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DISCRETION IN SOCIAL ASSISTANCE LEGISLATION

Nathalie des Rosiers and Bruce Feldthusen*

RÉSUMÉ

Les auteurs examinent les diverses formes de pouvoir discrétionnaire qui apparaissent au sein de l'administration de la législation sociale. Leur conclusion est qu'il n'est pas vraiment important de savoir s'il y a de nombreuses règles précises ou si on peut ou non avoir un pouvoir discrétionnaire au niveau administratif. En effet, la distinction conceptuelle entre règles et pouvoir discrétionnaire s'avère inexistante dans la pratique, et les travailleurs ont tendance à suivre un code déontologique *de fait* plutôt que de droit. Selon les auteurs, il serait plus important d'améliorer les méthodes de recrutement et de formation que de s'attarder sur la précision des règles. Dans l'ensemble, les auteurs préfèrent des règles moins nombreuses et simples à appliquer à des règles complexes visant à couvrir chaque situation.

The authors survey the kinds of discretion found in the administration of social legislation. They conclude that whether there are many precise rules or whether administrative discretion is allowed is much less important than is usually supposed. This is because the conceptual distinction between rules and discretion breaks down in practice, and because of a tendency for workers to follow a *de facto* code of discretionary conduct. The authors observe that recruitment and training practices may be more important to achieving the purposes of the legislation than whether there are precise rules or not. In general the authors favour fewer rules that are relatively simple in their application over complex rules intended to cover every situation.

1. INTRODUCTION

What tells in holdin' your grip on your district is to go right down among the poor families and help them in the different ways they need help. I've got a regular system for this. If there's a fire in Ninth, Tenth, or Eleventh Avenue, ... any hours of the day or night, I'm usually there with some of my election district captains as soon as the fire engines. If a family is burned out, ... I don't refer them to the Charity Organization Society, which would investigate their case in a month or two and decide they were worthy of help about

* Copyright © 1992 Nathalie des Rosiers and Bruce Feldthusen. They are professors of law at the Faculty of Law, University of Western Ontario, London, Ontario.

the time they are dead from starvation. I just get quarters for them, buy clothes for them ... fix them up 'til they get things runnin' again.¹

For a family caught in a burn-out, the Fire Department's battalion chief at the scene issues a written "notification of possible need for temporary or permanent shelter for persons due to fire" for the occupants ... and calls his dispatcher who in turn informs the central Emergency Desk at the Department of Relocation, which reports the case to their [sic] personnel in the nearest hotel or shelter that the agency uses for such cases—if the fire is between 9 a.m. and 5 p.m., Monday through Friday. If not, the fire dispatcher notified the Red Cross, which places the family overnight and refers the case to relocation officials in the morning—assuming the family is living in a private dwelling. If the house or apartment is owned by a public agency like the New York City Housing Authority, the Department of Real Estate, or Urban Renewal, the Department of Relocation has no jurisdiction. In these cases, the Department of Social Services is responsible, if the family is already on public assistance or qualifies for special emergency aid. After the family is housed, it must make an appointment at the nearest Income Maintenance (Welfare) Centre for an interview to apply for a "disaster relief grant" covering clothes, food, and lost furniture; arrange for children to go to schools in a new area, since the shelters are usually not in the same community; and begin to look for an apartment with the assistance of housing staff in the Departments of Relocation or Social Services.²

The objective of this paper is to study the exercise of discretion in social assistance legislation, and to bring this research to bear on options for reform. This paper will provide a theoretical discussion of discretion in social assistance legislation. In a future paper, we intend to apply the theoretical conclusions to the present social assistance legislation and make concrete recommendations for change.

Beatty offers the following working definition of discretion:³

... an official making a decision has discretion in a given situation if the rules governing his or her decision allow for the exercise of interpretation or judgment. ... A decision-maker lacks discretion in a situation if there are precise rules which determine exactly what is to be done.

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1. George W. Plunkitt, famous political boss in New York City in the early 1900's quoted by Norton, "Public Assistance, Post-New Deal Bureaucracy, and the Law: Learning from Negative Models" (1983) 92 Yale L.J. 1287 at 1291-2.
 2. Standard Operating Procedures of the New York Fire Department during the 1970s., quoted by Norton, *ibid.*
 3. H. Beatty, "Discretionary Decision-Making, Equity, and Social Assistance", at 4 (Report prepared for the Social Assistance Review Committee, 1987). The authors wish to extend their appreciation for having been able to rely on this most helpful work.

It is useful to think in terms of a continuum between discretion and rule precision, and to think of more or less discretion, more or less precision. In practical terms the goal is to attempt to strike the correct balance between discretion and rule precision. A gain in one direction, flexibility for example, will occur at an expense in another direction, consistency perhaps. The choice of the "appropriate" level of discretion will often depend on conflicting value choices. We try in this paper to present value choices for consideration and to make our own value choices explicit.

K.C. Davis has provided a slightly different definition of discretion from that given by Beatty. Davis defined discretion as a situation in which "the effective limits on (an official's) power leave him (sic) free to make a choice among possible courses of action or inaction."⁴ This is a pragmatic definition which differs from Beatty's primarily in that it includes unauthorized as well as authorized exercises of discretion. We believe that an understanding of the significance of unlawful, *de facto* discretion is necessary in order to appreciate fully what can and can not be accomplished by controlling discretion granted by legislation. Thus, we will include some consideration of enforcement in our analysis of discretion, even though this might be omitted in traditional legal analysis.

Similarly, although our main concern is with relatively high level discretionary power, usually statutory powers of decision⁵, we shall have to keep in mind the significance of lower level discretion. A client's success at obtaining assistance may turn as much on what information a worker volunteers, on a worker's willingness to schedule an appointment at the client's convenience, or on a worker's attitude towards the client, as on any legislative grant of formal discretion.

Finally, our study focuses directly on discretionary powers that affect clients; for example, discretion regarding eligibility or quantum of assistance. We exclude from consideration discretionary powers that affect, for example, relations between workers and supervisors, or relations among workers themselves.

4. K.C. Davis, *Discretionary Justice* (Baton Rouge: Louisiana State University Press, 1969) at 4.

5. "... a power or right conferred by or under a statute to make a decision deciding or prescribing, (i) the legal rights, powers, privileges, immunities, duties, liabilities of any person or party, or (ii) the eligibility ... to receive (or continue to receive) a benefit ... whether he is legally entitled thereto or not." *Judicial Review Procedure Act*, R.S.O. 1980, c. 224, s. 1(f).

