Revisiting the Promise of *Kelly v. Goldberg* in the Era of Welfare Reform

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I. INTRODUCTION

Over forty years ago, the Supreme Court in *Kelly v. Goldberg* held that due process protections applied to statutorily provided welfare benefits.¹ The *Goldberg* Court spoke graciously and generously about the poor, observing that "we have come to recognize that forces not within the control of the poor contribute to their poverty" and that welfare was not "mere charity," but rather allowed the poor to "participate meaningfully in the life of the community" by meeting basic subsistence needs.² While falling short of creating a substantive right to welfare, the Court provided welfare participants with a way to challenge and forestall an erroneous denial of benefits by requiring pre-termination hearings before benefits were reduced or discontinued.³

Since then, perceptions of the welfare poor and government’s obligations towards them have experienced a seismic shift. Welfare assistance has been recast from a vehicle for social inclusion to one that precludes it by encouraging dependency. The causes of poverty are no longer considered outside the control of the poor but to reside within them.⁴ The government obligation to help the poor has been overridden by the poor’s obligation to help themselves, as encapsulated in the defining phrase of welfare reform—“personal responsibility.”⁵

While this shift in the United States’ treatment of the welfare poor had been occurring for several decades, it reached its zenith with the abolishment of Aid to Families with Dependent Children (AFDC) in 1996 and its replacement with the

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2. *Id.* at 265.
3. For an account of the failed attempt to create a constitutionally based right to welfare, see ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION (1997).
Temporary Assistance for Needy Families program (TANF). TANF transformed welfare from a cash assistance program to a work-based temporary one. Assistance is limited to five years over a lifetime, and participants must engage in certain designated work activities in exchange for benefits. Although the law provides for work supports, such as day care, its predominant approach is punitive. States are required to impose sanctions, or financial penalties, on participants who do not comply with work requirements. They are also encouraged to divert people from the rolls.

One of the few vestiges of the old system preserved in the new one is the requirement that participants be given an opportunity to be heard in a state administrative appeals process when benefits are reduced or denied. Although the law explicitly provides that it “shall not be interpreted to entitle any individual or family to assistance,” participants still have the right to challenge individual decisions about eligibility for assistance. Virtually all of the states have retained their pre-welfare reform fair hearing systems. Little is known about whether, or how, these systems have adapted to the new demands wrought by welfare reform. Several critical questions remain unexamined. Can an administrative apparatus

6. Id. The shift largely focused on linking work and welfare, first by implementing programs to encourage work, then making work required. As far back as 1967, the Work Incentives Program (WIN program) encouraged work among recipients, but very few of the eligible welfare population participated. The 1980s saw an expansion of such programs, culminating in a more mandatory approach with the passage of the Family Support Act of 1988. Pub. L. No. 100-485, 102 Stat. 2343-2428 (codified as amended in scattered sections of 42 U.S.C.). The Act required work from a larger number of recipients than past programs, and increasingly relied on sanctions, or penalties, to enforce it. For a discussion of these programs, see MARY JO BANE & DAVID T. ELLWOOD, WELFARE REALITIES: FROM RHETORIC TO REFORM 20-27 (1994); FRANCES FOX PIVEN & RICHARD CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 382-99 (2d Ed.1993).

7. Under TANF, mandated work activities are narrowly defined for most recipients as employment in the public or private sector, on-the-job training, job search, job readiness training, or community service. 42 U.S.C. § 607(d) (2006 & Supp. 2011). Vocational training is limited to twelve months, while post-secondary education is not an allowable work activity. Id. § 607(d)(8). Single parents must work thirty hours per week, two-parent families thirty-five hours per week. Id. § 607(c).

8. Federal law requires states to impose partial sanctions for violations of work rules, with the option to increase and extend sanctions, including imposing full-family sanctions. Id. § 607(e). A partial sanction means only the adult is removed from the household budget for a fixed period of time. A full-family sanction means the elimination of the entire family’s grant.

9. See Matthew Diller, The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government, 75 N.Y.U. L. REV. 1121, 1152-58 (describing the various forms diversion programs have taken under PRWORA and arguing that under the former law they would have been considered a form of bureaucratic disentitlement).


11. Specifically, the law requires the states “to provide opportunities for recipients who have been adversely affected to be heard in a state administrative process.” Id. § 402(a)(1)(B)(iii).

12. The one exception is Wisconsin, which has turned over this function to the private and public contractors who administer its welfare program, known as W-2. However, recipients can appeal the decision of the private contractors to a state administrative appeal system. For a discussion of Wisconsin’s system, see Melissa Scanlan & Melissa Kwaterski, The End of Welfare and Constitutional Protections for the Poor: A Case Study of the Wisconsin Works Program and Due Process Rights, 13 BERKELEY WOMEN’S L.J. 153 (1998).
embedded within the welfare bureaucracy act as a bulwark against arbitrary government action when the focus is on the poor's behavior rather than the government's? How useful are fair hearings under a regime that emphasizes the denial of, rather than an entitlement to, assistance?

Law in action looks very different from law on the books, and how well or poorly fair hearings work cannot be known without studying them on the ground. As scholars of implementation research have observed, bureaucrats rarely, if ever, implement the law as envisioned by policy makers. While the usefulness of hearings has been debated since Goldberg, virtually all of the few empirical studies were conducted many decades ago, some before Goldberg, and were limited in scope, focusing primarily on how many people appealed and whether they were successful or not. Other commentary draws from advocates

13. Traditionally legal scholarship has focused on analysis of the law as written and as interpreted by the courts. Beginning in the 1980s, scholars began identifying gaps in this scholarship because it did not incorporate how people experienced law in everyday life and what meaning it held for them. Since then many studies of legal consciousness, as it is referred to in the socio-legal literature, have been conducted. For an overview of the legal consciousness literature, see generally Susan Silbey, After Legal Consciousness, 1 Ann. Rev. L. & Soc. Sci. 223 (2005). Several of these studies focus on traditionally disenfranchised groups in lower-level legal settings, for example criminal district courts. Sally Merry, Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans (1990), and small claims courts, John Conley & William M. O'Barr, Rules Versus Relationships: The Ethnography of Legal Discourse (1990). This study follows in this tradition, exploring for the first time administrative hearings in welfare bureaucracies.

