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The New Localism in Welfare Advocacy

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THE NEW LOCALISM IN WELFARE ADVOCACY

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Much ink has been spilled examining and critiquing various modes of advocacy that lawyers for the poor use, don't use, or are alleged to use.[1] When it comes to poverty law, it seems that the landscape is filled with arm chair generals, Monday morning quarterbacks and back seat drivers all advising, criticizing and mixing metaphors in a cacophonous din. Accordingly, I hesitate to offer another contribution to this literature. I will restrict myself to a single point—forms of advocacy cannot be considered apart from the legal structure and context of the object of advocacy. This point seems obvious, but observers seldom draw this connection, concentrating instead on issues that are internal to the advocacy process, such as the relationship between advocates and clients. Second, a corollary to this point: As the legal structures shift and evolve, methods of advocacy must also adapt to these changing circumstances.

This essay elaborates on this point and its corollary by examining forms of advocacy in the area of welfare. First, it points out the connection between the advocacy forms favored by poverty lawyers and the structure of the Aid to Families with Dependent Children (AFDC) program. In particular, it shows how AFDC and the class action went hand in hand. The centralized and rule based structure of AFDC made it particularly susceptive to class action litigation. Next, this essay discusses the growing criticism of the class action as a tool for social reform, and the implications of this criticism for welfare advocacy. Finally, this essay examines the structure of welfare as it is emerging from the process of welfare reform and highlights some of the ramifications of these changes for welfare advocacy. As the welfare system becomes increasingly decentralized and fragmented, critical decisions are increasingly made on the local level. Accordingly, effective advocacy must also be structured to influence decisions locally. Successful advocacy will depend on identifying the loci of decision making in the new regime of welfare and exploiting or creating opportunities to exert influence at these points.

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1. For a compilation of scholarly writing about the practice of poverty law, see *Bibliography to the Conference on the Delivery of Legal Services to Low Income Persons: Professional and Ethical Issues*, 67 FORD. L. REV. 2731 (1999).

1. AFDC and the Law Reform Model

In the 1960s, the law reform model of advocacy emerged as the dominant means used by poverty lawyers to effect social change.[2] The law reform model posited that social change can be brought about through test cases and class action litigation. Analogizing from the litigation strategy of civil rights activists, poverty lawyers sought to use the courts to establish core principles concerning the rights of people in poverty and to implement and enforce these principles through judicial decree. The test case model was first applied in the poverty law context by Edward Sparer and the Center for Social Welfare Policy and Law.[3] As used by its progenitors, the test case model focused heavily on the goal of establishing welfare rights, and many of the most well known cases brought by poverty lawyers dealt with the subject of welfare.[4]

Public benefit programs were a natural fit with this advocacy strategy. First, the programs were run by large government agencies, so that advocacy for systemic change could target a single institution. A change in policy by a welfare agency affects thousands of people. In contrast, in many other areas of vital importance to people in poverty, social conditions can only be altered by changing the conduct of thousands of individuals. In the important areas of health care, housing, and employment, the critical decisions affecting poor individuals and communities are principally made by large numbers of private parties that cannot possibly be subjected to a single court decree. These problems are polycentric, resulting from the interplay of individuals, market forces, and institutional constraints. They fit poorly into the traditional bi-polar rubric of litigation, which requires one or more similarly situated plaintiffs who are pitted in opposition to no more than a few defendants.[5] It is by no means clear who one sues in order to create rights to housing, health care or jobs for people in need.

This is not to say that the law reform model could not be used in these fields. The judicial recognition of the warranty of habitability and other rights

2. *See* MARTHA DAVIS, BRUTAL NEED: LAWYERS & THE WELFARE RIGHTS MOVEMENT (1993); Allen Redlich, *Who Will Litigate Constitutional Issues for the Poor?*, 19 HASTINGS CONST. L. Q. 745 (1992).

3. Martha Davis' fascinating history of the Center for Social Welfare Policy and Law provides a thorough examination of how Sparer and his colleagues borrowed and adapted the approach of the NAACP Legal Defense Fund. *See* DAVIS, *supra* note 2.

4. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); King v. Smith, 392 U.S. 309 (1968) Rosado v. Wyman, 397 U.S. 397 (1970); Wyman v. James, 400 U.S. 309 (1971); Dandridge v. Williams, 397 U.S. 471 (1970); Graham v. Richardson, 403 U.S. 365 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969). For a comprehensive discussion of law reform litigation in the area of welfare, see Barbara Sard, *The Role of the Courts in Welfare Litigation*, 22 CLEARINGHOUSE REV. 367 (1988). *See generally* SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS (1994).

5. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

for tenants shows that the law reform strategy could yield benefits even in these areas.[6] But the impact of litigation victories in a field such as housing is inherently difficult to ascertain. The task of improving housing conditions in a given city or state depends on changing the conduct of tens of thousands of independent landlords. In housing and other areas, advocates attempted to overcome the problem of polycentricity by concentrating on the portions of the issue in which government is heavily involved. For example, poverty lawyers have focused on public housing[7] and public funding for health care through the Medicaid program.[8] Although both of these focuses achieved important gains, they provided only a limited perspective on these problems that did not really strike at their heart. In contrast, the welfare system seemed tailor-made for the law reform approach. A lawsuit directed at the administrators of a state AFDC program, or at the Department of Health and Human Services could produce a judicial order requiring, in one swoop, that all applicants or recipients be treated in a new and different manner.

