

# Controlling Official Behavior in Welfare Administration<sup>†</sup>

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LAWYERS HAVE ALWAYS BEEN CONCERNED with controlling the actions of government. What is new today is that attention has shifted to welfare administration. The shift, of course, reflects the larger national interest in civil rights and poverty. The legal profession's reaction to the national interest has been an increasing awareness and apparent (if somewhat halting) willingness to do something about providing legal services for the underprivileged, the Negro, and the dependent poor. Within these broader shifts in attitudes, it is natural that lawyers would begin to concern themselves with the problems raised by government activity in the welfare field. Public welfare has been around a long time; attention is now being directed at it as part of the broad national movement for civil justice.

To a very considerable extent, lawyers cast the problem in traditional terms: How can the socially approved interests of the individual be protected in the government welfare programs? The concern of lawyers in the welfare field is timely. Existing welfare programs, which were aimed primarily at assistance or income maintenance, are being extended. But more important, government welfare programs are taking on new goals and purposes. The dependent poor are not only to be helped financially, but the new programs are designed to strengthen family life and to move the dependent poor toward self-support and independence, to improve their life-chances by "breaking the cycle of poverty." The War On Poverty is the most popular example. The Social Security Act,<sup>1</sup> particularly in its recent amendments concerning aid to families with children, bristles with the new approach. The Aid to Dependent Children program (ADC) has been changed to "aid and services to needy families with children" (AFDC).<sup>2</sup> The purposes have been restated "to help such

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<sup>†</sup> This article grew out of two related efforts: (1) the Russell Sage Law and Sociology Program at the University of Wisconsin, and, more particularly, the Administrative Law Seminar which was given for graduate students in that program; and (2) a study of the administration of the AFDC program in Wisconsin now getting under way under the direction of Professor Anthony F. Costonis, Department of Sociology, Wisconsin University, and myself.

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<sup>1</sup> 49 Stat. 620 (1935), as amended, 42 U.S.C. §§ 301-1394 (1964), as amended, 42 U.S.C. §§ 302-1396d (Supp. I, 1965).

<sup>2</sup> 76 Stat. 185 (1962), as amended, 42 U.S.C. §§ 601-09 (1964), as amended, 42 U.S.C. §§ 602, 603, 606 (Supp. I, 1965).

parents or relatives to attain or retain capability for maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . ."<sup>3</sup> The amendments call for increased services such as accelerated programs in education, vocational rehabilitation, counselling, mental health, and community organization work.<sup>4</sup> The War On Poverty and the changes in the Social Security Act offer new hope for the dependent poor to escape many of the problems that they have known. But the new programs also pose new threats to the interests and freedom of the welfare clients; they may further weaken or debilitate family life and result in further loss of personal dignity.<sup>5</sup>

It is to the danger or threats to the freedom and dignity of the individual that the recent literature of the lawyers has turned. A good way to discuss the issues is to examine the work of Professor Charles Reich. His three articles—*Midnight Welfare Searches and the Social Security Act*,<sup>6</sup> *The New Property*,<sup>7</sup> and *Individual Rights and Social Welfare: The Emerging Legal Issues*<sup>8</sup>—have received a great deal of attention. They purport to define some of the more important issues, and suggest how we should solve them. Much new legal research adopts Reich's analysis and approach.<sup>9</sup>

Reich catalogues certain "ills" of present-day welfare administration. Welfare officials have attempted to impose moral codes on welfare recipients. Privacy has been unnecessarily invaded under the guise of eligibility and need investigations. Welfare laws sometimes impose financial responsibility on relatives of welfare recipients that are much broader than duties imposed on relatives of nonwelfare persons. The residence of welfare recipients is usually restricted; in some states, there are "removal" laws. Several states require work or vocational retraining as a

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<sup>3</sup> 70 Stat. 848 (1956), as amended, 42 U.S.C. § 601 (1964).

<sup>4</sup> See 76 Stat. 173 (1962), 42 U.S.C. §§ 603(a)(3), (c)(1) (1964) (the states are offered a seventy-five per cent grant-in-aid to develop these new programs); BUREAU OF FAMILY SERVICE, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, PART IV §§ 4050-53.5 (Rev. Nov. 30, 1962).

<sup>5</sup> Some of the far-reaching implications of the new welfare programs are discussed in Handler & Rosenheim, *Privacy in Welfare: Public Assistance and Juvenile Justice*, 31 LAW & CONTEMP. PROB. (1966) (to be published).

<sup>6</sup> 72 YALE L.J. 1347 (1963).

<sup>7</sup> 73 YALE L.J. 733 (1964).

<sup>8</sup> 74 YALE L.J. 1245 (1965).

<sup>9</sup> See, e.g., the statement of purposes of the newly established Project on Social Welfare Law at the New York University School of Law, 1 Welfare Law Bull., Dec. 1965, p. 1 (quoted in text accompanying note 64 *infra*), and Columbia University School of Social Work: Center on Social Welfare Policy and Law, Memorandum on the "social welfare law testing" function of the Center 1. This memorandum has been reprinted in *Practical Lawyer*, April 1966.

condition of receiving aid. Public housing authorities may deny admission or terminate leases of people who have police records or whom the authorities think keep undesirable company or engage in immoral conduct. Often welfare recipients are required to take loyalty oaths not required of the general public. Under the means test, welfare officials have great powers over the family budget; independence is restricted by official supervision.<sup>10</sup>

The "ills" that Reich (as well as others) are concerned with fall into two broad categories. On the one hand, the day-to-day administration has resulted in many instances of plainly lawless administrative behavior; that is, administrative officials are acting contrary to the Constitution and/or statutory terms, and clients are being deprived of rights embodied in constitutional and statutory law. On the other hand, there is concern over unwarranted interferences in the interests of welfare clients that are not clearly defined legal rights. These would include various aspects of privacy, moral behavior, and the manipulation of welfare clients in such matters as employment, retraining, counselling, mental health, and other rehabilitative services. In this latter category, there is a feeling that welfare clients are being made to adopt behavior not required of other people by the state, or that welfare clients are made to forego activities and enjoyments that other people are allowed to enjoy.

The ills come about in two ways. First, there is bad substantive legislation. Welfare statutes often contain provisions which impose unnecessary hardships on the recipients. These would include residence requirements, responsibility provisions, loyalty oaths (included in the Economic Opportunity Act),<sup>11</sup> and the notice to law enforcement provision in the ADC program. Second, there are broad delegations of authority to welfare agencies which allow them to define critical substantive matters. Generally, the federal welfare statutes allow the states to determine the criteria of need, levels of income and resources, and the minimum level of living for the recipients.<sup>12</sup> When eligibility criteria are set forth in the legislation (federal and state), the criteria often conflict, or are vague, and the agencies have choice over which criteria to choose in any given situation. Or, the statutes are silent as to critical substantive areas, giving the agencies an even freer hand. In the day-to-day administration, the power granted through delegations of authority is increased by the agency practice of deciding issues on a case-by-case basis rather than promulgating and publishing rules in advance, the discretionary powers of enforcement,

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<sup>10</sup> Reich, *supra* note 8, at 1247-51.

<sup>11</sup> 79 Stat. 973, 42 U.S.C. § 2714(d) (Supp. I, 1965).

<sup>12</sup> See BURNS, SOCIAL SECURITY AND PUBLIC POLICY 228-31 (1956).

the power to delay, investigate, and harass, and the fact that people dependent on welfare are over-anxious to please officials rather than run the risk of punishment.

The remedies or solutions that Reich proposes have a ring familiar to lawyers. In welfare the government should not be allowed to impose any conditions that would be unconstitutional if imposed on persons not on welfare; government can't "buy up" constitutional rights. The substantive provisions of welfare statutes must be stripped of all that is not relevant to the purposes of the programs, such as loyalty requirements for tenants in government housing. In addition, "to the extent possible, delegated power to make rules ought to be confined within ascertainable limits, and regulating agencies should not be assigned the task of enforcing conflicting policies. Also agencies should be enjoined to use their powers only for the purposes for which they were designed."<sup>13</sup> But because it is so difficult to define in statutes what is relevant and to confine administrative discretion, Reich puts heavy emphasis on "basic" procedural safeguards. "In the case of a decision removing a family from public housing, or a decision denying aid to families with dependent children, generally the matter is finally determined at some level within the appropriate agency, after investigation by the agency, and with comparatively informal procedures, if any, available to the persons affected."<sup>14</sup> He calls for "full adjudicatory procedures."<sup>15</sup> Reich is not very specific about what he means by this ("procedures can develop gradually and pragmatically")<sup>16</sup> but appears to favor quite strongly the following: advance notification and publication of regulations that will govern future agency decisions; notice of proposed action, including a "full statement of the basis for it"; a trial-type hearing with the right to be represented by counsel; a separation of functions of investigator and judge; a decision based on competent evidence in the record; reasons in support of the decision; and "some form of review" (perhaps "within the agency, and, ultimately, in the courts").<sup>17</sup> Finally, Reich develops his idea of "entitlement." His conclusion is that the poor are entitled to welfare as a matter of "right" and not of "privilege." "The idea of entitlement is simply that when individuals have insufficient resources to live under conditions of health and decency, society has obligations to provide support, and the individual is entitled to that support as of right." At the risk of oversimplification, the objective

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<sup>13</sup> Reich, *supra* note 7, at 782-83.

