obvious means nor any real incentive to report how the program was being run; perhaps more importantly, without clear objective eligibility standards against which they could test their treatment, they most likely did not realize that local agencies might be deviating from higher officials' goals. Finally, and most obviously, AFDC's management was failing because it was unable to ensure consistent treatment, under any standard, of similarly situated claimants.

AFDC's entitlement structure was one way to address these failings. Another alternative was federalization of administration.¹³³ In 1965,

128. See DOROTHY K. NEWMAN ET AL., *PROTEST, POLITICS, AND PROSPERITY: BLACK AMERICANS AND WHITE INSTITUTIONS, 1940-1975*, at 257-62 (1978).

129. President Eisenhower's Secretary of Health, Education and Welfare (HEW), Arthur Flemming, wrote, "'A State plan . . . may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable, while the child continues to reside in the home.'" *King*, 392 U.S. at 322 (quoting State Letter No. 452, Bureau of Public Assistance, Social Security Administration, Department of Health, Education, and Welfare) (emphasis removed).

130. *Id.* at 323.

131. A new Louisiana statute triggered the Flemming Ruling. *Id.* at 322.

132. Instead, they classified large numbers of rejected claimants simply as "obviously ineligible." NEWMAN, *supra* note 128, at 259.

133. In practice, Congress found it politically and administratively convenient to make the most important federally administered public-benefit programs legal entitlements, too.

Congress transferred responsibility for providing health-care assistance to many elderly people and persons with disabilities from states to a new federal Medicare program.¹³⁴ Similarly, although cash-aid programs for the elderly, blind, and persons with disabilities appear not to have been quite so severely afflicted with local arbitrariness, a few years after *King* Congress sharply reduced states' roles in designing and administering programs for these populations by replacing a set of federal-state programs similar to AFDC with the SSI program.¹³⁵

For means-tested programs, particularly those serving families with children, the federal government remained reluctant to take over administration. Entitlement structures became the favored method of communicating policy directives to local officials, of verifying (and correcting) those officials' compliance, and of ensuring comparable treatment across subgroups of claimants. Eligibility criteria in the new Medicaid program followed those of the now-centralized AFDC program. Legislation in the late 1960s and early 1970s similarly eliminated much state and local discretion to set food stamp eligibility criteria. Although states received considerable discretion to expand financial eligibility for Medicaid in the 1980s, they nonetheless were required to exercise that discretion through explicit rules.¹³⁶

Thus, enforceable individual rights became a substitute for federalization of administration, a means of *preserving* state and local control over most phases of program design and operations. The individual legal entitlement allowed the federal government to limit its intervention to enforcing norms of overriding federal importance, such as eliminating racist program administration. The recent coupling of disentanglement with further devolution hence is a noteworthy departure from the historic relationship between those two approaches and leaves open the question of how the federal government can measure and ensure adherence to each of the

134. TRATTNER, *supra* note 125, at 327.

135. Many states are required to supplement federal SSI benefits, and all states have the option to do so. 42 U.S.C. §§ 1382e, 1382g (2000). Since states' compliance with this maintenance-of-effort requirement can be measured on the basis of aggregate expenditures, in theory they retain some ability to modify their eligibility criteria. *See id.* § 1382g(b)(1). In practice, states generally have not felt strongly enough about the design of these programs to bear the expense of a separate bureaucracy to administer their own criteria after the federal Social Security Administration (SSA) has applied its own rigorous criteria. States also have the option to provide "interim assistance" to claimants whose SSI applications are being adjudicated in the sometimes-ponderous SSA eligibility-determination system. *Id.* § 1383(g). Finally, some states operate GA programs for persons whose disabilities lack the severity or duration to qualify for SSI. Nonetheless, for the vast majority of low-income elderly people and low-income people with severe disabilities, state policies have little or no effect.

136. Thus, for example, states were permitted to liberalize, but not narrow, financial eligibility rules for most classes of Medicaid claimants. 42 U.S.C. § 1396a(r)(2) (2000).

norms it has set for a program whose primary funding it continues to supply.¹³⁷

B. Legal Entitlements' Impact on Political Control of Public-Benefits Policy

The textbook model of entitlements to public benefits makes entitlements seem imposing. In theory, *Goldberg v. Kelly*¹³⁸ recognized the continued receipt of cash welfare benefits as a property interest for due-process purposes, thus giving the power to enforce programs' rules to those with the strongest interest in doing so: individual claimants. A related due-process doctrine sought to ensure that claimants received sufficiently clear notices of the agencies' actions that they could recognize situations where the agency was deviating from its rules—and pursue administrative remedies.¹³⁹ Federal and state administrative-procedure acts, which legislation or agencies' voluntary elections had made applicable to public-benefit programs,¹⁴⁰ would ensure thoughtful rules. These rules would in fact contain programs' operative principles because still another line of due-process cases barred rules so vague as to leave essentially standardless, and hence unreviewable, discretion to eligibility workers.¹⁴¹ Where an agency's non-compliance was more global, or where its rules abridged statutory or constitutional rights, legal services attorneys would represent the claimants in class-action litigation against the agency. Finally, policy experimentation would be sharply constrained since any claimant treated less generously than the program's basic rules required could sue.

If this model did indeed fairly reflect reality, public-benefits claimants would be formidable foes for officials seeking to impose a less generous balance of programmatic priorities, and disentanglement plausibly could be seen as necessary to return control of programs to the political process. In fact, however, evidence calls into question each major assumption in this model. Part II.B.1 tests the importance of *Goldberg v. Kelly* and the right to an administrative hearing against available data and implications that can be drawn from states' behavior. Although skepticism about the efficacy of

137. Without the assurance that states are complying with those conditions, continued federal financing is likely to disappear. See David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2574, 2648 (2005) (suggesting that, absent state compliance with federal policies, Congress may continue a longstanding grant program for a few years to avoid a sudden shock to states' budgets but is likely to allow funding to erode fairly rapidly).

138. 397 U.S. 254 (1970).

139. *Id.*; see, e.g., *Ortiz v. Eichler*, 794 F.2d 889 (3d Cir. 1986); *Buckhanon v. Percy*, 708 F.2d 1209 (7th Cir. 1983); *Hill v. O'Bannon*, 554 F. Supp 190 (E.D. Pa. 1982); *Willis v. Lascaris*, 499 F. Supp. 749 (N.D.N.Y. 1980).

140. See, e.g., 7 U.S.C. §§ 2013(c), 2014(b) (2000) (requiring USDA to control the food stamp program through "uniform national standards" promulgated through informal rule-making).

141. *Carey v. Quern*, 588 F.2d 230 (7th Cir. 1978); *White v. Roughton*, 530 F.2d 750 (7th Cir. 1976); *Holmes v. N.Y. City Hous. Auth.*, 398 F.2d 262, 265 (2d Cir. 1968).

fair hearings in shaping eligibility workers' behavior is not new,¹⁴² this quantitative examination facilitates a comparison with the force of counter-entitlements developed below.¹⁴³ Part II.B.2 examines the role of affirmative litigation based on public-benefit entitlements to determine how serious a threat it is to the political branches' ability to reshape programs' goals in ways disadvantageous to claimants. Part II.B.3 assesses the availability of legal representation to help low-income claimants exercise their legal rights against public-benefit programs' administrators. Finally, Part II.B.4 briefly discusses the flexibility that Congress and federal agencies increasingly have sought to incorporate into entitlement programs—and the courts' acceptance of that flexibility. This suggests that the necessarily local and subjective elements of work requirements—assessing what opportunities exist in a community and selecting assignments for particular claimants—could easily have been incorporated into a cash-assistance program that continued to operate as a legal entitlement. Similarly, it suggests that utilization controls and other cost-containment measures could be added to Medicaid without the curtailment of legal rights involved in mandatory managed care.

1. The Promise and Limits of Procedural Due Process

Over time, the fair-hearing system has shown significant limitations in policing eligibility workers' behavior. Even if every mistreated claimant sought a fair hearing, the process would be unlikely to deter eligibility workers' misapplication of rules: virtually all eligibility workers work fixed hours and will likely be only modestly inconvenienced by having to attend hearings. Adverse hearing decisions are generally not detrimental to eligibility workers; they merely restore claimants to the position they would have been in had policy been applied correctly in the first place. Thus, the mere possibility of a fair hearing is unlikely to influence an eligibility worker that otherwise would have disregarded the program's rules.¹⁴⁴

142. See, e.g., Mashaw, *supra* note 15 (arguing that *Goldberg* had relatively little impact on AFDC's operation); Charles F. Scott, *The Reality of Procedural Due Process*, 13 WM. & MARY L. REV. 725 (1972) (same); William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 BROOK. L. REV. 777 (1990) (finding that fair hearings and other elements of procedural due process did not suffice to empower systematically subordinated claimants); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes*, 38 BUFF. L. REV. 1 (1990) (same).

143. See *infra* Part IV.B.3.

144. Any deterrent effect of the fair-hearing system depends upon additional, voluntary actions by managers relying on fair-hearing decisions for indications of problems on their staffs. Although this undoubtedly happens in a number of offices, it can hardly be said to be an impediment to the sound administration of the program. If a manager feels that fair-hearing results are commanding too much attention from their staff, she is free to reduce or eliminate her follow-up. Thus, to the extent fair hearings have an impact on policy, it is in their role as a management device rather than through empowering claimants.

Even if it did, however, the number of fair hearings requested is consistently small, with the number of victorious claimants all but negligible. Data that is most comparable across states is available from the food stamp program. The results in Table 2 are stark: the number of fair hearings requested each year is generally less than half of one percent of the number of claimants participating in the program in an average month.¹⁴⁵ Moreover, of those requesting hearings, Table 3 shows that in most states fewer than a third prevail.¹⁴⁶

This result cannot be interpreted solely as evidence that eligibility workers are faithfully applying the program's rules, for the food stamp quality control (QC) system has found a significant number of mishandled food stamp cases. Until very recently, as Table 4 shows, underissuances to eligible participating households typically equaled 2.5% to 3% of the total value of food stamp benefits issued.¹⁴⁷ It should be noted that the underissuances reported here include *only* those involving households that received at least some food stamps.¹⁴⁸ Although USDA does not record the value of benefits lost to households improperly denied benefits, Table 5 shows that at least 2.5% to 4% of denials and terminations reported each year were erroneous.¹⁴⁹ Estimating the number of cases mishandled each year from these average monthly error rates is difficult since some cases presumably are underissued several months in a row. Nonetheless, it appears that even if all those requesting fair hearings have valid grievances, over 90% of the claimants with such grievances are not requesting fair

145. STATE ADMIN. BRANCH, USDA, FOOD STAMP PROGRAM STATE ACTIVITY REPORT FISCAL YEAR 2002, at 23 (2003) [hereinafter 2002 STATE ACTIVITY REPORT]. Since the total number of people receiving food stamps *at some point* during the year is typically about one and one half times the number receiving benefits in an average month during that year, fewer than one third of one percent of the claimants that could request a hearing during a year do so.

146. *Id.* at 13, 23. Claimants do significantly better in New York, year in and year out. According to USDA officials, this appears to reflect the fact that many claimants in New York City win by default when their eligibility workers elect not to take the time to travel to the central hearings office.

147. QUALITY CONTROL BRANCH, USDA, FOOD STAMP PROGRAM QUALITY CONTROL ANNUAL REPORT FISCAL YEAR 2002, at 22 (2004) [hereinafter 2002 PROGRAM QUALITY CONTROL ANNUAL REPORT]; 2002 STATE ACTIVITY REPORT, *supra* note 144, at 13.

148. See 7 U.S.C. § 2025(c)(1) (2000) (including only cases where households received some benefits in the definition of "payment error rate"). The food stamp program does require each state to examine random samples to determine what percentage of its denials and terminations are procedurally or substantively incorrect. 7 C.F.R. § 275.13 (2004). During the 1990s, USDA did not test most states' assertions about these "negative case error rates," which likely led to some underreporting. See U.S. GENERAL ACCOUNTING OFFICE, FOOD STAMP PROGRAM: EVALUATION OF IMPROPER DENIAL OR TERMINATION ERROR RATES (GAO/RCED-88-12 1987). Even when USDA did begin to verify all states' reported negative-case error rates in the 2000 fiscal year, it generally reviewed only the states' case files. Presumably other claimants' denials and terminations would prove faulty if their side of the story were considered.

149. 2002 PROGRAM QUALITY CONTROL ANNUAL REPORT, *supra* note 146, at 23.

hearings. And even if all of those winning hearings deserve to do so, the QC estimates suggest that many meritorious claims likely fail.¹⁵⁰

Instead, the low rate at which aggrieved claimants seek hearings may be the result of confusing or opaque notices, particularly those that merely direct recipients to call their eligibility worker to learn the reason for the agency's action.¹⁵¹ Another factor is likely to be recipients' inability to understand food stamp rules well enough to know when the food stamp office has mishandled their applications—or to understand the fair-hearing rules well enough to know what to do in response to the food stamp office's error.¹⁵² Recipients also have insufficient child care or transportation to allow them to pursue a remedy of uncertain utility. Those that are marginally literate may fear that a hearing will expose them to embarrassment. Working claimants may lose more in wages (and their employer's good will) by attending than they would win from a successful result. And many claimants may fear that requesting a hearing will antagonize their eligibility workers and result in retaliatory exercises of discretion.

The modest impact of the right to a fair hearing on states' administrations also can be inferred from states' own behavior. The Food Stamp Act of 1977 purports to deny continued benefits—in effect, a pre-termination hearing—to households appealing a reduction or denial of assistance beyond the period for which the state previously determined the household eligible (its “certification period”).¹⁵³ This is true even though the household has the right to a new certification period if it reapplies and remains eligible.¹⁵⁴ The Sixth Circuit upheld the constitutionality of this provision in 1983,¹⁵⁵ followed by the Fourth Circuit in 1987.¹⁵⁶ Food stamp regulations gave states broad discretion, allowing them to set certification periods

150. Compare 2002 STATE ACTIVITY REPORT, *supra* note 144, at 13, with 2002 PROGRAM QUALITY CONTROL ANNUAL REPORT, *supra* note 146, at 14.

151. See, e.g., *Hill v. O'Bannon*, 554 F. Supp. 190 (E.D. Pa. 1982) (requiring termination notices to provide a list of possible alternative bases of eligibility); *Jackson v. O'Bannon*, No. 80-500 (E.D. Pa. Feb. 8, 1980), reprinted in *CCH Medicare & Medicaid Guide* ¶ 31,108 (requiring notices to clearly specify the benefits being terminated).

152. See generally *Handler*, *supra* note 15 (describing factors that might cause claimants not to request a hearing despite feeling wronged); *Mashaw*, *supra* note 14 (same).

153. The Food Stamp Program, like other means-tested public-benefit programs, requires recipients to re-establish their eligibility periodically in order to receive benefits. 7 U.S.C. §§ 2012(c), 2020(e)(4) (2000). Thus, the statutory right to a pre-termination hearing applies to terminations the state initiates between these periodic reviews but not to those arising from the household's participation in the review process.

154. *Id.* § 2020(e)(4), (e)(10).

155. *Banks v. Block*, 700 F.2d 292, 297-98 (6th Cir. 1983).

156. *Holman v. Block*, 823 F.2d 56, 59 (4th Cir. 1987); see also *Jackson v. Jackson*, 857 F.2d 951, 957 (4th Cir. 1988) (holding that food stamp claimants have no property interest beyond the end of each certification period). These holdings are difficult to square with the rejection of the “bitter with the sweet” theory of property rights in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 540 (1985); the requirement to seek periodic reviews of eligibility is purely procedural, and *Loudermill* rejects attempts to incorporate procedural restrictions into the definition of property rights.

as short as three months or as long as twelve.¹⁵⁷ Since states have more than sixty days to decide and implement the results of hearings,¹⁵⁸ a state can completely eliminate the right to a pre-deprivation hearing by giving households three-month certification periods.¹⁵⁹ Thus, if states found that the right to a pre-deprivation fair hearing was interfering with their operation of the food stamp program, they had a ready means to eliminate it. In fact, most states found short certification periods far more burdensome than the occasional fair hearing. As the table below shows, neither the 1977 Act nor the subsequent decisions upholding its constitutionality led to any significant increase in the incidence of short certification hearings. When states finally did move to short certification periods, it was in response to pressure from USDA to reduce food stamp quality control error rates rather than out of any aversion to fair hearings.¹⁶⁰

2. *The Limited Role of Affirmative Litigation Under Public-Benefits Entitlements*

Affirmative litigation in means-tested family-assistance programs scored some important successes during the decade and a half before 1981. The Supreme Court struck down longstanding policies denying aid to women on the basis of supposed moral shortcomings.¹⁶¹ The Court also struck down state-imposed rules artificially reducing claimants' AFDC grants based on income that was not actually available to them.¹⁶² The Court rejected state policies arbitrarily disqualifying families based on unusual configurations or other circumstances that did not affect need.¹⁶³

157. 7 C.F.R. § 273.10(f)(3) (2001) (subsequently amended).

158. 7 C.F.R. § 273.15(c)(1) (2004).

159. Even if a household appeals immediately upon receiving the state's certification decision, the state can issue benefits at the level it has selected for all three months of that certification period, while the hearing remains pending. If the household wins the hearing, it will receive retroactive benefits; however, the state can reset the household's benefit level at its preferred level for the next certification period while the household appeals again. Alternatively, if the household appeals the denial of a benefit, upon losing the hearing, the state can provide benefits for the months following its decision but require the household to reapply on the ground that it would have received only a three-month certification period had its application been approved. The state then could, if it still felt the household was ineligible, deny the new application and provide no current food stamps for the next three months.

160. Super, *Quiet Revolution*, *supra* note 104, at 1311-12.

161. *King v. Smith*, 392 U.S. 309, 333 (1968); *see also* *Lewis v. Martin*, 397 U.S. 552, 559-60 (1970) (rejecting the California rule that arbitrarily attributed substantial amounts of income to claimant families when a man was present in a household).

162. *Philbrook v. Glodgett*, 421 U.S. 707, 712-19 (1975) (refusing to allow states to disqualify families based on unemployment-compensation benefits for which they were eligible but that they did not receive); *Van Lare v. Hurley*, 421 U.S. 338, 346 (1975) (prohibiting reduction of aid to a family with a non-paying lodger); *Shea v. Vialpando*, 416 U.S. 251, 265-66 (1974) (requiring states to deduct claimants' actual commuting costs from their earned income before considering that income available to the family).

163. *Miller v. Youakim*, 440 U.S. 125, 145 (1979) (requiring state to provide foster care assistance to children in relatives' care); *Carleson v. Remillard*, 406 U.S. 598, 604 (1972) (rejecting

Perhaps the most ambitious decision was the D.C. Circuit's 1975 directive to USDA to increase food stamp benefits to a level sufficient to assure a nutritionally adequate diet for most recipients.¹⁶⁴

These results, while impressive, do not suggest that litigation is likely to frustrate the political branches' efforts to change the substantive conditions of entitlements. First, the overwhelming majority of successful public-benefits litigation came during the thirteen years between the Court's 1968 decision in *King v. Smith*, recognizing public-benefits claimants' right to sue under the terms of federal statutes, and the first of President Reagan's major pieces of budget-cutting legislation in 1981.¹⁶⁵ During this period, a series of political impasses over welfare-reform proposals from Presidents Nixon and Carter diverted Congress from developing any significant substantive AFDC legislation;¹⁶⁶ the expectation that welfare reform was in the offing apparently dissuaded the Department of Health and Human Services (HHS) from initiating major AFDC rulemakings during this period as well. Thus, the courts were left largely on their own without political guidance. As the Court noted, "Congress . . . frequently . . . has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding."¹⁶⁷ Its resolution of cases under those circumstances is hardly indicative of a willingness to challenge the political branches' primacy in defining the terms of entitlements.

Second, even during this period, the courts sought whatever political direction they could find to guide their decisions. *King v. Smith* struck down Alabama's disqualification of women with male visitors based on a memorandum from Health, Education and Welfare Secretary Arthur Flemming rejecting this very policy.¹⁶⁸ The D.C. Circuit ordered an increase in food stamp benefits based on explicit language in the Food Stamp Act of 1964 and the explicit rejection of a proposal to give USDA more discretion by the conference committee that drafted the language in question.¹⁶⁹ The Supreme Court denied states authority to limit recipients' deductions for employment expenses upon finding that "Congress has spoken with firmness and clarity."¹⁷⁰ And the Court, speaking through Justice Rehnquist, broadened the eligibility of unemployed people for AFDC upon

disqualification of families in which the father's absence was due to military service); *Townsend v. Swank*, 404 U.S. 282, 290-91 (1971) (barring state from disqualifying college students).