In addition, by the late 1960s the AFDC program became increasingly rule-based.[9] Prior to that point, the program was administered through a social work model, in which critical decisions were left to the professional discretion of case workers.[10] Thus, even though the programs were administered by single agencies, the agencies themselves relied on comparatively few fixed rules. The increasingly rule-based nature of the welfare system facilitated the reliance on litigation-based advocacy strategies in a number of ways. First, in

6. *See, e.g.*, Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970) (finding implied warranty of habitability in leases for rental apartments). *Cf.*, Lindsey v. Normet, 405 U.S. 56 (1972) (rejecting due process challenge to summary eviction procedure).

7. *See, e.g.*, Miles v. Metropolitan Dade Co., 916 F.2d 1528 (11th Cir. 1990), *cert. denied*, 502 U.S. 898 (1991) (class action challenging housing authority practice of charging tenants for court costs in unsuccessful eviction proceedings); Durrett v. Housing Authority of the City of Providence, 896 F.2d 600 (1st Cir. 1990) (approving consent decree in class action challenge to conditions in public housing). I do not mean to suggest the poverty lawyers have ignored issues relating to private sector low income housing, only that they have recognized that a focus on public or subsidized housing can leverage their limited resources.

8. *See, e.g.*, Boatman v. Hammons, 164 F.3d 286 (6th Cir. 1998) (class action challenging improper notice of denials of Medicaid assistance for transportation expenses); Catanzano v. Wing, 103 F.3d 223 (2d Cir. 1996) (class action challenging reduction in Medicaid home health care); Alexander v. Britt, 89 F.3d 194 (4th Cir. 1996) (declining to modify consent decree setting deadlines for processing Medicaid applications).

9. *See* William Simon, *Legality, Bureaucracy & Class in the Welfare System*, 92 YALE L.J. 1198 (1983). It could be argued that the shift to a rule based system was itself the product of poverty law advocacy. Although this point has some validity, in the late 1960s, increasing reliance on rules was a general trend in administration. *See* Richard Pierce, *Rulemaking and the APA*, 32 TULSA L.J. 185, 188-91 (1996). *See also* KENNETH DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 52-96 (1969) (arguing for increased use of fixed rules as a means of constraining administrative discretion).

10. *See* Simon, *supra* note 9, at 1201-1203.

a rule-based system, agency policies are more easily discerned and therefore more readily challenged in litigation. In the absence of formal rules, the operative policies of a welfare agency cannot be challenged unless they are uncovered and their existence proven, a process often difficult and resource intensive.[11]

Second, the multiple tiers of authority in the AFDC program resulted in many different sources of rules. Each program was subject to a federal statute and regulations, as well as a state statute and regulations. Conflicts between these many sources of authority provided a fertile source for legal claims that could be exploited in the court room to the benefit of recipients.[12] Moreover, the legal claims arising from these conflicts fell well within the ambit of traditional judicial functions. Many of the cases required only the traditional judicial function of statutory interpretation, deciding whether one set of rules complies with another set. AFDC litigation seldom broke new ground at the remedial stage, as ongoing judicial supervision of welfare administration was seldom ordered. In a rule based system, an injunction generally led to the recission of one rule and the substitution of a revised version in its stead.[13] Welfare class actions rarely tested the remedial powers of the courts in the same way as litigation over prison conditions, treatment of residents of long term care facilities, or school desegregation.

Finally, the rule based structure of the AFDC program facilitated the use of the class action. Because large numbers of individuals could be harmed by a single rule of general applicability, class certification requirements were easily met. The prerequisites of typicality, commonality and numerosity were not difficult to fulfill in such a context.[14]

Many have written about the allure of litigation as an apparent "magic bullet" for dispatching social problems.[15] In the context of welfare advocacy, however, the focus on litigation also had some grounding in reality. The structure of the AFDC program made welfare a particularly fertile ground for test case and class action litigation, and poverty lawyers exploited this match the fullest extent that they could.

11. Agencies frequently claim that less formal means of instruction such as guidelines or training materials do not constitute binding policy statements and thus do not reflect the official position of the agency.

12. *See, e.g.*, Carleson v. Remillard, 406 U.S. 598 (1972); Lewis v. Martin, 397 U.S. 552 (1970); Shea v. Vialpando, 416 U.S. 251 (1974); Van Lare v. Hurley, 421 U.S. 338 (1974). *See generally* Sard, *supra* note 4 (explaining how welfare litigation shifted from a focus on constitutional challenges to statutory claims after the decision in *Dandridge v. Williams*).

13. The Supreme Court held that the Eleventh Amendment prohibits federal courts from ordering retroactive payments of benefits to recipients. *See* Edelman v. Jordan, 415 U.S. 651 (1974); Quern v. Jordan, 440 U.S. 332 (1979).

14. *See* Fed. R. CIV. P. 23(a).

15. *See generally* GERALD ROSENBERG, THE HOLLOW HOPE 336-343 (1991) (concluding that "courts act as 'fly paper' for social references who succumb to the 'lure of litigation'").

2. Critique of the Law Reform Model

Over the years, academics and poverty lawyers have become increasingly aware of the shortcomings of the law reform model. In fact, much of the writing on poverty lawyering consists of a cataloging of the deficiencies in litigation as a vehicle for social change.[16] In the place of litigation based strategies, critics have counseled poverty lawyers to focus on building low income communities by nurturing grass roots activism and helping to build community institutions.[17] This approach seeks to empower poor communities to achieve their own ends, with the lawyer serving principally as a resource of knowledge and expertise.

