

1-1-1998

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### Recommended Citation

David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 Brook. L. Rev. 231 (1998).  
Available at: <https://brooklynworks.brooklaw.edu/blr/vol64/iss1/4>

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# DUE PROCESS IN A PRIVATIZED WELFARE SYSTEM\*

David J. Kennedy†

## INTRODUCTION

The dust of the 1996 Presidential campaign had barely settled before Bill Clinton and Governor George Bush took aim at each other. In the spring of 1997, the Clinton Administration formally rejected Governor Bush's proposal to privatize elements of Texas' welfare, Medicaid, and Food Stamp programs.<sup>1</sup> The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") had allowed the states to use private corporations to operate certain state benefit programs.<sup>2</sup> Texas had already permitted private companies to administer several components of its state welfare system; under its waiver request, it sought to privatize the entire system.<sup>3</sup> The Department of Health and Human Services ultimately denied Texas' waiver request on the ground that it would empower private sector employees to determine eligibility for Medicaid and Food Stamps.<sup>4</sup>

President Clinton's rejection of Texas' waiver application appeared to be based on his desire to curry favor with labor unions.<sup>5</sup>

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<sup>1</sup> See Sam Howe Verhovek, *Clinton Reining in Role for Business in Welfare Effort*, N.Y. TIMES, May 11, 1997, § 1, at 1.

<sup>2</sup> Pub. L. No. 104-193, § 104 (1996) (amending 42 U.S.C. § 604(a) (1994)).

<sup>3</sup> See Michael Totty, *Plan to Privatize Welfare Services Spawns Novel Bidding Partnerships*, WALL ST. J., Mar. 20, 1996, at T1 (listing state programs already privatized).

<sup>4</sup> See *White House Limits States in Privatizing Welfare*, WALL ST. J., May 5, 1997, at A20. Texas was still permitted to continue using private corporations to operate its own state benefit system. See *id.* Governor Bush has indicated that he may proceed with elements of the rejected privatization plan anyway. See Verhovek, *supra* note 1, at 1.

<sup>5</sup> See Verhovek, *supra* note 1, at 1. This is not to say that there were no valid reasons to oppose the Texas plan. See Max B. Sawicky, *Welfare Privatization is Texans' Greased Piglet*, HOUS. CHRON., May 5, 1997, at 21. Sawicky argues:

Governor Bush's effort to privatize most of Texas' welfare system, in turn, seemed rooted in his attempt to make a name for himself with the kind of bold experimentation that could carry him to national office.<sup>6</sup> Yet while neither Bush nor Clinton treated it as such, the political jockeying in this instance was of critical national concern. After fighting so hard for greater authority over the welfare system, states seem strangely eager to pass the prize to private corporations.<sup>7</sup> This effort to privatize welfare could have lasting repercussions for the lives of the American poor. The fact that few attached much importance to the merits of privatizing welfare in one of the nation's largest states illustrates how the debate on this issue is unformed and unfocused. This Article attempts to redress that problem.

It is clear that the American welfare system is undergoing dramatic change. However, this change has been negotiated, implemented, and critiqued largely in terms of the relationship between the states and the federal government. Equally important is another, less obvious, reallocation of authority: from state entities in charge of benefit distribution to private corporations seeking to profit from welfare reform. The privatization of welfare is perhaps a more significant development than defederalization: while the ever-shifting balance of federal-state relations could tip once again in favor of federal dominance,<sup>8</sup> power once acquiesced to the private sector

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All the harbingers of this deal are unpromising. We have secret plans, withheld data, wildly ambitious estimates of cost savings, important questions of legality, contractors with terrible records of corporate responsibility, state officials and corporate lobbyists in the proverbial revolving door and two programs that are essential to brute, physical survival of the most vulnerable members of society. The president should deny Gov. Bush the imprimatur he seeks.

*Id.*

<sup>6</sup> See Gerard Baker, *'Little Fellow in Texas' Eyes Dad's Old Job in Washington*, FIN. TIMES, June 19, 1997, at 5 ("Nothing illustrates the radicalism better than his welfare reform legislation, which aimed to privatize much of the state's provision of assistance to the neediest.").

<sup>7</sup> The major beneficiaries of the Texas plan would have been Lockheed Martin, the military contractor, and Electronic Data Systems, the Medicaid claims processing company started by 1992 third-party presidential candidate H. Ross Perot. See John Harwood, *Locking Horns: EDS, Lockheed Duel Over Contract to Run Texas' Welfare System*, WALL ST. J., Mar. 19, 1997, at A1. Since Texas was compelled to adopt a more piecemeal approach to welfare privatization, Lockheed has assumed a dominant role. See Miriam Rozen, *Doling for Dollars*, DALLAS OBSERVER, May 8, 1998.

<sup>8</sup> See generally Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL'Y

will not be lightly surrendered. Recent technological advances in benefit provision, moreover, significantly accelerate the privatization of welfare; while these advances hold forth the promise of a more efficient welfare system, they may become invidious instruments of social control.

This Article argues that the transition from public to private welfare services, and from paper-based applications to electronic benefit transfer (EBT), dramatically redefines the due process rights of the poor. By delegating the public welfare to private corporations, states have placed highly vulnerable populations at the mercy of the market. Although the rush to award welfare contracts to private corporations promises to save the states money, experience suggests that privatization has undesirable financial, not to mention moral, costs. New welfare technologies are also highly overrated. Foolproof fraud prevention technologies often prove to be merely foolish. Beyond the purported benefits of improved technologies, such systems could easily be used to invade the private lives of many benefit recipients. A plastic benefit card usable at automated teller machines (ATMs) and grocery stores, for example, has the potential to do what a room of social welfare bureaucrats never could: detail how every last dollar of benefits is spent. In that regard, the possibilities for exploitation of dependent populations are higher than ever before.

Of course, privatization is not inherently bad; most Americans believe that carving out a larger role for private initiative, creativity, and financing leads to innovation and improvement. This Article will discuss how technological advances could reduce the stigma borne by welfare recipients and provide benefits more rapidly and accurately. The point is that the rapid pace of devolution from the federal government to the states has set off a fever of often ill-advised, and occasionally irreversible, experiment. This Article suggests a set of standards and rules that protect the due process rights of the indigent against the newly potent forces of corporate profiteers.

Part I of this Article will reexamine the standard story of poverty law scholarship. On this account, welfare policy has evolved from in-person application and recertification interviews by trained social work professionals to mass administrative procedures implemented by unskilled caseworkers. Thus, the goal of serving vast

benefit populations gradually replaces the effort to meet individual needs. The increasingly important role of technology and superior information processing, however, changes the expected course of affairs: welfare policy is now becoming both individualistic and impersonal. Part II will evaluate the three important developments of the last several years that have drastically altered welfare policy in the United States: the devolution of control over welfare policy from the federal government to the states; the newfound reliance on private companies to provide welfare services; and the development of new technologies to provide benefits.

After describing a vastly different new world of welfare policy, this Article will ask whether our old concepts of due process are adequate to protect the rights of the poor. Part III will explain how new relationships require new safeguards, and new powers require new constraints. First, this Article will argue that a new set of procedural controls and rights must be put into place to protect benefit recipients, as well as the government, from the financially self-interested behavior of welfare privatizers. The government simply cannot opt out of the benefit business altogether. Because of the constitutional prohibition on financially interested parties controlling rulemaking or even low-level adjudication, state involvement will remain a necessity. These constitutionally required monitoring costs, moreover, may lead one to ask whether privatization is such a bargain after all. Second, I will argue that as the move to privatization ratchets up the importance of procedural due process protections, the increased reliance on technology raises a host of substantive questions that have hardly been answered. The substantive rights of the poor are clearly affected by technological developments that invade their privacy and assign an informational advantage to the private contractor should a dispute arise. Congress' decision to exempt EBT accounts, which all Food Stamp beneficiaries must have by October 1, 2002, from disclosure requirements that commonly apply to financial institutions is a disturbing sign that the promise of EBT will be undermined. This Article will contend that the existing framework of electronic consumer protection law should be the appropriate source of procedural rights for EBT recipients. If a goal of welfare policy is to integrate benefit recipients with the general population, it would be inconsistent to grant the poor a different set of procedural due process rights. In fact, because their participation is involuntary, the poor need greater due process protections.

The aim of this Article is not to oppose innovation or technological advances, but to argue that these potentially liberating developments, at present, have been turned to improper purposes.<sup>9</sup> The welfare reform bill of 1996 did not completely eliminate the rights of benefit recipients, and experimentation does not mean "anything goes." If state governments are intent on reforming welfare through imprudent, superficial, and irrational policies, a whole new set of constitutional protections is implicated.

## I. THE EVOLUTION OF WELFARE POLICY

Before evaluating the major changes in welfare policy of the past few years, it is worth analyzing the backdrop of reform. By 1996, policymakers all over the political spectrum agreed that the American social welfare system was in dire need of reform. As one analyst put it, "Everyone hates welfare."<sup>10</sup> Conservatives charged that vast expenditures on the underclass were all for nothing,<sup>11</sup> that the free handout of benefits undermined basic American values such as hard work,<sup>12</sup> and that so-called "welfare queens" were

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<sup>9</sup> See Fred W. Weingarten, *Privacy: A Terminal Idea*, 10 HUM. RTS. Q. 18, 56 (1982) ("It is not technology, as such, which affects society for good or bad, but its uses, which are . . . shaped by the values of society and by the historical context in which the technology is used.").

<sup>10</sup> DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 4 (1988); see also THEODORE R. MARMOR ET AL., AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES 16 (1990) ("American social welfare provision has been most often characterized as ungovernable, unaffordable, or undesirable—sometimes all three at once."); Mark Neal Aaronson, *Scapegoating the Poor: Welfare Reform All Over Again and the Undermining of Democratic Citizenship*, 7 HASTINGS WOMEN'S L.J. 213, 213 (1996) ("In the contemporary American political lexicon, *welfare* is a perjorative term.").

<sup>11</sup> See CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980 (1984). Murray's major contribution to the debate has been the assertion that while expenditures on the poor have vastly increased, the number of the poor has not gone down, but increased as well. Numerous commentators have thoroughly refuted Murray's "perverse effects" analysis. See CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS 70-91 (1992); MARMOR ET AL., *supra* note 10, at 104-15, 105 ("Almost nothing Murray says about the effects of welfare or welfare state policies on the poor is believed by serious students of the subject."); Frances Fox Piven & Richard A. Cloward, *The Contemporary Relief Debate*, in FRED BLOCK ET AL., THE MEAN SEASON: THE ATTACK ON THE WELFARE STATE 45, 67-92 (1987). However, Murray's thesis continues to shape the debate over welfare reform. See, e.g., John Goodman, *Welfare Privatization*, WALL ST. J., May 28, 1996, at A18 ("According to the Congressional Research Service, we have spent \$5.4 trillion (in 1992 dollars) on federal means-tested poverty programs since 1960. Yet the poverty rate is higher today than it was in 1965, when the War on Poverty started.").

<sup>12</sup> The major statement of this theme is LAWRENCE M. MEAD, BEYOND ENTITLEMENT:

cheating the system by driving up to groceries in limousines to purchase alcohol with their Food Stamps.<sup>13</sup> Liberals, on the other hand, contended that the welfare system failed to guarantee people enough resources on which to live, that it failed to use jobs, health care, and child care as part of a coherent approach to lifting people out of poverty, and that the welfare bureaucracy belittled and stigmatized recipients.<sup>14</sup>

This Part will focus on the relationship between the beneficiary and the state. Unlike the highly contested historical arguments on social policy, the history of the evolution of the relationship between state and beneficiary follows a generally accepted trajectory, plotted out by landmark court cases. On this account, welfare policy begins as an in-person, individualized series of interactions with trained social workers. Over time, the system becomes more and more reliant on untrained workers who attempt to weed out applicants through various hoops and hurdles, rendering the process impersonal and collectivized. This standard story is, like most gener-

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THE SOCIAL OBLIGATIONS OF CITIZENSHIP (1986). See also CHARLES LOCKHART, *GAINING GROUND: TAILORING SOCIAL PROGRAMS TO AMERICAN VALUES* (1989).

<sup>13</sup> President Ronald Reagan repeatedly told the tale of a "Chicago welfare queen" with numerous aliases, addresses, Social Security numbers, and husbands who was collecting \$150,000 from the government. See Aaronson, *supra* note 10, at 227. But cf. Paul Glastris, *Was Reagan Right?*, U.S. NEWS & WORLD REP., Oct. 20, 1997, at 30 (suggesting that one result of welfare reform has been to "smoke out" fraudulent claimants). The story was meant to underscore the permissiveness of the welfare state, even though it more clearly illustrates the problem of incompetent administration. See *infra* note 82.

Since Reagan popularized this stereotype, it has taken pernicious root in the welfare debate. The "welfare queen" need not be involved in fraud; instead, she is the embodiment of a putatively permissive "ghetto culture" entirely reliant on governmental hand-outs. Dorothy E. Roberts explains that the stereotypical "welfare queen . . . breeds children at the expense of the taxpayers in order to increase the amount of the welfare check." Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1419, 1444 (1991). This stereotype is fuel for punitive welfare policies such as family caps, which prevent Aid to Families with Dependent Children ("AFDC") families from receiving more assistance even though the mother has another child. See Risa E. Kaufman, *The Cultural Meaning of the "Welfare Queen": Using State Constitutions to Challenge Child Exclusion Provisions*, 23 N.Y.U. REV. L. & SOC. CHANGE 301 (1997).

<sup>14</sup> See, e.g., ELLWOOD, *supra* note 10; Piven & Cloward, *supra* note 11. For more impressionistic, yet powerful, accounts of the failure of the American welfare system to provide for the poorest members of our society, see ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE* (1991) (describing the lives of young boys in Chicago housing project); and JONATHAN KOZOL, *RACHEL AND HER CHILDREN: HOMELESS FAMILIES IN AMERICA* (1988) (describing the problem of homelessness in America through the story of a mother and her children in New York City).

alized accounts, somewhat simplified. The aim of this Part, however, is to show that the theory behind the standard story fails to explain the consequences of the three critical developments addressed in this Article. The result of greater state control over the operation of welfare systems, advanced technology, and increased privatization is a system that is impersonal yet individualized. In a sense, welfare bureaucracies now know more and care less about each individual recipient than ever before. This Part will explain how this state of affairs is unanticipated in poverty legal scholarship; Part II will sketch out what these developments mean.

### A. *From Personal and Invasive to Impersonal and Superficial*

Even American antipoverty programs, a constant target of attack from all over the ideological spectrum, enjoyed an idealized past. In the "good old days," there was a sincere effort to win the war on poverty by empowering low-income populations. Paradigmatic of this approach was the face-to-face meeting between social worker and benefit recipient; rather than giving out food or clothes to a long line of needy individuals, welfare agencies sought to establish a personal rapport with their clients. The "face-to-face" Food Stamp recertification interview was originally understood "not as a means to control the recipient and the uses of relief, but as a way to administer welfare based upon a mutually respectful exchange between the worker and the applicant."<sup>15</sup>

Thus, the standard story of the welfare bureaucracy from the 1960s to the present begins with professionalized discretion.<sup>16</sup> Joel

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<sup>15</sup> Susan D. Bennett, "No relief but upon the terms of coming into the house"—*Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter System*, 104 YALE L.J. 2157, 2185 (1995); see also William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 4-5 (1985) ("From 1935 to the late 1960s, the Federal Bureau of Public Assistance, which administered the most controversial federal welfare program — Aid to Families with Dependent Children (AFDC)—as well as the old age and disability welfare programs, was dominated by social work professionals committed to this perspective.").

<sup>16</sup> For an account of this transformation, see, for example, Joel F. Handler, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law*, 92 YALE L.J. 1270 (1983); William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983). Michael Sosin divides this period into three parts. The discretionary age of AFDC provision lasted from 1962 to 1967; the legal rights approach triumphed in 1967 to 1972; and from 1972 to 1980, the social welfare system became increasingly bureaucratized. See Michael R. Sosin, *Legal Rights and Welfare Change, 1960-1980*, in FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T 260 (Sheldon H. Danziger & Daniel H.



Handler has described the welfare system of the early 1960s as "discretionary, professional, and decentralized."<sup>17</sup> Professional social workers ran the welfare bureaucracy and brought a generally compassionate and flexible approach to their work.<sup>18</sup> On this model, the individual social worker was free of bureaucratic constraints to act in the best interests of the client. While professionals could abuse their discretion,<sup>19</sup> welfare recipients at least encountered a measure of humanity in their dealings with the system.

Of course, with intimacy comes a certain degree of invasiveness. Social workers could make the best use of their expertise only by learning a great deal about exactly what their clients were doing. When benefit recipients were not forthcoming on such matters, welfare agencies resorted to "condescending moralism"<sup>20</sup> to police the behavior of their clients. Frances Fox Piven and Richard Cloward, in their landmark book *Regulating the Poor*, provide a discussion of the invasiveness problem in the late 1960s and early 1970s:

A central feature of the recipient's degradation is that she must surrender commonly accepted rights in exchange for aid. AFDC mothers, for example, are often forced to answer questions about their sexual behavior ("When did you last menstruate?"), open their closets to inspection ("Whose pants are those?"), and permit their children to be interrogated ("Do any men visit your mother?"). Unannounced raids, usually after midnight and without benefit of warrant, in which a recipient's home is searched for signs of "immoral" activities, have also been part of life on AFDC.<sup>21</sup>

The courts took a dim view of these efforts. In *King v. Smith*, for example, the Supreme Court struck down an Alabama regulation that discontinued AFDC benefits to households in which there was a cohabitating father.<sup>22</sup> To enforce this regulation, Alabama Department of Social Services officers would investigate the recipient's sex

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Weinberg eds., 1986).

<sup>17</sup> Handler, *supra* note 16, at 1270.

<sup>18</sup> See Bennett, *supra* note 15, at 2185; Sosin, *supra* note 16, at 261.

<sup>19</sup> The most common area of abuse of discretion involved home visits to determine, among other things, whether there was a man cohabitating with the mother of the recipient family unit. See, e.g., J.L. Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia*, 57 VA. L. REV. 818 (1971); Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963).

<sup>20</sup> Simon, *supra* note 15, at 2.

<sup>21</sup> FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 166 (1971).

<sup>22</sup> 392 U.S. 309, 314 (1968).

life. In some counties, a man was considered to be "cohabitating" if he and the recipient mother had sex once a week; in other counties, officers considered sexual relations once every six months to constitute "cohabitation."<sup>23</sup> As Justice Douglas pointed out in his concurring opinion, the statute sought to punish mothers who were sinful, whether or not the father actually could have played a role in supporting the family financially.<sup>24</sup> Thus, "professionalism" was simply not enough of a counterweight to the pressures of bureaucracy, rules and regulations, and public opinion.<sup>25</sup>

According to the standard story, the informal, personalized world of professional social workers came to an end with the landmark welfare rights case of *Goldberg v. Kelly* in 1970.<sup>26</sup> *Goldberg*, which required that welfare recipients be afforded a hearing before their benefits were terminated, imposed legalistic due process requirements on welfare administration. In response, welfare departments felt compelled to develop specific, precise, written eligibility requirements to defend agency decisions at a fair hearing.<sup>27</sup> These

<sup>23</sup> *Id.* at 314.

<sup>24</sup> See *id.* at 336 (Douglas, J., concurring). Similarly, in *Lewis v. Martin*, 397 U.S. 552 (1970), AFDC recipients challenged a California law that presumed that the income of a nonadoptive stepfather or man assuming the role of spouse should be included in computing a family's AFDC budget. The Court ruled that the state law violated federal Department of Health, Education, and Welfare regulations.

<sup>25</sup> See Sosin, *supra* note 16, at 262 (summarizing this view).

<sup>26</sup> 397 U.S. 254 (1970). The Court declared that

[w]elfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

*Id.* at 265. Thus *Goldberg* forms a central part of the standard story. See Simon, *supra* note 15, at 3.

<sup>27</sup> See JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW* 289-90 (3d ed. 1992). This leading casebook suggests that if the standard story is accurate, "[p]rograms that were generally viewed as paternalistic, discretionary, and individualized have been transformed into adversarial, impersonal, property-rights regimes." *Id.* at 290. Sosin argues that the attack on discretion exemplified by *Goldberg* stemmed from the "legal rights view" that discretion was undesirable because it could be abused. See Sosin, *supra* note 16, at 261-62. Sosin disagrees with the standard account, however, in that he attributes the depersonalization of the welfare bureaucracy to economic conditions rather than the victory of this "legal rights view." See *id.* at 279.

objective and routinized criteria and policies "led to the realization that well-trained or professionalized social welfare workers were no longer needed."<sup>28</sup> Clerks replaced trained professionals.<sup>29</sup> As the Director of Labor Relations of the Massachusetts welfare department explained in the early 1980s: "We've been trying to get the people who think like social workers out and the people who think like bank tellers in."<sup>30</sup> The system of proving eligibility became document-based,<sup>31</sup> and "voluminous" policy manuals replaced informal standards.<sup>32</sup> Far from fostering a more accountable welfare system, *Goldberg* created a depersonalized bureaucracy. Several scholars point to *Goldberg* as the birth of a legalistic approach to welfare eligibility determinations.<sup>33</sup>

The standard story is not quite accurate. *Goldberg* was limited in scope quite soon after it was decided.<sup>34</sup> Furthermore, *Goldberg*

<sup>28</sup> MASHAW, *supra* note 27, at 289-90; see also DANIEL J. BAUM, *THE WELFARE FAMILY AND MASS ADMINISTRATIVE JUSTICE* 16-22 (1974); Simon, *supra* note 15, at 1215.

<sup>29</sup> Sosin explains: "Their primary interests were in meeting rules, filling out forms, and taking deadlines into account, not in dispensing social services or referring clients to service workers." Sosin, *supra* note 16, at 275.

<sup>30</sup> Simon, *supra* note 15, at 1216.

<sup>31</sup> See Simon, *supra* note 15, at 1205-06.

<sup>32</sup> See Simon, *supra* note 15, at 1201.

<sup>33</sup> See, e.g., Simon, *supra* note 15, at 1230-33. At the time, however, advocates for the poor were optimistic about the use of litigation to bring about improvements in the welfare system. See PIVEN & CLOWARD, *supra* note 21, at 306-14.

A similar line of reasoning contends that efforts to change the welfare system through litigation are unlikely to succeed. As one scholar suggests, "The inadequacy of liberal legalism is that it has tried to either stamp out discretion or control it through the adversarial assertion of legal rights . . ." Handler, *supra* note 16, at 1277. Handler argues for a mixed system in which several areas of policy are left to discretionary determinations. See *id.* at 1279. The transformation of the welfare system, on this account, reflects less the impact of a single case and more the cumulative effects of a litigation strategy. Even where litigation has been successful, the bureaucracy responds by imposing new hurdles and obstacles. See Gary L. Blasi, *Litigation Strategies for Addressing Bureaucratic Disentitlement*, 16 N.Y.U. REV. L. & SOC. CHANGE 591, 599 (1987-88).

<sup>34</sup> See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976) (allowing termination of SSI benefits pending the outcome of fair evidentiary hearing); *Jefferson v. Hackney*, 406 U.S. 535 (1972) (allowing states to fund AFDC below standard of need); *Dandridge v. Williams*, 397 U.S. 471 (1970) (same); see also Joel F. Handler, "Constructing the Political Spectacle": *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 900 (1990) (describing "short-lived" triumph of *Goldberg*).

Conversely, *Goldberg* was not the only significant decision protecting the rights of the poor. As Alan Houseman explains, "Prior to *King v. Smith*, the AFDC program was viewed by both state and federal administrators as a program that provided vast state discretion and imposed few federal requirements to which the states had to adhere."

hardly explains the decline in social work professionalism: the overall qualifications of welfare workers were clearly in decline before 1971.<sup>35</sup> Equally important to the development of the welfare bureaucracy was the evolution in social attitudes: "Social work . . . came to be associated on the left with invasion of privacy and conformist manipulation and on the right with bleeding heart sentimentality and administrative laxity."<sup>36</sup> Yet while it is too easy to overstate the unintended consequences of *Goldberg*, the legalistic insistence on standards and policies lends itself to mechanical, routinized processing of individual benefit cases. A personalized system of welfare provision has distinct advantages and drawbacks: a caseworker who is personally familiar with a client's case could be of invaluable assistance in helping the client meet his or her needs, but by the same token the client's privacy would be diminished. Once the caseworker loses discretion, the client may be able to better protect his or her privacy but at the cost of dealing with personnel who know little about his or her case and care even less. As the next Section suggests, this administrative callousness has rather unfortunate consequences.

