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THE NEW CONTRACT: WELFARE REFORM, DEVOLUTION, AND DUE PROCESS

CHRISTINE N. CIMINI*

INTRODUCTION

In 1996 Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Reform Act or PRWORA),[1] claiming that fundamental and revolutionary changes were necessary to cure the perceived intractable problems of the welfare system. The problems identified by Congress included long-term dependency on welfare benefits, large numbers of out-of-wedlock pregnancies, and the lack of two parent families.[2] In order to address these perceived problems, the Welfare Reform Act was designed to promote job preparation, work and marriage among recipients, and to increase administrative flexibility for states.[3] Specific provisions designed to achieve these goals include: a requirement that each recipient be engaged in a work-related activity within twenty-four months of receipt of assistance,[4] a sixty-month lifetime limit on receipt of assistance,[5] obliga-

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* Assistant Professor, University of Denver College of Law. I thank the organizers and participants of the University of Maryland School of Law symposium on Welfare Reauthorization, particularly Karen Czapanskiy, without whom the conference would not have been possible, and Cheryl Miller, for commenting on my Article. For helpful comments and suggestions I also thank Diane Burkhardt, Alan Chen, Roberto Corrada, Karen Czapanskiy, Ronald Griffin, Ruthann Macolini, and Julie Nice. The University of Denver College of Law provided valuable financial support for the project. Finally, I thank Jessica West for her continued and unwavering support of my work.

1. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C. (Supp. V 1999)).

2. 42 U.S.C. § 601(a)(2)-(4).

3. *Id.*

4. *Id.* § 602(a)(1)(A)(ii). States are required to insure that the requisite percentage of recipients are participating in "work activities," as defined by the statute. *Id.* § 607(a)(1). The statute defines work activities as:

(1) unsubsidized employment;
(2) subsidized private sector employment;
(3) subsidized public sector employment;
(4) work experience (including work associated with the refurbishing of publicly assisted housing) if sufficient private sector employment is not available;
(5) on-the-job training;
(6) job search and job readiness assistance;
(7) community service programs;
(8) vocational educational training (not to exceed 12 months with respect to any individual);

tions to enter into individual responsibility plans with the government that set forth the conditions for assistance,[6] and devolved authority for the administration of welfare programs to state and local governments.[7]

Much current debate exists regarding whether these goals and statutory mandates have succeeded in remedying the perceived problems of the welfare system. Since passage of the Welfare Reform Act, the number of welfare recipients has dramatically declined.[8] In 1994, prior to welfare reform, the number of families receiving assistance nationally was 5 million.[9] By March 2001, the number dropped to 2.1 million.[10] Though some may consider this decline a tremendous success, such proclamations depend upon the definition of suc-

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(9) job skills training directly related to employment;

(10) education directly related to employment, in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency;

(11) satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence, in the case of a recipient who has not completed secondary school or received such a certificate; and

(12) the provision of child care services to an individual who is participating in a community service program.

Id. § 607(d). States are permitted to further define each category. *See* Temporary Assistance for Needy Families Program (TANF), 64 Fed. Reg. 17720, 17776, 17778 (Apr. 12, 1999).

5. 42 U.S.C. § 608(a)(7)(A). The statute does include a hardship exception that permits a state to exempt a family from the sixty-month lifetime limit. *Id.* § 608(a)(7)(C).

6. *Id.* § 608(b)(2)(A).

7. *See id.* § 603(a) (providing a block grant payment to each state in order for each state to administer its own welfare program). At the same time the federal government has devolved authority to the states, it has retained very limited authority to regulate state conduct. *See id.* § 617 ("No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part."); *see also* JULIE A. NICE & LOUISE G. TRUBEK, CASES AND MATERIALS ON POVERTY LAW: THEORY AND PRACTICE 193 (Supp. 1999) (detailing how the federal statute explicitly limits the Department of Health and Human Services' authority to regulate state implementation of TANF). According to one scholar:

> The principle of devolution . . . is based on the notion that decisions made closest to those affected are likely to be the best informed and certainly the most democratically based. It suggests that actions to implement legitimate government objectives should be taken at the lowest level of government capable of effectively addressing the problem.

Marshall J. Breger, *Government Accountability in the Twenty-First Century*, 57 U. PITT. L. REV. 423, 430 (1996).

8. Mark Greenberg, *Welfare Reform and Devolution, Looking Back and Forward*, BROOKINGS REV., Summer 2001, at 20, 22.

9. *Id.*

10. U.S. DEP'T OF HEALTH & HUMAN SERVICES, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES: TOTAL NUMBER OF FAMILIES (2001), *available at* http://www.acf.dhhs.gov/news/families.htm.

cess.[11] If the ultimate goal is to effectuate a decrease in the number of welfare recipients, it is difficult to argue with the numbers. However, if one evaluates welfare reform's success in creating a fair system for the distribution of government benefits, the analysis is less than conclusive.

Focusing exclusively on the number of recipients no longer receiving welfare ignores numerous unresolved philosophical, political, social, and legal questions accompanying this sweeping overhaul of the welfare system. Congressional reauthorization of the Temporary Assistance to Needy Families (TANF) program in 2002 presents an opportunity to unearth and explore many of these unresolved issues. This Article will explore one aspect of the manifold legal implications of welfare reform—namely, under the new paradigm of public assistance, does the government remain accountable to recipients for its administration of welfare benefits?

An analysis of the question of government accountability may illuminate one reason for the rapidly decreasing number of welfare recipients. For example, is there a correlation between a decrease in the number of welfare recipients and the perception that due process mandates no longer exist under welfare reform? Or, are welfare recipients falling off the roles because of inadequate procedural due process protections?[12] If, in fact, governments are presuming that welfare benefits are no longer an "entitlement" and are, therefore, sanctioning recipients without adequate notice or process,[13] scholars

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11. *See* Sanford F. Schram & Joe Soss, *Success Stories: Welfare Reform, Policy Discourse, and the Politics of Research*, 577 ANNALS 49, 50 (2001) (discussing how some view a decline in the number of welfare recipients as evidence of its success, and questioning the standards used to measure such success); *see also* BILL BERKOWITZ, APPLIED RESEARCH CENTER, PROSPECTING AMONG THE POOR: WELFARE PRIVATIZATION 19 (2001) ("While welfare privatization has delivered drastic reductions in caseloads and welfare rolls, it has not moved recipients from the 'underclass' to the working class. Privatization is not efficiently delivering job training and support services to those who need them."); David Kocieniewski, *Study Finds Mixed Results in Reducing Welfare Rolls*, N.Y. TIMES, Oct. 22, 1999, at B6 (describing a study which found that two thirds of the individuals leaving New Jersey's welfare rolls remained below the federal poverty level, and that half experienced serious housing problems including eviction, staying in shelters, or moving in with family and friends).

12. *See* U.S. GENERAL ACCOUNTING OFFICE, WELFARE REFORM: STATE SANCTION POLICIES AND NUMBER OF FAMILIES AFFECTED 4-5 (2000) [hereinafter GAO, WELFARE REFORM]. The report explains that a substantial number of families have been affected by sanctions, increasing the possibility that sanctioning does not comport with minimal standards of due process: "During an average month in 1998, about 135,800 families received reduced benefits or no TANF benefits at all as a result of sanctions for failure to comply with TANF work and other responsibilities." *Id.* at 5.

13. One recent case involving the procedural due process implications of welfare reform tends to support the idea that at least one state and county are operating as if recipients are no longer entitled to minimum standards of procedural due process. Weston v.

and advocates should give serious thought to conceiving alternative bases for due process protections.[14] This Article identifies contracts, both social contract and traditional legal contracts, as alternative means to provide recipients with due process protections.

Passage of the Welfare Reform Act fundamentally shifted the paradigm of public assistance from a federal statutory entitlement model to a devolved contractual model. Under the previous entitlement model of administration, recipients obtained due process protections based upon eligibility criteria that afforded caseworkers little discretion.[15] Caseworkers applied very specific eligibility rules to each potential applicant to determine whether the individual qualified for benefits.[16] Once an applicant qualified for benefits, the applicant was entitled to receive assistance. Thus, the statutory criteria and absence of caseworker discretion created a legitimate expectation in the receipt of benefits for qualified applicants.[17] This legitimate expectation formed the basis of an "entitlement," which was construed by the

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Cassata, No. 99CA2449 (Colo. Ct. App. July 5, 2001); *see also infra* notes 106-111 and accompanying text (describing the lack of due process given to welfare recipients). The following excerpt exemplifies the position held by some state and local governments:

> [Defendant Adams County]: "It is . . . defendant's argument that, in fact, there is no due process right to notice under the Fourteenth Amendment of the U.S. Constitution or under the Colorado Constitution. . . ."
>
> The Court: "Are you saying there's no right to notice because there's no right to due process because there's no property interest?"
>
> [Defendant Adams County]: "Absolutely."
>
> The Court: "Okay. Meaning that under that scenario there's no right to notice at all? Agreed?"
>
> Defendant Adams County: "Absolutely."

Transcript of Hearing on Motion to Dismiss at 48-49, Weston v. Hammons, No. 99CV412 (Colo. Dist. Ct. May 28, 1999) (on file with author).

14. *See* Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 625-641 (2001) (offering alternatives to traditional constitutional litigation on behalf of welfare recipients in the context of privatized welfare).

15. *See* Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (holding that "benefits are a matter of statutory entitlement for persons qualified to receive them" and cannot be discontinued without affording the recipient due process); Morel v. Giuliani, 927 F. Supp. 622, 627 (S.D.N.Y. 1995) ("Recipients [of AFDC] have a constitutionally guaranteed right to have an administrative due process hearing to review an agency action affecting their benefits."); *cf.* Alexander v. Polk, 750 F.2d 250, 260-61 (3d Cir. 1984) (holding that where discretion to deny benefits is absent, a recipient has a valid property interest in her continuing eligibility to receive funds).

16. *See, e.g.*, Evans v. Dep't Soc. Serv., 178 N.W.2d 173, 177-78 (Mich. Ct. App. 1970) (concluding that AFDC claimants were entitled to have their interest in public assistance "considered in accordance with statutory criteria").

17. *Cf. Alexander*, 750 F.2d at 261 (explaining that "[p]otential recipients had a legitimate expectation of receiving benefits upon satisfying the criteria specified in" the Supplemental Food Program for Women, Infants, and Children).

Supreme Court as "property" under the Fourteenth Amendment.[18] As constitutionally protected property, recipients of such benefits were entitled to procedural due process protections in the administration of public assistance.[19] As this Article will illustrate, the devolved contractual model of the Welfare Reform Act dramatically changed this analysis.[20]

In essence, the new devolved contractual model of welfare administration removes federal statutory criteria and allows each state to design and develop its own welfare program within broad federal guidelines.[21] In the absence of federal statutory eligibility criteria, the new model reformulates the role of the caseworker by permitting much broader discretion in decision-making.[22] Caseworkers now serve as government agents who assess each applicant and create an individualized contract or plan detailing the agreement between the government and the recipient.[23] The new model also decreases traditional government accountability mechanisms, such as specific rules to govern eligibility, which formerly helped to insure fairness in administration.[24] Further, some states have instituted second order de-

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18. *Goldberg*, 397 U.S. at 262 n.8 (stating that welfare entitlements are "more like 'property' than a 'gratuity'"); *see also* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 778 (1964). Professor Reich argues that public assistance, like other forms of government largess, such as licenses, franchises, and jobs, should be treated and protected as property. *Id.* Moreover, he argues that "[t]he grant, denial, revocation, and administration of all types of government largess should be subject to scrupulous observance of fair procedures." *Id.* at 783.

19. *See Goldberg*, 397 U.S. at 266 (holding that welfare recipients are entitled to due process before their benefits are terminated).

20. *See infra* notes 54-77 and accompanying text (describing the changes in welfare assistance under the 1996 reforms).

21. *See* 42 U.S.C. § 604(a)(1) (Supp. V 1999) (providing that states can use the block grant from the federal government "in any manner that is reasonably calculated to accomplish the purpose of this part . . ."). The stated purposes of the block grant are to:

> (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
>
> (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
>
> (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
>
> (4) encourage the formation and maintenance of two-parent families.

Id. § 601(a)(1)-(4).

22. *See* Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1147-48 (2000) ("One pronounced trend [in implementing the Welfare Reform Act] is the return to administrative schemes that emphasize discretionary rather than rule-based decisionmaking.").

23. *See infra* notes 79-87 and accompanying text.

24. *See infra* notes 88-95 and accompanying text (discussing the problems resulting from the devolution of authority from the federal government to the states).

volution to counties[25] or privatization of administration,[26] which can increase discretion and decrease the oversight of welfare administration.[27] Unless due process safeguards exist, this new model of welfare administration may engender unequal treatment between recipients and unfair or inappropriate treatment of individual recipients.[28]

This shift in the paradigm of public assistance administration was accompanied by the federal statutory provision expressly denying the existence of an entitlement.[29] The Welfare Reform Act specifically states that it "shall not be interpreted to entitle any individual or family to assistance . . . ."[30] While this "no entitlement" provision alone is not likely dispositive of the (non)existence of an entitlement,[31] the combination of the no entitlement provision, the lack of federal statutory criteria,[32] and increased discretion raises questions about previously secured due process protections. Under the previous federal statutory entitlement model, the existence of express statutory criteria created legitimate expectations in recipients that led to the creation of a property interest.[33] Under the new devolved contractual model, the absence of such criteria and the increase in discretion raises questions regarding the applicability of "legitimate expectation" analysis. Given the inverse relationship between discretion and legitimate ex-

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25. ANNA LOVEJOY & ELAINE M. RYAN, AMERICAN PUBLIC WELFARE ASS'N, DEVOLUTION OF ADMINISTRATIVE AUTHORITY TO THE LOCAL LEVEL: WELFARE REFORM EFFORTS IN FIVE STATES 1 (1998) (describing various second order devolution models in Maryland, North Carolina, Ohio, Colorado, and Wisconsin).

26. *See id.* at 8.

27. *See infra* notes 96-100 and accompanying text (commenting on the increased discretion resulting from privatization).

28. Karen Houppert, *You're Not Entitled!: Welfare "Reform" Is Leading to Government Lawlessness*, NATION, Oct. 25, 1999, *available at* 1999 WL 9307325 (concluding that governments and agencies implementing welfare reform are acting lawlessly in the new devolved model of welfare administration).

29. 42 U.S.C. § 601(b) (Supp. V 1999).

30. *Id.*

31. *See* Christine N. Cimini, *Welfare Benefits in the Era of Devolution*, 10 GEO. J. ON POVERTY L. AND POL'Y (forthcoming Mar. 2002) (arguing that the "no entitlement" provision is not determinative in regards to the existence of a legal entitlement). *But see* Michelle L. VanWiggeren, Comment, *Experimenting with Block Grants and Temporary Assistance: The Attempt to Transform Welfare by Altering Federal-State Relations and Recipients' Due Process Rights*, 46 EMORY L.J. 1327, 1354-55 (1997) (arguing that the "no entitlement" clause was intended to eliminate the individual entitlement to cash benefits).

32. For example, under the previous AFDC system all states accepted federal monies and provided assistance to "all eligible individuals" who met the federal criteria for eligibility. 42 U.S.C. § 602(a)(10)(A) (1994) (amended 1996). The Welfare Reform Act has no such corollary provision.