164. *Rodway v. U.S. Dep't of Agric.*, 514 F.2d 809, 842-43 (D.C. Cir. 1975).

165. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35 [hereinafter "OBRA 1981"] (codified in scattered sections of 7 U.S.C., 42 U.S.C., and other titles).

166. MICHAEL D. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 269 (1986).

167. *Rosado v. Wyman*, 397 U.S. 397, 412 (1969).

168. 392 U.S. at 325.

169. *Rodway*, 514 F.2d at 818-24.

170. *Shea v. Vialpando*, 416 U.S. 251, 265 (1974).

finding that Congress had crafted a disqualification for recipients of unemployment compensation narrowly.¹⁷¹

Third, even in the heyday of affirmative welfare litigation and even without political guidance or specific statutory support, the Court has proven unwilling to disturb states' authority to impose genuine behavioral requirements. Even in *King v. Smith*, the Court declared beyond question "Alabama's general power to deal with conduct it regards as immoral and with the problem of illegitimacy."¹⁷² Subsequently, it ignored principles it had just laid down in other cases and upheld state rules disqualifying strikers¹⁷³ and claimants that refused to comply with work requirements.¹⁷⁴ It gave states free reign to require claimants to submit to invasive inspections of their homes.¹⁷⁵

Fourth, the Court also proved reluctant to impose fiscal obligations on state or federal agencies without clear congressional authority. Again, the Court made the limited scope of its intervention clear from the outset in *King v. Smith*, declaring that "[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program."¹⁷⁶ It declined an opportunity to interpret AFDC's statute as requiring states to base grant levels on the actual cost of maintaining a family.¹⁷⁷ It unanimously allowed states broad discretion to arbitrarily meet one set of emergency needs while disregarding others.¹⁷⁸ And despite its insistence that only income "actually available" be counted in AFDC, the Court refused to extend that principle to the food stamp program.¹⁷⁹ When disabled Medicaid recipients invoked the Rehabilitation Act's antidiscrimination provision to challenge some states' cost-cutting rules that disproportionately denied them health care, a unanimous Court, speaking through Justice Marshall, read the Medicaid statute very narrowly to preserve states' fiscal discretion.¹⁸⁰

Fifth, when Congress did act to change AFDC's purposes, the courts not only consistently upheld the legislation but generally endorsed federal agencies' most aggressive interpretations of that legislation. Prior to

171. *Philbrook v. Glodgett*, 421 U.S. 707, 713-19 (1975).

172. *King v. Smith*, 392 U.S. 309, 320 (1968).

173. *Batterton v. Francis*, 432 U.S. 416 (1977); *accord*, *Lyng v. UAW*, 485 U.S. 360 (1988) (rejecting constitutional challenge to Food Stamp Act's disqualification of most strikers).

174. *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 422 (1973).

175. *Wyman v. James*, 400 U.S. 309, 324 (1971).

176. *King v. Smith*, 392 U.S. 309, 318-19 (1968).

177. *Rosado v. Wyman*, 397 U.S. 397, 408-09 (1970) (noting that Congress has left states a "great deal of discretion" in determining how much assistance families will be given).

178. *Quern v. Mandley*, 436 U.S. 725, 741-46 (1978) (construing the emergency assistance program to be unfettered by rules previously applied to AFDC).

179. *Knebel v. Hein*, 429 U.S. 288, 293 (1977).

180. *Alexander v. Choate*, 469 U.S. 287 (1985).

PRWORA, Congress's major efforts to alter AFDC's substantive purposes involved efforts to restrain spending, specifically through a series of budget-cutting bills President Reagan pushed through Congress in 1981,¹⁸¹ 1982,¹⁸² and 1984.¹⁸³ Since states controlled actual benefit levels, the federal government could reduce costs most easily by changing AFDC's grant-group composition and income-attribution rules—the very rules the courts had liberalized over the preceding decade and a half. Although legal services lawyers filed a welter of suits seeking to invalidate or limit these changes, few challenges won even temporary relief in the lower courts and none did so in the Supreme Court.¹⁸⁴ Indeed, once it became clear that cost containment was an accepted congressional purpose in AFDC, the Court even allowed states to go further than the federal government in denying benefits to families with unusual living arrangements.¹⁸⁵

Finally, the Court has taken several steps, independent of specific congressional actions, to prevent claimants from prevailing on interpretations of ambiguous statutory passages that might go beyond what the political process intended.¹⁸⁶ To be sure, claimants did win a few cases on

181. OBRA 1981, *supra* note 165; Agriculture and Food Act of 1981, Pub. L. No. 97-98 (1982).

182. Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253 (1982); Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248 (1982).

183. Deficit Reduction Act of 1984, Pub. L. No. 98-369 (1984).

184. See *Sullivan v. Stroop*, 496 U.S. 478, 494 (1990) (allowing AFDC to count Social Security survivors' benefits specifically for one child as available to all members of a family); *Gardebring v. Jenkins*, 485 U.S. 415, 417-18 (1988) (allowing lump-sum disqualification to be imposed on a family that had spent the funds, unaware of the AFDC amendment providing that families receiving non-recurring lump-sum income are ineligible for benefits for the number of months determined by dividing the family's standard of need into the sum received); *Bowen v. Gilliard*, 483 U.S. 587, 600 (1987) (finding it rational for Congress to adjust the AFDC program to reflect the fact that support money generally provides significant benefits for entire family units); *Lukhard v. Reed*, 481 U.S. 368, 387 (1987) (upholding the rule that disqualified families from AFDC for a fixed number of months whenever a family member received a personal injury award without regard to the continued availability of the award money); *Atkins v. Parker*, 472 U.S. 115, 131 (1985) (upholding imposition of food stamp reductions without giving recipients an opportunity for a pre-deprivation hearing under *Goldberg v. Kelly* if the family was untimely in their request for a hearing); *Heckler v. Turner*, 470 U.S. 184, 211-12 (1985) (allowing Congress to cap deductions for work expenses, effectively overruling *Shea v. Vialpando*); see also *Skidgel v. Me. Dep't of Human Servs.*, 994 F.2d 930, 939-41 (1st Cir. 1993) (upholding the requirement that stepparents' unemployment compensation be deemed available to children whom they had no legal duty to support); *Falin v. Sullivan*, 776 F. Supp. 1097, 1100-02 (E.D. Va. 1991), *aff'd per curiam*, 6 F.3d 207 (4th Cir. 1993), *cert. denied*, 511 U.S. 1036 (1994) (upholding rule disqualifying families from AFDC based on the equity value of a motor vehicle that exceeds \$1,500); *Grimesy v. Huff*, 876 F.2d 738, 745 (9th Cir. 1989) (upholding statute denying relief to families previously denied AFDC benefits based on a policy deeming the income of grandparents "available" in determining eligibility for AFDC that was concededly unlawful).

185. *Anderson v. Edwards*, 514 U.S. 143, 145-46 (1995) (upholding rules states initiated without federal authorization requiring all children with a single caretaker to have their needs considered together, effectively deeming income received for minor children available to their cousins).

186. *E.g.*, *Blessing v. Freestone*, 520 U.S. 329, 323-33 (1997) (finding no private right of action to services under the child-support enforcement program); *Suter*, 503 U.S. at 350 (holding that the Adoption Assistance and Child Welfare Act of 1980 does not create an enforceable right on behalf of families); *Halderman*, 451 U.S. at 17-18 (requiring clear evidence of congressional intent before

constitutional rather than statutory grounds.¹⁸⁷ In general, however, Congress was able to accomplish many of the same goals through other means.¹⁸⁸ And, of course, most constitutional claims do not depend on whether claimants have an entitlement to a program's benefits.¹⁸⁹

In sum, although affirmative litigation in entitlement programs did significantly liberalize the availability of assistance for low-income claimants, it did so primarily when the political branches, actively or by default, accepted that the programs' primary goal was preventing hardship for low-income people. When the political branches have established different substantive priorities, the courts have not stood in their way and, indeed, at times have sought to anticipate changes without explicit statutory or regulatory direction. The fear of affirmative litigation is thus an implausible basis for rejecting entitlement structures.

3. *The Paucity of Legal Assistance to Public-Benefits Claimants*

Even if fair hearings and affirmative litigation gave claimants far more influence over programs' policies than they do, the availability of legal representation is generally essential to exercise that influence.¹⁹⁰ Yet in many areas, public-benefits claimants lack access to attorneys who will litigate against programs' managers. Even before 1995, legal services programs had the resources to assist only a tiny fraction of people seeking assistance with public benefits. Indeed, legal services programs in many parts

finding Congress has intended the states to fund certain entitlements as a condition of receiving federal funds).

187. *See, e.g.*, *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 537-38 (1973) (invalidating the rule that prevented unrelated individuals from forming food stamp households together); *U.S. Dep't of Agric. v. Murry*, 413 U.S. 508, 514 (1973) (invalidating the rule that denied food stamps to persons who had been claimed on a non-household member's most recent tax return). These were efforts to disqualify "hippie communes" and college students, respectively.

188. *See, e.g.*, 7 U.S.C. § 2015(e) (2000) (denying food stamp eligibility explicitly to college students); *Lyng v. Castillo*, 477 U.S. 635, 638-43 (1986) (allowing Congress and USDA broad flexibility to configure the food stamp household definition in ways that denied benefits to people who were at one time eligible).

189. *Compare Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969) (invalidating discrimination against interstate migrants in the entitlement AFDC program), *with Saenz v. Roe*, 526 U.S. 489, 492-93, 507-11 (1999) (invalidating discrimination against interstate migrants in the non-entitlement TANF program).

190. To be sure, most claimants' victories in fair hearings come without the benefit of counsel. In 2001, attorneys from programs funded by the federal Legal Services Corporation (LSC) represented claimants in 892 food stamp cases decided by fair hearings. LSC, *FACT BOOK 2001* (2002) [hereinafter *LSC 2001*]. Even if all these were victories, they represent only 8% of the 11,320 food stamp hearings decided in favor of plaintiffs that year. STATE ADMIN. BRANCH, USDA, *FOOD STAMP PROGRAM STATE ACTIVITY REPORT, FISCAL YEAR 2001*, at 22 (2002). Most of the fair hearings that *pro se* claimants won, however, likely involved simple factual disputes. Apart from being quite rare, as demonstrated above, an adverse determination on the facts of one case is unlikely to affect the way eligibility workers or managers treat other claimants.

of the country largely eschewed family-based public-benefits cases, and only a small minority engaged in affirmative litigation.¹⁹¹

In 1995, the new Republican majority in Congress slashed legal services' funding and curtailed many of the areas of practice that most annoyed parties opposing legal services' clients. Several of these rules specifically sought to limit claimants' ability to influence policy in public-benefits programs. Since then, legal services programs receiving federal funds have been barred from bringing class-action lawsuits¹⁹² and lawsuits challenging "welfare reform."¹⁹³ They also have been forbidden from making claims under statutes shifting liability for attorneys' fees to unsuccessful defendants.¹⁹⁴ In addition to deterring some unlawful behavior, these fees had been crucial to the financial viability of many legal services programs' public-benefits practices.¹⁹⁵ A few areas are served by legal services "spin-offs" that rely on nonfederal funds to engage in forms of advocacy now prohibited to the Legal Services Corporation's (LSC's) grantees. In many states, however, affirmative litigation is not even a theoretical possibility for ensuring that agencies' practices conform to statutes and other policies established by political officials.¹⁹⁶

Although data is only intermittently available from LSC, legal services programs' involvement in family public-benefit programs has been declining steadily over the past two decades.¹⁹⁷ Some 5.4% of the cases

191. Although a substantial number of lawyers and law firms engage in pro bono representation of low-income people, few are attracted to, or are immediately competent to handle, cases involving complex public-benefit programs.

192. 45 C.F.R. § 1617.3 (2004).

193. *Id.* § 1639.3.

194. *Id.* § 16.

195. Programs that were willing to represent public-benefits litigants in affirmative litigation often budgeted based upon the likelihood of receiving these fees. Continuing that litigation without the ability to benefit from fee-shifting statutes meant that this work could continue only to the extent that programs were willing to divert resources from other representation—at the same time they already were having to make deep reductions in services in response to federal budget cuts. Moreover, public-benefits lawyers' ability to bring in attorneys' fees also was particularly important in some states because the agencies whose actions they challenged often had influence over state legal services funding.

196. Obviously private lawyers in these states are not subject to LSC's restrictions, but few have the substantive knowledge of public-benefit programs to identify unlawful actions or to prosecute litigation. They also lack contact with claimants that are subject to unlawful practices. Those few that do have the requisite substantive knowledge, such as former legal services lawyers, typically work in practices that can ill afford to wait years for possible recovery under fee-shifting statutes.

197. Although data is insufficient to determine the cause of this decline with any certainty, it appears that discouragement from federal and state funders and the perception that the courts were no longer receptive to public-welfare litigation played a significant role. Since 1987, the author has sought to encourage legal services programs to become more actively engaged in public-benefits work, particularly involving the Food Stamp Program. He has conducted scores of trainings for legal services programs in over forty states, written over a dozen articles for the legal services journal, and responded to thousands of calls, emails, and letters seeking information about these programs. His results have been decidedly mixed. Although some individuals have become enthusiastic and expert advocates as a result, many met resistance from their program directors or were not permitted to specialize sufficiently

LSC programs closed in 1983 involved AFDC or “other welfare” programs;¹⁹⁸ by 1996, that share had already fallen to 3.5% despite the growth of behavioral requirements leading to sanctions that presumably many recipients would want help contesting.¹⁹⁹ By 2001, the most recent year for which data are available, only 2.6% of legal services cases closed involved TANF and related programs.²⁰⁰ Similarly, food stamp cases shrank from 1.7% of the total cases in 1983²⁰¹ to 1.1% in 2001.²⁰² As small as they are, these numbers nonetheless overstate legal services’ impact on public-benefit programs: with LSC funding declining over this period, public-welfare representation was claiming a declining share of a shrinking pie.²⁰³ As a result, even though the Food Stamp Program still was functioning as an entitlement, only a little more than one claimant in a million had her case taken to court.²⁰⁴

to develop the expertise required for difficult cases. And when a program loses its public-benefits experts, the complexity of the law, and its lack of application in the private bar, makes it difficult to hire or train effective replacements.

198. LSC, 1984 FACT BOOK 17 (1984) [hereinafter LSC 1984].

199. LSC, FACTS 1996 (1997) [hereinafter LSC 1996].

200. LSC 2001, *supra* note 190.

201. LSC 1984, *supra* note 198.

202. LSC 2001, *supra* note 190. Legal services programs’ involvement with Medicaid actually rose from 1.1% in 1983 to 2% in both 1996 and 2001. *Id.*; LSC 1996, *supra* note 199; LSC 1984, *supra* note 198. This may reflect the dramatic increase in Medicaid eligibility Congress legislated between 1984 and 1990 (expansions that were still phasing in until 2002). In 1983, relatively few low-income people could qualify for Medicaid without receiving cash assistance from AFDC or SSI; by 1996, Medicaid eligibility was often determined separately. Also, LSC’s figures do not distinguish between family Medicaid cases and those involving long-term care.

203. Due to funding cutbacks, legal services programs closed 39% fewer cases in 2001 than they did just five years earlier. LSC 2001, *supra* note 190; LSC 1996, *supra* note 199. Moreover, the vast majority of these cases involved only brief advice and similar casual involvement, not active challenges to public-benefits agencies’ actions. Cases in which legal services advocates challenged an agency’s actions in court or during an administrative hearing, including those that settled amicably, constituted only one-sixth of the TANF cases and one-tenth of the food stamp cases LSC recorded in 2001. LSC 2001, *supra* note 190. That year, legal services lawyers took only thirty-six food stamp cases to court, *id.*; most of those were simply appeals of individual unfavorable fair-hearing decisions.

204. The food stamp program served an average of about 17.3 million people per month in 2001. STATE ADMIN. BRANCH, USDA, FOOD STAMP PROGRAM STATE ACTIVITY REPORT, FISCAL YEAR 2001, at 5 (2002). Over the course of the year, slightly more than half of all food stamp recipients left the program, meaning that about 27 million people received food stamps at some point during 2001. Several million more people unsuccessfully apply for food stamps each year. Therefore, the total number of people getting or seeking food stamps in 2001 was likely over thirty million.

Indeed, the non-entitlement TANF program yielded substantially more court challenges, albeit still a trivial ratio of the whole. Roughly four million families received cash assistance per month in 2001. Assuming a turnover rate of 50%—AFDC’s turnover rate was somewhat less than that in food stamps, but time limits and sanctions have likely increased TANF’s turnover to at least that level—means that six million people received TANF assistance over the course of the year. If another million tried and failed to obtain cash assistance, the 231 “TANF and other welfare” cases legal services lawyers litigated to a judicial decision would represent one case for every thirty thousand claimants—hardly an imposing ratio.

4. *Entitlement Systems' Tolerance for Administrative Flexibility*

At the same time as some programs have been stripped of their legal entitlements, the rules of those that continue to provide enforceable rights to eligible claimants have become increasingly malleable. Whatever other constraints programs' managers may face, courts' interpretation of legal entitlements have proven no obstacle to their flexibility. As public-benefit programs become increasingly caught up in federal and state budgetary politics, agencies are often asked to implement changes in policies more rapidly than they can change their administrative rules. This has caused them to make policy by sub-regulatory memos. Even when agencies continue to rely upon rules, some programs have become so complex that, at least when rendered to claimants and other nonexperts, they become difficult to distinguish from open-ended grants of discretion.²⁰⁵ Lacking an understanding of the rules constraining agencies' discretion, claimants are in no position to challenge them.

For the most part, courts have accepted broad administrative discretion and flexibility within entitlement programs. Contrary to the popular image of robust legal entitlements yielding formalistic results, courts have responded very pragmatically to practical arguments from programs' managers. Courts have allowed agencies to change policies quickly in response to newly legislated priorities without following rulemaking procedures²⁰⁶ or giving claimants the opportunity for pre-deprivation hearings.²⁰⁷ They have rejected arguments that agencies must promulgate detailed policies on all issues of program administration in order to impose their views.²⁰⁸ And

205. Consider, for example, the exceptions to the food stamp program's three-month time limit on certain childless adults. 7 U.S.C. § 2015(o) (2000); 7 C.F.R. § 273.25 (2003). The statute lists six distinct exceptions, one of which cross-references another statute with six more. In addition, the statute embodies several more exceptions within its definitional language and other paragraphs. It also makes exceptions for persons working in any of three designated ways, with one of those defined in terms of three subtypes, one of which cross-references another statute containing eight possible forms of work activity. Barring an exceptional burst of creativity or dedication, eligibility workers and those that design claimant notices for the state will be tempted to summarize the rule merely as creating a three-month limit subject to a number of (unspecified) exceptions. For the vast majority of claimants lacking expert representation, this wholly indefinite description will be all they know of the rule and will make it all but impossible for them to judge when the rule has been misapplied to them. *But see* Hill v. O'Bannon, 554 F. Supp. 190, 198 (E.D. Pa. 1982) (requiring state to send GA recipients a notice explaining each of ten exceptions to the general assistance program's three-month time limit).

206. *E.g.*, Phila. Citizens in Action v. Schweiker, 669 F.2d 877, 880-82 (3d Cir. 1982) (allowing HHS to reduce AFDC benefits in response to OBRA 1981 without going through notice-and-comment rulemaking procedures to interpret its provisions).

207. *E.g.*, Atkins v. Parker, 472 U.S. 115, 129-30 (1985) (finding implementation of food stamp reductions in OBRA 1981 was sufficiently legislative in nature that it did not require due process).

208. *E.g.*, New York v. Lyng, 829 F.2d 346, 348, 353-54 (2d Cir. 1987) (accepting USDA's argument that restaurant allowances for the homeless did not fall within the income provisions for "reimbursements" despite the department's failure to promulgate rules providing the basis for denying such treatment).

they have refused to apply state constitutions' procedural provisions to obstruct policy changes that governors have sought to implement.²⁰⁹

Even where clear, legally enforceable rules appear to constrain discretion, administrative waivers have allowed managers to disregard those rules with little accountability. Congress and federal agencies have granted states waivers to experiment with different ways of accommodating programs' various priorities. This growth in administrative waivers as a vehicle for policymaking in benefit programs renders rules far less significant. In general, the courts have declined to scrutinize agencies' grants of even the most sweeping waivers to states.²¹⁰ Indeed, a series of waivers led to both the expansion of work requirements for cash-assistance recipients²¹¹ and mandatory Medicaid managed care.²¹² It thus seems that legal entitlements are not an obstacle to the exploration of new accommodations of competing programmatic priorities through waivers²¹³ and similar devices.²¹⁴

C. *The Rise of Counter-Entitlements*

Whatever the strength of the legal entitlements that support programs' humanitarian purposes, they are not designed to vindicate programs' other goals. In particular, a necessary objective of any spending program is to prevent unnecessary expenditures. Weakening a legal entitlement alone will not do this; a weaker entitlement might cause the program to deny more worthy claimants, but it would not prompt agency staff to be more careful to deny benefits to unworthy ones. Programs have developed counter-entitlements to provide that balancing function.