<sup>14</sup> Reich, *supra* note 8, at 1252.

<sup>15</sup> *Id.* at 1253.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

of this position is to promote individual security by rejecting the case law justifying government interference on the ground that what the individual is claiming is a "mere gratuity" rather than a "right."<sup>18</sup>

Reich's strategy is quite clear. What he wants to do, in essence, is elevate the position of the welfare recipient to a position similar to that of a person whose business interests are regulated by government. In business regulation, government agencies are dealing with a "right"—property. Constitutional limits, more or less, are applicable. Through the years statutory and judicially-imposed procedural safeguards have developed. Reich introduces his argument for procedural safeguards in the welfare field by talking about and listing specifically the types of procedural safeguards developed in business regulation. (These were basically the "full adjudicatory" procedures discussed above.)

These procedures, however cumbersome they may seem, have come to represent a fundamental standard of fairness in administrative process. They may be exaggerated and misused until they produce inordinate delay and expense, but they represent effective checks on the characteristic evils of proceedings in any large public or private organization: closed doors, Kafka-like uncertainty, difficulty in locating responsibility, and rigid adherence to a particular point of view. They are fundamental safeguards for those who must deal with government.<sup>19</sup>

What Reich is doing then, is giving welfare recipients legally protectible rights (similar to "standing"), procedural safeguards with which to assert those rights, and, he adds, the ability to protect the rights through representation by counsel. Welfare clients would then be in a position similar to regulated industries, and in "business regulation . . . lawyers have made paper procedures a practical reality."<sup>20</sup>

In analyzing this very appealing approach, I will first examine the assumptions underlying Reich's view as to what the process of business regulation is like. We will see how much lawyers have in fact made a "practical reality" out of "paper procedures." More important, an examination of the administrative process in business regulation will shed light on some basic institutional and structural problems which apply to welfare administration. Second, I will discuss some of the particular problems of judicializing welfare administration. The main example will be the AFDC program. Third, I will suggest different avenues if we are to accomplish Reich's, as well as our, goal of civil justice.

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<sup>18</sup> *Id.* at 1256.

<sup>19</sup> *Id.* at 1253.

<sup>20</sup> *Id.* at 1252.

## I

## THE ANALOGY TO ADMINISTRATIVE REGULATION OF BUSINESS INTERESTS

The procedural safeguards in the administration of business interests, which Reich has in mind, arise in many types of situations. Typically, they come into operation when a person or business is claiming that an agency is acting contrary to law. The person may claim, for example, that the agency is taxing him illegally, or is wrongly applying a health regulation to his restaurant. The person may also be complaining about the failure of an agency to give him permission to do something, such as denying an application for a zoning variance. In situations like these (and if the matter cannot be settled), the claimant, with counsel, presents his claim to the agency which then conducts a trial-type hearing. The agency (or a hearing officer) acts like a judge. Although agencies are generally not bound by formal rules of evidence, the decision usually must be based on evidence in the record and the type of evidence cannot stray too far afield from that typically presented in court. If the claimant is still unhappy with the agency decision, he can seek judicial review. Again there are variations, but we will assume that the review will be appellate court review rather than a trial *de novo*. The appellate court is asked to "review" the administrative action, to see whether the administrative behavior was authorized by law. The claim can be that there was no authority for the agency to act at all in this situation (for example, no statutory jurisdiction), or that the agency misapplied the statute, or that there was insufficient evidence to support the decision, or that there was bias, and so forth.

If the court thinks that the claimant is correct, the remedy may be to nullify the administrative decision and thus to allow the claimant to use his property as he intended free from official interference. Such would be the case, for example, if the court decided that the particular health regulation did not apply to the claimant's business. On the other hand, if the court decides that there was insufficient evidence to support the agency decision, the court may send the case back to the agency for a "new trial." This may also happen even if the court thinks that the agency has misconstrued the statute. The court may still think that the basic substantive decision should be made by the agency rather than the court. But the court will insist that the administrative decision be legal.

In these examples, we note that there is no question about the protectibility of the claimant's interest; he is seeking to prevent interference with land or money or other types of property in which he has "rights." In addition, there is generally no question about knowledge or resources on the part of the claimant. He knows what he wants to do with his property;

the agency has told him what he can or cannot do with the property; he has legal counsel of his own choosing to advise him. Reich's solutions would place the welfare recipient in a similar position—he would have rights, he would have procedural safeguards, and he would be given counsel.

The fact of the matter is that even in the administration of business regulation, very little of the type of control of administrative behavior that Reich talks about exists. It is now commonplace to reiterate that the informal procedures are truly "the lifeblood of the administrative process."<sup>21</sup> Davis estimates that "perhaps eighty or ninety per cent of the impact of the administrative process involves discretionary action in absence of safeguards of hearing procedures."<sup>22</sup> These are cases which are disposed of without a trial-type hearing or a record upon which the decision is based. Sometimes the informal adjudication consists of "settlement cases"—the party is entitled to a formal hearing if he wants one, but the case is settled prior to the hearing. In others, sometimes called the "pure administrative process," no formal hearings are provided prior to the formal decision (for example, inspection or tests of physical properties).<sup>23</sup> I cannot here describe in any detail the characteristics and range of problems encompassed by the informal administrative process. I will point out instead some highlights and examples of some aspects that have particular relevance to the problems raised by welfare administration and the program of "rights" that Reich calls for.

A great deal of informal adjudication is present when agencies have the power to enforce statutes. These agencies are able to negotiate settlements and regulate behavior without using formal procedures and without judicial review. In nonadministrative law contexts, the regulatory practices of the police and the administrators of juvenile justice are familiar examples. These officials "settle" cases and impose sanctions without any resort to courts or other formal procedures.<sup>24</sup> This is also true of many administrative agencies. One prominent example is the Federal Trade Commission. The statute provides for hearings, findings of fact, and orders to cease and desist.<sup>25</sup> The vast majority of the results obtained by the FTC are through stipulation and consent orders rather than cease and desist orders. Many deceptive practices are disposed of through administrative treatment upon assurance that the party will discontinue the

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<sup>21</sup> Att'y General's Comm. on Administrative Procedure, *Report*, S. Doc. No. 8, 77th Cong., 1st Sess. 35 (1941).

<sup>22</sup> DAVIS, *ADMINISTRATIVE LAW—CASES, TEXT, PROBLEMS* 70 (1965).

<sup>23</sup> On the "pure administrative process," see GELLHORN & BYSE, *ADMINISTRATIVE LAW* 657-65 (4th ed. 1960).

<sup>24</sup> See generally Note, 79 HARV. L. REV. 775 (1966).

<sup>25</sup> 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1964).

practice. It is claimed that "if the Federal Trade Commission were compelled to discontinue its stipulation and consent order procedures, it would have to forego a major part of its activity."<sup>26</sup> It is also said that "the fact that stipulation and consent orders are based on consent does not mean that parties are necessarily protected against exercise of arbitrary power."<sup>27</sup> There is little difference between the "quasi-judicial" independent Commission and the wholly nonjudicial Antitrust Division of the Justice Department in the matter of informal adjudication. In recent years, between eighty-five and ninety per cent of the antitrust decrees were obtained under consent procedures.<sup>28</sup> The FTC, with its judicialized structure and procedural rights and safeguards, operates to a large extent as strictly a prosecuting agency.

The regulation of banking is another prominent example.

The striking fact is that the banking agencies use methods of informal supervision, almost always without formal adjudication, even for the determination of controversies. . . . A single example will suggest the spirit of the regulatory system. The Board of Governors of the Federal Reserve System has authority, after hearing, to suspend any member bank for "undue use" of its credit for speculative purposes inconsistent with sound credit conditions. . . . What happens is that the Board enforces the statute through methods of bank examiners, who call to the bank's attention the items which require correction. A bank which is inclined to disagree does not typically stand on its supposed rights and defy the Board to start a formal proceeding; suspension is too drastic a remedy for the bank to risk. The bank deals informally with the Board's representatives until some mutually satisfactory solution is worked out. Adjudication gives way almost entirely to supervision. . . . The sanction is not the power of suspension but the power of instituting proceedings.<sup>29</sup>

A third example involves the Securities and Exchange Commission's power over registration and acceleration. Because the mere announcement that a stop-order proceeding is so harmful, the decisive administrative determination, as far as the registrant is concerned, is the letter of comment from the SEC staff suggesting changes in the registration statement. "The registrant may be inclined to disagree with the staff's policies and may even think that the staff is arbitrary or unreasonable. But even if the registrant could convince a reviewing court that this is so, the registrant is in practical effect at the mercy of the Commission."<sup>30</sup> The statute provides that the effective date of a registration statement is twenty days after

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<sup>26</sup> Massel, *The Regulatory Process*, 26 LAW & CONTEMP. PROB. 181, 187 (1961).

<sup>27</sup> DAVIS, *op. cit. supra* note 22, at 75.

<sup>28</sup> Massel, *supra* note 26, at 192.

