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COMMENTARIES

CONTROLLING WELFARE BUREAUCRACY: A DYNAMIC APPROACH

*John Denvir**

I. Introduction

Our society has become, within an incredibly short fifty years, a society of institutions. It has become a pluralist society in which every major social task has been entrusted to large organizations—from producing economic goods and services to health care, from social security and welfare to education, from the search for new knowledge to the protection of the natural environment.¹

This observation is fast becoming part of the “conventional wisdom”; the fact that Peter Drucker’s book is on the nonfiction bestseller lists indicates the central place which the bureaucratization of modern life occupies in contemporary social policy debates.² Over one-half of our gross national product comes from service institutions which are not businesses and consequently not subject to market control.³ State, local, and federal governments alone comprise one-third of the GNP.⁴ Drucker dramatically warns that “the alternative to autonomous institutions that function and perform is not freedom. It is totalitarian tyranny.”⁵

The national concern over bureaucratization has failed to infiltrate legal scholarship; administrative law scholars have generally addressed only the peripheral legal problems which omnipresent public bureaucracies create. While government bureaucracies such as the police, public housing authorities, prisons, county hospitals, social security offices, and public welfare agencies take thousands of illegal actions each day, the administrative law casebooks concern themselves almost exclusively with the actions of major federal regulatory agencies, and of those only “ones which ultimately generate lawsuits traditional in form.”⁶ There are only 10,000 employees of the seven major federal regulatory agencies; yet 420,000 policemen daily make administrative decisions which affect the lives of millions of citizens.⁷ Public social welfare agencies disbursed \$64.3 billion in benefits in 1970; 23 million citizens wait monthly for pension checks from Social Security or other government retirement programs; another 15 million depend upon public welfare agencies.⁸ It is not unfair to conclude that the traditional administrative law focus is egregiously myopic.

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1 P. DRUCKER, *MANAGEMENT* ix (1973).

2 E.g., J. GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967); *ECONOMICS AND THE PUBLIC PURPOSE* (1973).

3 P. DRUCKER, *supra* note 1, at 7.

4 *Id.* at 7.

5 *Id.* at ix.

6 L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW* 5 (3d ed. 1968).

7 K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 8 (1969).

8 S. COOPER, ET AL., *LAW AND POVERTY: CASES AND MATERIALS* 30-31 (2d ed. 1973).

As to how fairly these "consumers" of public bureaucracies are treated, one study of social security disability claims showed that the odds against getting a fair determination were quite substantial.⁹ Thirty-seven percent of the disability applicants who were originally denied but requested "reconsideration" at a higher agency level were found eligible; 43 percent of those who were originally denied and also denied during the "reconsideration" process were subsequently found eligible by a hearing examiner. Almost 40 percent of those who were denied at all levels of the agency (including the hearing examiner and a National Appeals Council) and yet who had the stamina to seek judicial review were found by a federal district court to have been the victims of administrative error.¹⁰ What makes these rates of bureaucratic error so alarming is that they stem from the administration of a "middle class" social insurance program where administrators are ostensibly much more client-oriented than in poor people's programs such as public welfare.¹¹

Some legal scholars have addressed the issue, but their proposals for reform consist only of such traditional administrative law techniques as rule-making and judicial review.¹² Such techniques, while useful, are inadequate to control low-level administrative discretion since they fail to take into account the dynamic forces determining bureaucratic behavior.¹³

Legal services attorneys have spent much time litigating against public bureaucracies. However, for the most part (and almost entirely in the welfare area) these lawsuits have been structured to strike down legal rules. Unfortunately, the rule has often been struck down but the practice has continued unabated because the rule reflected institutional pressures which continue to exist with or without the rule.¹⁴

This commentary suggests new mechanisms designed to ensure the responsiveness of public bureaucracies to their clientele. An attempt will be made to construct a model of bureaucratic behavior for one public bureaucracy—welfare—and then to draw from that analysis new forms of legal control which better conform to the dynamic of the bureaucratic structure.

9 Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681, 683.

10 *Id.*

11 Friedman, *Social Welfare Legislation: An Introduction*, 21 STAN. L. REV. 217 (1969).

12 K. DAVIS, *supra* note 7; Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293 (1972).

13 Handler, *Controlling Official Behavior in Welfare Administration*, in LAW OF THE POOR (J. tenBroek ed. 1966).

14 Gary Bellow has stated the problem well:

For example, a group of farm workers tells me that, in essence, they want the disease and injury rates from pesticides to be reduced substantially. There exist laws on the books; the agency does not, however, enforce these laws or enforces them so selectively that enforcement has no effect on the practice. The problem is the creation of a mechanism that can create a substantial and lasting change in behavior, governmental and private. This is inevitably a political as well as a legal problem. We can try to generate pressures on the parties involved by bringing public attention to the problem, or try to develop sanctions for non-compliance with existing laws or attempt to develop institutional mechanisms to keep the problem visible. Sometimes we can achieve these results with a lawsuit. Sometimes a legal decision can produce conforming behavior. But, what happens when we go away — when the pressure abates? Legal victories can be so easily circumvented. If one avenue is blocked, five other alternatives remain open.

Quoted in Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1087 n.28 (1970).

While the discussion centers on welfare, many of the principles also apply to other public bureaucracies such as social security and unemployment insurance. Indeed, students are the "consumers" of schools, patients of hospitals, tenants of public housing, prisoners of prisons, and the community of police services. Each bureaucracy presents unique problems but each shares one common characteristic: there is no market control of the "seller's" behavior; the dissatisfied customer cannot bring his trade elsewhere. Society in general, and lawyers as the architects of our social institutions in particular, must therefore create controls which will ensure the responsiveness of public bureaucracies.

II. The Varieties of Administrative Abuse

It has become increasingly clear that the administration of our national welfare system does not proceed on a mechanical model, efficiently churning out uniform grants and services on the basis of universal requirements and policies. Numerous studies have shown that administration varies not only from state to state¹⁵ but also between local agencies in the same state,¹⁶ between different offices in the same local unit,¹⁷ and between different caseworkers in the same office.¹⁸ While important variations are permitted between states, the variations from locality to locality, office to office, and worker to worker are clearly forbidden by the Social Security Act.¹⁹

This commentary does not wish to portray caseworkers as ogres. Welfare caseworkers, like legal service attorneys and law professors,²⁰ are a mixed group, some conscientious and some inept. Our welfare system, however, gives enormous discretion to all low-level administrators, and then exposes them to anticlient pressures while insulating them from proclient pressures. The resulting active abuses such as midnight raids²¹ are dramatic, but perhaps the passive abuse of withdrawing as much as possible from recipients and their needs is a more serious problem.²² What follows is not an exhaustive catalogue of administrative abuses; it should, however, illustrate the potential for abuse and the variety of low visibility techniques which can be employed to illegally limit the number of recipients and the amounts they receive.

A. Applications—The Problem of Discouragement

One effective way to limit applications is to refuse to publicize the existence of a program. We have all seen public service spots on television encouraging

15 A. KEITH-LUCAS, DECISIONS ABOUT PEOPLE IN NEED 179 (1957).

16 Derthick, *Intercity Differences in Administration of the Public Assistance Program: The Case of Massachusetts*, in CITY POLITICS AND PUBLIC POLICY 243 (J. Wilson ed. 1968).

17 Graham, *Civil Liberties Problems in Welfare Administration*, 43 N.Y.U.L. REV. 836, 848 (1968).

18 A. KEITH-LUCAS, *supra* note 15, at 37.

19 42 U.S.C. § 602(a)(3) (1970).

20 Perhaps some study should be done on the "responsiveness" of legal service attorneys to their clients (or of law professors to their students). The same lack of "market controls" which will be discussed in this commentary also exists in legal aid and law school bureaucracies.

21 *E.g.*, Parrish v. Civil Serv. Comm'n, 66 Cal. 2d 260, 57 Cal. Rptr. 623, 425 P.2d 223 (1967).

22 Handler & Hollingsworth, *Reforming Welfare: The Constraints of the Bureaucracy and the Clients*, 118 U. PA. L. REV. 1167, 1176 (1970).

inquiries about social security and veterans' benefits, but certainly never an invitation to unwed mothers to inquire about possible eligibility for AFDC.²³ Also, the potential recipient who does come to the welfare office may be greeted by a wide variety of ambiances, some overtly hostile. A welfare office in a rural California county with which the author had many dealings was situated on the second floor of a modern office building. A sign on the elevator directed welfare recipients to use the stairs. After checking in with the receptionist, the potential client was sent to a room containing only long rows of straight-back chairs, all facing one wall. No ashtrays were provided.