The critics of the law reform model focused on the fact that litigation based strategies of necessity place the lawyer in the forefront of the effort.[18] The idea of effecting sweeping change through the vehicle of a class action law suit, often rests on the image of the lawyer as hero—a savior who brings justice to the masses. The prominence of the lawyer in his arrangement, however, does not further the development of leadership and organization that is indigenous to the community served.[19] Indeed, some have argued that litigation strategies may have the negative consequence of encouraging reformers to look to the courts for salvation rather than doing the hard work necessary to mount a political or public relations campaign.[20] Critics have also pointed out that the law reform model favors a focus on issues that can be addressed through litigation, rather than on the needs of the community.[21] The question of whether there is a legal claim and how strong it is may take precedence over the question of which problem is most urgent or central to the lives of clients.

Inherent in these criticisms is a belief that litigation strategies cannot, or frequently do not, yield results that are sufficiently compelling to outweigh these drawbacks. Accordingly, many critics have also questioned whether litigation can really bring about lasting gains for people in poverty. When courts order the expansion of substantive or procedural rights, adversaries can respond by toughening the system at other points. Litigation for social change can be seen as a battle with Hydra – as one head is stricken off, two more take its place. Examples of this pattern can be readily identified in the area of welfare, where Congress overruled a string of litigation successes by amending

16. *See, e.g.*, GERALD LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISON OF PROGRESSIVE LAW PRACTICE (1992); Anthony Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992); Lucie White, *To Learn and Teach: Lessons from Dreifontein on Lawyering and Power*, 43 WISC. L. REV. 699 (1988).

17. *See, e.g.*, LOPEZ, *supra* note 16, at 32-38.

18. *See id.* at 14-16 (describing how a test case lawyer chooses the clients to fit the case, rather than the other way around).

19. *See* White, *supra* note 16, at 755.

20. *Id.* at 742; Alfieri, *supra* note 16, at 837-838.

21. White, *supra* note 16, at 757.

the Social Security Act and adding provisions that were even more harsh than those originally challenged.[22]

As I have argued elsewhere, these critiques can be overdrawn. Litigation strategies can yield positive results for poor clients.[23] It is difficult to contest the proposition that lawsuits such as *Shapiro v. Thompson*[24] and *King v. Smith*[25] yielded many rewards for poor families.

More importantly, the drawbacks of litigation must be considered in light of the difficulties that accompany the alternative approaches. Litigation has proven attractive precisely because the political process has often looked so bleak.[26] In a system dominated by money, it is not surprising that poor communities generally fare poorly in the political arena. Not only do poor people lack the resources to gain political clout, they are frequently targets of blame for many social ills. The focus on litigation can be seen as an attempt to appeal to the arm of government that is least influenced by money and social scapegoating. Although the judiciary is far from immune from either of these influences,[27] it strives to appear as a neutral arbiter of the rule of law. Poor people can and do win in court.

Nonetheless, the critique of litigation is not without force, particularly as a caution against an exclusive or reflexive reliance on litigation based strategies. The limits of litigation call for a diversification of approaches, rather than abandonment of the lawsuit as a vehicle for seeking social change.[28] This recognition of the limits of litigation based strategies together with growing reluctance of the judiciary to interfere with the administration of public benefit programs has posed a major challenge for advocates working on welfare and other public benefits programs.

22. *See* Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, 95 Stat. 357 (1981) (amending Social Security Act to undo the result of several Supreme Court decisions favoring AFDC recipients).

23. *See* Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401 (1995); *See also* Lynn Kelly, *Lawyering for Poor Communities on the Cusp of the Next Century*, 25 FORDHAM URBAN. L.J. 721 (1998).

24. 394 U.S. 618 (1969).

25. 392 U.S. 309 (1968).

26. *See* Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993).

27. In many states judges are elected for fixed terms, and are thus dependent on campaign contributions. *See* William Glaberson, *Fierce Campaigns Signal New Era for State Courts*, N.Y. TIMES, June 5, 2000, at A1. Few doubt the influence of ideology and public opinion on the judiciary. Moreover, in the process of litigation wealthy repeat players enjoy advantages over impecunious individuals. *See* Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. 95 (1974).

28. *See* Paul Tremblay, *Acting "A Very Moral Type of God:" Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2514-17 (1999) (calling for poverty lawyers to seek a diversified portfolio of goals and methods).

The focus on community based advocacy, however, is not easily adapted to the field of public benefits. After the collapse of the National Welfare Rights Movement, the prospects for assisting a grass roots movement aimed at improving the welfare system were bleak.[29] The principal goal of recipients has always been to leave the rolls rather than to stay and fight to improve the welfare system.[30] Moreover, even within poor communities welfare recipients are often marginalized. Poor communities rarely rally around the issue of public benefits, in part, because such a focus may further stigmatize the community. Community leaders are likely to steer clear of issues which suggest that their neighborhoods consists largely of welfare recipients.

Finally, the structure of the AFDC program was not conducive to a community based approach. Although some important problems with AFDC administration could be addressed at the local level, such as the treatment of applicants or recipients by staff, many of the key program decisions were made at the federal or state level. The Social Security Act contained detailed requirements governing the treatment of income, work expenses, child support payments, and eligibility requirements.[31] States set the benefit levels and chose among a variety of options left open to them by federal law. Although states were given broader freedom in designing work and training requirements under the JOBS program,[32] and this freedom sometimes translated down to localities, such programs never assumed major roles in the operation of the welfare system. At most, only ten percent of adult recipients participated in JOBS programs.[33] Local activism around welfare issues ran up against the reality that the centers of decision making in the AFDC program were, in many respects, not local at all.