Unfortunately, narratives about the supposed power of legal entitlements typically fail to account for these counter-entitlements and hence present a one-sided view of the pressures on frontline agency staff. These

209. *E.g.*, *State ex rel. Wis. Senate v. Thompson*, 424 N.W.2d 385, 473 (Wis. 1988) (allowing the governor to reduce AFDC benefits by item vetoing word fragments and digits within numbers); *Harbor v. Deukmejian*, 742 P.2d 1290, 1299, 1301 (Cal. 1987) (acknowledging a violation of a governor's item-veto authority but finding underlying liberalizing legislation violates other constitutional requirements).

210. *See, e.g.*, *C.K. v. N.J. Dep't Health & Human Servs.*, 92 F.3d 171, 189-90 (3d Cir. 1996) (finding no right to public comment on proposed AFDC waiver). *But see* *Beno v. Shalala*, 30 F.2d 1057 (9th Cir. 1994) (finding HHS's approval of an AFDC waiver without responding to objections raised by some members of the public arbitrary and capricious).

211. MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* 90-98 (2001).

212. NAT'L HEALTH LAW PROGRAM, *AN ADVOCATE'S GUIDE TO THE MEDICAID PROGRAM* ch. 2, at 7 (2001).

213. Indeed, Congress has required expedited consideration of proposed Medicaid demonstration waivers. Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000, Pub. L. No. 106-554, § 703 (to be codified at 42 U.S.C. § 1315(f)).

214. *See, e.g.*, 7 U.S.C. § 2035 (2000) (giving states the option to conform food stamp rules to rules they have chosen to apply in their TANF-funded assistance programs through a "simplified food stamp program").

narratives posit that agency staff are asked to determine eligibility and benefit levels to the best of their abilities but face a profoundly skewed risk of error: improper denials or underpayments are subject to review at the claimant's behest while, we are told, approvals of ineligible applicants and overpayments go unchallenged. Were this true, even the relatively feeble administrative and judicial enforcement mechanisms described in the preceding section over time might bias such a system in favor of allowing benefits: eligibility workers inclined to grant benefits freely would have trouble-free jobs while more conscientious ones would have to defend themselves periodically in administrative hearings or even in court.

This one-sidedness would be profoundly at odds with the values of our adversary system, which generally relies upon balance. Even where one side in a dispute has much in its favor, some counterweight typically seeks to guard against overreaching.²¹⁵ The majority may dominate policymaking but may not prosecute minority legislators for their dissenting speeches or choke off criticism from the press.²¹⁶ Few legal rights are offered without qualification: copyrights are subject to fair use, contract rights are subject to defenses such as impossibility of performance. Here again, if the simplistic model were correct, the political process's ability to change substantive priorities might seem to depend upon the elimination of legal entitlements, even weak ones. Thus, if we focus only on affirmative legal rights and not their counterweights, we might think that we could expand public access to literary and artistic works only by abandoning copyright protection, rather than by broadening fair use; we might think that we could protect consumers only by abandoning the enforceability of contracts, rather than by expanding contract defenses to include, for instance, certain oppressive contracts of adhesion.

This simplistic model cannot be reconciled with reality. Fearing just this kind of pro-claimant bias, Congress and program administrators have developed counter-entitlements to provide counterweights to entitlements. Since private parties generally lack standing to oppose awards of benefits,²¹⁷ these devices, sometimes called "quality control" systems, typically

215. For example, even a defendant that blatantly failed to perform her contract nonetheless has a right not to be required to pay more than necessary to satisfy the expectation she created in the contract.

Our political system tends to fear that one-sided adjudicative processes will lead to overreaching. More open-ended systems, such as tort awards for wrongful death or pain and suffering, are frequent subjects of political criticism. And the federal criminal-sentencing guidelines are an example of an effort to impose a countervailing pressure on what had been a relatively open-ended judicial function, the honoring of sympathetic defendants' pleas for mercy (or prosecutors' pleas for vengeance against unsympathetic ones).

216. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 105-16 (1980) (finding the protection of minorities' opportunities for political participation central to the structure of the Constitution).

217. Cf. e.g., *Kitchens v. Bowen*, 825 F.2d 1337, 1340-41 (9th Cir. 1987) (dismissing on federalism grounds an absent parent's suit seeking the right to a hearing concerning the custodial parent's application for AFDC benefits where the state would seek reimbursement for these benefits from the non-custodial parent if the application is successful). But see 20 C.F.R. § 404.932 (2003)

take the form of specialized audits in which an independent unit examines a subset of cases in which benefits were granted to check for errors. As a result, agency staff whose sympathies might otherwise tempt them to grant benefits in questionable cases face the risk of being held accountable.

Indeed, sophisticated policymakers have at times sought to change programs' operations by manipulating counter-entitlements rather than by changing the terms of the programs' entitlements.²¹⁸ Accordingly, when Congress sought to transform the substantive priorities of its cash-assistance programs in the mid-1990s, or when a future Congress or administration seeks to modify the substantive priorities of another entitlement program, it makes sense to consider whether creating or modifying counter-entitlements might be a more effective means of implementing the change. Thus, for example, instead of denying public assistance to families in which children are not immunized—curtailing an entitlement—policymakers could consider reducing Medicaid's per capita reimbursements of managed-care plans where more than a minimal share of child beneficiaries have not received their shots—creating a counter-entitlement. Similarly, when Congress became concerned about long-term foster-care placements, it could have reduced payments under the Child Welfare Services program to states that failed in large numbers of cases to take specified efforts to reunify families instead of requiring states to commence actions to terminate the rights of parents whose children have been in foster care for fifteen months.²¹⁹

Making policy by manipulating counter-entitlements will only be viable if counter-entitlements can exert strong enough pressure on human-services agencies and their staffs to offset the pressure that entitlements exert. Just as Part II.B demonstrated that legal entitlements have exerted far less pervasive influence on benefit programs' design than is commonly assumed, this Section argues that counter-entitlements can be much more powerful than is generally recognized. Part II.C.1 identifies the defining characteristics of counter-entitlements, briefly sketches their history in major federal public-benefit programs, and offers thumbnail descriptions of some of the more important counter-entitlements attached to major

(allowing any party whose interests would be adversely affected to request a hearing on a Social Security dispute); 20 C.F.R. §§ 404.403-404.406 (reducing the benefits of Social Security beneficiaries based on other persons' claims for benefits on the account of the same wage-earner).

218. For example, the Reagan Administration pursued its desire to reduce spending on SSI and Social Security disability benefits, AFDC, and food stamps as much by strengthening counter-entitlements in those programs as by narrowing the terms of those programs' substantive entitlements. The Clinton Administration's desire to expand the availability of health insurance was marked by a relaxation of Medicaid's counter-entitlement. Towards the end of its term, the Clinton Administration also relaxed the food stamp program's counter-entitlement to help low-income working families that were eligible but not participating.

219. See 42 U.S.C. § 675(5)(E) (2000); Super, *New Moralizers*, supra note 100, at 2054-55 (criticizing requirement).

entitlement programs today. Part II.C.2 demonstrates the programmatic power of counter-entitlements with a case study.²²⁰ Finally, Part II.C.3 considers how a counter-entitlement might have enforced work requirements had PRWORA not eliminated the entitlement to cash assistance in 1996.

1. *The Rise of Counter-Entitlements in Public-Benefits Programs*

Following the initial landmark cases of the late 1960s, the 1970s saw the blossoming of legal entitlements as a means of managing public-benefit programs. At about the same time, however, the major federal means-tested public-benefit programs were developing counter-entitlements. These systems most commonly sought to restrain programs' costs and enforce high standards of integrity.

In significant respects, counter-entitlements operate almost as a shadow to fair-hearing systems. As such, they have five generic characteristics. First, like fair hearings, they are specific to particular cases. Just as each fair hearing examines one specific set of decisions involving one particular claimant, each counter-entitlement review analyzes a case handler's decisions involving one particular claimant. In place of the aggrieved claimant's appeal, a counter-entitlement needs a system for selecting cases to be reviewed. Some counter-entitlements rely on random sampling; others have selection processes that target cases in which it appears that an error favoring the claimant has occurred.²²¹

Second, counter-entitlements, like fair hearings, rely upon independent reviewers to make judgments about cases. *Goldberg* concluded that the supervision of eligibility workers' regular overseers was not sufficient to ensure that those workers paid benefits to all eligible claimants. It therefore required that hearing officers be individuals not previously involved in the disputed decision. In the same vein, counter-entitlements introduce independent reviewers to supplement regular supervisors' oversight—and, presumably, to give those supervisors incentives to watch their staff more carefully.

220. Specifically, it shows how the food stamp program's quality control (QC) system overwhelmed one of the stronger entitlements in the mid and late 1990s and reshaped the program's substantive priorities. When the administering agency and Congress ultimately sought to realign the food stamp program's priorities, they focused not on transforming or strengthening the terms of its entitlements but rather on weakening and redirecting its counter-entitlement. See Super, *Quiet Revolution*, *supra* note 104, at 1354-58.

221. An example of the latter is the Bellmon review process of the Social Security Administration (SSA). Bellmon reviews evaluate an SSA administrative law judge (ALJ) by re-examining a sample of cases that she has decided. They sample a larger fraction of cases in which the ALJ allowed benefits than of those in which the ALJ rejected the disability claim. See *infra* note 232 and accompanying text. Similarly, the portion of the food stamp quality control system that imposes sanctions on states only samples cases where states granted at least some benefits, thus ignoring terminated and denied cases in which any error would be adverse to the claimant.

Third, like fair hearings, counter-entitlements seek to rely on objective standards—typically the agency’s rules—for making decisions. A fair-hearing officer, at least in principle, is not free to award benefits simply because she finds the claimant’s circumstances subjectively compelling. So, too, a reviewer in a counter-entitlement system may not reject the case handler’s decision unless she can show that it violates specific agency rules. For example, if a program’s rules direct case handlers to accept the medical assessments of claimants’ treating physicians, a subsequent reviewer would not be free to criticize the case handler’s acceptance of a claimant’s disability simply because she believes—even for compelling reasons—that the doctor was wrong.²²²

Fourth, counter-entitlements generalize from the cases they examine and draw conclusions about how program administrators are doing their jobs.²²³ Remedies typically affect the entire caseload rather than just those individual cases found in error. In a sense, this mimics the role of affirmative class-action litigation, which sometimes allows claimants with entitlements to argue that the agency is mistreating other claimants and achieve agency-wide relief.²²⁴

Finally, counter-entitlements have the capacity to impose consequences on the basis of their reviews. Fair-hearing decisions can compel awards of benefits to individual claimants. Counter-entitlements’ consequences typically are more systemic. Some counter-entitlements produce a ranking system that embarrasses underachievers²²⁵ or holds high performers out as models.²²⁶ With other counter-entitlements, the consequence may be a requirement to take corrective action, to impose additional limitations on managerial flexibility, to provide less administrative funding, or to demote or otherwise affect the employment status of individual case handlers. These consequences give counter-entitlements their ability to change case

222. Thus, counter-entitlements, like fair hearings, give case handlers incentives to reduce the risk of reversal by basing their decisions whenever possible on those criteria that are subjective and hence immune from second-guessing.

223. See, e.g., *supra* notes 120-23, and accompanying text for a description of the food stamp QC system.

224. See, e.g., *Robertson v. Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) (holding the state Commissioner fully responsible for ensuring compliance with federal laws and regulations concerning the acceptance and processing of applications for food stamp assistance); *Alexander v. Hill*, 707 F.2d 780, 784 (4th Cir. 1983) (awarding the eligible applicants remedial fines in their class action to compel timely processing of federal-aid-program application); *Harley v. Lyng*, 653 F. Supp. 266, 280-83 (E.D. Pa. 1986) (issuing an order setting forth requirements that the department had to meet in order to comply with federal standards for the food stamp program).

225. See, e.g., Jim Lynch, *State Fumbled Food Stamps: Washington Ranks Worst Among States for Errors and Fraud*, SEATTLE TIMES, Aug. 10, 1998, at A1; Steven Rosenlind, *County Off \$53.9M in Food Stamp Payments: Audits Show Fresno County’s Error Rate is Among the Highest*, FRESNO BEE, Aug. 29, 1998, at A1; Leslie Tayler, *State Has Worst Error Rate for Food Stamps*, ROANOKE TIMES, Feb. 15, 1998, at B5.

226. See, e.g., John Butch, *Miss. Ranked 8th in Food Stamp Distribution Accuracy*, CLARION-LEDGER, Oct. 23, 1999, at 1A.

handlers' and local administrators' behavior, particularly since losing a fair hearing ordinarily has no consequences beyond the individual case involved.

Beyond these five basic characteristics, counter-entitlements differ from one another considerably. Food stamps, Medicaid, and the former AFDC program have measured the accuracy of eligibility decisions through "quality control" (QC) systems that both ranked states' performance and imposed fiscal penalties on states not meeting specified goals. In each of these programs, the QC systems served the primary values of cost minimization and program integrity. Medicaid policymakers determined that reimbursements to providers for unnecessary services cost the program more than inaccurate eligibility determinations. Accordingly, they established a variety of counter-entitlements requiring states and providers to review utilization to ensure that it was truly necessary.²²⁷ In 2004, seeking to cut Medicaid's costs, the Bush Administration proposed administrative rules that would reinstitute strict QC for eligibility decisions.

Related monitoring systems also arose in child-support enforcement²²⁸ and foster care.²²⁹ Thus, for example, states face loss of federal child-support funds if they do not move a large percentage of cases beyond each major milestone in the process (e.g., establishment of paternity, issuance of a support order) within a specified period of time. The school meal programs impose state-supervised counter-entitlements on local school food-service authorities' eligibility decisions.²³⁰

The Social Security Administration (SSA) operates two major counter-entitlements for the Supplemental Security Income (SSI) program's disability determination, both of which also are designed to cut costs. One relatively little-known counter-entitlement redetermines eligibility in samples of cases in which state disability determination services (DDSs), which make initial disability determinations for SSA, grant

227. Although the reviews involve particular claimants, and the outcomes affect those claimants' receipt of benefits, the claimants are often not permitted to participate. *See, e.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 994 (1982) (requiring each nursing home to establish a utilization review committee of physicians who periodically assess whether each patient's continued stay in the facility is justified); *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 775-76 (1980). *But see* *Fifty Residents of Park Pleasant Nursing Home v. Commonwealth Dep't of Pub. Welfare*, 503 A.2d 1057 (Pa. Commw. Ct. 1986) (noting that HEW notified Town Court that it no longer met the statutory and regulatory standards for skilled nursing facilities and that, consequently, its Medicaid provider agreement would not be reviewed).

228. *See, e.g.*, *Hodges v. Thompson*, 311 F.3d 316, 317 (4th Cir. 2002) (upholding fiscal sanctions against states); *Kansas v. United States*, 214 F.3d 1196, 1203 (10th Cir. 2000) (upholding child-support enforcement conditions on availability of TANF block grant funds).

229. *See, e.g.*, *Conn. Dep't of Children & Youth Servs. v. Dep't of Health & Human Servs.*, 9 F.3d 981, 987 (D.C. Cir. 1993) (upholding sampling procedure to determine states' performance for purposes of allocating bonus funds); *cf.* *Harvey v. Shalala*, 19 F.3d 1252, 1253 (8th Cir. 1994) (rejecting the state's attempt to correct case files retroactively to justify federal foster-care payments).

230. 7 C.F.R. §§ 210.18, 225.7, 226.8 (2003).

benefits.²³¹ The other, one of the best-known of all counter-entitlements, is Bellmon reviews. These subject administrative law judges (ALJs) that grant a high percentage of appeals from adverse decisions to more intensive reviews.²³²

Just as entitlements became more formalized in the decade and a half following *King v. Smith*²³³ and *Goldberg v. Kelly*,²³⁴ counter-entitlements became more institutionalized during this period. Indeed, as courts were imposing one set of procedural changes that tended to increase the chance that agencies would grant claims for AFDC benefits, the Department of Health and Human Services was imposing another that expanded the same agencies' authority to conduct intrusive investigations into claimants' applications²³⁵ and established a QC system to pressure local agencies into exercising that authority.²³⁶

Food stamp QC findings initially served only as a source of management information that could lead to discretionary enforcement action by USDA. In the early 1980s, however, after President Reagan, Senator Jesse Helms, and others criticized AFDC and food stamps as causing "waste, fraud, and abuse," Congress made fiscal penalties automatic for states whose error rates exceeded statutory targets.²³⁷ Because few members of Congress wanted to be seen as defending "high error rates," the threshold for fiscal sanctions was set so low that all but a handful of states were liable for sanctions. Neither Congress nor the Reagan and Bush Administrations had much stomach for collecting hundreds of millions of dollars from states. Yet even as a series of collection moratoria were followed by legislative and administrative actions to moderate the sanction threshold²³⁸ and

231. See SOCIAL SECURITY ADVISORY BOARD, DISABILITY DECISION MAKING: DATA AND MATERIALS 62 (2001).

232. Compare, e.g., *Barry v. Bowen*, 825 F.2d 1324, 1331 (9th Cir. 1987) (finding "Bellmon reviews" of ALJs "not substantially justified" and hence sufficient to justify an award of attorneys' fees to a claimant challenging their use) with *Stieberger v. Heckler*, 615 F. Supp. 1315, 1376-97 (S.D.N.Y. 1985) (finding Bellmon reviews unobjectionable), *vacated on other grounds*, 801 F.2d 29 (2d Cir. 1986). From time to time, recommendations have been made for other counter-entitlements in the Social Security and SSI disability-determination processes, such as allowing an advocate for the Commissioner to participate in hearings. See, e.g., SOCIAL SECURITY ADVISORY BOARD, CHARTING THE FUTURE OF SOCIAL SECURITY'S DISABILITY PROGRAMS: THE NEED FOR FUNDAMENTAL CHANGE 19 (2001).

233. 392 U.S. 309 (1968).

234. 397 U.S. 254 (1970).

235. *Casey & Mannix*, *supra* note 83, at 1385 (describing the repeal of regulations limiting home visits and eligibility workers' calls to third parties that accompanied the establishment of AFDC QC). Thus, the due-process revolution resulted in the legalization of welfare-eligibility determination procedures in two ways: it not only mandated one set of procedural protections but also indirectly contributed to the disappearance of many of those that it did not constitutionalize.

236. *Id.* at 1381.

237. 7 U.S.C. § 2025(c)(1) (2000).

238. In the late 1980s, Congress raised the sanction threshold in AFDC and the food stamp program to the national average error rate or something similar to it. Even with only about half the states subject to sanction each year, many others were near enough the threshold to be intimidated.

forgive or compromise most accrued penalties,²³⁹ states and their frontline eligibility staffs were given strong incentives to avoid paying benefits to ineligible households or overpaying eligible ones.²⁴⁰

2. *The Programmatic Impact of a Powerful Counter-Entitlement: The Case of the Food Stamp Quality Control System*

The power of counter-entitlements to effect substantive changes in spite of an existing entitlement structure is best demonstrated by example. Several counter-entitlements have profoundly shaped the administration of the programs to which they are attached. Bellmon reviews likely resulted in denials and terminations for large numbers of claims that might otherwise have been granted and may have contributed to the glut of Social Security and SSI cases hitting the federal courts in the 1980s.²⁴¹ Medicaid utilization

CTR. ON BUDGET & POLICY PRIORITIES, PREVENTING POTENTIAL FOOD STAMP QUALITY CONTROL LIABILITIES FROM DERAILING THE ADMINISTRATION'S FOOD STAMP AGENDA 21 n.11 (1999).

239. USDA allowed states to "reinvest" many of their sanctions in error-reduction activities. Although reinvested sanctions are not paid directly to the federal government, from the state's point of view reinvestment represents an appropriation of state funds it would not have otherwise made. Agency officials, in turn, must undertake the embarrassing task of justifying these appropriations within the executive branch and to the legislature. Unlike the costs of most other administrative activities, for which states receive a 50% match from the federal government, states do not receive any federal match for reinvestment activities. According to USDA, states reinvested about \$140 million in liabilities accrued between 1986 and 1998.