Our research has brought us to consider the developments in the disciplines of political science and sociology. These students of public organizational behaviour focus on how an organization *actually operates* as opposed to the lawyers' preoccupation with how an organization ought to operate according to formal institutional design. One of the important findings of the social scientists is that the formal legal structures of organizations tend to tell us relatively little about how the organization actually functions.

Our initial premise was that it might matter significantly whether to employ discretionary powers or precise rules in social assistance legislation. We are somewhat embarrassed to report that, based on the theoretical investigation, we have concluded that it matters a great deal less than we originally had supposed, and a great deal less than other issues. It is for this reason that our analysis has drifted on occasion into related areas, particularly the monitoring and enforcement of *de facto* discretion.

Section 2, immediately below, is a stage-setting section in which we introduce the main questions and concerns posed by administrative discretion. There is a typical pattern to the legal analysis of administrative discretion. It begins with a critique of administrative discretion. From that beginning, discretion remains on the defensive throughout. This is true regardless of whether the analysis proceeds to the conclusion that some discretion is potentially useful, or to the conclusion that discretion is a necessary evil that ought to be controlled whenever possible. Suspicion of administrative discretion survives all analysis. There seems to exist a considerable gap between acquittal on all charges and outright vindication.

Inevitably, much of our analysis falls into this pattern. However, we have tried to break from that tradition by beginning our stage-setting on a more positive note. We emphasize that discretion is *human* judgment, part of our humanity, and as such valued despite its human shortcomings. By this, we try to emphasize that our task ought to be to control the inappropriate exercise of discretion; not to control or eliminate discretion itself.

We then describe the two related, but different types of criticisms commonly levelled against discretion; the symbolic and the practical. By the symbolic, we mean the conflict between the rule of law ideology and the patently human discretionary powers. The practical indictment of discretion as "arbitrary" is then explored in its various meanings: capricious, inappropriate or personal, and despotic.

In the remainder of the paper, we attempt to focus on the characteristics of administrative discretion in a more neutral manner. We develop three inter-

related themes. The first is that discretion is inevitable. Every rule requires discretion in application. The more rules we promulgate, the less likely they will be followed. Instead, workers will follow a *de facto* code of discretionary conduct. The second theme is that the analytic distinction between rules and discretion tends to collapse in practice. Just as rules admit of much discretion in application, so discretionary powers are subject to firm constraints, legal and practical. The third is that it is *de facto* discretion that governs bureaucratic conduct and *de facto* discretion that is experienced by clients, as much or more than conduct authorized by legal rules or powers. We conclude with some general observations that will be the basis of our second more practical paper. Our conclusions are not so much critical or supportive of statutory powers of discretion in social assistance legislation. Rather, we conclude that the difference between precise rules and discretionary powers in social assistance legislation is less than is usually supposed. We do recommend more structured discretionary powers, but for somewhat different reasons and with more modest expectations than is typically the case.

2. SETTING THE STAGE: THE PROS AND CONS OF ADMINISTRATIVE DISCRETION

2.1 A WORD IN FAVOUR OF HUMAN JUDGMENT

Administrative discretion is not a positive symbol in public institutional design.⁶ The word is associated with capricious, despotic and biased decision-making. Lawyers in particular have never been comfortable with discretion within a legal framework. Persons who have anything good to say about discretion tend to be dismissed for favouring a romanticized (and classist) vision of the good old days when caring professionals controlled the entire social assistance process in the interests of dependent clients.

The *exercise* of human discretion in a particular case has no inherent value. Discretion is a virtue when exercised in an "appropriate" manner. Otherwise it is a vice. To the extent that we can judge the exercise of discretion as appropriate or not, we can only do so after the fact. Were it otherwise, we would have attempted to determine the outcome by rule.

The *concept* of discretion does have inherent value. To exercise discretion is to exercise *human* judgment. This is one aspect of our humanity. Another is to be affected by the human judgment of others. If we could predict in advance

6. See Beatty, *supra*, note 3 at 3.

how discretion ought to be exercised in a particular case, we would not have needed discretion in the first place. One of the main reasons why we can not predict outcomes in advance is because we can not replicate by rule the number and weight of relevant factors that comprise human judgment. Administrative discretion is the implicit endorsement of human judgment.

Consider the alternative. We could devise a social assistance scheme under which all important determinations were made by rule. Indeed, we could devise such precise rules that, once data were checked for accuracy, decisions could be made by computers.⁷ But, for most of us this would be an Orwellian nightmare, not an ideal to which to aspire. We would have lost the human ability to recognize unique situations, unanticipated factors, or unusual weights and different combinations of standard factors. We would literally have dehumanized the entire process for clients and workers alike.

This is not to wax eloquently or naively about human judgment. Once we attach value to human judgment in any decision-making process, we must accept that there will be human failure along with success; bias with fairness; arrogance with compassion; ignorance with appreciation.⁸ The real task is to attempt to control the inappropriate exercise of discretion. The key may lie beyond the scope of this paper; in recruitment, education, training, monitoring and enforcing. Limiting and structuring discretion with more precise rules and standards may also have a role to play. But it is important to keep in mind that every movement along the continuum towards precision is a move away from human judgment. This is a choice that should be made deliberately and reflectively, not one to be based on a rote bias against unstructured discretion.

2.2 THE SYMBOLIC OBJECTION TO ADMINISTRATIVE DISCRETION

Ours is a society raised on the "rule of law" ideology. We use the term ideology deliberately to emphasize that the reified conception of law that permeates our civic culture simply does not exist. In reality, laws, however precise, are enforced, applied and interpreted by human beings exercising

7. For example, the calculation of the shelter allowance under Regulations 12(2)4, 9, and 11 of the *General Welfare Assistance Act*.

8. "... discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or unreasonableness." Anizman, ed., preface to "A Catalogue of Discretionary Powers in the Revised Statutes of Canada 1970" (Law Reform Commission of Canada, 1975).

formal and *de facto* discretion. Collectively, we find it comforting to believe otherwise, and to minimize the human element of legal decision-making.⁹

Although administrative discretion-making is remarkably similar to legal decision-making, it simply does not fit into this rule of law model. Public administration has none of the mystery of law; administrative decisions are made without the ritual of law; and administrators function without the professional status of lawyers and judges. Administrative discretion is naked human decision-making. Without the ideological support that nurtures lawyers and judges, administrative discretion is vulnerable to the type of criticism from which our legal system is culturally protected.