## B. *The Dissuasion Function of Welfare Bureaucracies*

### 1. Churning

One consequence of the rise of impersonal, mechanical benefit systems is the phenomenon known as "churning," the effort to reduce welfare rolls through burdensome or repetitive administrative eligibility procedures.<sup>37</sup> This process attempts to weed out current

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Alan W. Houseman, *The Vitality of Goldberg v. Kelly to Welfare Advocacy in the 1990s*, 56 BROOK. L. REV. 831, 831 (1990).

<sup>35</sup> See Simon, *supra* note 15, at 1215 n.46 (noting that 57% of federal public assistance personnel in 1950 had two or more years of graduate study in social work, but 24.9% had similar qualifications in 1960) (citing M. DERTHICK, *THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS* 159 (1970); and U.S. DEP'T OF HEALTH, EDUC. & WELFARE, BUREAU OF FAMILY SVCS. & CHILDREN'S BUREAU, *PUBLIC SOCIAL WELFARE PERSONNEL—1960*, at 86 (1962)).

<sup>36</sup> Simon, *supra* note 15, at 1215.

<sup>37</sup> The New York City Human Resources Administration apparently coined the term in 1973 to describe cases that are closed purely for administrative reasons. See Anna Lou Dehavenon, *Charles Dickens Meets Franz Kafka: The Maladministration of New York City's Public Assistance Programs*, 17 N.Y.U. REV. L. & SOC. CHANGE 231, 234 n.14 (1989-90). Bennett defines "churning" as "the rapid administrative closure of welfare cases, usually as a result of the recipient's inability to comply with a request for verifi-

or potential welfare recipients by placing administrative hoops and hurdles in the way of a successful application. Many claimants either become discouraged and decide it is not worth their while to apply, or they inevitably run afoul of some requirement or another, causing them to become ineligible.<sup>38</sup> Of course, policymakers do not expressly state that their aim is to wear down recipients through administrative attrition; instead, churning procedures are justified in terms of evaluating eligibility, insuring that only "deserving" candidates receive welfare, and preventing fraud.<sup>39</sup> Whatever the specific justification, the depersonalized, document-based system of welfare eligibility determination expanded the role for "bureaucratic disentanglement."<sup>40</sup> Welfare recipients and applicants could be denied for their failure to satisfy any one of innumerable verification and documentation requirements.<sup>41</sup> Such disentanglement is the result of management procedures and efficiency concerns, rather than determinations of need or desert.<sup>42</sup>

Churning consists not only of front-line welfare officials engaged in verification extremism, but also high-level bureaucrats setting policy goals whose utility is far outweighed by their churning potential. While feeding the needy may seem an unquestionably valid goal of welfare policy, federal policymakers have frequently intervened to make it difficult to get Food Stamps. For example, Monthly Reporting and Retrospective Budgeting ("MRRB") procedures were a mandatory feature of federal Food Stamp policy from 1981 through 1988.<sup>43</sup> Under MRRB, recipients had to visit the lo-

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cation of eligibility or failure to arrive at a scheduled appointment with the intake caseworker or to meet some other deadline." Bennett, *supra* note 15, at 2180-81. For a discussion of this practice before 1970, see PIVEN & CLOWARD, *supra* note 21, at 149-61.

<sup>38</sup> Far from taking unqualified people off the rolls, churning usually eliminates recipients who are qualified but for their adherence to some administrative requirement or another. For a comparative analysis that shows a very close relationship between administrative case closings and case reopenings, see Dehavenon, *supra* note 37, at 239.

<sup>39</sup> Bennett concurs: "Of the three insatiable external demands with which welfare offices cope through 'neutral,' internal adjustments, external demands for fraud control measures are the most disruptive." Bennett, *supra* note 15, at 2194-95.

<sup>40</sup> Michael Lipsky, *Bureaucratic Disentanglement in Social Welfare Programs*, 58 SOC. SERV. REV. 3 (1984).

<sup>41</sup> Susan Bennett has written extensively about such "verification extremism" that causes single mothers to lose benefits for the failure to prove that the children were theirs or to notarize their homelessness. See Bennett, *supra* note 15, at 2164-71. Bennett defines this term as "[f]ixations on the form of proof of eligibility." *Id.* at 2164; see also Michael Lipsky & Marc A. Thibodeau, *Domestic Food Policy in the United States*, 15 J. HEALTH POL. POL'Y & L. 319, 330 (1990) (discussing verification extremism).

<sup>42</sup> See Lipsky & Thibodeau, *supra* note 41, at 330.

<sup>43</sup> The general consensus is that the welter of Food Stamp administrative require-

cal welfare office every month to go over their household budgets.<sup>44</sup> Needless to say, monthly budget reporting makes compliance with Food Stamp regulations extremely difficult: even if recipients manage to attend every single meeting, itself an onerous task, the failure to provide documentation of any minor change in their life circumstances could lead to loss of benefits.<sup>45</sup> While the putative purpose of MRRB was to insure the accuracy of budgetary information, MRRB failed to save money in terms of program costs.<sup>46</sup> Instead, it increased administrative closings and caused otherwise eligible recipients to be cut off, a classic feature of churning.<sup>47</sup> In this harsh post-PRWORA climate, it would be quite easy for the state to return to the days of the MRRB and require Food Stamp recipients to arrange a visit to the welfare office, endure interminable delays and reschedulings, arrange for child care for these eventualities, and change their work program schedules to be recer-

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ments is primarily responsible for the relatively low number of households on Food Stamps: only 43.8% of all eligible households. See Karen Terhune, Comment, *Reformation of the Food Stamp Act: Abating Domestic Hunger Means Resisting "Legislative Junk Food"*, 41 CATH. U. L. REV. 421, 437-38 (1992). One reason for this low figure are the federal accounting rules adopted in 1973, known as Quality Control, which encouraged states to adopt extreme verification requirements. See Dehavenon, *supra* note 37, at 245. There were "modest reforms" in the Food Stamp Quality Control regulations in 1988. See Dehavenon, *supra* note 37, at 251 & n.95. As part of these reforms, states were penalized for overpayments of Food Stamps, but not underpayments. See Lipsky & Thibodeau, *supra* note 41, at 329-30; Terhune, *supra*, at 434. Lipsky and Thibodeau also note the blizzard of changes in the Food Stamp program during this period. During one thirty-month period in the 1980s, the Food and Nutrition Service implemented ninety "major regulatory changes." Lipsky & Thibodeau, *supra* note 41, at 330 n.27. One can only imagine how difficult it would be for an individual benefit recipient, particularly a single working mother or an elderly retiree, to keep up with these changes.

<sup>44</sup> See Hunger Prevention Act of 1988, Pub. L. No. 100-435, § 204(b) (amending 7 U.S.C. § 2015(c) (1982)) (allowing optional monthly administration of MRRB). In Connecticut, state regulations allow the welfare department to certify the recipient for anywhere from one to twelve months. See CONN. UNIF. POL'Y MANUAL § 1545.10(B)(1)(e), P-1545.05(2).

<sup>45</sup> See Lipsky & Thibodeau, *supra* note 41, at 330.

<sup>46</sup> See Terhune, *supra* note 43, at 440 n.124 (citing studies).

<sup>47</sup> See Terhune, *supra* note 43, at 440 n.124 ("[M]onthly reporting adds to administrative costs, . . . can lead to termination of benefits for recipients who are otherwise eligible, and . . . results in a substantial amount of case closures followed by case reopenings (or 'churning').") (quoting ROBERT GREENSTEIN & MARION E. NICHOLS, CENTER FOR BUDGET AND POLICY PRIORITIES, MONTHLY REPORTING: A REVIEW OF THE RESEARCH FINDINGS 33-35 (1989)).

Every year, individuals across the country are cut off welfare because they fail to attend their recertification. One New York study found that 43% of families who lost their Food Stamp benefits did so because they missed their recertification interviews. See Dehavenon, *supra* note 37, at 248.

tified each month. With each additional administrative requirement comes another possibility that that recipient will fail to meet some requirement or another, or the caseworker will make an error, and benefits will be terminated for reasons unrelated to need.

The courts have proven largely unreceptive to the claim that churning violates due process or equal protection. In *Boddie v. Connecticut*, the Supreme Court noted that there may be a case where administrative action would be "the equivalent of denying [individuals] an opportunity to be heard upon their claimed right . . . , and, in the absence of a sufficient countervailing justification for the State's action, a denial of due process."<sup>48</sup> However, the lower courts have applied *Boddie* largely in the context of court filing fees, rather than broadening the scope of this prohibition to include churning by welfare agencies. For example, litigants attacked several churning mechanisms in the 1976 case *Perez v. Lavine*: first, prescreening applicants based on criteria that were never made known to them; second, the long lines that poor staffing and management produced outside the welfare center; third, the practice of closing the doors of the center once staff had met their daily quotas; and fourth, accepting applications only after a formal interview.<sup>49</sup> These hoops and hurdles to completing a mere application for benefits suggests that the agency was at the very least involved in a passive form of application dissuasion. The court, however, dismissed these claims,<sup>50</sup> concluding that,

A minimum of compassion and the slightest penchant for efficiency would lead one to deplore the onerous conditions existing at many of the welfare centers, but this alone is insufficient for the Court to conclude that the congestion itself is such a deterrence to interested individuals as to amount to a denial of their opportunity to apply for public assistance . . . .<sup>51</sup>

In short, even the most limited opportunity to apply for benefits will suffice. The failure of the federal courts to monitor agency churning practices allows welfare officials to deny relief on an arbitrary basis.

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<sup>48</sup> 401 U.S. 371, 380-81 (1970).

<sup>49</sup> See 412 F. Supp. 1340, 1346-47 (S.D.N.Y. 1976).

<sup>50</sup> See *id.* at 1349-56.

<sup>51</sup> *Id.* at 1351.

## 2. Churning in Action

In 1995, New York City Mayor Rudolph Giuliani introduced a dramatic effort to reduce welfare rolls known as eligibility verification review, or EVR.<sup>52</sup> One legal services lawyer called EVR "the most aggressive effort to deny public assistance I've seen in my 20 years in this business."<sup>53</sup> In addition to the systemic barriers of five-hour waits, undersupplied offices, and unresponsive personnel,<sup>54</sup> the EVR process imposed two additional hurdles upon the receipt of welfare. First, all applicants, regardless of their borough of residence, were required to report to a special center in Brooklyn for an additional eligibility interview. The second step to EVR was an unannounced home visit to confirm that the applicant had provided correct information as to residence and family composition.<sup>55</sup> The home visits followed preexisting, but irregularly used, verification procedures titled "Front End Detection Service."<sup>56</sup>

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<sup>52</sup> For a basic description of EVR, see David Firestone, *100,000 New Yorkers May Be Cut Off Welfare in Crackdown*, N.Y. TIMES, Aug. 8, 1995, at B1; Kimberly J. McLarin, *City Sued Over Program to Curb Welfare Fraud*, N.Y. TIMES, Dec. 30, 1995, § 1, at 31; Kimberly J. McLarin, *Poor See New Indignity in Welfare Fraud War*, N.Y. TIMES, Apr. 21, 1995, at A1. See also Peter M. Cicchino, *The Problem Child: An Empirical Survey and Rhetorical Analysis of Child Poverty in the United States*, 5 J.L. & POL'Y 5, 82-83 (1996) ("EVR is a process that gathers no new information, contributes nothing substantive to the determinations of eligibility, but serves purely and simply as another obstacle to prevent poor people from obtaining what paltry assistance our society affords them.").

A complete description of the effects of EVR is presented in *McKeon v. Giuliani*, No. 95-10990, at ¶¶ 28-32 (S.D.N.Y. Dec. 28, 1995) (Order to Show Cause for Preliminary Injunction and Class Certification with Temporary Restraining Order) [hereinafter *McKeon*]. Following the passage of the PRWORA, as well as concessions by the city welfare department, the *McKeon* lawsuit was withdrawn. Although the *McKeon* suit did not put a halt to EVR, a New York Supreme Court recently struck down the requirements of EVR as applied to AIDS services clients. See *Hernandez v. Barrios-Paoli*, N.Y.L.J., Feb. 3, 1998, at 26.

Even Medicaid recipients are subject to home visits. In one case, reminiscent of the days of the "man in the house" rule, a woman and her children were denied Medicaid because inspectors found a single pair of jeans in the mother's closet. They insisted that the jeans belonged to a cohabitating male. See Nina Bernstein, *New Hurdle for Some Seeking Medicaid: Home Inspections*, N.Y. TIMES, Sept. 20, 1998, §1, at 43.

<sup>53</sup> Firestone, *supra* note 52, at B1 (quoting Legal Services for New York City lawyer Don Friedman).

<sup>54</sup> See McLarin, *Poor See New Indignity in Welfare Fraud War*, *supra* note 52, at A1 (describing such conditions).

<sup>55</sup> For a description of these new requirements, see sources cited *supra* note 52.

<sup>56</sup> See N.Y. COMP. CODES R. & REGS. tit. 18, §§ 351.4, 387.8(c) (1998) (home visits for Food Stamp recipients); N.Y. SOC. SERV. LAW § 134(b) (McKinney 1992) (home visits for public assistance recipients).



Hence investigators, calling themselves "FEDS,"<sup>57</sup> would show up at the recipient's home and interrogate landlords and neighbors if the recipient was not there.

Those interviewed by EVR workers stated that the workers were "belligerent" and "intimidating."<sup>58</sup> The interviewers wore badges even though they were not police officers.<sup>59</sup> One applicant reported that his address book was pulled from his hands by an EVR worker when he could not provide an address. The applicant was forced to sign a form in English even though he only spoke Spanish; later it turned out he had unwittingly signed a form withdrawing his application for relief.<sup>60</sup>

The home visit stage saw further abuses even apart from case-workers posing as the "Feds." Cases were frequently closed simply because there was nobody at home to answer the questions,<sup>61</sup> or because the forms slipped under the door by EVR investigators failed to give instructions in any language but English.<sup>62</sup> In one incident, an individual's case was closed because she was not present when the EVR investigators dropped by her house; she was out at the work program assigned to her by the very same welfare agency.<sup>63</sup>

Although the asserted justification for EVR is fraud prevention, the number of proven cases of fraud paled in comparison to the number of cases of administrative harassment and frustration.<sup>64</sup> Robert Marquez, the Queens administrator for Catholic Charities, explained: "There are more and more delays for people applying for public benefits. You see a three, four, five-month delay."<sup>65</sup>

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<sup>57</sup> See McKeon, *supra* note 52, at ¶¶ 72-80.

<sup>58</sup> Paul Schwartzman, *City Welfare Suit Advocates Rip Screening Program*, DAILY NEWS, Dec. 30, 1995, at 12 (quoting applicant Edward DeLoatch).

<sup>59</sup> See McKeon, *supra* note 52, at ¶ 35.

<sup>60</sup> See Patrick J. Horvath, Letter to the Editor, *Has Harassment Become the Plan for Reducing Welfare Rolls?*, N.Y. TIMES, Aug. 15, 1995, at A16 (describing experience of client); McKeon, *supra* note 52, at ¶ 132.

<sup>61</sup> See McLarin, *Poor See New Indignity in Welfare Fraud War*, *supra* note 52, at A1.

<sup>62</sup> See Firestone, *supra* note 52, at B1 (describing the experience of a Russian immigrant who lost his benefits because he did not understand EVR forms).

<sup>63</sup> See McKeon, *supra* note 52, at ¶ 60.

<sup>64</sup> See Paul Moses, *Desperate Queens Mother Gets Quick Offers of Aid*, NEWSDAY (N.Y.), Dec. 14, 1995, at A6 (telling story of woman who waited four months for her case to be processed as result of EVR).

<sup>65</sup> Paul Moses, *Stuck in Red Tape: As Holidays Approach, Cuts Leave Some Poor Trapped in Bureaucracy*, NEWSDAY (N.Y.), Dec. 12, 1995, at A5.

Bureaucratic inconsistency, arbitrariness, and cruelty were rampant. One reporter found an applicant with two contradictory documents, one cutting her benefits off for missing an EVR interview and a second verifying that she had in fact made the interview.<sup>66</sup> AIDS patients who missed their EVR appointments had their benefits canceled even though the only reason they had missed their appointments was because they had been hospitalized.<sup>67</sup>

The protests of city officials notwithstanding, it was not difficult to discern the motivation for New York City's harsh new approach to welfare policy: the City sought to impose administrative hoops and hurdles to reduce the number of individuals on welfare. As one applicant, a flood victim seeking an emergency grant, complained, "It's the running around that gets to you."<sup>68</sup> A report by the City's Public Advocate found that "improper and illegal treatment of applicants and recipients was commonplace" in the rush to close cases.<sup>69</sup> Opponents of the policy leaked a memo written by a Human Resources Administration official that baldly declared that the program was "designed to alleviate the budget gap."<sup>70</sup> An extensive report on EVR a year and a half after its implementation found that its overly rigorous procedures denied thousands of eligible people the benefits to which they were entitled.<sup>71</sup>

To some degree, EVR has reduced the number of welfare recipients. In its first year, the number of Home Relief recipients in New York City dropped from 244,000 to 179,000,<sup>72</sup> and other states seem interested in following Mayor Giuliani's lead.<sup>73</sup> However, the

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<sup>66</sup> See *id.*

<sup>67</sup> See Denene Miller, *Welfare Flap Over AIDS Patients*, DAILY NEWS, Nov. 16, 1995, at 38. At a City Council hearing on the subject, Councilman Tom Duane produced an internal memo that directed EVR workers not to call caseworkers in the Division of AIDS Services if AIDS patients missed their appointments. See *id.*

<sup>68</sup> Claire Serant, *Flood Victims in Bureaucratic Sea*, DAILY NEWS, Nov. 4, 1996, Suburban Section, at 1.

<sup>69</sup> Firestone, *supra* note 52, at B1. City officials asserted that the low number of Fair Hearing requests filed against EVR closings suggests that the program is generally satisfactory to recipients. On the other hand, simply reapplying may reestablish benefits faster than going through the hearing process. See Dehavenon, *supra* note 37, at 243. In my own experience assisting clients in this process, informal negotiation with EVR officials often proved to be the fastest way to solve the problem of unwarranted cut-offs.

<sup>70</sup> Paul Moses, *City Accused of Welfare Scare Tactics*, NEWSDAY (N.Y.), Nov. 16, 1995, at A24.

<sup>71</sup> See Lynette Holloway, *Report Says Errors, Not Fraud, Are the Biggest Reason New York City Cuts Off Welfare*, N.Y. TIMES, Aug. 12, 1997, at B3.

<sup>72</sup> See McLarin, *City Sued Over Program to Curb Welfare Fraud*, *supra* note 52, at 31.

<sup>73</sup> Connecticut has recently adopted legislation that would allow the creation of an

use of criteria wholly unrelated to need is an ominous development in the context of increased state discretion to run their own relief systems. Moreover, private corporations have a strong interest in churning policies; not only does churning allow the private provider to claim that it has processed a high number of cases, but the putatively neutral churning criteria also screen out deserving claimants and thereby maximize private profits.

### 3. The Human Costs of Administrative Dissuasion

Churning applicants is not merely an unfortunate side effect of the welfare system: it is one of its primary goals. As one Los Angeles County welfare official declared: "[The] welfare application process . . . was designed to be rough. It is designed quite frankly to be exclusionary."<sup>74</sup> Policymakers implement churning procedures to force exclusion among eligible recipients.<sup>75</sup> It could be argued that all welfare policies cause some amount of exclusion: no matter how valid or reasonable the requirement, somebody will always drop out rather than comply. Yet whether welfare recipients should be compelled to get jobs, to have fewer children, or to attend training sessions are all value questions; these questions all merit debate and discussion. There are few values inherent to churning, however, apart from cost-effectiveness<sup>76</sup> and ensuring that only those who

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early fraud detection system. See 1995 Conn. Acts 194, § 25 (Reg. Sess.). Florida has developed a similar system as well. See Annmarie Sarsfield, *Program Making Dent in Welfare Fraud*, TAMPA TRIBUNE, Nov. 4, 1996, at 1.

<sup>74</sup> Quoted in Blasi, *supra* note 33, at 596 (citation omitted); see also Rachel L. Swams, *New York's New Strategy Cuts Welfare Applications at Two Offices*, N.Y. TIMES, June 22, 1998, at A18 (noting that policy manual defines the "primary goal" of welfare office as to "divert[] people from applying for public assistance . . .").

<sup>75</sup> Churning is not caused solely by welfare workers on the understaffed front lines; it is part of the overall policy of administrative agencies. See Bennett, *supra* note 15, at 2160 ("Not all manifestations of discouragement are the result of decisions by individual line workers. Many are the consequence of higher-level government decisions about relief policy."). For this reason, attacking individual caseworkers for rudeness or insensitivity is not a complete strategy for reform.

<sup>76</sup> Policymakers turn to churning mechanisms largely to effectuate budget cuts. See Bennett, *supra* note 15, at 2199. However, the cost of churning may outweigh its benefits. Implementing and monitoring additional requirements demands more personnel and resources, thereby mandating expenditures that might not be worth it in the long run. EVR, for example, came with a price tag of between \$40 and \$50 million. See Firestone, *supra* note 52, at B1. The net savings, however, are projected at \$200 million, see *id.*, but it is difficult to assess the validity of this estimate. Monthly Food Stamp budgeting sessions with recipients failed to save money in terms of program costs.

illogically persevere receive assistance.

Churning policies often reward recipients whose skills consist of managing to attend meetings and playing the system rather than endeavoring to lift themselves out of poverty. Satisfying the vast number of administrative obligations imposed by EVR, for example, seems to require a life of leisure. Such policies may have the paradoxical effect of hindering recipients' search for employment or efforts to take care of their children. Similarly, work requirements are selection devices of questionable validity when there are few employment opportunities.<sup>77</sup> In a critique of the Food Stamp program, one study noted that churning policies had the effect of screening out those traditionally considered most "deserving" of assistance: bureaucratic burdens fell especially hard on elderly recipients, who found it difficult to make all the required appointments.<sup>78</sup> If the aim of public assistance is to assist the neediest or those most committed to improving their situation, churning policies fail to satisfy these goals.

A final reason why churning is counterproductive is that it stigmatizes recipients even while other welfare policies seek to integrate benefit recipients into the social mainstream.<sup>79</sup> The government takes a far greater risk on graduate student loans, for example, than on any welfare recipient.<sup>80</sup> In light of this risk, "[welfare fraud] is not too different from the 'fraud' committed by those collecting unemployment insurance who fail to report occasional income, or those who 'forget' to report earnings on their income tax forms."<sup>81</sup> The argument that it is essential to impose additional "an-

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See Terhune, *supra* note 43, at 440 n.124 (citing studies).

<sup>77</sup> See Lipsky & Thibodeau, *supra* note 41, at 331.

<sup>78</sup> See Lipsky & Thibodeau, *supra* note 41, at 331.

<sup>79</sup> Social mainstreaming is a major argument behind work requirements: through work, recipients will be inculcated with the "proper" attitudes needed for success in the job world. See Jason DeParle, *Better Work Than Welfare—But What if There's Neither?*, N.Y. TIMES, Dec. 18, 1994, § 6 (Magazine), at 44.

<sup>80</sup> As one commentator notes:

[F]raud is a fact of life at every point where public and government intersect, and we don't hear the Governor and the Mayor calling for universal anti-fraud fingerprinting. Doctors and dentists are not fingerprinted to combat health insurance swindling. College graduates who received government school loans are not fingerprinted, even though they are notoriously lax about repaying the loans. No, it is the poor who are singled out.

David Jones, Letter to the Editor, *Fingerprinting As Political Posturing*, N.Y. TIMES, June 12, 1994, § 14, at 17.