<sup>29</sup> DAVIS, *op. cit. supra* note 22, at 76.

<sup>30</sup> *Id.* at 73.



filing.<sup>31</sup> Registrants, however, usually want the date accelerated, and the Commission has discretionary power to grant the request.<sup>32</sup>

Business reasons usually make acceleration . . . so compelling that the registrant is willing to yield to onerous conditions. The SEC uses its discretionary power . . . to bargain for what it thinks the public interest may require; indeed, it sometimes requires substantive action having nothing to do with full disclosure. . . . The manner in which the SEC uses the acceleration power has long been highly controversial, but no registrant has been able to challenge it in a reviewing court.<sup>33</sup>

The SEC example, as well as the others, raises another aspect of the informal administrative process—regulation by fear of prosecution or publicity. The main weapon in the arsenal of the SEC, in the above example, is the potentially disastrous effects of publicity and delay. There are numerous examples in the literature of regulation by threats of adverse publicity. The Food and Drug Administration decided to stop salad oil and margarine makers from making claims about cholesterol and heart disease. According to H. Thomas Austern:

The FDA did not reach that conclusion by taking evidence or by offering any facts or opinions for expert discussion and criticism at a public hearing. It did not issue any formal regulation. It held no hearings. It made no formal findings. Instead, it published what it called a "Statement of Policy." It simply announced that it would hereafter consider as false and misleading any label claim that the use of a non-animal fat had any relation to heart disease. In the accompanying Press Release, which was hardly a legal document, it went even further. It announced that any label reference to "cholesterol" would also be illegal, because it might falsely imply some relation to heart disease. . . .

Whether the FDA was right or wrong, the fact is that every margarine manufacturer has acquiesced.<sup>34</sup>

After discussing other FDA examples of this type of regulation (including the cranberries), Austern concludes:

That is why no experienced Food and Drug lawyer resorts to court save *in extremis*—why here the conventional talk about the "administrative process" and "court review" is largely academic, why seizures usually go uncontested, why what I shall call "jawbone enforcement" is the real area of administrative activity, why reported decisions and formal regulations bear as little relation to what really goes on as the

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<sup>31</sup> 48 Stat. 79 (1933), as amended, 15 U.S.C. § 77h (1964).

<sup>32</sup> *Ibid.*

<sup>33</sup> DAVIS, *op. cit. supra* note 22, at 73-74.

<sup>34</sup> Address by H. Thomas Austern, *Sanctions in Silhouette*, Second Annual Charles Wesley Dunn Food and Drug Law Lecture, delivered at the Harvard Law School, March 22, 1960, reprinted in GELLHORN & BYSE, *op. cit. supra* note 23, at 671-72.

visible top of an iceberg to the whole, and why the question of enforcement of administrative views by Madison Avenue techniques of publicity demands such close scrutiny in this field.<sup>35</sup>

Reich, in drawing upon the analogy of the administration of business regulation to support his arguments for "judicializing" welfare administration, seems to give the impression that administrative decisions are generally carried out with all the procedural safeguards: advance publication of rules, notice, formal trial-type hearings, competent and relevant evidence, decisions based on the record. His description leaves out the most significant area: informal administration, where none of these procedural safeguards are used. He is quite wrong in asserting that lawyers have made a "practical reality" of the judicial-type procedures. The existing evidence points in the opposite direction. According to persons intimate with the administrative process, it seems rare indeed when judicial-type procedures are used to attempt to control administrative behavior.

It might be argued that the fact that judicial-type procedures are not used or are circumvented in business regulation does not detract from their value; it only means that reform is needed with business regulation as well as welfare administration. The fact is, however, that arguments over procedures in administration have been raging for years, and many able and serious students of the administrative process argue for *less*, not more, judicial-type procedure. It is claimed, for example, that many regulatory agencies simply could not administer their programs if all decisions on cases and policies had to go through formalized hearing procedures.<sup>36</sup> The same is true with regard to enforcement agencies. In many situations the parties may be better off if minor infractions can be settled informally.<sup>37</sup> Several critics take issue with the popular notion (usually put forward by lawyers) that adjudication can be considered separate from policy formulation. They argue that many administrative policies have to be formulated on a case-by-case approach, with observation of a gradual development, rather than the promulgation of rules in advance.<sup>38</sup> Marver Bernstein suggests, as a hypothesis, that the "continuing judicialization of administrative regulation . . . has encouraged the growth of nonad-

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<sup>35</sup> *Id.* at 673.

<sup>36</sup> Massel, *supra* note 26, at 187.

<sup>37</sup> *Ibid.*

<sup>38</sup> Mark Massel, of the Brookings Institution, for example, states that "The criticisms of policy-making seem to be founded on the assumption that the agencies refuse to issue rules because of timidity, inability, and ineffectiveness. There seems to be no room allowed for the possibility that there exist reasonable grounds for the agency practice or institutional pressures against such a practice." *Id.* at 189. See generally Shapiro, *The Choice of Rule-making or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

versary methods to dispose of regulatory business and may have stimulated wider recourse to ex parte contacts and communications.”<sup>39</sup> That is to say, more stringent “due process” requirements may result in more nonformal regulations or less regulations altogether; more rigid and formal hearing requirements may result in increased pressures for informal settlements. Running through many of the arguments of informed critics like Massel, Bernstein, Gellhorn, Byse, as well as many others, is the view that lawyers have wrongly looked at administrative agencies through judicial-colored glasses and have evaluated the administrative process in terms of how well administrative procedures match up to court procedures. This approach concentrates on the independent regulatory agencies and ignores the vast amount of regulation carried on by executive departments; it fails to recognize that the agencies were set up, in part, because the courts and legislatures could not handle the programs that the agencies are charged with; it misses the very important regulatory activity that goes on without judicial-type procedures and the value of the informal process; and it has resulted in sometimes harmful and sometimes futile attempts to engraft on agencies procedural requirements unsuited for the conduct of their business.<sup>40</sup>

But, it may be argued that even though “rights” embodied in judicial-

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<sup>39</sup> Bernstein, *The Regulatory Process: A Framework for Analysis*, 26 LAW & CONTEMP. PROB. 329, 345 (1961).

<sup>40</sup> Gellhorn and Byse, in commenting on informal adjudication, say:

“Procedural forms are not fetishes. They are means to ends. The ends are correct determinations of disputable questions, with safeguards against abusive exercises of governmental authority.

“In some circumstances it has been concluded, and rightly so, that a record of past happenings can be reconstructed with greatest fidelity by requiring narrations concerning them to be made with full solemnity—under oath, in a public forum, and subject to that process of refinement and qualification known as cross-examination. . . .

“In other circumstances . . . a different method seems warranted. An investigatory technique supplants the judicialized hearing. It is the technique which, after all, is employed almost exclusively—except by government—to develop the facts on which the gravest judgments turn. To suggest that it is no longer an apt tool merely because it is in official hands, would be an absurdity. The groupings of cases mentioned in these pages . . . suffice to refute . . . the contention that administration is necessarily defective to the extent that it tolerates basic departures from the procedure of courts. . . .

“The extension of unconventional processes presupposes a subordinate personnel equipped to use them fairly and an administrative hierarchy fired with a sense of responsibility for scrupulously just results. There is no reason to suppose that public administration through official agencies is incapable of developing professional traditions and standards comparable with those developed by public administration through the courts.

“It is here that the experience of life offers lessons: the formalized hearing is a method of getting at the truth and of assuring justice; but it is only one of many methods. No particular means is invariably synonymous with the fair result. No one device can properly assert a monopoly over the procedural virtues, and thus debar efforts to build new, perhaps more direct roads to justice.” GELLHORN & BYSE, *op. cit. supra* note 23, at 664-65.

type procedures are not used very often, it is still important that they exist; it is still within the power of private citizens and companies to check illegal and unwarranted official behavior if the need should arise. This argument may or may not be true. First, as some of the above examples show (and these are not atypical cases), in many instances people and businesses are not *able* to use the judicial-type procedures. The costs or the risks involved are too high—even in situations where they feel that government action is unwarranted. Later I will discuss why this happens.

Second, the argument is dangerous and, if implemented, can be productive of much harm. By ignoring the realities of administration, and particularly the informal process, it leads one into thinking that the important problems of controlling official behavior will be solved by enacting a program of rights. The informal process exists. It cannot be legislated away. In many situations, there is persuasive evidence that the informal process works fairly and fulfills legislative goals.<sup>41</sup> No doubt there are many instances where this is not true.<sup>42</sup> But the informal process is intimately connected with the formal process. Enacting a formal program of rights and judicializing the administrative procedure may make the informal process more fair. On the other hand, changing the formal process may destroy much of the value of the informal process; in other instances, it may lead to even more lawless administrative behavior.<sup>43</sup> Reich pays little or no attention to the problem of implementing his program or to whether the harm caused by an effective use of these rights (if that is ever possible) outweighs the good. It is premature to defend his position on the ground that "it is good as far as it goes" because of his failure to calculate the costs of judicializing administrative procedures. The easy assumption that because agencies decide individual cases they are therefore like courts and should act like courts ignores the very different institutional and structural characteristics of administrative agencies. These points will be discussed in detail in the following section which deals specifically with welfare administration.