14. Similar to legal consciousness studies, implementation studies focus on what is actually occurring on the ground. Its conceptual framework recognizes that the law is often vague or contains contradictory policy objectives, requiring policy implementers to fill in the gaps or make the choices avoided by policymakers. It also emphasizes that the law is implemented within organizations. Like any human enterprise, it is shaped by a myriad of factors, from organizational culture and incentives, to the availability of resources, to the personalities and predisposition of individual actors, to environmental factors. For the seminal book on implementation research, see Michael Lipsky, Street-Level Bureaucracy: Dilemmas of the Individual in Public Service (1980) (describing the different ways in which front line works in public agencies manage their caseloads and responsibilities within certain constraints). For a recent implementation study within welfare bureaucracies, see Evelyn Brodkin & Malay Majmundar, Administrative Exclusion: Organizations and the Hidden Costs of Welfare Claiming, 20 J. Pub. Admin. Res. Theory 827, (2010) (describing the phenomenon of administrative exclusion in public welfare bureaucracies, where confusing and contradictory rules and a focus on process over substance makes the cost of claiming benefits too high).

15. See Alexander Bell & Todd Norvell, Texas Welfare Appeals: The Hidden Right, 46 Tex. L. Rev. 223, 223-24 and n.13 (1967) (finding that out of 141,286 welfare recipients whose applications were denied or whose grants were lowered or terminated, only 693 (0.49%) filed appeals. Reversal rates ranged from a low of 37% to a high of 67%, with an average of 51.4%); Joel Handler, Justice for the Welfare Recipient: Fair Hearings in AFDC-The Wisconsin Experience, 4 Soc. Serv. Rev. 12, 20 (1969) (finding that between 1945 and 1965 only 1.2% of denied applicants and 0.4% of discontinued recipients appealed the cut-off or denial of their aid); Daniel Baum, The Welfare Family and Mass Justice 39 (1974) (finding a 5% to 20% rate of appeal in New York City); Ronald Hammer & Joseph M. Hartley, Procedural Due Process and the Welfare Recipient: A Statistical Study of AFDC Fair Hearings in Wisconsin, 1 Wis. L. Rev. 145, 202-03 tibs. 4 & 5 (1978) (finding a wide variation in appeal rates after Goldberg was decided, ranging, for example, in Milwaukee from 1.09% to 3.99% for terminations of aid, with higher rates of 2.2% to 10.4% for denials of aid. Success rates varied, with appeal rates dropping substantially in Milwaukee from 79.37% in the pre-Goldberg years between 1965 and 1968 to 43.07% between 1969 and 1973, but increasing in certain other urban areas from 28.9% to 64.9% and in rural
and others' experiences within the fair hearing system. While extremely helpful and insightful, such observations are not based on rigorous empirical methods that can fully illuminate the depth and breadth of a phenomenon.

This Article reports on the first empirical study of fair hearings using a method of social science analysis called "focused ethnography," including ethnographic observations of 215 fair hearings, analysis of the recordings and transcripts of hearings, and interviews with ten administrative law judges (ALJs) and seventy-nine appellants.

Part I discusses the hope and promise of Goldberg, along with past critiques of the fair hearing system as a mechanism for correcting the errors of government bureaucracies. Supporters contend that the rights-based remedy of fair hearings invites a more individualized and contextualized style of decision-making than occurs on the front lines. Critics, though, question the usefulness of adversarial style procedures to citizens who lack sufficient knowledge, skills and resources to effectively deploy them. This Part also examines how the reengineering of the welfare system under welfare reform, and in particular the work rules and its focus on reducing caseloads, has changed the nature of disputes. While some contend that such changes make fair hearings even more essential, others contend that hearings are insufficient to challenge the more complex and discretionary front-line decisions required under welfare reform.

Part II reports on the results of the empirical study. The findings of the study reveal that hearings are sites of complexity and contradiction, with ALJs playing a key role in whether hearings are useful for challenging some of the harshest areas from 40.95% to 45.97%). One of the few studies not based on appeal rates and outcomes was by Robert Scott, who surveyed a national sample of welfare caseworkers in 1972 on their opinion of hearings. He found that while 56% thought hearings were important to the administration of welfare, only 13% thought they were essential and nearly a third, or 31%, were undecided or ambivalent. Robert Scott, The Reality of Procedural Due Process—A Study on the Implementation of Fair Hearing Requirements by the Welfare Caseworker, 13 WM. & MARY L. REV. 725, 743 (1972). The most recent study of appeal rates and outcomes, and the only one post-welfare reform, is the author's. See Vicki Lens & Susan Vorsanger, Complaining after Claiming: Fair Hearings after Welfare Reform, 75 SOC. SER. REV. 430, 439-40 tbl. 1 and 2 (2005) (finding appeals rates of less than 1% in Texas and Wisconsin, 21-35% in New York City and 3.5% in the rest of New York State).

16. See Lucie White, SUBORDINATION, RHETORICAL SURVIVAL SKILLS, AND SUNDAY SHOES: NOTES ON THE HEARING OF MRS. G., 38 BUFF. L. REV. 1 (1990) (describing and interpreting the experience of her and her client at a fair hearing using a race, class and gender analysis, and drawing on linguistics and anthropology, to reflect on how socially subordinated persons experience legal settings); Paris Baldacci, A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant, 27 J. NAT'L ASS'N ADMIN. L. JUD. 447 (2007) (discussing difficulties experienced by pro se appellants at administrative hearings, drawing from her own experiences representing appellants at fair hearings, and suggesting ways in which the problem can be addressed through changes in how administrative law ALJs preside over hearings); Lisa Brodoff, Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings, 30 J. NAT'L ASS'N ADMIN. L. JUD. 601 (2010) (former administrative law ALJ describing the disadvantages appellants experience in the fair hearing system and arguing for a shift of the burden of proof to the agency and a requirement that it be met by clear and convincing evidence).

17. Such observations also did not involve pro se clients. An advantage of this study was virtually all the observed appellants represented themselves without assistance of counsel.

18. See infra note 60 for a description of focused ethnography.
provisions of welfare reform, including the work rules and sanctions. This study reveals two contrasting styles of judging, referred to as bureaucratic and adjudicatory.