<sup>81</sup> Ruth Brandwein, *It's Folly to Fingerprint Welfare Clients*, NEWSDAY (N.Y.), Aug. 31, 1993, at 82.

ti-fraud" requirements on welfare recipients is particularly galling as terminally sloppy welfare agencies barely try to combat fraud, with the information they already have, such as names and social security numbers.<sup>82</sup>

Even apart from churning policies that have a patina of criminal law enforcement, the arbitrary and erratic enforcement of even mundane administrative welfare regulations places the poor outside the realm of due process. One analyst describes the logic behind bureaucratic disentanglement as follows: "Besiege the families with red tape. Find and use every opportunity to tell the parents, especially the mothers, that they are inferior human beings . . . . Change the rules several times a year. Keep the rule changes complex and quasi-secret, so they can't 'comply' . . . . Wonder why they don't like you."<sup>83</sup> Practices that humiliate and discourage those in need work at cross-purposes with other, more laudable welfare policies which seek to enable the poor to improve their situation. If a public agency fails to serve the needs of the poor, even though its mandate is to do so, it would be naive to expect more of a private corporation whose primary duty is to its shareholders.

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<sup>82</sup> In a major welfare fraud case, Federal District Judge Jack Weinstein noted that the fraud had occurred first, because those fraudulently receiving welfare had friends or bribed workers at the relevant offices to help them commit fraud and second, that nobody at the agency had simply bothered to see if the Social Security number provided by the claimant even existed. See *United States v. Concepcion*, 795 F. Supp. 1262, 1270 (E.D.N.Y. 1992). Judge Weinstein called the agency's efforts to combat fraud "lackadaisical." *Id.* at 1270-71.

Efforts to combat "welfare fraud" frequently focus on potentially illegal behavior among recipients rather than on providers or welfare caseworkers. See John Sullivan, *90 Are Charged in Welfare Fraud Schemes*, N.Y. TIMES, June 30, 1998, at A24; John Sullivan, *100 Accused in Fraud Case Over Benefits*, N.Y. TIMES, June 30, 1995, at B1. Persistent focus in the press on welfare fraud over other kinds of fraud also reinforces racial stereotypes. See Erik Kolbert, Letter to the Editor, *Upper-Class Cheating*, N.Y. TIMES, Mar. 24, 1997, at A14 (attacking *Times* for running article on welfare fraud committed by the lower class in Brooklyn and suggesting article on tax fraud committed by middle and upper class in Manhattan).

<sup>83</sup> Susan Bennett & Kathleen A. Sullivan, *Disentitling the Poor: Waivers and Welfare Reform*, 26 U. MICH. J.L. REFORM 741, 783 n.183 (1993) (quoting THERESA FUNICIELLO, *TYRANNY OF KINDNESS* 311-12 (1993)). As one applicant described his treatment at the hands of EVR: "I was treated like an outcast, a criminal . . . it was a humiliating feeling, almost inhuman." McLarin, *City Sued Over Program to Curb Welfare Fraud*, *supra* note 52, at 31 (quoting recipient Edward DeLoatch).

### C. *The Ambiguous Promise of Technology*

For the late 1980s and early 1990s, the picture of a vast, impersonal welfare bureaucracy that denied individual rights through repetitive, meaningless application requirements was largely accurate.<sup>84</sup> This system was a constant source of anger, frustration, and desperation for benefit recipients. Claimants dealt with caseworkers who could barely recall their names, much less their circumstances. On the other hand, the apparent carelessness of welfare caseworkers meant that benefit provision was not as intrusive as it was in the days of the "man in the house" rule.<sup>85</sup>

Technology, however, promises to transform the welfare system. Advocates of mass technological innovation promise foolproof fraud prevention mechanisms, accurate and uniform distribution of benefits through EBT systems, and faster and easier procedures to claim benefits.<sup>86</sup> The next Part sets forth many reasons to be skeptical of these promises, but for present purposes, the critical point is that technological innovation will allow welfare caseworkers to be both impersonal and invasive. Keeping close tabs on benefit recipients is quite difficult for a caseworker who has to manage the flow of thousands of pieces of paper concerning hundreds of different cases. It is far easier to monitor behavior if she need only call up a file that tracks the use of an EBT transfer card, much as a customer assistance clerk can call up your credit card account. A great deal has been written about how information gleaned from magazine subscriptions, credit card reports, and Internet purchases can be

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<sup>84</sup> This conclusion is based in part on my own experience working with benefit recipients in New York City and Connecticut, particularly with assisting clients through New York City's EVR program. Accounts of such experiences similar to mine include Bennett, *supra* note 15, and Dehavenon, *supra* note 37.

<sup>85</sup> A significant exception to this generalization is EVR, as well as other fraud prevention programs around the country. It could be argued, however, that these new fraud prevention programs are a response to the lax administration of the past, thus proving the general point that welfare bureaucracies had become sloppy and ineffectively managed by the 1990s.

<sup>86</sup> Unfortunately, the major advocate of these technologies is the federal government. Once the government's role evolves from watchdog to cheerleader, it is fair to ask: "Who is left to inform consumers of the risks and other costs?" Mark E. Budnitz, *Electronic Money in the 1990s: A Net Benefit or Merely a Trade-Off?*, 9 GA. ST. U. L. REV. 747, 748 (1993).

used to construct a frighteningly accurate picture of who we are.<sup>87</sup> If the EBT card becomes the currency of the welfare state, a small piece of plastic is poised to do what floors of bureaucrats could not.

Because of these technological advances, welfare policy has evolved in a direction unanticipated by poverty law scholarship. Rather than continue the trend toward less individualized and less personal benefit provision, welfare bureaucracies could soon command highly personal, even intimate, information about recipients. This informational advantage is gained, moreover, at a time when pressures to cut costs have never been greater. The following Part will survey three important developments of the 1990s that promise to transform the welfare system: the devolution of authority from the federal government to the states; the privatization of welfare provision; and the increasing use of technological systems to operate welfare bureaucracies.

## II. THE BASIC ELEMENTS OF WELFARE REFORM

Since the passage of the PRWORA, welfare reform in the states has taken discernible shape. While it is beyond the scope of this Article to assess whether the overall policy shift has benefitted or harmed the poor, this Part will focus on three highly significant developments that have changed the fundamental rights of benefit recipients: first, the devolution of authority to operate welfare programs from the federal government to the states; second, the increased reliance on private corporations to deliver social services; and third, the use of new technologies to deliver or deny services. Not surprisingly, advocates for the poor contend that all three trends have had negative effects. Less obvious, but equally important, is that, upon closer analysis, the benefits of these trends fail to materi-

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<sup>87</sup> Several commentators have noted, with alarm, the ease with which private companies are able to gather personal data. In a recent column, Patricia Williams noted that aggressive marketing and consumer information collection practices stem from "the use of computer technology to track individual tastes as unerringly as a bloodhound." Patricia Williams, *Desire and Design*, THE NATION, Dec. 15, 1997, at 10; see also Robert O'Harrow Jr., *Data Firms Getting Too Personal?*, WASH. POST, Mar. 8, 1998, at A1 (discussing data collection by private firms); Margaret Webb Pressler, *They've Got Your Numbers: Data-Minded Catalogue Firms Know How to Zero in on Buyers*, WASH. POST, Dec. 7, 1997, at A1 (discussing vast amount of information on individual purchasing activity possessed by catalogue merchants); William Safire, *Nobody's Business*, N.Y. TIMES, Jan. 8, 1998, at A27 (denouncing the threat to privacy posed by data surveillance).

alize. Changing to a computerized system of benefit distribution, or to a defederalized welfare policy, or to privatized social services, exchanges one set of problems for another. As the following sections will explain, it is unclear whether these dramatic changes have even addressed the concerns they purport to solve. State governments have frequently bypassed the tough questions in their rush to experiment.<sup>88</sup>

### A. *The New(er) Federalism*

Control over welfare policy has long teetered back and forth between the states and the federal government. Indeed, "[b]attles over federalism form a key part of more generalized battles over social welfare policies in the United States."<sup>89</sup> In the early 1970s, President Richard M. Nixon sought to implement what he called "The New Federalism," through which the states would enjoy more latitude over welfare policy.<sup>90</sup> In the 1980s, President Ronald Reagan made a similar pledge to reduce the size of the federal government and restore authority to the states, although in practice he accomplished the opposite.<sup>91</sup> The devolution of welfare policy in the 1990s was largely the product of the 1994 midterm elections, in which the Democratic party lost control of the House of Representa-

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<sup>88</sup> As one commentator, while critically surveying the Texas proposal to privatize welfare, asked:

Is such an arrangement legal? Will the objectives of the programs, funded in whole or in part with federal tax dollars, be served? Will costs be reduced or increased? Will client confidentiality be safeguarded? Will corruption, an endemic problem in contracting, infect operations and expose government and taxpayers to financial liability? Given the radical changes in welfare already legislated, is this a good time to blaze new trails? And has the way in which Texas has gone about this exercise allowed for the most careful, substantive and democratic evaluation?

Sawicky, *supra* note 5, at 21.

<sup>89</sup> MARMOR ET AL., *supra* note 10, at 46.

<sup>90</sup> As Nixon proclaimed, "It is time for a New Federalism in which power, funds, and responsibility will flow from Washington to the states and to the people." *Quoted in* Scheiber, *supra* note 8, at 288; see also Helene Slessarev, *Racial Tensions and Institutional Support: Social Programs During a Period of Retrenchment*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES* 357, 378 (Margaret Weir et al. eds., 1988). In retrospect, Nixon's welfare policies are quite surprising in light of his conservative Republicanism. Nixon is the only President who ever proposed a guaranteed annual minimum income. See Charles V. Hamilton & Dona C. Hamilton, *Social Policies, Civil Rights, and Poverty*, in *FIGHTING POVERTY*, *supra* note 15, at 303-05.

<sup>91</sup> See Scheiber, *supra* note 8, at 290-94.



tives for the first time in forty years, while the Republican party consolidated its majority in the Senate. Despite the fervent states' rights rhetoric that these Republicans brought to Congress, their commitment to devolution extended only so far as was conducive to their ideological goals.<sup>92</sup> One such goal was to dismantle the welfare state.<sup>93</sup>

While welfare reform occupied a prominent place on the political agenda for several decades, 1996 marked a truly historic moment: the abolition of the federal entitlement to assistance which was at the heart of the New Deal.<sup>94</sup> The legislation that took this step was the Personal Responsibility and Work Opportunity Reconciliation Act,<sup>95</sup> signed into law by President Clinton in the heat of the 1996 campaign. Castigated as "the worst thing he has ever done" by a former Health and Human Services official,<sup>96</sup> the PRWORA was the logical result of Clinton's 1992 campaign promise to "end welfare as we know it."<sup>97</sup> The PRWORA did not inau-

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<sup>92</sup> For example, a perennial favorite of Congressional Republicans is "takings" legislation, which would abolish the federal jurisdictional requirements of ripeness and abstention and allow a plaintiff to head straight into federal court. An effort to pass "takings" legislation recently failed. See John H. Cushman, Jr., *Senate Halts Property Bill Backed by G.O.P.*, N.Y. TIMES, July 14, 1998, at A13. Not only does this contradict the clear language of the Fifth Amendment, which does not prohibit all takings but only those effected without just compensation, but it also eliminates the role of state government, from municipal boards to state courts, which have traditionally been the first avenue of redress.

<sup>93</sup> See Jason DeParle, *Momentum Builds for Cutting Back Welfare System*, N.Y. TIMES, Nov. 13, 1994, § 1, at 1.

<sup>94</sup> For a sampling of the rhetoric that marked the passage of the PRWORA, see 142 CONG. REC. H9393(01) (daily ed. July 31, 1996); *infra* note 101. The PRWORA reconfigured other relationships as well. For an argument that this federal entitlement precedes even the New Deal, see THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1996) (discussing origins of welfare state in mothers' and soldiers' pensions in early twentieth century, rather than during New Deal).

<sup>95</sup> Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.).

<sup>96</sup> Peter Edelman, *The Worst Thing Bill Clinton Has Done*, 43 ATLANTIC MONTHLY, Mar. 1, 1997, available in 1997 WL 10090554. Edelman and Mary Jo Bane, another Assistant Secretary at the Department of Health and Human Services, resigned in protest over the Act. See Joel F. Handler, *"Ending Welfare as We Know It"—Wrong for Welfare, Wrong for Poverty*, 2 GEO. J. ON FIGHTING POVERTY 3 (1995); see also Alison Mitchell, *Two Clinton Aides Resign to Protest New Welfare Law*, N.Y. TIMES, Sept. 12, 1996, at A1.

<sup>97</sup> Jason DeParle, *The Clinton Welfare Bill: A Long, Stormy Journey*, N.Y. TIMES, July 15, 1994, at A1. As Clinton explained:

In a Clinton Administration, we're going to put an end to welfare as we know it. . . . We'll give them all the help they need for up to two years. But after

gurate an era of welfare reform; it dramatically acceded to the pressure of varied and extensive reforms already underway among the states.<sup>98</sup> The PRWORA is most notable for its conclusive abolition of any federal entitlement to assistance.<sup>99</sup>

Two years later, it is too soon to tell whether the PRWORA has fundamentally changed the American welfare system.<sup>100</sup> During the debate in Congress, advocates for the poor maintained that the PRWORA would only increase poverty and suffering, particularly among children.<sup>101</sup> One major reason for these dire predictions was the fear that sending block grants to the states with relatively few strings attached would encourage a "race to the bottom" in welfare policy.<sup>102</sup> On this theory, states will compete against each other to offer fewer benefits, so as to avoid becoming "welfare magnets" for needy individuals.<sup>103</sup> States are still in the process of

that, if they're able to work, they'll have to take a job in the private sector, or start earning their way through community service.

*Id.* (quoting Bill Clinton campaign promise from 1991).

<sup>98</sup> Many states had already begun experimenting with their welfare programs; both the Clinton and Bush Administrations had routinely approved waivers to the AFDC program to allow states wider latitude. See Lucy A. Williams, *The Abuse of Section 1115 Waivers: Welfare Reform in Search of a Standard*, 12 YALE L. & POL'Y REV. 8 (1994). The PRWORA simply continues this trend. See Pub. L. No. 104-193, § 401(a) (codified at 42 U.S.C. § 601(a) (1998)) ("The purpose of this part is to increase the flexibility of States . . .").

<sup>99</sup> See Pub. L. No. 104-193, § 401(b) (codified at 42 U.S.C. § 601(b) (1998)) ("This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.").

<sup>100</sup> This is a very difficult question to answer in any event. See Barbara Vobejda & Judith Havemann, *States' Welfare Data Disarray Clouds Analysis*, WASH. POST, Apr. 13, 1998, at A1 ("Eighteen months after federal lawmakers dramatically changed the nation's welfare program, it is becoming clear that the mass of data the government requires states to collect is in such disarray that it is impossible to determine whether the law is working.").

<sup>101</sup> As Representative John Lewis (D-GA) charged, "How, how can any person of faith, of conscience, vote for a bill that will put a million more kids into poverty?" 142 CONG. REC. H9392-01 (daily ed. July 31, 1996); see also *id.* at H9395 ("The Republicans will throw two million people, children, into poverty, and my President will only throw one million into poverty.") (statement of Rep. Charles Rangel (D-NY)); *id.* at H9407 ("[T]his deadly and Draconian piece of garbage . . . will do nothing to reform the conditions of poverty and unemployment suffered by our Nation's most vulnerable.") (statement of Rep. Jesse Jackson Jr. (D-IL)); Nichola L. Marshall, *The Welfare Reform Act of 1996: Political Compromise or Panacea for Welfare Dependency?*, 4 GEO. J. ON FIGHTING POVERTY 333, 341-43 (1997).

<sup>102</sup> See Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 YALE L. & POL'Y REV./YALE J. ON REG. 297, 306-13 (1996); Note, *Devolving Welfare Programs to the States: A Public Choice Perspective*, 109 HARV. L. REV. 1984 (1996).

<sup>103</sup> See Stephen D. Sugarman, *Welfare Reform and the Cooperative Federalism of*

experimenting, and the courts have had little opportunity to weigh in on the critical issues. A few months after the passage of the PRWORA, a spate of lawsuits challenged several of its provisions, particularly a provision allowing states to limit benefits to recipients who had lived in that state less than one year.<sup>104</sup> The PRWORA even grants additional revenues to those states that are most successful in trimming their rolls,<sup>105</sup> providing yet another incentive to impose severe eligibility requirements. These unhealthy incentives, moreover, are set in place against the backdrop of the general failure of welfare policy to address the problem of declining work opportunities.<sup>106</sup>

Yet as the next Section demonstrates, the real danger is not that states will take it upon themselves to establish particularly miserly benefit programs, but that they will wash their hands of all responsibility for their neediest citizens. Although welfare reform was intended to vindicate the rights of states to design and operate programs as they saw fit, many states have simply surrendered this authority. All over the country, state governments are turning to private corporations to run their welfare systems. The choice to do so is not merely ironic, but also ill-considered.

### B. *Privatizing the Welfare State*

Policymakers and legal scholars have paid a great deal of attention to the devolution of responsibility for the poor from the federal government to the states. An equally important trend, however, is the gradual accretion of power to private corporations to operate welfare systems. This is a very serious development; in the context of welfare services, the power to grant or deny benefits has coercive force.<sup>107</sup> In the context of this Article, "privatization" refers to the

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*America's Public Income Transfer Programs*, 14 YALE L. & POL'Y REV./YALE J. ON REG. 123, 136 (1996).

<sup>104</sup> See Richard C. Reuben, *The Welfare Challenge*, 83 A.B.A.J., Jan. 1997, at 34. This provision is almost certainly unconstitutional. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Supreme Court struck down state residency requirements that reduced welfare payments to those who were newcomers to the state.

<sup>105</sup> See Pub. L. No. 104-193, § 103(a)(1) (1996) (codified as 42 U.S.C. § 603(4)(3) (1998)).

<sup>106</sup> See Handler, *supra* note 16, at 1273-77. See generally WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996).

<sup>107</sup> This power of coercion is generally the most controversial aspect of privatization schemes. See David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J.

privatization of state social services by for-profit entities. It does not address provision of services by nonprofits.<sup>108</sup> The latter practice raises fewer concerns regarding motive and efficacy; as I argue later, the financial self-interest of decision-makers greatly affects the due process rights of the poor. Moreover, as nonprofits have more experience in and commitment to serving needy populations, their role is less problematic.<sup>109</sup>

The PRWORA clearly envisions a major role for privatization in the post-New Deal landscape. From the outset, its supporters suggested that welfare reform would require a fundamental reconception of the role of government. Florida Representative Clay Shaw, a major architect of the PRWORA, argued that privatization is "exactly what has to happen for welfare reform to work."<sup>110</sup> The PRWORA provides that a state can operate its welfare programs "through contracts with charitable, religious, or private organizations."<sup>111</sup> This policy is hardly a matter of principle. The PRWORA, like most pieces of legislation, bore the earmarks of extensive lobbying. Courtesy of Senator John Breaux of Louisiana, the word "nonprofit" was dropped from the bill.<sup>112</sup> As one jour-

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647, 648 (1986). Thus far, the privatization of welfare has engendered little debate in legal scholarship. The few articles that address the issue do so peripherally. See, e.g., Julie A. Nice, *The New Private Law: An Introduction*, 73 DENV. U. L. REV. 993, 993-95 (1996) (noting issues raised by welfare privatization).

<sup>108</sup> In many respects, a better word to describe the for-profit privatization on which this Article focuses would be "profiteering." Although this term is more accurate, it is also far too perjorative.

<sup>109</sup> See, e.g., Lynette Holloway, *Shelters Improve Under Private Groups, Raising a New Worry*, N.Y. TIMES, Nov. 12, 1997, at B1. In the 1996 Republican primary race, former Tennessee Governor and Secretary of Education Lamar Alexander suggested allowing taxpayers to direct their payments to the local charity of their choice. Although widely assailed as an ill-conceived idea, this proposal would have facilitated the privatization of welfare services by local nonprofits. Later on in the race, eventual Republican candidate Bob Dole made an identical suggestion. See Goodman, *supra* note 11, at A18 (describing Dole plan and arguing for "501(c)(3)-plus" designation for particularly beneficial charities). This idea has been acclaimed in some places. See Alan Finder, *Some Private Efforts See Success In Job Hunt for Those on Welfare*, N.Y. TIMES, June 16, 1998, at A1; William Safire, . . . As We Know It, N.Y. TIMES, July 6, 1995, at A21; Cathy Young, *Taking Privatized Welfare Seriously*, DETROIT NEWS, Feb. 27, 1996.

<sup>110</sup> Judith Havemann, *Welfare Reform Leader Makes Corporate Move: Ex-Official Predicts Privately Run Programs*, WASH. POST, Sept. 17, 1996, at A13.

<sup>111</sup> Pub. L. No. 104-193, § 104 (1996) (amending 42 U.S.C. § 604(a)). Hence Florida specifies that the state welfare department "shall enter into public-private contracts for all provision of electronic transfer of public assistance benefits . . . ." FLA. STAT. ANN. § 409.942 (West 1997); see also OHIO REV. CODE ANN. § 5101.33(B)(1) (Banks-Baldwin 1994 & Supp. 1998).

<sup>112</sup> See Nina Bernstein, *Profits From Poverty: Deletion of Word in Welfare Bill Opens*

nalist has documented, the deletion of this single word from the bill has had significant consequences.<sup>113</sup> Before 1996, only nonprofit orphanages were eligible for federal funds. Section 501 of the PRWORA, however, grants authority to the states "to make foster care maintenance payments on behalf of children in any private child care institution,"<sup>114</sup> rather than any private nonprofit child care institution. The chief lobbyist on this provision was Kenneth M. Mazik, who runs a for-profit orphanage in Delaware. One investigation revealed that his orphanage's staff manual instructed personnel on using electric shock devices on children, that Mazik himself openly beat a mentally retarded boy with a riding crop, and that New York State investigators pulled all New York wards from the orphanage in 1992 upon finding children held in physical restraints in trailers that reeked of urine and feces.<sup>115</sup> In light of such facts, it seems prudent to ask whether for-profit orphanages take proper care of children before allowing a notorious offender to help write federal welfare law.

The PRWORA opened the door to a number of large corporations adept at the art of pursuing federal largesse. Among the major contenders, and perhaps the most improbable one, is defense contractor Lockheed Martin, more accustomed to manufacturing weapons of mass destruction than calculating family needs budgets.<sup>116</sup> As of fall 1997, Lockheed had eleven contracts in three states; its Florida contracts alone totaled \$13 million.<sup>117</sup> A second major player in these sweepstakes is Dallas-based Electronic Data Services (EDS). EDS first rose to national prominence as the cash cow of H. Ross Perot, the eccentric Texan who intermittently ran for President in 1992 and 1996. Perot's efforts to portray himself as a capitalist colossus succeeded in spite of the fact that he amassed a large part

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*Foster Care to Big Business*, N.Y. TIMES, May 4, 1997, § 1, at 1.

<sup>113</sup> See *id.*

<sup>114</sup> Pub. L. No. 104-193, § 501 (1996) (codified at 42 U.S.C. § 672(c) (1998)).

<sup>115</sup> See Bernstein, *supra* note 112, at 1.

<sup>116</sup> Jeff Kunerth, *Lockheed Takes on Welfare; A Division of Defense Giant Lockheed Martin is Snapping up Contracts in the Move Toward Privatizing Welfare*, ORLANDO SENTINEL, Sept. 7, 1997, at H1 ("There are big bucks in helping poor people, and Lockheed Martin Corp. is leading a pack of large corporations going after million-dollar contracts to provide services to welfare recipients."). Ironically, Lockheed was the original "corporate welfare" recipient. Senator William Proxmire coined the term in 1971 when the federal government bailed out Lockheed to the tune of \$250 million. See William D. Hartung & Jennifer Washburn, *Lockheed Martin: From Welfare to Welfare*, THE NATION, Mar. 2, 1998.