Merely limiting the number of staff and telephones implicitly limits case-loads. This same office, which served over 15,000 recipients, had only four telephone lines; probably half the eligible population in the county spoke Spanish, but the telephone receptionist spoke only English. Since most recipients had to use pay phones and many lived 15 to 20 miles from the office, the disincentive to apply was considerable.

The caseworker interviewing the potential recipient also has the option of classifying the request as an inquiry rather than an application, thereby saving the potential recipient (and the caseworker) the bother of filling out a formal application.²⁴ Even if a formal application is accepted, the primary burden of steering it through the bureaucratic rapids rests with the applicant.²⁵ If he stops at any time during the process, the application will lapse. Amassing records may require several trips to the agency and the amount of support the applicant receives from the caseworker will undoubtedly determine whether the application is ever completed.

In this regard, the availability of emergency aid becomes extremely important. The Social Security Act does not require it, but most states provide for emergency aid to help families in immediate need since the federal government shares the cost.²⁶ Because most applicants come to welfare as the last resort in a crisis and the eligibility determination and issuance of the first check may take several weeks, most recipients need and have a right to this immediate payment.²⁷ Many never receive it; frequently they never even hear of its existence. As a consequence they may well resolve the immediate crisis in some other way (perhaps by borrowing from family or friends) and allow the application to lapse.

B. Eligibility Requirements—The Problem of Vagueness

Our welfare policy has a split personality: it both purports to be eager to

23 For a long time the actual recipients of welfare were about one-half of those actually eligible; the publicity which community action and welfare rights groups gave the program may explain the sudden jump in participation rates in the late 60's. See Steiner, *Reform Follows Reality: The Growth of Welfare*, 34 PUB. INTEREST 47, 64 (1974).

24 California Department of Benefit Payments Reg. § 40-103.6 (hereinafter cited as "CDBP Reg.").

25 "In the initiation of an application for assistance . . . the applicant shall assume as much responsibility as he can . . ." CDBP Reg. § 40-105.

26 42 U.S.C. § 606(e) (1970); 45 C.F.R. § 233.120 (1973); CDBP Reg. § 40-129.

27 CDBP Reg. § 40-129 recognizes "immediate need" when the applicant's "current income and/or liquid resources are insufficient to meet his expenses for food, clothing, shelter, medical care, or other nondeferrable needs during the period of evaluation."

help the truly needy and yet fiercely resolves not to waste tax dollars on malingerers. It resolves this dilemma by vaguely worded eligibility requirements giving the caseworker maximum discretion to include or exclude.²⁸ The Supreme Court has struck down some of the more outrageous requirements,²⁹ but the same abuses in different forms remain.

One statutory requirement for AFDC eligibility is that the child be "deprived of parental support."³⁰ One form of deprivation is the "continued absence" of one parent. California regulations define "continued absence" as a "substantial severance of marital and family ties" and further define "substantial severance" as a "definite interruption of or marked reduction in marital and family responsibilities compared to previously existing conditions."³¹ A caseworker must apply this broad standard to real life situations; sometimes it is done harshly. For instance, the author once had a client who lived in a border town and brought her children every Sunday morning to a park on the Mexican side so they could see their father who was an excluded alien. The welfare department was not sure this amounted to continued absence.

The Supreme Court has recently ruled that the Social Security Act does not prevent the states from having supplementary "work programs."³² California requires "employable" recipients to go through a whole panoply of procedures purportedly designed to lead to employment. One requirement is that the "employable" recipient "shall demonstrate to the satisfaction of the county that he has been, and is available for, and actively seeking employment."³³ This, of course, is not an unreasonable requirement so long as the recipient is indeed "employable"³⁴ and there is some reasonable hope of finding work. Often, however, this is not true of unskilled welfare recipients in California in the 1970's; the consequence is that welfare administrators may use this job search requirement as a club. One winter the author spoke with a young man in a northern California rural county, heavily dependent on the logging industry which closed down in winter. Each day this young man walked to one of the five to ten gas stations in town to inquire about work. He would walk to one station a day, five days a week, in two-week cycles, so he could fill out his job search card. He knew there was no work, so did the gas station operators and so, presumably, did the welfare department, but they insisted on this demeaning ritual if his wife and baby were to continue to receive benefits. In the same county, the author also spoke with a middle-aged woman who, about twice weekly, drove at her own expense about 20 miles round trip to inquire about maid jobs at motels, even though she knew they were not hiring during the slow winter season.

The California work rule is especially vulnerable to abuse since it holds that a recipient can fail in his or her job search duty by "adopting voluntary personal

28 W. BELL, *AID TO DEPENDENT CHILDREN* 181 (1965).

29 *E.g.*, *King v. Smith*, 392 U.S. 309 (1968).

30 42 U.S.C. § 606(a) (1970).

31 CDBP Reg. § 41-450.

32 *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405 (1973).

33 CDBP Reg. § 41-407.

34 *E.g.*, CDBP Reg. § 40-407.27 exempts "a caretaker whose presence in the house is required on a substantially continuous basis because of the illness or incapacity of another member of the household."

appearance factors or a bizarre mode of dress shown not to be acceptable to prospective employers in light of the labor market of the registrant."³⁵ One young man in a California central coastal county was questioned about the "suitability" of his long hair (held neatly in a ponytail with a rubber band) before he was sent to apply for work at a local cannery.

C. Grant Computations—The Problem of Complexity

AFDC, of course, is only available to children who are needy.³⁶ This requires an inquiry into an applicant's income and assets.

The spectre of affluent loafers on the public dole has spawned an extremely complex set of regulations pertaining to income and property. The California welfare manual devotes 40 pages to the subject of income alone. The result is a system which generates abuse because of its own complexity and the resulting ignorance of both recipient and caseworker.

The concept of "in-kind income," for example, would befuddle an educated person, much less an undereducated welfare recipient. "In-kind income" is the "noncash economic benefit" which California regulations impute to recipients who share facilities with other recipients or nonrecipients. If two welfare recipients with separate grants live in one house, the state reasons there is a saving which is income to one of the recipients and deducted from the grant.³⁷ If a non-needy grandparent allows needy grandchildren who receive AFDC to live in his home, the value of the lodging he gives them is income.³⁸ Even the value of the nourishment and shelter provided to the fetus by its mother is income to be deducted from the grant.³⁹

The average recipient certainly cannot protect his or her rights under such a system. Even legal services attorneys who do not specialize in welfare feel ill at ease checking a budget computation. One suspects that the rapid turnover in welfare personnel, together with the desire to free more experienced personnel from "paper work," creates a situation in which all too often the caseworker computing the budget is ignorant of the applicable law.

D. Offsets, Recoupment, and Fraud—The Problems of Presumptions and Punishments

Not only is the welfare system complex, but the administrator has great power to impose sanctions against the recipient who is ignorant of his duties with respect to the system. A series of convenient presumptions unfairly increases that power. In California, a recipient is presumed to be aware of all eligibility conditions and his duty to report relevant information.⁴⁰ If he fails to report, his

35 CDBP Reg. § 30-152.23.

36 42 U.S.C. § 606(a) (1970).

37 *Cooper v. Swoap*, 11 Cal. 3d 856, 115 Cal. Rptr. 1, 524 P.2d 97 (1974).

38 *Waits v. Swoap*, 11 Cal. 3d 887, 115 Cal. Rptr. 21, 524 P.2d 117 (1974).

39 *C.W.R.O. v. Brian*, 11 Cal. 3d 237, 113 Cal. Rptr. 154, 520 P.2d 971 (1974). It should be noted that *Cooper*, *Waits*, and *C.W.R.O.* each repudiated the "in-kind income" thesis as a violation of state law.

40 CDBP Reg. § 44-333.14.

failure is "presumed to be willful" unless the recipient rebuts the presumption.⁴¹ The recipient is guilty until he proves himself innocent to the satisfaction of the caseworker.

The same type of presumption is used in the job search program; a recipient can be terminated not for refusing a job offer but for failure "to demonstrate to the county" that he has been looking for a job. The burden of proof is placed on the recipient, thereby increasing administrator's discretionary power over the recipient.

Of course, if a recipient disagrees with a caseworker's reduction of the grant, he can ask for a hearing and receive the original amount of aid until a hearing is granted and a decision announced; this is the mandate of *Goldberg v. Kelly*.⁴² However, if the hearing officer upholds the caseworker's determination, federal regulations now permit the department to recoup the resulting overpayment, often by a deduction from the current grant.⁴³ This procedure requires the recipient in effect to wager that his position will be upheld.