33. *See* Goldberg v. Kelly, 397 U.S. 254, 262 (1970) ("Such benefits are a matter of statutory entitlement for persons qualified to receive them.").

pectations[34] and the new welfare paradigm, scholars and advocates would benefit by exploring bases other than "legitimate expectation" upon which to ground due process rights.

This Article analyzes the due process implications of the change in welfare administration from the federal statutory entitlement model to the devolved contractual model and posits that, despite the changes, due process protections still exist. These protections arise from an analysis of contracts as evidenced on at least two levels. The first level is the macro, or implied, contract, which I will refer to as the social contract between the government and the populace. The second level is the micro, or express, contract encompassing the terms of the agreement between the recipient and the government. The Article ultimately concludes that both the macro and micro elements of the devolved contractual model create a new basis of due process protections for recipients of welfare.

Part I of the Article details the fundamental changes accompanying the shift from federal statutory entitlement model to devolved contractual model. The ways in which these changes have led to increased discretion and less accountability, and the potential benefits of a contractual due process analysis in light of these changes, are explored in Part II.

Within this context, Part III of the Article examines the existence of a new contractual source of due process protections for recipients and suggests that two different sources of contract may provide due process protections to recipients. The Article posits that a social contract between the government and the populace is one source of protection. The existence of this social contract is evidenced in numerous sources including: political theories that explore the use of political authority; foundational democratic legal sources, such as the Declaration of Independence and the United States Constitution; and the body of social contract rhetoric that permeates social welfare discourse. Finding support to determine that a social contract between

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34. Under the traditional procedural due process analysis, the greater the discretion afforded the administrators, the less likely the court is to find the existence of legitimate expectations. *See* Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (finding "that a State creates a protected liberty interest by placing substantive limitations on official discretion"); Hewitt v. Helms, 459 U.S. 460, 472 (1983) (holding that a liberty interest did exist where the statutory language was mandatory in nature and limited the discretion of the decision-maker); *Goldberg*, 397 U.S. at 262-63 (finding that a procedural due process hearing was required before the termination of welfare benefits); Jones-Booker v. United States, 16 F. Supp. 2d 52, 59-60 (D. Mass. 1998) (finding that the distinction between an "entitlement" and a mere "expectancy" necessarily depends upon the amount of discretion provided the decision-maker).

the government and the populace does exist, the Article then analyzes the terms of the social contract and concludes that, in addition to existing constitutional protections, the social contract insures that, at a minimum, the government must not act in an arbitrary manner.

The second source of contract arises from the existence of express contracts between the government and each individual recipient. These contracts take the form of Individual Responsibility Plans (IRPs) or Individual Responsibility Contracts (IRCs), which are created by welfare caseworkers and govern the terms of assistance.[35] The Article posits that these agreements are legally cognizable contracts[36] between the government and each recipient. As such, these contracts constitute "property" requiring the application of procedural due process protections pursuant to the Fourteenth Amendment.

Reframing the bases of due process protections becomes increasingly important as unfettered government discretion adds to the possibility for arbitrary action. Between 1970 and the 1996 passage of the Welfare Reform Act, advocates and scholars took for granted the existence of a property interest triggering procedural due process protections. The issues that were then debated involved what type of process was due.[37] However, under the new devolved contractual model of welfare, the very foundations that previously secured due process protections have been altered. Given legislative permission for increased discretion and heightened possibilities for arbitrary action, the question that needs to be addressed is even more fundamental—namely, how do we ensure that governments are held accountable while administering public assistance.

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35. *See* 42 U.S.C. § 608(b) (describing the requirements of the individual responsibility plans).

36. This Article uses the term "legally cognizable contract" to refer to an agreement that meets all the necessary requirements for the creation of an enforceable contract: offer, acceptance, and consideration. The Article specifically does not employ the term "legally enforceable contract" because enforcing the contract in court necessitates overcoming additional hurdles including jurisdiction and immunity barriers.

37. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (explaining that the type of process due is flexible and depends on balancing the individual and governmental interests involved); Dilda v. Quern, 612 F.2d 1055, 1057 (7th Cir. 1980) (holding that notice to welfare recipients whose benefits are being reduced which contains only a "brief statement of reasons" does not satisfy the due process clause).

I. THE WELFARE REFORM ACT'S NEW PARADIGM: FROM FEDERAL STATUTORY ENTITLEMENT MODEL TO DEVOLVED BLOCK GRANT CONTRACTUAL MODEL

The 1996 passage of the Welfare Reform Act fundamentally changed the conceptual framework of public assistance to adults with dependent children. Prior to 1996, the federal cash assistance program to adults with dependent children, Aid to Families with Dependent Children (AFDC), was recognized as a statutory entitlement available to "all eligible individuals."[38] The 1996 Welfare Reform Act, however, expressly rejected the existence of any entitlement to assistance.[39] Rather, the Welfare Reform Act's program of cash assistance to adults with dependent children, Temporary Assistance to Needy Families, adopted a contractual model, under which recipients must agree to comply with both general and specific obligations placed upon them by the government in order to receive a monthly assistance grant.[40] This new contractual model, which reconfigured the cash assistance program on both systemic and individual levels, differs from the old entitlement model in various respects. The differences include: state or local, rather than federal, administrative implementation;[41] varying state, as opposed to federal, eligibility criteria for applicants;[42] and a block grant funding scheme rather than direct funding from the federal government.[43] All of these changes, and others, coalesced to form the basis of the shift in paradigm from entitlement model to contractual model.

A. *AFDC as an Entitlement*

While many elements of the pre-1996 AFDC program evolved after the program's inception in 1935, several components remained consistent. Throughout its history, the AFDC program was administered based on a model of cooperative federalism.[44] Under this

38. 42 U.S.C. § 602(a)(10)(A) (1994) (amended 1996); *see* King v. Smith, 392 U.S. 309, 317 (1968) (emphasizing the statutory requirement that aid "be furnished . . . to all eligible individuals . . .").

39. 42 U.S.C. § 601(b) (Supp. V 1999). *But see* Cimini, *supra* note 31 (arguing that an entitlement may still exist despite the "no entitlement" language).

40. *See generally* 42 U.S.C. §§ 607, 608, 609 (describing the varying obligations to which recipients must adhere and the penalties that apply to violation of these obligations).

41. *Id.* § 601(a).

42. *Id.* § 604(a).

43. *Id.* § 603(a).

44. *See* King v. Smith, 392 U.S. 309, 316 (1968) (articulating, for the first time, the term "cooperative federalism" to describe government programs that are run with concurrent federal and state oversight).

model, the federal government provided money to the states which, in turn, administered the program in accord with federal and state rules and regulations.[45] As a condition to the receipt of federal funding, states were obligated to provide assistance to "all eligible applicants" as determined by criteria including household income, resources, and family members.[46] States were permitted discretion in determining the amount of the monthly benefit.[47] Funding was provided to states on an open-ended basis, increasing when a state's AFDC caseload increased.[48]

In 1970, after thorough debate regarding the due process implications of the AFDC statutory scheme, the Supreme Court adopted the well-known entitlement analysis set forth in *Goldberg v. Kelly*.[49] In this analysis of the federal welfare program, the Court determined that, under the system of cooperative federalism, federal statutory criteria mandated that benefits be provided to all eligible individuals.[50] Thus, in the absence of significant discretion, an eligible welfare applicant could legitimately expect to be "entitled" to such benefits.[51] That entitlement was legally recognized as property, which implicated the protections of procedural due process, including notice and hearing requirements.[52] Between the *Goldberg* decision in 1970 and passage of the Welfare Reform Act in 1996, the federal statutory entitlement

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45. *Id.* at 316-17.

46. *See* 42 U.S.C. § 602(a)(10)(A) (1994) (amended 1996) (stating that all eligible recipients were entitled to receive assistance).

47. COMM. ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, 105TH CONG., 1998 GREEN BOOK 398-99 (Comm. Print 1998) [hereinafter 1998 GREEN BOOK]; MARK GREENBERG ET AL., CENTER FOR LAW AND SOCIAL POLICY, WELFARE REAUTHORIZATION: AN EARLY GUIDE TO THE ISSUES, at pt. II.A (2000), *available at* http://www.clasp.org/pubs/TANF/packa.htm.

48. GREENBERG ET AL., *supra* note 47.

49. 397 U.S. 254, 262 (1970); *see* Cimini, *supra* note 31 (describing the evolution of the procedural due process clause as it applies to public assistance). *See generally* David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231 (1998) (discussing the changing due process rights accompanying welfare reform).

50. *See Goldberg*, 397 U.S. at 262 (stating that "benefits are a matter of statutory entitlement for persons qualified to receive them"); *see also King*, 392 U.S. at 317 (concluding that the federal welfare program "clearly require[s] participating States to furnish aid to families with children").

51. Cimini, *supra* note 31.

52. *Goldberg*, 397 U.S. at 262-63; *see* Charles A. Reich, *Property Law and the New Economic Order: A Betrayal of Middle Americans and the Poor*, 71 CHI.-KENT L. REV. 817, 818-19 (1996) (describing *Goldberg* as an "important but tentative step[ ]" in providing adequate legal protection to government entitlements).

model remained the prevailing conceptual framework for an analysis of the procedural due process implications of public assistance.[53]

B. The Welfare Reform Act's Contractual Model

Passage of the Welfare Reform Act in 1996 altered several of the structural premises underlying the conception of public assistance as a federal statutory entitlement and replaced them with contract precepts. First, devolution, coupled with the absence of meaningful federal oversight,[54] resulted in a shift from a federal system to a devolved state-specific system.[55] Further, even while the federal government devolved authority to create and administer programs to the states, some states in turn devolved authority to local governments. Under this devolved model, states or localities, rather than the federal government, determine which families are eligible for assistance, how long families are eligible, and how much and what type of assistance they receive.[56] Second, rather than mandatory federal eligibility criteria, states are permitted to use the block grant in any manner reasonably calculated to accomplish the purpose of the Welfare Reform Act.[57] Third, the Welfare Reform Act altered the funding mechanism of the program to provide essentially fixed federal funding, under which each state receives a yearly block grant amount based upon the state's prior federal spending under the AFDC program.[58]

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53. For an overview of the various critiques of the entitlement model, see generally Joel F. Handler, *"Constructing the Political Spectacle": The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899 (1990).

54. *See* 42 U.S.C. § 617 (Supp. V 1999) ("No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part."); *see also* MARK GREENBERG & STEVE SAVNER, CENTER FOR LAW AND SOCIAL POLICY, A DETAILED SUMMARY OF KEY PROVISIONS OF THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES BLOCK GRANT OF H.R. 3734, at 46 (1996) (identifying the limited federal oversight and regulation of state and local governments implementing welfare).

55. *See* 42 U.S.C. § 602 (detailing the requirements states must meet in order to receive block grant money). A publication of the House Committee on Ways and Means described the shift from AFDC to TANF as follows:

> TANF greatly enlarges State discretion in operating family welfare, and it ends the entitlement of individual families to aid. Under TANF, States decide what categories of needy families to help (AFDC law defined eligible classes and required States to aid families in these classes if their income was below State-set limits). Under TANF, States decide whether to adopt financial rewards and penalties to induce work and other desired behavior. Also, States set asset limits (AFDC law imposed an outer limit) and continue to set benefit levels.

1998 GREEN BOOK, *supra* note 47, at 398.

56. Cimini, *supra* note 31; *see also* 42 U.S.C. § 604(a)(1).

57. 42 U.S.C. § 604(a)(1); *see also supra* note 21 (detailing the purposes of the Act).

58. 42 U.S.C. § 603(a)(1); *see also* GREENBERG & SAVNER, *supra* note 54, at 10 (explaining how each state receives a family assistance grant).

Concomitant with these structural changes, the Welfare Reform Act instituted a new model of individual assistance based upon the creation of contracts between the government and welfare recipients. The concept of contractual obligations in the context of public assistance is not entirely novel.[59] One of the major components of the 1988 amendment to AFDC, known as the Family Support Act, required recipients to complete certain obligations in exchange for assistance.[60] Additionally, waivers, which permitted states to circumvent federal obligations,[61] were increasingly used to place additional obligations upon recipients in exchange for monthly assistance.[62]

The intention to change public assistance to a contractual model in the Welfare Reform Act is both explicit and implicit in the legislative history, the rhetoric surrounding passage of the Act, and the statutory language of the Act. In the legislative hearings leading to passage of the Welfare Reform Act, numerous legislators articulated their desire to change the existing entitlement model of welfare, under which recipients were perceived as getting something for nothing.[63] Instead, legislators sought to devise a system that obligated a recipient to engage in affirmative responsibilities in exchange for assistance.[64] Politi-

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59. When the Social Security Act (SSA) was enacted in 1935, academics and politicians construed social insurance programs as contractual in nature. *See* William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1451-54 (1986) (detailing how social security was viewed, when enacted, as a contract between private citizens and the federal government); Allison Moore, Book Note, *"From Opportunity to Entitlement" and Back Again—Or Beyond*, 106 YALE L.J. 923, 924 (1996) (reviewing GARETH DAVIES, FROM OPPORTUNITY TO ENTITLEMENT: THE TRANSFORMATION AND DECLINE OF GREAT SOCIETY LIBERALISM (1996)) (finding contractual analogies in the New Deal social insurance and public works program).

60. The Family Support Act created JOBS (the Job Opportunity and Basic Skills Program), under which any welfare recipient with children over three years old had to work as a condition of assistance. 42 U.S.C. §§ 681-687 (1994) (repealed 1996). Under the JOBS legislation, welfare recipients who could not get work in the public or private sector had to enroll in education or job training as a condition of continued assistance. *Id.* § 682(c).

61. Waivers enable states to create "experimental, pilot, or demonstration project[s]" that might otherwise violate a specific provision of federal law. 42 U.S.C. § 1315 (1994 & Supp. V 1999).

62. *See* Susan Bennett & Kathleen A. Sullivan, *Disentitling the Poor: Waivers and Welfare "Reform,"* 26 MICH. J. L. REFORM 741, 743-44 (1993) (detailing the ways in which waivers were used to place additional obligations upon recipients). One example of a waiver used to create additional conditions for recipients is New Jersey's family cap program, which was designed to deny additional assistance to unmarried women who had additional children while on AFDC. N.J. STAT. ANN. § 44:10-3.5 (West 1993) (repealed 1997).

63. *See, e.g., Welfare Reform: Hearing Before the Senate Finance Comm.*, 105th Cong. 5 (1995) (statement of Sen. Tom Harkin) ("[W]e must fundamentally change the conceptual framework of how we think about welfare. Welfare is not a government giving away money for nothing.").

64. *Id.* As Senator Harkin explained:

cians on both the national and state levels clearly used contractual rhetoric when discussing welfare reform. Prior to its passage, then-President Clinton referred to welfare reform as "a simple compact" in which the government provides support, job training, and child care for a limited time while recipients work in exchange for assistance.[65] On the state level, New York City Mayor Rudolph Giuliani explicitly stated his intent that welfare reform construct a new "social contract" that emphasized every recipient's obligation to contribute.[66]

In addition to the legislative history and political rhetoric, the statute itself contains an express rejection of the pre-1996 entitlement model.[67] The Welfare Reform Act requires that recipients accept government imposed obligations in order to receive assistance.[68] Recipients now have to "do something"—volunteer, go to classes, keep children in school—in order to receive their monthly assistance.[69] If

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> [W]elfare [is] a contract between an individual and the government which involves mutual responsibility, that the recipient will contract to do certain things, and the government will contract to do certain things.
>
> Receipt of AFDC benefits must be conditioned on a signed contract between the recipient [and the state], which outlines steps that the recipient will take to become self-sufficient . . . .