Some ALJs function as "super bureaucrats" rather than judges, adopting the normative practices of the welfare system, including its focus on procedural compliance over substantive need. Such judges avoid making complex factual and legal judgments and instead rely on the rote and mechanical application of rules. Rather than relying on conventional legal strategies for determining the facts, such as soliciting detailed testimony and an array of proof, they ask for the same narrow range of documents required on the front lines. They also at times undermine their neutrality as impartial decision makers by adopting a moralistic tone that suggests appellants are irresponsible and undeserving of benefits. Such judges are less likely to uncover the types of bureaucratic excess and error that may occur under welfare reform, with hearings functioning instead as sites for surveillance of appellants, rather than the agency.

In contrast, the adjudicators emphasize their neutrality and role as judicial officials, fully employing the tools of the adversarial system to decide disputes. They are more likely to develop contextual narratives and seek out a broader range of documentary evidence. They are more skeptical of agency records, and more willing to scrutinize the agency. Such judges ensure that some of welfare reform's harshest provisions are not applied in error. They demonstrate the usefulness of fair hearings, especially under a welfare system that emphasizes the denial of assistance and the continuing monitoring of citizens' work behaviors. However, their efforts fall short in scrutinizing potential deficiencies in administrative systems and decision-making processes regarding the work rules and sanctions.

Not surprisingly, given these contrasting styles of judging, appellants in this study reported varied experiences with fair hearings. Virtually all appellants, including those who reported negative experiences, viewed hearings as an essential and valuable resource because it allowed them "another bite at the apple" when faced with a denial or discontinuance of benefits. However, the bureaucratic judges exacerbate appellants' disadvantages in the hearing room, including their lack of legal knowledge, unfamiliarity with the legal process, and limited access to bureaucratic records and other forms of evidence. Appellants left such hearings believing the ALJ was not independent from the agency and frustrated by their inability to fully present their side of the story. In contrast, when adjudicators presided over their hearings, appellants reported positive experiences. They believed they had a full opportunity to present their case and described their hearings as fair and the ALJ as unbiased.

In view of these findings, Part III suggests how to improve the fair hearing system. As the Supreme Court noted in Goldberg, due process procedures must "be adopted to the particular characteristics of welfare recipients, and to the
The limited nature of the controversies to be resolved. Hearings must also be "tailored to the capacities and circumstances of those who are to be heard." Based on the findings of this study, several changes are suggested to the fair hearing system that will better accommodate its primary users and enhance the efficacy of hearings post-welfare reform.

The first set of recommendations draws from the strategies used by the adjudicators to suggest ways in which appellants' inherent disadvantages can be addressed. These include providing a clearer and more detailed explanation of how the adjudicatory process works, encouraging appellants to actively participate in their own hearings, and helping appellants who are more versed in everyday storytelling than legal storytelling to structure their testimony. However, because such micro strategies are unlikely to address the institutionalized deficiencies in the system, including the existence of bureaucratic judges who mimic rather than scrutinize agency practices and the lack of a deeper scrutiny of post-welfare reform agency practices, more structural changes are needed.

Specifically, this Article suggests adopting the inquisitorial, rather than adversarial model, for fair hearings. Unlike the latter, the former mandates a more vigorous role for the judge, both in defining the nature of the dispute, including the legal and factual issues to be resolved, seeking out information and witnesses, and directing the questioning. By requiring ALJs to more actively scrutinize agency practices and seek out contrary evidence, they will be less likely to passively acquiesce to the norms and standards of the bureaucracies. They would also have more leeway to define the dispute, including conducting a broader inquiry into the agency's decision-making processes and practices regarding the work rules and sanctions.

The role of the agency representative at fair hearings should also be redefined from agency advocate to a "friend of the court," who is responsible for gathering evidence and objectively evaluating both sides of the dispute. Under the present adversarial model, the agency and the appellant are unevenly matched opponents, with the agency's far more superior knowledge and resources deployed to win their case. However, as a governmental actor, the agency's primary interest should not be in winning, but ensuring that its decisions were made properly. This is more likely to occur if the agency assumes a more neutral role at the fair hearing stage, including seeking out opposing evidence and legal arguments.

In sum, the proposed redefinition of both the ALJ and agency's roles would harness their skills, resources, and knowledge in ways that remedy appellants' deficiencies in these areas, hence ensuring that hearings are "tailored to the

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20. Id. at 268-69 (footnote omitted).
21. See Jason Parkin, Adaptable Due Process, 160 U. PA. L. REV. 1309 (2012) (arguing that the changes wrought by welfare reform require further changes in the fair hearing system to ensure that due process is preserved).
capacity and circumstances” of the citizens who use them. It would also allow for a fuller and fairer vetting of the types of disputes generated by a work-based welfare system and the administrative practices underlying them.

II. THE USE OF FAIR HEARINGS IN PUBLIC WELFARE BUREAUCRACIES: FROM GOLDBERG TO WELFARE REFORM

A. The Promise and Peril of Fair Hearings

The ability of quasi-judicial systems to correct the errors of the administrative state, and especially public welfare bureaucracies, has long been debated. Some contend that the proper vehicle for contesting the errors of government is one that arms citizens with rights and an adversarial system for claiming them. Goldberg is rooted in this view, locating welfare participants’ rights in a statutory entitlement to welfare benefits, which cannot be taken away without due process of law. To advocates, the rights-based language of Goldberg signaled more than legal rights, but a vision of political and social rights as well, elevating welfare participants’ social status and validating their citizenship. It would allow the poor to participate in the institutions so essential to their well-being.