The final source of power lies in the caseworker's ability to recommend a fraud prosecution which can be used as a bill collection technique of great efficacy.⁴⁴ Once again, a personal anecdote illustrates the problem. One day a farmworker came to my office because he was being investigated for fraud. The county welfare fraud investigator had told him he would be prosecuted if he did not repay all the aid he had received. The client had obviously failed to report a good deal of casual income. He claimed ignorance of the requirement; perhaps, he said, the fact that the caseworker spoke only English and he only Spanish caused the problem. I told him he only had a legal duty to repay if he had withheld the information willfully. He said he had not, and that he did not have any money anyway. I told him to plead not guilty if he had, in fact, done nothing wrong. He went to trial, was convicted and went to jail for three months. Today I would advise such a client to make some financial arrangement with the county whether or not he was innocent. The fraud prosecution is necessary, but its potential for abuse is enormous. Too often the only pressures which operate on the administrator considering a fraud prosecution induce him to use it as an economy device rather than for its intended purpose.

III. The Bureaucratic Dynamic

A. Informal Structure, Power, and Self-Interest

A basic premise of this commentary is that lawyers have an inadequate understanding of the nature of bureaucracy and the motives of bureaucratic officials. While lawyers certainly no longer subscribe to Max Weber's portrayal of bureaucracy as the most rational and efficient form of organization, they do tend to stereotype bureaucrats as "pencil pushers" without the ability and ambition necessary to succeed in a more demanding profession. Most lawyers' knowl-

41 CDBP Reg. § 44-333.161.

42 397 U.S. 254 (1970).

43 45 C.F.R. § 233.20(a)(12) (1973), amended, 39 Fed. Reg. 22268-69 (1974).

44 CDBP Reg. § 20-001 *et seq.*

edge of organization theory is limited to Parkinson's Law and perhaps some acquaintance with Robert Merton's concept of "ritualism," a process in an ossified bureaucracy where "adherence to rules, originally conceived as a means, becomes transformed into an end-in-itself," and "instrumental" values become "terminal" values.⁴⁵

Social scientists no longer center the study of bureaucracy on the static organization chart, but view it as a dynamic system of force and counterforce.⁴⁶ No longer are bureaucratic officials portrayed as timid simpletons; administrators are recognized as ambitious, aggressive individuals looking to their own self-interest. The insights of these social scientists should aid lawyers in understanding the bureaucracies they seek to reform.

One concept developed in this literature is "informal structure," the pattern of relationships which develop in an organization parallel to and often in conflict with the formal hierarchical structure. Bureaucracies are thus viewed in terms of the actual conduct of their officials rather than the formal description of their duties. A study of a public employment office found that many of the formal regulations of the agency had been informally amended in practice because they were found inefficient or inconvenient by the people actually performing the tasks.⁴⁷

Anthony Downs sees these informal structures as reactions by employees against management's penchant for viewing workers as objects rather than as whole persons.⁴⁸ Such structures often divert the bureau's members "from achieving the formal purposes of the bureau to manipulating conditions of power, income, and prestige within the bureau."⁴⁹

This type of dysfunction is not inevitable. Bureaucrats are "significantly motivated by their own self-interest";⁵⁰ therefore, a properly structured organization could marshal the "informal structure" in support of its formal goals. Blau's study of the public employment office gives a simple but striking example of this phenomenon. The agency's formal regulations gave weight both to counselling job applicants and to referring applicants to jobs for which they were qualified. At first, the statistical records from which the interviewers' job performance evaluations were made listed only the number of referrals made. Consequently, interviewers spent little time in counselling and made large numbers of referrals, many to jobs they knew the applicants would not obtain. Later the statistics were changed to reflect not only the number of referrals but also the percentage of referrals which resulted in jobs. A marked change was immediately noticed in the interviewers' conduct toward fewer total referrals but to jobs which the referee had an excellent chance to obtain. The formal regulations remained the same, but the agency brought interviewee conduct closer to the agency's formal goals

45 R. MERTON, *SOCIAL THEORY AND SOCIAL CHANGE* 253 (rev. ed. 1968).

46 P. BLAU, *THE DYNAMICS OF BUREAUCRACY* (1955); P. BLAU & W. SCOTT, *FORMAL ORGANIZATIONS* (1962); M. CROZIER, *THE BUREAUCRATIC PHENOMENON* (1964); A. DOWNS, *INSIDE BUREAUCRACY* (1967); G. TULLOCK, *THE POLITICS OF BUREAUCRACY* (1965).

47 P. BLAU, *supra* note 46, at 24-26.

48 A. DOWNS, *supra* note 46, at 63.

49 *Id.*

50 *Id.* at 2.

by more closely identifying the interviewers' self-interest with those goals.⁵¹

Michel Crozier relies heavily on the concepts of power and discretion in his study of two French bureaucracies, one a public agency performing clerical functions for the public and therefore in many ways resembling a welfare agency. Following Robert Dahl, Crozier defines power as the ability to cause another to take an action he otherwise would not have taken.⁵² Crozier maintains that bureaucracies are best understood not as hierarchical, formal structures but as a series of power relationships. Moreover, power requires dependence which in turn requires discretion. Discretion permits one to bargain as to the course of action he will choose; one cannot bargain if he has no discretion to choose between alternatives. Crozier found that supervisors in the agencies he studied in fact had no power over subordinates because rigid work rules left them no discretion. A supervisor with discretion to selectively enforce work rules would wield considerable power.⁵³ Since discretion is the source of power, Crozier believes that a continuing battle takes place within the agency with each occupational group attempting to maximize its discretion in dealing with its subordinates and simultaneously to limit its supervisor's discretion in dealing with it.⁵⁴ Blau and Scott's welfare study indirectly supports this thesis; it showed that welfare caseworkers who on every other index showed themselves "pro-client" were less willing than their "anti-client" colleagues to see a previously caseworker-determined special needs figure made part of the basic grant. They evidently wanted the discretion to give or withhold this bonus. Blau also found that interviewers in the public employment office used their discretion to impose sanctions to control "uncooperative" job applicants.⁵⁵

B. *The Caseworker as Broker*

At this point, three observations can be made: (1) We should pay more attention to the actual conduct of welfare officials and less to formal structure and written procedures; (2) welfare agencies are fields of power relationships with the amount of discretion in large part determining one's bargaining power; and (3) bureaucratic officials are not necessarily ideologically pro- or anticlient but in large part are self-interested brokers between competing influences.⁵⁶ Therefore, a study of the influences or inputs which weigh on an official's decision should prove helpful in attempting to control welfare abuse. The following discussion views the influences which weigh on a caseworker decision; the caseworker's vantage point has been chosen partly out of necessity (an analysis of all the roles in a welfare bureaucracy would be unwieldy) but also because the low visibility of caseworker decisions makes them especially inappropriate for tradi-

51 P. BLAU, *supra* note 46, at 44. However, it should be noted that another "dysfunction" immediately appeared: interviewers, in order to improve their statistical performance, began to "refer" employees temporarily laid off to jobs they knew they would return to before coming to the employment office.

52 M. CROZIER, *supra* note 46, at 157.

53 P. BLAU & W. SCOTT, *supra* note 46, at 142.

54 M. CROZIER, *supra* note 46, at 151.

55 P. BLAU, *supra* note 46, at 102; P. BLAU & W. SCOTT, *supra* note 46, at 103.

56 J. SIMON, ET AL., *PUBLIC ADMINISTRATION* 421 (1950).

tional types of legal control. The same pressures and influences are of course in operation throughout the entire welfare administration and affect all levels of management.⁵⁷

1. Peer Group

The norms and values of fellow workers substantially influence caseworker decisions. This may take the form of informal work norms whose violation is punished through ostracization.⁵⁸ Such norms prevent competition among workers, helping them to better control their work environment and limit the power of management. Other values may pertain not to the quantity or quality of work but to what the group considers a proper balance between compassion for the client and concern for the public fist. Blau and Scott found that a caseworker whose individual attitudes were proclient was no more likely to engage in proclient behavior if the majority of his peers held anticlient views than an individual caseworker whose own attitudes were anticlient but whose peers were proclient. Not surprisingly, the anticlient worker in the proclient group was twice as likely to take proclient action as an anticlient caseworker in an anti-client group.⁵⁹ Blau noted in his public employment study that the peer group frequently protected its members from the anxiety caused by aggressive clients by making jokes about such clients. This joking at the client's expense "transformed inconsiderate treatment of clients from a private exception into a socially approved practice."⁶⁰

The organization's formal structure will either augment or diminish the force of peer group pressures. A public welfare office lacking a manual of procedures gives great influence to the older workers since newcomers are dependent on them for information; conversely, the presence of a manual and an intensive formal orientation will tend to limit the influence of older workers and increase that of the management.