The symbolic objection to administrative discretion is especially forceful in the context of social assistance. Much depends on how social assistance is conceptualized and legitimized in a particular jurisdiction. For example, it is possible to regard social assistance as a matter of public largesse, a matter of public charity, a privilege. By definition, social assistance would be discretionary under this model. It would be entirely consistent with this model to implement the legislative scheme without affording to applicants any legal rights whatsoever. Matters of initial eligibility, quantum of support, variation and termination, and procedural protection could all coherently be governed by strong discretionary language.

In contrast, there is an entirely different conception under which the government is obliged to meet the basic human needs of all its citizens and those citizens are entitled to demand that it do so. We shall call this a citizen entitlement model. We believe that the citizen entitlement model is much closer to the philosophy of the government of Ontario, and that of the majority of its citizens, than the pure largesse model.¹⁰ Here, by **definition**, social

9. It is impossible to do justice to the complexity or importance of this line of argument in a few lines. For a powerful discussion, see T.W. Arnold, *Symbols of Government* (New York: Harcourt, Brace & World, 1962).

10. See for example, *Transitions* (Toronto: Publications Ontario, 1988), Report of the Social Assistance Review Committee, at 9 and 11-2. We must, however, acknowledge that the Canadian courts have not always taken this view, a point to be kept in mind when looking to the courts for general client protection in this field. See Hason, "What's Your Favourite Right? The Charter And Income Maintenance Legislation" (1989) 5 J. Law & Soc. Pol. 1; and Morrison, "Poverty Law And The Charter: The Year In Review" (1990) 6 J. Law & Soc. Pol. 1. See also Rochman, "Working For Welfare: A response To The Social Assistance Review Committee" (1989) 5 J. Law & Soc. Pol. 199, suggesting that the public may not be strongly in the citizen entitlement camp either. Of course, persons who reject the entitlement model are not the ones who are criticizing the discretionary aspects as arbitrary.

assistance is a matter of rights and obligations. In that context, discretionary power seems incoherent and offensive. How can one speak meaningfully of obligation and entitlement, if the obligation and entitlement are defined and effected by discretionary decisions, rather than through precise legal definition? In our opinion, this apparent incoherence is one of the main sources of objection to discretionary power in social assistance legislation.

Objections of this nature came to the fore in the United States in the 1960's. Much can be learned from the experience there. The 1960's in the United States can be characterized as decade dominated by liberal legal reform. This is so in two senses. First, there was an increased mainstream interest in issues affecting the relatively less powerful segments of the population. Second, there was a general belief that these issues could be best advanced by law, and in particular by legal rights. Social assistance was an especially attractive target for liberal legal reform. It concerned, in particular, the poor and members of minority groups. And, the legislation typically treated eligibility for benefits as a discretionary matter rather than as a matter of rights-based legal entitlement. Prior to 1960, social assistance had been conceptualized in the culture and in the legislation in a manner consistent with the government largesse model.¹¹

The classic attack on government discretion generally was the now famous "New Property" article written by a Yale law professor, Charles Reich. It contained many references to discretion in the social assistance field. Reich emphasized the tremendous power over claimants which administrative discretion conferred to bureaucrats, and he lamented the virtual absence of legal protection for recipients or legal control over service providers. He concluded:¹²

The concept of right is most urgently needed with respect to benefits like unemployment compensation, public assistance, and old age insurance. ... The aim of these benefits is to preserve the self-sufficiency of the individual, to rehabilitate him where necessary, and to allow him to be a valuable member of a family and a community; in theory they represent part of the individual's rightful share in the commonwealth. Only by making such benefits into rights can the welfare state achieve its goal of providing a secure minimum basis for individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny.

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11. For a richer and more accurate history relevant to the present debate, see Simon, "The Invention And Reinvention Of Welfare Rights" (1985) 44 Maryland L.R. 1.
 12. C. Reich, "The New Property" (1964) 73 Yale L.J. 733 at 785-6.

Although Reich's descriptions of the evils of discretion remain relevant today, even inspiring to those who share his liberal values, further study has revealed far more complications than he might have imagined. In particular, although the citizen entitlement model has probably become more widely and strongly accepted throughout the western world, American scholars have discovered that it is neither possible nor desirable to attempt to achieve it solely or mainly through legal rights and precise legal rules. In other words, just as they discovered the shortcomings of discretion, they next discovered the shortcoming of legal rules. Indeed, they have had to face up to the shortcomings of law itself as an effective vehicle for controlling the bureaucracy.

We will demonstrate below that discretionary powers are inevitable in any bureaucratic regime, including the social assistance scheme. We will argue that the practical differences between discretion and rules are far less than they appear to be. To the extent that they are different, we will suggest a mixture of rules and discretion is as desirable as it is necessary. However, rational analysis is no antidote for symbolic complaints. The government must accept that while efficient administration requires discretion, such discretion will always be a source of citizen complaint.

2.3 DISCRETIONARY DECISION-MAKING CRITICIZED AS ARBITRARY DECISION-MAKING: CAPRICIOUS, PERSONAL, OR DESPOTIC?

Of course, objections to discretionary power in social assistance legislation have a practical basis as well as a symbolic one. The practical objection, and perhaps the one voiced most frequently, is that discretionary decisions are "arbitrary" decisions. This is a complex objection, a complexity revealed by the different shades of meaning of the word "arbitrary" in the English language.

To complain about arbitrary decisions may be to complain about decisions that appear to be made at random, capriciously or by whim. We shall attempt to demonstrate below that this objection is misconceived. In law there is no such thing as a statutory power of decision that authorizes random, capricious, or whimsical decision making. Legislation that says that an officer "may" grant a certain benefit does not mean at law that the officer may grant or withhold benefits for any reason whatsoever. Through their power of judicial review, the courts limit discretionary powers to purposes consistent with the legislation that grants the power. This is developed further in Section 4 ...

A different, but equally important objection is that many bureaucratic decisions *appear* capricious to clients. To a limited degree, this can be addressed by having the government, or the agency under its rule-making power, limit discretionary powers explicitly or at least declare the governing purpose behind discretionary powers. Beyond that, social scientists have demonstrated that decision makers seldom act in a capricious manner. Rather, they act according to a *de facto* set of rules that may or may not accord with the statutory purpose behind the discretionary power.