Judicial decision making would also act as a counterbalance to bureaucratic decision making. Unlike front line decision making, which is focused on the mass

23. See Edward V. Sparer, The Right to Welfare, in RIGHTS OF AMERICANS: WHAT THEY ARE-WHAT THEY SHOULD BE 63, 71-72 (Norman Dorsen ed., 1971) (arguing that adversarial style procedures were a "major tool" for allowing welfare recipients to challenge their workers without fear). See also FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS POLICY IN MODERN AMERICA 71-73 (2007) (describing how fair hearings were used as an organizing tool for asserting the right to welfare). For an early history of the evolution of the welfare system from a social work model that emphasized discretion and the tailoring of grants to individual needs to the legal bureaucratic model, which emphasizes rights and rules rather than discretion, and the values of fairness, uniformity, and efficiency, see generally William Simon, The Rule of Law and the Two Realms of Welfare Administration, 56 Brook. L. Rev. 777 (1990) [hereinafter Simon, The Rule of Law].
24. In deciding what procedures were required, the Goldberg Court noted that the “pre-termination hearing need not take the form of a judicial or quasi-judicial trial,” Goldberg, 397 U.S. at 266, and that only “minimum procedural safeguards, adapted to the particular characteristics of welfare recipients and to the limited nature of the controversies to be resolved” were needed, id. at 277. It did, however, import many of the features of adversarial judicial proceedings, including the provision of timely and adequate notice, a chance to argue the case orally, the opportunity to confront and cross-examine witnesses, and a written decision. For a discussion of the ways in which these features were implemented, see Scott, supra note 15, at 733, and Cesar A. Perales, The Fair Hearings Process: Guardian of the Social Service System, 56 Brook L. Rev. 889, 889-96 (1990).
25. Goldberg was part of a broader based movement that attempted to link welfare rights with civil rights. See generally Elizabeth Wickendon, Social Welfare Law: The Concept of Risk and Entitlement, 43 U. DET. MERCY L. REV. 517 (1966) (discussing the link between civil rights and welfare rights). For a history of the welfare rights movement, see KORNBLUH, supra note 23.
The judge's professional knowledge and skill would also act as an antidote to an excess of rules and the mechanized decisions made by an unskilled workforce. The benefits would also ripple beyond the individual case, exposing the errors of the system to administrators, who could use the information to correct systemic problems. Hearings had extralegal benefits as well: by allowing appellants a dedicated forum for airing complaints before a neutral third party, they would provide dignity rights.

Others, however, criticized the reliance on adversarial style procedures to resolve disputes between parties of unequal power for failing to consider the needs and characteristics of intended users: poor people unversed in the language of law and without the education or ability to learn it and adequately represent themselves. They would also be perpetually outmatched by their adversaries, the agency representatives who were repeat players within a bureaucracy that was often opaque and confusing, and who had a far superior knowledge of the law and access to documents.

Critics also doubted hearings were a correcting balm to poorly run bureaucracies. Separated from the front lines, and issuing decisions with no precedential effect, critics argued that it would encourage rather than correct systematic errors on the front lines. Workers seeking to deflect clients and their complaints would


27. See Simon, Legality, Bureaucracy, and Class, 92 Yale L.J. 1198, 1268 n.178 (1983) ("One of the advantages of adversary representation in the current system is that it is the principal form of decision-making in which the system tolerates complex judgment, decentralization, and professionalism.").

28. See Handler, supra note 15, at 18 (noting that in the early days of ADC (a precursor to TANF) hearings helped standardize the administration of benefits as individual counties came under the supervision of the state for the first time); David J. Kennedy, Due Process in a Privatized Welfare System, 64 BROOK. L. REV. 231, 287 (1998) (arguing that fair hearings may "improve the accuracy of agency determinations").

29. See Simon, The Rule of Law, supra note 23, at 787 ("At its best, the hearing system provides the beneficiary with the individualized, respectful attention contemplated by those who interpret Goldberg as an expression of 'dignitary' or 'process' values."); Kennedy, supra note 28, at 287 (noting the "dignity values" of fair hearings); Diller, supra note 9, at 1203 n.418. See generally TOM TYLER, WHY PEOPLE OBEY THE LAW (2006) (finding that in dealing with government authorities, procedural fairness, which is characterized by voice, neutrality, respectful treatment, and trustworthiness, is more important to people than substantive fairness).

30. See Brodoff, supra note 16, at 625-29 (noting that the vast majority of people who appear at fair hearings are not represented by counsel and further, that serious disadvantages exist to make hearings difficult for appellants, including poverty, physical or mental disabilities, low education, and language barriers); see also JOEL HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY (1986) (noting that the sheer complexity of the rules and regulations may prevent recipients from understanding that an error has occurred).


32. See Simon, The Rule of Law, supra note 23, at 785 ("[L]ine workers are taught that what happens in the hearing system should not influence their routine administrative work; in particular, they are not to
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...use hearings as an escape valve. **33** Hearings would also contribute to the hyper-legalization and bureaucratization of the welfare process, making it even more difficult for appellants to establish eligibility in the face of increasingly complex and rigid rules. **34** Finally, the few dignitary rights it afforded were a poor substitute for more substantive rights, while deflecting attention from asserting those rights. In short, it would cool people out rather than spur them to advocate for more systemic change. **35**

Detractors and supporters of the fair hearing system have been proved both wrong and right. Since *Goldberg*, hearings have become a fixed feature of the welfare bureaucracy. In the decades after *Goldberg*, fair hearing use increased, especially in urban areas such as New York City where it rose to 150,000 hearings in 1989, from only 1300 the year before *Goldberg* was decided. **36** Success rates for appellants hover around 40 to 50%, and as high as 80% in certain jurisdictions, thus indicating that at least some appellants are able to navigate the process and that hearings do not function as a rubber stamp for front line practices. **37** There is little evidence, however, that hearings function as a barometer for the bureaucracy; jurisdictions with high reversal rates, such as New York City, do not appear to have reformed their front line practices to avoid so many appeals. **38** There is some evidence that the availability of hearings can...
give caseworkers an escape valve when making decisions about eligibility for benefits. As one former Social Services Commissioner conceded, it may be "easier for a caseworker to say 'request a fair hearing' than it is to try and resolve a dispute."\(^{39}\)

### B. Welfare Reform and the Transformation of Front-Line Work

The grander hopes of *Goldberg*—that its rights-based approach to welfare would lead to greater social inclusion and a higher social status for the welfare poor—have not been realized. The short-lived welfare rights movement of the 1960s that spawned cases like *Goldberg* has been replaced with the erosion of any concept of rights for welfare recipients. As noted above, this trend reached its apogee in the 1996 passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which ended the entitlement status of welfare, and replaced it with a harsher regime that emphasizes welfare participants' obligations and targets their work and other behaviors. Much of what welfare bureaucracies now do is "moral work," sorting the deserving from the undeserving,\(^{40}\) with work behavior as the litmus test. The law also emphasizes diverting people from the rolls, in contrast to pre-welfare reform law where such tactics violated people's right to assistance.\(^{41}\)