2. Professional Values

Another pervasive influence bearing on caseworker decisions is professional social work values. Even though a very small percentage of public assistance caseworkers have had professional social work training, to a large degree social work professionals dictated our social welfare practices between the passage of the Social Security Act and the middle sixties when welfare became a volatile political issue.⁶¹

Most writers assume that professionalization protects the client since internalized professional standards insulate him from administrative concerns for

57 However, a caveat should be given: some writers have drawn attention to the "marginal" nature of a caseworker's role implying that the caseworker's situation is in many ways unique and not analogous to the rest of the bureaucratic hierarchy. See, e.g., Lipsky, *Street-Level Bureaucracy and the Analysis of Urban Reform*, 6 URBAN AFFAIRS Q. 391 (1971).

58 P. BLAU & W. SCOTT, *supra* note 46, at 92-93.

59 *Id.* at 102.

60 P. BLAU, *supra* note 46, at 111.

61 Moynihan, *The Crises in Welfare*, 10 PUB. INTEREST 3 (1968).

efficiency and community biases against the poor.⁶² One suspects many welfare recipients might disagree. First, while Blau and Scott did find that caseworkers with a professional orientation were more "client-oriented," the client-oriented sample were less willing to relinquish their discretion in favor of the recipient's autonomy.⁶³ Piven and Cloward also cite an HEW study which discovered professional-oriented caseworkers were less likely than their nonprofessional colleagues to find applicants eligible.⁶⁴ Keith-Lucas similarly found that the state department of welfare with high numbers of professional social workers had more liberal paper requirements than a neighboring state without many professionals but lower average grants and proportionally fewer poor people on the rolls.⁶⁵ Keith-Lucas adds that perhaps professional social workers apply the same harsh community values to recipients as nonprofessionals but garb them in psychological terminology.⁶⁶ One tentative conclusion to be drawn from this data is that while professional values do counteract local community prejudices, the social work profession has biases of its own in favor of moral supervision rather than financial support of the poor.⁶⁷

3. The Supervisor

Blau and Scott also found that the supervisor's attitudes exerted great influence on caseworker decisions. A caseworker was much more likely to be concerned with eligibility procedures if the supervisor shared that concern.⁶⁸ The casework supervisor has two sources of control over the caseworker's decision. One inheres in the supervisor's position in the formal hierarchy and depends on the supervisor's ability to affect the caseworker's professional future through promotion and to overlook certain inconvenient or burdensome aspects of the caseworker's formal job description. Anthony Downs states that all officials will exhibit loyalty to those who control their job seniority and promotion.⁶⁹ It is not surprising, then, that the supervisors in the tobacco monopoly Crozier studied had little control over their subordinates—strict security regulated promotion. Blau found that supervisors in the public employment agency he studied did not want statistics to be the sole evaluation of the work performance of subordinates since such a system would diminish their power.⁷⁰ A second source of supervisor control is knowledge, since the supervisor is experienced in the complexity of the system.

4. Management

It should be obvious that the upper level administrators of a welfare agency

62 P. BLAU & W. SCOTT, *supra* note 46, at 63.

63 *Id.* at 103.

64 F. PIVEN & R. CLOWARD, *REGULATING THE POOR* 176 (1971).

65 A. KEITH-LUCAS, *supra* note 15, at 179-80.

66 *Id.* at 123.

67 See J. HANDLER, *REFORMING THE POOR: WELFARE POLICY, FEDERALISM, AND MORALITY* (1972); R. LUBOVE, *THE PROFESSIONAL ALTRUIST* (1965).

68 P. BLAU & W. SCOTT, *supra* note 46, at 151-52.

69 A. DOWNS, *supra* note 46, at 211.

70 P. BLAU, *supra* note 46, at 44.

exert a good deal of influence on how a caseworker performs; they are, after all, the caseworkers' employers in the conventional sense of the word. This applies to administrators at both the local and the state levels, the relative degree of control being determined by how much autonomy the state has given the local unit. Some writers have emphasized the importance of the local director,⁷¹ and indeed a strong-willed local director does have substantial impact on caseworker behavior. One California county director of the author's acquaintance literally put a caseworker under house arrest to prevent her from testifying at a judicial hearing which the director did not consider in the agency's best interest. Another caseworker who was considered proclient was assigned to an Indian reservation in a remote corner of the county after being told he was a bad influence on other workers.

The local director usually controls training and indoctrination, a process which develops a "bureau philosophy," a set of values newcomers will be expected to accept without critical examination. He will also have considerable control over the incentive systems (pay, promotion, etc.) to which caseworkers are extremely sensitive.

Even in a locally administered system, the state management will have great influence. The state department will, of course, publish the caseworker's manual which may or may not grant the caseworker great discretion. The manual may also focus his attention on restrictive eligibility requirements or emphasize maximizing service to the recipient.⁷² The state department will also normally prescribe the educational requirements for various positions, including the local director, thereby largely determining who will hold that position. Many local services depend upon state department aid and local sensitivity to federal requirements will thus to a large extent reflect state policy.

Management's considerable power over the caseworker's decisions may often be against the client's interests. This management bias sharpens the inevitable conflict between the individual best interests of recipients and the administrative needs of a large bureaucracy.⁷³ The higher one goes in the welfare hierarchy, the more overtly the decisions become political and the more vulnerable administrators become to powerful interest groups in which recipients are not likely to be represented.

5. Community Values

Community values influence caseworker decisions in many subtle yet insidious ways. Social scientists have developed the concept of "status congruence" to explain the tendency to judge people by external signs, one "low" status sign signifying all sorts of other unrelated low status characteristics.⁷⁴ Consequently, police tend to judge a situation not on the known facts but on the status of the parties involved. As a result, Blacks and Chicanos are apprehended not on the

71 Derthick, *supra* note 16, at 256.

72 A. KEITH-LUCAS, *supra* note 15, at 181, 201.

73 P. BLAU & W. SCOTT, *supra* note 46, at 44.

74 G. HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* 250 (R. Merton ed. 1961).

basis of their overt behavior but because of their lower class status.⁷⁵ Since all welfare recipients are by definition poor, they face prejudgment by the community (and the caseworker) before the individual facts of each situation are known.

All of the other actors discussed above as important influences on the caseworker's decision are likewise affected by community values. The caseworker may also consciously or unconsciously weigh the effect casework decisions will have on the public's image of the welfare agency and, derivatively, of the caseworker. Caseworkers in southern states have infused the vague regulations on "suitable home" and "substitute father" with local social stereotypes,⁷⁶ and caseworkers in Massachusetts have applied traditional middle-class morality in dealings with recipients.⁷⁷ Other caseworkers have also admitted being sensitive to local public opinion.⁷⁸

IV. Resolution of Bureaucratic Dilemmas

This analysis demonstrates that the caseworker often faces a dilemma created by conflicting pressures and influences.

The simplest form of dilemma occurs when the accomplishment of two or more ends depends on the same scarce means, since the more one end is attained the more the other must be sacrificed, and the choice how to distribute the means poses a dilemma.⁷⁹

If the caseworker only has 10 minutes to spend with an AFDC mother, he or she is faced with the dilemma of deciding whether to spend that time determining if the family is entitled to a special need grant for school clothes or if the mother has received any excess income which must be deducted from the grant. Or perhaps the caseworker has to decide whether to visit the family at all or spend the time making extremely neat entries in the file, a trait which his or her supervisor may value highly.

These examples are merely illustrative; the point is that often the caseworker is caught between conflicting desires of different groups. This does not bode well for the recipient since "[t]he outcome of dilemmas in which the interests of various groups conflict . . . tends to be determined by the distribution of resources and power [among the groups]."⁸⁰

One actor omitted from our list of influences on caseworker decisions is the recipient himself. The omission is partly for purposes of emphasis since the recipient's desires are obviously not totally removed from the caseworker's mind; otherwise, there would be no need for the peer group protecting the worker from client hostility.⁸¹ In fact, the caseworker's anguish at not being able to

75 J. WILSON, *VARIETIES OF POLICE BEHAVIOR* 37 (1968).

76 W. BELL, *supra* note 28, at 181.

77 Derthick, *supra* note 16, at 247.

78 A. KEITH-LUCAS, *supra* note 15, at 225-27.

79 P. BLAU, *THE ORGANIZATION OF ACADEMIC WORK* 270 (1973).

80 *Id.*

81 P. BLAU & W. SCOTT, *supra* note 46, at 111.

really help the recipient is cited as one reason for caseworker withdrawal from contact with the recipient.⁸² However, it is just this ability to withdraw which accents the unique position of the welfare recipient as compared with clients of other public bureaucracies. With many public bureaucracies, we fear just the opposite abuse, that the public regulatory agency has been captured by its clientele.⁸³ The reason for the distinctive position of the welfare recipient is no mystery; as a group, recipients do not have sufficient cohesiveness and financial power to be a politically potent force. To make welfare responsive, we must devise a system which grants power to the welfare recipient similar to that held by other client groups in our political system.