<sup>117</sup> See Kunerth, *supra* note 116, at H1.

of his fortune overnight by selling EDS, which processed Medicare/Medicaid reimbursement claims.<sup>118</sup> These corporations, and others, have spared little time and expense in the race to privatize social services. As William D. Eggers, of the libertarian Reason Foundation, recently urged attendees at a conference on the subject, welfare privatization is now "'probably the hottest area [of privatization] in the country."<sup>119</sup> A brochure touting the conference exhorted companies to: "'Capitalize on the massive growth potential of the new world of welfare reform/Gain a leading edge in the market while it is in its early stage/Profit from the opportunities available."<sup>120</sup>

Despite the radical tilt toward privatization, the debate over welfare reform featured remarkably little discussion on the subject. In part, this may reflect the fact that the central issue was the abolition of an entitlement to assistance. More likely, the goal of privatization went hand-in-hand with the real purpose of welfare reform: cutting costs.<sup>121</sup> Yet the view that the market inherently provides services more cost-effectively, accepted as gospel in some quarters, often proves false in this area of policy. Delegating service provision to a private entity creates monitoring costs. "[C]ontracting out demands exceptional knowledge and honesty on the part of politicians and government bureaucrats: they must negotiate contracts that defend the public interest, and they must monitor them carefully."<sup>122</sup> This assumes, moreover, that the private entity provides benefits in a competent manner. The record suggests otherwise:

Unisys Corp.'s Statewide Automated Welfare System in California could cost twice its 1995 bid price of \$554 million. Andersen Consulting is four years behind and \$64 million over budget with its computerized child-support enforcement system in Texas. Ohio canceled its job-placement

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<sup>118</sup> In his biography of Perot, Gerald Posner refers to Perot as a "welfare billionaire." See GERALD POSNER, *CITIZEN PEROT: HIS LIFE AND TIMES* 34 (1996).

<sup>119</sup> Barbara Ehrenreich, *Spinning the Poor Into Gold: How Corporations Seek to Profit From Welfare Reform*, HARPER'S MAG., Aug. 1997, at 46 [hereinafter *Spinning the Poor Into Gold*].

<sup>120</sup> *Id.* at 44.

<sup>121</sup> As Don Winstead, head of Florida's WAGES (Work And Gain Economic Self-Sufficiency) program, comments: "The only way this works financially is that the cost to government must go down because these tasks are being done by the private providers." Quoted in Kunerth, *supra* note 116, at H1.

<sup>122</sup> Edward S. Herman, *Privatization: Downsizing Government for Principle and Profit*, DOLLARS & SENSE, Mar. 1, 1997, at 10.

contract with America Works after finding it was costing the state \$24,000 per placement. Problems with an EDS auto-insurance claims system cost New Jersey \$50 million in uncollected premiums.<sup>123</sup>

The computerized child-support enforcement system Lockheed promised California for \$99 million in 1995 is now \$205 million over budget.<sup>124</sup> Tired of Andersen Consulting's cost overruns, the Nebraska Department of Social Services withheld payment in January 1996.<sup>125</sup> Virginia canceled a Medicaid contract with EDS when performance ran twenty months late.<sup>126</sup> EDS sold Florida a faulty social services computer system that wound up costing the state \$260 million. Florida sued for damages of \$60 million and an order keeping EDS out of Florida for the foreseeable future.<sup>127</sup>

Privatization also fosters its own kind of fraud. Although the question of which private corporation administers which benefit programs may seem unimportant, the process by which these bids are made and won raises serious concerns about how the programs will be administered. Corporate suitors court various state agencies in an effort to improve their chances of receiving privatization bids.<sup>128</sup> Gtech Corporation, the nation's largest operator of state lotteries and the parent company of a firm under contract to administer Food Stamps in Texas, has been accused of bid-rigging and influence-peddling.<sup>129</sup> Maximus allegedly paid a West Virginia welfare administrator to give them the inside track in bidding for a child welfare services contract.<sup>130</sup> While Lockheed gave \$1.3 mil-

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<sup>123</sup> Kurerth, *supra* note 116, at H1.

<sup>124</sup> See George Rodrigue, *Problems Reported in Privatizing Welfare—Firms Seeking Texas Contract Cite Successes, Though Most Have Had Troubles Elsewhere*, DALLAS MORNING NEWS, May 17, 1997, at 1A.

<sup>125</sup> See Elizabeth MacDonald, *States Sour on Computer Consultants as Costs Swell*, WALL ST. J., Mar. 26, 1998, at A2.

<sup>126</sup> See Rodrigue, *supra* note 124, at 1A.

<sup>127</sup> See *Claiming Fraud, Florida Seeks to Bar EDS*, N.Y. TIMES, Oct. 26, 1995, at D6. Florida subsequently sought to withdraw from alternative dispute resolution on the issue, claiming fraud on the part of EDS. See *State v. EDS*, 664 So. 2d 332 (Fla. Dist. Ct. App. 1995).

<sup>128</sup> See, e.g., Harwood, *supra* note 7, at A1 (noting improbable alliances between Lockheed Martin and Texas Workforce Commission, and Electronic Data Systems and the Texas welfare department); Totty, *supra* note 3, at T1 (same).

<sup>129</sup> See *Lottery Supplier Gtech Will Trim Jobs, Sell Unit*, ATLANTA J. & CONST., Feb. 28, 1998, at 1E; Brett Pulley, *The Game Behind the Gaming: Charges of Gtech Misconduct Fail to Shake Investors*, N.Y. TIMES, Apr. 4, 1998, at D1.

<sup>130</sup> See Nina Bernstein, *Giant Companies Entering Race to Run State Welfare Programs*, N.Y. TIMES, Sept. 15, 1996, § 1, at 1.

lion to federal candidates and national parties in 1995-96,<sup>131</sup> money alone does not always do the trick. In Mississippi, Lockheed bid \$16 million for the right to operate the state network while Transactive bid \$450,000. Even though its bid was one-thirty-second of Lockheed's, Transactive won.<sup>132</sup> The revolving doors from public to private employment also contribute to the appearance of impropriety.<sup>133</sup> No sooner had Michigan's former welfare services director helped draft and lobby for the PRWORA than he became a lobbyist for Lockheed.<sup>134</sup> Finally, being the EBT provider has certain benefits. Relying on EBT as a financial foot in the door, "Missouri hopes to lure welfare recipients into opening bank accounts."<sup>135</sup> Serving the needy thus becomes a means of expanding private corporations' customer base.<sup>136</sup>

The consequences of privatization, moreover, have completely undercut the highly touted advantages of devolution, which theoretically was the impetus behind welfare reform. As in any major industry, corporate welfare providers go bankrupt, acquire one another, or split up. In early 1998, for example, Citibank EBT Services announced that it would buy the EBT services provided by Transactive, services that include Indiana, Illinois, Texas, and Sacramento County, California. Because the move would make Citibank the EBT vendor for thirty-three states, the Antitrust Division of the United States Department of Justice has filed suit to prevent the acquisition.<sup>137</sup> State officials were less than enthusiastic about the proposed deal. As Raymond McCabe, Massachusetts's EBT coordinator, complained, "Where is the competition? Where is our ability

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<sup>131</sup> See Harwood, *supra* note 7, at A1.

<sup>132</sup> See *Mississippi Battle Continues*, EFT REP., Sept. 24, 1997, at 1.

<sup>133</sup> One possible reason that Justice Department officials have grown more receptive to the idea of privatizing prisons is that the representatives of the privatizing companies include many of their former colleagues. See Jeff Gerth & Stephen Labaton, *Prisons for Profit: Jail Business Shows Its Weaknesses*, N.Y. TIMES, Nov. 24, 1995, at A1.

<sup>134</sup> See Havemann, *supra* note 110, at A13.

<sup>135</sup> As EBT Nears, Mo. Pushes Poor to Open Bank Accounts, AM. BANKER, Aug. 1, 1997, at 13.

<sup>136</sup> Labor and community activists criticized the Treasury Department's implementation of EBT, contending that, "People who are outside the financial mainstream will be vulnerable to the abusive practices of fringe bankers who may enter into partnerships with the banks to build up a captive customer base." Dean Anason, *Electronic Benefits Plan Called Unfair to Poor*, AM. BANKER, Nov. 24, 1997, at 2 (quoting letter by advocacy groups to the Secretary of the Treasury).

<sup>137</sup> Charles Keenan, *Citicorp to Buy EBT Business of Rival Transactive*, AM. BANKER, Mar. 2, 1998, at 14; *Digest*, WASH. POST, July 28, 1998, at E1.



to negotiate with these guys?"<sup>138</sup> Hence for most of the country, "welfare reform" has meant that power devolved from a single national authority down to the states, then back up again to national corporations, then to a single national authority. The states, and their needy populations, have merely replaced Uncle Sam with Lockheed. The big difference is that the former is accountable to the democratic process, but the latter is not. Taken at face value, the arguments of welfare reformers emphasized that local government would better meet the needs of benefit populations, that a single national authority was too vast and impersonal, and that the states would function as fifty laboratories for innovative policies. To have one national corporation running the major benefit assistance program thwarts every value advanced in support of defederalization. Of all the prognostications about welfare devolution, no one predicted that it would devolve into farce in less than two years.

The drawbacks of privatization should have been well known to policymakers. The effort to privatize correctional services, for example, has been a widely reported disaster. Describing the failure of prison privatization, Professor John Dilulio contends that the history of private sector involvement in corrections is "unrelievedly bleak, a well-documented tale of inmate abuse and political corruption."<sup>139</sup> As is rapidly becoming the case with welfare privatization, private for-profits jumped into the prison market without adequate knowledge, skills, or training. A brochure put out by the World Research Group on prisons made the same promises that have been made in the welfare context: "While arrests and convictions are steadily on the rise, profits are to be made—profits from crime. Get in on the ground floor of this booming industry now!"<sup>140</sup> The same unhealthy incentives were put into place: "Companies receive a guaranteed fee for each prisoner, regardless of the actual costs. Every dime they don't spend on food or medical care or training for guards is a dime they can pocket."<sup>141</sup> In 1995,

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<sup>138</sup> Keenan, *supra* note 137, at 14.

<sup>139</sup> Quoted in Francis Wilkinson, *Taking Prisons Private*, AM. LAWYER, Nov. 1988, at 100.

<sup>140</sup> Quoted in Ehrenreich, *Spinning the Poor Into Gold*, *supra* note 119, at 45. For a similar pitch made in the context of welfare reform, see *supra* note 120 and accompanying text.

<sup>141</sup> Eric Bates, *Private Prisons*, THE NATION, Jan. 5, 1998, at 11. For youthful offenders, privatized prisons are notorious for "brutality, cronyism, and neglect." Fox Butterfield, *Profits at a Juvenile Prison Come with a Chilling Cost*, N.Y. TIMES, July 15, 1998, at A1.

a riot broke out at an immigrant detention center in Elizabeth, New Jersey, run by Esmor Correctional Services, a for-profit prison privatizer. As United States Representative Robert Menendez explained, "It was a cauldron waiting to explode."<sup>142</sup> Former detainees filed suit against several of the guards and testified that the guards had beaten them, starved them, and squeezed their genitals with pliers.<sup>143</sup>

Privatization's embarrassing record has not stopped its supporters from declaring victory. Yet even when privatization "works," private corporations often do little more than the state. The major promise of the Texas reformers, for example, was that privatization would allow "one stop shopping" for benefits,<sup>144</sup> but nothing prevented the state welfare system from offering one stop shopping on its own. Like many a welfare bureaucracy, America Works has been accused of "creaming": separating out the best qualified recipients and finding them jobs while ignoring needier clients.<sup>145</sup> Another irony of privatization is that it has suddenly ennobled a task long scorned by anti-welfare politicians and commentators. For years, a staple of conservative critiques of social welfare policy has been that welfare bureaucrats were parasites who could aspire to no higher purpose in life than giving free handouts to the undeserving.<sup>146</sup> As R. Emmett Tyrrell, Jr., founder of the right-wing *American Spectator*, wrote in 1984, "[t]he welfare state . . . ruined many heretofore toiling Americans into parasites, and this new class of busybodies live[s] as superparasites, deriving nourishment from the dependence of the welfare clients."<sup>147</sup> The private businessmen who take over these very same functions, however, are hailed as

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<sup>142</sup> Richard Pérez-Peña, *Illegal Aliens Overrun a Jail in New Jersey*, N.Y. TIMES, June 19, 1995, at A1.

<sup>143</sup> See Ronald Smothers, *Asylum Seekers Testify on Abuse by Jail Guards*, N.Y. TIMES, Feb. 6, 1998, at A1.

<sup>144</sup> See Harwood, *supra* note 7, at A1.

<sup>145</sup> See David Henry, *Private Company Wins Praise by Making Profits from Welfare*, NEWSDAY (N.Y.), June 2, 1991, at 82.

<sup>146</sup> See Barbara Ehrenreich, *The New Right Attack on Social Welfare*, in THE MEAN SEASON: THE ATTACK ON THE WELFARE STATE, *supra* note 10, at 165-70.

<sup>147</sup> Quoted in Ehrenreich, *Spinning the Poor Into Gold*, *supra* note 119, at 49. The reference is to MILOVAN DJILAS, *THE NEW CLASS: AN ANALYSIS OF THE COMMUNIST SYSTEM* (Frederick A. Draeger ed., 2d ed. 1963) (1957), in which Djilas attacked the emerging class of Communist apparachik in his native Yugoslavia. Djilas's major argument was that while under Communism the state was supposed to wither away, instead it created a new bureaucracy whose primary function seemed to be safeguarding its own privileges.

entrepreneurial and visionary.<sup>148</sup> Even worse, what private corporations lack in expertise they seek to make up for by pillaging state welfare departments and luring away key officials, the same officials whose alleged incompetence created the problem in the first place.<sup>149</sup> The possibility that a private contractor hires the welfare workers they helped to disemploy is a somewhat encouraging prospect, but labor unions object that this shuffle exchanges civil service, unionized jobs with good benefits and pensions for nonunionized positions.<sup>150</sup> When the cleaning services for state buildings in Buffalo, New York, were privatized, officials first claimed that privatization would offer efficiency improvements. As it turned out, the program relied on increased use of part-time workers, with lower salaries and fewer benefits.<sup>151</sup> All this is privatization at its most successful.<sup>152</sup>

A counterargument to the views of this Article could be that corporations are already in the welfare business, not by assuming control over state bureaucracies, but by offering generous benefit packages to their own employees. If these corporations have experi-

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<sup>148</sup> See Ehrenreich, *Spinning the Poor Into Gold*, *supra* note 119, at 49.

<sup>149</sup> Michigan's welfare director, Gerald H. Miller, left his post after the PRWORA was passed to become senior vice president of welfare initiatives at Lockheed Martin. See Havemann, *supra* note 108, at A13; see also Kunerth, *supra* note 116, at H1 ("At the top of Lockheed Martin IMS' payroll are former officials from Miami Beach, Alaska, Oregon, Texas and Washington, DC.").

<sup>150</sup> See Kunerth, *supra* note 116, at H1. As one union representative argues, "We give workers an impossible job to do, limit the tools available to them and then say, 'Gee, it's not a great system.' If there is money to be had, it shouldn't be going into some company's pocket. It should be put into services." *Id.*

<sup>151</sup> See Herman, *supra* note 122, at 10.

<sup>152</sup> One leading commentator on the issue of privatization generally supports the idea, suggesting that it fulfills several values. See Lawrence, *supra* note 107, at 651 ("My own bias . . . is that frequently a delegation of public power to a private actor is not harmful and indeed can benefit the public interest."). These values or features include pluralism, interest representation, flexibility, the ability to serve as a transitional stage to the government's taking full responsibility over the issue, expertise, and cost-cutting. See *id.* at 651-57.

Privatization seems to fall far short in this context. Now that the number of private providers is so low, privatized welfare promotes neither pluralism nor interest representation, as there is no diversity among decision-makers. Second, the efforts of these private agencies are not to serve as a practice run for full governmental assumption of responsibility over welfare policy because the momentum clearly runs in the opposite direction. Third, these private providers are often lacking in expertise, compared to state welfare departments. The only remaining values are cost-cutting and flexibility. So far, privatization has been inordinately expensive, as the accompanying paragraphs in the text demonstrate, and have offered little in the way of flexibility that the state could not have done on its own.

ence in successfully meeting the needs of their workers, then why not allow them to do the same for others? The obvious response is that businesses have a vested interest in ensuring the well-being of their employees; most corporations would gladly spend a half million dollars on their workers if the consequent gains in productivity yielded tens of millions of dollars in profits. The more subtle response, however, is that the counterargument takes the benefit packages of big business to indicate attitudes supportive of the welfare state. The opposite is more likely the case. Corporate benefit policies do more than assist the worker, they also assuage workers' demands for change in broader social welfare policies. Sanford Jacoby, in his study of American corporate paternalism, contends that management frequently uses generous corporate policies to abate radicalization.<sup>153</sup> Kodak, for example, adopted a no-layoff policy in part to blunt its employees' desire for unionization,<sup>154</sup> and its top managers lobbied to keep federal Social Security benefits low so as to make Kodak's assistance programs seem generous by comparison.<sup>155</sup> The most alarming aspect of these efforts is not that major corporations might dupe their employees into settling for less, but that Kodak's corporate priorities shaped social policies affecting millions of people. Corporate welfare policies are less an indicator of what businesses will do than what they will try to avoid doing.<sup>156</sup>

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<sup>153</sup> See SANFORD M. JACOBY, *MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL* 236-52 (1997).

<sup>154</sup> See *id.* at 82-83. Kodak has since revoked this policy. See *id.* at 94; Raymond Hernandez, *Deferring to Great Yellow Father: Kodak Workers Say Layoffs May Be Necessary Medicine*, N.Y. TIMES, Nov. 16, 1997, § 1, at 41.

<sup>155</sup> See JACOBY, *supra* note 153, at 214-19; see also *id.* at 219-20 (making similar point in the context of national health insurance). Nor should this be surprising:

The private side of the welfare state is, however, private, and thus has no responsibility to act as an equalizing, universalizing, or redistributive force. State incentives designed to mobilize the private sector—business—for such purposes will be effective only when they coincide with the interests of business, that is, when they appear to be cost-effective. Non-clients of the private welfare state, that is to say, non-employees of corporations offering childcare and other services, have no purchase in it, no claim to its benefits.

Sonya Michel, *Tale of Two States: Race, Gender, and Public/Private Welfare Provision in Postwar America*, 9 YALE J.L. & FEMINISM 123, 155 (1997).

<sup>156</sup> Beth Stevens has pointed out that once the state sets the boundary between the welfare policies it will implement and what it will expect private companies to do, private companies will do as little as possible within their assigned sphere. See Beth Stevens, *Blurring the Boundaries: How the Federal Government Has Influenced Welfare Benefits in the Private Sector*, in *POLITICS OF SOC. POL'Y*, *supra* note 89, at 123-48. Fur-

In sum, welfare reform has had many regrettable consequences. Chief among them is privatization. It seems quite ironic that the states have urged devolution of welfare policy from the federal government and succeeded on the strength of the argument that local needs are best met by local services, only to vest operational authority in national, if not multinational, corporations. Devolution, after all, was supposed to result in decisions being made in state capitals, rather than corporate boardrooms.<sup>157</sup> Welfare policy is usually the product of different tensions between American values and interest groups.<sup>158</sup> To have these value disputes played out in the political process is one thing; to have a private company definitively resolve them is another. Moreover, when arguably the main function of welfare is to protect people from the market,<sup>159</sup> it seems perverse to allow the market to assume control over welfare policy.<sup>160</sup> Privatization neither balances nor resolves the tension between state and market; it simply surrenders social welfare to the

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thermore, private welfare policies, such as corporate pensions or insurance benefits, tend to assist those who are least needy, as they are already employed. Public welfare policies, in contrast, assist the hard-core poor. The fact that public and private assistance programs aid very different populations is usually overlooked in the mad dash to proclaim that the private sector does a better job in social policy. See *id.* at 147 ("Because public programs serve marginal groups whose needs are greater and more intractable, they are less likely to appear to be effective.").

<sup>157</sup> Cf. Ehrenreich, *Spinning the Poor Into Gold*, *supra* note 119, at 49 ("Compared with the torchbearers of international capitalism, a deputy social service director from, say, Allegheny County, Pennsylvania, is a remnant of a dying culture.").

<sup>158</sup> These conflicts arise from deeply held values concerning autonomy, work, community, and family. For a discussion of these conflicts and their complexity, see ELLWOOD, *supra* note 10, at 16-26.

<sup>159</sup> See Piven & Cloward, *supra* note 11, at 95-96 ("Welfare state programs protect people from the vagaries of the labor market and the power of particular employers by providing income that is not conditional on market performance."). Furthermore, as Piven and Cloward have argued, "Market-oriented relief reforms help to produce the demoralizing effects on recipients that are attributed to the fact of social provision itself." *Id.* at 37. In their earlier work, Piven and Cloward suggested that one important goal of welfare policy was to keep the working class in line. Keeping benefits low and forcing individuals to work at any job, no matter how demeaning, are responsible for more human misery than angst over living on a welfare check. See PIVEN & CLOWARD, *supra* note 21, at 173-75.

<sup>160</sup> This result is not necessarily illogical. See Piven & Cloward, *supra* note 11, at 93. ("The idea that the self-regulating market must necessarily be pre-eminent in political, social, and individual life is capitalism's central myth."); see also MARMOR ET AL., *supra* note 10, at 209 ("The politics of medical care in the United States has traditionally favored free market ideology.").

profit motive. As has been noted in the prison context, privatization "is really about privatizing tax dollars, about transforming public money into private profits."<sup>161</sup>

### C. *The Impact of Technology*

Welfare reform has also spurred the implementation of new technologies intended to cut costs, curb fraud, and improve services. This Section will evaluate two of the most important developments. First, Electronic Benefit Transfer ("EBT") is significant largely for reasons of scale; all Food Stamp benefits are to be processed through EBT by fiscal year 2003. Second, digital imaging merits analysis as it has become a high-profile, high-tech way to prevent fraud, or so its supporters would claim. Both technologies have severe drawbacks. If welfare bureaucracies are incompetent, poorly monitored, underfunded, or overworked, then new technology will not solve the problem: it will simply provide new ways for such bureaucracies to be ineffective. Because neither technology addresses root problems, but simply adds a new, more complicated overlay to an already troubled system, adopting either raises a number of thorny issues.<sup>162</sup>

#### 1. Electronic Benefit Transfer

In contrast to the national debate that accompanied the passage of the PRWORA in 1996, one of the most groundbreaking developments in welfare policy occurred with little fanfare years before, the development of EBT.<sup>163</sup> EBT distributes benefits through ATM machines and "point of sale" devices ("POS") at supermarkets and other retail outlets. Benefit recipients use a debit card to access their accounts<sup>164</sup> in much the same way many consumers use their

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<sup>161</sup> Bates, *supra* note 141, at 15.

<sup>162</sup> Some states combine the programs. See, e.g., FLA. STAT. ANN. § 414.391(1) (West Supp. 1998) ("The Department of Children and Family Services shall develop and implement, as part of the electronic benefits transfer program, a statewide program to prevent public assistance fraud by using a type of automated fingerprint imaging . . . ."); TEX. HUM. RES. CODE ANN. § 31.0325(a) (West Supp. 1998) (same).

<sup>163</sup> The United States Dairy Association took the first step in developing an EBT program in 1983 when it set up its Electronic Benefit Transfer Alternative Issuance Demonstration Project. See General Notice, 48 FED. REG. 31,431 (1983). See generally 7 C.F.R. § 274.12 (1998) (setting forth EBT regulations).

<sup>164</sup> The relevant regulation explains:

ATM or credit cards to ring up purchases at the supermarket checkout. The underlying premise of the program is that by giving Food Stamps and Temporary Assistance to Needy Families ("TANF") benefits directly to recipients, the government will save on the administrative costs of sending the funds to the states, which then divide funds among recipients. This system would replace the byzantine welfare bureaucracy with a simple transfer of wealth. As one court has noted, "EBT thus promises the efficiencies of a direct deposit system and the conveniences of a debit card."<sup>165</sup> The PRWORA required all states to move to EBT by October 1, 2002, totally eliminating paper Food Stamps.<sup>166</sup> EBT programs have spread across the nation in anticipation of the deadline.<sup>167</sup>

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An on-line EBT system is a computer-based system in which the benefit authorization is received from a central computer through a point-of-sale (POS) terminal. Eligible households utilize magnetic-stripe plastic cards and have accounts maintained at the central computer in lieu of food stamp coupons to purchase food items at authorized food retailers. Once certified, the household's benefits are electronically loaded into a central computer account for each month during the certification period. Checkout lanes at authorized food retailers are to be equipped with POS terminals. When the transaction occurs, the POS terminals connect on-line to the central computer database; verify the validity of the Personal Identification Number (PIN), card number, and the amount of available benefits in an EBT account; obtain authorization for each purchase and initiate the debiting of the household's account and the crediting of the retailer's account.