Id.

65. Ruth Marcus & Dan Balz, *Clinton Outlines Plan to Break Welfare Cycle*, WASH. POST, June 15, 1994, at A1.

66. *See* Jason DeParle, *What Welfare-To-Work Really Means*, N.Y. TIMES, Dec. 20, 1998, § 6, at 50.

67. 42 U.S.C. § 601(b) (Supp. V 1999) ("[The Welfare Reform Act] shall not be interpreted to entitle any individual or family to assistance . . . .").

68. The Welfare Reform Act requires that each individual be assessed, prior to receipt of assistance, to determine his or her skills, prior work experience, and employability. *Id.* § 608(b)(1). On the basis of this assessment, the state agency may develop a formal agreement that sets forth the employment goals of the recipient, the obligations of the recipient, and the services the state will provide to the recipient. *Id.* § 608(b)(2)(A)(i)-(v). All fifty states and the District of Columbia require some type of written agreement that is signed by the recipient. Sixteen states require recipients to sign "employability contracts" only, which focus exclusively on employment related issues. Eighteen states require "responsibility contracts," which proscribe conduct in matters in addition to employment obligations. These additional matters include child school attendance, child immunization, cooperation with child support enforcement, parenting training and agreements to achieve self-sufficiency. Seventeen states require recipients to sign both "employability contracts" and "responsibility contracts." *See* STATE POLICY DOCUMENTATION PROJECT, FINDINGS IN BRIEF: TANF APPLICATIONS, *available at* http://www.spdp.org/tanf/applications/appsumm.htm (last visited Nov. 26, 2001) [hereinafter TANF APPLICATIONS].

69. These requirements range from the innocuous, such as job search obligations, to more punitive requirements, such as child school attendance, drug and alcohol programs, and agreements to achieve self-sufficiency. *See* STATE POLICY DOCUMENTATION PROJECT, PERSONAL RESPONSIBILITY CONTRACTS: OBLIGATIONS, *available at* http://www.spdp.org/tanf/prcreq/index.htm (last visited Nov. 2, 2001) [hereinafter PERSONAL RESPONSIBILITY CONTRACTS: OBLIGATIONS].

the recipient fails to comply, the state may reduce the amount of assistance available by whatever amount the state deems appropriate.[70]

The basis for the contractual obligations imposed upon the recipient is determined from a mandatory application assessment.[71] Based upon information obtained from the assessment of the applicant, the Welfare Reform Act permits the state to create an individual responsibility plan (IRP) addressing, inter alia: employment goals; a plan to move the recipient into private sector employment; obligations on the individual recipient, including nonwork related obligations such as attendance at parenting classes; the services the state is obligated to provide the recipient; and an optional provision for the requirement of substance abuse counseling.[72]

Because IRPs are authorized but not mandated by the federal statute, the contractual agreement varies among the states.[73] Thirty-three states require recipients to sign "employability contracts," which focus exclusively on employment related issues.[74] Thirty-five states require "responsibility contracts," which prescribe conduct in both employment and other matters such as child school attendance, child immunization, child support enforcement cooperation, parenting training, and agreements to achieve self-sufficiency.[75] Seventeen states require recipients to sign both "employability contracts" and "responsibility contracts."[76] While states may vary in the names for these documents, all states require that the agreements be in writing and that they be signed by the recipients.[77]

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70. 42 U.S.C. § 608(b)(3); *see also* GAO, WELFARE REFORM, *supra* note 12, at apps. II-III (detailing each state's sanction policies for noncompliance with TANF work responsibilities and child support enforcement); GREENBERG ET AL., *supra* note 47, at 8 (describing the position of some advocates who claim "that the extent of state discretion in sanction policy has contributed to the numbers of families leaving welfare without work, and to the deepening of poverty for the poorest female-headed families").

71. 42 U.S.C. § 608(b)(1).

72. *Id.* § 608(b)(2)(A)(i)-(v).

73. For a description of the variances in contractual agreements among the states, see STATE POLICY DOCUMENTATION PROJECT, PERSONAL RESPONSIBILITY CONTRACTS, *available at* http://www.spdp.org/tanf/applications/applicprc.pdf (last visited Nov. 26, 2001).

74. STATE POLICY DOCUMENTATION PROJECT, EMPLOYABILITY PLANS, *available at* http://www.spdp.org/tanf/applications/applicep.pdf (last visited Nov. 26, 2001).

75. PERSONAL RESPONSIBILITY CONTRACTS: OBLIGATIONS, *supra* note 69.

76. TANF APPLICATIONS, *supra* note 68.

77. *See id.* (detailing that all states implementing TANF require recipients to sign some form of the agreement). This Article uses the terms "contractual agreement," "individual responsibility plan," and "individual responsibility contract" interchangeably because while the names may differ the basic substance of the underlying agreement does not. Each agreement is in writing and details, in some form, the obligations the recipient must meet in order to receive assistance.

The fundamental shift away from a federal statutory entitlement model to one of "mutual obligations," and the resulting changes in administrative implementation of TANF, raise questions regarding governmental discretion and due process protections. The next section will examine various reasons for increased discretion and explain why the Article focuses on contracts as a basis of due process protections for recipients. The remainder of the Article will explore whether these agreements provide a basis of due process protection to recipients.

II. REASONS TO PROPOSE A CONTRACTUAL MODEL AS THE BASIS FOR DUE PROCESS PROTECTIONS: FACTORS OF INCREASED DISCRETION

This section explores the ways in which the changes described in the preceding section have led to increased discretion and decreased accountability. In light of the government's greatly expanded discretion, this section also analyzes the benefits associated with a due process analysis based upon contracts as opposed to legitimate expectations entitlement analysis.

Scholars have identified a number of factors that lead to increased discretion and have found these factors to exist across the range of welfare administrative models. The factors include: an increased absence of actual rules to guide discretion, a change in the role of the welfare administrator from eligibility technician to contract negotiator, devolution of authority to state and local governments, and the privatization of previously public services.

Actual implementation of the Welfare Reform Act has led to an increased absence of rules.[78] In the administration of welfare programs, caseworkers now rely on guidelines that offer a range of options, as opposed to bright-line rules.[79] In contrast to the previous rule-based mandates, this new model emphasizes discretionary decision-making.[80] As a result, caseworker decisions are not legally construed as mere eligibility determinations, but rather as the

78. *See* Diller, *supra* note 22, at 1127 (describing the previous welfare system as one that was principally legal in nature, but arguing that the current system is now "becoming delegalized, shorn of the rules and procedures that characterize a system of laws").

79. *See id.* at 1196 ("[R]ecipients are promised little that is concrete and specific, and workers are given a range of actions and leeway to select a course. If the key decisions are not contained in rules of general applicability, the notice and comment requirements do not provide an effective avenue for public input.").

80. *See id.* at 1147-63 (detailing several elements of this trend, including programs adopting substantive measures that call for discretionary decisions, the increased potency of sanctions, and the increasing and varying roles played by the caseworkers administering welfare).

discretionary application of broad guidelines. As such, this new model potentially allows caseworker decisions to escape administrative and judicial review.[81]

Compounding the problems associated with the absence of rules, welfare workers are required to play a significantly increased role in the analysis of an applicant's need without any relevant professional training.[82] As compared to caseworkers under the AFDC system, who were mainly eligibility technicians,[83] caseworkers are now asked to be vocational experts, child care specialists, and even mental health workers in order to assess and arbitrate the terms of an applicant's public benefits.[84] The new contractual scheme transforms the caseworker into the government's sole bargaining representative with almost unbridled discretion to dictate contract terms to a welfare re-

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81. Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 FORDHAM URB. L.J. 1559, 1564 (2001).

82. *See* Diller, *supra* note 22, at 1161-63 (describing a current trend "toward recombining administrative functions so that each worker has several roles"). Though caseworkers operating before the 1960s had a significant amount of discretion, efforts were made after 1960 to create a more rule-based system to ameliorate the perceived abuses that accompanied broad caseworker discretion. *Id.* at 1140-41. Then, after the extremely influential decision in *Goldberg v. Kelly*, and after AFDC was legally recognized as an entitlement, the administrative system became a bureaucratic rule-based system. *Id.* at 1137. Under this new bureaucratic model, welfare workers did not need to be trained social workers because their role did not require individual assessment. *Id.* Instead, workers were seen as eligibility technicians who simply applied specific and mandatory rules to any given situation. *Id.* at 1139-40.

83. *See* MARY JO BANE & DAVID T. ELLWOOD, WELFARE REALITIES: FROM RHETORIC TO REFORM 16 (1994) (describing the change that took place in 1969 as social workers who required college or master's degrees were replaced with eligibility technicians with no requisite specialized training).

84. *See* Diller, *supra* note 22, at 1161-62 (contrasting and providing examples of caseworkers' past responsibility to determine eligibility with the many roles and responsibilities caseworkers have under the current welfare system). Professor Gilman writes:

> [F]ront-line workers generally now engage in a variety of counseling and evaluative tasks. These include educating applicants about the TANF program; assessing their work histories and attempts to obtain employment; reviewing their eligibility for entitlement benefits such as SSI, Medicaid, and food stamps; determining their eligibility for cash grants, loans, or other services to divert them from the TANF program; assisting them in securing child support from noncustodial parents; helping them with job searches; assessing their child care and transportation needs, as well as domestic violence problems or alcohol or drug abuse; drafting individualized plants to attain economic self-sufficiency; and assisting them in locating job training, GED, ESOL, and other skill building activities.

Gilman, *supra* note 14, at 580. For a historical review of the changing role of the welfare administrator, see BANE & ELLWOOD, *supra* note 83, at 8-27. The role of the welfare administrator has evolved since welfare began. For a historical analysis of the caseworker as social worker, see LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935, at 102-05, 162-64 (1994).

cipient. In this new role, caseworkers obtain assessment information,[85] translate the information into obligations and monitor compliance with the obligations.[86] These terms not only determine the particular obligations each recipient must meet, but also form the basis of possible sanctions against recipients.[87]

Devolution of administrative authority from the federal government to the states, and often from states to local governments, has resulted in additional problems of discretion.[88] Especially in those states that have devolved authority for welfare administration to the local governments, preliminary information reveals that caseworkers are actually operating with greatly increased discretion.[89] For example, Colorado has devolved authority to administer TANF to each of its sixty-three counties.[90] While the state imposes some mandates,[91] essentially each county has the ability to design its own TANF program.[92] Further, despite federal and state statutory obligations to adopt rules and regulations governing the administration of bene-

85. An individual seeking assistance who applies for TANF benefits must undergo an assessment by a caseworker. *See* 42 U.S.C. § 608(b)(1) (Supp. V 1999) (explaining that during this assessment, the worker is charged with ascertaining "the skills, prior work experience, and employability of each recipient"). According to the statute, the worker then develops an Individual Responsibility Plan (IRP), which sets forth the applicant's obligations should he or she wish to obtain benefits. *Id.* § 608(b)(2).

86. *See* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES, at xii (1980) (arguing that "the decisions of street-level bureaucrats, the routines they establish, and the devices they invent to cope with uncertainties and work pressures, effectively *become* the public policies they carry out").

87. For a complete list of the federal statutory provisions regarding which sanctions are mandatory by states and which are optional, see GAO, WELFARE REFORM, *supra* note 12, at 9, app. II.

88. *See* JOEL F. HANDLER, DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT 41-47 (1996) (describing the general problems devolution creates for domestic social programs).

89. *See generally* LOVEJOY & RYAN, *supra* note 25 (describing devolution schemes in Colorado, Maryland, North Carolina, Ohio, and Wisconsin). The increased discretion is also accompanied by a lack of administrative accountability mechanisms. *Id.* at 9. Requirements of notice and comment rulemaking set forth in federal and state Administrative Procedure Acts and state freedom of information acts are not binding on local governments. Diller, *supra* note 22, at 1190.

90. *See* COLO. REV. STAT. ANN. §§ 26-2-712, 26-2-714 (West Supp. 2001) (creating a system of block grants from state to county governments to administer the TANF program); LOVEJOY & RYAN, *supra* note 25, at 11.

91. *See generally* COLO. REV. STAT. ANN. § 26-2-709 (setting statewide cash assistance amounts); *id.* § 26-2-710 (establishing a statewide administrative review system).

92. *See id.* § 26-2-705(2)(c) (explaining that one purpose of the Colorado Works Program is to allow increased county responsibility in implementing the works program).

fits,[93] of the sixty-three counties, thirty-four are operating without any written rules or regulations to govern caseworker decision-making.[94] These findings raise significant concern because, as other scholars have concluded, poor people and other minorities tend to be worse off when benefit decisions are made by local governmental entities.[95]

Likewise, privatization and the use of private management techniques in public administration also have increased discretion in the administration of benefits.[96] Private contractors might not be subject to the APA notice and comment rulemaking requirements and freedom of information statutes, decreasing both the ability for and effectiveness of any public input.[97] Further, some private management models use funding incentives or performance-based evaluation to govern behavior in the workplace,[98] which, especially when coupled with increased discretion, may lead to biased decision-making.[99] Finally, private contractors may understand their goals as reducing the number of people on welfare rather than providing needed services or assistance to individuals.[100] All of these factors create a system that appears to increase the discretion of welfare administrators to the detriment of recipients.

In addition to the concerns noted above, increased discretion in the welfare context may lead to unequal treatment between similarly

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93. *See* 42 U.S.C. § 602(a)(1)(B)(iii) (requiring states to use fair and objective criteria for the delivery of benefits); COLO. REV. STAT. § 26-2-715(1)(a)(I) (requiring counties to administer the works program using fair and objective criteria).

94. *See* Cimini, *supra* note 31 (documenting initial implementation problems in Colorado). Currently, of the sixty-three counties operating without procedures, thirty-two are operating with other incomplete tools to assist in the administration of the program, including charts, graphs, and lists to guide caseworker decision-making. Five counties are using old AFDC policies to administer the new TANF program.

95. *See, e.g.*, Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 554-55 (1999).

96. *See* Bezdek, *supra* note 81, at 1568-70 (discussing how privatization has decreased government accountability); Diller, *supra* note 22, at 1127 ("This . . . discretion . . . is an outgrowth of a broad movement toward the use of private sector management techniques in public administration."). For a historical description of decentralization and privatization in the welfare state, see HANDLER, *supra* note 88.

97. Diller, *supra* note 22, at 1190; *see also* Bezdek, *supra* note 81, at 1564 (explaining that these protective mechanisms existed under the former AFDC program); U.S. GENERAL ACCOUNTING OFFICE, SOCIAL SERVICE PRIVATIZATION: EXPANSION POSES CHALLENGES IN ENSURING ACCOUNTABILITY FOR PROGRAM RESULTS 14 (1997) [hereinafter GAO, SOCIAL SERVICES PRIVATIZATION].

98. *See* Bezdek, *supra* note 81, at 1566-67.

99. *See* GAO, SOCIAL SERVICES PRIVATIZATION, *supra* note 97, at 16 ("Some experts in social service privatization have expressed concern that contractors, especially when motivated by profit-making goals and priorities, may be less inclined to provide equal access to services for all eligible beneficiaries.").