Bureaucratic dilemmas, of course, must be resolved; this occurs either by compromise or by suppression of one of the groups involved. Too often compromise comes at the expense of the recipient. An analogous situation existed earlier in this century in labor relations. The individual worker lacked the power to bargain effectively with his employer; the employer normally had sufficient power to prevent organization of the workers. The legislative solution was the National Labor Relations Act which required the employer to allow employee organization and required him to bargain with the employees' union. The legislature intervened, not to force a substantive solution to the crisis, but rather to change the structure of the confrontation so as to increase the power of the employee. Once the structure of the confrontation was altered, the dynamic of the bargaining process itself protected worker interests. We need a similar intervention to change the structure of public bureaucracies in order to make them more responsive.

The extent of legislative intervention necessary to redress the present imbalance of power is a more difficult question since responsiveness to recipient desires is not the only desirable value in a bureaucracy. The recipient cannot be the sole determinant of welfare eligibility. In fact, the bureaucratic dilemma merely reflects the conflicting missions the greater society has assigned to the bureaucracy. The welfare bureaucracy must grant benefits to all eligible applicants but must simultaneously be frugal with the public purse; it must respect the recipient's dignity but also guard against possible fraud; must give individualized services yet be evenhanded in dealing with all recipients. These conflicting missions create an organizational schizophrenia. The problem, however, is not this conflict between the various missions but the present organizational structure which overemphasizes some missions at the expense of others. The welfare bureaucracy emphasizes economy at the expense of responsiveness. The answer lies in restructuring the organization to strike a proper balance between the conflicting missions.

V. Solutions: Strategies for Intervention

It is misleading to speak of solutions to the problems of welfare administration. Some distortion of any legislative policy must occur as it is filtered through

⁸² Handler & Hollingsworth, *supra* note 22, at 1176.

⁸³ See Wilson, *The Dead Hand of Regulation*, 25 PUB. INTEREST 39 (1971).

the organizational apparatus set up to administer it. Even if there were one consistent national welfare policy, there would of necessity be some misconduct in administration since the program would be administered by self-interested individuals. However, we do not have one welfare policy in the United States but a national program reflecting different policies, many in conflict with each other. We wish to insure that those truly in need receive an adequate level of income; we wish that those who are capable of self-support have an incentive to leave the program; we wish that individuals similarly situated will be treated equitably; we wish that the program be run economically so as not to place too great a tax burden upon the rest of society. So long as welfare administrators are attempting to adjust these conflicting goals, there will be welfare abuse; and since these goals themselves reflect an ambivalence which we as a nation have toward those who are poor, it is unrealistic to expect the conflicts to disappear.

This commentary will therefore resist the temptation to propose any ideal solution. It will focus on more practical proposals for legislation and litigation. For instance, there is no doubt that a "negative income tax" or "guaranteed minimum income" would improve welfare administration by removing many discretionary abuses.⁸⁴ However, the fate of Senator McGovern's welfare proposals in 1972 and even of President Nixon's rather modest movement toward a guaranteed income in his Family Assistance Plan demonstrate that the "negative income tax" is an idea whose time has not yet come.⁸⁵

Similarly, litigation is not a fully effective reform tool. The abuses tend to have very low visibility. As soon as one moves from published regulations to the murkier area of administrative practices, very real problems of proof arise; moreover, there are difficult problems of framing proper remedies even where the abuse can be proven. For example, how does one draft an injunction requiring caseworkers to treat welfare recipients courteously and to give them emotional support in their attempts to qualify for assistance? How does one argue for a contempt citation for violation of such an injunction? However, this merely proves that just as comprehensive legislative reform is preferable to piecemeal legislative reform, piecemeal legislative reform is normally preferable to judicial attempts at reform. When even piecemeal legislative reform is unavailable, however, the courts become the only forum to which the poor and their representatives have access.

Perhaps the problem is not with litigation per se but with the type of lawsuit traditionally brought. Rather than attack punitive regulations, lawsuits should attempt to change the bureaucracy's internal structure so that such a punitive regulation is never issued. Since some vague regulations are inevitable, employment discrimination suits brought to change hiring procedures will insure that the workers applying those vague regulations will be less likely to use the vagueness as a weapon against clients.

One problem in the traditional welfare lawsuit has been its tendency to undermine attempts to organize recipients. However, a lawsuit geared toward

⁸⁴ See M. FRIEDMAN, *CAPITALISM AND FREEDOM* (1962); *THE GUARANTEED INCOME* (R. Theobald ed. 1966).

⁸⁵ See D. MOYNIHAN, *THE POLITICS OF A GUARANTEED INCOME* (1973).

the creation of a client advisory board creates a forum in which recipients can exert their power. In fact, this lawsuit makes the attorney dependent upon the recipients he represents because the strategy can only succeed if the advisory board exercises its power; this can only come about by actions of the recipients themselves.

It is indeed ironic that so many of the reforms which would make welfare bureaucracy more responsive (advisory boards, use of paraprofessionals, and bilingual aides) are already written into federal law and regulations. The bureaucracy, of course, has little incentive to implement them imaginatively. All that is needed is recipient pressure and lawsuits are an excellent tool for applying this pressure.

A. Removing Discretion

1. Deleting Unrelated Eligibility Requirements

The "paramount" goal of our national AFDC program is to protect dependent children, defined by the Social Security Act to be those who are (1) needy and (2) deprived of parental support.⁸⁶ Therefore, all eligibility requirements not directly related to need or dependency should be viewed with grave suspicion. States have created additional eligibility requirements which have discriminated between potential recipients on the grounds of "moral worthiness" and racial background.⁸⁷ While some of the most blatant nonneed conditions have been struck down, ingenious administrators always devise new variations on the same theme.⁸⁸ Here is one area in which litigation has proven more fruitful than legislative reform. Time and again, courts have invalidated eligibility requirements unrelated to need on constitutional⁸⁹ or statutory grounds.⁹⁰ In the *King-Townsend-Remillard* line of cases, the Supreme Court seems to have interpreted § 406(a) of the Social Security Act as creating a statutory "right to welfare" which the states cannot diminish by adding eligibility requirements not specifically authorized by the Act itself.⁹¹

⁸⁶ *King v. Smith*, 392 U.S. 309, 325 (1968); 42 U.S.C. § 606(a) (1970).

⁸⁷ See *King v. Smith*, 392 U.S. 309, 320-23 (1968).

⁸⁸ The recent California case, *Alice v. State Dep't of Social Welfare*, 37 Cal. App. 3d 998, 112 Cal. Rptr. 730 (1974), provides a good example of an unnecessary nonneed eligibility condition. In *Alice* a pregnant, emancipated minor applied for AFDC in order to obtain an abortion under the related Medi-Cal benefits. She sought no cash grant and the state statute prohibited the welfare department from requesting her parents to pay for the abortion; yet her application was turned down because of her refusal to consent to the welfare department's wish that they contact her parents to inform them of her pregnancy. The department persisted even though she gave them all the information they requested about her parents; she told them that one was dead, the other was on welfare, and even the address of the mother. One has to question what objective the county had in contacting the girl's parents other than to discourage her application.

⁸⁹ *Graham v. Richardson*, 403 U.S. 365 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁹⁰ *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309 (1968); *Taylor v. Martin*, 330 F. Supp. 85 (N.D. Cal. 1971), *aff'd sub nom.* *Carleson v. Taylor*, 404 U.S. 980 (1971); *Doe v. Shapiro*, 302 F. Supp. 761 (D. Conn. 1969).

⁹¹ See *Townsend v. Swank*, 404 U.S. 282, 286 (1971):

Thus, *King v. Smith* establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legis-

As administrators devise new forms of nonneed eligibility conditions, legal services attorneys should challenge them under the *King-Townsend-Remillard* theory. However, not all welfare conditions unrelated to need are vulnerable to legal challenges. Congress has become increasingly concerned with some highly publicized "welfare abuses" and will insist on some form of control which responds to politically sensitive areas such as the alleged presence of "malingerers" on welfare.