240. The history of counter-entitlements in Medicaid is more complex. The cost of health care is so high that, even paying well less than half of the cost, each additional Medicaid beneficiary has a substantial impact on states' budgets. In recognition of this, federal law has made little effort to impose detailed oversight of the accuracy of states' eligibility decisions. States must have a quality control system, but for more than a decade, they have been free to design whatever system they decided best suited their needs. Over the past decade, the federal Centers for Medicare and Medicaid Services (CMS) has penalized no state for improper allowances of benefits. The Bush Administration recently published a notice of proposed rulemaking to establish a federally directed quality control system for Medicaid that arguably would be the most severe in the history of the federal government: it would, for example, punish states for correct payments that reviewers believe are miscoded.

The absence, until recently, of a strong federal role designing a Medicaid counter-entitlement has left states largely on their own. Their financial responsibilities have served as an imperfect incentive to ensure accurate eligibility decisions. During periods of relative fiscal health, states may be unconcerned with errors that cover beneficiaries with incomes or resources modestly exceeding the program's stated eligibility limits. During recessions, periods of rapid growth in health-care costs, and other periods when state budgets are under stress, even correct decisions may be a source of anxiety. Thus, states may have little incentive to scrutinize cases closely during booms, and may even be tempted to erect procedural barriers that discourage eligible families when savings seem essential. The effect is to make Medicaid spending more cyclical, although perhaps not enough to balance the naturally counter-cyclical nature of spending on means-tested programs. The difficulty of organizing and dismantling effective counter-entitlements has likely interfered with many states' efforts to control their Medicaid programs. In addition, some states probably lack the sophistication to resolve the important issues associated with designing a counter-entitlement. It is far from clear, however, that CMS's proposal provides a sensible response to these issues.

241. See, e.g., F. William Hessmer IV, *Own Motion Review of Disability Benefit Awards by the Social Security Administration Appeals Council: The Improper Use of an Important Procedure*, 2 ADMIN. L.J. 141 (1988); L. Hope O'Keeffe, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L.

review has transformed the way nursing homes and, to a lesser extent, hospitals operate.²⁴² AFDC QC was implicated in a proliferation of paperwork requirements that even Kafka could have admired.²⁴³

None, however, has overwhelmed as many opposing philosophical, political, legal, and administrative forces as the food stamp QC system. Accordingly, this Section illustrates the transformative potential of a counter-entitlement by examining food stamp QC. That the legal entitlement to food stamps provided no means for blunting the effects of the food stamp QC system demonstrates that counter-entitlements can have drastic effects on the substantive priorities of programs that retain legal entitlements.

a. The Operation of the Food Stamp Quality Control System

The food stamp program's financing structure was virtually unique when it was established and remains highly exceptional: states have primary responsibility for determining eligibility under relatively complex criteria for a broadly available entitlement benefit funded entirely by the federal government.²⁴⁴ The Food Stamp Act of 1964 initially gave oversight authority to USDA,²⁴⁵ but with limited resources the Department had little capacity to identify any but the most egregious state administrative deficiencies. The Food Stamp Act of 1977 sought to improve USDA's oversight capacity by requiring states to conduct QC reviews of their eligibility decisions. Where a review showed a deficiency in a state's administration, USDA could press the state's administrators for corrective action and could withhold some of the states' administrative funding to compel compliance. Although USDA did sanction states on a number of occasions, states' error rates provided ready support for the program's critics' charges of weak administration.²⁴⁶

REV. 591 (1986); Richard J. Pierce, *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 503 (1990).

242. See, e.g., David S. Douglas et al., *Rx for the Elderly: Legal Rights (And Wrongs) Within the Health Care System*, 20 HARV. C.R.-C.L. L. REV. 425, 476-77 (1985).

243. See Dehavenon, *supra* note 85.

244. Other programs have superficially similar financing structures but differ dramatically from the food stamp program. Although school breakfast and lunch benefit programs are funded entirely with federal dollars, for instance, these subsidies are relatively modest, and states determine eligibility for meals merely by classifying a family's income into one of three ranges. And though state or local agencies determine eligibility for WIC, LIHEAP, and federal housing-assistance programs, none of these programs are responsive ("open-ended") entitlements: the federal government's financial exposure is limited by the formula specifying each state or public housing authority's allocation. See Super, *Political Economy*, *supra* note 22, at 654-55. In a responsive entitlement program, by contrast, costs are constrained by eligibility and benefit-calculation rules. If states poorly enforce those rules, the federal government's financial exposure could be substantial.

245. H.R. REP. NO. 95-464, 292-98 (1977).

246. USDA ultimately forgave most of the fiscal sanctions it initially assessed against states. Particularly under the Carter Administration, fiscal sanctions were seen more as a way of increasing leverage to compel compliance than a penalty that would actually be collected.

As a result, in 1981 Congress imposed automatic, mandatory fiscal penalties on states that issued more than an arbitrarily set percentage of benefits incorrectly.²⁴⁷ The levels chosen, however—9% in the first year, 7% in the second year, and 5% thereafter—were well beyond the capacity of most states to meet.²⁴⁸ Because QC error rates now had direct fiscal consequences, this legislation resulted in the development of a much more formal and extensive set of rules for measuring errors. These included sampling standards, review procedures, minimum completion rates to avoid biasing the sample, and rules specifying which types of variances would and would not be charged as errors.²⁴⁹ The sample size became quite formidable: in fiscal year 2000, the number of food stamp QC reviews exceeded the number of food stamp fair hearings by 40%.²⁵⁰ To guard against underzealous state reviews of their own performance, federal officials re-reviewed a sample of states' samples.²⁵¹

The unrealistic targets selected left over forty states facing fiscal penalties each year. It soon became evident that a system that sanctioned such large numbers of states was politically unsustainable.²⁵² Rather than abandoning the concept of automatic sanctions, however, Congress attempted to design a system that would sanction a small enough number of states to be enforced.²⁵³ Nonetheless, until a final round of QC liberalization in 2002,

247. See 7 C.F.R. § 275.10 (2004).

248. These targets were proposed by Senator Bob Dole, a strong supporter of the food stamp program, who concluded that error rates were undermining political support for the Program.

249. Pub. L. No. 97-253 (codified as subsequently amended at 7 U.S.C. § 2025(c) (2000)). AFDC's QC system was tied to similarly unrealistic error-rate targets at about the same time. See 42 U.S.C. § 603(i), 608 (1994) (repealed 1996). A somewhat analogous system applied to Medicaid under 42 U.S.C. § 1396b(u) (2000). Initially, states stalled through administrative appeals and litigation to challenge the method by which error rates were calculated. Eventually, Congress intervened to impose a series of moratoria on error-rate collections. See, e.g., 42 U.S.C. § 603(m) (1994) (repealed 1996).

250. In fiscal year 2000, the most recent year for which USDA has published data, states completed food stamp QC reviews of 48,275 cases. QUALITY CONTROL BRANCH, USDA, FOOD STAMP PROGRAM QUALITY CONTROL ANNUAL REPORT, FISCAL YEAR 2000, at 5 (2002). Only 34,451 food stamp fair hearings were decided that year. STATE ADMIN. BRANCH, USDA, FOOD STAMP PROGRAM STATE ACTIVITY REPORT, FISCAL YEAR 2000, at 22 (2001).

251. See 7 C.F.R. § 275.3(c), 275.23(e)(8) (2004). From the discrepancies between the state and federal QC reviewers' findings, a regression is used to project what federal reviewers might have found had they reviewed the entire state sample. *Id.* § 275.23(e)(8). Notably, federal officials re-reviewed 18,550 of the cases state QC bureaus had sampled and reviewed, some 38% of the total. QUALITY CONTROL BRANCH, USDA, *supra* note 250. USDA considered and rejected having federal officials review states' fair hearings for accuracy, apparently because doing so would be too costly. See 7 C.F.R. § 273.15(u) (2003).

252. See NATIONAL ACADEMY OF SCIENCES, RETHINKING QUALITY CONTROL: A NEW SYSTEM FOR THE FOOD STAMP PROGRAM 84-86 (Dennis P. Affholter & Fredrica D. Kramer eds., 1987).

253. The Hunger Prevention Act of 1988, Pub. L. No. 100-435, changed the sanction threshold to the lowest national average ever achieved plus one percentage point. It also sought to improve the balance of the measure by counting underissuances—cases in which eligible households received some benefits but less than food stamp rules direct—along with overissuances. Improper denials and terminations were not counted because states often lack sufficient information to determine the amount of benefits lost by improperly denied households.

the substantial majority of states were at financial risk based on their food stamp QC error rates in any given year.²⁵⁴

Moreover, even states that have performed better than the national average in prior years may fear sanctions because the measurement of states' error rates is subject to some statistical uncertainty²⁵⁵ and because substantial improvements in other states' error rates could lower the national average.²⁵⁶ The number of states over, or within one percentage point of, the national average climbed from twenty-three to thirty-three during this period, putting more states at risk as a direct consequence of states' own improvement in administration.

Overall, from 1993 through 2000, almost forty states were sanctioned at least once. In addition, through fiscal year 1997 a standard part of the settlement agreements USDA negotiated to resolve states' sanction liabilities involved holding some of a state's sanction "at risk" based on its performance in future years. If the state achieved specified error-reduction targets, the "at risk" money would be forgiven; if not, that money would have to be reinvested or paid to USDA. Each "at risk" agreement typically set error-rate targets for several future years.

Nor was QC's impact limited to states with high error rates. States that received enhanced funding because of a very low error rate²⁵⁷ could quickly come to budget in reliance on those funds.²⁵⁸ Should the state's

The Mickey Leland Childhood Hunger Relief Act of 1993, Pub. L. No. 103-66, changed the sanction threshold to the current year's national average (without the previous one-point margin for error) and established a sliding scale for QC penalties that greatly reduced the impact on states whose error rates modestly exceeded the national target. Pub. L. No. 103-66 § 13951(c).

Finally, the 2002 farm bill modified the threshold further so that only about three to five states will face penalties each year. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 4118, 116 Stat. 134, 316 (repealing 7 U.S.C. § 2025(c)(1)(A) (2000)) (to be codified at 7 U.S.C. §§ 2022, 2025, 2027, 2031); see Super, *Quiet Revolution*, *supra* note 104, at 1357.

254. With sanctions applied to states whose error rates exceed the national average, by definition a substantial number of states would be sanctioned every year. As several large states reduced their error rates in the mid-1990s, the national average error rate fell from 10.81% in 1993 to 9.23% in 1996 while the number of states in sanction increased from sixteen to twenty-five. QUALITY CONTROL BRANCH, USDA, FOOD STAMP QUALITY CONTROL ANNUAL REPORT, FISCAL YEAR 1997, at 13 (1998). The threshold for sanctioning states is the national combined payment error rate, which is the sum of the national overissuance error rate and the national underissuance error rate. Each of those component error rates is computed by dividing all errors of that type by the total national benefit issuance. Thus, the error rates of states with large volumes of food stamp issuances have far more impact on the sanction threshold than do those of states issuing relatively few benefits.

255. The margin of error for most states' error rates is between one and two percentage points. In other words, a state with an error rate just below the national average faces a nontrivial chance that, in the following year, its error rate will rise above the national average simply because of an unlucky sample.

256. A state cannot know until the end of the year how low its error rate needs to be to avoid sanction. If a few large states lower their error rates substantially and thereby reduce the national average, a state that has consistently performed reasonably well may unexpectedly face a sanction.

257. 7 U.S.C. § 2025(c)(1)(B) (2000) (repealed 2002).

258. For 2002, thirteen states received \$77 million in enhanced funding. FOOD STAMP PROGRAM, ERROR RATES, POTENTIAL AND ADJUSTED LIABILITIES, AND ENHANCED FUNDING, FISCAL YEAR 2002

error rate rise above 6% and cause a cessation of that funding, the human-services agency may find a hole in its budget and criticism from the governor's budget office, the state legislature, or the media.²⁵⁹

The ultimate effect of the QC program was to drive both federal and state administrators to obsess over "payment accuracy." Although payment accuracy was but one of several objectives set out for the Food and Nutrition Service (FNS) in USDA's strategic plan under the Government Performance and Results Act,²⁶⁰ it was the only one that FNS had a ready means of quantifying at the state level.²⁶¹ Error reduction permeated almost all aspects of FNS's relations with states.²⁶² FNS regional offices, which previously had brought together state agencies' staffs for annual discussions of a wide range of food stamp administrative issues, now convened dedicated "payment accuracy conferences" each year. On the national level, despite the varied challenges the food stamp program was facing in the post-TANF world, the two national conferences to which FNS flew state agency staff in the years immediately following PRWORA were devoted to "payment accuracy."²⁶³ Much of the food stamp-related travel of senior FNS officials was QC-related, and error rates became the primary focus of most meetings between regional FNS officials and state administrators.²⁶⁴ At least one FNS regional administrator twice met personally with a state governor and extracted a commitment from the governor to reduce the state's error rate to 7%, a level well below the sanction

(2003). Eleven other states had combined payment error rates between 6% and 8%, *id.*, giving them realistic prospects of achieving enhanced funding in the near future. Between the states potentially subject to liabilities and those aiming for enhanced funding, the overwhelming majority of states had strong incentives to seek policies that would lower their error rates.

259. *See, e.g., Arkansas Earns \$2.7 Million for Handling of Food Stamps*, ARKANSAS DEMOCRAT-GAZETTE, Aug. 14, 1998, at B3; Noelle Phillips, *Owensboro, Ky., Department Awarded for Excellence in Foodstamp Administration*, MESSENGER-INQUIRER, June 7, 1977; Carl Redman, *Louisiana Gets \$3 Million Extra for Food Stamp Administration*, ADVOCATE (BATON ROUGE), Aug. 4, 1998, at 11A.

260. Pub. L. No. 103-62, 107 Stat. 285 (codified in various sections of 31 U.S.C.).

261. *See* 31 U.S.C. § 1115(a)(2) (2000) (requiring quantifiable goals).

262. USDA's publications on program management similarly reflected this single-minded focus on error rates. *See, e.g.,* FOOD & NUTRITION SERVICE, USDA, MANAGING FOR PAYMENT ACCURACY: A REVIEW OF STATE PRACTICES (1999); FOOD & CONSUMER SERVICE, USDA, MANAGING FOR PAYMENT ACCURACY: A REVIEW OF STATE PRACTICES (1997); KRA CORPORATION, EVALUATION OF GRANTS TO STATES FOR THE REDUCTION OF PAYMENT ERROR IN THE FOOD STAMP PROGRAM (1996) (report commissioned by USDA); FOOD & CONSUMER SERVICE, USDA, MANAGING FOR PAYMENT ACCURACY: A REVIEW OF STATE PRACTICES (1996); FOOD & CONSUMER SERVICE, USDA, MANAGING FOR THE PUBLIC TRUST: NATIONAL FOOD STAMP PAYMENT ACCURACY REPORT (2d ed. 1995-96); FOOD & CONSUMER SERVICE, USDA, MANAGING FOR THE PUBLIC TRUST: NATIONAL FOOD STAMP PAYMENT ACCURACY REPORT (1995).

263. Having seen a severe reprimand in Congress's prolonged flirtation with a food stamp block grant, it appears that some FNS staff, particularly on the regional level, were eager to find a means of redemption. Since critics of the program long had focused on error rates, and since error rates were one of the most readily quantifiable measures of performance, improving payment accuracy seemed the obvious vehicle for winning back congressional favor. *See Super, Quiet Revolution, supra* note 104, at 1320-22.

264. *See id.* at 1302-03.

threshold.²⁶⁵ With so many states subject to sanctions or competing for enhanced funding for extremely low error rates, both federal and state officials came to evaluate substantive policy proposals based on their likely effect on error rates.²⁶⁶ In contrast to AFDC, where states sought waivers to implement work requirements, family caps, and other social policies, states' food stamp waivers typically sought to define away categories of errors.²⁶⁷

b. How QC Skewed Incentives in the Food Stamp Program

Although the food stamp QC system provided an incentive to process cases correctly, that incentive is not unbiased. Since improper awards of eligibility count as errors and improper denials do not, a policy of "when in doubt, deny" would have much to commend it. One hopes that few if any agency staff would espouse so crude a policy, but this bias in QC's measurement system nonetheless is likely to affect outcomes.²⁶⁸

In addition, the QC counter-entitlement, although nominally treating all cases the same, in fact counterbalanced the entitlements of some eligible households far more than others. Eligibility and benefit levels are more difficult to determine correctly for some types of households than for others. States are less likely to set benefit levels inaccurately—or to see once-accurate benefit levels become erroneous because of changes in a household's circumstances—when serving households with fixed incomes, such as cash assistance, SSI, or Social Security, than when serving those with earnings or irregular child-support income.²⁶⁹ Similarly, households subject to specialized categorical eligibility rules, such as immigrants and college students, are likely to be more error prone than households not containing a member in one of those categories.²⁷⁰ Here again, it seems unlikely that

265. *See id.* at 1312 n.148.

266. *See, e.g.*, GENERAL ACCOUNTING OFFICE, FOOD STAMP PROGRAM: STATES SEEK TO REDUCE PAYMENT ERRORS AND PROGRAM COMPLEXITY (2001) (treating error reduction as the primary goal of program simplification); Editorial, *Revamp Food Stamp Rules*, DESERET NEWS, Mar. 8, 2002, at A12 (citing state's error rate as evidence that food stamp rules need to be changed).

267. *See* CENTER ON BUDGET & POLICY PRIORITIES, PREVENTING POTENTIAL QUALITY CONTROL LIABILITIES FROM DERAILING THE ADMINISTRATION'S FOOD STAMP AGENDA 6-8 (1999).

268. For example, with limited time and staff resources available for training eligibility workers and improving automated eligibility systems, those areas of policy in which staff have been too lenient, causing overissuances, are likely to be well known to state administrators and to receive priority; indeed, program administrators may be unaware of which policies are being misapplied to cause substantial numbers of improper denials and terminations. (Because a state's negative error rate is not relevant to its potential sanction liability, USDA did not check states' reported negative error rates during the 1990s.)

269. Indeed, in fiscal years 1998 and 1999, all but one state reported having a higher payment error rate for households with earned income than it did for households without earnings. *See* CENTER ON BUDGET & POLICY PRIORITIES, PREVENTING POTENTIAL QUALITY CONTROL LIABILITIES FROM DERAILING THE ADMINISTRATION'S FOOD STAMP AGENDA 11 (1999).

270. In fiscal years 1998 and 1999, over forty states had higher error rates for immigrant households than they did for nonimmigrant households.

state administrators or even individual eligibility workers would deliberately deny or discourage a household simply because it falls in a more error-prone category. These households may, however, receive special scrutiny and be subject to additional verification requirements that have the effect of increasing the costs of participating and the likelihood of a procedural default by the household.²⁷¹

The QC counter-entitlement's dominance in ruling state administration is underscored by the fact that no other aspect of states' performance in administering the food stamp program is subject to a remotely comparable measurement-and-incentive system. For example, USDA does not have a systematic way of measuring states' success in meeting statutory deadlines for providing food stamps to eligible applicants, for supporting working poor families, for providing accurate information to those who might apply for food stamps, or for maintaining basic customer service to applicants and recipients (by, for example, answering telephones or limiting waiting times for persons with appointments). States do conduct a separate, much less rigorous review of "negative" cases—those denied or terminated from food stamps.²⁷² These reviews, however, usually consist only of a desk review of the eligibility worker's case record. More importantly, no sanctions attach to states with high rates of improper denials and terminations.

c. The Results of the Counter-Entitlement's Dominance

The simplistic model of legal entitlements holds that as long as claimants retain an enforceable right to benefits, administrators' hands are tied. Such a model might accept that systems like food stamp QC could influence administrators' behavior in ways not affecting benefits, but the model would insist that the legal entitlement would block any policies seriously disadvantaging claimants. By contrast, the adversarial model of program administration, in which frontline staff balance pressures they receive from both entitlements and counter-entitlements, would predict that eligible claimants' access to benefits could suffer if a strong counter-entitlement overwhelms a weak entitlement. The history of states' responses to food stamp QC, particularly in the late 1990s, lends powerful support to the adversarial model and undercuts its rival.