The discussion about the inappropriateness of the analogy to the

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<sup>41</sup> For an excellent and exhaustive analysis of the intimate relationship between the formal and informal process in the administration of the automobile dealers statutes, see Macauley, *Changing A Continuing Relationship Between A Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers, and The Legal System* (pts. 1, 2), 1965 WIS. L. REV. 483, 740. Professor Macauley presents a persuasive case that the informal process in Wisconsin better serves the competing interests than the formal legal system.

<sup>42</sup> See Levy, *Protecting the Mentally Retarded: An Empirical Survey and Evaluation of the Establishment of State Guardianship in Minnesota*, 49 MINN. L. REV. 821 (1965).

<sup>43</sup> See LAFAYE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (1965); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965).

administration of economic regulation would not be complete without mentioning that all-important guardian and protector of individual rights, the reviewing court. Whatever the injustice committed at the administrative level, the opportunity to go to court means that ultimately the rights of the individual will be secure against lawless administrative behavior. Of course, there have been instances where appellate courts have checked lawless administrative behavior; and it might be demonstrated that the availability of judicial review does have some impact on some administrative agencies. But, in the main, it seems doubtful to rely on reviewing courts to accomplish significant changes in administrative behavior. First, much of the informal administrative process is not susceptible to judicial review.<sup>44</sup> Second, at least in federal administrative law, the impact of the reviewing courts has been characterized as sporadic, clumsy, and largely ineffective.<sup>45</sup> The courts have been concerned almost exclusively with matters of procedure; what the agencies *do* to people and their property is largely beyond judicial scrutiny, as long as procedural steps are properly taken or adequate "findings" are made. Judicially developed doctrines of limited scope of review of questions of fact and of law, expertise, and primary jurisdiction all have served to hasten the flight of courts from supervising the substance of administrative programs and from serious attempts to control official behavior. Howard Westwood says:

In the case of the federal agencies, it is my observation that the appellate court decisions—especially those of the Supreme Court—do not greatly affect the day-to-day problems that arise in the practice before the agencies. . . . This conclusion would be difficult to prove and, based as it is upon personal experience, it may well be faulty. Yet, as I look upon a considerable experience I find little significant impact of the advance sheets upon what actually goes on from one day to the next in agency practice.<sup>46</sup>

Agencies, reports Westwood, usually do not pay very much attention to court decisions involving different agencies.

And even the agency directly involved in an appellate case often is not drastically affected thereby. A little adjustment of procedure, another form of words in "findings," a slightly different evidentiary presumption—and life goes on rather as before in many, many cases; or, indeed, the appellate decision may have no effect at all save in the specific case immediately involved. The point of the matter is that the agency's own decisions (and sometimes the decisions of sister agencies on related problems) are usually more important as precedents than

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<sup>44</sup> See DAVIS, *op. cit. supra* note 22, at 72.

<sup>45</sup> See, e.g., Att'y General's Comm. on Administrative Procedure, *Report*, S. Doc. No. 8, 77th Cong., 1st Sess. 76-77 (1941); Westwood, *The Davis Treatise: Meaning to the Practitioner*, 43 MINN. L. REV. 607, 608 (1959).

<sup>46</sup> Westwood, *supra* note 45, at 608.

the rulings of the appellate courts. Important, too, is a "feel" for the way the agency and its staff will react to a situation, a "feel" not to be disclosed in any precedents at all.<sup>47</sup>

Frank Newman points out that reviewing courts can only deal effectively with "judicial review law," "but law relating to agency powers and procedures is quite different, for judges inevitably can deal only with tiny pieces of it."<sup>48</sup> The "right" to judicial review, as a method of controlling administrative behavior, may be largely one of paper only. Judicial review is simply not applicable to many administrative decisions; and when it is available, the court may decline to make the substantive decision anyway.

## II

### APPLYING JUDICIAL TECHNIQUES TO THE ADMINISTRATION OF WELFARE

The importance of the discussion in the preceding section does not lie solely in exposing some of the futility and difficulties in the attempt to judicialize the administration of business regulation. It sheds light on some of the basic aspects of administrative processes; the lessons learned in the administration of business regulation should help in avoiding the pitfalls of attempting to control official behavior in welfare administration by imposing similar techniques.

I will use as my example the AFDC program, which is a grant-in-aid program administered under the Social Security Act. The Act sets forth relatively few mandatory requirements on the states as conditions for participation (for example, a state can have a residence requirement but it cannot be for longer than one year);<sup>49</sup> most of the federal statutory provisions are permissive (for example, a state *may* extend the program where need is caused by the unemployment of a parent).<sup>50</sup> As stated earlier, the federal statute generally leaves to the states the determination of the criteria of need, the levels of income and other sources that will be included in the budget, and the levels of income to be paid to the families (subject to a federally imposed maximum). In Wisconsin, as well as many other states, the state agency (Wisconsin State Department of Public Welfare, Division of Public Assistance) supervises the program, but the actual administration is carried on by county welfare agencies. The Wisconsin Division of Public Assistance assists the counties in the development of their programs, supervises their activities, and advises the local agencies of federal and state requirements. At both the federal and state

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<sup>47</sup> *Id.* at 609.

<sup>48</sup> Newman, *The Literature of Administrative Law and the New Davis Treatise*, 43 MINN. L. REV. 637, 644 (1959).

<sup>49</sup> 49 Stat. 627 (1935), as amended, 42 U.S.C. § 602(b) (1964).

<sup>50</sup> 75 Stat. 75 (1961), as amended, 42 U.S.C. § 607 (1964).

levels there has been a conscious attempt to provide flexibility and a large measure of autonomy and discretion at the county level.

One of the discretionary decisions that is made at the county level is whether the AFDC mother should work. When the program was first enacted, the policy was to provide financial assistance so that the mother would not have to leave the home in order to work. Attitudes have changed, and it is now recognized that in certain situations if the mother has a job it may be beneficial to both the mother and the children (assuming adequate day care). Whether the mother should work or not is a decision that must be made on the basis of each family's needs. One of the dangers, of course, is that mothers will be "encouraged" to work in order to save public money, since her earnings will be included in the family budget. The Wisconsin regulations go to great length in suggesting criteria to be used by the county caseworkers in making this decision.<sup>51</sup> The caseworkers are specifically told that the mother should work only if her working will contribute to the strengthening of family life and promote other rehabilitative goals; the decision must not be made in order to save public money.

Assume that in a particular case, a caseworker decides that the mother should work. Assume further that this decision was made to save public money and that it was not in the "best interests" of the family. The mother, for example, is genuinely reluctant to leave her children in the hands of the available day-care help. To a very great extent, the mother already has the "rights" that Reich calls for. In distinguishing the Social Security Act from other welfare programs, he says that "the framers of the Act had a clear concept concerning the 'right' to public assistance, and provided devices to protect these rights. Thus, in the program for aid to families with needy children, the Act requires that states afford an opportunity for a fair hearing to any individual whose claim is denied or not acted upon with reasonable promptness . . ."<sup>52</sup> Wisconsin faithfully implements the purpose of the Social Security Act to provide procedural regularity and fairness. There is advance publication of the rule governing the situation; indeed, the fullness and clarity of the Wisconsin regulation is probably unusual. The state statute provides for a prompt, fair hearing not only when a claim is denied but also when an individual is dissatisfied with the amount of the grant.<sup>53</sup> The regulations set forth detailed procedures which display a careful balance between fairness and informality.<sup>54</sup>

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<sup>51</sup> Div. of Public Assistance, Wis. State Dep't of Public Welfare, Regs. § III, ch. III, (Need Determination) 47.

<sup>52</sup> Reich, *supra* note 8, at 1246, referring to the amended 42 U.S.C. § 602 (1964).

<sup>53</sup> WIS STAT. § 49.50(8) (Supp. 1961).

<sup>54</sup> Div. of Public Assistance, Wis. State Dep't of Public Welfare, Regs. § I, ch. III, Rule No. PW-PA 20.18, as amended (1951).

The appeal is heard by a special representative of the state Division of Public Assistance, and not by the county welfare department.<sup>55</sup> Yet, it is easy to see how Reich's program of rights will be of little use to the mother in this type of situation.

One of the critical facts to realize is that at the point where the caseworker tells the mother that she must take a job, the mother is still in the program. She and her family are currently receiving assistance and she will probably not be able to support her family with her earnings; besides, she does not want to leave her children. She knows that tomorrow and the next day the same caseworker will be making other decisions that affect vitally her level of living and style of life. She may want extra money to give herself or her children special vocational training; she may want a referral for herself or one of her children for mental health services or counseling; she may want the earnings of her children set aside for future higher education; or she may want to move to a better apartment in a better neighborhood. There are literally countless decisions that the caseworker may be called upon to make that can help this family: Boy Scout fees, a graduation dress or money for the graduation dance, money for a band instrument, money for tools to learn a trade, and so on.<sup>56</sup> These can be matters of great importance to any of us; and they are decided by the county caseworker.