One possible solution is to utilize voluntary programs in these areas which would give recipients incentives to cooperate with authorities. This approach is especially valuable in the area of collecting support payments from deserting spouses.⁹² At present there is no incentive for a mother to cooperate with efforts to collect support from her husband. First, she may have good cause to fear reprisal from the angry husband. Second, any amount received will be deducted dollar for dollar from her welfare grant. Finally, if the support payments are made directly to her, she may be caught in a cycle of late payments much less dependable than a regular welfare check. The father also has no incentive to cooperate since he knows that whatever he pays only replaces state money and in no way improves the lives of his family. However, a program which would offer a "finder's fee" to the mother by permitting her to retain a percentage of the support payments she receives without a corresponding reduction in her grant would provide an incentive both to her cooperation and the father's.⁹³

lative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.

It should be noted that two Supreme Court cases have upheld state eligibility requirements not expressly authorized by the Act. *Wyman v. James*, 400 U.S. 309 (1971), upheld a New York state requirement that a recipient must permit a caseworker to make a "home visit" to check eligibility. *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973), authorized the states to operate supplementary work programs in addition to the programs mandated by the Social Security Act. The *Wyman* case, however, antedated *Townsend* and the opinion was limited to consideration of whether the "home visit" requirement imposed by New York violated the Fourth Amendment stricture against unreasonable searches. The *Dublino* case distinguished the *King-Townsend-Remillard* line by pointing out that § 402(a)(19) of the Social Security Act specifically requires a federal work program ("WIN"), the question in *Dublino* being whether the state was allowed to operate a supplementary work program in addition to the federal program. However, on a different level, there seems to be an unarticulated philosophical division on the Court as to whether welfare is an "entitlement" or public charity. In this regard, compare Mr. Justice Blackmun's majority opinion in *Wyman* ("One who dispenses purely private charity naturally has an interest in and expects to know how his charitable funds are utilized and put to work. The public, when it is the provider, rightly expects the same." 400 U.S. at 319) with Mr. Justice Douglas' dissent, equating welfare benefits with all other forms of government largess, such as farm subsidies. 400 U.S. at 326. There is a need for scholarship attempting to better explicate the philosophical basis for a "right" to welfare. For such an attempt based upon John Rawls' theory of justice, see Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. Pa. L. Rev. 962 (1973).

⁹² The Act requires the states to undertake a program to collect support from deserting spouses. 42 U.S.C. § 602(a)(17) (1970). This provision, however, has not been interpreted as permitting the states to force cooperation from the mother as a condition of eligibility. *Taylor v. Martin*, 330 F. Supp. 85 (N.D. Cal.), *aff'd sub nom.* *Carleson v. Taylor*, 404 U.S. 980 (1971).

⁹³ It is interesting to note that Senator Russell Long, a conservative in welfare matters, has proposed legislation making use of such a mechanism. H.R. 3153, 93d Cong., 1st Sess. (1973).

2. Requiring Specificity in Remaining Eligibility Requirements

Deleting eligibility requirements unrelated to need or dependency narrows the discretion which the caseworker has over the recipient and correspondingly the power to abuse that discretion. Of course, not all eligibility conditions unrelated to need can be deleted; the society which funds the program insists upon them, but they can be drafted with enough specificity to notify the caseworker and the recipient of their respective duties.

Americans firmly believe that welfare should be for those who are unable to work, not for those who choose to remain idle. This is a reasonable position in the abstract, but it oversimplifies the problem of employment in our economy. First, there are simply not enough jobs to employ everyone who is "employable." Second, while social science data overwhelmingly support the proposition that the poor really do want to work,⁹⁴ there is evidence that a series of disappointing job experiences has a negative effect on the attachment to the labor market of a sizable portion of our poor population.⁹⁵ The combination of a scarcity of jobs, the ambivalence of some recipients toward work, and vaguely worded welfare work regulations administered by caseworkers with strong moral views toward work results in a great deal of welfare abuse. Narrowly drawn regulations in this area will put the recipient on notice as to what his or her duties are and limit the caseworker's discretion to impose his or her own moral values on recipients.

California's "job search" regulation is an excellent example of a vaguely phrased duty which invites administrative abuse: "An applicant . . . shall demonstrate to the satisfaction of the county that he has been and is available for and actively seeking employment."⁹⁶ The parallel requirement under federal law finds a recipient ineligible if he or she has:

refused without good cause to accept employment in which he or she is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined, after notification by him, to be a bona fide offer of employment.⁹⁷

Federal law thus requires a determination that (1) a definite bona fide offer was made and (2) the recipient refused to accept the offer. Here are concrete acts

94 See L. GOODWIN, *DO THE POOR WANT TO WORK?* (1972).

95 See E. LIEBOW, *TALLY'S CORNER: A STUDY OF NEGRO STREETCORNER MEN* (1967).

96 CDBP Reg. § 41-407.11. Such broad welfare regulations may well be vulnerable to constitutional attack under the "void-for-vagueness" doctrine. Imprecise regulations deprive the recipient of notice and make review of official action by the court extremely difficult. Also, imprecise regulations relating to such matters as "bizarre mode of dress" may impinge upon first amendment rights. See text accompanying notes 32-35 *supra*. These are all defects which the vagueness doctrine is designed to prevent. See Note, *Vagueness Doctrine in Federal Courts: A Focus on the Military, Prison, and Campus Contexts*, 26 STAN. L. REV. 855 (1974). See also *Procunier v. Martinez*, 416 U.S. 396 (1974), where the Court struck down prison regulations censoring prisoners' mail, stating: "These regulations fairly invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship." *Id.* at 415.

97 42 U.S.C. § 602(a)(19)(F) (1970).

capable of proof as opposed to the California regulation which places the recipient at the mercy of whatever the county deems "satisfactory."

The California job search regulation also unfairly shifts the burden of proof to the recipient. It is his duty to "demonstrate to the satisfaction of the county" that he is looking for a job. The recipient also bears a financial burden; there is no reimbursement for expenses. There is no duty that the administrator find a job for the recipient. He merely tells the recipient to keep looking; once the recipient becomes discouraged because there are no jobs available, he is subject to termination. One way to discourage the administrator from forcing the recipient to look for nonexistent jobs would be to require that the administrator pay some "costs." For example, if the welfare department were required to reimburse recipients for out-of-pocket expenses incurred in "job search" activities (for example, gasoline), there would be less incentive to send a woman on a 20-mile round trip to look for a job which the department should know does not exist.⁹⁸

Related to the problems of vagueness and shifting the burden of proof is that of presumptions. Irrebuttable presumptions are constitutionally invalid.⁹⁹ Some rebuttable presumptions such as presuming the "willfulness" of failure to report income¹⁰⁰ until the recipient proves otherwise are patently unfair and may also violate due process if there is "no rational connection between the facts proved and the ultimate fact presumed"¹⁰¹

3. Simplifying Need Requirements and Budget Computations

One traditional form of controlling discretion has been to promulgate complex, detailed regulations. Paradoxically, such regulations only breed more discretion because the complexity becomes incomprehensible both to the administrator and the recipient. Some welfare abuse comes from honest mistakes made by inexperienced welfare workers administering a complex system.¹⁰² The complexity of the system not only creates errors but also prevents recipients from detecting them. A system based on less complex need calculations, a flat grant structure, and standardized work deductions would be both more efficient and more humane.¹⁰³ Recipients will be more willing to challenge reductions in aid if they better understand what their rights are within the system.

98 See text accompanying notes 33-35 *supra*. It appears that such a reimbursement would now be required by the Social Security Act, 42 U.S.C. § 602(a)(7) (1970). See *Shea v. Vialpando*, 416 U.S. 251 (1974).

99 See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Lewis v. Martin*, 397 U.S. 552 (1970).

100 See text accompanying notes 40-41 *supra*.

101 *Tot v. United States*, 319 U.S. 463, 466 (1943); see also *Leary v. United States*, 395 U.S. 6 (1969).

102 See *Wyman v. James*, 400 U.S. 309, 322 n.11 (1971), where Mr. Justice Blackmun quotes from an amicus brief filed by a social workers' union which states: "Caseworkers are either badly trained or untrained and that [g]enerally, a caseworker is not only poorly trained, but also young and inexperienced . . ."

103 See the discussion of the history of the California "flat grant system" in *Cooper v. Swoap*, 11 Cal. 3d 856, 861-67, 115 Cal. Rptr. 1, 4-5, 524 P.2d 97, 100-01 (1974). The United States Supreme Court, in *Shea v. Vialpando*, 416 U.S. 251 (1974), has ruled that standardized work expense deductions are invalid as applied to recipients whose work-related expenses exceed the standard allowance. However, the Court does state that the standard

B. Reinstating Competition

A basic structural problem leading to abuse is the lack of market controls over public bureaucracies.¹⁰⁴ The customer of a business exercises control through his discretion to shop elsewhere or not at all. The customers of public bureaucracies have no such control because the bureaucracy is a monopoly dealing in essential benefits and services. This is especially true of bureaucracies which serve the poor: welfare, public housing, public schools, and public hospitals. The suggestion is to reinstate market-type controls where possible and to create other forms of countervailing power which will maximize responsiveness to legitimate client demands.