Because of their powerful impact on states, QC error rates increasingly began to drive states' policymaking on issues relating to the food stamp program. The effect on claimant households, for the most part, was quite negative. A particularly dramatic example of the impact of food stamp QC on policymaking can be seen in the case of short certification periods. Often at USDA's recommendation, states required households

271. See Super, *Quiet Revolution*, *supra* note 104, at 1311-12.

272. See 7 C.F.R. § 275.13 (2003).

with current or recent work histories to come to food stamp offices every three months to reapply. Frequent visits to the welfare office can be very inconvenient for households with earnings because many states assign interview times without regard to households' work schedules.²⁷³ Nonetheless, between 1994 and 1999 several states sharply increased the proportion of working families with children that were required to reapply every three months. Nationally, data gathered through the food stamp QC system demonstrate that the proportion of working families with children required to come into food stamp offices at intervals of three months or less *more than tripled* between 1994 and 1999, rising from less than one-tenth to a full one-third of such households.²⁷⁴ Four of the five states with the largest declines in food stamp participation among working families between 1994 and 1999 all dramatically expanded their use of three-month certification periods during those years.²⁷⁵ Similarly, participation *rates*—the percentage of eligible households of all types that received food stamps in an average month—fell from 74% to 55% between 1994 and 1998 in the eleven states that increased their use of three-month certification periods for working families with children by more than 50 percentage points during this period.²⁷⁶ In other states, the participation rate fell only half as much, from 70% to 61%.²⁷⁷

The rapid increase in short certification periods in the food stamp program was remarkable in part because it dramatically increased states' workloads. At a time when most states were under strong political pressure to devote all available resources to driving down their cash-assistance caseloads, the willingness of many states—including “welfare reform” poster child Wisconsin—to accept the burden of recertifying households two to four times more often is a testament to the power of this counter-entitlement.

Perhaps even more telling is the fact that this mass conversion of cases to three-month certification periods was illegal. Food stamp regulations required that each household be given the longest certification period possible based on its individual circumstances, with a presumption of at

273. Most local welfare offices are not open in the evenings or on weekends. A USDA survey of food stamp recipients in 1996 found that the average applicant spent five hours applying for food stamps initially, and two to three hours applying for recertification. FOOD & NUTRITION SERVICE, USDA, CUSTOMER SERVICE IN THE FOOD STAMP PROGRAM (1999).

274. *See infra* tbl. 1.

275. *See id.* Overall, ten of the twelve states that increased the proportion of working families that were required to apply every three months by at least fifty percentage points experienced declines in participation for working families that exceeded the national average for this period.

276. ALLEN L. SCHIRM & LAURA A. CASTNER, MATHEMATICA POLICY RESEARCH, REACHING THOSE IN NEED: STATE FOOD STAMP PARTICIPATION RATES IN 1999, at 2 (2002).

277. *Id.*; *see also* RANDY ROSSO, TRENDS IN FOOD STAMP PROGRAM PARTICIPATION RATES: 1994 TO 1999, at 16 (2001).

least six months except in unusual circumstances.²⁷⁸ Evidently, neither USDA nor the states that took its advice in converting their caseloads to three-month certification periods feared either fair-hearing requests or litigation to enforce claimants' entitlement to longer certification periods. It appears this confidence was well placed. Thus, for working families in particular, the counter-entitlement of food stamp QC swamped the entitlement to food stamps.²⁷⁹

Table 1: States with the Five Largest Declines in Food Stamp Participation Among Working Families, 1994 to 1999

State	Proportion of Working Families with Children Required to Reapply Every Three Months		Change in Participation Among Working Families 1994 to 1999
	1994	1999	
Texas	3%	60%	-39%
Indiana	0%	45%	-37%
Arizona	1%	87%	-37%
Mississippi*	0%	0%	-37%
Ohio	1%	68%	-34%
U.S.	9%	31%	-5%

Source: Tabulations by author and his former research assistant, Daniel Tenny, from USDA's Food Stamp QC database."

* Instead of requiring working families to reapply every three months, Mississippi required them to submit detailed reports of their circumstances every month, whether or not those circumstances have changed. *See Gilman v. Helms*, 606 F. Supp. 644 (D.N.H. 1985); 7 C.F.R. § 273.21. Failure to submit such a report shortly after the close of a month, or failure to attach all of a worker's pay stubs or other required documentation, results in termination of the household's food stamps. Studies conducted in the 1980s found that such monthly reporting requirements caused benefits to be terminated to many eligible households. Although all states once required food stamp households to report monthly, most other states have abandoned this requirement.

278. 7 C.F.R. § 273.10(f)(3), (4) (2000) (subsequently amended).

279. Barriers to participation are not limited to repeated, often lengthy, office visits that are scheduled during working hours. For example, some states call a worker's employer every three months to verify the employee's earnings. Low-wage workers who are concerned this may alienate their employers and endanger their jobs may conclude they do not wish to continue receiving food stamps. These practices, too, likely violate the terms of the food stamp entitlement. *See* 7 C.F.R. § 272.1(c), 273.2(f)(4), (5) (2000) (subsequently amended). Once again, no affirmative challenges were filed, and if these practices were challenged in fair hearings, the challenges were too rare to concern federal or state administrators.

Indeed, the counter-entitlement seemed to dominate the entire food stamp program. Between 1994 and 1999, eight states reduced their error rates by four or more percentage points, which represented very large reductions, considering that the national average error rate was around 10%. Food stamp participation in these states—Arizona, Florida, Indiana, Mississippi, Ohio, Texas, West Virginia, and Wyoming—declined by 44% over those years, compared to a 30% participation decline in the remaining states. Other states achieving more modest declines in food stamp error rates did not have unusually sharp declines in participation.

This perverse result became the subject of criticism across the political spectrum. Dr. Ron Haskins, former Staff Director of the House Subcommittee on Human Resources and the architect of the 1996 welfare law, testified on June 27, 2001 before a subcommittee of the House Agriculture Committee that it was only a slight exaggeration to say that “in the TANF program, states are penalized if they don’t put people to work. In the Food Stamp program, states are penalized if they do put people to work” because of the threat of food stamp QC penalties.²⁸⁰ It is evidence of the power of the food stamp QC counter-entitlement that states would disregard the overwhelming pro-work ideology of the era to impose policies that systematically disadvantaged low-wage working families.

d. The Political Character of Responses to the Food Stamp Quality Control’s Problems

With the legal entitlement to food stamps hopelessly overmatched, political efforts to change food stamp policy have increasingly focused on changing the QC counter-entitlement. In September 1999, recognizing that the emphasis on QC may conflict with the goal of serving working families effectively, USDA exercised its discretion to adjust the sanction amounts downward for those states serving relatively high or increasing shares of working households and households with immigrants.²⁸¹ Recent legislation has further moderated QC pressures on states. Spurred primarily by claimants’ advocates rather than states, the Farm Security and Rural Investment Act of 2002 increased the sanction threshold to 105% of the national average and provided for automatic fiscal penalties only against states that

280. See also Ed Bolen, *A Poor Measure of the Wrong Thing: The Food Stamp Program’s Quality Control System Discourages Participation by Working Families*, 53 HASTINGS L.J. 213 (2001).

281. Both of these groups had higher rates than the food stamp population as a whole, the former because of fluctuating income and the latter because of complex eligibility rules imposed in the 1996 welfare law. Because sanctions are based on a state’s error rate compared to the national average, states that serve relatively more households with earnings or immigrants will tend to have higher error rates. This means that in the absence of adjustments, states that maintain effective access for the working poor and immigrant families will be at greater risk of fiscal sanction. To counteract this inequity, USDA’s adjustments lowered liability amounts to hold states harmless for the extent to which they had a growing share of households with earners or immigrants, or a share of such households above the national average.

USDA determines to a 95% statistical certainty exceeded that level for two years in a row.²⁸² USDA has said it will continue some form of sanction adjustment, although those adjustments may no longer cover immigrants and may not fully offset the impact of high or rising shares of working households on states' error rates. Nonetheless, the new legislation is expected to reduce the number of states under sanction each year to between three and five. The 2002 legislation also restructured the system for awarding states enhanced funding to allow USDA to consider factors other than low error rates. Whereas in prior years, benefit expansions and procedural protections for claimants had formed the centerpiece of liberal food stamp legislation,²⁸³ the 2002 legislation's food stamp title was dominated by QC relief and new options to help states reduce their QC error rates.

Counter-entitlements' centrality to food stamp policymaking extends beyond changes to QC. The 2002 legislation also included a modest new counter-entitlement to enforce aspects of the food stamp rules not readily amenable to fair-hearing requests, such as timely application processing.²⁸⁴

3. *Making Counter-Entitlements Work*

Although counter-entitlements to date have been employed primarily in pursuit of cost avoidance and program integrity, they can readily be adapted to serve other principles by which Congress wishes to limit an entitlement. As noted at the outset, policymakers seeking to rein in legal entitlements have three choices. First, they can narrow or condition the scope of that entitlement. This is the most transparent approach and was the more visible theme of the Reagan Administration's treatment of AFDC and food stamps in the early 1980s. It also has been a frequent theme of states' budget-cutting initiatives during economic slowdowns. Second, policymakers can establish or strengthen counter-entitlements. This, too, was a significant Reagan Administration theme in the early 1980s, but one that received relatively little attention. It is exemplified in the dominance over the food stamp program by QC discussed in the preceding section. Finally, policymakers can eliminate legal entitlements completely. In eliminating entitlements, policymakers can elect to retain counter-entitlements or to eliminate them as well.

The Family Support Act of 1988 was an attempt to strengthen work requirements in cash-assistance programs through the first two strategies: eligibility for AFDC became more conditional on compliance with work requirements, and states became subject to penalties if they could not

282. Pub. L. No. 107-171, § 4118 (to be codified at 7 U.S.C. § 2025(c)).

283. See, e.g., Hunger Relief Act, Pub. L. No. 100-435 (1988); Stewart B. McKinney Homeless Assistance Act, tit. VII, Pub. L. No. 100-77 (1987); Food Security Act, tit. XVI, Pub. L. No. 99-198 (1985).

284. Pub. L. No. 107-171, § 4120 (2002) (to be codified at 7 U.S.C. § 2025(d)).

establish that they were enforcing those limitations by engaging specified percentages of claimants in workfare or other employment or training activities.²⁸⁵ This sketchy, feeble, and much-postponed counter-entitlement²⁸⁶ hobbled that initiative, particularly when the recession of the early 1990s deprived states of the funds they needed to match federal work-program money. This failure of the counter-entitlements caused many to draw the erroneous conclusion that narrowing legal entitlements was ineffectual and that only the complete elimination of legal entitlements for cash-assistance claimants could succeed.

In fact, TANF's counter-entitlement—its work-participation rates—have had a far more profound impact on states, and through them on claimants, than the elimination of legal entitlements. Of necessity, however, that counter-entitlement has been crudely framed because it lacked a clearly drawn entitlement against which to be juxtaposed. For example, with states enjoying virtually unlimited discretion as to what kind of aid to provide to families, Congress had no reliable way of stating what benefits were conditioned on working.²⁸⁷ Moreover, because PRWORA gave states virtually complete control over eligibility for cash assistance, policymakers were concerned that states needed incentives to reduce participation in those programs. Thus, an incentive to do so—the caseload-reduction credit, which reduces states' TANF work-participation rates—was grafted onto TANF's work rules.²⁸⁸ Building these two inconsistent goals—having welfare recipients work or having them simply leave the welfare system—into a single counter-entitlement without reconciling the tension between them inevitably sent a muddled message to the states and guaranteed that, in one way or the other, their performance would be subject to criticism.

Had AFDC's eligibility structure remained, states could have been held accountable for work participation alone. To the extent that conservatives have become dissatisfied with the rate at which welfare recipients have been working,²⁸⁹ this is largely traceable to the lack of a clear

285. See 42 U.S.C. § 603(l)(3) (1994) (repealed 1996).

286. 42 U.S.C. § 687(a) (1994) (repealed 1996). The law effectively gave HHS five years to recommend performance standards to Congress, which then would have to take further action for any significant consequences to be attached to those standards.

287. Few would argue that claimants should be required to work in exchange for casual job-seeking advice. The problem, then, is where to draw a line between such incidental services and ongoing "welfare" benefits. The choice PRWORA made—to tie its work requirements to receipt of "assistance" from a TANF-funded program—essentially delegated a resolution of this problem to HHS. HHS's regulatory definition gave states broad discretion to shape the aid they provided as "assistance" or "non-assistance." 45 C.F.R. § 260.51 (2003).

288. 42 U.S.C. § 607(b)(3) (2000).

289. See, e.g., BRIAN M. RIEDL & ROBERT E. RECTOR, HERITAGE FOUNDATION, MYTHS AND FACTS: WHY SUCCESSFUL WELFARE REFORM MUST STRENGTHEN WORK REQUIREMENTS (2002) (asserting that just 34% of adult TANF recipients worked in 2000). *But cf.* SHARON PARROTT, CENTER ON BUDGET AND POLICY PRIORITIES, ARE STATES REQUIRING TANF RECIPIENTS TO PARTICIPATE IN

entitlement that would allow a more precise counter-entitlement to have been designed.²⁹⁰

If Congress had specified whom it wanted to work and what sorts of exceptions it was willing to allow for how long, those expectations could have been enforced through the existing AFDC QC system. For example, if Congress wanted 75% of single parents with only school-age children to be working, states could be required to record for each such family whether the parent was working. AFDC QC²⁹¹ then could check the validity of the states' tabulations and adjust the state's reported participation rate based on its findings. States whose adjusted participation rates fell below 75% could be subject to sanction. This would not prevent eligibility workers from granting exemptions but would impose strong pressure to limit the granting of those exemptions. Alternatively, if Congress did not favor allowing eligibility workers flexibility in defining exemptions, it could codify the work requirements and permissible exemptions, allowing QC to assign errors to cases in which benefits were paid to non-exempt families not engaged in work. Either way, ambiguities in the definition of work, or of any exemptions authorized by Congress, could be clarified in the course of resolving disputed cases in the QC system. In the current system, by contrast, states' reporting is largely unsupervised. States' interpretations vary considerably, with little opportunity to resolve those questions authoritatively.²⁹²

Alternatively, if Congress shared some Republican governors' conviction that work should be promoted and supported without regard to fiscal cost,²⁹³ it could replace the cost-avoidance-based AFDC-QC system with one devoted to enforcing work requirements. One Democratic welfare bill in 1995 proposed to do just that—to maintain the entitlement to cash assistance conditioned on compliance with strict work requirements and to shift AFDC QC's focus to "measur[ing states'] performance in moving

WELFARE-TO-WORK ACTIVITIES? (2002) (showing that TANF's reporting procedures result in substantial underestimates of true participation in TANF work activities).

290. See GENE FALK ET AL., CONG. RESEARCH SERV., WELFARE REFORM: STATE REPORTING REQUIREMENTS UNDER THE TANF PROGRAM 12-13 (2001) (finding that many states take advantage of TANF's flexibility to provide little information to HHS about what activities they are counting as "work"); GENERAL ACCOUNTING OFFICE, WELFARE REFORM: WITH TANF FLEXIBILITY, STATES VARY IN HOW THEY IMPLEMENT WORK REQUIREMENTS AND TIME LIMITS 10-16 (2002) (finding wide variations among states in the definition and intensity of work requirements).

291. 42 U.S.C. § 608 (1994) (repealed 1996).

292. See GENERAL ACCOUNTING OFFICE, WELFARE REFORM: CHALLENGES IN MAINTAINING A FEDERAL-STATE FISCAL PARTNERSHIP 16-26 (2001) (identifying state manipulations of TANF's financial flexibility to shift funds to activities far removed from TANF's purposes).

293. See, e.g., Jack Tweedie, *From D.C. to Des Moines—The Progress of Welfare Reform*, STATE LEGISLATURES, Apr. 1, 2001, at 22 (quoting then-Governor of Wisconsin, now HHS Secretary, Tommy Thompson as declaring, "I have always said—as loudly and publicly as I can—that for welfare reform to be successful you have to make an investment up front. It can't be done on the cheap."). But see Frances Fox Piven, *Thompson's Easy Ride*, THE NATION, Feb. 26, 2001, at 4 (suggesting that Gov. Thompson's Wisconsin did in fact underfund supportive services for low-wage workers).

recipients of such aid into permanent employment.²⁹⁴ Other Democratic bills made gestures in a similar direction.²⁹⁵ By then, however, the momentum for disentanglement was unstoppable, and this more promising approach was ignored.

III

CONTROLLING PUBLIC-BENEFIT PROGRAMS WITHOUT ENFORCEABLE RIGHTS

As the foregoing discussion reveals, legal entitlements are not barriers to changes that disfavor claimants, even ones that affect them profoundly. Indeed, modifying the AFDC QC system or creating a new counter-entitlement to press eligibility workers not to aid persons refusing to work might have proven highly effective in moving state agencies' staffs to impose tough behavioral requirements, just as the food stamp QC system prompted those same agencies to increase the costs of receiving food assistance. Even if elimination of legal entitlements was not *necessary* to changing cash assistance programs' substantive priorities, however, disentanglement might nonetheless be *compatible* with the implementation of those changes. If that were true, policymakers that disliked legal entitlements for ideological or philosophical reasons unrelated to their desire to change the program's priorities could plausibly pursue both their structural and substantive agendas at once.

In fact, however, eliminating legal entitlements greatly complicates the task of implementing a new balance of substantive priorities. In particular, non-entitlement programs must struggle to replicate three crucial functions that legal entitlements perform in helping administrators and political officials govern programs. First, legal rules provide explicit messages from senior officials to agency staff about how the latter are to perform their duties. If a program's goals were unitary, providing appropriate messages might not be terribly difficult. For example, in disaster relief programs, the overwhelming goal is usually to comfort the afflicted. A general message to grant aid in all questionable cases is likely to tell local staff what they need to know, and a welcoming announcement is likely to reach potential claimants through the news media and word-of-mouth.²⁹⁶ More commonly, however, policymakers seek to accommodate multiple, partially inconsistent goals. They want to help as many of the eligible as possible, for example, but also want to deny as many ineligible claims as possible. In TANF,

294. S. 840, 104th Cong. § 101 (1995) (proposed section 407(a)) (Sen. Conrad).

295. *E.g.*, S. 828, 104th Cong. § 101 (1995) (Sen. Moynihan).

296. Of course, even disaster programs must balance the goal of aiding the afflicted with concern about preventing fraud, partly because scandals that arise from one response may undermine public support for future disaster-relief programs.

the goals of promoting work and self-sufficiency must be balanced with the goal of aiding destitute families.²⁹⁷

Second, rules allow for an implicit response from those frontline eligibility workers to senior officials, confirming that the program is in fact being run as directed. If the program were being run too harshly, claimants presumably would be requesting administrative hearings or filing lawsuits. If the program were being operated too leniently, the rules would provide an explicit basis for criticism under applicable counter-entitlements.

Finally, entitlements provide the means for ensuring that the program is administered uniformly across all groups of claimants—or at least that any deviations result from deliberate policy choices. Again, if the program were treating any one group of claimants more harshly than the rules permitted, members of that group could be expected to seek administrative or judicial redress. Similarly, if one group were getting more generous treatment than the rules authorized, auditors operating the counter-entitlement could cite an error in the more lenient cases without needing to know how other claimants were being treated.

This Part considers alternative means by which administrators might accomplish the purposes served by rule-based entitlement programs.²⁹⁸ Part III.A explores whether a return to reliance on eligibility workers' discretion is a plausible way to advance new substantive priorities in a non-entitlement program. This discretion could be guided either by professional standards of the kind that dominated anti-poverty programs prior to the 1960s or by impressionistic guidance from central policymakers emphasizing, for example, the primacy of work. Alternatively, Part III.B considers the possibility of central policymakers' controlling a program's local administration through automated systems to ensure that their substantive priorities are honored. Finally, Part III.C explores the substitution of contractual terms for entitlement rules. Ultimately, none of these alternatives can reliably perform the three key functions of legal entitlements. As a result, none offers an adequate means of ensuring adherence to the desired

297. Although not prominent in the rhetoric surrounding PRWORA, the original goal of AFDC—to aid families in need—clearly remains in TANF. It is the first goal explicitly set forth in the TANF statute. 42 U.S.C. § 601(a)(1) (2000). More simply, if promoting work and reducing receipt of government assistance were Congress's only goals, a simpler and cheaper approach would be to repeal AFDC and create no successor program. The fact that no important participant in the welfare debates of the mid-1990s proposed to do this demonstrates that continuing to provide financial aid to families in need remained an important, if clearly not exclusive, programmatic goal.