Welfare reform has also transformed front line work. As Matthew Diller describes, welfare reform has granted caseworkers increased discretion over areas—such as participants' ability to work, what supports they need, and what type of work they should be doing—that go beyond the questions of eligibility that dominated welfare bureaucracies in the past.\(^ {42}\) Such decisions are complex and require considering individual characteristics. Hence they are less amenable to a bright line rule and require evaluative judgments. The ability to impose sanctions has also increased the power of front line workers, with much of the welfare caseload now subject to the work rules and sanctions.\(^ {43}\) The law governing the imposition of sanctions also requires subjective determinations, including whether or not the participant had "good cause" for failing to comply with the rules.\(^ {44}\) Workers must decide, for example, whether claims of illness or a

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41. See Diller, *supra* note 9.
42. Id. at 1148.
44. Federal law provides for a good cause exception to violation of the work rules, but does not define it. 42 U.S.C. § 607(e)(2) (2006). States have adopted various criteria for good cause, such as ill health, a family crisis, child care difficulties, or lack of transportation. For a review of these provisions, and TANF sanctions, see generally MARCIA MEYERS, SHANNON HARPER, MARIKA KLAWITTER, & TARYN LINDHORST, *REVIEW OF RESEARCH ON TANF SANCTIONS*, 28 (2006).
family crisis are credible and serious enough to prevent attendance at a work activity. In short, distinguishing the unable and the unwilling require subtle and complex factual judgments. However, welfare bureaucracies are still largely populated by a low-skilled work force unconstrained by professional norms or practices.45

Layered over this increased discretion is a web of incentives that encourage states to reduce their caseloads. Under the PRWORA, states that do not engage a certain minimum percentage of participants in federally designated work activities are financially penalized.46 The so-called “work participation rate” is calculated by dividing a numerator consisting of families engaged in the federally acceptable work requirements by a denominator consisting of the total families receiving TANF assistance.47 One way to reduce the denominator is to divert people from the rolls so fewer people are counted as receiving assistance.48 Similarly, one way to reduce the numerator is to sanction participants, because participants in sanction status (for fewer than three months) are not considered engaged in work activities.49 In short, states can reduce their participation rates and avoid financial penalties both by both diverting people from the rolls and sanctioning those on it, thus giving states an incentive to do both.50

States have also delegated many work-related administrative responsibilities to the private sector.51 The use of market mechanisms such as performance-based contracts when contracting with these agencies also has consequences for caseload reductions and sanctioning.52 Contracts that require contractors to place

45. Diller, supra note 9, at 1195 (noting that the welfare work force has not been professionalized, and that in some places no schooling beyond high school is required); see also Super, supra note 38, at 1120 (describing how the transformation of the welfare system under welfare reform to a more discretionary based system was not accompanied by a change to a more highly skilled and professionalized workforce).
47. Id.
48. Id.
49. Id.
50. See Office of Planning, Research, and Evaluation, U.S. Dep’t of Health and Human Services, Using Work-Oriented Sanctions to Increase TANF Program Participation (2007) (describing the interplay between participation rates and the work rules). As described by Super, supra note 38, at 1131, changes in the funding of welfare benefits has also incentivized states to reduce their rolls. Under PRWORA, funding was changed from an open-ended entitlement, based on the number of people who were eligible for assistance, to a block grant, which caps the amount of money each state receives. States are also able to divert their block grant to uses other than social welfare, thus the less money the state grants to welfare recipients, the more money it has for other purposes.
51. See 42 U.S.C. §604a(a)(1) (2006) (permitting states to “administer and provide services under the [TANF program] through contracts with charitable, religious, or private organizations” and to provide TANF beneficiaries with “certificates, vouchers, or other forms of disbursement which are redeemable with such organizations”). As described by Parkin, supra note 21, at 1345-46, “within five years of PRWORA’s passage, forty-nine states and the District of Columbia had contracted with private entities to provide at least some welfare services (citing U.S. Gen. Accounting Office, GAO-02-245, Welfare Reform: Interim Report on Potential Ways to Strengthen Fed. Oversight of State and Local Contracting U.S. (2002)).
52. For a discussion of the ways in which privatization has resulted in the reduction of welfare rolls, see Wendy A. Bach, Welfare Reform, Privatization, and Power: Reconfiguring Administrative Law
a certain number of welfare recipients in jobs, for example, will incentivize workers to focus on the clients who are most likely to succeed, while deflecting those participants with the most challenging obstacles to work. Driven by both contractually-based outcome measurements and the desire to reduce costs, contractors may find it more advantageous to sanction such clients rather than to offer extensive and expensive supports.

C. Fair Hearings: Up to the Task?

The changes wrought by welfare reform raise even more questions about the usefulness of a fair hearing system born out of a concern for individual rights, but now operating under a very different type of regime. One view, espoused by Matthew Diller, is that hearings are a weak tool in a system where discretion has been expanded and equal treatment is no longer assured. Many decisions are also hidden from view, and hence escape review. In contrast, David Super argues that an adversarial system is even more essential given these changes; it provides a place within the welfare system where such discretionary decisions can be reviewed, allowing recipients to challenge, understand, and contribute to decisions that directly affect them. He likens it to a consumer audit system that invites input from claimants rather than relying solely on internal audits by self-interested staff whose objectives may conflict with those of claimants, especially under welfare reform. Parkin likewise acknowledges the value of hearings in the era of welfare reform, but argues that due process requires changes in the fair hearing system because "changes in the facts and circumstances of welfare programs and welfare recipients have increased the risk that benefits will be erroneously terminated."

Structures from the Ground Up, 74 BROOK. L. REV. 275, 279 (2009). For a discussion of the problems that privatization has wrought in the administration of public benefits, see Parkin, supra note 21, at 1344-48.


54. Diller, supra note 9, at 1128 ("[I]n the new system that is emerging, individual hearings are a less-effective means of allowing individuals to contest individual determinations.").

55. Super, supra note 38, at 1064-71 (arguing that rights based entitlement system can act as a check on the errors of government, and improve its efficiency).

56. Id. at 1058 ("A regime of individual legal rights provides the functional equivalent of an audit of line employees’ compliance with a particular set of objectives.").