Thus, the movement toward community based lawyering has looked principally to issues other than public benefits. Luke Cole, for example, has highlighted the potential of campaigns for environmental justice as a means of both improving life in poor communities and as a vehicle for nurturing community activism.[34] Others have stressed the benefits of focusing on

29. *See* FRANCES FOX PIVEN & RICHARD CLOWARD, POOR PEOPLE'S MOVEMENTS 264-359 (1977); Diller, *supra* note 23, at 1426-1427.

30. *See generally* ALBERT O. HIRSHMAN, EXIT, VOICE AND LOYALTY 15-20 (examining dynamic of deteriorating institutions or systems in which stakeholders choose to either abandon the institution or remain loyal and seek to improve it).

31. *See* 42 U.S.C. § 602(a) (repealed 1996) (detailing state plan requirements).

32. *See* 42 U.S.C. § 682 (repealed 1996).

33. *See* COMMITTEE ON WAYS & MEANS, BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 486 (1998) (reporting that in 1995 only 42.6 percent of adults receiving AFDC could be required to participate in the jobs program, and only 27 percent of these actually participated).

34. *See* Luke Cole, *The Crisis and Opportunity in Public Interest Law: A Challenge to Law Students to be Rebellious Lawyers in the '90s*, 4 B.U. PUB. INT. L.J. 1, 10-11 (1994); Luke Cole,

community economic development as a means of strengthening critical social and economic institutions in low income communities.[35]

Advocates working on public benefits were largely left out of the movement toward community based strategies. Indeed, the calls for a renewed emphasis on community building could have the effect of shifting advocacy resources away form work on public benefits issues in favor of other areas. Given the critical importance of public benefits, however, such a trend would be unfortunate.

3. Advocacy in the New Welfare System

A. The Emerging Structure of TANF

The Temporary Assistance for Needy Families (TANF) program is structured quite differently from its predecessor, the AFDC program.[36] The TANF program eliminates most of the federal requirements that governed the AFDC program. It contains no federal definition of eligibility and no federal rules for calculating income and resources. States thus have vast freedom to design their own programs. Indeed, rather than submitting state plans for federal approval, states only need submit "outlines" of their TANF programs for which no federal approval is required.[37]

Many states are, in turn, delegating significant policymaking authority to localities and are contracting out portions of TANF administration.[38] This second order devolution is prominent in states such as California, Ohio, Colorado, and North Carolina in which localities are given explicit policy making authority.[39] In California and Colorado, TANF funds are provided to

Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law, 19 ECOLOGY L.Q. 619 (1992).

35. *See* Brian Glick & Matthew Rossman, *Neighborhood Legal Services as House Counsel to Community Based Efforts to Achieve Economic Justice: The East Brooklyn Experience,* 23 N.Y.U. REV. L. & SOC. CHANGE 105 (1997); Susan Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195 (1997); Peter Pitegoff, *Child Care Enterprise, Community Development and Work*, 81 GEO. L.J. 1897 (1993).

36. A description of TANF administration appears in Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion & Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000).

37. 42 U.S.C. § 602(a)(1). The statute expressly restricts the regulatory authority of the Department of Health and Human Services. *Id.* at § 617.

38. *See* Diller, *supra* note 36, at 1179-83. *See also* RICHARD NATHAN & THEODORE GAIS, IMPLEMENTING THE PERSONAL RESPONSIBILITY ACT OF 1996: A FIRST LOOK 35-42 (1999).

39. *See* AMERICAN PUBLIC WELFARE ASS'N, DEVOLUTION OF ADMINISTRATIVE AUTHORITY TO THE LOCAL LEVEL: WELFARE REFORM IN FIVE STATES (1998) [hereinafter DEVOLUTION OF ADMINISTRATIVE AUTHORITY].

counties as block grants.[40] In Ohio, counties enter into partnership agreements with the state that constitute the TANF plan for each locality.[41]

Even absent these dramatic forms of devolution, many states are granting considerable flexibility to localities. For example, many states require applicants for assistance to undertake job searches while their claims are pending.[42] In many areas, the nature and contents of these requirements are left up to the localities.[43] Similarly, considerable local discretion is often exercised in decisions to pay lump sum amounts to "divert" applicants from the welfare rolls. Localities are also frequently accorded discretion in defining the content of work requirements.

In shifting authority to states and localities, many TANF programs are also according greater discretion to their ground level administrative personnel. In many places, the functions of ground level personnel are being redefined. Eligibility specialists, whose jobs were viewed as clerical, are being replaced by case managers with broad authority to advise, assist and supervise clients.[44] As one newspaper article put it, the case manager is intended to serve as "a teacher, preacher, friend and cop—an all-purpose partner to guide poor parents into jobs."[45]

In this new regime, agency personnel operate under many fewer rule based constraints. Instead, program leadership is provided through performance based evaluation systems that link funding and other incentives to measurable outcomes.[46] This new emphasis on outcomes is intended to replace fixed rules with a set of incentives intended to spur local agencies and contractors to produce particular results.[47] In such a system, the key policy decisions are

40. *See id.* at 11-16 (describing Colorado's TANF program); JANET QUINT ET AL., BIG CITIES AND WELFARE REFORM 79-80 (1999) (describing CalWORKS).