In short, in calculating whether to fight the decision about working, the mother has to weigh the costs to her on-going relationship with the local agency; what will happen to her tomorrow if she disagrees with the caseworker this time and "goes over his head"? She is now beginning to think that in the "long run" it would be "better" for her family if she agreed with the caseworker and went to work. Reich is absolutely right in stating that caseworkers in these situations have great power over their clients. What he fails to realize is that this power largely nullifies a program of rights. This is one of the lessons that we learn from the administration of business regulation; why there is so much informal administrative adjudication. The bankers will have to deal with the federal examiners next month; securities dealers and traders and manufacturers of food and drugs are under constant supervision by government officials; the same is true in commercial broadcasting and transportation. In these fields, as

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<sup>55</sup> *Ibid.*

<sup>56</sup> The Wisconsin regulations explicitly recognize the importance of these items. For example, "additional special needs [for children] . . . may be the following: lunches, transportation, costs of special courses of training, participation in school band or orchestra, athletic activities or in community activities (such as Scouts, 4-H); union dues, health insurance (if not deducted by employer); regular payments on equipment such as bicycle, lawn mower, special clothing, or tools and equipment of employment." Div. of Public Assistance, Wis. State Dep't of Public Welfare, Regs. § III, ch. III-51 (Revised 1965).



well as others, the complaints about the unchecked discretionary powers of officials and the lack of procedural safeguards and judicial control are loud. The reason is not because procedural rights and judicial review are not provided for; they are. It is because the relationships between the regulators and the regulated interests are such that the latter are effectively discouraged from exercising those rights.

It is curious, then, that where knowledgeable and powerful economic interests forego procedural rights and succumb to lawless official behavior, one would argue that a program of rights would control officials in the welfare field. Again, there is solid evidence to the contrary. In the administration of juvenile justice, quite often the "clients" have at least some of the rights; indeed, a juvenile cannot be declared a delinquent, or neglected, or dependent without a formal court proceeding. Yet it is found that the effective decisions are made by the police and probation officers, not the judges. In many instances, the juveniles, rightly or wrongly, think that it is to their advantage to play ball rather than to fight. One of the reasons is that they know that even if they win today, the officer will have another chance tomorrow. Reformers here also call for a program of rights. I have argued elsewhere that before rights can be made effective in this field, there has to be knowledge, ability or resources, *and clear, practical advantages for using these rights*.<sup>57</sup> All of these conditions present formidable hurdles in the area of juvenile justice. The same would seem to be true in the welfare field. The dependent poor, we are told, are bewildered, confused, and have a deep sense of helplessness; many suffer from mental illness. Legislation, regulations at the state level, and appellate court opinions would seem to have little impact on these people in their face-to-face encounters with county welfare officials.<sup>58</sup>

Of course, there are situations where the victims of government will use their rights, where they will fight. Again, these cases are instructive; they indicate the significance of the on-going relationship. Formal administrative hearings and court cases are long and hard fought in the allocation

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<sup>57</sup> Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. Rev. 7. See also Sparer, *The Role of the Welfare Client's Lawyer*, 12 U.C.L.A.L. Rev. 361, 378 (1965): "The public welfare worker, however, presents a different situation. Generally, he initially makes the ruling which necessitates the client going to the lawyer. This presents the attorney with a double danger. On the one hand, he needs to remember that he cannot afford, for his client's sake, to make an enemy of the public social worker. Although antagonism to the worker's decision will often result, the lawyer's function should not be to undermine the welfare worker and inspire needless hostility. The welfare worker, after all, remains with the client if the lawyer wins the latter's case. There are ways other than the flat denial of eligibility to make a welfare recipient's life intolerable. Indeed, these may be beyond the redress of the legal process."

<sup>58</sup> These exact points are made by Levy, *supra* note 42, where there is also a full program of rights.

of TV channels, or airline routes, or franchises, or when licenses are revoked. But these are in the nature of "either-or" situations. The airline gets the route or it does not; the company or individual can stay in business or it can't. Similarly, if we look at the cases where Reich and others call for judicial-type rights and judicial control, we find also that they tend to be extreme "either-or" situations. Reich's cases, in welfare, generally deal with situations where clients are denied entrance to the program or are thrown out. In the midnight raid situation, state statutes and regulations deny AFDC aid if there is a man living in the house; the theory is that a man using the "privileges" of marriage ought to bear the responsibilities as well. Enforcement officials conduct raids on the homes of clients, late at night and without a warrant, to find evidence of the man. If such evidence is found, the client is thrown out of the program. Other cases deal with the improper or illegal use of eligibility requirements to prevent clients from entering the program. I would not minimize the importance of protecting people from this type of lawless official behavior; these issues are poignantly critical for the people involved. But they are cases where people have been cut off from the program or denied entrance; if they want in, they have no recourse but to fight and to appeal ultimately to agencies outside of the administrative bureaucracy, that is, the courts. For these people, future risks in the on-going administrative relationship are of considerably less relative importance than they are to the mother who has been told that she must work. These people are now interested in survival, not higher education. Reich, then, is talking primarily about the extreme cases. His discussion and solutions do not touch the mass of people in welfare administration, the people who have to deal day to day with officials and who are subject to the more elusive forms of administrative manipulation and interference.

In addition, even if we assume that the mother who has been told that she must work is resourceful and has the courage to challenge the case-worker's decision, and is willing to risk subsequent administrative disapproval, we may ask what her chances are of winning? Under the Wisconsin statutes, the AFDC mother has no absolute right not to work; the statute provides, instead, that the county "may require the mother to do such remunerative work as in its judgment she can do without detriment to her health or the neglect of her children or her home . . ."<sup>59</sup> The mother's "right," then, depends on the existence of certain underlying facts and the evaluation of those facts; she is not required to work if working, in her particular family situation, will defeat the objectives of the program. This conditional aspect, of course, is true for most rights: A family is eligible

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<sup>59</sup> WIS. STAT. § 49.19(6) (1957).

under the Social Security Act if it is needy; a person is entitled to receive benefits if he is "under a disability";<sup>60</sup> an applicant for an occupational license (or a driver's license) has to be competent, and so forth. Reich correctly points out that the "rights" of the mother (and in the other examples) are largely procedural: She is entitled to a fair hearing as to whether under the particular facts and under the regulations properly construed she should be required to work.

This dependence of "rights" on underlying and often complicated facts seriously qualifies the right of appeal. The caseworker, we may be sure, is familiar with the state regulations and will tailor his reasons to fit them. In his "professional" judgment, it would be good for both the mother and the children if the mother took the job; the latest medical reports say that she is physically and mentally able to work; this is a job suited to her abilities; she will be better integrated into the community if she is a working mother; the day-care help is very competent (in fact, the center or the person is "certified" by the state or the county). And, of course, there will be no hint that the purpose of the mother working is to save the public money. If this case gets to an appellate court, what will the court review? Will the court substitute its judgment on the substantive question for that of the professional worker in the field? Should the court? From the experience in judicial review of administration of business regulation, the reviewing court will probably examine the procedural steps taken, find "substantial evidence in the record" to support the agency's determination, and affirm the decision. I would guess that the most the mother could hope for, unless the administrative decision was outrageous and stupid, and she had very strong evidence, is that the reviewing court would reverse and remand the case to the agency for further findings. The court, in effect, would ask the agency to reconsider its decision. This generally is what happens when regulated business interests "win" in the reviewing courts.

A program of rights builds on the courtroom experience of lawyers and is subject to the limitations of that system of legal control. Control of government through court processes requires activity by the individual. If the person does not object to the official decision, the control does not come into play. I have already touched on the difficulties of getting individuals to act: In business regulation, the power of officials influences others to submit to informal regulation; in welfare administration, this power exists, and in addition, there are severe limitations concerning the personalities and resources of the dependent poor.

But there is another basic limitation to this adversary-oriented system of control. It is essentially negatively oriented; its emphasis is on blocking

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<sup>60</sup> 70 Stat. 815 (1956), as amended, 42 U.S.C. § 423 (1964), as amended, 42 U.S.C. § 423 (Supp. I, 1965).

or preventing government activity. It has at its base a philosophical position about the function of property, the proper relationship between the state and the individual, and the role of law and legal institutions in preserving or maintaining that relationship. It is predicated on assumptions that if government is checked or prevented from making unwarranted intrusions, then the individual, free from lawless behavior, will behave in socially useful ways. Reich's *New Property*<sup>61</sup> is laden with this belief. The purpose of property, he says, is to create a boundary between the individual and the state; within that zone the individual will have dignity, the capacity to defy the majority, to act, if he wants, with whim and caprice; it will create "precincts sacred to the spirit of individual man."<sup>62</sup> This is an old view in America. Reich himself says that the "Bill of Rights depends upon the existence of private property. Political rights presuppose that individuals and private groups have the will and means to act independently."<sup>63</sup> This view limits the use of law and legal institutions to the establishment of clear rights in individuals and the defense of those rights against government (and others). Reich himself concludes:

We need a radically new approach to the field of social welfare. Today the nation's poor stand as far from the enjoyment of basic rights as did the Negro at the beginning of the Civil Rights movement. As in the case of the Negro, the avenue of reform must be through law. In a society that is highly organized, institutional and bureaucratic, law is the essential means by which individuals are protected; law alone can ensure the fairness and lack of oppression that is essential to individual independence. . . .