298. In theory, states could try to rely upon the complaints of now-disentitled claimants to alert them when local offices are deviating from policy, at least when those deviations disadvantage claimants. In practice, this is unlikely to prove reliable. In a disentitled environment, claimants are particularly unlikely to know what policies are and hence what standards they may demand their local offices follow. They may feel particularly susceptible to retaliation. And their paucity of rights may make the dispute resolution system so ineffectual that it holds little appeal. *See generally* SUZANNE LYNN, MANPOWER DEMONSTRATION RESEARCH CORPORATION, DISPUTE RESOLUTION IN THE CONTEXT OF WELFARE REFORM (2001).

mix of substantive policies. In addition, some of these alternatives suffer from the very rigidity and arbitrariness that are commonly attributed to entitlements.

A. Returning to Discretionary Program Administration

When Congress eliminated claimants' entitlement to cash assistance in 1996, states theoretically could have sought to recreate the system of discretionary eligibility criteria²⁹⁹ that existed before *King v. Smith*³⁰⁰ gave claimants a right of action to enforce benefit programs' rules and *Goldberg v. Kelly*³⁰¹ established the right to an administrative fair hearing before the state may terminate a claimant's benefits. Federal law, and the laws of most states, would have permitted that.³⁰² States might not want to bring back the "suitable home" or "man in the house" rules,³⁰³ but they could empower eligibility workers to make subjective judgments about whether a claimant seems to be trying hard to find work. To be sure, states did vastly increase eligibility workers' discretion,³⁰⁴ sometimes with troubling consequences.³⁰⁵ Discretionary administration alone, however, cannot reliably implement central policymakers' designs.

A traditional medium for guiding discretion is a profession's code of ethics. Up through the 1960s, the social-work profession's standards of practice provided some general guidance for individual welfare workers. Individuals naturally would interpret this guidance in differing ways, and some would reject parts of it outright. Nonetheless, it provided a common starting point.

The explosion in welfare caseloads during the 1960s, and criticisms of the intrusiveness of the social-work model of program administration, led states to turn the administration of their public-benefit programs over to

299. See Super, *Offering an Invisible Hand*, *supra* note 82, at 819-20 (describing the rise and fall of the social-work era in public-welfare programs).

300. 392 U.S. 309 (1968).

301. 397 U.S. 254 (1970).

302. *But see* *Weston v. Cassata*, 37 P.3d 469 (Colo. Ct. App. 2001) (holding that despite language in federal and state statutes disclaiming any entitlement to cash-assistance benefits, claimants had a property interest cognizable under the Due Process Clause, based on the definiteness of the state's eligibility rules); *Tucker v. Toia*, 371 N.E.2d 449 (N.Y. 1977) (applying New York's constitutional guarantee of welfare benefits); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1132, 1144-53, 1168-83 (1999) (describing state constitutional guarantees of welfare rights).

303. See *supra* notes 29-32 and accompanying text.

304. See generally Diller, *supra* note 15 (criticizing this trend because the eligibility workers receiving this authority typically lack the professional training and standards to exercise it appropriately).

305. See, e.g., Susan Tinsley Gooden, *All Things Not Being Equal: Differences in Caseworker Support Towards Black and White Welfare Clients*, 4 HARV. J. AFR. AM. PUB. POL'Y 22 (1998) (finding gross racial inequalities in the ways cash-assistance recipients are informed of transportation subsidies and other important resources).

paraprofessional eligibility workers.³⁰⁶ These workers lacked the training, time, or expectations to follow social work's professional standards. This may not have made an obvious difference while all of these programs were operating as highly routinized, rule-based entitlements. When Congress ended the AFDC entitlement in 1996, however, this transformation of states' workforces precluded a return to the pre-*Goldberg* regime of professional judgment: state and local welfare offices no longer employed staff with professional training to determine eligibility. Although some tried to reinvent their income-maintenance workers as "employment specialists," they could not turn poorly paid, and often poorly educated, staff members into trained professionals overnight.

Even if states did have the means to return administration of non-entitlement programs to professional social workers, this would be unlikely to effectuate their new welfare policies or the interplay between entitlements and counter-entitlements. In the social-work model, staff making eligibility decisions respond to professional norms that policymakers have little direct role in shaping. With regard specifically to the new emphasis on work, one can imagine that social workers generally would regard work as beneficial for most families. Less clear, however, is whether they would concur with state policymakers on what kinds of family crises justify postponing searches for employment or the severity of sanctions to be applied to those not working.³⁰⁷ Because agencies would lack the ability to claim that eligibility workers' decisions about claimants' substantive eligibility reflected professional judgment, legal and media sources could easily scrutinize those decisions.³⁰⁸ With researchers and reporters eagerly watching to see whether "welfare reform" would succeed, states have felt the need to exercise more direct control over their programs. Similarly, whether eligibility workers' interactions with claimants go well or badly provides senior managers little insight into whether frontline employers are following the organization's priorities.³⁰⁹ Finally, because professional norms rely upon subjective exercises of judgment and are likely to be interpreted differently by different social workers, they offer little prospect for promoting uniform treatment of claimants. Accordingly, they have sought other means for guiding the actions of local offices.

306. See Diller, *supra* note 15, at 1140 (describing states' transfer of responsibility for eligibility determinations from professional social workers to employees lacking professional training).

307. Reconciling time limits with social-work norms likely would be considerably more problematic.

308. See Diller, *supra* note 15, at 1205.

309. Thus, for example, conflict between a social worker and a claimant could result not from enforcement of a work requirement but from the claimant's resentment of another kind of intervention the social worker made. Conversely, a skilled social worker could push a claimant very hard to work without alienating the claimant.

The absence of a professional code, however, does not mean that eligibility workers cannot be organized to exercise their considerable discretion in relatively consistent ways without formal rules. Eligibility workers read the same newspapers and watch the same television news programs that other members of the community do. If the governor and other senior federal and state officials consistently describe welfare programs in terms of fraud, eligibility workers are likely to give program integrity a high priority. If the governor calls a news conference each month to congratulate her administration on having reduced caseloads, eligibility workers are unlikely to want to do anything to prevent the governor from announcing similar “achievements” in the future. If the governor or the welfare commissioner brags about the percentage of welfare recipients that are employed, eligibility workers may feel they can be lenient with low-wage workers but should be tough with other claimants. These messages can be reinforced through internal newsletters, staff meetings, and awards.

Conveying impressionistic policies in this manner can nonetheless be quite problematic. First, broad messages convey little nuance and offer scant guidance about how to accommodate competing priorities. Although senior policymakers can ensure that their staff members see the same newsletters and attend similar meetings, they cannot be sure that all of them will interpret the messages similarly. If the governor brags about reducing the welfare roles and having people go to work, which of the two is more important? The answer will determine whether applications from low-wage workers should be welcomed or shunned. Different workers in the same organization are likely to draw differing conclusions.³¹⁰ To the same effect, if the president of a managed-care organization congratulates staff for controlling costs and maintaining high patient satisfaction, which is more important? Approvals of treatment in many close cases may hang on a staff member’s divination of the organization’s priorities.³¹¹

Ironically, however, recent moves to eliminate entitlements have come just as programs’ priorities have become more complex, creating more difficult conflicts that staff need to resolve. Congress eliminated AFDC’s entitlement at the same time it asked cash assistance programs to add a strong emphasis on work to their existing mission of aiding the

310. See, e.g., QUINT ET AL., *supra* note 330, at 69-71, 104-05 (1999) (reporting that eligibility workers and employment specialists drew differing conclusions from central managers’ pronouncements).

311. Some policymakers may avoid admitting, or addressing, the existence of conflicting priorities by insisting that one—such as reducing caseloads—has absolute priority. If this were true, of course, they would simply terminate all cash-assistance programs. The fact that they do not shows that assisting those in need does in fact remain a priority. The inconsistency between categorical statements of priorities and measured implementation suggests that policymakers are counting on a combination of the personal sensibilities of eligibility workers and their impressionistic policymaking to arrive at a desired balance. This method combines many of the deficiencies of the two variants of impressionist policymaking discussed in this section.

needy. Similarly, states are eliminating important features of the Medicaid entitlement through managed care and waivers as they seek to accommodate the goals of beneficiary care and cost containment.

Even where weak entitlement structures remain in some programs, impressionistic policies established in other programs jointly administered by the same staff are likely to distort administration in unanticipated and undesirable ways.³¹² The decline in food stamp participation in the late 1990s provides a poignant example. Participation was depressed by some governors' failure to distinguish between cash assistance and food stamps when bragging about caseload declines.³¹³ States relentlessly reminded their eligibility workers that potential claimants that decided to forego applying and recipients that left public assistance should be considered successes that should be zealously promoted; eligibility workers applied these policies to food stamps too.³¹⁴ Food stamp participation also was hurt by a relentless drumbeat of meetings, rankings, and awards relating to QC error rates. Even if eligibility workers understood that no statistically valid inferences could be drawn from a single case that was found to have a payment error, after seeing how colleagues responsible for such cases were treated, they were determined not to suffer a similar fate. Participation in food stamps rebounded as senior policymakers began to refer to them as "work supports"—instead of the reviled "welfare"³¹⁵—and moderated their efforts to reduce their error rates.³¹⁶

Management through impressionistic signaling also fails to provide senior policymakers reliable information about how frontline workers are administering programs. Workers will report, no doubt, that they are faithfully adhering to the prescribed priorities. But how they are interpreting those priorities, particularly in cases of conflict, is likely to remain obscure.

312. See, e.g., VIVIAN GABOR & CHRISTOPHER BOTSKO, HEALTH SYSTEMS RESEARCH, CHANGES IN CLIENT SERVICE IN THE FOOD STAMP PROGRAM AFTER WELFARE REFORM (2001) (finding that efforts to discourage applications for cash assistance may be affecting applications for food stamps as well).

313. See KATHLEEN MALOY ET AL., MATHEMATICA POLICY RESEARCH, STATE OF INDIANA: STRATEGIES FOR IMPROVING FOOD STAMP, MEDICAID, AND SCHIP PARTICIPATION (2001) (describing the effects of emphasis on caseload reduction that did not discriminate between TANF and food stamps).

Medicaid participation stalled during this period even as its eligibility rules liberalized. Similar factors appear to be at work. A survey sponsored by the Kaiser Family Foundation found that 79% of low-income parents of Medicaid-eligible uninsured children erroneously believed that welfare time limits also applied to Medicaid. KAISER COMMISSION ON MEDICAID & THE UNINSURED, MEDICAID AND CHILDREN, OVERCOMING BARRIERS TO ENROLLMENT: FINDINGS FROM A NATIONAL SURVEY (2000). Some 72% of the parents of children enrolled in Medicaid were under a similar misconception.

314. See GABOR & BOTSKO, *supra* note 312, at 14-17.

315. See, e.g., *Budget Initiatives on Transportation for Working Families*, 36 WKLY. COMP. PRES. DOCS. 359 (Feb. 28, 2000) (describing food stamps as essential to help low-wage working families).

316. Super, *Quiet Revolution*, *supra* note 104, at 1380-90.

Finally, impressionistic guidance provides little help in ensuring that claimants with similar circumstances are treated similarly. Whether an eligibility worker grants benefits to a favorite or denies aid to a claimant she dislikes, she will have some broad priority available to invoke.³¹⁷

B. *Governing Through Automated Systems*

The legal entitlement to public benefits grew up in an era when automation had little impact on the operation of public-benefit programs. At most, perhaps a basis accounting program tracked the flow of funds.³¹⁸ By 1996, however, this had changed dramatically. Computer systems routinely played central roles in eligibility determination as well as financial management.³¹⁹ Many states had interactive systems that cued eligibility workers with questions to ask claimants and, when the workers entered the claimants' answers, supplied the applicable follow-up questions.³²⁰ Upon obtaining the information necessary for an eligibility decision, these systems would render an eligibility decision, calculate the amount of benefits for successful claimants, and generate denial notices for others.³²¹ Thus, in these highly automated systems, eligibility workers were not in fact making most of the important decisions relating to claimants' eligibility.

This high level of automation transformed the governance of public-benefit programs. Agencies continued to file state-plan amendments with federal officials, promulgate regulations through their administrative-procedure acts, and write eligibility manuals for their workers. With actual eligibility decisions being made by the automated systems, however, each of these documents' practical importance was bounded by its impact on the state's computer programs.

317. Conflicting priorities' potential for concealing willful decision making is well-understood in other contexts. *See, e.g.*, Karl N. Llewellyn, *Canons of Construction*, 3 VAND. L. REV. 395 (1950) (showing that many popular canons have similarly popular counterparts pointing in the opposite direction, leaving judges free to invoke whichever helps them to achieve their preferred result).

318. GENERAL ACCOUNTING OFFICE, FOOD STAMP PROGRAM: PROGRESS AND PROBLEMS IN USING 75-PERCENT FUNDING FOR AUTOMATION (1988) (finding all but three states had basic food stamp automation systems but that their capacities varied widely). In the mid 1980s, Congress felt the need to require states to at least consider systematic improvement to their automation capacity. 7 U.S.C. § 2020(o) (2000). This transition remained problematic for some time. *See* GENERAL ACCOUNTING OFFICE, HUMAN SERVICES INTEGRATION: RESULTS OF A GAO COSPONSORED CONFERENCE ON MODERNIZING INFORMATION SYSTEMS (2002); GENERAL ACCOUNTING OFFICE, WELFARE PROGRAMS: INEFFECTIVE FEDERAL OVERSIGHT PERMITS COSTLY AUTOMATED SYSTEM PROBLEMS (1992). The lack of a coordinated federal approach to helping states develop information systems likely will continue to hamper development in this area. CORPORATION FOR THE MANAGEMENT OF HUMAN SERVICES, BACKGROUND AND INITIAL BUSINESS PLAN 2 (2003).

319. Jack Slocum et al., U.S. Dept. of Agriculture, State Automation Systems Study, at I-6 (1995) (finding that thirty-seven states had automated systems that determined eligibility and forty-one had systems that determined benefit levels).

320. *Id.* (finding 21 states had interactive systems guiding interviews).

321. *Id.* (finding that 44 states had automated systems that generated notices to claimants).

But the process by which state policies are rendered into operating instructions for automated systems is far from transparent. Although policymakers and line staff may assume that the system is carrying out the same policies expressed in the program's state plan and manuals, deviations may be difficult to detect.³²²

In some respects, systems-governed programs raise problems similar to those that govern legalistic ones. In the old system, delays in promulgating amended regulations could leave federal and state agencies applying inappropriate, outdated policies;³²³ now states' ability to modify their policies is constrained by their resources for reprogramming their systems. States that do their own programming must develop ways of prioritizing finite programming resources. If the welfare department seeks to change its policies at the same time the revenue department wants to improve its collection systems, the welfare policy changes are likely to have to wait. Policy innovation nearly ground to a halt in 1999, across states and across agencies, as states focused their programming resources on preventing any systems collapses due to the "Y2K" problem. States that contract out for programming may face similar difficulties; in addition, their capacity for policy change may be stunted during budget crises as programming funds are slashed. Indeed, programming queues may be even slower than the clearance process for regulations.³²⁴ Although agencies' mastery of the Administrative Procedure Act varies considerably, few are unable to adjust their policies because their state has run out of pages in its equivalent to the *Federal Register*.

Whatever the cause, this ossification is as subversive to the enforcement of programs' substantive policy priorities as it is difficult to avoid.³²⁵ When states try to instruct their eligibility workers to apply policies that their systems are not yet programmed to support, chaos rapidly ensues. Eligibility workers must design "workarounds"—essentially ways of deceiving the automated system into producing the desired result in cases to which the system is programmed to apply a different policy.³²⁶ Although

322. In many states, policy is translated into computer code by private contractors, meaning that no state employees may even be aware of any deviations from, or possibly erroneous interpretations of, state policy. *Id.* at IV-9-IV-10.

323. See, e.g., Schweiker, 669 F.2d at 877 (refusing to delay the implementation of budget cuts until an agency complied with APA requirements).

324. See Super, *Quiet Revolution*, *supra* note 104, at 1305-07 (describing the clearance process for one federal agency).

325. See MARK RAGAN, ROCKEFELLER INSTITUTE OF GOVERNMENT, BUILDING BETTER HUMAN SERVICES SYSTEMS 33-34 (2003).

326. Consider, for example, a claimant with earnings of \$500. If the system is programmed to disregard one-quarter of claimants' earnings in determining benefits but the state has reduced that deduction to 20%, eligibility workers may falsely enter the claimant's earnings as \$533.33 to achieve the desired net income figure (\$400). Of course, this approach is highly error-prone and may distort the automated system's other decision making. In this example, the claimant could be denied benefits altogether if the program has a \$520 gross income limit.

central program administrators may suggest workarounds that seem to minimize the corruption of information within the system, once eligibility workers are authorized to manipulate the system, it becomes extremely difficult for central managers to control the unintended side-effects of locally designed workarounds. Many states crossed the Rubicon by authorizing workarounds in the pre-Y2K period and are likely to have serious difficulty restoring their staffs' deference to their systems.

In addition, systems-driven programs tend to favor objective, bright-line eligibility criteria, perhaps even more than the rule-based programs associated with legal entitlements. Although this is not absolutely inevitable,³²⁷ in practice, states have been reluctant to allow overtly subjective eligibility decisions to be married to systems-driven eligibility-determination processes. This may reflect concerns about accountability or about the possibility that invidious discrimination could poison the resulting decisions.³²⁸ It also may reflect a conviction that excluding automated systems from some of the most important eligibility decisions wastes the system's resources. Where the agency relies upon computers to issue eligibility notices to claimants, administrators may fear that awkward and costly modifications would be required to enable either the system or eligibility workers to issue proper notices.³²⁹

In some ways, however, a systems-driven program differs substantially from a rule-driven one. Most obvious is the question of transparency. Even a badly-written regulation or policy manual is likely to surrender at least some of its secrets to persistent senior managers, legal services lawyers, lay advocates, researchers, and journalists. With the rarest of exceptions, however, none of these people is likely to have either access to the code that powers an automated eligibility system nor the skills to interpret that code. Thus, determining why particular individuals were granted or denied benefits may sometimes be difficult, and seeing a general pattern across the range of claimants coming to the state agency may be all but impossible. The system may be able to generate reports summarizing the number of claimants granted or denied benefits and perhaps breaking down the types of reasons on which denials were made. Few states, however, have devoted the sophisticated programming and policy-development resources that would be necessary to design reports that would provide a

327. Indeed, in theory, neither formal eligibility rules nor automated systems compel reliance on bright-line standards. Each could be limited to performing triage, directing denials for those whose objective conditions clearly fall outside the range for which the state might wish to provide benefits and granting benefits for people with certain extremely compelling objective problems. Eligibility workers could then be left to make subjective judgments on the remaining cases, which could be quite numerous.

328. Gooden, *supra* note 305.

329. See *Mayhew v. Cohen*, 604 F. Supp. 850 (E.D. Pa. 1984) (finding that early computer-generated notices violated the Due Process Clause for failing to provide claimants with adequate explanations of the actions the state was taking against them).

nuanced picture of their program's administration on the local level. Privacy concerns, and sometimes the proprietary rights of the companies that developed the states' systems, generally deny independent researchers access to the systems' data with which to develop reports of their own.

Thus, while automated systems' importance in governing public-benefit programs clearly will continue to increase, at present, states seem not to have surmounted the problems that would keep them from replacing the control and accountability functions of rule-based systems. Despite their superficial appeal, they cannot adequately perform any of the three core managerial functions of legal entitlements. As vehicles for disseminating the policy decisions of central administrators, they have much of the same rigidity as rule-based systems. Because they can be written and checked only by skilled programmers, policymakers may have more difficulty learning what policies are currently in force or checking the accuracy of the changes they have ordered. They also may impose significant administrative costs to change policy, and they induce states to maintain the same relatively objective eligibility standards that characterized entitlement-based systems—and that are often cited as a prime reason for abandoning entitlements.

In theory, automated systems control the outcome in local agencies and thus provide the same assurances of compliance as systems balancing entitlements with counter-entitlements. They can even produce summary reports on how cases have been handled at the local level. In practice, however, their reporting capacity often lags behind changes in policy and substantive priorities.³³⁰ Moreover, ad hoc workarounds can and routinely do defeat them. States can build systems resistant to workarounds only at the cost of surrendering their ability to change policies more rapidly than their staff or contractors can reprogram their systems.

Workarounds also compromise automated systems' ability to ensure consistent application of their policies. In the hands of either sentimental or hostile frontline staff, workarounds can result in treatment of vulnerable sub-groups that differs substantially from what central policymakers intend.³³¹ Automated systems' lack of transparency exacerbates both of these deficiencies.