41. *See* DEVOLUTION OF ADMINISTRATIVE AUTHORITY, *supra* note 39, at 27-32; Miriam Wilson & Charles F. Adams, Jr. *Welfare Reform: Ohio's Response*, 60 OHIO ST. L.J. 1357 (1999).

42. *See* KATHLEEN MALOY ET AL., A DESCRIPTION AND ASSESSMENT OF STATE APPROACHES TO DIVERSION PROGRAMS AND ACTIVITIES UNDER WELFARE REFORM 32-40 (1998).

43. *Id.* at 37.

44. DEVOLUTION OF ADMINISTRATIVE AUTHORITY, *supra* note 39, at 27-32.

45. *See* Jason Deparle, *For Caseworker, Helping is a Frustrating Struggle*, NY TIMES, Dec. 10, 1999, at A1, A26.

46. *See* Diller, *supra* note 36, at 1183-85.

47. The emphasis of welfare reform on performance measurement is part of a broad trend in public administration. *See, e.g.*, Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (1993) (requiring federal agencies to prepare performance goals and measure and report outcomes in relation to these goals). *See generally* GENERAL ACCOUNTING OFFICE, MAJOR MANAGEMENT CHALLENGES AND PROGRAM RISKS 10 (2001) (describing administrative reforms focused on "results-oriented and accountability based management approaches" intended to "deliver economical, efficient and effective programs and services to the American people"); Mary L. Heen, *Reinventing Tax Expenditure Reform: Improving Program*

reflected in outcome measurements and other performance incentives that give direction to the system as a whole.[48]

In addition to this administrative restructuring of welfare, there have been major substantive shifts, as well as an infusion of resources. Despite the Family Support Act of 1988,[49] the AFDC program served principally as a means of income maintenance. The principal function of the program was the payment of benefits to families who were eligible for assistance and who complied with program conditions. In contrast, TANF programs are principally oriented toward getting recipient off the benefit rolls. In some places, this emphasis may amount simply to a push to terminate assistance or to create barriers to entry.[50] In other areas, greater attention may be paid to placing recipients in employment.[51] Throughout the country, however, the rhetoric of promoting self sufficiency is overwhelmingly dominant.

A final characteristic of the new welfare system is critically important. The new system is simply awash in money. The abundance of resources is the result of a confluence of several factors. First, the formula for which state TANF block grants are set is based on the federal funding levels of the AFDC program in the early 1990s.[52] These levels were elevated due to the recession in the early part of the decade. As caseloads have fallen, federal funding has remained constant, thus yielding a huge surplus of funds. Although many states have siphoned off a portion of these funds for other purposes,[53] there is no lack of money available for assisting low income families. Second, as part of its promise to follow through on welfare reform, the Clinton Administration has goaded Congress into providing money on top of federal TANF funding. The Balanced Budget Act of 1997 provided an additional 3 billion dollars to fund welfare to work programs administered by state and local governments during fiscal years 1998 and 1999.[54] The funds are intended to assist long term

Oversight Under the Government Performance and Results Act, 35 WAKE FOREST L. REV. 751, 756 (2000) (describing broad trend in public management to shift focus from "inputs" to "outputs").

48. Diller, *supra* note 36, at 1185.

49. Pub. L. No. 100-485, 102 Stat. 2343.

50. The City of New York provides a good example of such an approach. *See* Reynolds v. Giuliani, 35 F. Supp. 2d. 331 (S.D. N.Y. 1999).

51. *See, e.g.*, VIRGINIA KNOX, ET AL., REFORMING WELFARE AND REWARDING WORK: A SUMMARY OF THE FINAL REPORT ON THE MINNESOTA FAMILY INVESTMENT PROGRAM (2000), *at* http://www.mdrc.org/Reports2000/MFIP/MFIPSummary.htm (reporting on results of Minnesota's efforts to encourage and reduce dependence while also reducing poverty).

52. *See* 42 U.S.C. § 603(a)(1).

53. *See, e.g.*, Raymond Hernandez, *Federal Welfare Overhaul Allows Albany to Shift Money Elsewhere*, N.Y. TIMES, Apr. 23, 2000, at A1 (reporting that the State of New York used over $ 1 billion in federal TANF funding for purposes other than assisting the poor and noting that other states have similarly diverted welfare funds to other uses).

54. Pub. L. No. 105-33, § 5001.

welfare recipients in making the transition to work. Furthermore, the strength of the economy has produced budget surpluses in many states and localities, thus reducing the pressure to take money out of the welfare system.

Finally, the Work Force Investment Act of 1998[55] consolidated a number of federal job training programs and established a new structure for such programs. Under the Act, recipients of public assistance are given a priority for enrollment in adult job training programs.[56] The new law stresses local decision making and control, as funds are dispensed through state and local work force investment boards.[57] In fact, 85 percent of the funding available for training adults is allocated at the local level.[58] The Workforce Investment Act thus provides an additional source of funds that may be available to provide services to public assistance recipients.

In sum, the TANF program differs from AFDC in at least four critical respects. Decision-making authority is shifted downward, as power is dispersed from the federal government to states, and from states to localities and private contractors. Second, there is a trend toward increasing the discretion of ground level workers. Many important features of TANF are not reflected in written rules of general applicability. Agencies, however, steer the exercise of discretion through performance standards and other forms of incentives. Third, on a rhetorical level, and to a certain extent in practice, the focus has shifted from income maintenance to the promotion of self sufficiency and work. Finally, there is an abundance of funds available to create and sustain new initiatives.