The public welfare caseworker's job can be subdivided into two basic functions: determining eligibility and providing social services. The determination of eligibility is basically clerical in nature. The social services function includes the provision of family services in order to help the family obtain "capability for the maximum self-support and personal independence,"¹⁰⁵ and child welfare services to "protect and promote the welfare of children."¹⁰⁶ This is the traditional province of the social worker. The conflict between the policing role of eligibility determination and the helping role of providing social services has often been noted.¹⁰⁷ Federal regulations now require that the two functions be separately administered.¹⁰⁸

Of course, a welfare recipient cannot be permitted to shop around in search of the eligibility worker who applies eligibility standards in the most lenient manner; but to permit the recipient to choose his or her social services worker should improve both recipient morale and caseworker responsiveness since the worker will be forced, in a sense, to compete for the recipient's "trade." Drucker refers to a variation on this concept as "socialist competition":¹⁰⁹ The government sets certain minimum performance standards through a licensing agency and thereafter permits the eligible consumer a choice between providers. The poor presently have a similar choice of the provider of medical services under the Medicaid program.¹¹⁰ To convert present social services workers from employees of a public agency into independent contractors would require a substantial restructuring of the public welfare delivery system. However, such a drastic restructuring is not necessary. One could instill a similar dynamic by having the recipient choose between various welfare workers already employed by the agency; the social services worker who was not carrying his or her pro-

allowance would be permissible so long as those with greater expenses could make an individual claim for a larger reimbursement. 416 U.S. at 265.

104 P. DRUCKER, *supra* note 1, at 141.

105 42 U.S.C. § 606(d) (1970).

106 42 U.S.C. § 625 (1970).

107 See *Wyman v. James*, 400 U.S. 309, 317 (1971): "It is also true that the caseworker's posture in the home visit is perhaps, in a sense, both rehabilitative and investigative." See also Note, *Rehabilitation, Investigation and the Welfare Home Visit*, 79 YALE L.J. 746 (1970).

108 45 C.F.R. § 205.102 (1973).

109 P. DRUCKER, *supra* note 1, at 163.

110 42 U.S.C. § 1396(a) (23) (1970).

portion of the work load would feel peer pressure to perform better and would also be subject to termination.

C. Countervailing Forces Where Market Controls Are Inappropriate

1. Independent Officers

In addition to market controls, or where they are inappropriate, other controls are possible. For instance, some police forces have adopted what James Q. Wilson described as a "service style" in which they perceive themselves as selling police services to the public.¹¹¹ Understandably, these police forces cannot permit the suspect to choose whether he will be arrested and who will arrest him. However, they do allow the "consumer" some input by publicizing that any officer who is the subject of five or more complaints will not be promoted. A system which permitted recipients to voice their views on caseworker courtesy and helpfulness would perform a similar function.

One possibility would be to create an independent officer charged with monitoring the responsiveness of the welfare administration to legitimate client desires.¹¹² Client evaluations of caseworker performance could be solicited on an anonymous basis. The results of these evaluations could be recorded in employment dossiers and considered at the time of promotions. Perhaps the client evaluations could even be made public. Nor need the incentive be merely negative; awards of merit could be made to caseworkers judged especially helpful by their clientele. Special attention should be given to applicants who are denied aid; spot checks could be made to see if these denials were indeed proper or resulted from caseworker apathy or discourtesy.

The officer must be independent of the bureaucracy which he attempts to monitor. Perhaps the officer and his staff could be made accountable to a state welfare advisory committee.¹¹³ In California, the auditor general's function could be expanded to include reports on the responsiveness as well as the fiscal soundness of state administration. In fact, the auditor general presently has authority to do "performance audits."¹¹⁴

2. Governing Boards with Significant Recipient Representation

A complementary approach would be to create governing boards with substantial client representation which would have both specific powers and the staff to utilize those powers effectively. The creation of recipient governing boards is based on a political rather than an economic model of control. Bureaucracies become more responsive to their clientele when the clients become more involved in their own governance, just as national governments became more responsive to the worker as the franchise was extended.¹¹⁵ It is unfortunate that

111 J. WILSON, *supra* note 75, at 205.

112 For a general discussion of the European experience with "ombudsmen," see W. GELLHORN, *OMBUDSMEN AND OTHERS* (1967).

113 See text accompanying notes 115-22 *infra*.

114 See CAL. GOV'T CODE § 10500 (Cum. Supp. 1974).

115 R. DAHL, *PARTICIPATION AND OPPOSITION* 23 (1971).

most discussion of this approach has been under the rubric of "community control," a term which connotes an all-or-nothing choice. Participation is better viewed as a continuum of potential control; the goal is client input, not client control.¹¹⁶

Once again, federal law presently offers at least a partial solution. Federal regulations require that advisory committees be established at the state and, where feasible, local levels.¹¹⁷ These committees must "have adequate opportunity for meaningful participation" in program administration, including "furtherance of recipient participation in the program of the agency."¹¹⁸ Recipients, or their representatives, must constitute at least one-third of the membership of these committees,¹¹⁹ and these committees must be provided with staff assistance.¹²⁰ Financial arrangements must be made to permit recipients to participate in the committee's work.¹²¹ Little has been done to carry out the law because the bureaucracy has a natural aversion to outsiders looking over its institutional shoulder. Legal services attorneys and their clients should make sure that these committees are set up and that their membership is not handpicked by the bureaucracy.

While the federal requirements are an excellent starting point, these governing boards should be granted additional powers: (1) the presence of a committee member at all staff meetings, (2) advance notice of all proposed regulations and staff memoranda and a right to comment before their adoption, (3) access to competent legal counsel (at the local level, this could be provided by legal services attorneys), and (4) participation in the process of choosing high-level agency personnel.

Often in the past governing boards have not been effective controls on administrators, but these have tended to be boards without effective powers and resources to use those powers. We cannot expect people, poor or otherwise, to actively participate on boards which are designed to be ineffective. Also, too often the poor and their attorneys have been insensitive to the tactical advantages which control of such boards gives to them even in the face of an uncooperative administration. The official status of a board makes its actions more "newsworthy" to the media and the resources which it controls (staff, access to records, etc.) can be used to expose an uncooperative administration as well as to cooperate with a friendly administration.

One persistent criticism of community control proposals has been that client boards tend to be subject to manipulation by small pressure groups not truly representative of the poor. The low turnout at OEO Community Action Program elections is often cited in support of this proposition.¹²² It is true that the

116 See Kalodner, *The Right to Participate*, in *THE RIGHTS OF AMERICANS* (N. Dorsen ed. 1971).

117 45 C.F.R. § 220.4(a)(1) (1973). See *Arizona State Dep't of Public Welfare v. Dep't of Health, Educ. and Welfare*, 449 F.2d 456 (9th Cir. 1971).

118 45 C.F.R. § 220.4(a)(1) (1973).

119 45 C.F.R. § 220.4(a)(2) (1973).

120 45 C.F.R. § 220.4(a)(3) (1973).

121 45 C.F.R. § 220.4(a)(4) (1973).

122 R. KRAMER, *PARTICIPATION OF THE POOR: COMPARATIVE COMMUNITIES CASE STUDIES IN THE WAR ON POVERTY* (1969); P. MARRIS & M. REIN, *DILEMMAS OF SOCIAL REFORM* 167 (1967).

limited scope of a governing board's power and the basic reluctance of many poor people to identify themselves with other recipients limit effective participation. However, to some degree these defects should be remedied by the very fact of granting specific powers to the board and by having it include both recipients and interested professionals.

It would be a mistake to believe that a governing board must be perfectly representative in order to effectively represent the clients' interest. Few would argue that the oligarchies controlling most labor unions truly represent their membership as required by a pure democratic model; but unions have been very successful in protecting the interests of their members against management. In other words, the presence of a countervailing force makes the bureaucracy more responsive, even if the force is not entirely representative of its constituency.

3. Civil Damage Actions Against Recalcitrant Administrators

While many, and perhaps most, welfare abuses stem from the vagueness and complexity of the system itself, other abuses are plainly deliberate.¹²³ The traditional litigation technique has been to sue for declaratory and injunctive relief. However, administrators can find judicial declarations ambiguous and read injunctions extremely narrowly; courts are most reluctant to use the contempt sanction.¹²⁴

Some might maintain that the bad press an administrator suffers if an intentional abuse is publicized through a lawsuit will have some effect; however, welfare is one area in which publicizing administrative abuses may be ineffective and, in some cases, even counterproductive. The political context in which our welfare system operates is such that publicizing blatantly illegal administrative practices may actually improve an administrator's political position, creating a public image that he or she is not soft on "welfare chiselers."