We need organized legal research to examine statutes, regulations, manuals and practices to determine where changes are needed. We need institutions capable of financing both legal research and test cases to determine the extent of rights in given areas. And we need lawyers to represent individual clients who cannot pay for help or secure that help from any existing organizations; *it is only through individual cases that the law comes into being and keeps on growing.*<sup>64</sup>

The newly established Project of Social Welfare adopts this same view of the role of law. In its statement of purposes, it says:

The Project will focus on the substantive and procedural rights of persons entitled to public benefits, such as rights to unemployment insurance, workmen's compensation, social security insurance, public assistance, public housing, child welfare services, and education or training programs. The Project will seek ways to clarify the legal rights and protections connected with these benefits, all of which are based

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<sup>61</sup> Reich, *The New Property*, 73 YALE L.J. 733 (1964).

<sup>62</sup> *Id.* at 778.

<sup>63</sup> *Id.* at 771.

<sup>64</sup> Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1256-57 (1965). (Emphasis added.)

on varying factors of entitlement. It will consider possible infringement of constitutional, statutory, and other rights in the administration of social welfare programs, such as arbitrary or unreasonable eligibility requirements, inequitable distribution of benefits, use of "midnight" and other unreasonable searches, release of privileged information, and restrictions on freedom of movement. The Project will also devote attention to legal protection of the public at points of special vulnerability, including consumer protection, commitment of the mentally ill and retarded, and landlord-tenant relationships.<sup>65</sup>

This is not the place to say whether Reich's and the Project's view of the proper relationship of the state and the individual is correct or not. But it is important to recognize quite clearly that this view is not entirely the view of the recent amendments to the Social Security Act and the Economic Opportunity Act. These programs want to assist people, to give them income, but they also want to do more. They want the states, the counties, and the local government units to rehabilitate families and individuals as well as provide income maintenance. They want new programs that will move the dependent poor into middle-class America. The authors of these programs do not view the problem in the same way that Reich does. Social objectives will not necessarily be accomplished by giving people property and offering them services to use as they see fit. The purpose is not to restrain government from interfering with the behavior of people, which, if let alone, will produce individualism, dignity, and spirit. The purpose, at least in part, is to encourage government to interfere to change the dependent poor into the type of person which Reich implies now exists.

It is perfectly clear that the traditional adversary techniques of controlling administrative behavior are not capable of accomplishing some of the important goals of the new programs. Prospective recipients will not be able to get a reviewing court to require a state or county agency or local government unit to take advantage of a federal grant-in-aid to institute or expand mental health services, counseling, vocational rehabilitation, or other community projects. Davis calls this the discretion to do nothing.<sup>66</sup> Welfare officials have the power to thwart the new legislative programs by simply doing nothing. This form of official behavior is beyond the traditional judicial-type techniques of control.

Whether or not the country was wise in adopting the new rehabilitative programs is not the subject of this article. I have mentioned briefly, in the introductory remarks, the dangers that these programs pose for the individual. They also offer, it is argued, great promise—a real chance to im-

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<sup>65</sup> Welfare Law Bull., Dec. 1965, p. 1. See also Columbia University School of Social Work: Center on Social Welfare Policy and Law, Memorandum on the "social welfare law testing" function of the Center 1.

<sup>66</sup> DAVIS, *op. cit. supra* note 22, at 71.

prove the life-chances and style of life of the dependent poor. At any rate, the elected representatives of the people apparently think that in the long run the new programs will do more for the dependent poor than the older assistance programs. Reich's program of rights does not touch this problem of controlling welfare officials, the problem of implementing national and state legislative goals. And this may be the most important issue of all.

In summary, the "radical approach" to the problem of controlling official behavior in welfare administration is not really radical at all. It relies on the traditional adversary methods of establishing rights and providing judicialized procedures to protect those rights against government. It may be that statutory rights, judicial-type controls, and judicial review will help in eliminating certain obnoxious features of welfare programs and provide redress for the outrageous cases. But how much help and whether there will be a net gain are the crucial questions. The experience of the administration of business regulation and the peculiar problems of welfare administration cast doubt on the benefits to be gained from a program of rights. Its lack of utility in helping to fulfill the broader legislative goals—the rehabilitative or people-changing aspects of welfare programs—is manifest. But what is really unknown are the costs of these reforms—the impact on the informal process, the unintended consequences of formal procedural requirements, lawyers, judicial decisions. There is persuasive evidence that current judicial supervision of the police in some areas of administration has resulted in *more*, not less, lawless behavior.<sup>67</sup> We may be fairly certain that welfare officials disposed to use the midnight raid and similar tactics will not change their ways merely because a supreme court tells them to stop. The civil rights movement is beginning to rely more on administration than litigation in court. This is not to argue that rights, lawyers, courts, and due process should not be used. It is only to point out that we are dealing with administrative systems. We must consider the whole operation of the systems and the relationship of the reforms to the rest of the systems.

### III

#### CONTROLLING OFFICIAL BEHAVIOR THROUGH LEGISLATIVE AND ADMINISTRATIVE TECHNIQUES

We need a change in focus. We ought to examine the possibilities of statutory and administrative methods of control. Line officials in welfare

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<sup>67</sup> See authorities cited in note 43 *supra*. In the running dispute over whether probation reports should be disclosed to defense counsel, it is suggested that if disclosure is required, the caseworkers will write their reports "differently." See, e.g., Dembitz, *Ferment and Experiment in New York: Juvenile Cases in New Family Court*, 48 CORNELL L.Q. 499, 517 (1963); Paulsen, *The New York Family Court Act*, 12 BUFFALO L. REV. 420, 435 (1963).

operate in a maelstrom of conflicting pressures: the persistent drive to cut costs, local hostilities towards welfare recipients, moralistic demagoguery, prejudice, overwork, lack of adequate compensation, lack of proper professional training, poor relationships with federal, state, and local agencies.<sup>68</sup> Most of the distress over welfare is probably not caused by the people who administer welfare, but by those who never were sympathetic with welfare. Legislative standards of eligibility and need determination make welfare officials fraud investigators and keepers of public morality.<sup>69</sup> The traditional adversary method of controlling official behavior attempts to block or change activity once undertaken. An approach that looks to statutory and administrative methods of control focuses on the nature of the causes and conditions of official behavior and then seeks ways of changing the causes and conditions. We need information on the types of activities that officials engage in and why, and the types of legislative changes officials react to and why. Administrative programs can be recast to make them more susceptible to fulfillment, personnel practices might be changed, and new methods of rewards and punishments can be built into the administrative system to strengthen the hand of the line officials. The task is to make sure that the legislative program is carried out by the line officials; this involves not only correcting lawlessness in the traditional sense of the mishandling of individual cases, but also in the broader sense of fulfilling legislative goals.

The difficulties of implementing the AFDC program are illustrative of many of the problems facing most of our comprehensive social welfare programs. In the first instance, the three-tiered bureaucratic structure of federal leadership and financial support, but state and local implementation, presents special problems of coordination and control. The Social Security Act provides the basic framework for the administration, organization, and implementation of the AFDC program.<sup>70</sup> At the federal level, the Department of Health, Education, and Welfare, and more specifically, the Bureau of Family Services, has the responsibility for the administration of the program. The Bureau, through control and review devices, interprets and explains the federal position. In addition, the Bureau, through its regional representatives, assists the states in the design of their programs. On the state level, the Act provides that a single state agency must be responsible for the administration of the program. The state

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<sup>68</sup> See Sparer, *supra* note 57, at 375.

<sup>69</sup> Compare Rosenheim, *Vagrancy Concepts in Welfare Law*, this symposium; Handler & Rosenheim, *Privacy in Welfare: Public Assistance and Juvenile Justice*, 31 LAW & CONTEMP. PROB. (1966) (to be published).

<sup>70</sup> See Wedemeyer & Moore, *The American Welfare System*, this symposium, for a description of the statutory framework of the welfare system under the Social Security Act.

agency may administer the program itself or it may supervise a program administered by the counties or other political subdivisions. Wisconsin, as stated earlier, has elected to choose the latter organizational structure.

At both the federal and state levels, there has been a conscious attempt to provide flexibility to lower governmental units. Within the sphere of local autonomy, the role of the county welfare director is particularly important. He establishes both the formal and informal policy concerning the following areas: the design of the program, the mobilization of staff, the supportive community resources, and the encouragement of families to take advantage of the available services. The staff of the agency is under the supervision of the welfare director; his style of leadership, both in philosophy and in administration, will largely determine the content of the program.

This is the three-tiered bureaucratic structure so familiar in many welfare programs. What are the techniques of coordination and control that are employed to ensure that legislative standards are being carried out? The states are not required to enter the program (although all of them have). The basic incentive is the financial support provided by the federal government in the form of grants-in-aid. The federal government uses a number of techniques by which it attempts to ensure that the monies are being spent for the purposes intended. Sometimes it requires the states to enact specific statutory requirements as a condition of participation. These requirements may leave no room for state statutory deviation and confer only narrow administrative discretion. On the other hand, the federal government may prescribe certain minimum or maximum requirements as a condition of participation; the state statutes can deviate above or below the line, as the case may be, and there can be broad administrative discretion.<sup>71</sup> The federal government can make available additional or supplementary programs which the state is not required to adopt as a condition of participation in AFDC. Again, the additional programs can have fixed, narrow requirements or broadly defined requirements. Finally, the federal government may not take a position at all on certain issues.