7 C.F.R. § 274.12(a). Note that the regulations cited in this Article are Food Stamp regulations and do not address the full universe of federal benefits. For a thorough description of the operation and problems of EBT, see Barbara Leyser, *Recipient Concerns with the Use of Electronic Benefit Transfer Systems for the Delivery of State and Federal Benefits*, 32 CLEARINGHOUSE REV. (forthcoming 1998) (manuscript on file at the Brooklyn Law Review); Barbara Leyser & Adele M. Blong, *The Use of Electronic Benefit Transfer Systems to Deliver Federal and State Assistance Benefits*, 27 CLEARINGHOUSE REV. 406 (1993); Kathryn O'Neill Pulliam, Notes & Comments, *Muddying the Water: Electronic Benefits Transfer After the Welfare Reform Act of 1996*, 14 GA. ST. U. L. REV. 515 (1998).

<sup>165</sup> *Transactive Corp. v. United States*, 91 F.3d 232, 234 (D.C. Cir. 1996).

<sup>166</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 825(a)(1)(i)(1)(A) (codified at 7 U.S.C. § 2016(i)(1)(A) (1994 & Supp. 1997)).

<sup>167</sup> For a listing of each state's progress toward the deadline, see Summary of State EBT Implementation Information—July 1998 (prepared by Barbara Leyser, EBT Consultant to the National Consumer Law Center) (on file with the Brooklyn Law Review).

For state statutes requiring the implementation of EBT, see, for example, ARK. CODE ANN. § 20-76-213 (Michie 1997); CAL. WELF. & INST. CODE §§ 10065-77 (West 1998); COLO. REV. STAT. ANN. § 26-2-104 (West 1998); FLA. STAT. ANN. § 409.942 (West 1997); 15 ILL. COMP. STAT. ANN. 405/9-05 (West 1998); IND. CODE ANN. §§ 12-13-14-1 through 12 (West 1997); LA. REV. STAT. ANN. § 450.1 (West 1998); ME. REV. STAT. ANN. tit. 22, §§ 21-22 (West 1997); MISS. CODE ANN. §§ 43-1-28-29 (1997); MO. ANN. STAT.

As millions of Americans rely on ATMs to do their banking, ATM machines would seem a commonsense way to distribute benefits. One important advantage is that obtaining one's benefits from an ATM machine rather than a welfare office or a check cashing outlet removes the stigma of dependency from the poor. As one EBT task force leader explains, "There's a certain social stigma—right or wrong—to be standing in line, and people behind you are looking at you with your food stamps. With an EBT card, you're part of the mainstream of society."<sup>168</sup> Having beneficiaries use the same financial mechanisms as mainstream America also serves to eliminate stigma by creating a bank account of sorts; recipients will supposedly be able to manage their account almost as bank consumers balance their checkbooks.<sup>169</sup> Some benefit recipients have expressed initial enthusiasm. As one Washington state Food Stamp recipient commented, "Plastic works for the rest of America, so it works for me."<sup>170</sup>

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§ 208.182 (West 1997); OHIO REV. CODE ANN. § 5101.33 (Banks-Baldwin 1997); TENN. CODE ANN. § 71-3-160 (1998); WASH. REV. CODE ANN. § 74.08A.020 (West 1997); WIS. STAT. ANN. § 49.129 (West 1998); WYO. STAT. ANN. § 42-2-102(a)(iii) (Michie 1997).

<sup>168</sup> Alisa Wabnik, *Food Stamps Will Soon Look Like Debit Cards*, ARIZ. DAILY STAR, Aug. 24, 1997, at 1B (quoting state EBT official Dayne Coffey); see also Brett Johnson, *'Dignity Card' Helps Strip the Stigma from Food Stamp Use*, L.A. TIMES, Nov. 23, 1997, at A3. EBT systems could therefore reduce reliance on what one analyst calls "fringe banks," the check-cashing outlets and pawnshops used by poor individuals who are unable to set up checking accounts at commercial banks. See John P. McCaskey, *Explaining the Boom in Check Cashing Outlets and Pawnshops*, 49 CONSUMER FIN. L.Q. REP. 4 (1995). These merchants are unlikely to give up without a fight. See Shannon O'Boyle, *Check Cashers Set for War*, DAILY NEWS (N.Y.), Mar. 15, 1998, Metro Section, at 1.

<sup>169</sup> See Leyser, *supra* note 164, at 4; Kimball Perry, *Smart Card Replacing Food Stamps; Hamilton County to Switch to Program by End of Year*, CINN. POST, Oct. 8, 1997, at 14A; Christopher Rowland, *Welfare Going Electronic; Debit Cards Will Replace Welfare Checks and Food Stamps in Rhode Island Next Year*, PROVIDENCE J.-BULL., Oct. 9, 1997, at A01 & A21 (citing claims made by Director of Rhode Island Department of Human Services). This point assumes that merely using a quasi-credit card will be enough to remove the stigma of poverty. Yet much of the commentary on the stigma felt by welfare recipients suggests that the real crux of the stigma is being unemployed. For a thorough development of the relationship between welfare, stigma, and work, see WILSON, *supra* note 106, at 64-65 (noting isolation of welfare recipients). On stigma more generally, see IRWIN GARFINKEL & SARA S. MCLANAHAN, *SINGLE MOTHERS AND THEIR CHILDREN: A NEW AMERICAN DILEMMA* 39-40 (1986) (describing stigma felt by some welfare recipients).

<sup>170</sup> AP, *Some Welfare Recipients Will Get Debit Cards*, NEWS TRIB. (Tacoma, WA), Sept. 27, 1997, at B4.



The potential advantages of EBT include not only dignitary values, but also the elimination of practical problems including mail theft, late receipt of benefits, crime at ATM machines, and check-cashing fees.<sup>171</sup> As noted above, the dominant justification for EBT is that it will save money by sending benefits directly to the recipient, obviating the need for state bureaucracies to process payments.<sup>172</sup> EBT would also reduce the paperwork that grocers must do to collect the value of redeemed Food Stamps.<sup>173</sup> Finally, EBT promoters argue that EBT will reduce crime. If recipients carry a plastic card with a secret PIN number rather than cash, they will be less attractive targets for robbery.<sup>174</sup> Even if robbed, the account can be frozen once the beneficiary reports that the card has been stolen.<sup>175</sup> EBT is also hailed as a way to eliminate fraud.<sup>176</sup> As one welfare official pointed out, "There won't be any food stamps to sell for money."<sup>177</sup> In short, EBT promises to solve a wide variety of problems.

The practical application of this technology, however, has been less encouraging. The first disturbing trend is the concentration of power in few hands. EBT is "one of the privatizers' favorite innovations,"<sup>178</sup> and with good reason. EBT does not simply send funds from the Treasury to individual accounts; instead, federal benefits are sent to a type of holding account, often owned by a bank or

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<sup>171</sup> See Leyser, *supra* note 164, at 3-4.

<sup>172</sup> See Michael Buettner, *Retailers Respond Slowly to Electronic Food Stamps, Welfare System*, ORLANDO BUS. J., Sept. 12, 1997, at 19 (estimating savings of \$4 million for the state of Florida); *New Welfare Benefit Card Could Save \$1 Million*, ST. LOUIS POST-DISPATCH, Aug. 13, 1997, at 3B (noting \$1 million savings for the state of Missouri); Jack Sherzer, *Merchant Group Sues Over Benefits Automation*, HARRISBURG PATRIOT, Sept. 27, 1997, at B01 (estimating savings of \$25 million for the state of Pennsylvania). But cf. Rick Stouffer, *Checks Aren't Checking Out; Electronic Transfers Aren't Replacing Checks*, BUFFALO NEWS, Jan. 6, 1998, at 1E (noting argument that paper checks are cheaper than electronic transfers). Budnitz ascribes more extensive costs to EBT, ranging from computer software and hardware, to backup systems. See Budnitz, *supra* note 86, at 750.

<sup>173</sup> See Rowland, *supra* note 169, at A01.

<sup>174</sup> See Sherzer, *supra* note 172, at B01.

<sup>175</sup> See Perry, *supra* note 169, at 14A. In Georgia, for example, officials estimate that every year \$1 million in food stamps is lost or stolen before ever reaching the intended recipient. See Susanna Capelouto, *Welfare Debit Cards*, (NPR Morning Edition, Oct. 2, 1997), available in 1997 WL 12823406.

<sup>176</sup> See Perry, *supra* note 169, at 14A; Rowland, *supra* note 169, at A01 (quoting claims made by Director of Rhode Island Department of Human Services).

<sup>177</sup> See Perry, *supra* note 169, at 14A (citing head of Hamilton County (Ohio) Welfare Department).

<sup>178</sup> Ehrenreich, *Spinning the Poor Into Gold*, *supra* note 119, at 50.

other private corporation. In *Transactive Corp. v. United States*, which arose out of a challenge to the EBT bidding process,<sup>179</sup> the D.C. Circuit ruled that the Treasury Department had erred in the bidding process it employed for potential EBT administrators. Specifically, the Treasury Department had relied on the "mistaken belief" that only a governmental agent could bid for EBT contracts; instead, the bidding should have been opened to a broad array of private financial institutions.<sup>180</sup> Yet a relatively small number of private contractors have snatched up EBT programs across the country. Citicorp Services Inc. operates the Rhode Island, Connecticut, Massachusetts, and Alaska EBT programs.<sup>181</sup> Citibank EBT Services operates the Pennsylvania system under a \$110 million contract,<sup>182</sup> and recently acquired Transactive's system in Indiana, Illinois, Texas, and Sacramento County, California.<sup>183</sup> Louisiana, Wisconsin, Idaho, and San Diego and San Bernardino counties in California rely on Deluxe Corporation for their system operation.<sup>184</sup> Having so few major EBT providers is risky as thousands of people would be affected by a system error in a single provider's operation. This is exactly what happened on October 14, 1997, when a computer failure at Deluxe caused an "EBT meltdown" in Alabama, Arkansas, Kansas, Louisiana, Massachusetts, Missouri, and Oregon. The EBT cards simply stopped working.<sup>185</sup>

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<sup>179</sup> 91 F.3d 232, 234 (D.C. Cir. 1996). Transactive also filed suit in three states seeking to enjoin the award of an EBT contract to Citibank on the ground that the bidding process was unfair. All three suits, in Kentucky, Michigan, and New York, failed. See *In re Transactive Corp. v. New York State Dep't of Soc. Servs.*, 665 N.Y.S.2d 701 (N.Y. App. Div. 1997), cert. granted, 91 N.Y.2d 812 (N.Y. 1998); *Company Sues State Over System That Will Replace Food Stamps*, COURIER-J. (Kentucky), Nov. 8, 1997, at B5; Amy Lane, *Losing Bidder Challenges Welfare Contract Award*, CRAIN'S DETROIT BUS., Nov. 17, 1997, at 6;

<sup>180</sup> 91 F.3d at 233, 235. The court may have correctly interpreted the Treasury Department's own regulations to include entities that were not financial agents of the federal government. See *id.* at 237 (citing 31 C.F.R. §§ 202.2, 206.2, 210.2, 333.2). However, the court minimized the policy concerns the Treasury Department could rationally have relied on to limit the financial institutions that would handle EBT.

<sup>181</sup> See Rowland, *supra* note 169, at A01 (RI, CT, MA); *EBT Elsewhere*, EFT REP., Sept. 10, 1997, at 1 (AK).

<sup>182</sup> See Sherzer, *supra* note 172, at B01.

<sup>183</sup> See *supra* note 137.

<sup>184</sup> See *EBT Elsewhere*, *supra* note 181, at 1 (LA, WI); Dave Goins, *Retailers Wary of Electronic Welfare*, IDAHO BUS. REV., Aug. 25, 1997, at 1A (ID); Caitlin Rother, *County OKs Vendor for Food Stamp System*, SAN DIEGO UNION TRIB., Aug. 16, 1997, at B4.

<sup>185</sup> See Isabelle Sender, *Processing Slowdown Makes for EBT Meltdown*, CHAIN STORE AGE, Dec. 1, 1997, at 216; Marsha Shuler, *Food Stamp Service is Interrupted*, BATON ROUGE ADVOC., Oct. 16, 1997, at 21A.

Allowing private contractors to deliver EBT services creates additional tension in the relationship between the state and retailers, whose cooperation is essential to the success of EBT. In a number of states, including Pennsylvania and Louisiana, retailers have sued over the costs imposed by EBT, alleging that the state has sought to pass on the cost of the point of sale ("POS") terminals onto retailers.<sup>186</sup> These complaints suggest that the states may be saving money on EBT largely by shifting costs elsewhere.<sup>187</sup> Moreover, Pennsylvania and Louisiana have not yet been able to persuade banks not to charge third-party fees.<sup>188</sup> Privatization hardly represents a step forward if the states are simply shifting their costs onto others.<sup>189</sup>

The claim that EBT would eliminate fraud is likewise overstated. Fraudulent behavior has simply taken on other forms. In New Jersey and New Orleans, for example, recently exposed fraud

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<sup>186</sup> See Sherzer, *supra* note 168, at B01 (noting suit by 1,900 food stores); see also Wabnick, *supra* note 168, at 1B (noting concerns of Arizona retailers). The basic problem is that state guidelines often do not allow the use of state-supplied point of sale ("POS") terminals to accept cash assistance benefits, only Food Stamps. Naturally, retailers want a single machine in the supermarket aisle to accept all purchases. The choice faced by retailers, therefore, is whether to get the single free state-supplied machine that only handles Food Stamps or to get a commercial machine at substantial cost. See Buettner, *supra* note 172, at 19; *Pennsylvania Retailers File Suit Over Third-Party Processing Fees*, EFT REP., Sept. 24, 1997, at 1.

<sup>187</sup> Nor are these fees reimbursed by the state, see *Pennsylvania Retailers*, *supra* note 186, chart at 1, even though imposing such costs on retailers is inconsistent with the federal regulations on EBT. See *infra* note 277.

<sup>188</sup> See Sherzer, *supra* note 172, at B01 (Pa.); *Louisiana Retailers Pick Fight That Could Shake EBT Industry*, EFT REP., Sept. 10, 1997, at 1. In Louisiana, a court battle has erupted over whether the EBT provider, Deluxe Corp., should be required to pay third-party fees. The state legislature passed a law requiring Deluxe to assume these costs, but Deluxe has objected that this requirement was not in the contract they signed with the state. See *Louisiana Retailers*, *supra*, at 1. The sponsor of the legislation was state Democratic Representative Jimmy Long of Natchitoches, a retired grocer. See Susan Finch, *Welfare Card Company Sues Over Reimbursing Retailer Fees*, THE TIMES-PICAYUNE, Aug. 5, 1997, at C4. Until the fee dispute can be worked out, Louisiana retailers have been made to pay the fees. See Marsha Shuler, *Fee Problem Hits Welfare Card Program*, BATON ROUGE ADVOC., Sept. 5, 1997, at 4A.

<sup>189</sup> Another example of the effort to shift fees away from the private providers is the cost of "toll free" calls. In October 1997, the Federal Communications Commission ruled that states must bear the cost of "800" number calls made by EBT participants from pay phones to the free help desks maintained by the EBT processors. See Charles Keenan, *800-Number Charges Dent States' EBT Plans*, AM. BANKER, Feb. 23, 1998, at 1. In Massachusetts alone, the costs of such calls would be more than \$200,000. See *id.* Not surprisingly, the reaction of major EBT providers Citicorp and Deluxe has been to insist that the states pay for the calls themselves or block all free assistance phone calls made by EBT participants, thereby eliminating a major source of benefit assistance. See *id.*

schemes involved grocery clerks ringing up bogus charges on the card, then giving the cardholders seventy cents on the dollar. The clerks or owners kept the rest, which for one store added up to \$50,000 a month.<sup>190</sup> An EBT card essentially allows individuals to commit the same kind of fraud they could with a regular credit card, where the cardholder asks the retailer to ring up nonexistent purchases.<sup>191</sup> Still, EBT may be an improvement; as one New Jersey paper noted, "The card makes fraud both simpler to carry out and easier to detect."<sup>192</sup> Although EBT may purport to reduce crime as it reduces the amount of money that individuals carry around,<sup>193</sup> "many consumers have been mugged at ATM sites and subjected to fraudulent practices whereby their funds have been withdrawn without their authorization."<sup>194</sup> EBT only makes the benefit population vulnerable to the kind of crime faced by all ATM users, but without the same consumer protections.

Finally, EBT raises the threat of invasiveness. EBT "has the potential for rapid and systematic assembly of information about when funds were used, how much was spent, in what place, and for what purchases."<sup>195</sup> Many supermarkets are able to keep close tabs on exactly what a specific consumer purchases, usually by

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<sup>190</sup> See Editorial, *The Cardsharps*, STAR-LEDGER (Newark, NJ), Aug. 9, 1997, at 8 (describing case in which merchants ran up bogus purchases in exchange for cash); Jerry DeMarco, 16 *Grocers Accused of Fraud With Food Stamp Debit Cards*, THE RECORD (Bergen County), Aug. 5, 1997, at A4; see also *Food Stamp Defrauders Ordered to Repay*, POST & COURIER, Dec. 16, 1997, at B6 (EBT prosecution in South Carolina); Hamil R. Harris, *Food Stamps Are a Bargain on DC Streets: Hustlers Trade Cash, Drugs, Stolen Goods*, WASH. POST, Dec. 28, 1997, at A1 (describing fraud before and after EBT); N.O. Police Seize Welfare Debit Cards; Store Owner, 19, *Booked on Fraud, Theft*, BATON ROUGE ADVOC., Sept. 6, 1997, at 4B (describing case in which store owner stole and used 42 welfare debit cards).

<sup>191</sup> For two federal prosecutions of such conduct, see *United States v. Wilson*, 81 F.3d 1300 (4th Cir. 1996), and *Rivera v. United States Dep't of Agric.*, 1988 U.S. Dist. LEXIS 13426 (E.D. Pa. 1988).

<sup>192</sup> *Cardsharps*, *supra* note 190, at 8. As one federal official put it, "We continue to rock and roll in Maryland. We return indictments there weekly." DeMarco, *supra* note 190, at A4 (quoting Robert G. Viadero, inspector general of the U.S. Department of Agriculture).

<sup>193</sup> Some advocates object that recipients can just as easily be compelled by force or threat of force to withdraw money from their account, as some criminals will force an individual at gunpoint to withdraw money from an ATM. Were the card usable only at a POS terminal in a retailer's checkout aisle, this problem would be mitigated, but at the cost of reducing privacy and access to benefits.

<sup>194</sup> Budnitz, *supra* note 86, at 752-53; see also *id.* at 769.

<sup>195</sup> Mark Leymaster, *Electronic Banking and the Poor: On the Short End of an Expensive Stick*, 14 CLEARINGHOUSE REV. 721, 728 (1980) (emphasis omitted).

offering a special card touted as a pass to the "Savings Club." In return for a few cents discount, consumers hand over a great deal of information about their consumption patterns.<sup>196</sup> Other consumer information services are then able to compile this data along with credit card or bank purchases. Obviously, none of this is to suggest that welfare service providers care which breakfast cereal people eat, but other purchases are weighted with importance in the context of welfare eligibility. How can a single mother on TANF say that she is caring for three children when she is only buying enough food for two? Why did the recipient suddenly stop buying an item she usually purchased—was there another contributor to the family's budget? Why did recipients not buy groceries for two weeks—were they away from home, and if so, with whom, why, and for how long? As trivial as these questions may seem, enforcing the "man in the house" rule of the 1960s involved analogous investigations.<sup>197</sup> This information could then be used to restrict recipients' ability to purchase certain items. New York's cashless welfare benefits system, for example, would impose restrictions on where the poor could shop and what they could buy.<sup>198</sup> In the past, welfare caseworkers spent a great deal of time and effort seeking the answers to these questions. Thanks to EBT, this information is now readily available. As one commentator contends, "These cards are in effect national identity cards, and as such spark privacy and security concerns."<sup>199</sup>

Health insurance cards already track private information. Pennsylvania's EBT/Medicaid card, for example, allows the state to track prescriptions.<sup>200</sup> On the one hand, a health care card like that promoted by the Western Governors' Association would be a tremendous benefit in that it would, as supporters contend, "lower administrative barriers to care by reducing the paperwork."<sup>201</sup> Yet it would also "enhance the tracking of health care outcomes and medical decision-making by increasing the availability and accuracy

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<sup>196</sup> See O'Harrow, *supra* note 87, at A1.

<sup>197</sup> See *supra* text accompanying note 21.

<sup>198</sup> See Sara-Ellen Amster, *Critics Envision Chaos if State Uses Cashless Welfare System*, REP. DISPATCH, Sept. 23, 1997, at A1. To some degree, there are restrictions already in place. Food Stamps cannot be used to buy alcohol or cigarettes. See 7 U.S.C. § 2012(g)(1) (1998).

<sup>199</sup> Budnitz, *supra* note 86, at 764.

<sup>200</sup> See Sherzer, *supra* note 172, at B01.

<sup>201</sup> *Western Governors Pilot Health Card*, EFT REP., Sept. 10, 1997, at 1.

of health statistics.<sup>202</sup> Policy analysts may rejoice at the thought of all this information, encoded on personal health cards, pouring into a central data bank, but such extensive and easy information gathering raises numerous privacy concerns.<sup>203</sup> Likewise, the argument that the card would "promote personal responsibility by placing individuals in control of the information on the card"<sup>204</sup> has two faces. Allowing beneficiaries to take control of their own health care is clearly a good thing, but suggesting that they will somehow be made to answer for taking care of their health, or any other basic human need, is quite another.

## 2. Digital Imaging

Fingerprinting, also known as digital imaging, has also become an extremely popular aspect of welfare policy in recent years. It is also overrated—a high-tech, high-profile system that often turns into a net money loser. This new fraud prevention technology has turned into a massive drain on state coffers without uncovering much fraud. To the extent that adoption of digital imaging has led to decreased caseloads, much of this reduction is simply application dissuasion. It takes a leap of faith to suggest that only criminals are dissuaded.

Digital imaging has been implemented among Home Relief recipients in New York,<sup>205</sup> General Relief recipients in California,<sup>206</sup> and General Assistance recipients in Connecticut.<sup>207</sup> New York approved a pilot program for Onondaga and Rockland Counties, which ran from October 1992 to March 1994, to fingerprint all Home Relief applicants. State officials, including Democratic Gover-

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<sup>202</sup> *Id.*

<sup>203</sup> The state obviously has some interest in the way its Medicaid funds are spent. Few would endorse a system that allows beneficiaries to obtain cosmetic surgery on the public's dime. Once policymakers agree on a list of services Medicaid will cover, however, privacy concerns may outweigh the state's interests in finding out who received which of those covered services.

<sup>204</sup> *Western Governors*, *supra* note 201, at 1.

<sup>205</sup> N.Y. SOC. SERV. LAW § 139-a (McKinney Supp. 1995). For an extended comment on this legislation, see Note, *Recent Legislation*, 109 HARV. L. REV. 1168 (1996). An enthusiastic argument in support of the New York law as proposed is James J. Killerlone III, Note, *FingerImaging: A 21st Century Solution to Welfare Fraud at Our Fingertips*, 22 FORDHAM URB. L.J. 1327 (1995).

<sup>206</sup> Leslie Berger, *Savings Seen in Welfare Fingerprint Program*, L.A. TIMES, Oct. 15, 1994, at B1.

<sup>207</sup> See CONN. GEN. STAT. § 17b-30 (1997) (creating "biometric identifier system").

nor Mario Cuomo, hailed the program and approved its implementation for Nassau and Westchester Counties.<sup>208</sup> In Suffolk County, officials pointed to fingerprinting as the reason for a twenty percent drop in the welfare caseload.<sup>209</sup> Los Angeles County began fingerprinting of all applicants for General Relief in 1991<sup>210</sup> and expanded the procedure to include AFDC recipients in 1994 under a federal waiver.<sup>211</sup> Finally, Connecticut began fingerprinting recipients in January 1996.<sup>212</sup> Other jurisdictions are soon to follow.<sup>213</sup> States confined their fingerprinting programs to state benefit programs before the PRWORA, but can now expand this policy to the general welfare population.