If injunctions and publicity are inadequate, perhaps an action for damages against the individual administrator would be more effective. One could sue on tort principles in state court¹²⁵ or as a § 1983 action in federal court.¹²⁶ The

¹²³ *E.g.*, *Cooper v. Swoap*, 11 Cal. 3d 856, 864, 115 Cal. Rptr. 1, 6, 524 P.2d 97, 102 (1974):

In promulgating the regulation in question here, the department has ignored this fundamental principle of administrative law [*i.e.*, administrative regulations that alter or amend the statutes are void] and has arrogated to itself the authority to reject explicit legislative determinations, an authority which is completely incompatible with the basic premise on which our democratic system of government rests.

¹²⁴ The case of *Doe v. Carleson*, 356 F. Supp. 753 (N.D. Cal. 1973), presents a good example. Earlier, in *Taylor v. Martin*, 330 F. Supp. 85 (N.D. Cal. 1971), a three-judge federal court had issued a preliminary injunction ordering the state not to require execution of a nonsupport complaint against an absent spouse as a condition of the family's eligibility for welfare. The state director of social welfare then wrote a letter to all counties advising them that recipient could no longer be terminated for refusing to cooperate with the district attorney, but then added: "It is NOT required that an applicant or recipient be told that she has no obligation to answer questions or to be interviewed by the district attorney concerning these matters, and she should NOT be so advised." 356 F. Supp. at 755. Judge Peckham noted that "this position suggests a lack of candor that borders on the contemptuous," but no contempt citation was issued. *Id.*

¹²⁵ *E.g.*, *Ramos v. County of Madera*, 4 Cal. 3d 685, 94 Cal. Rptr. 421, 484 P.2d 93 (1971).

¹²⁶ See *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974): "[D]amages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office."

damage remedy could be joined with a claim for equitable relief. So long as the damages proved are neither speculative nor excessive, courts may well be willing to grant awards. A relatively modest potential liability against any individual administrator should have a dramatic deterrent effect on deliberate abuse well beyond the individual case. Once again, the principle is clear; just as caseworkers in some situations are deterred from a liberal construction of eligibility requirements because of fear of displeasing their supervisors, they can be made leery of illegally restrictive interpretations by fear of personal financial liability.

D. Restructuring Personnel Policies

Another complementary approach is to restructure personnel policies so as to hire workers who will be spontaneously more responsive to client needs. Employment of more paraprofessionals, more minorities, and more bilingual personnel will help span the economic and cultural chasm between the agency and the recipient. A former recipient may be better qualified to help the poor than his middle-class colleague. A B.A. in English literature may little help a caseworker to deal effectively with the everyday problems of a poor black family.

The experience with restructuring jobs so as to allow more employment of nonprofessionals is still scanty, but preliminary results in the welfare field are most promising.¹²⁷ Observers of nonprofessional welfare aides in both California and New York conclude that they have improved service because of their better communication with recipients and greater responsiveness to client needs; they provide a role model for recipient emulation.¹²⁸ Furthermore, there are several legal precedents which can be used to force a restructuring of hiring policies.

1. Federal Law on the Employment of Paraprofessionals

Section 402(a)(5)(B) of the Social Security Act requires states to provide "for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community service aides."¹²⁹ Federal regulations under this section require the institution of recruitment methods, the establishment of training programs, the maintenance of job progression ladders to higher-paying positions, and a demonstration of increasing utilization of subprofessional staff on an annual basis.¹³⁰ There has been some use of paraprofessionals as community service aides in welfare departments, but welfare clients and their attorneys could spur faster action through negotiation and litigation. They could influence recruitment policies so as to maximize the hiring of sympathetic personnel. Governing boards could also help administer the recruitment program.

127 Goldberg, *Untrained Neighborhood Workers in a Social-Work Program*, in *NEW CAREERS FOR THE POOR* 125 (A. Pearl & F. Riessman ed. 1965); *UP FROM POVERTY* (F. Riessman & H. Popper ed. 1968).

128 Brager, *The Indigenous Social Work Technician*, in *UP FROM POVERTY* 80 (F. Riessman & H. Popper ed. 1968); Elston, *Public Welfare: The Breath of Change*, in *UP FROM POVERTY* (F. Riessman & H. Popper ed. 1968).

129 42 U.S.C. § 602(a)(5)(B) (1970).

130 45 C.F.R. § 220.6 (1973).

2. Title VII Actions on Employment Discrimination

The Supreme Court in *Griggs v. Duke Power Co.*¹³¹ invalidated testing and other selection procedures which statistically discriminated against minorities unless the procedures were shown by the employer to be job related:

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in application. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.¹³²

If public welfare employee selection techniques¹³³ result in a statistically disproportionate number of whites being hired over Blacks, Indians, and Chicanos, the burden of defending the selection process passes to the employer. Some public agencies, such as fire departments¹³⁴ and police departments,¹³⁵ have been unable to justify their procedures as performance related and have had strong affirmative relief decreed against them.

3. Title VI Actions to Require Employment of Bilingual Aides

The Supreme Court case of *Lau v. Nichols*¹³⁶ provides a basis to require the employment of more bilingual personnel. In *Lau*, the Supreme Court interpreted § 601 of the Civil Rights Act of 1964¹³⁷ to require bilingual education for non-English-speaking schoolchildren of Chinese descent. Section 601 bans discrimination based on the grounds of race, color, or national origin in "any program or activity receiving federal financial assistance." The Court reasoned that children who are unable to communicate with their teachers because of a language barrier are not receiving the benefits of the federally financed education program. If the lack of bilingual teachers denies educational benefits to non-English-speaking children, then the absence of bilingual welfare workers also deprives non-English-speaking recipients of the full benefits of the federally financed welfare program.¹³⁸

California statutory law also lends support to litigation requiring more employment of bilingual employees. California Government Code §§ 7291 and 7292 require that "a sufficient number of qualified bilingual persons" be employed "in public contact positions or as interpreters assisting those in such posi-

131 401 U.S. 424 (1971). See also 29 C.F.R. § 1607 *et seq.* (1973).

132 401 U.S. at 431.

133 In California the state personnel board sets personnel standards on a "merit" basis. CAL. Gov't CODE § 19800 *et seq.* (Cum. Supp. 1974).

134 *E.g.*, *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971); *Western Addition Community Organization v. Alioto*, 360 F. Supp. 733 (N.D. Cal. 1973).

135 *E.g.*, *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n*, 354 F. Supp. 778 (D. Conn. 1973).

136 414 U.S. 563 (1974).

137 42 U.S.C. § 2000(d) *et seq.* (1970).

138 It should be noted that *Guerrero v. Carleson*, 9 Cal. 3d 808, 109 Cal. Rptr. 201, 512 P.2d 833 (1973), holds that termination notices to welfare recipients who speak only Spanish need not be in Spanish, but the *Guerrero* case antedates *Lau*, and the attack in *Guerrero* was based solely upon constitutional grounds.

tions." The Office for Civil Rights of the Department of Health, Education, and Welfare recently notified California that an estimated 80 percent of California recipients who spoke Spanish as their primary language were being served by staff who did not speak Spanish.¹³⁹

VI. Conclusion

Aleksandr Solzhenitsyn's *Gulag Archipelago* contains a grisly illustration of the frailty of any attempt to reform a bureaucracy.¹⁴⁰ When the Soviet state security police come to pull an unsuspecting citizen out of bed in the middle of the night, perhaps never to return to his home, they are accompanied by a civilian witness. Evidently, the requirement of a civilian witness had been instituted long ago as a form of control on the police. The hope of deterring the police soon vanished, but the regulation remained; the witness is forced to accompany the police on their nocturnal raids.

While there is no such thing as a perfectly functioning bureaucracy, some bureaucracies do perform better than others. Certainly a welfare bureaucracy which has both concrete and simple regulations, which is subject to the scrutiny of an independent officer and the input of a client advisory board, which is manned by personnel who are more sympathetic to and more knowledgeable about the problems of their clients, will perform better than the bureaucracies which presently administer welfare. Both legislators and attorneys representing welfare recipients should devise and implement strategies to bring about such a system.

¹³⁹ Letter from Peter E. Holmes, Director, HEW Office for Civil Rights, to David B. Swoap, Director, California Department of Social Welfare, November 15, 1973.

¹⁴⁰ A. SOLZHENITSYN, *THE GULAG ARCHIPELAGO* 4-5 (1974).