All of these alternatives have been exercised in the relationship be-

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<sup>71</sup> The terms "broad" and "narrow" administrative discretion are admittedly crude, if not awkward. In a study of a bureaucracy, such as found in the AFDC program, a critical issue is the types and kinds of policy-making decisions delegated and exercised at the several hierarchical levels. Every administrative decision requires a policy decision in the sense of supplementary interpretation. The delegation of administration to the Department of Health, Education, and Welfare, the states, and the local units carries with it the delegation of differences in the range of power. Sometimes the delegation is very narrow (for example, the age requirements of the AFDC children); sometimes, very broad (for example, providing counseling services). For the purposes of this paper, we are only distinguishing between two polar types—narrow and broad. Further research and analysis will require more refined categories.



tween the federal and state governments. Important substantive decisions have been delegated to the states and from the states to the counties. Little attention has been paid to the nature and consequences of the delegations to the states: why choices were made between mandatory and permissive requirements and the consequences of these choices; why the states and counties make the substantive decisions that they do and the intended and unintended consequences of these decisions. The Social Security Act was amended recently to allow AFDC payments to be made where need was caused by the unemployment of the parent.<sup>72</sup> The purpose of the amendment was to mitigate the harshness of the existing program which required the breadwinning parent to be absent from the home; instances were reported where fathers were forced to leave a stable family situation so that the family could be eligible for benefits. The new federal program (AFDC-U) was permissive for the states; they could take advantage of an additional grant-in-aid if they wanted, but it was not a condition of continued participation in the existing program. One would have expected Wisconsin, with its long tradition of liberalism in welfare, to have speedily amended state legislation to take advantage of the new program. Yet, on two occasions proposed amendments failed to pass the legislature. Part of the reason was budgetary. But, in addition, many of the county welfare directors and caseworkers opposed the legislation. The reason was that the new program, if adopted, would have imposed vastly different tasks on those line officials. They felt that under the new program, they would be forced to devote much of their energy and time to finding jobs for AFDC parents. They would be diverted from what they considered to be their main tasks: that of rehabilitating and strengthening family life.

It would be a mistake, I think, to assume that the opposition of the Wisconsin line officials was merely another manifestation of bureaucratic resistance to change. Under certain conditions, public officials not only welcome change, but even initiate change on their own.<sup>73</sup> It would also be a mistake to think that these officials were opposed to giving assistance to needy families where the husband was not absent. The reaction of the Wisconsin line officials shows the importance of learning why officials react as they do. The amendment to the Social Security Act was designed to ameliorate what was thought to be a harsh result under the existing program. One would guess, however, that if Wisconsin had adopted the AFDC-U program, without other significant changes, grants would have been given to these families but little serious effort would have been made by the county caseworkers to find jobs for unemployed fathers. Of course, it could still be argued that the results would have been good

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<sup>72</sup> 75 Stat. 75 (1961), as amended, 42 U.S.C. § 607 (1964).

<sup>73</sup> BLAU, *THE DYNAMICS OF BUREAUCRACY*, ch. 13 (rev. ed. 1964).

—the families would have been getting needed assistance; but an important aspect of the federal statutory policy (whether wise or not) would not have been carried out by the line officials. This type of official lawlessness is not susceptible to control by a program of rights. With better information as to attitudes, perhaps the legislation could have been recast to insure more sympathetic and cooperative responses by the caseworkers.

Another example of a federally-initiated change is the requirement of notice to law enforcement officials if need is caused by the desertion of a father (the NOLEO amendment).<sup>74</sup> The amendment was an effort by Congress to stimulate the enforcement of the responsibilities of husbands to support their families. As distinguished from AFDC-U, the states were required to adopt NOLEO. NOLEO has resulted in a great variety of administration on the state and local level. Several states have gone beyond the mere notice to law enforcement officials required by federal law and insist that mothers cooperate actively with law enforcement officials.<sup>75</sup> There is some evidence that the operation of such policies has destroyed reconciliation possibilities in some families; in others, mothers have refused to cooperate, thus defeating the policy of supplying aid to needy children.<sup>76</sup> Perhaps more seriously, the involvement of local law enforcement officials and the local courts by the NOLEO amendment has increased the chances of repressive and brutal treatment of welfare clients. One of the results of the amendment was to shift the decision to use criminal processes from the welfare agency to the law enforcement officials. This might result in lower welfare costs, but it also might have exacerbated problems of controlling or preventing local indiscriminate and predatory attacks on welfare recipients.<sup>77</sup>

Similar problems of coordination and control apply in the flexible arrangements between the state and the local government units. In Wisconsin, the State Division of Public Assistance attempts to maintain a certain state-wide consistency. A review of state regulations and interviews with state officials indicate that state control and state uniformity are greatest for the assistance components of the program. State regulations go into very great detail in this area, even to the point of providing specific dollar allowances for necessities. Any deviations from these regulations must be in writing and are scrutinized very carefully by the

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<sup>74</sup> 64 Stat. 550 (1951), as amended, 42 U.S.C. § 602(a)(10) (Supp. I, 1965).

<sup>75</sup> For a discussion of federal objectives in enacting, and federal policies in implementing the NOLEO amendment, with an analysis of the states' reactions thereto, see McKEANY, *THE ABSENT FATHER AND PUBLIC POLICY IN THE PROGRAM OF AID TO DEPENDENT CHILDREN* 48-68 (1960).

<sup>76</sup> *Id.* at 64-67.

<sup>77</sup> tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 17 STAN. L. REV. 614, 659-66 (1965).

state district supervisors. On the other hand, state regulations may be very ambiguously stated, indicating standards for the county agency to achieve rather than rules to be followed. Invariably, these are usually in the area governing the service components of the program. For example, the Division strongly encourages the local agencies to motivate AFDC children to continue their education and training. The state provides monies for this purpose but the local agency decides whether or not to follow this lead.<sup>78</sup>

One of the principal reasons why it is so difficult to control official behavior in the service aspects of the program is that decisions in this area are not readily quantifiable. It is relatively easy for supervisory state and federal officials to check numbers of people on welfare and the dollar amounts spent for necessities. It is far more difficult to check the caseworker decisions denying a family request for extra needs and services. The decision about requiring a mother to work, discussed above, illustrates the difficulties of supervising the exercise of broad administrative discretion based on an assessment of individual family situations. The difficulties of intelligent quantification limit the use of one of the principal tools of supervision—statistical reporting. For many types of administrative decisions, statistical reporting works well. It allows supervisors to tell at a glance the output of subordinates. The subordinates themselves can evaluate their own performances. It avoids what is often a more imprecise qualitative evaluation. It lessens the unpleasantness of personal criticisms; instead of the supervisor telling the subordinate his

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<sup>78</sup> The above examples, dealing with the problems of implementing legislative goals at the lower levels of the bureaucracy, illustrate the importance of the attitudes or predispositions of line officials in the administration of the program. Alan Keith-Lucas emphasized this condition of administration in his study of ADC in two states. State *A*, in general, emphasized financial eligibility more than State *B*. For example, under the NOLEO amendment, State *B* only required the notice. State *A*, however, went further; it required, as a condition of eligibility, that a deserted wife file a nonsupport charge against her husband, and that an unmarried mother file a charge against the putative father. State *A*, as another example, required an incapacitated father to accept rehabilitation, including surgery, as a condition of eligibility. State *B* was more flexible. State *A* treated the employment of a mother as a condition of eligibility, but State *B* treated this as only a factor "to be considered in establishing need." Keith-Lucas examined the decisions of two caseworkers in County *A* of State *A* and two caseworkers in County *B* of State *B* concerning the employability of mothers. He found that the workers in each of the counties had different results (that is, the proportion of mothers actually working) and, that despite the differences in the state policies, the overall results between the two counties were the same. Each county had one caseworker with a high proportion of mothers working and one with a low proportion of mothers working. It was his conclusion that "the worker's predilections play a major part" in enforcing the state policies concerning the employment of the mothers; it was their attitudes toward work—its social and rehabilitative, as well as economic, value—which probably accounted for (a) the differences within the same county agency and (b) the overall similarity between the two states. KEITH-LUCAS, DECISIONS ABOUT PEOPLE IN NEED 218-21 (1957).

impression of the subordinate's work, he can show the subordinate his record as compared to the records of his co-workers. Statistical reporting also facilitates changing the production goals of line officials. In the public employment agency that Peter Blau studied, a new supervisor changed the reporting from the number of clients interviewed to measures of job placement. Under the previous regime, workers became more interested in just interviewing clients rather than making serious efforts to find jobs for them. Workers modified their behavior under the new system.<sup>79</sup>

Statistical reporting also has important limitations. Blau's example of the employment agency illustrates one of the limitations; it can result in what the sociologists call the "displacement of goals." If the performance of workers is based on the statistical reports, then making a good report can become the goal of the workers which may conflict with the goal of the administrative program. In the employment agency, the goal was finding jobs for people, and not just interviewing a great number of people. Anthony Costonis, in his work on a large Veterans' Administration Hospital, examined the performance of four units dealing with mental health patients.<sup>80</sup> One of the units was "treatment oriented"; it kept patients longer than the other units and it frequently readmitted previous patients for further treatment. Another unit was "rules oriented"; it discharged patients earlier than the other units and there were few readmissions. The statistical reporting method of supervising performance in this large bureaucracy favored the "rules oriented" unit; it "treated" more patients per unit of time and was able to terminate care for more patients. Output was measured by the number of patients who "completed" treatment. If the quality of mental health services was better in the "treatment oriented" unit, then the method of evaluating performance resulted in a displacement of goals by the "rules oriented" unit. Costonis suggests that the exigencies of administrative control in the large bureaucracy impelled this result, even though its questionableness was recognized. It was felt by the evaluators at the top that there was simply no other adequate administratively feasible method of supervising performance than the number of patients who "completed" treatment. Better methods of control, to avoid this displacement of goals, had to await technological improvement.