This takes us to another possible meaning behind the objection to arbitrary decision making. To criticize a decision as “arbitrary” may be to criticize it as wrong, inappropriate, and usually as one made for personal reasons. This observation is confirmed by social science research. There is every reason to expect decision-makers to act according to a set of rules divorced from the statutory purpose, perhaps according to some organizational norms and perhaps according to personal biases and interests. This will occur, not only in isolated cases but also systemically throughout any large bureaucratic organization.

However, replacing statute authorized discretionary powers with more precise rules is not necessarily, or even usually, likely to correct this. Instead, we must face the problem of how to monitor and enforce compliance with legislative goals in a public bureaucracy. Although this is a separate topic, we shall have to give it some attention below.

Much the same is true about another possible meaning to the complaint about arbitrary decision-making. The term “arbitrary” may be used to describe a manner of decision-making, imperious, autocratic or despotic, rather than an outcome of the process. The manner in which clients are treated is every bit as legitimate a concern as the outcomes of the process. In fact, treating clients with dignity and respect is as much an exercise in social responsibility as is assisting them with financial needs. However, whatever tendency to imperious worker behaviour may exist, it does not derive from formal grant of discretionary power and it can not be controlled by shifting to more precise rules. Simon makes the following observation:¹³

When lawyers confronted the welfare system in the 1960's, they charged it with oppressive moralism, personal manipulation, and invasion of privacy. They focused attention on the “man-in-the-house” rules that disqualified families on the basis of the mother's sexual conduct and the “midnight raids”

13. Simon, “Legality, Bureaucracy, and Class in the Welfare System” (1983) 92 Yale L.J. 1198.

in which welfare workers forced their way into recipients' homes searching for evidence of cohabitation.

When I represented welfare recipients from 1979 to 1981, the workers showed little interest in policing their morals or intruding on their private lives. The "man-in-the-house" rule and the practice of unannounced or nighttime visits had been repudiated. Yet the pathologies emphasized by the lawyers of the 1960's seemed to have been mitigated at the costs of exacerbating others that were in some respects their mirror images: indifference, impersonality, and irresponsibility. The new pathologies were typified by cases in which newly arrived Cuban refugees were denied assistance because they could not produce appropriately certified copies of birth certificates for their children or in which people who sought assistance from the wrong worker were sent away without explanation, thinking mistakenly that they were entitled to nothing.

Simon makes these observations in support of more discretion, and more worker power exercised in a professional manner in the interests of the clients. We do not necessarily share that opinion. What he has illustrated, however, is that thoughtless, despotic and irresponsible worker conduct is just as possible under a rule based system as not, and further that rules themselves may be used as an instrument of worker tyranny. To the extent that this is a problem in Ontario, the solution lies elsewhere than in the facile attempt to curb worker discretion.

Much the same can be concluded about the political dimension to the power analysis. Public discretionary powers have been analyzed at the macro level and criticized as vehicles whereby the state increases its own power and correspondingly lessens the power and autonomy of its citizens.¹⁴ However valid this criticism may be, little of significance turns on whether particular provisions in legislation employ discretionary or rule-based entitlement language. The source of the state power over the individual rests far more in its having something to distribute to citizens (social assistance), than on the terms for distribution (discretion or rule).¹⁵ The degree to which a citizen can control the state through legal rules and judicial institutions is distinctly limited in the first place, and depends little on the rule-discretion choice in

14. See for example, C. Smith and D.C. Hoath, *Law and the Underprivileged* (London; Boston: Routledge & Kegan Paul, 1975); Wilding, *Professional Power and Social Welfare* (London; Boston: Routledge & Kegan Paul, 1982); and Galligan, *Discretionary Powers* (Oxford: Clarendon Press, 1986); *Manitoba Task Force Report*, 1983, at 28; Reich, *supra* note 13.

15. For the view that discretion causes client degradation, see Burman and Gardner, "The Negotiation Of Trust And Identities In The Public Distribution System" (Conference on Qualitative Analysis, York University, 1990) [unpublished] at 34.

the second. Modern attempts to empower citizens and clients are based on giving them meaningful participation in both institutional design and operation.¹⁶ Although we shall not consider the power critique directly again, much of what follows will support the conclusions we have reached here.

3. THE LIMITS OF RULES: THE LAW OF CONSERVATION OF DISCRETION

Given the citizen entitlement model, and assuming that the characterization of discretionary decision-making as arbitrary decision-making is warranted, the important question which remains is whether there is any room whatsoever for discretionary decision-making in social assistance legislation. That is, is it possible, and if so desirable, to draft legislation which consists solely of precise legal rules? The short answer to both questions is no.

3.1 OPEN TEXTURE AND ITS CONTROL: THE STANDARD SUGGESTIONS

The analytic distinction between discretion and precise rules breaks down in practice. Any system that requires the exercise of human judgment must have an element of discretion. H.L.A. Hart put it this way:¹⁷

Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*. ... (U)ncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact. Natural languages like English are when so used irreducibly open textured.

To the extent that open texture is a problem, little may be done about it. One possibility is to avoid general classifying terms. It is also unrealistic to expect the legislature to be willing and able to anticipate all specific criteria and to keep them current in the legislation. Davis recognized as naive the hope that administrative discretion could or should be replaced by more precise legislative drafting. Instead, he encouraged agencies to use their internal rule-making power to publish more specific guidelines as they developed with experience.¹⁸ The extensive policy manuals employed within Ontario's

16. See for example, Handler, "Continuing Relationships And The Administrative Process: Social Welfare" [1985] Wisc. L.R. 687; Mosher, "Recipient Participation in Discretionary Decision-Making" (University of Toronto, 1989) [unpublished] at 2.

17. H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 124-5.

social assistance scheme would appear to be precisely what Davis called for. However, as we shall demonstrate below, the generation of more precise rules in manuals does not solve the problem. Moreover, the policy manuals in existence in Ontario pose specific problems of their own.

This, then, is the standard recipe for controlling discretion. First, for each statutory power of decision define the standard case with a rule, not a discretionary power. Second, refine the legislative language to move from general classifying terms to more specific language. Third, continue the task of further precision in rule drafting in co-operation with the agency itself. By this route, discretion in both clear and borderline cases can be virtually eliminated.