100. *See* Diller, *supra* note 22, at 1180-82.

situated applicants or recipients[101] and unfair or inappropriate application of discretion on an individual basis.[102] Both unequal and unfair treatment may result from a caseworker's individual biases and beliefs.[103] Moreover, if the increase in discretion derives, at least in part, from the lack of written standards, a recipient may have no right to a meaningful hearing or judicial review.[104]

Prior to passage of the Welfare Reform Act, recipients of welfare could invoke procedural due process to protect against caseworker

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101. For example, assume Recipient *A* and Recipient *B* live in the same county and go to the same welfare office. Recipients *A* and *B* are both single parents with high school degrees and two children over six years of age, but minimal work history. Assume further that Recipient *A* is assigned to Caseworker 1, a middle aged woman who has been working in the welfare administrative system for five years and is a team manager within her unit, while Recipient *B* is assigned to Caseworker 2, a young woman just out of college who has been on the job for one month. After the assessment, Caseworker 1 prepares an IRP that includes twenty hours of work search each week with no other obligations, but also gives bus tickets and child care assistance to make sure Recipient *A* can comply with the twenty-hour obligations. Caseworker 2 prepares an IRP that includes twenty hours of work search, required attendance at job training classes fifteen hours a week, and no transportation or child care assistance. Despite the fact that both recipients have similar family make-ups, educational backgrounds, and work experiences, under the new legislation workers can employ their discretion resulting in unequal treatment of recipients with similar backgrounds.

102. For example, Recipient *C*, a single mother with one child who has a GED but no work history, is assessed by Caseworker 3. On the basis of her assessment, Caseworker 3 creates an IRP for Recipient *C* that requires Recipient *C* to conduct a job search thirty hours a week, but includes no supportive or job training services. This recipient may have a claim that the new caseworker treated her unfairly by not providing her sufficient assistance that would enable her to meet the obligations of her IRP.

103. *See* Goldberg v. Kelly, 397 U.S. 254, 266 (1970) (stating that "the possibility for honest error or irritable misjudgment [is] too great, to allow termination of aid without giving the recipient" notice and a hearing); *see also* FRANCIS FOX PIVEN & RICHARD CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 133-35 (1993) (describing the ways in which "black relief mothers" were treated differently than their white counterparts under AFDC programs from 1935 to 1961); JOEL F. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY 26 (1991) ("As part of the dominant social and economic order, welfare policy has served the societal values of racial hostility, discrimination, subordination, and exclusion."); *see also* Susan T. Gooden, *All Things Not Being Equal: Differences in Caseworker Support Toward Black and White Welfare Clients*, 4 HARV. J. AFR.-AM. PUB. POL'Y 23, 32 (1998) (finding that "caseworkers encourage education investment among white welfare recipients, but not black welfare recipients").

104. *See, e.g.*, Hide-A-Way Massage Parlor v. Bd. of County Comm'rs, 597 P.2d 564, 566 (Colo. 1979) (determining that, in the absence of adequately defined standards, neither the public nor the courts have any means of knowing in advance what evidence is material); *see also* Elizondo v. Dep't of Revenue, 570 P.2d 518, 522 (Colo. 1977) (finding that in the absence of rules and regulations to govern the suspension of licenses, hearing officers would not be able to determine what evidence and arguments are relevant); County Dep't of Pub. Welfare v. Deaconess Hosp., Inc., 588 N.E.2d 1322, 1327 (Ind. Ct. App. 1992) ("[J]udicial review is hindered when agencies operate in the absence of established guidelines.").

abuse of discretion.[105] This due process right was based on a recipient's legitimate expectation in receipt of benefits.[106] However, in light of the statutory no entitlement provision and increased discretion, recipients can no longer rely exclusively upon legitimate expectations entitlement analysis for due process protections.[107] Under legitimate expectation entitlement analysis, the finding that an individual has a protected property interest depends in part upon the amount of discretion afforded the administrator of public assistance.[108] As the administrator's discretion increases, the likelihood of a court finding that a recipient has a legitimate expectation in the benefit decreases.[109] In the context of welfare reform, this legitimate expectations analysis is of questionable value to recipients attempting to secure due process protections because the actual implementation

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105. *Goldberg*, 397 U.S. at 262.

106. *See id.* at 262 & n.8. The question of whether legitimate expectations create a property interest is directly related to the amount of discretion afforded the administrators under the implementing statute. *See* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). Where the discretion afforded the administrators is very limited, such as where there exist express statutory criteria for the benefit, it is more likely that the court will find a property interest. *See, e.g., Goldberg*, 397 U.S. at 262. When the amount of discretion afforded the decision-maker increases, it is less clear whether there exists a legitimate expectation. *Compare* Eidson v. Pierce, 745 F.2d 453, 462 (7th Cir. 1984) (concluding that there was no entitlement to federally subsidized housing because private landlords had discretion in the selection of tenants), *with* Ressler v. Pierce, 692 F.2d 1212, 1215-16 (9th Cir. 1982) (concluding that there was an entitlement to federally subsidized housing as administered because the regulations circumscribed the landlord's discretion).

However, the Supreme Court has still found a constitutionally protected interest when such discretion is coupled with mandatory language and substantive predicates that limit discretion. *See* Bd. of Pardons v. Allen, 482 U.S. 369, 378 (1987) (finding a constitutionally protected liberty interest in parole release despite the broad discretion afforded administrators because there was mandatory language in the statute which created a presumption that parole would be granted once the statutorily designated findings were made); Hewitt v. Helms, 459 U.S. 460, 471-72 (1983) (finding that while the mere existence of procedural guidelines to direct prison officials in decision-making does not, in itself, create a liberty interest, mandatory statutory language requiring such procedures does create legitimate expectations that form the basis of a liberty interest). *But see* Olim v. Wakinekon, 461 U.S. 238, 249 (1983) (finding that Hawaii's prison regulations did not create a constitutionally protected liberty interest because the regulations contained no limitations on the administrator's exercise of discretion).

107. *But see* Cimini, *supra* note 31 (arguing that legitimate expectations analysis may be adequate in and of itself to create procedure due process rights in recipients).

108. *Id.*

109. For an analysis of the relationship between lack of discretion and legitimate expectations, see *supra* note 106; *see also* Wash. Legal Clinic for Homeless v. Barry, 107 F.3d 32, 36 (D.C. Cir. 1997) (finding that the less discretion the state official has to determine a benefit, the more likely the benefit is a property interest); Beitzell v. Jeffrey, 643 F.2d 870, 874 (1981) (stating that "the more circumscribed . . . the government's discretion (under substantive state or federal law) to withhold a benefit, the more likely that benefit constitutes 'property' . . .").

of welfare reform has resulted in increased discretion to welfare administrators[110] as well as the potential for abuse of that discretion. If recipients rely exclusively upon the finding of legitimate expectations to assure due process protections, recipients may be left with little to no protections at the time when such protections are most needed.[111]

In the alternative, recipients might obtain procedural due process protections through a different source—namely that of contracts. Basing the due process analysis upon contracts removes the link between discretion and the existence of a property interest, thus providing recipients an alternate source of due process protections despite the current discretionary administration of welfare. The next section of the Article will explore this alternative means of due process protections and propose that the TANF contract, both the macro social contract and the micro individual contract, mandate some due process protections.

III. THE WELFARE REFORM ACT'S CONTRACTUAL MODEL PROVIDES A SOURCE OF PROCEDURAL DUE PROCESS PROTECTION

Given the problems of unfairness, inequality, and unaccountability associated with increased discretion in the administration of welfare, this section articulates a new basis for due process protections based on the law of contracts. Utilizing a traditionally private law analysis—as opposed to one based on public law legitimate expectation—may provide new protection against the unfair, unequal, and unaccountable government action described in the preceding sections.[112] In this section, the Article explores the implications of con-

110. Cimini, *supra* note 31.

111. Some may argue that the constitutional protections are unnecessary because many states have a statute protecting the right to a hearing if benefits are terminated. *See, e.g.*, COLO. REV. STAT. ANN. § 26-2-710 (West Supp. 2001). Despite the fact that some states have a statutorily guaranteed right to a hearing, there are many reasons why the analysis offered in this Article is important. First, not every state has such statutory guarantees. Second, simply because a state now guarantees a hearing by statute does not ensure that such a statute will remain. Legislators may simply amend current statutes and abolish hearing rights altogether. The ability of legislators to amend makes the constitutional component of the analysis even more important. Finally, and perhaps most fundamentally, this response fails to take into account the most basic concern raised by the devolved contractual model—the fundamental absence of governmental accountability that implicates the rights of recipients even prior to the hearing stage. These concerns are raised by the increased absence of rules or standards, the change in role of the welfare administrator, the actual implementation of devolution, and the increasing use of privatization in welfare administration.

112. *But see* Simon, *supra* note 59, at 1437-41 (arguing that analogizing public assistance to private law norms, including property and contract, ignores the underlying issue of wealth redistribution to assure a minimal standard of living).

tractual agreements between recipients and government entities[113] and determines that implied and express terms of the agreement between the government and welfare recipients may create due process protections. First, on a macro level, the Article examines the concept of a social contract between the government and recipient which requires, at a minimum, that the government not act in an arbitrary manner. Second, on a micro level, using a private law contractual analysis, the agreement between the government and recipients may constitute a contract that forms a property interest.[114] If the agreement were to create an enforceable contract, it would be legally cognizable as personal property and may thereby constitute a property interest, entitling the recipient to procedural due process protections.[115] Together, these macro (broad/implied) and micro (specific/express) aspects of the government contract place some limitations upon the government's otherwise unfettered actions in the administration of welfare.

A. The Social Contract: The Macro or Implied Contract Between the Government and the Populace

This section examines the existence of an implied macro contract between the government and recipients of public assistance that derives from the concept of a social contract.[116] In the first part of this

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113. Some scholars have explored the use of the private doctrine of contracts in traditionally public arenas. *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000). Professor Freeman argues that the administrative law arena is no longer hierarchical, but is instead based on a horizontal set of negotiated relationships between the private and the public realm. *Id.* at 571-74. Given this new model, the author identifies contracts as a new accountability mechanism. *Id.* at 667-71; *see also* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 29-54 (1983) (considering the use of tort law as a mechanism for establishing accountability for the actions of street-level officials); Martha M. Ertman, *Commercializing Marriage: A Proposal For Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 19-21 (1998) (proposing that the commercialization of marriage, through the use of security agreements, will help solve the financial difficulties encountered by divorced homemakers); Patricia J. Williams, *Commercial Rights and Constitutional Wrongs*, 49 MD. L. REV. 293, 293 (1990) (attempting to reduce "the all-encompassing social contract to a manageable, private contract context . . .").

114. While this Article identifies contracts as a possible theoretical foundation upon which to explore the procedural due process rights of welfare recipients in an era of devolution, additional private law analogies exist including tort. For a discussion of how the tort analogy reconciles American individualist tradition with the needs-based government redistribution program more effectively than property or contracts, see Moore, *supra* note 59, at 927-28.

115. For a range of views on the impact of finding an entitlement to welfare, see Handler, *supra* note 53, at 947-74.

116. For an overview of the use of social contract theory in American case law, see Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1 (1999).

section the Article explores the existence of this type of social contract and finds that a social contract exists. This section then questions the underlying terms of such a contract. Finally, this section examines the due process implications of an existing social contract and posits that at a minimum, the existence of a social contract mandates that the government not act in an arbitrary manner.

Welfare discourse is deeply-rooted in the idea of a social contract. This idea has been most frequently used by both scholars and politicians to justify increased obligations upon welfare recipients.[117] This section attempts to invert this dynamic and utilize notions of social contract to instead place affirmative obligations on the government. Specifically, the concept of the macro, or implied, contract is employed to ensure that the government not act arbitrarily and without restraint.

1. Existence of a Social Contract.—The idea of a social contract exists in both historical and current discussions about the relationship between government and its people. This Article identifies three contexts in which scholars, academics, and politicians have engaged in discourse regarding the existence of a social contract. Initially, this section addresses the discourse among political theorists who discuss the existence and scope of the social contract as a justification for political authority. Similarly, primary sources fundamental to the democratic model of governance in the United States contain significant threads of social contract theory. Finally, a large body of social contract rhetoric permeates social welfare discourse and supports the existence of a social contract, especially in the arena of public benefits.[118] All three of these bases support the understanding that a social contract exists between the government and its people.

a. Political Theory and Social Contract.—In order to distinguish among political theorists' views on social contract, this Article distinguishes between early theorists and classical theorists. Those

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117. *See, e.g.*, LAWRENCE M. MEAD, BEYOND ENTITLEMENT 3-4 (1986) (arguing that the main problem with the welfare state is its permissiveness, and that a more efficient welfare system would arise if recipients worked in return for their support). Social contract theory has been used in a variety of harmful contexts. Contractarian theory was used by antebellum courts to justify slavery and political exclusion. *See* Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); *see also* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 940 (1991) (explaining that social contract theory was used to argue that African-Americans and Catholics are not entitled to all the rights guaranteed by the Constitution).

118. For a critique of social contract theory as patriarchal, racist, and invasive of sexual and reproductive freedom, see April L. Cherry, *Social Contract Theory, Welfare Reform, Race, and the Male Sex-Right*, 75 OR. L. REV. 1037 (1996).

identified as early theorists were among the first to originate the idea of a contractual relationship between the ruler and the people. As such, the early theorists devised a range of ideas regarding the existence and purpose of the social contract.[119] Manegold of Lautenbach, a late eleventh century scholar, originally devised the concept of a "contractarian" agreement regarding the existence of political authority.[120] Specifically, Manegold argued that political authority existed to meet certain needs of the people, and that the authority specific rulers had over people stemmed from the people's recognition of this fact.[121] Under this "contractarian" arrangement, the people conferred on the ruler a "conditional authority" for their own benefit.[122] Engelbert of Volkersdorf, a later medieval scholar, based his theory on the concept of an "original contract."[123] Under this theory, "all kingdoms . . . originated when men, following nature and reason, chose a ruler and bound themselves to (conditional) obedience in a 'contract of subjection . . . in order to be ruled, protected and preserved.'"[124]

"Partnership" created by contract was a different version of the social contract espoused by Mario Salamonio around 1511.[125] Salamonio argued that political or civil society is a partnership among individual citizens created by contract among them as individuals.[126] According to Salamonio, "[t]he terms of the contract are the laws of the state, without which no state can exist, and which are binding on all members—including the . . . ruler."[127]

During the religious wars of the 1570s, Juniun Brutus explored the relationship between the concept of a divine contract and a social contract.[128] According to Brutus, the first contract was the divine contract, which set forth the role of people and government as part of "the divine plan of the universe."[129] This first contract was "a covenant between God on the one hand, and ruler and people on the other . . . ."[130] Under this contract, the ruler and the people had to

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119. *See generally* Michael Lessnoff, *Introduction* to SOCIAL CONTRACT THEORY (Michael Lessnoff ed., 1990) (describing the development of social contract theory).
120. *Id.* at 5.
121. *Id.* at 6-7.
122. *Id.*
123. *Id.* at 7.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 8.
129. *Id.*
130. *Id.*

"'serve God according to His will.'"[131] The second contract was a mutual contract between the ruler and the people requiring the people to obey faithfully and the ruler to govern lawfully.[132]

The classical theorists expanded upon the initial contractarian ideas espoused by the early theorists. This Article focuses on three classical social contract theorists who made significant contributions to the development of social contract theory: Thomas Hobbes, Jean-Jacques Rousseau, and John Locke.[133] Each of these theorists vary on three major components of the social contract theory: the state of nature prior to the social contract, the justification for creation of government, and a description, or the terms, of the social contract itself.