Statistical reporting, as a method of controlling line officials, presents similar issues for welfare administration. A caseworker decision discouraging a client's request for extra money or services will often not show up in the report to the top; an affirmative decision will, and may have to be

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<sup>79</sup> BLAU, *op. cit.* *supra* note 73, at 12.

<sup>80</sup> Costonis, A Study of Decentralization in a Mental Hospital, 1966 (unpublished thesis in the University of Chicago, Dep't of Sociology).

justified. The use of statistical reporting as the principal supervisory tool may dampen the willingness of line officials to implement rehabilitative programs. But the reverse may also be true; using statistical reporting in the rehabilitative areas may stimulate line officials to overact which may result in harmful consequences. A well-meaning supervisory emphasis on the *numbers* of AFDC people working or receiving mental health services, extended budget counselling, or vocational rehabilitation might result in the type of coercion or manipulation we seek to avoid. The point is obvious. In some instances, this standard method of administrative control is a relatively inexpensive and efficient way to stimulate proper official behavior. In other areas, lack of technology and the failure to refine criteria prevent the use of this technique which, if unthinkingly applied, can change administrative behavior in unintended and harmful ways.

These are some of the constraints and opportunities provided by the welfare bureaucracy that affect the operation of the program. But there are other factors which will affect the content of the program on the local level. In a service-oriented welfare program, no single agency by itself can accomplish all of the rehabilitative objectives. Cooperation and support must be obtained from other agencies within the community. Some communities develop elaborate mechanisms for increasing inter-agency efficiency in the handling of welfare problems. These include community-wide welfare services, social service exchanges, and handbooks on welfare agencies. In these endeavors, some communities are more successful than others, and in other communities, local agencies, which may be public or private, may be reluctant to commit their resources to AFDC families. These are contingencies over which the county agency has little control. Yet, they clearly can have an impact on the type of services which the agency will be able to provide its clients.

Another factor which can affect the content of the program is the community's generalized commitment to social welfare. While most American communities support traditional services, such as education, there is a great deal of variety in the support they provide for the more comprehensive service programs. This has been especially true for the programs oriented toward the dependent poor. The stance that the community adopts, particularly as it is reflected in the local leadership, will affect the county agency; county boards are elected, and they select the welfare directors. Blau and Scott argue that studies of other administrative programs indicate that if the environment is hostile, the officials will gradually retreat from the original goals of the program to more modest goals.<sup>81</sup>

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<sup>81</sup> BLAU & SCOTT, *FORMAL ORGANIZATIONS* 231 (1962).

In many areas, welfare administration, or at least AFDC and similar relief programs, operate in such environments.

Of crucial importance to the AFDC program is the community's resource base. This includes the health, recreation, and education facilities required to help families obtain self-sufficiency, better family functioning, and social integration within the community. In addition, it includes the local economic structure and level of prosperity. Communities vary in the extent to which such facilities and resources exist. In any one community, these factors—social, political, and economic—very likely converge to form a pattern to which the local agency must adapt itself and its programs. There is probably a very close relationship between the posture that the agency adopts and the context within which the agency is operating. It is important to determine the precise nature of this relationship since these factors are some of the essential preconditions which will determine the extent to which the objectives of the program will be achieved. Statutory changes like the NOLEO amendment may serve to increase the vulnerability of welfare administration to community or environmental control. A similar effect may be produced by the basic grants-in-aid or matching costs approach itself. tenBroek argues that a major cause of the harshness and restrictiveness of welfare programs is a deeply felt need to save public money.<sup>82</sup> This manifests itself in resentful attitudes towards welfare recipients. Local prosecutors campaign on getting cheaters off the welfare rolls. We remember the Newburgh episode. It may be, then, that the grants-in-aid approach needs rethinking. The theory behind requiring the states to match funds is that this will result in the states supervising more carefully the costs of the program. The same theory is apparently behind the practice of federally-imposed maximum benefits.<sup>83</sup> We don't know whether these theories have any foundation in fact. Many states do not grant the maximum benefits and many do not take advantage of several programs at all. Why states go into programs, why they stay out, and why they impose dollar limits lower than the maximum is unknown. In the meantime, the matching system may be having a devastating effect on the goals of the Social Security Act. By "costing" the states to participate, the system may be fanning local hostile attitudes towards welfare.

The final contingency or condition of the administration of the program may be the most important—the families. The AFDC families, as a group, have been defined by the legal system as being in need of assistance. This means that the families have two distinct statuses: one legal and the other social. The legal status (as participants in AFDC) involves

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<sup>82</sup> tenBroek, *supra* note 77, at 676-77.

<sup>83</sup> BURNS, SOCIAL SECURITY AND PUBLIC POLICY 240-43 (1956).

problems of rights, obligations, and other relationships between the families and the government bureaucracy. The social status involves the position of the families in the wider society. With respect to social status, AFDC families are drawn primarily from the lower class. In the first instance, their problems stem from this fact. Lower class problems can be economic-material (that is, related to the level of living) or they can be behavioral-attitudinal (that is, related to style of life). Thus, AFDC families are often "multiproblem" families. At the same time, this distinction calls attention to the fact that all AFDC families do not face the same types of problems. In one family, the most pressing problem may be one of inadequate childcare; in another, inadequate housing; in a third family, it could be both. The only problem that is common to all AFDC families is economic instability, since eligibility requirements are based on level of living criteria.

Prior to the amendments to the Social Security Act,<sup>84</sup> the ADC program was directed to the level of living problems. Most of the aid was in the form of financial assistance, with little provision for service. Moreover, the approach was typically in the form of "working with the cases at the level they are." As a consequence, little was done to improve the life-chances of the AFDC families or to move them towards self-support and independence. With the emphasis now on service and family rehabilitation, the approach is oriented not only to problems of level of living but also to problems associated with style of life. In this respect, the new approach to the program is to develop a more comprehensive attack upon the various problems which these families face. In the broader sociological perspective, the new program is an instrument of social mobility for the families. The underlying expectation appears to be that the program can move the members of AFDC families into middle-class positions as a result of successful rehabilitation.

The substantive impact of the program is inextricably tied to the impact of the program which results from the legal status of the AFDC families. As stated earlier, once programs move away from merely supplying assistance money to comprehensive services, the families face the prospect of greater control over their lives by the administrators of the program. The services aspects offer the most promise, but also the greatest threats to the freedom of the individual and the dignity of the family.

These are the factors which bear on how a comprehensive welfare program affects welfare recipients: legislation and regulations, the relationship of officials to each other within the bureaucratic structure, the relationship between the various structures, the impact of the environ-

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<sup>84</sup> Social Security Amendments of 1956, ch. 836, §§ 312(c), 342, 70 Stat. 849, 852, as amended, 42 U.S.C. § 603(a) (Supp. I, 1965).

ment, and the welfare recipients themselves. The various factors or conditions are related through formal and informal processes—styles of leadership, attitudes, customs, as well as statutes, rules, procedures. A comprehensive welfare program is a complex system. Controlling the behavior of line officials in this complex system has a double aspect. Lawyers tend to focus on restraining officials, preventing them from doing wrong by attacking through the adversary system. I have argued here that this approach may have only marginal utility, particularly since we do not understand the total administrative system. The costs might outweigh the gains. We should be concerned about strengthening the administrative system, creating conditions under which officials will be more likely to fulfill legislative goals. This will prevent official lawlessness, as lawyers conceive of the problem, but it will also prevent lawlessness in the broader legislative sense. Some of the conditions of welfare administration are either not susceptible to change or can be changed only very slowly; these would usually involve conditions arising out of the community context. But job security, social cohesiveness among officials, new devices of control and stimulation, and other aspects of working conditions can affect the willingness of officials to innovate, to accept responsibility and changes from the top, and to further the goals of the program.<sup>85</sup> Working conditions can aid professionals in their willingness to act in the desired way. Legislation and administrative regulation and supervision can do much to create a more favorable climate for officials, which, in turn, can affect materially the service given to clients.

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<sup>85</sup> See Blau, *The Dynamics of Bureaucracy*, in *COMPLEX ORGANIZATIONS* 343-55 (Etzioni ed. 1964).