57. Parkin, supra note 21, at 1317. However, his suggestions maintain the basic structure of the adversarial system. Specifically, Parkin suggests making greater use of pre-hearing screening and informal dispute resolution procedures, improvements in the audit trails left by automated eligibility
As described in Part I, this study examines how fair hearings are faring under welfare reform. The study fills a gap in the scholarly literature by using empirical social science research methods, for the first time, to examine what is occurring in the hearing room. It builds on the past and current critiques of scholars and practitioners described above by providing an empirical basis for suggesting structural changes in the fair hearing system.

III. FINDINGS FROM AN EMPIRICAL STUDY OF FAIR HEARINGS

A. Methodology

This study draws on observations of 215 administrative hearings and interviews with ten administrative law judges (ALJ) and seventy-nine appellants in two counties of a northeastern state, one suburban and one urban. The observational data was obtained using a type of sociological ethnography referred to as "focused ethnography," which examines specific and well-defined interactions, acts, or social situations rather than an entire system or culture. The Author observed seventy hearings presided over by seven different ALJs in the suburban unit and 129 hearings presided over by ten different ALJs in the urban unit. The observations in the suburban unit were conducted during 2007 and 2008 for a total of four months during this time period. The observations in the urban unit were conducted in 2009 over a three-month period.

During the hearings, the Author maintained a detailed log, recording both what was said (as much as possible) and other observations including the demeanor, style and tone of the parties, and the nature of the personal interactions. For the urban hearings, the Author was also provided with an audio recording of each hearing she observed by the state agency responsible for conducting the hearings, which she then transcribed.

In addition to observations of hearings, the Author also conducted formal,
in-depth interviews with five of the ALJs in the suburban unit and five of the ALJs in the urban unit. The study’s semi-structured interview guide consisted of open-ended questions about their initial training and experience, their approach to conducting hearings, their perception of appellants and the hearing process, and their decision-making processes. The interviews lasted between one and two-and-a-half hours.

The Author and several research assistants conducted interviews with seventy-nine appellants, twenty-nine of whom resided in the suburban area and fifty in the urban. Of these interviews, thirty-two were with appellants whose hearings the Author observed, and the rest were with appellants whose hearings the Author did not observe and who were recruited through local social service agencies. A semi-structured interview guide was used, consisting of open-ended questions about the interviewees’ reason for appealing and their experience at their hearing, including their perceptions of the ALJ and agency representative, how they were treated, and their perceived ability to present their case. The interviews lasted between one and one-and-a-half hours. The recorded interviews were transcribed verbatim.

Data analysis in qualitative research involves assigning descriptive or analytical labels or codes to segments of the data, a process called “coding,” and then combining these codes into broader categories or themes that describe the phenomenon being studied. The Author used HyperRESEARCH, a computer software program designed for the analysis of qualitative data, to code the transcripts of the hearings, field notes, and interviews with appellants and ALJs. She used “grounded theory conventions” for data analysis, an inductive approach that allows the findings to emerge from the data.

Specifically, following the conventions of “grounded theory,” as described by Kathy Charmaz, the Author began by conducting line-by-line open coding, attaching descriptive codes to lines of data and identifying similarities or variations in the text. The next step was focused coding, which involved identifying the most significant and/or frequent line-by-line codes and choosing

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61. Because the Author was not granted permission to tape record these interviews, she took notes only. To ensure the accuracy of my notes, the Author sent each ALJ her composed notes and requested that they check them for accuracy. Seven of the ALJs responded to this request and provided corrections and edits.

62. Of the appellants in the suburban county, 50% were African-American, 40% were white, and 10% were Hispanic. The average age was thirty-eight. Twenty-five percent had less than a high school education, 60% had a high school degree, and 15% had attended at least some college. Sixty-five percent had received assistance for three years or more. In the urban county, 67% were African-American, 14% were Hispanic, 12% were white, and were 4% African-American/Hispanic. The average age was forty-four. Thirty-three percent had less than a high school education, 18% had a high school degree, and 49% had attended at least some college. Sixty-seven percent had received assistance for three years or more.

63. For basic descriptions of the many different approaches to coding qualitative data, see generally JOHNNY SALDANA, THE CODING MANUAL FOR QUALITATIVE RESEARCHERS (2009).

64. See generally KATHY CHARMAZ, CONSTRUCTING GROUNDED THEORY (2006).
codes that best categorized the salient dimensions of the emerging themes and patterns. Next, the Author conducted axial coding, where codes are built up into categories, and the properties and dimensions of each category are defined and contrasted. Finally, the Author conducted theoretical coding, where all the codes are integrated and the central and core themes of the findings are identified. Coding was an iterative process, and she returned to earlier coded transcripts or field notes to confirm, refute, or modify codes as they developed. The Author used analytical memos throughout the process, first to define and describe various codes and then to rebuild the coded data and establish a conceptual framework by exploring the relationships between categories and subcategories.\textsuperscript{65}

B. Judging in the Era of Welfare Reform

Hearings are composed of many elements. There are the participants—the ALJ, the agency representative, and the citizen-recipient of benefits.\textsuperscript{66} There is the dispute that triggered the appeal, nearly always originating in an adverse action taken by the agency reducing, denying or discontinuing benefits.\textsuperscript{67} There is the applicable body of law and set of facts particular to the dispute. And there are the rituals of the adversarial process, which shape how the dispute is defined, presented and decided. While hearings are constructed out of all these elements and predetermined by some of them (for example the law might dictate a certain result), a key finding of this study is how much the ALJ, as chief choreographer, can alter or change the path of a dispute. It is the ALJ, in essence, who decides whether hearings will function as a forum for citizens to exercise their rights, or as a site for enforcing their obligations.

As noted above, welfare reform replaced the rights-based language of

\textsuperscript{65} As an example, in developing the category of ALJs identified as “bureaucrats,” first level and focused codes included: “blaming the appellant,” defined as when the appellant’s mistakes or negligence were highlighted by the agency or the ALJ, or where the questions asked of the appellant assumed fault and were not stated neutrally; “joining,” defined as when the agency and the ALJ presented as one front, or joined with each other during the hearing to question or interrogate the appellant; “shifting the focus,” defined as when the agency or the ALJ shifted the focus away from the agency and onto the appellant; and “narrowing the issues,” defined as instances where the ALJ narrowed the issues and emphasized process over substance. These codes and others were used to develop the axial category “bureaucratic judging,” which described the ALJ who relied on a form of excess proceduralism, both in defining the issues in dispute and determining what evidence to accept. The Author defined dimensions and properties of axial categories in reference to analytic memos. Theoretical coding occurred when the Author contrasted “bureaucratic judging” with the category of ALJs who used a more adjudicatory approach, highlighting the two defining and contrary ways in which ALJs conducted hearings.