3.2 MORE RULES GENERATE MORE DISCRETION

Unfortunately, the standard recipe does not turn out too well. Even if one could anticipate all contingencies, there is another sense in which it is impossible to eliminate discretion by increasing the number of precise legal rules. Imagine one could isolate all the decisions that a person in a particular job classification in the social assistance field would be required to make. Imagine that one was able to list every factor that might be relevant to the decision, define it unambiguously, and assign to it a direction and weight in the decision-making process. Imagine the size of the statute and policy manual that would result from this exercise. The more one generates rules and generates more precise rules, the more likely they become so numerous, complex, and conflicting that no worker could be reasonably expected to learn them, let alone to follow them.¹⁹ There is nothing unusual about this. In any large organization the number and complexity of the rules exceeds the workers' ability to comply with them. This is what "work-to-rule" is all about.²⁰

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18. *Supra*, note 4 at 55. For a sophisticated critique of Davis' work, see Baldwin and Hawkins, "Discretionary Justice: Davis Reconsidered" [1984] Public Law 570.
 19. We may have reached this point in Ontario. See *Back on Track* (1991), at 25. See also *Kerr v. Central Manager, Dept. of Soc. Services of Metro. Toronto* (1991), 4 O.R. (3d) 430, 82 D.L.R. (4th) 197 (Ont. Div. Ct.), in which the regulations under the *General Welfare Assistance Act* are described as "Kafkaesque". For a comment on the complexity of the British system see Brown, "The British Social Security Tribunals: A New Unified System for Adjudication of Social Security Benefits" (1986) 17 Camb. L.R. 40 at 52.
 20. See generally J.M. Prottas, *People-Processing* (Lexington, Mass.: Lexington Books, 1979), especially at 166-168; Simon, *supra*, note 11 at 1228 and at 1198.

So we must confront a basic and important paradox. The more one attempts to control discretion with rules, the more one increases the *de facto* discretion that workers will actually exercise. In the face of this rule overload, the worker will have to develop his or her own routines in order to cope. This is an illustration of what Simon has described as the "law of conservation of discretion".²¹ In complex systems such as the public assistance system in Ontario, one can limit the lawful exercise of discretion only by expanding the illicit exercise of discretion. The moral authority of the entire ministry will be undermined to the extent official standards are ignored in favour of *de facto* employee codes. There is no reason to expect that the *de facto* code will bear any relationship to the legislative goals, even if the workers are aware of what these goals are. More likely, the *de facto* code will evolve to cope with the time pressures created by the excessive number of rules, and to satisfy the interests of the individual workers, however commendable or reprehensible they may be.

3.4 DISCRETION BEST LIMITED BY SIMPLIFICATION

Given that a certain amount of discretion is inevitable, the most effective means of limiting it is to simplify the legislative scheme, and the bureaucratic procedures necessary to implement it. Discretion comes from the process of decision-making. The fewer the number of decisions required, the less the impact of discretion. The fewer the number of decisions required, the easier to monitor and enforce ministry standards. Protas puts it this way:²²

... street level discretion increases as the number and complexity of client categories increases. ... The more distinctions it is asked to draw among clients the less control its leadership retains over how those distinctions are actually operationalized.

4. The Legal Limits to Administrative Discretion

At law there is no such thing as unlimited discretion. All discretionary powers, no matter how broad the statutory language, are subject to numerous legal limits and constraints. No administrative power authorizes capricious decisions or decisions based on the personal motives of the worker. Various legal remedies, notably judicial review, exist to deal with complaints of this type. Any criticism of broad discretionary language which assumes otherwise is simply misconceived. Indeed, there is far less difference than supposed in

21. *Supra*, note 13 at 1224.

22. *Supra*, note 20 at 166.

the degree to which rules, structured powers and general powers are limited by law.

4.1 DWORKIN'S STRONG AND WEAK DISCRETION

Dworkin has drawn an apparent distinction between two types of lawful discretion, "weak" and "strong" discretion.²³ To say a decision-maker has strong discretion means that the decision-maker is authorized to choose among alternative courses of action for whatever reason he or she might wish. Put otherwise, there are no binding standards imposed by law against which the decision may be evaluated. With weak discretion there exist binding standards imposed by a superior to govern a subordinate in his or her exercise of a decision-making power. However, because the standards cannot be applied mechanically, the decision-maker must exercise interpretation or judgment to apply the standards.

To illustrate the difference between strong and weak discretion, Dworkin uses the example of a sergeant ordered by a superior officer to select soldiers for patrol. The sergeant has strong discretion to choose if ordered to select any five soldiers. In contrast, if ordered to select the five most experienced soldiers, the sergeant would have weak discretion.

The key distinction for Dworkin is that in the first case, one cannot criticize the sergeant for having made a *wrong* choice, wrong to be determined by formal criteria in the order. One can criticize the decision on other grounds. The decision might be a poor one if the five least capable soldiers were selected for an important mission, or an unfair one if the same five soldiers were always chosen for unpleasant tasks, or malicious if the five were chosen to satisfy a private grudge. With weak discretion, in addition to these criticisms, the decision may be criticized as *wrong* if the soldiers chosen do not somehow meet the criterion of "most experienced".

However, it is not quite true to say that an exercise of strong discretion cannot be criticized as wrong. "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept"²⁴. No administrator has, or could have, lawful discretion to decide free of all constraints.

23. R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 31-33. He also identified a third type, "final discretion" which we discuss briefly in section 5, below.

24. *Ibid.* at 31.

4.2 LEGAL CONTROL FROM BEYOND THE ADMINISTRATIVE SCHEME

Every discretionary power, strong or weak, is subject to formal legal constraints which exist independently of the administrative regime. For example, public decision-makers are constrained by the Canadian Charter of Rights and Freedoms, and by the Human Rights Code of Ontario. No administrative decisions that violate such constraints are final as a matter of law, because they may be challenged in the courts. Of course, as a practical matter, few recipients of social assistance are likely to mount such a legal challenge, a matter to which we shall return shortly.

4.3 LEGAL CONTROL EXPRESSED IN THE LEGISLATION

Second, the description of even the strongest discretionary power usually defines its own outer limits. Dworkin's example of the sergeant's strong discretion illustrates this. There may be strong discretion to choose *any* soldier, but the range of discretionary choice is limited to *soldiers*. Each important discretionary power in the social assistance legislation will be, or should be, limited in this sense.