One striking feature of the fingerprinting efforts in all three states is that the state spent vast sums of money to catch only a handful of people. In the first year of its fingerprinting program, Los Angeles County spent \$9.6 million dollars to set up and operate a program. It caught only two double-dippers.<sup>214</sup> New York spent \$10 million a year on fingerprinting, and could only point to \$2.5 million in savings over two years.<sup>215</sup> Rockland County, the first county to fingerprint recipients in 1993, has not yet found a double-dipper.<sup>216</sup> Nor has Suffolk County, while Nassau County has caught four fraudulent claimants in two years.<sup>217</sup> Most embarrassing, however, is Connecticut's fingerprinting program. Connecticut

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<sup>208</sup> See Kevin Sack, *Cuomo Sanctions Fingerprint Scans*, N.Y. TIMES, July 9, 1994, at 1.

<sup>209</sup> See Debra McGrath-Kerr, *Pols Hand it to Finger-Imaging*, DAILY NEWS, Sept. 19, 1995, Suburban Section, at 1.

<sup>210</sup> See Hugo Martin, *County Welfare Recipients Fingerprinted*, L.A. TIMES, Oct. 12, 1991, at B1.

<sup>211</sup> See *Fingerprinting of Federal Welfare Applicants Begins*, L.A. TIMES, Apr. 16, 1994, at B2.

<sup>212</sup> See Larry Williams, *Fingerprinting is All Thumbs on First Day*, HARTFORD COURANT, Jan. 23, 1996, at A1.

<sup>213</sup> Other jurisdictions that have proposed fingerprinting include Washington state, see Editorial, *Foreman: Drop That Fingerprinting Proposal*, SEATTLE TIMES, Aug. 19, 1996, at B4; Massachusetts, see Connie Page, *Weld Administration Pushing Plan to Fingerprint Welfare Recipients*, BOSTON HERALD, Feb. 13, 1996, at 16; and Arkansas, see Ray Pierce, *Flanagin Suggests Fingerprints to Rub Welfare Fraud Out*, ARK. DEMOCRAT-GAZETTE, Apr. 10, 1998, at B2. Canada has even begun fingerprinting certain welfare recipients. See James Wallace, *Workfare Bill Becomes Law*, TORONTO SUN, Nov. 26, 1997, at 3.

<sup>214</sup> Martin, *supra* note 210, at B1.

<sup>215</sup> See Robert Polner, *Whorl of Controversy, Critics Say Welfare Fingerprinting is Overkill*, NEWSDAY, Feb. 2, 1998, at A3.

<sup>216</sup> See *id.*

<sup>217</sup> See *id.*

spent \$5.1 million dollars and turned up a grand total of six possible cases of fraud, or .00008% of all recipients.<sup>218</sup> Thus, the state spent \$850,000 to catch each offender. As one commentator pointed out: "[T]he state could have let them swipe the dough for 235 years and still have been ahead."<sup>219</sup> Additionally, the new system was plagued by glitches: the first few people fingerprinted were flagged as frauds because the computer concluded that their prints were already in the database. As they were the very first to be fingerprinted, this was impossible.<sup>220</sup> A recent study in Texas reached a similar conclusion: the costs of fingerprinting were extraordinary in light of its dubious ability to prevent fraud.<sup>221</sup>

If fingerprinting was ever intended as a fraud prevention device, it has been a dismal failure. Welfare officials have pronounced it a success, however, largely because of its ability to churn welfare recipients. For example, an evaluation of the fingerprinting program in Los Angeles County, which serves 900,000 poor people, found only sixty-two cases of fraud. However, county officials declared that the program had saved \$4.5 million in a single month.<sup>222</sup> The County maintained that because it sent out letters to continuing cases asking them to come in and be fingerprinted as a condition of eligibility, and because many people refused to do so and were dropped from the rolls, each case could be presumptively considered fraud.<sup>223</sup> Yet many recipients might not have gotten notice of the new requirement or were intimidated by the policy. Similarly, after the first three months of fingerprinting in San Francisco, city officials found only twelve cases of fraud in a population of 15,000, but declared 400 discontinuances evidence of fraud.<sup>224</sup> San Fran-

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<sup>218</sup> See *Million-Dollar Criminals*, NEW HAVEN ADVOC., Dec. 11, 1996.

<sup>219</sup> Denis Horgan, *Millions Squandered Pursuing Fantasy of Welfare Fraud*, HARTFORD COURANT, Nov. 29, 1996, at A2.

<sup>220</sup> See Williams, *supra* note 212, at A1.

<sup>221</sup> See Bill Minutaglio, *State's Welfare-Fraud Program Doesn't Work, Study Says*, DALLAS MORNING NEWS, Oct. 30, 1997, at 19A.

<sup>222</sup> Berger, *supra* note 206, at B1. The month was August 1994. See *id.*

<sup>223</sup> See *id.* New York officials made the same assessment when the welfare rolls in Rockland and Onondaga counties dropped by 4.3%. See Kimberly J. McLarin, *Inkless Fingerprinting Starts for New York City Welfare*, N.Y. TIMES, July 13, 1995, at B3 [hereinafter *Inkless Fingerprinting*]. One commentator notes this drop and concludes that the pilot fingerprinting project was "successful," as those who elected not to enroll "offered no justifiable reason as to why they did not reapply." Killerlane, *supra* note 205, at 1339. Hence the definition of "success" becomes not actual cases of fraud but scaring people off. Nor does digital imaging address the widespread problem of provider fraud.

<sup>224</sup> See John King, *Welfare Recipients Shy Away: SF Fingerprint Law May Have*



cisco Department of Social Services Manager Brian Cahill admitted, "Actual discontinuances are where the savings come from."<sup>225</sup> In other words, the state makes more money scaring people away than actually catching the one in a million fraudulent case.

Fingerprinting has frequently been attacked as stigmatizing, demeaning, or dehumanizing.<sup>226</sup> Many recipients are particularly concerned about what happens with their fingerprints once they are filed into a computer system.<sup>227</sup> A legal challenge to fingerprinting on the ground that it stigmatizes individuals, however, is unlikely to succeed. Courts have allowed fingerprinting in a variety of non-criminal contexts<sup>228</sup> and are unlikely to be overly sympathetic to welfare recipients. Underscoring the relationship between fingerprinting and criminality, conservative columnist William Safire recently fumed that, "Encouraged by an act of Congress, Texas and

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*Caused Hundreds to Flee the System*, S.F. CHRON., June 23, 1994, at A19.

<sup>225</sup> Quoted in *id.*

<sup>226</sup> See Stephen Loffredo, "If You Ain't Got the Do, Re, Mi": The Commerce Clause and State Residence Restrictions on Welfare, 11 YALE L. & POL'Y REV. 147, 148 n.6 (1993); see also Christopher Keating & Tom Puleo, *Welfare Reform Clears Senate; Rowland Plan Among Strictest in Nation*, HARTFORD COURANT, Apr. 13, 1995, at A1 ("[F]ingerprinting is primarily associated with breaking the law . . .") (paraphrasing argument of State Sen. Toni Harp). There have, however, been surveys of welfare recipients that find that fingerprinting is not viewed as stigmatizing, see Will Sentell, *Fingerprinting Proposal Draws Support, Criticism*, KANSAS CITY STAR, Mar. 14, 1997, at C4, but there are obvious selection problems with such surveys. For one thing, those opposed to, or afraid of, fingerprinting are no longer in the system.

<sup>227</sup> See McLarin, *Inkless Fingerprinting*, *supra* note 223, at B3 ("You don't know what they're going to do with them once they have them.") (quoting recipient Thomas Amer). For a series of proposed safeguards on the security of digital images, see Jennifer K. Constance, Comment, *Automated Fingerprint Identification Systems: Issues and Options Surrounding Their Use to Prevent Welfare Fraud*, 59 ALB. L. REV. 399, 416-22 (1995).

<sup>228</sup> The lead case in this area is *Thom v. New York Stock Exchange*, 306 F. Supp. 1002 (S.D.N.Y. 1969), *aff'd sub nom. Miller v. New York Stock Exch.*, 425 F.2d 1074 (2d Cir. 1970), which rejected a challenge to a New York law requiring all employees of firms of national security exchanges and affiliated companies to be fingerprinted as a condition of employment. *Thom* is frequently cited not simply for its ringing declaration that "[p]laintiffs' contention that fingerprinting is an affront to their dignity and an invasion of their privacy is without substance," *Thom*, 306 F. Supp. at 1007, but also for its extensive list of cases in which fingerprinting in noncriminal contexts has been upheld. The *Thom* court attached an appendix citing over thirty state laws requiring fingerprinting in a noncriminal context. See *id.* at 1012.

Courts have continued to uphold laws similar to those cited in *Thom*. See *Iacobucci v. City of Newport*, 785 F.2d 1354 (6th Cir. 1986) (upholding ordinance requiring employees of adult entertainment establishments to be fingerprinted and photographed); *Utility Workers Union of Am. v. Nuclear Reg. Comm'n*, 664 F. Supp. 136 (S.D.N.Y. 1987) (rejecting challenge to federal law requiring the fingerprinting of all employees of nuclear power plants).

California now demand thumbprints of applicants for drivers' licenses—treating all drivers as potential criminals."<sup>229</sup> Few complained, however, when the same sort of requirements were imposed on welfare recipients, even though it has been some thirty years since Charles Reich famously argued that both licenses and welfare benefits were part of the "new property" of government largesse granted to individuals only on terms dictated by the state.<sup>230</sup>

It is unfortunate that many welfare services departments find digital imaging so alluring, for it represents a triumph of a technological fad over meaningful reform. Similarly, EBT has been rushed into place without sufficient thought given to the critical issues it raises. One such issue is privacy. Although most states with fingerprinting programs have firewall provisions in place that prevent the sharing of digital image files with other state agencies,<sup>231</sup> it is not difficult to imagine states violating these prohibitions in the name of prosecuting or preventing fraud. Nor would it be irrational for states to claim that they have an interest in knowing exactly what welfare recipients bought with their benefit funds. In the past, the costs of monitoring recipients so closely were prohibitive. With the new technology discussed in this section, gathering extremely invasive information takes but a few keystrokes. Finally, the use of these technologies as churning devices is even more pronounced in a privatized welfare system, in which a private corporation's fiduciary duties are to keep costs down and profits high.

### III. THE NEWLY ATTENUATED RIGHTS OF WELFARE RECIPIENTS

Welfare policy has long been in dire need of reform. Yet instead of reforming the system to improve the lives of the poor and expand the ability of states and localities to meet basic human needs, the federal government abdicated its responsibility and simply handed over the mess to the states. In turn, many states auctioned off the crisis to private corporations peddling glitzy promises of hightech solutions. Few expected devolution's main beneficiaries to be not the states, nor their citizens, but corporations like Lockheed Martin. The failure to confront the misperceptions and

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<sup>229</sup> Safire, *supra* note 87, at A29.

<sup>230</sup> The classic articles are Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964), and Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

<sup>231</sup> See, e.g., CONN. GEN. STAT. § 17b-30(f) (1997).

mistakes that are such a dominant part of our understanding of welfare policy has led to less democratic control over policy, not only in that we are unable to make informed choices, but also that we are more willing to hand this power over to private corporations.<sup>232</sup>

This Part will explore remedies to the specific dangers that the new system of decentralized, privatized benefit provision presents to the individual rights of welfare recipients. It will begin by reestablishing the relevance of the seminal welfare rights case *Goldberg v. Kelly*.<sup>233</sup> Although the PRWORA expressly eliminated an entitlement to assistance, no statute could eliminate the constitutional guarantees of due process that *Goldberg* enforced. Next, it will examine three critical areas in which these due process rights are in danger: the right to apply for benefits; the right to fair notice of changes in one's eligibility or benefit amount; and the right to a fair hearing. As this Article argues, a privatized welfare system requires a level of due process protections similar to the fair hearings procedure the PRWORA eliminated.<sup>234</sup> Privatization and technological innovation has thus far created hurdles to application, failed to provide adequate notice to recipients, and infected a wide variety of eligibility decisions with private pecuniary interests. This Article contends that all three deficiencies must be remedied.

### A. *The Continuing Vitality of Goldberg v. Kelly*

At first glance, *Goldberg v. Kelly* seems to be one of the casualties of welfare reform. The PRWORA sought to put an end to the period in our legal history in which federal courts intervened on behalf of welfare recipients. Section 401(b) of the PRWORA, establishing Temporary Assistance to Needy Families ("TANF"), the replacement for AFDC, makes clear that, "This part shall not be interpreted to entitle any individual or family to assistance under any

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<sup>232</sup> Cf. MARMOR ET AL., *supra* note 10, at 213-14.

<sup>233</sup> 397 U.S. 254 (1970).

<sup>234</sup> This argument relies on due process because the welfare case law relies so often on the Due Process Clause as a source of constitutional protection. Others have noted, however, that due process concerns also arise in the context of private delegation of public power. See, e.g., Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937); Lawrence, *supra* note 107, at 672-95; George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975).

state program funded under this part."<sup>235</sup> This provision seems to foreclose conclusively any argument that there is a right to welfare on behalf of needy families. In the aftermath of welfare reform, commentators wondered what rights remained for poor individuals, should they be subjected to discriminatory or arbitrary treatment by the state.<sup>236</sup> As one scholar has asked, "Should these rights [described in *Goldberg*] disappear if the operation of the welfare process is administered by a private agency having a contract with the state?"<sup>237</sup>

The PRWORA disclaims any right or entitlement to public assistance. However, the PRWORA does not eliminate, indeed cannot eliminate, the protections due process accords to property interests. In other words, Congress or a state legislature may declare that there is no right to a specific benefit; yet once it grants the benefit, it may not do so in a manner that denies due process to recipients. Once one has a property interest, whether that interest is a job or a welfare check, then that property interest cannot be taken away without due process of law.<sup>238</sup> The Supreme Court explained the difference in *Board of Regents of State Colleges v. Roth*: "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."<sup>239</sup> Once the feder-

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<sup>235</sup> Pub. L. No. 104-193, § 401(b) (1996) (codified at 42 U.S.C. § 601(b) (1997)).

<sup>236</sup> See, e.g., Laura C. Conway, *Will Procedural Due Process Survive After Aid to Families with Dependent Children Is Gone?*, 4 GEO. J. ON FIGHTING POVERTY 209 (1996).

<sup>237</sup> Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1185 (1995). Barak-Erez's main argument is that we must look to contemporary understandings of the role of government and, following the "public function" test, evaluate whether the activity in question constitutes state action. See *id.* at 1181-82; see also *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982).

<sup>238</sup> As the Court explained in *Goldberg*, "The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right.'" 397 U.S. at 262 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969)); see also *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights.").

<sup>239</sup> 408 U.S. at 577; see also *Perry v. Sindermann*, 408 U.S. 593 (1972). Several lower courts have ruled that the mandatory language of a statute gives rise to a claim of entitlement. See, e.g., *Mallette v. Arlington County Employees' Supp. Retirement Sys. II*, 91 F.3d 630 (4th Cir. 1996) (finding claims to retirement benefits rooted in county code); *Griffith v. Detrich*, 603 F.2d 118, 119 (9th Cir. 1979) (interpreting language of

al government allocates money into an individual's account via EFT, or under the new TANF statute, due process governs the distribution of those benefits.<sup>240</sup> *Goldberg* remains relevant because no piece of legislation could override the constitutional due process protections it articulated.<sup>241</sup> Although *Goldberg* is commonly viewed as the apex of the welfare rights movement, it did not purport to establish a right to welfare. *Goldberg's* innovation was to apply the requirements of due process to decisions of the state on whether to grant, deny, or eliminate assistance. The Court held only

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state statute requiring that "every city and county shall relieve and support all incompetent, poor, indigent persons"); cf. *Hewitt v. Helms*, 459 U.S. 460, 469 (1983) (ruling, in the context of a prison discipline procedure case, that mandatory language and statutory standards create a protected interest).

<sup>240</sup> For a similar argument, see Conway, *supra* note 236. The structure of the argument is also similar to that made by immigrants' rights advocates following the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Although IIRIRA eliminated many of the statutory routes for judicial review of decisions by the Immigration and Naturalization Service, the basic constitutional remedy of habeas corpus remains and cannot be abolished by statute. See *Felker v. Turpin*, 518 U.S. 651 (1996) (reaching same conclusion with respect to Antiterrorism and Effective Death Penalty Act of 1996); Lucas Guttentag, *The 1996 Immigration Act: Federal Court Jurisdiction—Statutory Restrictions and Constitutional Rights*, 74 INTERPRETER RELEASES 245 (1997); see also Todd G. Cosenza, *Preserving Procedural Due Process for Legal Immigrants Receiving Food Stamps in Light of the Personal Responsibility Act of 1996*, 65 FORDHAM L. REV. 2065 (1997) (contending that states must apply full constitutional safeguards for immigrants seeking to qualify for Food Stamps based on narrow administrative exception). The difference is that habeas corpus is always available; due process protections apply only in the event that a state or the federal government elects to provide welfare benefits.

In a recent article, Richard Pierce contends that due process analysis is on the wane. See Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 (1996). Pierce suggests that the first volley in the attack against a broad understanding of due process is the Second Circuit's opinion in *Colson v. Sillman*, 35 F.3d 106 (2d Cir. 1994), in which the court ruled that the termination of state medical services to disabled children did not entitle recipients to a pretermination hearing. See Pierce, *supra*, at 1989-90. Yet *Colson* is a very thin thread upon which to hang this argument. First, the language of the regulations at issue were highly discretionary, suggesting that the benefit could be revoked at any time. See 35 F.3d at 108. Second, the case was decided by a two-judge panel (the third panel member having recused himself after oral argument) composed of conservative Reagan appointees. See *id.* at 106. As a result, *Colson* is a weak indicator of an emerging legal consensus.

In contrast, the analysis of *Goldberg* remains relevant. Houseman suggests that *Goldberg's* emphasis on due process means that while other leading welfare rights cases have outlived their usefulness, "*Goldberg* may provide the most useful weapon to poverty advocates in the 1990s and beyond to assure that the poor are treated fairly and equitably by welfare administrators." Houseman, *supra* note 34, at 836.

<sup>241</sup> For an equal protection-based argument, see Rebecca E. Zietlow, *Two Wrongs Don't Add Up to Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures*, 45 AM. U. L. REV. 1111 (1996).

that, "Such benefits are a matter of statutory entitlement for persons qualified to receive them."<sup>242</sup> It did not create an independent source of entitlement or qualification.

*Goldberg* acquires heightened importance in an era of privatization, moreover, because its balancing test analyzes governmental interests, as distinct from private interests. Evaluating the state's asserted interest in avoiding costly hearings while unqualified individuals continued to receive benefits, the Court held: "the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increases in its fiscal and administrative burdens."<sup>243</sup> In *Mathews v. Eldridge*, which found that Social Security recipients were not entitled to a pretermination hearing,<sup>244</sup> the Court explained that to determine what process is due, courts must balance three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>245</sup>

The basic thrust of this test is to weigh the individual's right to procedural protections, such as a hearing, against the governmental interest in keeping costs down.

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<sup>242</sup> *Goldberg*, 397 U.S. at 262.

<sup>243</sup> *Id.* at 266. For an application of the *Goldberg* balancing test in the context of child support enforcement, see Houseman, *supra* note 34, at 858.

<sup>244</sup> 424 U.S. 319 (1976).

<sup>245</sup> *Mathews*, 424 U.S. at 335 (citing *Goldberg*, 397 U.S. at 263-71). The use of a balancing test explains the divergent results in *Goldberg*, which held that benefit recipients were entitled to a pretermination hearing, and *Mathews*, which held that they were not. In *Mathews*, the agency making the determination was the Social Security Administration, an arguably more reliable entity than the New York State welfare bureaucracy in *Goldberg*. See MASHAW ET AL., *supra* note 27, at 273. For an argument that the balancing test of *Mathews* is on its way out, see Pierce, *supra* note 240, at 1999.

Some examples of cases applying the balancing test of *Goldberg* and *Mathews* include *Heller v. Doe*, 509 U.S. 312, 330-33 (1993) (upholding Kentucky's involuntary commitment scheme); *Bliek v. Palmer*, 102 F.3d 1472, 1474-78 (8th Cir. 1997) (finding that demand letter for Food Stamp recoupment failed to satisfy due process); and *Ortiz v. Eichler*, 794 F.2d 889, 892-95 (3d Cir. 1986) (finding Delaware's pretermination notice to AFDC recipients was constitutionally defective).

In a privatized system of welfare administration, the governmental interest is dramatically minimized. In *Goldberg* and *Mathews*, the state interest was measured in terms of how due process might disrupt the state agency's application or verification procedures, whether state workers would need to devote time and energy to the case, and how much of a financial burden due process would impose. The Court in *Mathews* speaks repeatedly of assessing "the public interest,"<sup>246</sup> which requires the court to weigh "the administrative burden and other societal costs"<sup>247</sup> such as the impact of due process on "public funds."<sup>248</sup> The Court concludes that "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed."<sup>249</sup>

Where states have chosen to privatize their welfare systems, the countervailing interest must now be measured in terms of the burden on a private corporation. In most cases, the cost of due process will come out of the private company's profit margin. Needless to say, the state interest in operating a social services agency and managing governmental funds is of far greater importance than private profits. It is difficult to imagine any court giving the same weight to the interests of Lockheed Martin or EDS as to the interests of the State of California or the Commonwealth of Massachusetts. A court may reasonably defer to the state's decision that it will spend less money on welfare services and more on public schooling or local law enforcement. It would be irrational, however, for a court to decide that maximizing returns to a private company's shareholders is more important than guaranteeing due process to individual benefit recipients, particularly where the private corporation is under contract to the state to provide benefits to needy individuals.<sup>250</sup> The standard arguments in favor of court deference to the

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<sup>246</sup> *Mathews*, 424 U.S. at 347.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 348.

<sup>250</sup> Note that this argument does not suggest that benefit recipients should enjoy any and all conceivable due process rights at the expense of the private company. In most cases, the private company is under contract to provide welfare services and in return the state promises a fixed amount of money. If the private corporation manages to operate the system so as to keep its costs below what the state pays out, it keeps the difference as profit. See *infra* note 330. When the administrative and financial burdens of due process come out of that profit, the above analysis applies. When the administrative and financial burdens of due process exceed the private company's profit, and begin to

policy decisions of executive agencies no longer apply.

While one side of the equation has changed, the other has not. *Goldberg's* analysis of the "brutal need" of benefit recipients remains relevant. Quoting the lower court decision in the case, the Supreme Court explained:

While post-termination review is relevant, there is one overpowering fact which controls here. By hypothesis, a welfare recipient is without funds or assets. . . . Suffice it to say that to cut off a welfare recipient in the face of . . . "brutal need" without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it.<sup>251</sup>

Because private profits can hardly count as an overwhelming consideration, welfare recipients alleging some violation of their constitutional rights are entitled to greater due process protections under a privatized welfare system, not fewer.<sup>252</sup> Thus "it is possible to accept the economic reasons for the privatization of welfare services (by contracting them out) and still recognize the importance of safeguarding the due process rights of welfare recipients."<sup>253</sup> The balancing test now greatly favors the claim made by the recipient.

An advocate of privatization would find much to disagree with in the preceding paragraphs. To the extent that privatizing state functions is intended to save money and improve service delivery, imposing potentially costly and complicated due process requirements will undermine these goals. Yet a private company cannot expect to stand in the shoes of the state with respect to the state's advantages without incurring any liabilities. It is simply not credible to assert that the interests of the people of the State of Texas, for example, are no greater than the interests of Transactive's shareholders, particularly where these interests are weighed against the "brutal need" suffered by an individual whose benefits were wrongly

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cut into the state's funds, then the ordinary *Goldberg* analysis applies: the interest of the individual recipient is weighed against the governmental interest.