Even if states surmount these difficulties, however, automated systems' most productive use likely will be as an adjunct to, rather than a substitute for, legal entitlements. In particular, even the best automated system depends on the data that program staff enter into it, which in turn reflects

330. See, e.g., JANET QUINT ET AL., MANPOWER DEMONSTRATION RESEARCH CORPORATION, BIG CITIES AND WELFARE REFORM 71-72 (1999) (reporting officials' frustration with their computer systems' inability to generate reports that would indicate the success of their new policies).

331. Most simply, because workarounds require extraordinary effort, eligibility workers may easily regard them as acts of grace that they need not afford to claimants they deem unworthy.

that staff's understanding of a claimant's circumstances. Claimants seeking to enforce legal entitlements will have a different perspective on their situations, just as auditors may dispute line employees' characterization of a transaction.

C. *Governing Through Contractual Provisions*

Another relatively formal mechanism for governing a non-entitlement program is contract law. Under this approach, contractual terms serve purposes comparable to the rules in an entitlement system. Although the TANF statute and many states make gestures toward contracts with claimants,³³² these documents bear few of the important characteristics of contracts. They generally are not binding upon the state, do not limit even the obligations of claimants, and are not likely to be the product of meaningful negotiations since claimants have no meaningful leverage and must accept whatever terms the agency dictates. Thus, pseudo-contracts with claimants may serve as vehicles for conveying some of the agency's demands, but they provide no answer to questions of how those demands are formulated or how eligibility is determined.

A more meaningful application of contractual principles to public-benefit programs comes when state or local agencies engage private parties to perform discretionary administrative functions. Some providers, notably nursing homes and managed-care plans, exercise great discretion over which services Medicaid beneficiaries receive. States contract with private firms to provide employment and training services, which may involve discretionary judgments about claimants' compliance and their need for supportive services such as transportation reimbursements. With the elimination of AFDC's rules requiring eligibility decisions to be made by state civil servants,³³³ several states have begun to privatize aspects of eligibility determination for cash assistance. USDA recently granted Florida a waiver of the food stamp program's civil service rules,³³⁴ for example, to allow Florida to have private contractors determine food stamp eligibility for TANF claimants in some counties.³³⁵

332. 42 U.S.C. § 608(b)(2), (3) (2000).

333. 42 U.S.C. § 602(a)(5) (1994) (repealed 1996).

334. 7 U.S.C. § 2020(e)(6)(B) (2000). States' efforts in this regard are part of a much broader movement to privatize a vast array of governmental functions. *See, e.g.,* Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001 (2004).

335. FNS's waiver was intended as an experiment—a demonstration project. *See* 7 U.S.C. § 2026(b)(1) (2000) (authorizing such waivers). Florida subsequently sought to expand its privatization project to cover all counties and most cases within those counties. After the Florida agency became embroiled in some contracting scandals, FNS offered its tentative approval of this expansion subject to conditions seeking to ensure the integrity of the bidding process and requiring that the expansion occur in phases to allow the state to learn from the experiences of the earlier counties to implement the scheme. Florida rejected these conditions and shifted its attention from privatization to automation.

The success of these privatization efforts depends upon states' effectiveness in clearly specifying which policies they want enforced in their contracts with these private entities.³³⁶ To do that, however, states face several significant obstacles. First, contracts are likely to be more difficult to amend than rules or computer systems. Not only do state agencies require the approval of their non-governmental partners—who may demand additional compensation in exchange for agreeing to implement new contractual terms—but state and local governments typically have extensive, and often cumbersome, processes for approving contracts.³³⁷ Thus, once discretionary functions are contracted out, government may feel that it is effectively tied to the same set of policies for the term of the contract, which may run several years. Even once the contract has expired, some contractors may face little competition and hence be able to resist, or extract a price for, substantial policy changes.

The problems this policy paralysis creates may be compounded by agencies' errors in drafting contractual terms in the first place. The considerations involved in drafting sound contractual terms differ substantially from those involved in drafting sound regulations. State human-services agencies' staffs are likely to have far more experience in the latter. Studies of states' Medicaid managed-care contracts have revealed widespread and fundamental shortcomings.³³⁸ TANF case-management contracts similarly seem to reflect considerable naiveté.³³⁹

More fundamentally, when state or local agencies engage private parties in the administration of a public-benefit program, they change the balance of policies that must be accommodated in the program's implementation. Policies that the agencies impressed upon their staff through informal means will immediately become irrelevant unless incorporated into the contract. The process of converting policies to contractual

336. See PAMELA WINSTON ET AL., MATHEMATICA POLICY RESEARCH, INC., *PRIVATIZATION OF WELFARE SERVICES: A REVIEW OF THE LITERATURE* (2002).

337. Expediting the process of approving contract amendments would be difficult. The resources required to implement a policy change differ considerably: changing an income eligibility limit will take far less staff time and systems development than changing the terms of a work program by establishing new kinds of work placements and then screening the caseload to determine appropriate placements. Thus, establishing a generic price in advance for modifications will be impossible. And with new costs and specifications being negotiated between managers and the contractor, appropriate reviews within the government are needed to guard against cronyism or waste.

338. SARA ROSENBAUM, *AN OVERVIEW OF MANAGED CARE LIABILITY: IMPLICATIONS FOR PATIENTS RIGHTS AND FEDERAL AND STATE REFORM* (2001); SARA ROSENBAUM ET AL., CENTER FOR HEALTH CARE STRATEGIES, INC., *NEGOTIATING THE NEW HEALTH SYSTEM: FINDINGS FROM A NATIONWIDE STUDY OF MEDICAID PRIMARY CARE CASE MANAGEMENT CONTRACTS* (2002). Although they had several years of additional experience by the time the SCHIP block grant was created in 1997, states have done little better with those contracts. SARA ROSENBAUM ET AL., CENTER FOR HEALTH SERVICES RESEARCH AND POLICY, *BEHAVIORAL HEALTH AND MANAGED CARE CONTRACTING UNDER SCHIP* (2002).

339. SHEENA MCCONNELL ET AL., MATHEMATICA POLICY RESEARCH, INC., *PRIVATIZATION IN PRACTICE: CASE STUDIES OF CONTRACTING FOR TANF CASE MANAGEMENT* (2003).

language may serve to filter out subtler, more impressionistic policies that are not readily rendered into contractual terms. On the other hand, the interests of the contractor—presumably in reducing costs and perhaps in enhancing its other, related operations—must be accommodated with the mix of public policies relating to the program.³⁴⁰ Conveying the proper balance among these priorities to the individual employees interacting with claimants, especially through the distorting lens of contractual conditions, is likely to be quite challenging.

IV

CHOOSING BETWEEN ENTITLEMENT AND NON-ENTITLEMENT SYSTEMS

Part I established that legal entitlements are far from the indomitable tigers they often are presumed to be. Part II, in turn, showed that the counter-entitlements that have developed in the shadows of major entitlements now can prove more than a match for claimants' nominal legal rights and suggested how the substantive objectives of the 1996 welfare law might have been implemented through counter-entitlements. Part III explored some of the formidable problems managers face in non-entitlement programs, problems that tend to drive them back toward entitlement-like structures.

This Part seeks to provide a basis for selecting between entitlement and non-entitlement structures for impressing new substantive goals on an established entitlement. Part IV.A examines the undesirable incentives that disentitlement often creates. Part IV.B considers the efficiency of entitlement and non-entitlement structures in providing data about program operations. Part IV.C then considers the risk of inequities between and even within particular groups where programs operate without clear entitlement rules that reconcile competing priorities.

A. Skewed Incentives Resulting from Disentitlement

In entitlement programs, administrative decisions spring from the interplay between entitlements and counter-entitlements. When an entitlement is eliminated, the counter-entitlements typically remain. Unless the

340. Although both the public agency and the contractor are likely to be concerned about reducing costs, these interests are unlikely to align with one another. Most programs' administrative costs are a small fraction of their benefit costs. The agency, therefore, is likely to focus on conserving benefit dollars, while the contractor (who does not pay benefit costs) will strive to reduce its administrative expenses. Moreover, the government typically will have its administrative costs more or less fixed by the contract. The private contractor, by contrast, may have no interest in saving benefit dollars but great interest in keeping its administrative costs as low as possible. Alternatively, if the private contractor is given a fiscal stake in reducing benefit costs—as managed-care plans typically are—it may have an interest in minimizing all aspects of the program to the extent it can without being sued by the state. States' audit staffs are likely to have more experience policing *over*expenditures of public funds and may have difficulty identifying and obtaining correction of a contractor's spending *less* than what is necessary to achieve the program's basic purposes.

purpose originally vindicated by the former entitlement is truly abandoned—rather than merely taken for granted—frontline staff’s incentives are likely to be skewed toward those objectives enforced through counter-entitlements. Moreover, when the offsetting force of the entitlement is removed, these counter-entitlements may prove far more powerful than had previously been evident. Any deviations between the pressure they apply on frontline staff and the priorities of policymakers likely will be exaggerated, and that staff’s incentives skewed further. Where the program is a collaboration of multiple levels of government, or of public and private entities, the counter-entitlements’ effects will be even harder to predict as they interact with the disparate priorities of those responsible for implementing the program.

Here again, the 1996 welfare law provides a clear illustration. Although developments of the 1960s and early 1970s sharply reduced state and local governments’ formal control over public-welfare policies, they did not eliminate those governments’ fiscal and philosophical interest in the operations of these programs. These agencies continued to care intensely about how many people, and which ones, received the benefits that they continued to administer and helped to fund. Informal rationing, through intensive verification requirements, long waits in welfare offices, degrading home visits, and later requirements to participate in work programs helped these agencies restrict the influx of claimants.³⁴¹ The 1996 legislation therefore devolved power to entities with well-established policy preferences of their own, albeit ones that varied significantly from state to state. For this legislation to have the greatest chance of achieving the substantive changes its authors sought, its substantive message and the incentive structure it created for local agencies needed to be well aligned with one another. In reality, they were not.

PRWORA, and states’ policies under the waivers that preceded it, provided ideological support and fiscal incentives for what had been common but often ignored practices. They legitimated the notion that poverty results from bad choices and its corollary that anti-poverty policy should focus on improving those choices. Rationing benefits through overt efforts to influence claimants’ and potential claimants’ choices therefore seemed quite natural. They provided some disincentives to receive benefits by intensifying the stigma associated with welfare receipt, imposing a time limit on federally funded benefits, and giving many potential claimants the impression that eligibility rules had tightened drastically. More broadly, by delegitimizing the receipt of benefits, PRWORA gave states political cover to tighten rationing, particularly if the method chosen had some nominal relationship with employment.

341. See, e.g., Dehavenon, *supra* note 83.

Fiscal, administrative, and legal concerns, however, left most states disinclined to mount large-scale work programs.³⁴² TANF's caseload-reduction credit,³⁴³ however, reduced the work-participation rates of states that reduced the number of families receiving assistance. Caseload reductions also helped shrink the denominator used to calculate work-participation rates, allowing states to report more impressive rates while keeping the number of families in work programs manageable. Reducing participation rapidly was therefore crucial, meeting the legal and political definitions of strong performance. The simultaneous conversion of states' former AFDC funding into a fixed block grant gave states a further fiscal incentive to reduce participation since they could use any resulting savings in other programs.³⁴⁴

Many states' income eligibility limits were so low that they already effectively denied benefits to almost anyone with countable income; tightening those limits further could reduce payments to those participating but was unlikely to reduce the eligible pool significantly.³⁴⁵ Thus, developing effective informal rationing methods became essential. And with PRWORA's critics having focused attention on the likelihood of a "race to the bottom" in formal eligibility policy, states' ratcheting up the pressure

342. Once the Clinton Administration determined that work programs were covered by the Fair Labor Standards Act, and Congress failed to override that decision, many states could not require enough hours of work to count towards the work requirements for most families. When fully implemented, TANF required most recipients to work thirty hours per week in order to count as "working." 42 U.S.C. § 607(c)(1)(A) (2000). Claimants finding thirty hours per week of work in the private sector typically become ineligible for cash assistance immediately or within a few months. And if claimants unable to find private employment can only be asked to work off their grant in unpaid community service at the rate of the minimum wage, only those whose grants are at least \$664.35 per month can be assigned thirty hours per week of work. The *maximum* cash assistance grant in the median state peaked in the late 1990s at about \$400. See Super, *Quiet Revolution*, *supra* note 104, at 1318 n.162.

343. See *supra* note 288, and accompanying text.

344. This was no accident. The Heritage Foundation's Robert Rector, a principal non-governmental architect of the 1996 law, wrote as follows:

[A] bedrock premise of the 1996 welfare reform was that entitlement funding created perverse incentives that led to harmful levels of dependence. By financially rewarding states for increased caseloads and penalizing them for lower caseloads, the old system gave states incentives to keep recipients on the rolls and trapped millions of families in unnecessary dependence. This is why welfare reform abolished entitlement funding.

ROBERT RECTOR, HERITAGE FOUNDATION, THE BAUCUS "WORK" ACT OF 2002: REPEALING WELFARE REFORM 6 (2002).

345. One exception was the treatment of families containing an SSI recipient. Under AFDC, SSI recipients' needs and incomes were ignored, and this almost always advantaged the remaining family members. Shortly after PRWORA's enactment, a handful of states eliminated or sharply limited that rule, rendering most families containing SSI recipients ineligible. Perhaps because this policy's apparent harshness caused political problems that outweighed the effect on states' caseloads—and because these states learned that informal means could achieve similar ends without attracting political fire—several of these states have since abandoned their restrictive policies. See EILEEN SWEENEY, CENTER ON BUDGET & POLICY PRIORITIES, RECENT STUDIES INDICATE THAT MANY PARENTS WHO ARE CURRENT OR FORMER WELFARE RECIPIENTS HAVE DISABILITIES AND OTHER MEDICAL CONDITIONS (2000).

their overburdened and brutalized local offices were already applying on claimants went largely unnoticed.

The disentanglement of cash assistance provided the means for substituting caseload reduction for work promotion in the implementation of the 1996 legislation. This development has been the source of considerable complaint from conservatives³⁴⁶ while confronting liberals with a different kind of "race to the bottom." It is, however, the predictable result of attempts to manipulate incentives in the complex relationship that inevitably surrounds any federal-state program. If work truly was the goal of the 1996 legislation, a specific work requirement enforced by a counter-entitlement would have been far more likely to achieve the desired result. This could be done by modifying the existing AFDC QC system to examine recipients' work efforts and to punish states with unusually high shares of recipients not working.³⁴⁷ Alternatively, AFDC QC could be left to guard the program's integrity and a new audit system could be established to monitor recipients' work effort. Coupling a work-based counter-entitlement with a continuing entitlement to benefits for those claimants willing to work would have prevented states from meeting the work-participation rate requirement by shooing away ("diverting") needy families. To the extent implementation deviated from policymakers' intentions, or produced results they regarded as undesirable, the terms of the counter-entitlement could have been adjusted far more easily, and likely with less state resistance, than the TANF funding structure.³⁴⁸

B. Non-Entitlement Programs' Lack of Reliable Data on Impacts on Claimants

Nobody knows a program's impact on claimants better than claimants themselves. An entitlement program relies upon claimants to alert policymakers of concerns by requesting fair hearings and filing litigation against program administrators.³⁴⁹ Although the decision to eliminate the entitlement may signal a decreased interest in accommodating claimants' desires, the programs' continued funding makes clear that aiding the needy remains

346. See *supra* note 289.

347. One member of the Senate Finance Committee proposed doing just this. See *supra* note 294 and accompanying text.

348. At this writing, the original statutory authorization for TANF has been expired for more than two years. The House has twice passed reauthorizations, and the Senate Finance Committee has reported out reauthorization legislation once and appears ready to do so again. Final enactment of reauthorization legislation, and resolution of the various interest groups' dissatisfaction with the current system, however, appears months or years away.

349. Stripped of its emotive baggage, litigation is a complaint that junior officials are disobeying the commands of senior ones: frontline staff's failing to follow their regulations, state regulation-writers' or legislators' failing to follow federal regulations, federal regulations' failing to follow Congress's commands, or Congress's disregarding the Constitution. Thus, the essential cause of action is one for insubordination, although it is rarely styled as such.

a concern.³⁵⁰ Policymakers may well trust the good will of frontline staff. Obtaining information about exactly how that staff is treating claimants is difficult, however, without self-interested reporting from those most knowledgeable.

Predictably, senior policymakers have had serious difficulty determining just how TANF is treating claimants since the elimination of the entitlement. In the first years after PRWORA, HHS and others funded a host of studies of families leaving the cash-assistance rolls. Many of these studies were plagued with low response rates and other methodological problems. Even well-conducted studies faced serious structural problems gathering representative information. Telephone studies tended to be biased toward “leavers” who had prospered since those that had become destitute were more likely to have been evicted or to have lost telephone service. Moreover, respondents generally had little to gain and potentially much to lose—a child-protective services investigation and possible loss of their children—if they reported serious hardship. Even if the data was reliable, the lack of comparable studies of “leavers” from the pre-PRWORA period makes it difficult to determine if hardship was greater under the new system. Also problematic was the lack of a specific nexus to particular actions of agency staff, making it almost impossible to determine if a family’s good, or bad, fortune was the result of luck or the program’s administration.³⁵¹ Finally, these studies provided only a snapshot of programs’ impact at a given moment. They offered no insight into the programs’ change over time. Thus, when cash assistance caseloads kept falling after unemployment and poverty rose in the recession of 2001—raising serious new questions about TANF’s effectiveness as a safety net for the destitute—funding for leaver studies had largely dried up.

C. Non-Entitlement Programs’ Unequal Treatment Among Groups of Low-Income Families

Disparities in administration unfortunately are no rarity in entitlement programs. Nonetheless, with an explicit standard for program administration, claimants can assess how they are being treated. Although individual claimants may not know whether their treatment is better or worse than

350. See also 42 U.S.C. § 601(a)(1), (2) (2000) (establishing two of TANF’s four goals as assisting needy families).

351. One significant exception is the customer-service reviews the Tennessee Department of Human Services conducts before terminating assistance. See Super, *Offering an Invisible Hand*, *supra* note 82, at 882-83. These reviews focused on the specific decision to terminate benefits for non-financial reasons. Since responding could preserve a recipient’s benefits, the recipient had an incentive to respond truthfully. (By contrast, claimants have little incentive to respond to research surveys and may fear that admitting to hardship will not help their position but could jeopardize their custody of their children.) The fact that these reviews reversed half of all proposed terminations raises disquieting questions about the quality of decision making in other states.

those in other groups, disparate treatment is likely to produce a disproportionate number of complaints from members of whichever group is being ill treated. Possible discrimination can be identified relatively rapidly and without arduous studies.

In a non-entitlement program, however, they are both more likely to occur and more difficult to detect and excise. A non-entitlement program that relies on the local exercise of subjective discretion lacks both a coherent set of principles of decision that apply across all claimants and a systematic method for claimants to enforce those principals. Where the disparities in treatment implicate a group protected under civil-rights laws, adversely affected claimants retain legal rights.³⁵² In practice, however, members of protected classes may not realize that they are being disadvantaged because they lack a basis for comparing their treatment.³⁵³ Rigorous research into the extent of racial discrimination in non-entitlement cash-assistance and child-care programs is difficult without access to the case files of a random sample of claimants. Privacy rules³⁵⁴ empower state and local agencies to deny researchers access to that data, and not surprisingly, few have been eager to expose themselves to civil-rights complaints in this manner. What research is available, however, paints a disturbing picture.³⁵⁵

Yet even where the disadvantaged group is not specially protected by civil-rights laws, important public policies—or simple fairness—may be offended by disparate treatment. For example, persons that recently have undergone severe trauma may not have protected status under civil-rights laws, but they certainly merit sympathy. In a system that provides generalized pressure on local offices to move families off of the rolls, however, a parent who collects several months of aid while regaining her composure may already be regarded as a “problem client” before she has had a meaningful chance to comply with any work activities. The degree to which such a claimant meets with sympathy or irritation may well depend more on the culture of the local office, and perhaps whether its manager is seeking to improve her chance of a promotion by producing good statistical results, rather than on any balancing of policies ordained by central managers.³⁵⁶

352. In a sense, then, when an agency bestows non-entitlement benefits on some individuals, it creates an entitlement in members of protected classes that are similarly situated to those recipients. Proving that unsuccessful claimants truly are similarly situated, however, is extremely difficult in a non-entitlement program where eligibility workers need not specify the basis for their decisions.

353. By contrast, members of protected groups need not know how others are being treated to make a claim for a violation of the program’s rules. Proving a violation of a program’s rules is likely to be far easier than proving a civil-rights violation.