4.4 LEGAL CONTROL THROUGH JUDICIAL REVIEW OF IMPLIED JURISDICTIONAL ERROR

Third, within the limits of discretion there exist internal constraints. It is often believed that this is true only of weak discretion, and believed that strong discretion is subject to no internal constraints. For this reason, weak discretion is favoured by reformers who regard discretion as a necessary evil in social assistance legislation. If one cannot eliminate discretion entirely, at least one can structure it internally with legislative standards. The famous work of Davis is the classic example of this approach.²⁵ However, it is false to believe that strong discretion is subject to no internal constraints. On closer examination, the distinction between strong and weak discretion turns out to be little more than that between two points on a continuum in our project.

Limited discretionary powers are conferred by legislation to statutory public authorities who administer the social assistance schemes. Administrative discretion, whether strong or weak, must be exercised within these limits, or within "jurisdiction". Some jurisdictional limits are obvious. For example,

25. See Davis, *supra*, note 4 at 102. He distinguished between limiting and structuring discretion as follows: "... rules which establish limits on discretionary power confine it, and rules which specify what the administrator is to do within the limits structure the discretionary power."

an Ontario social assistance worker lacks jurisdiction to deny benefits under British Columbia legislation, or to revoke an Ontario driver's licence. Others, as discussed below, are far more subtle.

Judicial review is the standard legal remedy for jurisdictional error. In theory, judicial review is quite different from a right of appeal. For our purposes, a successful application for judicial review means that although a reviewing court cannot replace an administrative decision with a decision of its own, it may declare an exercise of administrative power void if the decision is made without "jurisdiction". An appellate body reviews legal errors, and may substitute its own view of the "correct" decision for that of the decision under appeal. Such a right would be incoherent in the case of strong discretion where, by definition, there are no standards upon which to judge the decision as legally correct.

The difference between judicial review and an appeal is relevant to the distinction Dworkin attempts to draw between weak and strong discretion. He suggests that strong discretion may be criticized on many grounds (e.g. poor, malicious, unfair, irrational, biased), but not challenged as wrong in law. If we understand him to mean that an appeal from an exercise of strong discretion would be incoherent, he is correct. But, that is not the whole story. In fact, every one of Dworkin's grounds of criticism and more are routinely relied upon in Ontario Courts to support judicial review.

Even in the absence of a statutory right of appeal, excesses of jurisdiction may be challenged in an application for judicial review. In addition to jurisdictional limits which are explicit in the legislation, the courts have recognized implied jurisdictional limits to the even the broadest statutory description of administrative discretion. Discretionary decisions must be based on "considerations pertinent to the object of the administration."²⁶ Thus, as a matter of law, no administrator in the social assistance field could rely on strong discretionary language to claim the right to make a capricious decision. The courts will read such a strong discretionary power as bounded by the object of the scheme. Moreover, in practice judicial review has developed to the point that any error may be characterized as "jurisdictional" by a court determined to review. As noted above, all of the types of criticism mentioned by Dworkin (poor, malicious, unfair, irrational, biased) may form

26. *Roncarelli v. Duplessis*, [1959] S.C.R. 121, per Rand J. Note this is another example of the law of conservation of discretion discussed in Section 4. Judicial review shifts discretion to determine relevance from the agency to the courts. It does not eliminate discretion.

the basis of a jurisdictional attack in an action for judicial review.²⁷ It is also worth noting that judicial review effectively transfers discretion from bureaucrats to the courts to determine whether, for example, a particular decision is rational or not.

In summary, statutory discretionary powers do not, as a matter of law, authorize arbitrary (capricious, random, whimsical, irrational, malicious, unfair, corrupt) decision-making. Judicial review is available to challenge the exercise of any statutory power of decision on virtually any ground, including these. In this respect, there is little significant difference between strong and weak discretion.

5. DE FACTO DISCRETION: BEYOND THE LAW

In the previous section we attempted to demonstrate that the legal limits to discretionary powers are not dissimilar to the limits imposed by more precisely worded rules. In fact, a great deal of employee behaviour is not governed by formal legal limits at all, be these explicit limits in rules or implied limits to discretionary powers. The practical question is whether rules or discretionary powers are more easily enforced to secure compliance with legislative goals.

5.1 THE SIGNIFICANCE OF UNWRITTEN RULES

Organizational theorists do study the formal structures of an organization such as a social assistance ministry or department, the legislation, regulations, and policy handbooks. But these formal structures, the pre-occupation of lawyers, are relatively unimportant for social scientists. Numerous studies of public bureaucracies suggest that bureaucrats deviate frequently from legal rules. Moreover, they seem to do so quite deliberately, not as a matter of error.²⁸ Instead, it is hypothesized, they tend to follow unwritten codes of conduct, codes which are likely reflect the interests of the bureaucracy itself

27. The formal law of judicial review is predicated on a distinction between a question of jurisdiction (to which the administrator may not have the final say) and a question of the merits (to which, in the absence of a right of appeal, the administrator does have the final say). The practice of judicial review is predicated on collapsing the distinction between jurisdiction and merits to allow judicial review whenever the courts feel judicial supervision is warranted. Perhaps the explanation of jurisdictional error that best supports this analysis may be found in the famous quote of Lord Reid in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 at 171.

28. Here we would disagree with Beatty, *supra*, note 3 at 6, who speaks of simple worker error.

and the interests of the individual bureaucrats, rather than the legislative interest reflected in the statute.

Any person who has ever worked in any organization knows this to be true. To succeed in any employment setting requires one to internalize the sub-culture of the work environment. One learns quickly which formal rules one is expected to observe, and which may be forgotten, if indeed they are ever learned. One learns the expectations of one's co-workers and superiors, the rewards for compliance and the penalties for deviance. And little or none of this ever appears in the statute, regulation, or even in the employee handbook.

Actual behaviour in bureaucracies is determined by a mixture of formal and informal rules, some lawful and some not. This is not an indictment of the public service, or even a mild criticism. It is simply an observation about what is and what must be. What it signifies for this project is that any attempt to limit or structure discretionary decision-making by careful drafting of social assistance legislation will be insufficient, perhaps futile, unless that effort is coordinated with efforts to control *de facto* discretionary powers. It also suggests that the preference for precision over general discretion should be based, in part, on whether one is more easily monitored and enforced than the other.