B. Advocacy Opportunities Under TANF

These four changes have major ramifications for the nature of advocacy in the welfare system. They further diminish the potential of litigation as a means of effecting broad changes in the welfare system. As the system becomes fragmented, each administering agency is responsible for a smaller piece of the whole. Correspondingly, there is less likely to be a single defendant in litigation who has broad control over the entire system. As functions are devolved and contracted out to private service providers, the welfare system has become increasingly polycentric, characterized by the complex interaction of many players instead of a top-down hierarchy of power. In this sense, welfare has come to resemble issues such as housing and health care.

Moreover, as the discretion of lower level administrative personnel expands, litigation is less likely to be a simple matter of identifying and

55. Pub. L. No. 105-22.

56. *Id.* at § 134 (d)(4)(E).

57. *See id.* at §§ 111, 116.

58. *See* U.S. DEP'T OF LABOR, OVERVIEW OF THE WORKFORCE INVESTMENT ACT OF 1998, *available at* http://usworkforce.org/runningtext2.htm.

challenging an unlawful rule. Instead, advocates must uncover and document the defacto policies that are cloaked by the language of discretion and then manage to identify some legal authority upon which to base a claim. The days of bringing litigation by matching up one set of rules with another are largely in the past.

On the other hand, taken together, the changes in the welfare system create new opportunities for community based welfare advocacy. As localities and private contractors play increasingly important roles in the welfare system, advocacy must shift to the local level in order to be effective. There are no fixed prescriptions for effective advocacy on the local level. Advocates in each community need to identify the best means of influencing the administrative and political system in their county or city. To do so, they must identify and, in many instances, create points of access to the key decision-making processes.

In some places, effective advocacy will center around county or municipal legislative bodies. The New York City Council, for example, has played an increasingly active role in shaping policies with regard to workfare and assistance to the homeless.[59] In other places, effective advocacy may target the executive branches. In Philadelphia, for example, advocates worked closely with the Mayor in shaping the City's implementation of welfare reform.[60] Programs funded by the Workforce Investment Act are overseen, in the first instance, by local Workforce Investment Boards. Advocates may direct their efforts at influencing both the selection of board members and the decisions of these local boards.[61]

In areas where aspects of welfare administration have been contracted out, advocates must seek involvement in the contracting process. Critical decisions are generally reflected in the terms of the contract, such as the specification of contract requirements, the provisions governing payment to providers and the means of government oversight. Together these elements of a contract establish the set of incentives that will, to a large extent, determine the manner in which a program is administered. Unfortunately, there are few formal means of influencing the process by which these terms are established.[62]

59. *See* City of New York, Local Law 00/13 (grievance procedures for workfare program); City of New York, Local Law 00/14 (transitional jobs for public assistance recipients); City of New York, Local Law 99/06 (limits on size of emergency shelters for adults).

60. Biennan Center for Justice, Legal Services Lawyers Work Closely with Communities in Need, at 16 (2000) (reporting that Mayor Rendell invited community legal services to help develop strategies for dealing with federal welfare reform).

61. Local boards must have a majority of business representatives and representatives of labor organizations, community based organizations and service providers. Board members are selected by local elected officials in accordance with criteria established by the governor of each state.

62. *See* Diller, *supra* note 36, at 1195-1206.

Nonetheless, advocacy in a privatized system is not necessarily futile. Advocates can develop creative means of influencing the way in which private contractors provide services.

Public contracting procedures may provide a point of access to decision making under the TANF program.[63] Advocates may be able to harness requirements designed to ensure the integrity of government contracting as a vehicle for input into the selection of private providers and, perhaps, as a way of influencing the substance of contracts with such providers. Recent disputes over the process of contracting for welfare services in New York and San Diego illustrate some of the potential of such an avenue of advocacy. In New York, accusations of influence peddling and failure to use competitive bidding derailed a $100 million dollar contract with Maximus, the large corporation selling welfare administrative services nationwide.[64] Although the contracts were ultimately upheld in the courts, they have not gone forward as originally planned.[65] In San Diego recipients and the union of public employees successfully sued to enjoin privatization of case management services.[66] The court concluded that the county charter prohibited the "wholesale" contracting of discretionary functions such as case management.[67]

In addition, advocates may be able to develop channels of communication with private welfare administrators. Ironically, contractors may have a stronger interest in maintaining a positive public image than many government agencies. The contracting process is frequently political and providers may wish to forestall vocal opposition from client advocates. The large national companies who have recently entered the business of welfare administration may find it bad for business on a national level if they develop reputations for antagonizing local constituencies. Indeed, conglomerates may be concerned that controversy over welfare issues will cut into the good will they have generated in other areas.

For example, in August 1999, the New York Times revealed that Citigroup, the parent company of Citibank, which has been hired to administer the electronic benefits payment system for welfare recipients in 29 states,

63. *See id.* at 1198-99.

64. *See* Christopher Drew & Eric Lipton, *2 with Ties to Chief of Welfare Got Jobs with Major Contractor*, N.Y. TIMES, Apr. 23, 2000, at A1; Eric Lipton, *City Contracts for Workfare Are Criticized*, NY TIMES, Mar. 14, 2000, at B1.