According to Hobbes, the state of nature was so unstable that it amounted to a state of war.[134] Given limited resources and the equal desire for such resources, people would fight among themselves for control over the limited resources.[135] Therefore, Hobbes argued that the only way to create a tolerable social structure is to create a social contract between individuals and the sovereign, under which individuals agree to transfer natural freedom to the sovereign in order to keep peace.[136] Under this theory, an unchallengeable sovereign is the imperative function of the social contract.[137] Hobbes's social contract requires a mutual transferring of rights, after which both the government and the individual assume obligations.[138]

As opposed to the Hobbesian view, in Jean-Jacques Rousseau's state of nature people are free and equal.[139] But according to Rousseau, war results from social relationships and from the development

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131. *Id.*

132. *Id.*

133. For a critique of Hobbes, Rosseau, and Locke, see generally Bertram Morris, *The Substance of the Social Contract, in* ESSAYS IN POLITICAL THEORY 113 (Milton R. Konvitz & Arthur E. Murphy eds., 1948). Morris argues that the fatal flaw of classical social contract theory is the absence of any connection between theory and practice—"namely, how the contract is to be known." *Id.* at 122.

134. THOMAS HOBBES, LEVIATHAN 103 (E.P. Dutton & Co. 1950) (1651).

135. *Id.* at 102.

136. *Id.* at 107-08. As Hobbes states:

> That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe. For as long as every man holdeth this Right, of doing any thing he liketh; so long are all men in the condition of Warre.

Id. (emphasis omitted).

137. *Id.* at 142-43.

138. *Id.* at 143-44.

139. Jean Jacques Rousseau, *Discourse on the Origin of Inequality, in* GREAT BOOKS OF THE WESTERN WORLD 323, 347, 363 (Robert Maynard Hutchins ed., 1952).

of private property.[140] In this state, those with material wealth seek to leave the state of nature to preserve the inequality.[141] Rousseau argued that poor people "agree" to this system to protect their freedom from those with more wealth.[142] For Rousseau, the construction of the social contract is a way to resolve the problems of political subjugation and inequality.[143] Under this social contract, people relinquish the right to total alienation and acquire civil rights—the restitution of what has been relinquished.[144] Thus, Rousseau's social contract is based on mutual consent and reciprocity; the social contract provides citizens with certain protections while creating obligations owed to society.[145]

Locke likewise finds equality in the state of nature.[146] However, Locke views the problem in the state of nature as the lack of any effective centralized mechanism to enforce the laws of nature.[147] For this reason, Locke views the sole purpose of the creation of the state to protect existing "natural law."[148] Thus, based on Locke's view, people

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140. JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 6 (Charles Frankel trans., Hafner Pub. Co. 1947) (1762) [hereinafter THE SOCIAL CONTRACT].

141. Rousseau, *supra* note 139, at 354-55.

142. *Id.* at 355-56.

143. THE SOCIAL CONTRACT, *supra* note 140, at 14-15. As Rousseau wrote:

> Where shall we find a form of association which will defend and protect with the whole common force the person and the property of each associate, and by which every person, while uniting himself with all, shall obey only himself and remain as free as before? Such is the fundamental problem of which the Social Contract gives the solution.

Id.

144. *See id.* at 15.

> Finally, each person gives himself to all, and so not to any one individual; and as there is no one associate over whom the same right is not acquired which is ceded to him by others, each gains an equivalent for what he loses, and finds his force increased for preserving that which he possesses.

Id.

145. Rousseau, *supra* note 139, at 354; THE SOCIAL CONTRACT, *supra* note 140, at 15.

146. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 289 (Peter Laslett ed., Cambridge Univ. Press 1964) (1690). Locke stated:

> The *State of Nature* has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions. For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker . . . they are his Property.

Id.

147. *Id.* at 300. As Locke stated:

> To avoid this State of War . . . is one great reason of Mens putting themselves into Society, and quitting the State of Nature. For where there is an Authority, a Power on Earth, from which relief can be had by appeal, there the continuance of the State of War is excluded, and the Controversie is decided by that Power.

Id. (emphasis omitted).

148. *Id.* at 299.

do not give up natural liberty, but they do give up their right to enforce the laws of nature.[149] The actual social contract that Locke envisioned is distinct from Hobbes and Rousseau because it is not based upon mutuality of obligations. Instead, the social contract is an agreement with duties delegated only to the government, while citizens retain their rights.[150] Further, because under Locke's vision all persons are naturally free, each person must consent to be subjected to civil society.[151] Once the civil society has been created by the consent of all members, the majority of the community can determine the limits of the state so long as the parameters of the state do not conflict with natural rights.[152]

b. The Social Contract and Democracy in the United States.—The early and classical social contract theorists laid the foundation for the incorporation of social contract theory in the fundamental documents that underlie and support our country's democratic model of governance.[153] In fact, those who contributed to the documents that form the foundation of the United States democracy significantly relied upon these theorists.[154] Thus, it is not surprising that the themes which embody notions of social contract—government by consent of the people and individual rights of people that cannot be unjustly infringed upon by government[155]—are woven throughout the basic documents.[156] The reliance upon these themes can be traced back to

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149. *Id.* at 301.

150. *Id.* at 301-03.

151. *Id.* at 301.

152. *Id.* at 302.

153. For support of the proposition that social contractarian philosophy influenced the founding of the United States and the Constitution, see PAULINE MAIER, FROM RESISTANCE TO REVOLUTION 27-28 (1972) (arguing that social contract theory in part shaped the American revolutionary movement); JOHN WITHERSPOON, LECTURES ON MORAL PHILOSOPHY 45 (Jack Scott ed., 1982); *see also* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (equating the United States Constitution with the formation of a social compact).

154. *See* SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 28 (1995) ("An examination of the phraseology and themes of the Declaration of Independence shows what most Americans have long accepted: that our founding document is an expression of Lockian neutral-rights political philosophy.").

155. W. FRIEDMANN, LEGAL THEORY 38 (1953). According to Friedmann, there are two essential features of the doctrine of social contract. First, from a state of nature, in which there exist no laws, no order, and no government, people have "passed to a state of society, by means of a contract in which they undertake to respect each other and live in peace (*pactum unionis*)." Second, to this contract is added a second pact by which the people "thus united undertake to obey a government which they themselves have chosen (*pactum subiectionis*)." *Id.* at 39.

156. Scholars disagree about the precise character of the relationship between the law of the United States and social contractarian thought. *See* STEVEN M. DWORETZ, THE UN-

before the Declaration of Independence and are found in that document as well as in many others created thereafter.[157]

In 1776, Thomas Jefferson relied upon social contract concepts espoused by John Locke in drafting the Declaration of Independence.[158] The document sets forth a series of individual natural rights that are protected from government interference.[159] The document employs express language that connotes mutuality between the government and the people and consent by the people to be governed.[160] Specifically, the Declaration of Independence reads:

> We hold these truths to be self-evident: that all men are created equal; that they are endowed . . . with certain unalienable rights; that among these are life, liberty and the pursuit of happiness." That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed . . . .[161]

Thus, consistent with concepts of contract theory and government by consent, individual freedoms are protected by granting only certain authority to the government.

These themes were also incorporated into state constitutions drafted both before and after the federal constitution.[162] After the American Revolution, individual states began to create state-specific constitutions that were based in large part upon the contract theory of government.[163] The principles underlying the state constitutions

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VARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION 5-6 (1990); JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 170-76 (1943); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 13-17 (1992).

157. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (accusing the British government of breaching its social contract with the colonists through various acts of "tyranny," and declaring it to be the "right" and "duty" of those governed to "throw off such government, and to provide new guards for their future security"); *see also infra* notes 162-170 and accompanying text (identifying individual state constitutions, the Articles of Confederation, and the federal Constitution as later documents in which reliance on these same themes is evident).

158. MAX J. SKIDMORE, AMERICAN POLITICAL THOUGHT 46 (1978).

159. *See* THE DECLARATION OF INDEPENDENCE para. 2 (identifying the unalienable rights to life, liberty, and the pursuit of happiness).

160. *See* SKIDMORE, *supra* note 158, at 46.

161. THE DECLARATION OF INDEPENDENCE para. 2.

162. *See* SKIDMORE, *supra* note 158, at 53-54 (discussing themes and concepts evident in the state constitutions); *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 283-91 (1969) (describing the turn to a Lockean social contract model made by the state governments in the years following 1776).

163. SKIDMORE, *supra* note 158, at 52-53. As Skidmore writes:

> After the Revolution, . . . state leaders combined English traditions modified by the unique American environment with the notion of compact, or the contract theory of government, to produce something more than the limited statements of

stemmed from the apprehension and skepticism of government power. Due to these concerns, most states adopted Bills of Rights that created a set of individual liberties with which the government could not interfere.[164] In addition, states formulated a system of checks and balances and separation of powers in order to constrain centralized government power.[165]

The federal Constitution mirrors many of the principles articulated in state constitutions.[166] The first attempt at a national constitution resulted in the Articles of Confederation, which was completed in 1777.[167] Without complete unanimity surrounding the Articles, the Constitutional Convention was convened in 1787 to amend the Articles and create a more workable solution.[168] After much controversy surrounding ratification, the parties reached a compromise promising that the first Congress under the new government would propose a Bill of Rights for states to ratify.[169]

The rhetoric and documents created during the 1787 Constitutional Convention recognized the importance of social contract and Lockean principles.[170] Government authority is based on the princi-

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> the past. The American constitutions thus produced, based as they were upon a contract theory that embodied a conception of the higher law, became the first truly comprehensive documents of politics, the first writings serving as the foundations of entire states and their political subdivisions.

Id. Similarly, Professor Wood writes:

> Under the changing exigencies of their polemics and politics, Americans needed some new contractual analogy to explain their evolving relationships among themselves and with the state. Only a social agreement among the people, only such a Lockean contract, seemed to make sense of their rapidly developing idea of a constitution as a fundamental law designed by the people to be separate from and controlling of all the institutions of government.

WOOD, *supra* note 162, at 283.

164. SKIDMORE, *supra* note 158, at 53.

165. *See id.* (describing the ways in which some states separated the executive from the legislative branches and created independent courts); *see also* WOOD, *supra* note 162, at 150-61 (describing the sources and development of the American constitutional principle of separation of powers).

166. Among these principles were a general mistrust of unchecked governmental power, especially of a powerful executive; the notion that "power should check power," which is embodied in the system of checks and balances; and the recognition of certain individual liberties. *See* SKIDMORE, *supra* note 158, at 53 (discussing general principles found in state constitutions).

167. THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE FEDERAL CONSTITUTION 4 (Patrick T. Conley & John P. Kaminski eds., 1988).

168. SKIDMORE, *supra* note 158, at 58.

169. *Id.* at 59.

170. *See id.* at 60 ("The major principles of the Constitution were highly consistent with the Lockean foundations of much of American political thought . . . . There was no question that the consent principle was valid and that power should be considered as flowing

ple of consent of the people;[171] the power of the government to act flows from the populace. In order to protect against power imbalances, there is a system of checks and balances and a separation of powers.[172] Further, the powers of the government are limited.[173]

In sum, the Declaration of Independence, original state constitutions, the Articles of Confederation, and the federal Constitution with its accompanying Bill of Rights all based their notions of the structure of democratic government on ideas of social contract. These documents amount to a formalization of the social contract between the government and its people.[174] Our current system of laws and regulations recognize the notions of social contract through mandatory compliance with constitutional guarantees as well as through popular notions of inherent democratic principles. Thus, the concept of the social contract as historically developed and currently implemented permeates our current system of laws.[175]

c. Social Welfare Discourse.—In addition to social contract theory as originally formulated and supplanted throughout the evolution of our democratic model of governance, the idea of social contract has particularly permeated academic and political social welfare discourse. Indeed, as the next section illustrates, the concept of the social contract is evident in various provisions of welfare legislation from the New Deal to the 1996 Welfare Reform Act itself.

Academics and scholars interested in social welfare concepts have long debated the terms and scope of the social contract. According to some scholars, the New Deal was a bargained-for surrendering of power to the new regulatory state in exchange for economic protec-

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from the people."). At least one court has characterized the ratification of the U.S. Constitution as a social contract. Von Lusch v. State, 387 A.2d 306, 309 (Md. Ct. Spec. App. 1978).

171. *See* THE FEDERALIST No. 22, at 139 (Alexander Hamilton) (Robert Scigliano ed., 2000) ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE.").

172. *See* THE FEDERALIST No. 29, at 48 (Alexander Hamilton) (Robert Scigliano ed., 2000).

173. *See* U.S. CONST. arts. I-III.

174. *See* Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. ILL. U. L. REV. 115, 147 (1997) ("Social contracts may be formalized, as in a constitution, or they may be the 'legal fictions' that legitimize governmental authority.").

175. *See* Allen, *supra* note 116, at 5-6 (asserting that social contract theory has influenced case law deciding many constitutional issues, including slavery, self-incrimination, and the right to privacy).

tions for those whose access to economic citizenship was depleted.[176] At various times throughout history, academics have also questioned whether the social contract, in the context of welfare, was being honored.[177] More current academic debate has focused on recipients' obligations, including the idea that the social contract is used to justify additional obligations upon recipients and to terminate assistance for noncompliance with the compact.[178] Other scholars argue that the problems with the current social welfare system are systemic, and that we need to create a new social contract.[179]

Politically, in the context of public assistance, passage of the New Deal in 1935 marked the creation of a social contract on the federal level.[180] Even the name the "New Deal" connotes a redefining of the bargain between the government and its people.[181]

Between 1935 and 1994, the welfare social contract went through varying permutations, and in response to demographic and political changes, the terms of the social contract varied.[182] However, consis-

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176. *See* Patricia E. Dilley, *Taking Public Rights Private: The Rhetoric and Reality of Social Security Privatization*, 41 B.C. L. REV. 975, 1037 (2000) (interpreting Reich's view of the New Deal).

177. Reich, *supra* note 52, at 817-19. As Professor Reich has written:

> *The New Property* argued that, if the new social contract was to be respected, welfare state protections and benefits for the middle class and the poor must be treated as *entitlements*—a substitute for old forms of property. . . .
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> . . . .
>
> . . . Only if the new forms of wealth were protected by both substantive and procedural due process would the New Deal prove to be not merely a one-way transfer of power to the state, but a two-way bargain, with the people receiving a quid pro quo of economic rights in return.

Id.

178. MEAD, *supra* note 117, at 3-4. Professor Mead finds that if the government required recipients to work or function in return for support, the welfare program would be more successful. *Id.* at 3-4. He writes: "For recipients, work must be viewed, not as an expression of self-interest, but as an obligation owed to society. At the same time, to fulfill this obligation would permit the poor a kind of freedom that government benefits alone never can." *Id.* at 70.

179. *See* MARTIN CARNOY ET AL., A NEW SOCIAL CONTRACT: THE ECONOMY AND GOVERNMENT AFTER REAGAN 6-7 (1983). The authors argue that big business has broken the New Deal social contract by moving to countries with better business climates, speculating in real estate, and seeking growth through mergers. The authors propose that the national government should "act as an agent of democratization for the public" by giving workers a more powerful voice in corporate governance. *Id.* at 9.

180. *See, e.g.*, Reich, *supra* note 52, at 817 (noting that the New Deal was a "revised social contract," under which the federal government promised "protection against the extremes of economic dislocation").

181. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 105-30 (1991) (arguing that reformers during the New Deal altered constitutional development).