5.2 RELATIONSHIP BETWEEN DE FACTO DISCRETION, LAWFUL DISCRETION, AND RULES

It is tempting, and in keeping with legal tradition, to put this aside entirely as a matter of monitoring and enforcement, rather than as a matter of discretion. Note, however, that from the practical perspective of the client who perceives that he or she is being treated in an arbitrary (capricious or inappropriate) manner the distinction is less important. In terms of what the client experiences, it matters little what is the source of the "discretionary" power. The power may be statutory and lawful. It may result from the system's inability to police itself effectively. It may result from systemic rule and task overload. It makes little practical sense to distinguish between these for the purpose of client problem definition.²⁹

It is entirely beyond the scope of this project to offer a comprehensive analysis of *de facto* discretionary powers in Ontario's social assistance scheme. Any proper approach to that topic would require agency-specific empirical study. We can, however, make a few observations about *de facto*

29. See also *Back on Track*, at 100.

discretion, concentrating on the relationship between *de facto* discretion and *de jure* discretion granted by the legislation.

Earlier, we argued that there is no such thing as the lawful authorization of capricious decision-making power. We can now dispose of the allegation of capricious decision-making in the practical realm. The exercise of *de facto* discretion is virtually always governed by a complicated set of unofficial rules or norms. The problem is not the absence of rules, but rather one of determining which of the formal and informal rules are operative, and then determining how to control them.

A comprehensive strategy for controlling administrative discretion must be directed towards promoting congruence between workers' personal values and interests and the policy goals of the public social assistance scheme. Recruitment and training may prove far more influential than drafting, monitoring and enforcing rules and standards.³⁰ The problem with rules, even if they could be drafted to insure perfect results, is that employees do not always follow them. And, it seems reasonable to suppose that exactly the same factors that skew the exercise of statutory discretion will influence outcomes when employees do not follow the statutory rules. So, whether we are dealing with rules or discretionary powers, there must exist some mechanism for compliance review and some incentive to use it.³¹

30. See Simon, *supra*, note 13, who argues throughout for less formal structure and for a better trained and motivated work force. See also Beatty, *supra*, note 3 at 47. For a criticism of the notion that rules shape the world and suggestions for more effective rule-making, see Baldwin, "Why Rules Don't Work" (1990) 53 Mod. L.R. 321.

31. No area in an administrative regime tends to be more dominated by discretionary powers than policing and enforcement. Frequently, the legislation is silent on the very question of whether there will be any institutional monitoring or enforcement of legislative standards, let alone on the questions of whether and which standards will be enforced, against who, and with what sanctions. We raise for consideration the possibility that more rule-governed monitoring and enforcement might be a very effective check on employee behaviour, including an effective review of discretionary powers. For example, it has been suggested that an agency itself ought to initiate judicial review in a given number of randomly selected cases. See Simon, *supra*, note 13. This proposal also responds to some of the other barriers to enforcement at the initiative of clients discussed below. We also note that the monitoring scheme chosen can itself distort the decision-making process. For example, if "good" decision-making is measured by the absence of client complaints, one would expect few client requests for aid to be turned down. If measured by budget reduction from the previous period, one may expect considerably more client dissatisfaction. These are matters beyond the scope of this project, but too closely connected to be ignored completely.

5.3 RULES AND MODEST CONTROL OF DE FACTO DISCRETION

There are a number of reasons to suggest that rules may be somewhat easier to monitor and enforce than are discretionary powers. To the extent that employees try to comply with the legislative intent, rules, in the standard case at least, dictate the correct outcome. This should reduce error at the first level of decision. It is difficult to monitor compliance with legislative purpose without some statement of purpose against which to measure behaviour. Rules provide relatively clear information to clients about their entitlements under the legislation. This, we might predict, will increase the clients' ability to monitor and enforce on their own initiative. Finally, whenever decisions are reviewed by superiors, appellate bodies or courts, those bodies also have a great deal of *de facto* and *de jure* discretion. Again, we might expect a clear rule to control outcomes better than general discretionary powers at that level.³²

These apparent advantages should not be overstated. Good faith error is seldom the main cause of employee deviance. One or two clear rules may assist clients to know their rights. Numerous complicated rules emanating from a variety of sources do not. There are many barriers to client-initiated enforcement other than uncertainty about entitlement. Some are obvious. How many social assistance clients can afford a court challenge? Some are more subtle. Many clients will prefer to take less than they might secure after review than to expose themselves, their privacy and dignity to further scrutiny.³³ And, the relationship between a social assistance agency and the client, even when brief, tends to be an ongoing one. The sociological literature makes clear that legal action is not a common or desired form of dispute resolution among persons who are in a continuous relationship, as opposed to persons who experience a chance-encounter discrete dispute.³⁴

32. This is the position taken by Ginsburg, "Discretionary Power In The General Welfare Assistance Act Of Ontario" (1987) 2 *J. Law and Social Policy* 1 at 21. We are more sceptical about judicial review as a meaningful form of administrative control in the social assistance context. In contrast to Ginsburg, see Norton, *supra*, note 1 at 1296-7.

33. See Handler, "Legality Bureaucracy, and Class in the Welfare System" (1983) 92 *Yale L.J.* 1198 at 1279;

34. The foundation work in this area is Macaulay, "Non-Contractual relations in Business: A Preliminary Study" (1963) 28 *Am. Soc. Rev.* 55. See also Handler, *supra*, note 33. All of this is a topic in its own right. For present purposes, we wish only to emphasize that the existence of a rule-defined right and its enforcement by client action are two very different matters.

On balance, we would conclude that rules have a small, but useful, advantage over discretionary powers from a monitoring and enforcement perspective. As we have demonstrated throughout, it is neither possible nor desirable to replace all, or even most, discretionary powers with precise rules. It remains, however, feasible to attempt to capture some of the enforcement advantages of rules by making the limits of discretion as explicit as possible, and by structuring important discretionary powers by stating explicitly the legislative purpose behind the power. We offer a number of reasons for a move in this direction below.

6. CONCLUSIONS

Legal rules purport to determine precisely what is to be done in a given situation. Discretionary powers authorize the decision-maker to exercise judgment. In fact, the application of rules to particular cases always requires some element of discretion. The exercise of discretion is always bounded by legal rules. It is inevitable that any legislative social assistance scheme will, in practice if not in form, operate through a mixture of rules and discretionary powers. Even were it desirable, and we are not of that opinion, it would be impossible to eliminate discretionary decision-making from Ontario's social assistance scheme.