354. 7 U.S.C. § 2020(e)(8) (2000); 42 U.S.C. § 602(a)(1)(A)(iv), 1396a(a)(7) (2000).

355. Gooden, *supra* note 305.

356. This should not be regarded as a generic argument against local flexibility. If the local offices were granted complete freedom to set their own policies, no doubt outcomes would vary as well. In that case, however, it would be clear that local officials are accountable for the choices they make. By

Even low-wage working people, the presumed role models of the current system, may receive sharply unequal treatment across local offices. As noted above,³⁵⁷ their fluctuating incomes may make them a liability to an office aiming for temporal precision in the application of a means test.³⁵⁸ In addition, since child-care subsidies often are more costly than assistance, some local offices may believe that the goal of cost-avoidance supersedes that of work support and may seek to discourage their application. Also, some low-skilled individuals, anxious to work, may have difficulty holding any one job for very long; local offices that seek to conserve administrative resources may resent having to process frequent changes in their benefits as these claimants find and lose employment.

Without the objective standards of an entitlement, policymakers may have difficulty preventing such disparities even when they fervently wish to do so. In each case, a strong argument can be made that it is counterproductive to disadvantage these particular groups. Although some analogous barriers appear in entitlement programs such as food stamps and Medicaid,³⁵⁹ they may be particularly intractable in non-entitlement cash-assistance and child-care programs.³⁶⁰ Many of these barriers are likely to reflect deliberate choices of state policymakers. Nonetheless, these barriers' impact may be compounded by additional barriers that local offices or eligibility workers impose with the discretion a non-entitlement program provides. As a result, more members of vulnerable groups may be unable to continue to participate.

V

ENTITLEMENT AND NON-ENTITLEMENT SYSTEMS IN OTHER AREAS OF LAW

The lessons this Article has developed have applications in numerous areas of law far removed from cash-assistance programs. Indeed, the Article's argument applies whenever all parties nominally espouse the

contrast, where central authorities attempt to manipulate local offices' choices without clear rules, claimants, members of the public, and even the two strata of officials may be unclear about who really is responsible for a particular outcome. Thus, disentanglement in a system where central authorities still purport to be setting priorities is very different from true devolution of authority.

357. See *supra* notes 142-45, and accompanying text.

358. Temporal precision is particularly vexing for program managers because events of which they have no timely knowledge can cause a case to be branded an error. Thus, a flawless determination of eligibility and benefit levels based on the claimant's application can be ruined by a subsequent raise or increase in hours worked. See Super, *Quiet Revolution*, *supra* note 104, at 1327-30.

359. See, e.g., GABOR & BOTSKO, *supra* note 312, at 13-27 (documenting access restrictions in states' TANF policies that local offices apply to food stamps).

360. An illustration of these differences is *Reynolds v. Guiliani*, 35 F. Supp. 2d 331 (S.D.N.Y. 1999). New York City's welfare department was imposing similar access barriers in TANF-funded programs, food stamps, and Medicaid. *Reynolds* enjoined many of these procedures as applied to food stamps and Medicaid, but plaintiffs lacked the basis for claims against most of the same practices in the disentitled programs. *Id.*

same substantive norm for the administration of a program but some argue that that norm need not be made legally enforceable. The ensuing debate commonly becomes disjointed, as those favoring the norm's enforceability argue about its importance while their opponents insist that they share a commitment to the norm but differ only as to process. A more meaningful discussion would focus on the three key functions of enforceable norms described above and on the government's ability to replicate those functions without enforceability.

For example, in May 2004, President Bush argued that because "[w]e're a nation of law[s]" the public should be "comfort[ed]" that the government would not practice torture.³⁶¹ At the same time, it was arguing before the Supreme Court that many of those held by the government had no recourse to the courts to enforce those laws.³⁶² In essence, the Administration argued that while the humane treatment of prisoners is one of the goals of the program that incarcerates them, that goal should not be enforced with a legal entitlement to such treatment through administrative hearings to challenge their detention, access to courts through writs of habeas corpus, or the ability to bring claims before international human-rights tribunals. Thus, just as PRWORA did not dispute the validity of the objective that the entitlement had supported—aiding the needy—but nonetheless declined to support it with an entitlement for fear of undermining the program's other objectives, the Bush Administration asserted that legal entitlement would undermine the other goal of incarceration—combating terrorism.

The Administration's critics respond by emphasizing the moral and practical importance of national and international proscriptions on torture (including the risk to future American POWs) and the government's proven inability to prevent abuses at Abu Ghraib prison and elsewhere.³⁶³ Occasionally someone also will note that U.S. Army doctrine holds that torture is counter-productive because it yields unreliable information. These arguments, however, are not directly responsive to the Administration's public position, which rejects not the norm of humane treatment but its enforceability.

That the Administration's position in spring 2004 sounded odd to many reflects American law's traditional skepticism about the value of

361. 40 WKLY. COMP. PRES. DOCS. 1049, 1055 (2004).

362. See, e.g., Editorial, *Bush's Legalistic Evasions about Torture Set a Dangerous Example for U.S. Forces and the World*, ATLANTA J.-CONST., June 16, 2004, at 16A; Editorial, *Not Just a Few Bad Apples*, BALTIMORE SUN, June 13, 2004, at 4C; David Ignatius, *Small Comfort*, WASH. POST, June 15, 2004, at A23; Molly Ivins, *The Many Errors of Bush's Ways*, CHI. TRIB., June 17, 2004, at C27.

363. E.g., Robert Kuttner, *Thank God for the Supreme Court, or at Least for the Six Members Who Rules Clearly that the President's Claims of Wartime Powers Do Not Trump the Rule of Law*, BOSTON GLOBE, June 30, 2004, at A17; Bob Dart, *U.S. POWs from Other Wars Tell What It's Like: 'When You Become a Prisoner of War, You're Completely at the Mercy of the Captors'*, ATLANTA JOURNAL-CONSTITUTION, May 29, 2004, P. 1A.

rules that individuals lack the capacity to enforce for themselves. Yet were it not for the managerial deficiencies of non-entitlement programs, the Administration's position in this regard might not seem particularly irrational.³⁶⁴ In the abstract, the questions of what standards constrain the operation of government and what procedures enforce those standards are entirely separate.

Ultimately, however, the release of photographs of brutality in Abu Ghraib and of memos justifying brutal treatment of prisoners at Guantanamo showed that, absent legal enforceability, the norm of humane treatment was likely to be overcome in practice. The causes of this failure are similar to those described above. First, frontline personnel yielded to the influence of a strong counter-entitlement: pressure from superior officers to help extract actionable intelligence. With no countervailing pressure to treat prisoners humanely, guards and intelligence officers' incentives became skewed.

Second, even to the extent that most senior policymakers had set out humane norms of prisoner treatment in the Uniform Code of Military Justice or otherwise, the lack of any mechanism for prisoners to seek enforcement of those rights may have deprived top managers of timely information about how frontline soldiers were resolving the tension between those norms and the counter-entitlement to extract intelligence.³⁶⁵ Indeed, the abuses at Abu Ghraib occurred despite the presence of many more safeguards than are commonly present. The norms violated were relatively clear, providing few serious interpretive problems: since the photographs have come to light, few have questioned that the conduct they depict should be proscribed. The U.S. Army also had the services of an expert and highly independent auditor of its behavior, the International Committee of the Red Cross.³⁶⁶ Yet the soldiers involved hid some abuses from the Red Cross, a frequent problem when those with the best information about a program's adherence to its norms—here, the prisoners—lack the ability to initiate an inquiry by requesting a hearing or contacting the outside observers. And even where the Red Cross knew of problems, it lacked the power to compel a decision on them or even to share the information to more senior policymakers. By contrast, it is far more difficult to hide abuses from

364. The President's credibility obviously was undermined severely by numerous pictures showing that the U.S. had, in fact, engaged in torture, *see* Lt. Gen. Anthony R. Jones, AR 15-6 Investigation of the Abu Ghraib Prison and the 205th Military Intelligence Brigade (2004) (describing abuses), and by extensive Justice and Defense Department memos offering legal justification for a broad range of abuses that many would consider torture, *e.g.*, Jay S. Bybee, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President (2002).

365. Subsequent investigations suggest that knowledge of prisoner abuse may in fact have gone a long way up the chain of command. At a minimum, however, the ultimate policymakers—the Congress and the electorate—were not aware until abuses had been occurring for many months.

366. Jones, *supra* note 25, at 64-67.

those subject to them, and enforceable rights give individuals what auditors generally lack: the power to force a decision.

Finally, prisoners' lack of ability to force inquiries helped deny senior military policymakers the ability to identify disparate treatment of prisoners. If, as the Administration has alleged, abuses were confined to a few particular military units, complaints likely would have come disproportionately from prisoners within the control of those units. Denying prisoners the right to make inquiry-forcing complaints prevented any such pattern from becoming apparent. In addition, the apparent targeting of observant Muslims for particular abuse might have become apparent from inquiries triggered by prisoners' complaints.

To similar effect, when Congress and states sought to temper Medicaid's goal of improving beneficiaries' health with the often contradictory goal of cost-containment, they forced millions of beneficiaries into managed care.³⁶⁷ This stripped beneficiaries of many of their legal rights to seek care and to choose among providers, much as PRWORA had stripped cash-assistance claimants of their legal rights. And just as PRWORA had given states virtually unchecked control over cash-assistance programs, managed-care companies' fiat now controlled the operation of Medicaid.³⁶⁸ Since then, federal and state administrators have pursued a daunting, and so far largely unsuccessful, search for viable means of measuring the quality of care these companies offer and counterbalancing the companies' incentives for cost containment with pressure for quality care.

As rising health-care costs have caused more employers to force their workers into managed-care plans, this problem has emerged on the broader political stage. Patients'-rights advocates have sought to give managed-care companies' patients a broader range of enforceable rights to balance the counter-entitlements that managed-care plans devise to encourage their physicians to contain costs. Just as the shift of decision making in public-assistance programs away from true professionals has discredited "professional judgment" as an alternative to enforceable rights,³⁶⁹ so too they have suggested that the shift in power from professional doctors to cost-focused managed-care companies has made traditional reliance on doctors' medical judgments an increasingly inadequate substitute for enforceable rights. On the other side, medical associations seeking relief from

367. Similarly, in 1997, when President Clinton and Congress sought to expand health insurance for children while containing costs, they enacted the capped State Children's Health Insurance Program (SCHIP), a block grant to states. 42 U.S.C. §§ 1397aa-1397jj (2000). Not only did this legislation provide no individual entitlement to coverage, it also offered those claimants that states did choose to cover few enforceable rights to services. The fiat of states, or of managed-care companies, determined what the program would provide and under what conditions; whatever promises policymakers might make about the services they would provide to claimants could be ignored without giving claimants legal recourse.

368. 42 U.S.C. § 1396n(b)(4) (2000).

369. See *supra* Part IV.C.3.

malpractice awards have argued that the entitlement to high-quality care is swamping the counter-entitlement for cost-containment, leading to wasteful “defensive medicine.” In neither case, however, are advocates of structural change prepared to admit that they wish to change the substantive norms being enforced.

Each year since 2003, with Medicaid costs continuing to press states’ budgets despite the growth of managed care, President Bush proposed to give states the option to convert Medicaid into a block grant shorn of legal entitlements.³⁷⁰ Although states may exercise this flexibility to create less generous entitlements, they also may be tempted to remove the entitlement to care altogether, subsidizing particular individuals and services without offering any legal assurances of coverage. The problems with disentanglement of Medicaid mirror those in cash-assistance programs. Without clear rules, state policymakers and CMS will have difficulty communicating their expectations to local offices or managed-care plans about what coverage they do and do not want to provide. They may have little reliable basis for assessing how those offices are operating the program since claimants will lack both a regularized channel for elevating complaints and clear criteria for framing their objections. And disentanglement raises the potential for unnoticed but pervasive unequal application of discretion on matters that may literally involve life or death.³⁷¹ More generally, disentanglement is likely to leave the tax-paying public with less reliable information about the program it is funding, including both the program’s accomplishments and the extent of unmet need.

President Bush also proposes to convert Section 8 housing vouchers³⁷² and several other programs³⁷³ into block grants, and the House has passed legislation that would do the same to the food stamp program.³⁷⁴ In each of these cases, rather than modifying the substantive norms of the programs to reflect new priorities, the proposals would extinguish claimants’ legal

370. BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2005 154-55 (2004) [hereinafter “FY 2005 BUDGET”]; BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2004 125-27 (2003).

On a smaller scale, the Centers for Medicare and Medicaid Services (CMS) has begun promoting waivers that allow states to limit or deny services in ways that otherwise would violate the Medicaid statute to save money for coverage expansions, employer subsidies, and closing state budgetary gaps. See KAISER FAMILY FOUNDATION, SECTION 1115 MEDICAID AND SCHIP WAIVERS: POLICY IMPLICATIONS OF RECENT ACTIVITY (2003).

371. An expanding literature documents serious disparities in the quality of medical care received by racial minorities and immigrants. *E.g.*, LEIGHTON KU & TIMOTHY WAIDMANN, KAISER COMMISSION ON MEDICAID & THE UNINSURED, HOW RACE/ETHNICITY, IMMIGRATION STATUS AND LANGUAGE AFFECT HEALTH INSURANCE COVERAGE, ACCESS TO CARE AND QUALITY OF CARE AMONG THE LOW-INCOME POPULATION 17-18 (2003). If health-care professionals succumb in this manner, it seems unlikely that non-professional eligibility workers will not. See Gooden, *supra* note 305.

372. FY 2005 BUDGET, *supra* note 370, at 165-66.

373. *Id.* at 130-31.

374. H.R. 4, 108th Cong. § 703 (2003).

rights: instead of rights based on less generous substantive norms,³⁷⁵ claimants would have none at all. Yet the maintenance of these programs' funding demonstrates that the President and the House are not prepared to renounce the norms of aiding the homeless, the poorly housed, and the hungry. Rendering these norms unenforceable, rather than making specific reductions in society's commitment to aid this population, risks setting local administration of these programs' funding adrift in ways that senior policymakers would never countenance.

Most recently, the legislation adding a prescription-drug benefit to Medicare also modifies the underlying program to begin to erode beneficiaries' legal rights. In lieu of entitlements to particular services, this legislation begins the process of converting Medicare into a promise of only a cash subsidy ("premium support") in an arbitrary amount. Here again, rather than facing the political costs of narrowing or eliminating specific rights that clashed with the new programmatic goal of cost containment (e.g., by reducing the number of days of hospitalization or skilled nursing-home care to which beneficiaries are entitled), the legislation would eliminate the structure of legal entitlement to any particular benefits.

Legislation stripping prison inmates of much of their ability to challenge abusive conditions sailed through Congress on the strength of some anecdotes about trivial complaints prisoners have lodged. In all likelihood, many of those that supported this legislation, or that declined to expend political capital to block it despite misgivings, may have been amenable to somewhat harsher substantive norms for the treatment of prisoners. Enacting those norms directly would have been a far superior path. The Prison Litigation Reform Act does little to distinguish between frivolous complaints, technically meritorious complaints filed under norms that have lost political support, and complaints of far more serious abuses that violate widely shared norms.³⁷⁶

Given the emotive nature of human rights, it would be politically difficult to narrow the substantive standards for asylum or other humanitarian relief.³⁷⁷ It may be precisely for that reason, then, that persons believing that these norms should be curtailed have contented themselves with stripping immigrants of the right to enforce those norms under many circum-

375. For example, the rent subsidies for Section 8 housing might be trimmed or the quality standards for that housing reduced.

376. See, e.g., *Davis v. Agosto*, 89 Fed. Appx. 523 (6th Cir. 2004) (dismissing for inadequate pleading a mentally ill inmate's civil-rights complaint alleging punitive beatings and abuse with cattle prod); *Roland v. Galloway*, 1998 U.S. Dist. LEXIS 7542 (D. Kan. 1998) (dismissing for failure to state a claim a civil-rights action by a prisoner alleging he was given electric shocks for profane and insubordinate speech).

377. See, e.g., *Ndom v. Ashcroft*, 2004 U.S. App. LEXIS 19072 (9th Cir. 2004) (requiring applicant for asylum to show not just danger upon returning home but that he would be singled out for imputed political beliefs).

stances.³⁷⁸ The lack of enforcement thus allows agencies' actual practice to deviate from their stated norms in ways that some policymakers prefer. The consequences of this deviation present a different type of inefficiency, well illustrated in the immigration field. The substantive norms of U.S. immigration policy have symbolic value as an extension of U.S. foreign policy as well as practical import for thousands of immigrants and their families. Voters and the bulk of Members of Congress likely assume that the stated norms are in fact those that are in force; oppressive regimes overseas, on the other hand, experience the actual policy as persons they have persecuted overtly are returned to their control. This deviation between nominal and actual policies will make it difficult for Members of Congress and the electorate to properly calibrate the other elements of foreign policies that affect these countries. The inefficiency of disentanglement, and the efficiency of enforceable rights that help hold agencies to stated norms, thus extend well beyond the programs immediately at issue.

CONCLUSION

Relatively few have compared the capacities of various administrative structures to implement particular substantive policies. One person who has is Jerry Mashaw. Writing long before PRWORA,³⁷⁹ he identified three models of administrative adjudication in public-benefits cases.³⁸⁰ One model assumes that programs' goals are primarily paternalistic and therapeutic; it criticizes agencies for failing to carry out programs' substantive goals fully.³⁸¹ This model, albeit seeking to implement very different substantive objectives from the Social Security cases he studied, certainly has driven welfare policy discussions over the past decade. Professor Mashaw posits a second, more legalistic model that seeks to borrow processes from civil litigation to improve the accuracy of decision making.³⁸² This model is the one most closely associated with legal entitlements. Finally, he describes a "bureaucratic rationality" model seeking predictable, consistent outcomes that treat similarly situated people similarly.³⁸³ Professor Mashaw argues that, although not obviously inconsistent, these models tend to clash in practice,³⁸⁴ forcing policymakers to favor one over the others. His conclusion about the inconsistency of these models has become

378. Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233 (1998) (describing the numerous circumstances under which prospective asylees may be ejected from the United States without having an opportunity for judicial review of their claims of foreign persecution).

379. MASHAW, *supra* note 76, at 21-23.

380. Although writing specifically about Social Security disability cases, Professor Mashaw suggests that these models may be applied to administrative adjudications generally. *Id.* at 23.

381. *Id.* at 21, 26-29.

382. *Id.* at 21-22, 29-31.

383. *Id.* at 22, 25-26.

384. *Id.* at 23, 34-40.

widely accepted, as reflected in the recent movement to reject legal entitlements.

This Article has revisited this problem two decades later and has reached a very different conclusion from that of Professor Mashaw. It finds that legal entitlements, far from being inconsistent with the implementation of complex, competing substantive policies, are essential to their success. It further concludes that assuring consistent application of those policies across the target population is essential to achieving the goals of paternalistic policies such as those upon which Professor Mashaw's first model depends. This result has important implications far beyond PRWORA and cash-assistance programs. The assumption that entitlements must be eliminated to accommodate major changes in programs' substantive priorities has come to have a pervasive influence on policy development in many other programs.³⁸⁵

None of this means, of course, that entitlements are appropriate vehicles for all public programs or activities. It is clear, however, that the force and rigidity of entitlements has been greatly exaggerated. At the same time, the force and effectiveness of counter-entitlements have gone unnoticed or underappreciated in debates about proposals to eliminate enforceable rights. Decisions about programmatic structure should not be made without careful consideration of the alternatives, including a clear-eyed assessment of how each structural option might affect the program's substantive objectives. In some cases, a clearer understanding of the likely consequences of eliminating the enforceability of substantive norms may help expose covert attempts to subvert norms that still retain wide public support. Unfortunately, in the current atmosphere of reflexive hostility to entitlements,³⁸⁶ that kind of reflection is proving all too rare.

385. Moreover, the question of whether cash-assistance programs coupled with work requirements should operate as entitlements remains very much alive at the state level even after Congress decided in 1996 that it would not provide any federal source of entitlement. *See, e.g., Weston v. Cassata*, 37 P.3d 469 (Colo. Ct. App. 2001) (finding that Colorado's cash assistance program was an entitlement for due-process purposes notwithstanding state legislation to the contrary).

386. The term "entitlement" once "signified the solidarity of an expansive welfare state that extended the rights and meaning of citizenship" but since the 1990s has "bec[o]me a term almost as negative as 'welfare.'" KATZ, *supra* note 117, at 324-25.