65. *See* Giuliani v. Hevesi, 276 A.D.2d 398, 715 N.Y.S.2d 12 (App. Div. 1st Dep't 2000) (holding that New York City Mayor could override objections of New York City Comptroller). As of March 15, 2001, Maximus has not commenced operations in New York and it is not clear when it will do so. Conversation with Glenn Passanen, the City Project, March 16, 2001.

66. *See* Karen Kucher, *County CalWorks Pacts May be Illegal Judge Tentatively Rules Against Millions in Farmed-out Contracts*, SAN DIEGO UNION-TRIB., July 22, 2000, at B1; Karen Kucher, *Lawsuit Targets Welfare Contracts*, SAN DIEGO UNION-TRIB., Aug. 3, 1999, at B1.

67. Kucher, *County CalWorks Pacts*, *supra* note 66, at B1.

charged fees and imposed limitations on the use of ATM cards that it does not apply to its other customers.[68] In anticipation of the article, Citibank officials immediately moved to provide greater access to cash in poor neighborhoods in New York.[69] It may well be that the ameliorative moves were not significant in this instance,[70] but the incident suggests that companies which spend millions in advertising to generate good will, may have reasons to respond to advocates for the poor.[71]

Advocacy in this new landscape of fragmented and devolved welfare administration is likely to require a new set of skills and technical knowledge. Advocates must become adept at deciphering the gnarled prose of the contracts and agreements that frequently constitute the governing source of authority in the new system. To be effective, advocates must be able to identify the key policy decisions in such documents and must learn to gauge the impact of the various oversight mechanisms that these documents frequently employ. They must develop a concrete agenda of substantive and procedural points that they believe should be included in the instruments that bestow authority on contractors and localities.

As part of this new set of skills, advocates must be develop expertise in performance based evaluation. The task of formulating performance measures requires translating a set of policy goals into discrete quantifiable standards. Thus, the amorphous goal of promoting family well-being can be broken down into particular indices such as increases in income and earnings, or broader measures that look to infant mortality rates, school completion rates, eviction rates, levels of homelessness and so forth. In a system centered on performance based evaluation, advocates must identify their goals and reduce them to a specific set of demands. The task is complicated by the reality that agencies subject to performance measures generally look for the easiest means of achieving the measure, which frequently means finding ways to achieve statistical success, rather than attainment of more difficult overall objectives. Programs can look good on paper, while accomplishing little of value. Moreover performance measures that are too broad may be self defeating if their achievement is not within the control of agency that is subject to the standard. Thus, a goal of reducing poverty may sound impressive but yield

68. *See* David Barstow, *ATM Cards Fail to Live Up to Promises to Poor*, N.Y. TIMES, Aug., 16, 1999, at A1.

69. *Id.*

70. The bank announced it would install 25 ATMs in poor neighborhoods and enable recipients to use their cards in the NYCE network of 23,000 machines. *Id.* It did not, however, drop its fees or provide access through other networks. *Id.*

71. Investor relations offers another possible avenue of influence over private welfare administrators. Campaigns may be organized to boycott the stock of companies that treat welfare recipients unfairly.

little results if the actors that are subject to the goal do not in fact have the means at their disposal to achieve the desired result.

This discussion suggests that advocates must learn the art of analyzing and constructing performance standards. The General Accounting Office has cautioned that many state and local governments do not have adequate experience and expertise to design and utilize performance measures effectively.[72] For this reason, it is especially important that advocates monitor and participate in the process of formulating performance standards. At the same time, advocates must themselves gain the skills necessary to play a constructive role and to gain credibility.[73]

The shift in the welfare system from income support to work also requires welfare lawyers to develop new expertise in the problems facing low wageworkers. Although the divide between the "working poor" and the "welfare poor" was always artificial, welfare lawyers did not generally focus on workplace issues. Under welfare reform, however, work and welfare have become thoroughly intertwined: Work is now frequently a requirement of benefit receipt and a variety of TANF related benefits might be available to those who work. Events, which jeopardize a client's job, also jeopardize her benefits case. The need for advocates with expertise in the intersection of welfare and work is acute.

This substantive shift in emphasis from the AFDC to the TANF program may actually invigorate efforts to activate communities around public benefits issues. Lawyers interested in community organizing may be able to focus more directly on the welfare system than in the past. Advocates can demand that welfare systems live up to the rhetoric of welfare reform by providing meaningful assistance to poor mothers in finding and retaining jobs. Moreover, advocates can work to improve the quality of life for mothers pushed into low wage jobs by seeking to use public benefits programs and other funding streams to create social supports for working parents. Issues such as child care, transportation and health coverage are obvious subjects of advocacy.

Advocacy around these issues may be particularly promising because it seeks to coopt the rhetoric of welfare reform, rather than simply serving as an exercise in resistance. These issues may strike a chord in public opinion. After all, welfare reform was billed as a change in the manner and means of helping poor families, not simply as a process of abandonment.

72. *See* GENERAL ACCOUNTING OFFICE, SOCIAL SERVICE PRIVATIZATION: EXPANSION POSES CHALLENGES FOR ENSURING ACCOUNTABILITY OF PROGRAM RESULTS 17 (1997).

73. There is a substantial body of literature on performance measurement. *See, e.g.*, MARK FRIEDMAN, A GUIDE TO DEVELOPING AND USING PERFORMANCE MEASURES IN RESULTS-BASED BUDGETING (1997), *available at* http://www.financeproject.org/measures.html. *See also* HARRY HATRY, PERFORMANCE MEASUREMENT: GETTING RESULTS (1999).