182. In 1950, demographic changes led to large increases in the number of recipients receiving Aid to Families with Dependent Children (AFDC), the cash assistance program

tent throughout the history of welfare in the United States has been the concept that the government owes minimal support to those without the means or ability to otherwise obtain it.[183] Then, beginning in the 1980s, the concept of the government's obligation began to develop into one of mutuality, in which the welfare recipient as well as the government had social obligations.[184]

The clamor surrounding welfare reform gained widespread national attention preceding the 1992 presidential election when both candidates promised fundamental changes to the welfare system.[185] In 1994, after the Republicans gained control of the House and Senate for the first time in forty years, House Republicans, led by Representatives Newt Gingrich and Dick Armey, published the *Contract with*

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for adults with dependent children. WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 309 (6th ed. 1999). Not only did the number of recipients increase, but the racial makeup of those receiving assistance changed. *Id.* What previously had been a pool of recipients comprised largely of white widowed women was now shifting to a pool comprised largely of single black women with illegitimate children. *Id.* Between 1960 and 1970, technological innovations decreased the need for agricultural workers in rural areas, and large numbers of persons migrated to urban centers, increasing the overall number of recipients receiving AFDC assistance. *Id.* at 313-14. In response to the large increase in number of recipients, the government changed the terms of the social contract. *Id.* at 320-21. Under this new version of the social contract, states received increased financial support to run the welfare programs and were in turn able to broaden the scope of services provided to recipients. *Id.*

183. *See* Burton v. Thornburgh, 541 F. Supp. 168, 174 (E.D. Pa. 1982) ("The United States Supreme Court has never held that individuals have a right to receive welfare or other types of subsistence payments.").

184. Between 1980 and 1990, the government's social contract regarding welfare began to constrict. *See* TRATTNER, *supra* note 182, at 363-82. The federal government began providing financial support to the states, and recipients had to comply with additional conditions in order to receive benefits. *See id.* In 1988 the federal government enacted the Family Support Act, legislation specifically detailing the component of the social contract. *Id.* at 376. The Family Support Act created the Job Opportunity and Basic Skills Program (JOBS), under which any recipient of welfare with a child over three years of age had to work in order to receive assistance. *Id.* In social contract terms, JOBS began a trend whereby government placed increasing obligations upon recipients as a condition of receipt of assistance. *Id.* This trend flourished from 1988 to 1992 as states were increasingly granted waivers from federal requirements. *Id.* at 380-81. The waivers permitted states to change the terms of the social contract by deviating from various federal statutory requirements. Many of the deviations chosen by states mandated recipients to comply with additional obligations. For example, waivers were granted that permitted states to deny welfare benefits to unmarried mothers who gave birth to children while receiving welfare benefits. Other waivers were granted to states that permitted welfare agencies to require a certain level of school attendance for children. *Id.* at 380-81.

185. *See, e.g.*, D'Jamila Salem, *Where the Candidates Stand on: Welfare*, L.A. TIMES, May 17, 1992, at A4 (reporting on the emergence of welfare reform as a major issue in the campaign).

America.[186] The *Contract with America* contained numerous references to the social contract. Specifically, the *Contract with America* purported to be "an agreement and a covenant between our . . . elected representatives and the American people with whom we sought a common bond."[187] The *Contract with America* further states that if government representatives break the contract, the people should remove them from office.[188] The *Contract with America* also dealt specifically with the topic of welfare reform,[189] identifying the perceived problems of welfare as recipient dependency upon the government, illegitimacy, lack of recipient work ethic, and inflated government spending on social welfare programs.[190] The "contract" was designed to cure these problems by placing additional obligations upon recipients and requiring them to take "personal responsibility for the decisions they make."[191]

Like their academic counterparts, social welfare advocates also use social contract rhetoric and ideas.[192] For example, a task force in New York state was appointed by then Governor Mario Cuomo to address questions surrounding poverty and welfare. Its report, published in December 1986, was entitled *A New Social Contract: Rethinking the Nature and Purpose of Public Assistance*.[193] The report envisioned "a new social contract based on the mutual responsibilities of citizens and society," which has as its goal the inclusion of all citizens in the economic mainstream.[194] According to this report, recipients would fulfill their part of the contract through work, training, and education. Society would have the responsibility to provide to recipients, for a reasonable period, the relevant education, training, and support services necessary to enable the recipient to achieve self-sufficiency.[195]

While the concept of welfare as a social contract is exemplified in the evolution of welfare policy, perhaps the most striking evidence of the existence of a social contract is the Welfare Reform Act itself. The

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186. NEWT GINGRICH ET AL., CONTRACT WITH AMERICA (Ed Gillespie & Bob Schellhas eds., 1994).

187. *Id.* at 6.

188. *See id.* at 22.

189. *Id.* at 66-67.

190. *Id.*

191. *Id.* at 65.

192. *See generally* HOMEBASE, INFUSING HUMANITY INTO WELFARE REFORM: A STATEMENT OF PRINCIPLES FOR A NEW SOCIAL CONTRACT (1995) (arguing that the protection of children should be one of the bases for a new social contract).

193. REPORT OF THE TASK FORCE ON POVERTY AND WELFARE, A NEW SOCIAL CONTRACT: RETHINKING THE NATURE AND PURPOSE OF PUBLIC ASSISTANCE (1986).

194. *Id.* at 2.

195. *Id.*

Act is based in large part upon a contractual model,[196] under which the government and recipients enter into plans or agreements.[197] If the recipient satisfactorily completes his or her obligations under the agreement, the government agrees to pay the recipient monthly cash assistance.[198] If, on the other hand, the recipient fails to abide by the terms of the agreement, the government is presumably freed from the obligation of providing assistance.[199] The underlying principle of the Act is one of mutual obligations.

Thus, each of these bases—political theorists ideas of social contract, the historical underpinnings of our democratic model, the discourse surrounding social welfare programs, and the Welfare Reform Act itself—all support the notion that a social contract exists between the government and the populace.

2. Terms of the Social Contract.—Defining the terms of the social contract is a more difficult inquiry. While contemporary and classical scholars have written extensively about the existence of the social con-

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196. *But see* Transcript of Hearing on Motion to Dismiss, *supra* note 13, at 49-51.

> [Defendant Adams County]: "[Welfare benefits] are, instead, now more in the nature of a contractual relationship between the public agency providing the benefits and the individual, rather than in the nature of an entitlement program."
> The Court: "Didn't Congress try to walk a fairly fine line on that one? I mean, they hesitated to make it clear that it was purely a contractual relationship for the same reason, they didn't want to call it an entitlement, because if it's a contract, then you certainly have a property interest in a contract. . . ."
> . . . .
> The Court: "Or let me ask that a different way. If they have a vested contract right, doesn't that make it a pretty easy case for me, because that's a property right?"
> . . . .
> [Defendant Adams County]: "[Q]uite frankly, we continue to assert that there is absolutely no property interest and no liberty interest that plaintiffs can point to in the receipt of welfare benefits; consequently, plaintiffs have no right to due process notice."

Id.

197. *See supra* pt. I. While the federal statute permits and does not mandate each state to create IRPs, all fifty states and the District of Columbia have in fact adopted some form of the IRP requirement. *See* TANF APPLICATIONS, *supra* note 68. While some states call these IRPs "plans" and other states call the IRPs "contracts," each state's form of the IRP creates conditions upon recipients that must be met to receive assistance. *Id.*

198. *See* 42 U.S.C. § 608(b) (Supp. V 1999) (allowing receipt of benefits to be conditioned on the satisfaction of certain personal obligations imposed on the recipient by the state). Under the federal statute, the agreement shall include employment goals for the individuals, affirmative obligations placed upon the recipient, a plan to move the recipient into private sector employment, and the services the state will provide to the individual. *Id.* § 608(b)(2)(A).

199. *See id.* § 608(b)(3) (suggesting that a recipient's failure to meet conditions under the "agreement" will dissolve a state's duty to provide assistance).

tract, much less attention has been given to its terms. However, because the social contract represents the basic understanding of the relationship between a people and its government, in the most general sense, the social contract must include the various understandings that we believe are necessary to the very functioning of an ordered society.

Among the terms of the contemporary United States social contract, therefore, we must include, first, that we operate as a nation of law.[200] Likewise, the government is structured as a democracy with a system of checks and balances and separation of powers between the governmental branches and will enact and fairly enforce the laws necessary for the basic functioning of society.[201] Similarly, though the system of law dictates limitations upon individual behavior, outside those limitations individual rights will be respected and individuals will be treated fairly and equally.[202] Finally, inherent in our notions of individual liberty and limited government is the understanding that the government will not act in an arbitrary manner.[203] In fact, permitting the government to act in an arbitrary manner would undermine the fundamental principles of the social contract.[204]

3. Due Process Implications of the Existence of a Social Contract.—The social contract may prohibit the government from acting in an arbitrary fashion and thereby provide welfare recipients protection against the unfettered discretion of welfare administrators.[205] The operation

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200. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

201. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1 (1997).

202. *See* U.S. CONST. amend. XIV, § 1.

203. *See* County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998) (explaining that "[s]ince the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action . . ."). For example, government agencies are forbidden from acting arbitrarily when their actions affect the property or liberty interests of individuals. *See, e.g.*, Tourus Records, Inc. v. Drug Enforcement Admin., 259 F.3d 731, 737 (D.C. Cir. 2001) (explaining that an agency must "set forth" reasons for the decisions it makes to avoid acting in an arbitrary or capricious manner).

204. *See* Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 247 (2000) (discussing John Locke, and stating that when leaders begin to see themselves as having "a distinct interest from the rest of the community," they may act in an arbitrary and tyrannical fashion, thereby breaking down the social contract).

205. A second potential source for due process protection builds from the first. If we assume there exists a social contract in which the government will administer a cash assistance program in a nonarbitrary manner, the government has created legitimate expectations that if the recipient meets the criteria and abides by the program rules he or she will be eligible for assistance. *See* Cimini, *supra* note 31. This legitimate expectation creates an

of a government program without standards and in an absolutely discretionary fashion is contrary to established understandings of the appropriate role of government and to our implicit agreement to be governed.[206]

Applying inherent principles of individual liberty and limited government to the Welfare Reform Act would constrain government discretion. For example, a welfare program would be required to have ascertainable written standards to guide the discretion of caseworkers. Further, these written standards would have to be published, and the ultimate application of standards to individuals would be subject to judicial review.[207] In the absence of such standards and checks, the

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entitlement for eligible recipients, which leads to a property interest and subsequent procedural due process protections. For a detailed exploration of this legitimate expectation analysis, see *id.*

206. While some scholars might argue that the arbitrariness doctrine itself would protect recipients from such improper government action, the devolution accompanying welfare reform raises questions about this doctrine's applicability. In the context of devolved authority, increased discretion, and fewer rules, the scope of protection against arbitrary action is less clear. Typically, when an agency acts in an adjudicatory fashion, the agency must comport with basic notions of due process, including the prohibition against arbitrary action. Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964). The arbitrary and capricious standard under the Federal Administrative Procedures Act requires a court to overturn any agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2000); *see* Fund for Animals v. Clark, 27 F. Supp. 2d 8, 11 (D.D.C. 1998) (finding that "[a]n agency action is arbitrary and capricious if the agency has failed to follow procedure as required by law, or has entirely failed to consider an important aspect of the problem" (internal citation omitted)); Varicon Int'l v. Office of Pers. Mgmt., 934 F. Supp. 440, 444 (D.D.C. 1996) (determining that the agency action is not arbitrary or capricious if the agency decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment" (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971))). An agency is said to act in an adjudicatory manner when making determinations about factual issues and applying legal criteria to the facts. *See Hornsby*, 326 F.2d at 608 (finding that basic requirements of due process apply to licenses because licensing consists of the determination of factual issues and the application of legal criteria to them). However, as the administrative functions become less clear through devolution of administrative authority and increased discretion, what constitutes adjudicatory action may, as a corollary, also become less apparent or definite. *See* Diller, *supra* note 22, at 1147. Moreover, the arbitrary and capricious doctrine is a very lenient standard of review. *See generally* 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 11.4 (4th ed. 2002). Making nonarbitrariness an implicit term of the social contract provides welfare recipients with an additional source of protection. For a discussion of the Federal and State Administrative Procedure Acts as they apply to federal block grants, see Janet Varon, *Passing the Bucks: Procedural Protections Under Federal Block Grants*, 18 HARV. C.R.-C.L. L. REV. 231, 267-74 (1983).

207. *See also* Daniels v. Woodbury County, 742 F.2d 1128, 1135 (8th Cir. 1984) (holding that "where the defendants have already established a category of eligible applicants, such as the category of 'poor' persons here, the County may not arbitrarily and capriciously deny the availability of that category by lodging unlimited discretion in the hands of the decisionmaker"); Carey v. Quern, 588 F.2d 230, 232 (7th Cir. 1978) (stating that welfare

government could act in unfair and unequal ways, which would be impermissible under the terms of the social contract.[208] In this way, the macro social contract at a minimum prohibits arbitrary government action.

B. Micro Contracts: IRC and Express Agreements

In addition to constraints mandated by concepts of social contract, due process protection also may arise from a contractual analysis of the individual responsibility plans (IRPs) or individual responsibility contracts (IRCs). This section is designed to explore the possibility that the IRPs or IRCs entered into between the government and welfare recipients are legally cognizable contracts and, as such, create a property interest for procedural due process purposes. This contractual interest may provide a more secure basis for recipients' procedural due process rights because the existence of the property interest does not depend upon the absence of government discretion, as it does under a legitimate expectation analysis.

1. Are the TANF Agreements Legally Cognizable Contracts?—The application of fundamental contract law principles to the "agreement" imposed upon welfare recipients indicates that the written accord between the recipient and government agency may constitute a legally cognizable contract. Essentially, for a contract to exist, the elements of offer, acceptance, and consideration (or a consideration substitute) must exist.[209]

An offer is a promise to act in some way in the future or to refrain from some act in the future.[210] The offeree accepts the offer by per-

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assistance programs should be administered fairly and in a way to avoid arbitrary decisionmaking); Holmes v. N.Y. City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968) (finding "that the existence of absolute and uncontrolled discretion in an [administrative] agency . . . would be an intolerable invitation to abuse"); County Dep't of Pub. Welfare v. Deaconess Hosp., Inc., 588 N.E.2d 1322, 1327 (Ind. Ct. App. 1992) ("[P]arties are entitled to fair notice of the criteria by which their petitions will be judged by an agency, . . . judicial review is hindered when agencies operate in the absence of established guidelines.").

208. *See supra* notes 78-104 and accompanying text (describing the dangers of unchecked government action).

209. Hightower v. GMRI, Inc., 272 F.3d 239, 242 (4th Cir. 2001); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 17 (1979) (specifying that the proper formation of a contract requires mutual assent and consideration); *see also* JOHN MURRAY, JR., MURRAY ON CONTRACTS § 28, at 51 (3d ed. 1990) (explaining that two of the essential elements to the formation of a contract are mutual assent and consideration).