<sup>251</sup> *Goldberg*, 397 U.S. at 261 (quoting *Kelly v. Wyman*, 294 F. Supp. 893, 899, 900 (S.D.N.Y. 1968)).

<sup>252</sup> This certainly does not mean that benefit recipients are on the whole better off, simply that their due process claims are stronger under a privatized welfare system. This is in some way compensation for the likelihood that, in general, their experience under a privatized system is likely to be unsatisfactory.

<sup>253</sup> Barak-Erez, *supra* note 237, at 1185.



denied or cut off. A private corporation that operates the state's welfare system assumes a great deal of authority; it should also be prepared to shoulder the responsibility that comes with such power.

Having recognized that the balance in a privatized welfare system will tip more frequently in favor of the claimant, the relevant question becomes what process is due.<sup>254</sup> As the Court noted in *Mathews*, "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."<sup>255</sup> There are three critical elements of due process to which benefit recipients were entitled under *Goldberg*, and these claims remain viable. First, claimants are entitled to the opportunity to apply for welfare and, if qualified, to receive it.<sup>256</sup> There is a wide body of case law that makes clear that there must be eligibility standards for benefit distribution and that such standards must be followed.<sup>257</sup> Churning jeopardizes this right, and the tendency of private service providers to adopt churning policies suggests that the future holds greater danger. Second, claimants are entitled to fair notice of the private agency's procedures and policies, as well as any action contemplated by the private provider that may affect the recipient's eligibility. The right to adequate notice plays an instrumental role in securing the most basic element of due process: the right to a fair hearing. As the Supreme Court has repeatedly emphasized, "The fundamental

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<sup>254</sup> While the Constitution is the primary source of due process protections, it need not be the only source. States are still likely to have their own benefit programs that establish standards for eligibility and benefit delivery. Another source of protection would be the guarantee of fair and open procedures established by federal and state administrative procedure acts. See Conway, *supra* note 236, at 213.

<sup>255</sup> *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

<sup>256</sup> Summarizing a number of cases, the Seventh Circuit has explained that, "Applicants who have met the objective eligibility criteria of a wide variety of governmental programs have been held to be entitled to protection under the due process clause." *Holbrook v. Pitt*, 643 F.2d 1261, 1278 n.35 (7th Cir. 1981); see also *Daniels v. Woodbury County*, 742 F.2d 1128 (8th Cir. 1984); *Carey v. Quern*, 588 F.2d 230 (7th Cir. 1978).

<sup>257</sup> In *Morton v. Ruiz*, 415 U.S. 199 (1974), the Court reasoned that "the agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries." *Id.* at 231; see also *Holmes v. New York City Housing Auth.*, 398 F.2d 262 (2d Cir. 1968); *Grueschow v. Harris*, 492 F. Supp. 419 (D.S.D. 1980) (finding that state had failed to provide adequate notice to potential beneficiaries of energy assistance). The point was made most clearly in an Illinois case: "Due process requires an evenhanded application of eligibility standards." *Brengola-Sorrentino v. Illinois Dept. of Pub. Aid*, 472 N.E.2d 877, 881 (Ill. App. Ct. 1984).

requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'<sup>258</sup> As will be argued in more detail below, a private corporation engaged in social service delivery has interests distinctly opposed to those of its "clients." Even the most hostile state bureaucracy did not have an inherently adversarial relationship with benefit recipients. Hearing rights, with the same protections established in *Goldberg*, are necessary to monitor and correct this tension.

These rights are significant not simply because they improve the accuracy of agency determinations, but also because they fulfill dignitary values. In his seminal article on due process, Judge Henry Friendly set forth a number of different features of a procedure that would satisfy due process: an unbiased court, notice of the proposed action and the reasons therefore, an opportunity to respond, the right to call witnesses, the right to know the evidence against one's claim, the right to a decision based on the evidence, the right to counsel, the right to a record, the right to receive a statement of reasons for the decision, public attendance, and judicial review.<sup>259</sup> The increasing reliance on technology threatens to undermine these dignitary values. A fair hearing may not be deemed necessary because "it could all be done automatically." One theorist has suggested that "adoption of electronic information technology for rulemaking, adjudication, internal management, and delivery of services advances virtually all of the traditional goals of administrative law."<sup>260</sup> Claimants could simply present their case by computer filing, the agency would file an electronic answer, and an adjudication management system would "automatically identify facts as to which there is dispute."<sup>261</sup> Such a procedure would likely be faster and involve less paperwork, but it has several drawbacks. Beyond

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<sup>258</sup> *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); see also *Goldberg*, 397 U.S. at 267 ("The fundamental requisite of due process of law is the opportunity to be heard.") (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

<sup>259</sup> See Henry J. Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267 (1975). Judge Friendly's argument is not that all procedures must include each of these elements, but that in any given case, many of these rights will be present. Note that under the *Goldberg/Mathews* balancing test, more of Judge Friendly's conditions are likely to be required where the competing interest is the private corporation's rather than a governmental interest.

<sup>260</sup> Henry H. Perritt, Jr., *The Electronic Agency and the Traditional Paradigms of Administrative Law*, 44 ADMIN. L. REV. 79, 80 (1992).

<sup>261</sup> *Id.* at 83.

the fact that it presupposes broad public use, and perhaps ownership, of computers, electronic adjudication would eliminate the in-person aspect of a fair hearing. For many benefit recipients, the fair hearing is the only time their claim is treated with any seriousness by any state official.<sup>262</sup> To eliminate this point of contact seems unduly cruel.

The cost-cutting imperatives that drive privatized welfare are on a collision course with the dignitary values protected by due process. The remainder of this Section will demonstrate how the impact of this collision can be contained. As a prudential matter, state legislatures and the courts should review the operation of their privatized programs carefully to ensure that private corporations are not simply churning recipients or denying individuals adequate opportunity to secure benefits for which they are qualified. Second, the federal regulations governing the EBT program should be revised to conform with federal law protecting all electronic transfer account holders. Third, every decision of import made by the private corporation should be reviewable by the state through a fair hearing process.

## B. *The Demands of Due Process*

### 1. The Right to Apply and Receive

Welfare privatizers have a strong economic incentive to churn recipients. According to Robert Rector of the Heritage Foundation, the success of Wisconsin in reducing the number of cases was largely attributable to "application dissuasion," such that "people never even walk in the door in the first place."<sup>263</sup> The impetus to

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<sup>262</sup> As Frank Michelman explains:

[T]he individual may have various reasons for wanting an opportunity to discuss the decision with the agent. Some pertain to external consequences: the individual might succeed in persuading the agent away from the harmful action. But again a participatory opportunity might also be psychologically important to the individual: to have played a part in, to have made one's apt contribution to, decisions which are about oneself may be counted important even though the decision, as it turns out, is the most unfavorable one imaginable and one's efforts have not proved influential.

Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, 18 *NO-MOS* 126, 127-28 (J. Roland Pennock & John W. Chapman eds., 1977). Even supporters of electronic adjudication recognize that the dignitary value of adjudication could be reduced. See Peritt, *supra* note 260, at 97.

<sup>263</sup> Ehrenreich, *Spinning the Poor Into Gold*, *supra* note 119, at 45. Intriguingly, advo-

cut costs conflicts with the obligation to provide benefits to the needy; private contractors usually motivated by profits are ill-suited to meeting basic human needs that carry no price tag. As Judith Gueron of the New York-based Manpower Demonstration Research Corporation pointed out, "It's not like garbage collection."<sup>264</sup> Richard Scott, the CEO of Columbia/HCA Healthcare, owner of 350 hospitals in thirty-eight states, is a perfect example of how privatization puts the wrong incentives into place. According to Scott, "Healthcare is a business just like anything else." His answer to the need to assist benefit populations is likewise disturbing: "Is any fast-food restaurant obligated to feed everyone who shows up?"<sup>265</sup> Such sentiments confirm the prediction made by a former Pennsylvania commissioner of children, who stated that, "It's a profit-making feeding frenzy. . . . These corporations are growing helter-skelter, without people who know the field or know kids."<sup>266</sup> It is not persuasive to argue, as do Lockheed officials in Florida, that the private contractor's financial benefit is dependent upon putting people to work. By paying \$450 to Lockheed for each person it processes, whether or not the person finds a job,<sup>267</sup> Florida encourages providers simply to churn cases.

In light of these incentives, there is a legitimate fear that once private corporations assume control over the day-to-day workings of state welfare bureaucracies, a variety of churning mechanisms will

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cates of welfare privatization contend that, in addition to doing most everything else wrong, the public sector fails to churn applicants efficiently. See *id.*

<sup>264</sup> Quoted in Harwood, *supra* note 7, at 21. As one state welfare executive elaborated: "Sometimes we have difficulty understanding each other. . . . The cultures are so different. We don't look at the bottom line." *Id.* Ira Colby, chair of the University of Central Florida's social work department, concurs: "I'm really concerned about putting a corporate mentality into anti-poverty programs." Kunerth, *supra* note 116, at H1.

<sup>265</sup> Carl Ginsburg, *The Patient as Profit Center: Hospital Inc. Comes to Town*, THE NATION, Nov. 18, 1996, at 18; see also Sawicky, *supra* note 5, at 21 ("Both advocates and critics agree that contractors are motivated by financial incentives in contracts, not by the missions of government policies.").

<sup>266</sup> Bernstein, *supra* note 112, at 1 (quoting Paul DeMuro). In New Jersey, child welfare officials proposed to turn over foster care placement, therapy, and adoption services for abused and neglected children to a private for-profit business. See Brett Pulley, *New Jersey Considers Privatizing Its Child Welfare*, N.Y. TIMES, Mar. 2, 1996, § 1, at 21. One child advocate objected, "If you're going to introduce a profit margin into a system that's already underfunded, I think you can pretty easily imagine the types of shortcuts that will occur, which will have a devastating impact on the children." *Id.* (quoting Marcia Robinson Lowry, Executive Director, Children's Rights Inc. in New York City).

<sup>267</sup> See Kunerth, *supra* note 116, at H1.

determine which individuals receive assistance and which do not. The most basic form of dissuasion is to make it difficult for recipients to access services. The classic example is "locating a welfare office several bus rides out of town and opening it at odd and erratic hours."<sup>268</sup> Allowing benefits to be accessed at any ATM terminal certainly expands access, but possibilities for dissuasion remain. One significant problem with dispensing benefits through ATM machines is that ATMs are difficult to find in poor neighborhoods that have largely been abandoned by banks.<sup>269</sup> If banks refuse to open ATMs in poor neighborhoods, or if retailers serving poor neighborhoods cannot afford POS terminals, then transmitting benefits via EBT is not much of an innovation.<sup>270</sup> Further, a largely unrecognized fact of American poverty is that almost thirty percent of the poor live in rural areas.<sup>271</sup> An ATM-based solution makes little sense in counties where banks, much less ATMs, are few and far between.<sup>272</sup> It is true that one advantage of EBT is that it delivers benefits through a "mainstream" technology, yet this technology is less familiar to certain recipient populations.

Even if beneficiaries are able to access EBT services, benefits might be available only on limited terms. As other commentators have pointed out, there are a vast number of highly technical questions with significant bearing on the individual rights of welfare recipients. Will withdrawals be limited to ATM terminals, or may recipients also withdraw funds from POS terminals? Are beneficiaries limited to specific amounts that they may withdraw? Is the maximum amount set per withdrawal, per week, or per month? Does the maximum include transaction fees? Will participation in the EBT program be mandatory? What if a benefit recipient would prefer the old paper system? Will the state select PIN numbers? What reporting requirements must be followed by the recipient? What happens if the recipient exceeds a maximum withdrawal or is suspected of fraud?<sup>273</sup>

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<sup>268</sup> Ehrenreich, *Spinning the Poor Into Gold*, *supra* note 119, at 45.

<sup>269</sup> See Rowland, *supra* note 169, at A01.

<sup>270</sup> See Buettner, *supra* note 172, at 1 ("Deployment of machines in low-income neighborhoods tends to be pretty low . . . . Most banks do not have their branches in low-income neighborhoods.") (quoting Zy Weinberg, Director, Inner City Food Access Program).

<sup>271</sup> See Ellwood, *supra* note 10.

<sup>272</sup> See Capelouto, *supra* note 175 (noting that there are no ATMs anywhere in Baker County, Georgia).

<sup>273</sup> Leyser lists eleven concerns with EBT: recipients should be able to choose to use

EBT systems should not be established and operated to turn a profit, but to deliver benefits in a user-friendly way. Each time the system is made more difficult to operate, the likelihood of application dissuasion goes up. Each time the private provider or the state conditions benefits on a seemingly minor administrative matter, the potential for churning is increased.

Federal Food Stamp regulations address many of the practical concerns raised by EBT, and in several cases resolve them satisfactorily.<sup>274</sup> The federal Food Stamp EBT regulations prohibit the states from implementing programs unless the system is first able to authorize benefits properly, the state has trained households and others in system usage, and information on the operation of such system has been provided to the recipient populations.<sup>275</sup> However, the federal requirements do not apply to the full universe of EBT programs, leaving the states discretion to enact conflicting policies. New Jersey, for example, allows the recipient three withdrawals before the state will deduct a transaction fee for each subsequent withdrawal.<sup>276</sup> This policy is troubling for several reasons. First, the general federal policy, reflected in the Food Stamp regulations, is not to deduct transaction fees.<sup>277</sup> Second, of all the penalties to impose on the poor, a financial penalty is most cruel and counter-productive. Third, many people have difficulty limiting their ATM withdrawals to only three per month; at least once per week, or four to five times a month, would be more reasonable. Finally, one purported advantage of EBT is that it reduces theft by reducing the

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EBT, rather than have it forced upon them; transaction fees should be federally regulated if not outright prohibited; recipients should be able to select their own Personal Identification Number (PIN); hearing and other rights should be made clear to recipients; there must be an adequate number of access devices; accommodation must be made for people with disabilities or facility in a language other than English; there should be opportunity for training; there must be policies protecting recipients in the event their card is lost or stolen; procedures must be put in place for handling complaints; adequate back-up systems must be put into place; and EBT recipients should get receipts after every transaction. See Leyser, *supra* note 164, at 1-44; see also Budnitz, *supra* note 86, at 763-64.

<sup>274</sup> See, e.g., 7 C.F.R. § 274.12(e)(1)(ii) (1998) (allowing recipients to select their own PIN number); *id.* § 274.12(h)(4)(i)(G) (requiring EBT systems to comply with the Americans with Disabilities Act).

<sup>275</sup> See 7 C.F.R. § 274.12(e)(1)(i)-(viii).

<sup>276</sup> See N.J. STAT. ANN. § 10-75(c)(1) (West 1998) ("[A]fter three free cash automatic teller machine withdrawals in a month, the department may deduct a transaction fee from a recipient's account for each subsequent withdrawal . . .").

<sup>277</sup> See 7 C.F.R. § 274.12(f)(1) ("[N]o transaction fees shall be imposed on food stamp households utilizing the EBT system to access their benefits.").

amount of money a needy individual must carry around on their person. Limiting the number of withdrawals means that individuals must take out more money on each occasion, thus making them more attractive targets for theft. Louisiana has run into difficulty, as explained above, in persuading private welfare providers to pay transaction fees. Faced with opposition from retailers, the state decided to impose the fees on individual recipients.<sup>278</sup>

These practical concerns, while significant, pale in comparison to the bottom-line issue: delivering benefits in a timely manner. The problem with late or faulty benefit delivery is that receiving benefits on time often is, as *Goldberg* suggests, literally a matter of life and death. So far, private corporate providers have stumbled over this responsibility. Maximus' operation of Connecticut's entire program of child-care benefits for families on welfare and the working poor turned out to be a disaster. Hundreds of families were denied aid solely due to Maximus' incompetent administration.<sup>279</sup> This "administrative chaos" arose when Maximus "failed to process thousands of applications in time to get the checks out to parents and care providers."<sup>280</sup> Over a three-day period in October 1997 the company's service center received 35,000 phone calls from people whose benefits had failed to materialize.<sup>281</sup> In Massachusetts, the EBT system crashed for a few hours on the day benefits were due.<sup>282</sup> In Colorado, debit machines denied sales even though beneficiaries had a positive Food Stamp or cash balance in the system.<sup>283</sup> The computer system Andersen Consulting set up in Texas erroneously puts random holds on child support checks.<sup>284</sup> Because of the repeated failure of the Andersen Consulting system, only twenty percent of child support payments are made on time.<sup>285</sup> These operational complaints come not only from recipi-

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<sup>278</sup> See LA. REV. STAT. ANN. § 231.13 (West 1997) ("Retailers participating in the cash assistance electronic benefits transfer system are not prohibited from charging or assessing a fee against cash assistance recipients who are accessing benefits for the sole purpose of obtaining cash.").

<sup>279</sup> See Jonathan Rabinovitz, *In Connecticut, a Privately Run Welfare Program Sinks Into Chaos*, N.Y. TIMES, Nov. 24, 1997, at B1.

<sup>280</sup> *Id.*

<sup>281</sup> See *id.*

<sup>282</sup> See Rowland, *supra* note 169, at A01. But see Emilie Astell, *Welfare by Plastic Weathers Glitches*, TELEGRAM & GAZETTE, Aug. 15, 1997, at A1 (noting that system was eventually fixed following early problems).

<sup>283</sup> See Goins, *supra* note 184, at 1A.

<sup>284</sup> See McDonald, *supra* note 125, at A2.

<sup>285</sup> See *id.* (citing General Accounting Office study).

ents: Louisiana retailers have often faulted Deluxe Data, the private contractor that operates Louisiana's EBT system, for being unresponsive to implementation problems.<sup>286</sup> As noted above, a computer failure on Deluxe's part caused an "EBT meltdown" in seven states, during which recipients were unable to use their cards.<sup>287</sup> In Rhode Island, only one-third of the grocers that will accept the cards have the necessary electronic equipment.<sup>288</sup> These are ominous signs. Expressing his suspicion of EBT, Maine's Social Services Commissioner explained: "The landscape across the country is littered with large, expensive computerization systems that private companies provided to states. When they didn't work out and failed, these private providers went back home, and the states were left with the pieces."<sup>289</sup> A system that frequently fails, out of neglect or carelessness, stigmatizes those who rely on it. In this way, an EBT card becomes a poor person's passport, the key to an unreliable and unpredictable source of support.

It is unlikely that mere incompetence on the part of a service provider would violate due process.<sup>290</sup> However, a cause of action may arise from administrative dissuasion, onerous application or receipt procedures, and bureaucratic disentanglement.<sup>291</sup> Preliminarily, policies that seek to dissuade or churn recipients fall afoul of the line of cases requiring benefit provision to follow ascertainable standards. A program that provides benefits to single mothers with an annual income of less than \$7000 cannot be operated to provide benefits to single mothers with an annual income of less than

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<sup>286</sup> See Marsha Shuler, *Task Force to Contact Contractor*, BATON ROUGE ADVOC., Oct. 1, 1997, at 10A.

<sup>287</sup> See *supra* note 185.

<sup>288</sup> See Rowland, *supra* note 169, at A01.

<sup>289</sup> Kunerth, *supra* note 116, at H1 (quoting Kevin Concannon, Commissioner, Maine Department of Social Services). Welfare administration is not the only area in which technical glitches have seriously affected program operation and interfered with people's rights. A new machine developed by the Immigration and Naturalization Service to produce "fraudproof" green cards has malfunctioned so badly as to hold up green cards for 78,000 qualified applicants. See Deborah Sontag, *Many Green Cards Delayed by "Bugs" in a New Machine*, N.Y. TIMES, Mar. 25, 1998, at A1.

<sup>290</sup> On the other hand, the EBT regulations may create a right to timely benefit availability: "The State agency shall insure that the EBT system complies with the expedited service benefit delivery standard and the normal application processing standards . . . ." 7 C.F.R. § 274.12(f)(8) (1998).

<sup>291</sup> State statutes, for example, may create such rights. See, e.g., CAL. WELF. & INST. CODE § 10071 (West 1998) ("Any benefits provided to recipients under the department's authority may be distributed through the electronic benefits transfer system as long as the recipient has reasonable access to his or her benefits.") (emphasis added).



\$7000 who show up at 5 AM on the first Thursday of the month to stand in line at the welfare center.<sup>292</sup>

More importantly, the necessity for such practices and procedures must be weighed against the brutal need experienced by beneficiaries. While a state interest in more effective, streamlined, or efficient procedures might outweigh the consequent harms inflicted upon recipients, the private interest must be much more substantial. To borrow from the language of equal protection analysis, an onerous bureaucratic procedure might not deny due process if rationally related to a legitimate state interest, but the very same procedure could violate due process unless it is strictly necessary to achieve a compelling private interest. As noted above, it is one thing for the courts to compel the state to spend its resources on pretermination hearings. The *Mathews* Court recognized the trade-offs such compulsion would involve: "Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited."<sup>293</sup> The same caution need not, and should not, be exercised when cutting into Lockheed's profit margin. Hence beneficiaries under a privatized welfare system may justifiably claim that the agency's tendency to make erroneous determinations supports a right to pretermination hearings,<sup>294</sup> the consistent failure to deliver benefits on time supports a right to emergency assistance, and the comparative cost of paying transaction fees suggests that this burden should fall on the provider, not the recipient.

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<sup>292</sup> See, e.g., *Perez v. Lavine*, 412 F. Supp. 1340 (S.D.N.Y. 1976). The Court established in *Morton* that, "This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, but also to employ procedures that conform to the law." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974) (citations omitted). This principle clearly prevents agencies from engaging in churning, even churning on the basis of ostensibly reasonable qualifications: "No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an *ad hoc* basis by the dispenser of the funds." *Id.*

<sup>293</sup> *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

<sup>294</sup> *Mashaw* suggests that the tendency of state welfare bureaucracies to commit errors, compared to the relative competence of the Social Security Administration, explains why *Goldberg* required a pretermination hearing in the first case, but *Mathews* required none in the latter. See *MASHAW ET AL.*, *supra* note 27, at 273.

## 2. The Right to Fair Notice

A second critical component of due process is notice.<sup>295</sup> The Supreme Court has repeatedly recognized that, "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"<sup>296</sup> The low level protections accorded to benefit recipients under the federal EBT regulations, however, deny these individuals "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"<sup>297</sup> Because the Electronic Fund Transfer Act and its enforcing regulations secure appropriate due process protections, this framework should replace the current regulations governing EBT.

In the developing law of electronic cash, the federal regulation that requires providers to supply adequate notice to account holders is known as Regulation E.<sup>298</sup> Regulation E establishes a set of procedures for error resolution, resolution of liability questions, and information sharing that enables account holders to monitor whether their funds are being kept properly. Initially, the Federal Reserve Board suggested that the protections of Regulation E would extend to EBT, explaining that "EBT transactions fit the definition of electronic funds transfers and must be covered by the same rules."<sup>299</sup> However, the PRWORA provided that EBT programs established under state or local law would be excluded from Regulation E.<sup>300</sup>

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<sup>295</sup> See *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (holding that due process requires "some kind of notice").

<sup>296</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)); see also *LaChance v. Erickson*, 118 S. Ct. 753, 756 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard.").

<sup>297</sup> *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

<sup>298</sup> Regulation E provides consumer protections pursuant to the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-1693r (1996).

<sup>299</sup> Quoted in Barbara A. Rehm, *States Seek Protection from Fraud Liability on Electronic Benefits*, AM. BANKER, Mar. 28, 1996, at 2.

<sup>300</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 825(a)(3) (1996) (amending 7 U.S.C. § 2016(i)) ("Disclosures, protections, responsibilities, and remedies established by the Federal Reserve Board under section 904 of the Electronic Fund Transfer Act shall not apply to benefits delivered under this Act through any electronic benefit transfer system."). The Electronic Fund Transfer Act now provides that, "The disclosures, protections, responsibilities, and remedies established under this subchapter, and any regulation prescribed or order issued by the Board in accordance with this subchapter, shall not apply to any electronic benefit

In August 1997, the Federal Reserve Board developed regulations that specifically exempt "needs-tested benefits in a program established under state or local law or administered by a state or local agency."<sup>301</sup> This decision is particularly odd in that federal benefits, or pooled accounts, still get the protection of Regulation E, but state benefit programs do not. As a result, different federal regulations govern state distribution of Food Stamps and state-administered cash benefits through EBT programs.