These issues may provide more effective focal points for community advocacy than did traditional income support issues. First, clients may be more likely to organize and agitate around these issues because they reflect the desire of many clients to become self supporting. As noted above, even though income support may have been vital to many families, clients were reluctant to organize around the issue because, individually, their goal was to leave the welfare rolls.

The objectives of securing jobs and the social supports necessary to succeed in the workplace, however, coincide with mainstream American norms. Recipients who organized to assert claims for income support sailed against the tide of social norms and risked being viewed as deviant.[74] In contrast, recipients who agitate for training, better jobs, child care and so forth do not present claims that are likely to be perceived as threatening to dominant values. For the same reason, leaders of institutions in low income communities may be more willing to champion the cause of welfare recipients, when it is centered on issues such as training, and child care, than when it simply focuses on income support. They are more likely to perceive these issues as projecting positive images of their communities, while claims for income support may be perceived as reinforcing negative stereotypes.

Second, as the locus of decision making is shifted down to the local level, community activism may be more relevant and effective because it is closer to the level at which meaningful programmatic decisions are made. One of the insights of the environmental justice movement is that it is much easier to mobilize people around issues of immediate local concern, such as an undesirable land use in their neighborhood, than around broader more amorphous issues. For much the same reason, the devolution of welfare is likely to make it easier to organize communities around issues relating to public benefits.

Finally, community based advocacy around these issues is likely to be facilitated by the fact that there is ample money to fund new programs. Thus, demands for new services and social supports present goals that are attainable. Welfare advocates can present a positive agenda that is realistic, rather than simply hoping to forestall cuts while arguing for affirmative measures that are patently beyond realm of possibility.

Advocates can also create new roles for themselves in assisting community based service providers in obtaining government grants and contracts. These groups frequently lack the expertise necessary to tap into sources of available government funding and to comply with the onerous administrative requirements that frequently accompany government funding. Advocates can

74. *See* Lucy Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159, 1177-84 (1995) (describing negative reaction to welfare rights activists in the 1960's).

help to fill these needs. In fact, welfare advocacy may in some instances converge with community economic development work as welfare can serve as a funding stream for neighborhood day care and job training centers.

C. Concluding Caveats and Cautionary Notes

This discussion points to some reasons why the process of welfare reform may help invigorate community activism around welfare issues and identifies some important new roles that advocates can play. These points are subject to two important caveats. First, even in the new system, traditional elements of advocacy continue to be important. Not everything that is transpiring under welfare reform is new. Regulations are still written that violate statutory commands.[75] Notices still go out that fail to provide proper information.[76] States still use hearing procedures that fall short of legal requirements.[77] Program rules may still transgress the limits of constitutionality.[78] In other words, there will continue to be important issues that demand litigation. Similarly, on many issues state and national advocacy are still vitally important. For example, the TANF program is up for reauthorization in Congress in 2002, a process fraught with opportunities and perils.

Second, although the new system creates greater potential for local activism, emphasis needs to be placed on the term *potential* – as yet, it is far from clear whether the final product of welfare reform will be more open or more closed to input than its predecessor. As I and others have argued elsewhere, devolution cannot be equated with openness or accessibility.[79] While the process has made a number of traditional advocacy tools less efficacious, devolution does not readily supply alternative means of assuring public input. Instead, the central challenge for advocates is to forge a new set of strategies and tools that reflect the changing structure of public benefits programs. Although this essay outlines a number of possibilities, it is far too early to discern the efficacy of these new techniques.

75. *See* Smith v. Commissioner of Transitional Assistance, 729 N.E.2d 627 (Mass. 2000) (striking down regulation limiting extensions of the time limit on benefits as violative of state statute); Minnefield v. McIntire, 11 Mass.L.Rptr. 369 (Super. Ct. Mass. 2000) (striking down regulation that impermissibly made it more difficult for caretakers of disabled children to receive exemptions from work requirements).

76. *See* Weston v. Hammons, Case No. 99 CV 412 (District Ct., City and Cy. of Denver, Nov. 5, 1999) (sanction notices in Colorado TANF program violate due process), *available at* http://www.welfarelaw.org/webbul/99novdec.htm#CO (sanction notices are constitutionally inadequate).

77. *See* Meachem v. Wing, 77 F. Supp.2d 431 (S.D.N.Y. 1999).

78. *See* Saenz v. Roe, 119 S. Ct. 1518 (1999) (striking down lower tier of benefits for new residents as unconstitutional).

79. *See* Diller, *supra* note 36, at 1206-10; *see generally* JOEL HANDLER, DOWN FROM BUREAUCRACY (1996).

Despite these caveats, it is clear that the major changes in the structure of the welfare system have profound ramifications for the nature and direction of welfare advocacy. Welfare lawyers can now move from the periphery to the center of the movement toward community lawyering, as important programmatic decisions are increasingly made at the local level. Although the multi-tiered layers of rules that characterized the AFDC program appeared to be dauntingly complex, the absence of rules has created a welfare system that, in comparison, makes the AFDC program look straightforward. The number of players has increased, the arsenal of carrots and sticks used to exert control over recipients has expanded and the ability of the rules to constrain both policy makers and ground level administrators has diminished. Within all this, advocates for people in poverty must identify the pivotal decision points and find or create opportunities to have an impact on the shape and content of the new welfare system.