210. *See* RESTATEMENT (SECOND) OF CONTRACTS § 24 cmt. a ("In the normal case of an offer of an exchange of promises, or in the case of an offer of a promise for an act, the offer itself is a promise, revocable until accepted."); *see also* MURRAY, *supra* note 209, § 29, at 52 ("Almost invariably, an offer is created by a promise . . . .").

formance of an act, forbearance from acting, or the making of a counter promise in accordance with the original offer.[211] These first two requirements of offer and acceptance are often referred to as mutual assent, or the "expression of agreement between or among parties,"[212] and form the basis of the underlying agreement between the parties. If this agreement is supported by consideration or a consideration substitute and there are no defenses, the parties have created a legally cognizable contract.[213]

Applying this contractual analysis to the TANF agreements,[214] it appears that both parties to the contract—the governmental entity administering TANF and the recipient—promise to perform respective acts in the future. As evidenced by the IRC or IRP, the applicant promises to engage in express work activities as well as other obligations in exchange for the government's promise to provide the applicant with monthly support, including money and services.[215] Thus the applicant is both a promisor, whose duty it is to complete the requirements, and a promisee, to whom the government has promised to provide cash benefits and services. Similarly, the government is a promisor, whose duty it is to pay the recipient upon completion of the obligations, and a promisee, to whom the recipient has promised to complete the work activities or other responsibilities. These promises operate as the offer and acceptance required for the formation of a contract. This offer and acceptance is then memorialized in the writ-

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211. MURRAY, *supra* note 209, § 29, at 52. The *Restatement (Second) of Contracts* defines acceptance of an offer as follows:

> (1) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.
>
> (2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.
>
> (3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.

RESTATEMENT (SECOND) OF CONTRACTS § 50; *see also* Cal Wadsworth Constr. v. City of St. George, 898 P.2d 1372, 1376 (Utah 1995) ("An acceptance is a manifestation of assent to an offer, such that an objective, reasonable person is justified in understanding that a fully enforceable contract has been made.").

212. MURRAY, *supra* note 209, § 29, at 51 (emphasis omitted).

213. *See* Koltis v. N.C. Dep't of Human Res., 480 S.E.2d 702, 704 (N.C. Ct. App. 1997) ("A valid contract requires offer, acceptance, consideration, and no defenses to formation."); *see also* MURRAY, *supra* note 209, § 28, at 51.

214. For purposes of this section, the TANF agreements to which this Article refers are the IRPs or IRCs that the government and individual recipients enter into. See *supra* notes 71-77 and accompanying text for a detailed description of the agreements. The question explored in this section is whether these agreements can be considered contracts.

215. *See* 42 U.S.C. § 608(b) (Supp. V 1999) (describing the individual responsibility plans).

ten agreement that constitutes the expression of the contract between the parties.

Discussion of the terms of the welfare contract should address both the duration of the agreement and the explicit obligations for each party. The duration of the TANF contract would last as long as the recipient was receiving assistance, but could last no more than sixty months.[216] Likewise, the specific terms of the contract would be determined by the agreement itself.[217] Thus, the contract may obligate the recipient to complete a range of activities, including job-related activities such as job search, job readiness classes, or vocational activities as well as non-job-related tasks, including obtaining child immunization, assuring a child's attendance at school, or attending parenting classes.[218] The specific terms vary with each contract.

On the other hand, the government's obligation is likely to be much more consistent across the range of contracts. In virtually all circumstances, the government's obligation would presumably include the payment of cash assistance.[219] In general, the expectation is that these payments will be made on a monthly basis.[220] However, the government may also be obligated to provide services to enable recipients to perform their obligations. These services can include child care arrangements, job training classes, or transportation vouchers.[221] In addition to these explicit terms, once the government creates an IRP or an IRC, the government will be bound by the statutory provi-

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216. 42 U.S.C. § 608(a)(7)(A). The federal statute does permit states to exempt up to 20% of their caseload from the sixty month lifetime limit. *Id.* § 608(a)(7)(C)(ii). States can grant an exemption if a hardship exists or if the family includes an individual who has been battered or subjected to extreme cruelty as defined by the statute. *Id.* § 608(a)(7)(C)(i). For a definition of "battered" or subject to "extreme cruelty," see *id.* § 608(a)(7)(C)(iii).

217. *See* Colorado Works Individual Responsibility Contract, attached as Appendix 1 (specifying that the "contract contains terms and conditions governing the participant's receipt of assistance . . . .").

218. *See* 42 U.S.C. § 608(b)(2)(A) (describing the contents of the individual responsibility plans); App. 1, *supra* note 217 (listing the various activities required by the Colorado Works program).

219. Every state and the District of Columbia provide some form of cash assistance. STATE POLICY DOCUMENTATION PROJECT, MAXIMUM CASH ASSISTANCE BENEFIT AMOUNTS, *available at* http://www.spdp.org/tanf/financial/maxben.pdf (last visited Feb. 4, 2002) [hereinafter MAXIMUM CASH ASSISTANCE BENEFIT AMOUNTS].

220. Cash assistance is generally administered on a monthly basis. *See* STATE POLICY DOCUMENTATION PROJECT, MAXIMUM CASH AND FOOD STAMP BENEFITS 2001, *available at* http://www.spdp.org/tanf/financial/maxben2001.pdf (last visited Feb. 4, 2002).

221. *See* 42 U.S.C. § 604 (permitting states to use TANF block grant funds in any manner reasonably calculated to accomplish the purposes of the act or in any manner that was permissible under the AFDC program).

sion that implicitly obligates the government to provide some services to enable recipients to obtain and maintain employment.[222]

If this concluded the analysis, it would seem rather straightforward. However, other provisions of the Welfare Reform Act pose complications. Specifically, the federal statute, and some state statutes, contain an express "no entitlement" provision,[223] which could be construed as the government's attempt to visciate its obligations to be legally bound by the terms of the express IRP agreements.[224] Additionally, some states include language in their statutes explicitly stating that the written IRP or IRC agreements do not create legally binding contracts.[225] These state and federal statutory provisions raise

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222. *Id.* § 608(b)(2)(A)(iv).

223. *Id.* § 601(b). There are seventeen states that have explicit "no entitlement" language in their state statutes. STATE POLICY DOCUMENTATION PROJECT, FINDINGS IN BRIEF: ENTITLEMENT TO BENEFITS, *available at* http://www.spdp.org/tanf/entitlement/cash_assistance_entitlement_summlist.htm (last visited Nov. 26, 2001). These states include: Arizona, Arkansas, Colorado, the District of Columbia, Florida, Georgia, Illinois, Michigan, Montana, North Carolina, North Dakota, Pennsylvania, South Dakota, Tennessee, Washington, West Virginia, and Wisconsin. STATE POLICY DOCUMENTATION PROJECT, CASH ASSISTANCE ENTITLEMENT POLICIES, *available at* http://www.spdp.org/tanf/entitlement.PDF (last visited Feb. 3, 2002).

224. It might be argued that the "no entitlement" language was designed to create an agreement with no legal consequences. However, equally apparent is other language conflicting with the express "no entitlement" provisions, which clearly indicates that the government intended these agreements be considered a contract. For example, in some states the agreement is actually called an "Individual Responsibility Contract" (IRC), expressly states that it is a "contract" between the participant and the state, and clearly delineates the rights and responsibilities of the parties to the agreement. *See, e.g.*, COLO. REV. STAT. ANN. § 26-2-708 (West Supp. 2001).

225. Initially, under the employment-at-will doctrine employers argued that they could fire employees for any reason or no reason at all. *See* Martin v. Capital Cities Media, Inc., 511 A.2d 830, 834 (Pa. Super. Ct. 1986). However, courts found that other factors, such as the language in employee handbooks, could be considered when determining the right of the employer to fire without cause. *Id.* at 841; *see also* Beck v. Phillips Colleges, Inc., 883 P.2d 1283, 1284-85 (O.K. Ct. App. 1994) (recognizing that at-will employment in Oklahoma can be converted to an implied contract if certain factors exist, including employer handbooks and policy manuals, longevity of employment, detrimental reliance on oral assurances, or pre-employment interviews); Kestenbaum v. Pennzoil Co., 766 P.2d 280, 284-85 (N.M. 1989) (holding that a binding agreement may be formed by such things as employer's oral representations of job security and customary personnel practice, as well as the contents of employee handbooks); Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 885 (Mich. 1980) (finding that the oral representations could be considered in conjunction with employee handbooks in order to determine whether there was an implied contract for job security).

After courts began to find that handbooks or other materials created rights for employees, employers started to expressly state on such materials that the materials themselves did not create any legal rights. *See* Bouwens v. Centrilift, 974 P.2d 941, 947 (Wyo. 1999) (holding that a disclaimer of contractual obligation in an employment handbook was sufficient to prevent the employment handbook from having contract status). Despite the employers' attempts to negate their legal obligations, courts decided that determining

questions as to the government's intention to be legally bound by the agreement—a necessary requirement for an enforceable contract.[226]

Although these statutory provisions may represent a clear manifestation of government intent that the agreement be nonbinding, they conflict with other indicia of government intent. For example, the agreements specifically set forth the obligatory terms of each party and, in many instances, are referred to as "contracts" that are signed by both the applicant and the caseworker as representative of the government.[227] Such factors seem to indicate the government's intent to create a legally binding agreement even in light of the statutory "no entitlement" provisions.

Despite the conflict between legally binding and nonlegally binding indicia, courts are likely to ultimately determine that the necessary mutual assent exists. Relying upon rules of construction governing conflicting provisions in a contract, courts are apt to construe any ambiguity against the drafter, in this case the government.[228] As such, the government's attempt to create a nonlegally binding agreement might be obviated by other indicia of a binding agreement. Further, in light of the legal tendency to look with disfavor upon provisions designed to negate legal obligations,[229] as well as the other indicators, an argument could be made that in fact mutual assent does exist.

Further, even presuming that the "no entitlement" and "nonlegally binding" provisions did operate to negate the government's obligations arising out of the contracts, courts might limit the application

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the nature of an employment relationship requires an analysis of all the circumstances. *See* Donovan v. Sabine Irrigation Co., 695 F.2d 190, 194 (5th Cir. 1983); Mecier v. Branon, 930 F. Supp. 165, 169 (D. Vt. 1996) (finding that handbook disclaimers "must be evaluated in the context of all the other provisions in a handbook and any other circumstances bearing on the status of an employment agreement").

226. *See, e.g.*, Superior Boiler Works, Inc. v. R.J. Sanders, Inc., 711 A.2d 628, 633 (R.I. 1998) ("The offer and the acceptance must be sufficient to manifest objectively the parties' mutual assent to be bound by a contractual relationship . . . ."); RESTATEMENT (SECOND) OF CONTRACTS § 21 (1979) ("Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract."); *see also* MURRAY, *supra* note 209, § 31, at 56 ("It has frequently been asserted that even though all of the elements of a contract are present, there is no contract unless the parties also intend their arrangement to be legally binding.").

227. STATE POLICY DOCUMENTATION PROJECT, PERSONAL RESPONSIBILITY CONTRACTS, *available at* http://www.spdp.org/tanf/applications/applicprc.pdf (last visited Feb. 3, 2002).

228. *See, e.g.*, Sanford v. H.A.S., Inc., 136 F. Supp. 2d 1215, 1223 (M.D. Ala. 2001) ("It is a fundamental tenet of contract law that ambiguous terms in a contract are construed against the drafter.").

229. *See* MURRAY, *supra* note 209, § 98, at 508-09 (explaining that courts tend to disfavor agreements that run contrary to public policy).

of such provisions based on notions of fairness or unconscionability. For example, if a recipient performed under the agreement, and the government, relying upon the no entitlement provision, refused to perform, enforcement of the clause might violate notions of fairness.[230] Similarly, in light of the parties' disparate bargaining power and the lack of meaningful choice on the part of the recipient, courts might determine the provision denying the existence of a contract to be unconscionable.[231]

If the TANF agreements meet the offer and acceptance requirements and the "non-legally binding" clauses are not dispositive, the next issue is whether the TANF agreements are supported by consideration or a consideration substitute. According to the *Restatement (Second) of Contracts*, consideration requires a bargained-for exchange of things of value.[232] An exchange is bargained-for if each party per-

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230. *See* RESTATEMENT (SECOND) OF CONTRACTS § 21, cmt. b (explaining that nonlegally binding clauses may raise difficult questions of interpretation, misrepresentation, mistake, or overreaching). While courts do not always clearly articulate reasons for not enforcing nonlegally binding provisions, it is clear that the rationale emphasizes reliance by one party who may not have read or understood the "non-legally binding" clause. *Id.* When the other party later raises the clause in defense, the reliance factor overcomes the technical defense, and the enforcement of the "non-legally binding" clause may also be unconscionable. *Id.*; *see also* MURRAY, *supra* note 209, § 31(B), at 57. For an example of a court's refusal to uphold nonlegally binding provisions of a contract, see *Tilbert v. Eagle Lock Co.*, 165 A. 205, 208 (Conn. 1933) (holding notice of withdrawal of death benefits ineffective until the end of the day it was posted).

231. *See* Hume v. United States, 132 U.S. 406, 415 (1889) (describing an unconscionable contract as one "such as no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept on the other"); *Restatement (Second) of Contracts* § 208 addresses unconscionable terms as follows:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

RESTATEMENT (SECOND) OF CONTRACTS § 208; *see also* Williams v. Walker-Thomas Furniture, 350 F.2d 445, 450 (D.C. Cir. 1965) (finding that where an element of unconscionability exists at the time the contract is made, the contract may be unenforceable as a matter of law).

232. The *Restatement (Second) of Contracts* states that the requirements of exchange are:

> (1) To constitute consideration, a performance or a return promise must be bargained for.
>
> (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
>
> (3) The performance may consist of
>
> (a) an act other than a promise, or
>
> (b) a forbearance, or
>
> (c) the creation, modification, or destruction of a legal relation.
>
> (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

forms or promises to perform, or if each party, as a quid pro quo, receives something in return.[233] Once either party incurs a benefit or suffers a detriment, the "value" requirement is met.[234]

In the context of the administration of benefits, the administering agency and the recipient each agree to obtain benefits and suffer detriments in order to receive either performance or a return promise from the other party. The recipient obtains the benefit of monthly assistance and suffers the detriments of losing individual autonomy over various life decisions and meeting the government's requirement of work outside the home.[235] The agency suffers the evident detriment of monthly assistance costs and providing services designed to assist the recipient in workforce re-entry. In return, the government gets recipients off the welfare rolls and decreases the amount of their monetary outlay.[236] Thus, it appears that the requisite consideration may exist.

On the other hand, the government could argue that no consideration exists because the monthly assistance grant is a "gift" rather than an obligation, and neither amounts to valid consideration nor inducement for the promise.[237] However, the facts belie this characterization because the government benefits not only from the recipient's work toward financial independence in the marketplace, but also from recipient compliance with other obligations, such as cooperation with child support enforcement, children attending school, and children being immunized.[238] Thus, on balance, it appears that the requisite consideration exists when, in exchange for its agreement to

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RESTATEMENT (SECOND) OF CONTRACTS § 71; *see also* Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130 (7th Cir. 1997) ("Consideration is defined as bargained for exchange whereby the promisor . . . receives some benefit or the promisee . . . suffers a detriment.").

233. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71; *see also In re* Lueders' Estate, 164 F.2d 128, 135 (3d Cir. 1947) ("Consideration, in a contract, is the *quid pro quo* that the party to whom the promise is made, does or agrees to do in exchange for the contract.").

234. *See* MURRAY, *supra* note 209, § 60, at 227; *see also* Hamer v. Sidway, 27 N.E. 256, 259 (N.Y. 1891) (finding the existence of consideration when an uncle promised his nephew $5000 on his twenty-first birthday as long as the nephew refrained from drinking, smoking, gambling, and swearing until age twenty-one).

235. *See* 42 U.S.C. § 608(b)(2)(A) (Supp. V 1999).