It transpires that many problems attributed to legislative grants of discretionary power have other causes. They can and do exist under rule dominated systems. For example, capricious or inappropriate or autocratic decision-making is just as likely in the application of a rule as in the exercise of a discretionary power. *De facto* discretion will have as much or more of an objectionable impact on clients as lawful discretion. It follows that efficient monitoring and enforcement of agency conduct is far more likely to generate compliance with legislative objectives than is the choice between rules and discretionary powers of decision.

If this paper were to make one important contribution to legal reform in the social assistance field it should be this: a great deal more attention ought to be paid to setting goals and establishing a scheme for monitoring and enforcing them than to establishing unenforced and perhaps unenforceable client rights.

There are at least two things directly relevant to this project that may influence the ability to monitor and enforce the legislative purposes underlying the social assistance legislation. First, as precise rules proliferate and become more complex employees tend by necessity to ignore them and

policing becomes relatively more difficult. The simpler the legislative scheme, the more likely it will be achieved. Second, monitoring and enforcement of discretionary powers is more effective the more structured they are. In particular, without a statement of the purpose for which the power was granted, how can anyone monitor meaningfully the exercise of the power?

7 RECOMMENDATIONS

In this section, we attempt to devise general recommendations which we will later apply more particularly to the different type of decisions made pursuant to social assistance legislation.

Firstly, it is absolutely essential that rules be devised to govern the great majority of important decisions in the social assistance scheme. Even if one favoured a totally discretionary system, which we do not, this would prove prohibitively time consuming and expensive.³⁵ Workers would quickly develop *de facto* rules to enable them to cope. It is far better to have the legislature develop efficient rules to govern the relatively uncontroversial paradigmatic case.

We would characterize Ontario as a jurisdiction where its government and citizens adopt the client entitlement model of social assistance. Therefore, there is an important symbolic advantage to a scheme that purports to govern most major decisions by legal rule.

Precise rules, when they are followed, eliminate the exercise of human judgment in particular cases. Precise rules should be favoured when the desired outcome can be predicted with relative certainty, i.e. when there is relatively little need for human judgment. They should also be favoured when the consequences of inappropriate discretionary decisions are particularly high.

Rules, provided they are relatively few and simple, may be marginally better at securing worker compliance with legislative objectives than discretionary powers.

Finally, some clients may prefer to be dealt with as a paradigm case, in a rote disengaged manner, than to become more intimately involved with the system and workers in an effort to secure greater assistance. A rule that provides routinely basic assistance leaves clients with the choice of whether to move

35. See Beatty, *supra*, note 3 at 38 for a discussion of cost-effective use of discretionary powers.

from a perceived position of claimant of right to one of supplicant seeking additional discretionary relief.

We emphasize again that we are recommending relatively few rules, and relatively simple rules. Discretion cannot be eliminated under any scheme that requires choice, but it can be reduced by reducing the need for choice. Thus, for example, the fewer the categories of applicant or criteria for eligibility in social assistance legislation, the less room for administrative discretion to operate. Simplicity in legislative design also makes it more likely that the legislative purpose will be observed voluntarily, and makes it easier to monitor and enforce worker compliance. The number of formal and informal rules found in social assistance legislation, regulations, and handbooks vastly exceeds the cognitive capacity of experts and employees, let alone clients. This is a breeding ground for uncontrollable *de facto* discretion.

Now we must confront the other side of the coin. A relatively simple rule-based scheme will be too crude. Rules are invariably over-inclusive or under-inclusive. This is where statutory discretionary powers can help.

Essentially, discretion can operate in one of two directions or both. Discretion can be granted to allow a worker to expand eligibility or quantum from what it would be under the rule. And, discretion can be granted to disentitle someone who would otherwise be eligible under the rule. At a minimum, the legislature should specify how, in this sense, the discretion may operate.

It is difficult to argue in principle against allowing discretion to benefit deserving clients, although concerns about arbitrary entitlement remain. Discretion to disentitle may be more objectionable to clients and hence more politically problematic, even though economists assure us there is no difference between experiencing a loss and foregoing a benefit. However, without discretion to disentitle funds will be wasted on cases that fit the words, not the purpose of the rule.

In our opinion, there is relatively little significant difference in law or practice between grants of strong and weak discretion. Notwithstanding this analysis, we do favour a move from strong discretionary language towards more structured discretionary powers in social assistance legislation. We perhaps differ from traditional arguments of this sort in that we have more modest expectations about the difference this will make in practice. Nevertheless, we support a move in this direction. For one thing, this insulates the legislature directly from any charge that the *grant* of discretionary power was arbitrary. This may have important symbolic advantages. For another, forcing the legislature and its advisory bodies, as well as the agencies themselves, to

reflect on appropriate internal constraints for discretionary powers has inherent value. One assumes that explicit discretionary powers are legislated for a particular purpose. For example, the purpose of discretionary power is often to enable the decision-maker to make eligible for assistance someone whose claim meets the purpose, but not the words, of the rule. It is entirely appropriate that the legislature be encouraged to consider and then to specify that purpose in the legislation.³⁶ Finally, as discussed earlier, it may be that more structured powers are easier to monitor and enforce to ensure compliance with legislative objectives. Nevertheless, there is a limit to how strictly limited and structured discretionary powers can be and still retain the advantages for which they were chosen over precise rules.³⁷

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36. As to the theme of openness in administration see generally Davis, *supra*, note 4 and *Back on Track* (1991).
37. See P. Williams *Alchemy of Race and Rights* (Cambridge, Mass.; London, England: Harvard University Press, 1991) at 146-7, where Ms. Williams, a black law professor makes an interesting comparison between how she and a white male friend had negotiated apartment leases in New York City. He handed over a \$900.00 cash deposit to strangers with no contract, exchange of keys, or receipt. She negotiated with friends a detailed lease establishing her as the "ideal arm's length transactor". Our analysis in this paper might suggest that she had attached too much importance to legal rights, or to suggest that she was not the typical social assistance client. However, it seems more likely that Williams has an appreciation of the significance of formal rights to the relatively less powerful which, whether symbolic or practical, ought not to be discounted by us.