The rights enjoyed by beneficiaries under the Food Stamp EBT regulations are distinctly inferior to those of Regulation E. Writing in 1993, two analysts, then at the Center on Social Welfare Policy and Law, found four different areas in which Regulation E offered protections superior to the EBT regulations, three of which will be addressed below.<sup>302</sup> While financial institutions need not comply with each specific provision of Regulation E in administering government fund accounts, the protections for such individuals are substantially similar.<sup>303</sup> Even if the financial institution does the minimum amount necessary to comply, Regulation E offers far greater protection than EBT regulations. Part of the reason is that "Regulation E works as a built-in contract whose terms cannot be negotiated, placing an uneducated recipient on a somewhat more equal bargaining level with the government provider."<sup>304</sup> The EBT regulations, by contrast, allow states and private banks to impose inequitable conditions.

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transfer system . . . . " 15 U.S.C. § 1693b(d)(2)(B).

Advocates for the poor had tried to extend the safeguards of Regulation E to EBT, but to no avail. See 142 CONG. REC. S8395-04 (July 31, 1996) ("Clearly, it is unfair to deny reasonable safeguards to welfare beneficiaries.") (statement of Sen. Edward Kennedy (D-MA)).

<sup>301</sup> 12 C.F.R. § 205.15(a)(1) (1998); see *Fed Frees States, Locals from EBT Compliance with Reg E*, AM. BANKER, Aug. 14, 1997, at 17. The private sector opposed the expansion of EBT largely on the basis of cost. See Pulliam, *supra* note 164, at 531-32.

<sup>302</sup> See Leyser & Blong, *supra* note 164, at 421-24. Leyser and Blong also explain that Regulation E imposes a fourth requirement that most ATM consumers take for granted—a printed receipt for every transaction. See 12 C.F.R. § 205.9. Since Leyser and Blong wrote, however, similar requirements were set up in the context of Food Stamp EBT systems, see 7 C.F.R. § 274.12(f)(3), yet the regulations do not provide for balance inquiries without a withdrawal. For an early treatment of the issues raised by EBT in the context of consumer protection, see Leymaster, *supra* note 195. For the most up-to-date analysis of problems with EBT, see Leyser, *supra* note 164.

<sup>303</sup> See 12 C.F.R. § 205.15.

<sup>304</sup> Budnitz, *supra* note 86, at 765.

First, Regulation E is preferable in that it limits the liability of recipients for unauthorized transactions. An account user is liable only if the financial institution has disclosed its procedures for unauthorized transfers, and if so, the consumer is only liable for \$50 if he or she gives two days notice of the transfer, or up to \$500 if timely notice was not given.<sup>305</sup> Furthermore, if the consumer discovers the unauthorized transfer by examining his or her statement, the consumer has sixty days within which to give notice.<sup>306</sup> In light of the vulnerability of benefit populations to theft, which in theory was part of the reason to adopt an EBT-based delivery system, it makes little sense that the EBT regulations do not account for the threat of theft by establishing similar standards for liability.<sup>307</sup> Under the EBT regulations, the state agency assumes liability for lost or stolen benefits only when the recipient reports that the card or PIN number has been lost or stolen.<sup>308</sup> As the theft of a card may not be immediately apparent, an individual recipient may lose a great deal of money before he or she realizes that the card has been stolen. Because certain states impose restrictions on the number of withdrawals one may make from an EBT account, a beneficiary may not use his or her card frequently and thus may not notice that it has disappeared.

Second, Regulation E requires the account holding institution to provide disclosure of the terms and conditions of the account. Recipients are entitled to disclosure as to fees, services, extent of liability, and processes for stopping payment and error resolution.<sup>309</sup> The error resolution notice must be sent to each consumer once per calendar year.<sup>310</sup> These disclosures must be "clear and readily understandable, in writing, and in a form the consumer may keep."<sup>311</sup> If an EBT beneficiary has some concern about the accuracy of his account statements, or believes the financial institution is acting inappropriately, he or she should at least have access to the rules to make such a claim properly. The EBT regulations, by contrast, require only that printed receipts be issued at the time of transaction.<sup>312</sup> Receipts are useful, but hardly a substitute for the

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<sup>305</sup> See 12 C.F.R. § 205.6(a).

<sup>306</sup> *Id.* § 205.6(b)(3).

<sup>307</sup> See Budnitz, *supra* note 86, at 770-71 (noting problem of unauthorized transfers).

<sup>308</sup> 7 C.F.R. § 274.12(f)(5)(iv) (1998).

<sup>309</sup> 12 C.F.R. § 205.7(b)(1)-(10) (1998).

<sup>310</sup> *Id.* § 205.8(b).

<sup>311</sup> *Id.* § 205.4(a).

<sup>312</sup> See 7 C.F.R. § 274.12(f)(3). These receipts must comply with Regulation E's dis-

complete picture afforded by periodic statements. Nor would receipts alone be of much use to an individual beneficiary in a fair hearing who sought to prove that funds due to him or her were never deposited into the account, or that other funds had been stolen without his or her knowledge, or that the state agency had wrongfully recouped EBT benefits. The failure to provide beneficiaries with a full picture of their accounts makes it virtually impossible to challenge adverse state action. The beneficiary simply lacks adequate information.

Third, Regulation E's procedures for error resolution are superior to the federal Food Stamp EBT regulations. This area is especially important because so many fair hearings turn on asserted agency error.<sup>313</sup> Regulation E sets up an error rectification procedure, with specific periods for giving notice and conducting an investigation, concluding with a written explanation of the financial institution's decision.<sup>314</sup> Federal EBT reconciliation provisions, on the other hand, are geared toward protecting the state's interest in knowing where the money goes, not protecting individual recipients' rights.<sup>315</sup> The recipient lacks the ability to challenge the statement when necessary. All information is in the hands of the private financial institution, and without the protections afforded by Regulation E, individual benefit recipients have no way to correct or evaluate such data. A subsidiary issue to error resolution is recoupment. In the event that the providing agency believes that it has erroneously allocated funds to an individual recipient, what are the appropriate remedies? An EBT system allows the private bank to withdraw money immediately and without notice.<sup>316</sup> In the current paper-based

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closure conditions. See *id.* § 274.12(f)(3)(ii). The regulations do provide that participant may request a written 60-day transaction history, see *id.* § 274.12 (f)(1), but no provision mandates that they be informed of this right.

<sup>313</sup> Such error is simply the nature of the beast in dealing with huge computer databases. See William M. Bulkeley, *Databases Are Plagued by Reign of Error*, WALL ST. J., May 26, 1992, at B6.

<sup>314</sup> 12 C.F.R. § 205.11.

<sup>315</sup> 7 C.F.R. § 274.12.

<sup>316</sup> The USDA has proposed amending the Food Stamp regulations to allow automatic deductions from an EBT account with contemporaneous, rather than advance, notice. See Notice of Proposed Rulemaking, 63 Fed. Reg. 27,511 (proposed May 19, 1998). This is already a problem in the states. See Leymaster, *supra* note 195, at 721 (describing recoupment without notice in Cuyahoga County, Ohio). Minnesota allows the agency or bank to immediately deduct the amount from the account. See MINN. STAT. ANN. § 256D.06 (West 1998). Proposed legislation in Texas provides that the agency "shall . . . use private collection agents to collect reimbursements for benefits granted by

system, notice must precede recoupment, allowing the beneficiary an opportunity to contest the agency action.

The final reason Regulation E is superior to the federal Food Stamp EBT regulations is that the latter fail to require a periodic statement of the amount of money in the account. The contractors' opposition to sending out such statements motivated the Federal Reserve Board to exempt EBT accounts from this requirement of Regulation E.<sup>317</sup> Once again, according second-class treatment to the accounts of poor and low-income individuals undermines the "mainstreaming" aim of EBT: "Because recipients are on a tight budget, one of the most important items of information recipients need is the balance in their account so they can be sure they have enough for necessities."<sup>318</sup> It is difficult to compel individuals to be "responsible" while denying them the necessary tools.<sup>319</sup> Regulation E would have furthered the ability of low-income recipients to plan their financial affairs; it required a periodic statement for each monthly cycle in which an electronic fund transfer has occurred, or a quarterly periodic statement if no transfer occurred, setting forth the same information most account holders get on their statements every month.<sup>320</sup>

The likely response to an argument for heightened due process rights for recipients of EBT, commensurate with Regulation E, is that these benefits are welfare—a handout—not somebody's hard-earned

the department in error . . . ." TEX. HUM. RES. CODE ANN. § 31.001 (West 1998), amended by 1997 TEX. SESS. LAW SERV. 75th Leg., ch. 1153, § 1.08 (West).

<sup>317</sup> See *Fed Frees States*, *supra* note 301, at 17.

<sup>318</sup> Budnitz, *supra* note 86, at 766.

<sup>319</sup> See CAL. WELF. & INST. CODE § 10065(b) (West 1998) ("The goals of electronic benefit transfer are . . . to afford public social services recipients the opportunity to better and more securely manage their financial affairs.").

It is worth asking whether the inappropriate requirements of the EBT regulations could support an argument that the regulations amount to "unconstitutional conditions" imposed on benefit receipt. For arguments tending to support this claim, see Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185 (1990); Julie A. Nice, *In the Context of Welfare and Reproductive Rights: Making Conditions Constitutional by Attaching Them to Welfare, The Dangers of Selective Contextual Ignorance of the Unconstitutional Conditions Doctrine*, 72 DENV. U. L. REV. 971 (1995); Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 FORDHAM URB. L.J. 1051 (1995). This claim is unlikely to succeed, however, because these regulations do not clearly infringe on any of the rights commonly asserted in unconstitutional conditions cases, such as freedom of religion. See *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *Sherbert v. Verner*, 374 U.S. 398, 401 (1963).

<sup>320</sup> See 12 C.F.R. § 205.9(b) (1998).

money. It could be argued that if the government is merely giving people money, these funds should not be treated the same way as ordinary bank accounts.<sup>321</sup> This argument is faulty. Whether or not government benefits sent to an electronic account constitute a property interest in the same way that depositing a paycheck does is a separate question from the question of what process is due.<sup>322</sup> The property interest vests once the federal or state government establishes a benefit program,<sup>323</sup> and once the property interest vests, due process applies. The second-class due process protections of the federal Food Stamp EBT regulations should therefore be replaced by Regulation E.<sup>324</sup>

### 3. The Right to be Heard

The delegation of state authority to administer a welfare system raises a number of due process concerns. The most obvious objec-

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<sup>321</sup> EBT will deposit benefits into existing bank accounts for Food Stamp and TANF participants. See, e.g., 305 ILL. COMP. STAT. ANN. 5/11-3.1 (West 1998). Hence there is some ambiguity as to whether EBT funds are like assets in any bank account. See Pulliam, *supra* note 164, at 533-38, 541-43. Under federal law, benefits may be carried over from month to month. See 7 C.F.R. § 274.12(e)(2)(vi). On the other hand, the balance escheats to the state upon the death of the account holder. See, e.g., HAW. REV. STAT. ANN. § 346-39.5 (Michie 1997).

<sup>322</sup> The Court has frequently drawn comparisons between welfare benefits and employment rights to suggest that, at least in due process analysis, these claims are comparable. In *Roth*, the Court ruled that, "Just as the welfare recipients' 'property' interest in welfare payments was created and defined by statutory terms, so the respondent's 'property' interest in employment . . . was created and defined by the terms of his appointment." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972). Other types of benefits also fall into the same category of due process protections such that a prerevocation hearing is required. See *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (consumer goods); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (wages).

<sup>323</sup> In *Roth*, the Court explained the necessary showing for an entitlement: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577. The legitimate claim of entitlement in this case arises from the statutory definition of the eligible class of beneficiaries. See *supra* note 257.

<sup>324</sup> While the provisions of Regulation E provide an appropriate framework for EBT, not every consumer protection provision of the Electronic Fund Transfer Act ("EFTA") should be adopted in the EBT context. For example, EFTA includes a treble damages provision that applies when the financial institution fails to recredit the consumer's account within a certain period after an error has been discovered. See 15 U.S.C. § 1693f (e) (1998). Hence, the policy recommendations of this Article are limited to Regulation E.

tion, that a state legislature may not delegate certain duties or responsibilities, lacks firm constitutional support.<sup>325</sup> The more significant danger is that privatizing welfare involves a grant of governmental authority to a financially interested party to make determinations affecting individual rights. As one theorist puts it: "The concern is that governmental power—power coercive in nature—will be used to further the private interests of the private actor, as opposed to some different public interest."<sup>326</sup> As the analysis of the next few paragraphs demonstrates, it would violate the Due Process Clause to have a private company determine with finality which individuals were entitled to benefits and whether benefits were improperly denied. The state must retain oversight responsibility, which would include a right to appeal adverse determinations in individual cases and to pre-enforcement review of general policies. The PRWORA eliminated the statutory right to a fair hearing.<sup>327</sup> Yet, by allowing a financially interested party to provide benefits, privatization creates a need for safeguards to protect the due process rights to which an individual beneficiary is entitled.

Dispute resolution in a privatized welfare system may take many forms. The least problematic possibility is that the present system of state administrative hearings, with right of appeal to state court, would remain. On this model, the private corporation simply doles out benefits without the power to enforce any individual or policy decisions. It is unlikely that privatization programs would adopt this model, however, because it denies the private provider any say in benefit distribution which, after all, is where the savings are expected. A more likely scenario is that the private provider has the power to make initial determinations of eligibility for, or termi-

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<sup>325</sup> The Court abandoned the so-called "nondelegation doctrine" long ago. See *MASHAW ET AL.*, *supra* note 27, at 55. Only on the state level is there much activity relating to this doctrine, and even there the case law is inconsistent. See Lawrence, *supra* note 107, at 650. Nor does a slightly different version of this argument, that governmental services must be performed by governmental workers, carry much weight. In *Corwin v. Farrell*, 100 N.E.2d 135 (N.Y. 1951), the New York Court of Appeals explained that "neither constitutional mandate nor statutory enactment requires that all services furnished or all labor performed for a governmental agency must be supplied by persons directly employed." *Id.* at 138; see also Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 43-45 (1995).

For an analysis of the irrelevance of the nondelegation doctrine in the case of privatized correctional facilities, see Warren Ratliff, *The Due Process Failure of America's Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371, 382-84 (1997).

<sup>326</sup> Lawrence, *supra* note 107, at 659.

<sup>327</sup> Fair hearing rights formerly were delineated at 42 U.S.C. § 602(a)(4) (1994).



nation of, benefits, subject to appeal to state administrative agencies or state court. Texas, for example, planned to contract out the gathering of information to establish eligibility while leaving the actual determination of eligibility in the hands of state employees. This division raises issues of procedural fairness, as well as the question of who has substantive control over these decisions.<sup>328</sup>

The basic problem with a private corporation delivering welfare services is not just that it is likely to deny benefits even to qualified recipients, but that its fiduciary obligations incline it to do so. Because a publicly traded company has a fiduciary duty to maximize shareholder profits, the private provider will seek to maximize profits even if it means harming the needy.<sup>329</sup> Texas's plan, for example, would have required the successful bidder and operator to provide services at \$560 million annually. If they operated below this amount, they would pocket the difference.<sup>330</sup> For this reason child welfare experts, for example, allege that "for-profits have a financial duty to place the interests of their shareholders ahead of what is best for children, and that states are ill prepared to hold such companies accountable."<sup>331</sup> Even the best intentioned corporation thus has a private interest in the outcome of any and all determinations of benefits.

The Supreme Court has established that financially interested parties cannot exercise ultimate authority over individual rights. Back in the days of Prohibition, the Court upheld a challenge brought by a bootlegger against Ohio's system of criminal fines in liquor cases.<sup>332</sup> An Ohio law appointed local mayors as judges in criminal trials to determine whether the defendant bootlegger should be fined. In *Tumey v. Ohio*, the Court struck down this arrangement on the ground that because the mayors' cities would benefit from the fines imposed, the mayors could not act as neutral arbiters.<sup>333</sup> In doing so, the Court set forth the basic rule against financial interestedness that is of paramount relevance to the current debate on privatization:

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<sup>328</sup> See Sawicky, *supra* note 5, at 21.

<sup>329</sup> See Bernstein, *supra* note 130, at 1 (citing Henry A. Freedman, Executive Director, Center on Social Welfare Policy and Law).

<sup>330</sup> See John Carlin, *How to Profit from the Poor*, INDEPENDENT (London), Sept. 29, 1996, at 12.

<sup>331</sup> Bernstein, *supra* note 130, at 1.

<sup>332</sup> *Tumey v. Ohio*, 273 U.S. 510 (1927).

<sup>333</sup> See *id.* at 512.

It certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.<sup>334</sup>

Other cases have emphasized that the principle of financial disinterestedness is rooted in the Due Process Clause.<sup>335</sup> In the context of welfare rights, *Goldberg* suggests that the matter is not even open to question: "of course, an impartial decision maker is essential."<sup>336</sup>

Significantly, the protection against financial disinterestedness applies not only against state authority, but also private power. In *Gibson v. Berryhill*, the Court invalidated the regulatory powers of a state optometry board because the board was composed of private practitioners, ruling that, "those with a substantial pecuniary interest in legal proceedings should not adjudicate these disputes."<sup>337</sup> This line of reasoning also emerged in two critical civil procedure cases invalidating prejudgment remedies: *Fuentes v. Shevin*, which struck down a Florida statute allowing a plaintiff to seize the property of a defendant before the latter could appear before a judge;<sup>338</sup> and *Sniadach v. Family Finance Corp.*, which allowed prejudgment garnishment of a defendant's wages.<sup>339</sup> The Court noted in both

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<sup>334</sup> *Id.* at 523. The Court elaborated: "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Id.* at 532. The rule that no man may be a judge in his own case has ancient origins, and became part of the Anglo-American common law in 1608, when Chief Justice Coke upheld the right of a graduate of Cambridge University to practice medicine without the approval of judicial representatives of a monopoly conferred on the graduates of University College, London. See *Dr. Bonham's Case*, 8 Co. 114a, 118a, 77 Eng. Rep. 646, 652 (K.B. 1610).

<sup>335</sup> See *Amett v. Kennedy*, 416 U.S. 134, 197 (1974) (upholding dismissal of employee from nonprobationary job in the Office of Economic Opportunity); *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972) (invalidating trial for traffic offenses before town mayor, whose court provided a substantial portion of the fines).

<sup>336</sup> *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

<sup>337</sup> 411 U.S. 564, 579 (1973).

<sup>338</sup> 407 U.S. 67, 81-82 (1972) ("[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process had already occurred.")

<sup>339</sup> 395 U.S. 337, 341-42 (1969) (noting that even a temporary loss of wages could lead to poverty or "drive a wage-earning family to the wall"); see also *Goldberg*, 397 U.S. at 264 (citing *Sniadach*, 395 U.S. at 341-42).

cases that these remedies were not per se impermissible, only that the potential harms to defendants were so serious that a disinterested judge should exercise preenforcement review over their exercise.

In short, while the PRWORA stripped away fair hearing rights, the role of private welfare provision requires fair hearing rights to be reinstituted.<sup>340</sup> Because every decision of import made by a private provider potentially furthers corporate profits at the expense of beneficiaries, every eligibility decision, termination of benefits, change in status, or implementation of a general policy rule should be appealable when made by a private corporation. As in *Goldberg*, the elements of the hearing should include timely and adequate notice; an opportunity to defend oneself by presenting arguments, evidence, and witnesses; the right to counsel if so desired; an impartial decision-maker; a decision based solely on legal rules; and a statement of reasons.<sup>341</sup> Privatized welfare does not yet offer anything close to these protections.

Instituting fair hearing rights for rule-making is an expansion of the hearing rights allowed prior to PRWORA, but a logical one: "One settled element of procedural due process is that the decision-maker must not be personally biased, that he must make his decision according to established standards or a disinterested view of the public interest."<sup>342</sup> Put simply, a private entity cannot determine whether an individual recipient is entitled to benefits because it has too great a financial stake in the answer. As noted above, many private providers of welfare benefits are paid in part based on how many cases they close. In light of this fact, it is rather obvious how most claims alleging wrongful termination of benefits would

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<sup>340</sup> Thus, while it is correct to say that, "Unlike the AFDC statute, the Personal Responsibility Act does not explicitly grant applicants the right to appeal a denial of benefits," Conway, *supra* note 236, at 220, the fact that there are private providers does impose appeal requirements. For other arguments in support of expanding due process hearing rights in the context of privatized systems, see Lawrence, *supra* note 107, at 691; Ratliff, *supra* note 325, at 388-90.

<sup>341</sup> See *Mathews v. Eldridge*, 424 U.S. 325, 332 n.4 (1976); *Goldberg*, 397 U.S. at 266-71. While it is true that "[i]n only one case, [*Goldberg*], has the Court required a full adversarial evidentiary hearing prior to adverse governmental action," *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985), the protected interest in *Goldberg* is the same as the protected interest in this case.

<sup>342</sup> Lawrence, *supra* note 107, at 661; see also Ratliff, *supra* note 325, at 388 ("If a financial conflict of interest would disqualify an elected legislator or executive official, then procedural 'fairness' or 'impartiality' should surely prevent mere administrative regulators from participating in rulemaking decisions in which they have a personal financial stake." (footnote omitted)).

fare. Even nonfinal decisions should be appealable to a neutral state arbiter, because the corporation could make a great deal of money through delay. The claimant might give up, and even if the claimant ultimately wins, the corporation can earn interest from the money while the case is pending.<sup>343</sup>

It may seem paradoxical that privatization would require a more prominent role for the state in protecting individual rights; after all, isn't privatization supposed to mean less government? However, by injecting the problem of financial interestedness into benefit provision, privatization heightens the level of rights protections required under the Due Process Clause. Review by state court also promotes accountability and ensures that the private corporation maintains an appropriate balance between its fiduciary obligations to shareholders and its obligations to the client populations it contracted to serve. "Privatization reduces accountability. Governments can be voted out, but private owners are insulated from the opinions of ordinary citizens and contractors are protected by legal agreements."<sup>344</sup> These protections also ensure that states will not adopt draconian, unjust, or irrational welfare laws and then lay the blame at the feet of a legally immune private corporation. A private corporation may operate a welfare system with greater speed and efficiency; however,

The Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.<sup>345</sup>

As objectionable as it may be to insulate private corporations from public opinion, insulating private corporations from public rights is even more noxious. Resurrecting the system of fair hearings over virtually all determinations of import made by a private welfare provider may seem drastic. This solution, however, is justified by

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<sup>343</sup> In the EBT context, the institution gets the "float," the interest that accumulates while the funds are being disputed. See Leymaster, *supra* note 195, at 726.

<sup>344</sup> Herman, *supra* note 122, at 10; see also Lawrence, *supra* note 107, at 660 ("But society probably relies most fundamentally on the political process, on its ability to vote the rascals out. And that remedy is not available against private rascals.").

<sup>345</sup> Arnett v. Kennedy, 416 U.S. 134, 223-24 (1974) (quoting Fuentes v. Shevin, 407 U.S. 67, 90-91 n.22 (1972)).

the equally drastic step of privatizing service provision, placing the fiduciary obligation and economic incentives of the private corporation in conflict with the well-being of needy citizens.

## CONCLUSION

The privatization for profit of welfare and other social services is a dangerous experiment. As states and private corporations scramble to allocate power over the lives of this nation's neediest citizens, it is important to recognize that the Constitution remains a crucial line of defense. The safeguards of the Due Process Clause are just as relevant and extensive in a privatized system as in a state-operated system. While the due process rights of individual claimants will not always trump a state interest, such rights will certainly trump private interests. Moreover, the right to a fair hearing before an impartial decision-maker is greatly magnified in importance where a private corporation operates a welfare system and, as a result, has a private pecuniary interest in the outcome. The rhetoric of privatization may emphasize less government, but the result of privatization is to raise due process claims for the courts and to increase the need for monitoring by the state government through administrative decisionmaking or judicial review. Welfare reform has often tried to define due process down. This effort, however, overlooks the fact that the Constitution protects a core set of dignitary rights. If these rights are eliminated in one context, they surface in another. The federal government, states, and private corporations unquestionably should have the flexibility to experiment with welfare provision, but certain fundamental protections cannot be compromised.