236. *See id.*

237. *See* Kirksey v. Kirksey, 8 Ala. 131, 131 (1845) (determining that no action in contract was created when brother-in-law asked his sister-in-law to move from the house he had provided her upon her husband's death); RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c ("[A] gift is not ordinarily treated as a bargain, and a promise to make a gift is not made a bargain by the promise of the prospective donee to accept the gift . . . . This may be true even though the terms of [the] gift impose a burden on the donee as well as the donor.").

238. *See* 42 U.S.C. § 608(b)(2)(A)(ii); *see also* Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970) (stating that welfare promotes governmental interests).

provide monthly assistance, the government obtains the recipient's compliance with government imposed conditions.

Even in the absence of traditional consideration, however, detrimental reliance would likely suffice to create an enforceable agreement between the parties. The *Restatement (Second) of Contracts* defines detrimental reliance as "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance . . . ."[239] As an equitable concept, the promise will be binding if enforcement of the promise results in the avoidance of injustice.[240]

Applying these principles to TANF agreements, it appears that detrimental reliance may exist. In essence, the administering agency promises to pay the recipient a monthly grant amount conditioned upon the completion of obligations set out in the recipient's individual contract.[241] That promise of monthly support, conditioned upon the completion of certain events by the recipient, would be likely to induce in the recipient the reliance contemplated by the contract doctrine.[242] If it does in fact induce such reliance and if the individual seeking assistance performs the required tasks, this reliance, coupled with the injustice that might result, creates a sufficient consideration substitute.[243] Thus, it appears that the requisite elements exist to sup-

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239. RESTATEMENT (SECOND) OF CONTRACTS § 90(1); *see also* Choate v. TRW, Inc., 14 F.3d 74, 77 (D.C. Cir. 1994) ("[A] promise that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and that does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.").

240. RESTATEMENT (SECOND) OF CONTRACTS § 90(1); *see also* C&K Petroleum Prods., Inc. v. Equibank, 839 F.2d 188, 192 (3d Cir. 1988) (explaining that detrimental reliance is designed to prevent the injustice that results when a promisee is reasonably induced by, and relies upon, some promise by a promisor that is broken).

241. Under the Welfare Reform Act, states are mandated to sanction recipients who fail to engage in work activities and who fail to cooperate with child support enforcement. *See* 42 U.S.C. §§ 607(e), 608(a)(2). Further, the statute permits a state to reduce, by an amount the state considers appropriate, assistance to a family when an individual fails without good cause to comply with other responsibilities mandated by his or her individual agreement. *See id.* § 608(b)(3). These work activities, child support enforcement obligations, and other responsibilities comprise the obligations placed upon recipients under the IRPs. *See id.* § 608(b)(2)(ii).

242. *See* Schmidt v. McKay, 555 F.2d 30, 36 (2d Cir. 1977) ("[A] promise without any agreed consideration may be enforced if there has been a substantial change of position by the promisee in reasonable reliance upon the promise.").

243. *See* Cohen v. Cowles Media Co., 479 N.W.2d 387, 391 (Minn. 1992) (finding that a source's reliance on a reporter's promise to keep the source's name confidential was detrimental); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114, 116 (Minn. 1981) (holding that reliance on a promise of employment at will was detrimental).

port a legally cognizable contract in the absence of specific defenses.[244]

2. Assuming There Is a Legally Cognizable Contract, What Are the Due Process Implications of the Contract?—This section will explore the due process implications of a legally cognizable contract between the government and the recipient. A legal contract may create a property interest, which in turn provides recipients with procedural due process protections.[245] Such analysis stems in part from the concept that parties to a legally cognizable contract have a certain bundle of rights that flow from the finding of the contract, including the right to compel compliance with the terms of the agreement.[246] Courts that have analyzed the import of a contract in the due process context support the conclusion that a contract can be construed as "property."[247]

The legal recognition of the agreement as property stems from a long line of precedent, beginning with the 1972 Supreme Court decision *Board of Regents v. Roth.* In that case, the Court developed the liberty-property approach to the Fourteenth Amendment, which requires three elements to establish a procedural due process violation: state action, the existence of a liberty or property interest, and the deprivation of such interest.[248]

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244. The recognition of a legally cognizable contract raises many questions that are beyond the scope of this Article. Such questions include the potential defenses available to either party to the TANF agreement as well as issues regarding enforcement should either party breach the agreement. I save these questions for another article.

245. *See* Arnett v. Kennedy, 416 U.S. 134, 165 (1974) (Powell, J., concurring) (explaining that "a property interest may be created by statute as well as contract," and "that a person may have a protected property interest in public employment if contractual or statutory provisions guarantee continued employment absent 'sufficient cause' for discharge").

246. Gersman v. Group Health Ass'n, Inc., 931 F.2d 1565, 1576-77 (D.C. Cir. 1991) (explaining that "a contract consists of a bundle of rights," including the right to enforce a contract in the event of breach).

247. *See* Bishop v. Wood, 426 U.S. 341, 344-45 (1976) (finding that an ordinance or implied contract may create a property interest); Perry v. Sinderman, 408 U.S. 593, 601-02 (1972) (determining that a written contract with explicit tenure provisions creates a property interest, as does a contract "implied" from policies and practices); Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (stating that property interests protected by procedural due process clearly include ownership of real estate, chattels, or money); Lashbrook v. Oerkfitz, 65 F.3d 1339, 1345 (7th Cir. 1995) (finding that an explicit contract may create a property interest); Vinyard v. King, 728 F.2d 428, 432 (10th Cir. 1984) (explaining that a federal statute, city charter, or contract may create a property interest); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 990-91 (2000) (finding that contract rights are often regarded as property for procedural due process purposes).

248. *See* 408 U.S. at 569 (suggesting that procedural due process protections apply only when an individual has been deprived of property and liberty).

Were the issue to arise in the context of TANF benefits, the "deprivation of interest" prong of the procedural due process question is unlikely to be at issue. The Supreme Court has found that a deprivation merely requires that government action adversely affect the individual's interest.[249] Given this broad definition, a sanction, in the form of a reduction or termination of assistance, by the government or private entity administering welfare would presumably qualify as a deprivation for due process purposes.

Similarly, state action is likely to be found because the government typically creates the contract directly with the recipient and sanctions the recipient for any noncompliance.[250] Though the state action analysis is more complicated when the government contracts out its administrative obligations to private entities, the nature of the administering agency is not dispositive of the question.[251]

The state action doctrine provides two exceptions to the general notion that private actors are not susceptible to the protections of the Fourteenth Amendment.[252] The first exception is the "public forum exception," under which constitutional limitations apply if the private entity is performing a task that has traditionally been exclusively done by the government.[253] The second exception is the "entanglement exception," under which constitutional limitations apply if the government has authorized, encouraged, or facilitated the unconstitutional conduct.[254] In the context of TANF contracts and termination of benefits by private actors contracting with the government, recipients could successfully argue that both exceptions apply.[255]

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249. *See* Fuentes v. Shevin, 407 U.S. 67, 84-85 (1972) (explaining that "it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment").

250. *See* 42 U.S.C. § 608(b) (Supp. V 1999); *see also* Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (stating that the termination of welfare benefits "involves state action that adjudicates important rights").

251. The Supreme Court recently decided to hear argument on a case involving the scope of "state action" in the context of a privately owned correctional facility operating on behalf of the Federal Bureau of Prisons. The specific question to be addressed by the Court is whether this private entity may be sued in a *Bivens* action for violating a prisoner's civil rights. *See* Malesko v. Corr. Servs. Corp., 229 F.3d 374, 377-78 (2000), *cert. granted*, 121 S. Ct. 2588 (2001).

252. *See* Gilman, *supra* note 14, at 609-25 (analyzing the state action complications under a system of privatized welfare).

253. Jackson v. Metro Edison Co., 419 U.S. 345, 352 (1974); *see* CHEMERINSKY, *supra* note 201, at 395.

254. *See* Shelley v. Kraemer, 334 U.S. 1, 19-20 (1948).

255. Under the "public forum exception," while private entities have frequently played various roles in the administration of public assistance, eligibility and termination decisions traditionally fall within the exclusive jurisdiction of the government. *See* Bezdek, *supra* note 81, at 1566 (describing the expanding power of private entities in determining

Presuming, as this Article has advocated, that a property interest continues to exist in the receipt of welfare benefits, and that there is a deprivation of that interest by state action, the question becomes what the due process clause requires. Generally, the question of what process is due involves the balancing of various interests: the importance of the private interest against the risk of government error and the magnitude of the government interest.[256] A determination of the requisite process is accomplished by a balancing of these factors.

In the context of public assistance under the previous AFDC program, procedural due process required notice and an opportunity to be heard prior to the deprivation of benefits.[257] The notice and opportunity to be heard necessitated a hearing at which the individual had the right to control witnesses, present evidence, hire an attorney, and have a decision made by a neutral fact finder.[258] Under the analysis set forth in this Article, the continued existence of a property interest in welfare benefits would implicate a private interest similar to that implicated by AFDC and likely would require a level of procedural protections consistent with those set out in *Goldberg*.

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welfare eligibility). However, as the scope of authority provided to private actors is increased, this exception may no longer prove beneficial to recipients. *See* Gilman, *supra* note 14, at 620-21 (questioning whether courts will place any limits on governmental entities delegating responsibility to avoid accountability). Recipients could argue that the entanglement exception may apply if unconstitutional action undertaken by the private entity has been authorized by the state or local government. *See* Blum v. Yaretsky, 457 U.S. 991, 1003-12 (1982) (finding that a private nursing home that received subsidies from the state was not a state actor for the purpose of challenging the home's decision to discharge or transfer Medicaid patients to lower levels of care). This second exception is even more difficult because while the government contracted out certain duties to private entities, the contract did not contemplate that such performance would be undertaken in an unconstitutional manner. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 838-843 (1982) (rejecting both the "public forum" and the "entanglement" exceptions even though the private school at issue received a large majority of its funds from the government and was regulated by the state). Despite these limitations, recipients of welfare administered by private entities could argue that private contractors receive funding from the state, are regulated by the state, and are carrying out tasks traditionally undertaken exclusively by the state.

256. *See* Matthews v. Eldridge, 424 U.S. 319, 333-35 (1976) (concluding that due process is not a fixed concept, but instead requires an analysis of the government and private interests affected).

257. *See* Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

258. *Id.* at 267-68 (concluding that due process requires that "a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally").

CONCLUSION

This Article attempts to address one of the more contentious questions raised in the context of the Welfare Reform Act—whether welfare benefits are still construed as property for purposes of procedural due process protections. As this Article illustrates, the traditional underpinnings of procedural due process analysis, in the welfare context, have been altered. These changes may require new and creative approaches both to defining the existence of a property interest and to the subsequent due process analysis.

In essence, since *Goldberg v. Kelly*, welfare benefits have been considered property.[259] However, the due process analysis employed in *Goldberg* has been called into question.[260] Under *Goldberg* and its progeny, the welfare statutes themselves created for the recipient a legitimate expectation in continued receipt of the benefits.[261] This legitimate expectation was the basis for finding a legal entitlement and was utilized not only in the welfare context, but also in various other government benefits programs, licenses to engage in a trade or profession, and various explicit or implicit contracts.[262] A current concern, however, is that this legitimate expectation analysis depends in large part upon the amount of discretion provided to the government—as the government's discretion increases the likelihood of finding legitimate expectations decreases.[263] Thus, if recipients of TANF rely exclusively upon legitimate expectation analysis, they may be deprived of procedural due process protections at the very time such protections are most needed.

As the actual impact of welfare reform begins to emerge, a picture of governmental nonaccountability presents the potential for arbitrary action by treating needy individuals differently or unfairly. In the context of the government's distribution of basic subsistence benefits, such a random and subjective system is impermissible. Exacerbating the problem of increased government discretion is the loosening of checks on government action. What used to be a federal statutory system that "entitled" recipients to benefits is now a devolved localized temporary program designed to get people off assistance

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259. *Id.* at 262 n.8.

260. *See* Cimini, *supra* note 31.

261. *See Goldberg*, 397 U.S. at 262 ("Such benefits are a matter of statutory entitlement for persons qualified to receive them.").

262. *See id.* at 261-62 (finding that social security and veterans' educational benefits have a statutorily created property interest); *see also* Nat'l Ass'n of Radiation Survivors v. Walters, 589 F. Supp. 1302, 1312 (N.D. Cal. 1984) (finding that veterans have an interest in the continued receipt of death and disability payments).

263. *See supra* notes 105-111 and accompanying text.

and into the workforce. While recipients could previously rely upon a "legitimate expectation" entitlement analysis to protect against improper discretion by government officials, this analysis may no longer apply. What has resulted is a devolved system with increased discretion and a loss of government accountability.

This Article offers a due process analysis that provides a more effective means of addressing the "new" structure of welfare benefits. This analysis, based in the law of contracts, includes both macro and micro aspects. The macro contractual analysis, based on the concept of social contract between recipients and the government, identifies an implicit guarantee that the government will not act arbitrarily when administering a government benefits program. The micro contract, evidenced by the express agreement between each individual recipient and the government, provides even greater protections by creating a property interest that provides the recipient with a basis upon which to claim significant procedural due process protections.

In light of the fundamental changes in the administration of welfare, recipients need new tools by which to hold the government accountable. Without such tools, those most vulnerable may be left without any legal checks or balances to assuage the discretion of government actors who wield power over their lives. Scholars and advocates alike must draw upon their skills, insights, and creativity to help the law respond appropriately in preventing these ongoing and impending injustices.

APPENDIX

SEP 28 '99 12:51PM ADAMS CNTY ATTORNEY

EXHIBIT "3"

COLORADO WORKS

Individual Responsibility Contract (IRC)

Participant's Name: [redacted] SSN: 491-48-8469 Case Name:

FOCUS: Employment

This contract contains terms and conditions governing the participant's receipt of assistance under the Colorado Works Program. This contract does not create a legal entitlement to assistance under the Colorado Works Program. All of the activities listed below must be completed by the person indicated and by the date indicated. If these activities are not completed, without good cause, a sanction may be imposed or financial assistance may be reduced or terminated. If these activities are not completed, any financial assistance given will be considered as overpaid and may be recovered from the individual who received the assistance.

PLAN GOAL: To become financially independent of all government support programs.

ACTIVITY All Activities must be completed no later than the date indicated. Verification of completion must be received no later than the date indicated.	Start Date	End Date	Verification Received Date
1. You will participate with Adams County Employment Center One-Stop program by cooperating with all scheduled activities.	12-4-97		[redacted]
2. You will be participating in a work activity within two years from date of assessment.		6-30-99	[redacted]
3. You must keep Adams County Employment Center informed of any household changes including, but not limited to, income and employment..	12-4-97	End of Grant Year	[redacted]
4. Contact Job Service weekly	12-4-97		[redacted]
			[redacted]
			[redacted]
			[redacted]
			[redacted]
			[redacted]
			[redacted]
			[redacted]
			[redacted]
			[redacted]
			[redacted]

I understand and agree that I am able to complete all of the above activities by the dates given. I understand that if the activities indicated are not completed then I may be ineligible to receive any Colorado Works funds. I understand that if the activities are not completed that I may be required to reimburse Adams County Department of Social Services for any financial assistance that was received on behalf of my family. I understand that if I am offered employment that I must accept the employment and retain the employment. I agree to cooperate and participate in all required activities to secure employment.

[redacted] 12-4-97 [redacted] 12/2/97

Signature of Participant Date Signature of One-Stop Specialist Date

White-Client File Yellow-Technician Pink-Client