\textsuperscript{66} In the subject state, ALJs must be law school graduates, admitted to the bar of the state, and must pass a state civil service exam. Agency representatives are not attorneys; many of them previously worked in other positions within the local welfare agency. Their sole function is to represent the agency at hearings. The caseworker who made the initial determination is not present at the hearings.

\textsuperscript{67} Most hearings are triggered in response to a formal notice from the agency advising appellants of the adverse action, although appellants can also request a hearing without such a notice when they think the agency has made an error.
Goldberg with a statutory scheme that focuses on recipients’ obligations. It reinforced the long-held view that the welfare poor are undeserving and personally defective. Reflecting this perception of welfare participants, welfare bureaucracies rely on harsh service technologies, in contrast to the more respectful and personalized service provided to higher-status citizens in other government agencies. Much of the welfare system has been constructed to monitor participants’ work behaviors through the imposition of sanctions. As noted in Part II, a system focused on behavioral change requires a more complex and subjective form of decision-making; however, such decisions are still largely being made by low-skilled workers guided by a default position of distrust and suspicion towards recipients. Consequently, as documented by this Author in an earlier study, work sanctions are often applied mechanically and arbitrarily, for minor violations and without consideration of the underlying goals of welfare reform. The work rules have also been grafted onto a system already characterized by an “eligibility compliance” culture that emphasizes form over substance, and procedural compliance over substantive need.

ALJs can either choose to align themselves with the agency and the normative values of welfare reform—treating appellants as “undeserving” or “irresponsible” and replicating the practices of the welfare bureaucracy, with its heavy emphasis on procedural compliance and its many dictates and demands—or they can fulfill the promise of Goldberg to provide the powerless poor with an effective mechanism for challenging the government welfare bureaucracy by using the tools of the adversarial system to scrutinize those dictates and demands. Which path they choose is reflected in their style of judging, as described below. Drawing on her observations—including field notes, recordings of the hearings, and transcripts—the Author identified two approaches: “bureaucrat” and “adjudicator.” Next, the Author interviewed ALJs and appellants, and described their perspectives on the hearing system.

69. HASENFELD, supra note 40, at 333.
70. Id.
72. See BANE AND ELLWOOD, supra note 6, at 19, for a discussion of the eligibility-compliance culture that dominates welfare bureaucracies; see Brodkin & Majmundar, supra note 14, for an empirical study on the barriers to claiming welfare benefits based on an overreliance on procedural demands.
C. Judges as Bureaucrats

Unlike judges in more formal judicial systems, ALJs are a hybrid of the judicial and the bureaucratic. They are judges, but they are also bureaucratic actors. While independent of the front lines, they are nonetheless part of the welfare apparatus. Through the sheer number of cases they hear, and their daily and sustained interactions with agency representatives, they know how the bureaucracy thinks. As such, they run the risk of “being ‘captured’ by the agency itself.”

For hearings, this means adopting the moralistic tone and mechanical and rigid style of decision-making employed on the front lines while also shielding the agency from scrutiny.

1. Making Moral Judgments

Questions of moral worth were lurking in virtually all cases, especially the work-sanction cases where appellants’ work behaviors were being tested. For some ALJs, the moral approbation was explicit and translated into overt comments and judgments about appellants’ conduct. For example, an appellant who claimed a medical problem caused him to leave the work site was told by the ALJ that “people with medical problems work. It doesn’t make them abandon their work.” This same ALJ told another appellant with multiple ailments challenging a determination that he was employable that “public assistance is not for people who can’t work.” Another was told to “toe the line” after she missed a work appointment. Such comments interject a form of moralizing that is at odds with the norms and practices of the adversarial system, which emphasizes fact-finding over moral sermonizing, neutrality over ideological bias.

More common was a less overt form of moralizing in which ALJs framed their questions to appellants in ways that suggested a lack of individual responsibility or personal defects. One such example involved a work sanction appealed by a forty-three-year-old woman living in an emergency shelter and suffering from shingles, AIDS, asthma, and orthopedic problems. She had a history of repeated hospitalizations and a recent attempt at working had ended because of her physical impairments. Deeming her able to work, the agency notified her that she was required to attend an interview at the Department of Labor (DOL). Placed in a shelter far from her former home, and without a car, she had to rely on public transportation to get there. Also without a phone, she walked to a nearby church to use their phone to check on the bus schedule. When she discovered that the only bus available would get her to the DOL twenty minutes late for her appointment, she called the DOL, and was told that they would not see her if she came late. As the following excerpt demonstrates, at her hearing the ALJ focused

on the appellant's perceived personal shortcomings in arranging transportation and not on her many obstacles (e.g., illness, living in a shelter, a lack of a car or a telephone) or the DOL’s inflexibility. Instead of addressing the latter, the ALJ focused on how and when she figured out what bus to take to the appointment from her homeless shelter, intimating that she acted irresponsibly by waiting until the morning of her afternoon appointment to check the bus schedule:

ALJ: Have you gone there [DOL] before?
Appellant: No, this is new to me. I was working and got sick.
ALJ: How much time did you have between the notice and the date of the appointment?
Appellant: [couldn't remember]
ALJ: When you did receive it [the notice] why didn’t you make an effort to find out before the date how to get there?
Appellant: Every morning I wake up sick, in pain, the landlord checks on me. It takes me a while to get going.
ALJ: I want some clarity. You were rambling. You didn’t call before because you got sick in the morning?
Appellant: Yes. But I didn’t know it would take so long.
ALJ: Do you travel by bus usually?
Appellant: Yes.
ALJ: So don’t you know to check before how long it will take?
Appellant: I didn’t know it would take so long. The route [the bus] sent me on (62) went past out to R_____ and back to C_____. All my other [bus] trips are right there. I have to walk fifteen minutes to church to use the telephone.
ALJ: Glad you clarified this. It was a bit incredible that you couldn’t get up and call from your house.
Appellant: There is no phone in the house [emergency shelter] where I’m staying.

The emphasis on the appellants’ behavior, rather the agency’s, was a common thread among ALJs who chose to replicate rather than review agency practices. Such practices often narrowly focused on appellants’ perceived ability to follow the agency’s orders, no matter their validity or reasonableness. One such example involved the agency’s practice of unilaterally scheduling appointments without considering other and conflicting demands on appellants’ time, such as child care responsibilities, school attendance, or other obligations. The seemingly reasonable requirement that participants notify the agency when they could not attend an appointment was often an insurmountable barrier when agency phones went unanswered and/or workers were not available to take calls. However, ALJs often played the role of enforcer rather than scrutinizer of agency practices, thus shielding such practices from review. In short, they were more likely to blame the appellant, not the agency, when administrative inefficiencies created obstacles.

An illustrative case involved a discontinuance of assistance for an appellant’s alleged failure to provide the agency with verification of work hours and residence for recertification because, as she testified at the hearing, she “was in
school at that time and I couldn’t make it for the appointment date” and that the agency knew she attended school. She explained to the ALJ that she subsequently provided the documents and was determined eligible, but that the agency still discontinued her because she “passed the deadline.” Similar to the case above, the ALJ chose to focus virtually exclusively on the appellant’s behavior, expressing disbelief that she would not contact the agency when told to and casting doubt on claims that she tried:

ALJ: Why didn’t you contact them before to let them know you’re not going to make it?
Appellant: Uh. I was in school that whole time and they knew because I, I gave them the letter.
ALJ: That’s all good and well but once they give you an appointment notice they are expecting something from you by that appointment date, when they don’t get it they take action against you. (Appellant: Alright) I don’t know why you wouldn’t pick up the phone to try and contact them, I’m not going to be able to make it but I’m working on it and I could get it to you by this date. Why wouldn’t you do something like that? Why wouldn’t you follow through?
Appellant: When I called they messed it up. They always the phone keeps ringing, or closes down.
ALJ: You mean just based on past experiences. (Appellant: Yes) That’s not what happened this time.
Appellant: It happened this time also. When you call it rings out or just goes, the line goes dead.
[There is a brief deviation from this line of questioning when the ALJ asks her where she went to school and whether it was part time or full time.]
ALJ: The uh, appointment notice, um [pause] gives you a phone number to call, specifically to your worker, that number . . .
Appellant: Right but he’s, he’s not my worker. So I didn’t even see him the next time I came in . . .
ALJ: But regardless that’s the number they tell you to contact (Appellant: Okay) you know and it’s assigned to an aid, a worker or an aid, that’s the number they are telling you to contact if you are not able to make the appointment or unable to get the documents by the due date.

Through her questioning and comments, the ALJ presented herself as the enforcer of bureaucratically prescribed procedures and commands rather than evaluating them in the context of the individual facts. She ignored the appellant’s assertion of arbitrarily scheduled appointments and never developed a factual record on these allegations. She also demanded accountability from the appellant but not the agency, insisting that the appellant must always call, but not that the agency must always answer. She defined accountability narrowly, appearing to give the appellant no credit for arguably making the more responsible decision to attend class, and then submit the documents shortly thereafter when she was able to. There was also more than a hint of paternalism as she chastised the appellant
for not calling and expressed disbelief and incredulity when the appellant claimed otherwise. Similar to the front lines, where process is often elevated over substance, the fact that the appellant ultimately proved her eligibility, and that she was attending school and working towards self-sufficiency, were irrelevant.

In essence, such ALJs substitute “moral work” for legal work. By scrutinizing appellants’ behaviors for the slightest evidence of irresponsibility, while absolving or ignoring the arbitrariness of agency practices that may have contributed to the dispute, they subvert the purpose of hearings and convert them into sites of surveillance rather than contestation. ALJs leave appellants worse off by exposing them, rather than the state, to further scrutiny. Instead of a forum for challenging and checking the power of government, as envisioned by Goldberg, hearings serve as an instrument for citizens’ further marginalization.

2. Avoiding Legal and Factual Judgments

Moral work can take different, and seemingly contradictory, forms. It can entail making judgments about participants’ personal behavior, as described above. But it can also involve a form of depersonalization, or a refusal to consider individual differences and context, and instead applying the same reductionist and rigid rules to all. As noted above, the latter is embodied in the service technologies used by bureaucracies serving low-status clients, where interactions with clients can become depersonalized, mechanistic and routine and where process is emphasized over a full personal assessment of need or “the reasonableness of clients’ claims.”

Judging, though, requires precisely the opposite; it is a highly individualized review of facts and the law. It can inject into the system a counterbalance to the front lines, preventing the unintended or unjust consequences of rigidly and narrowly applied laws while considering the law’s overall goals and objectives. For this to happen, ALJs have to avoid being captured by the bureaucracy, including mimicking its means and methods. However, some ALJs did precisely that, refusing to contextualize and individualize hearings, while also elevating process over substance.

An illustrative example was a hearing where the ALJ refused to consider the appellant’s mental disability (an IQ of 64) when she was discontinued from assistance for failing to attend a recertification appointment and submit requested documents. The appellant explained that she “sometimes forgets” and that the notice advising her of the recertification appointment “didn’t register” but that she subsequently came in with the requested papers and proved her continuing eligibility. The appellant’s case manager testified about her disability, her

74. HASENFELD, supra note 40, at 329.
76. BANE & ELLWOOD, supra note 6, at 19.
77. See Kagan, supra note 26, at 164-67.
confusion with paperwork, and the failure of the agency to assist her, instead denying her repeatedly. The ALJ’s response was to prompt the agency to submit evidence that the notice of appointment was properly mailed, and to suggest to the appellant that she reapply, make sure to attend all her appointments and bring her documents. After the hearing, and after the appellant and her case manager left the room, the ALJ explained that he did not have the authority to assess her cognitive ability.

The ALJ’s elevation of process (did the agency properly mail the letter, did the appellant attend the appointment) over substance (did the appellant fully understand what she was required to do, was the appellant eligible to be re-certified) replicated rather than remedied dysfunctional bureaucratic practices. The ALJ’s refusal to make a judgment, or even to consider the evidence of appellant’s cognitive abilities, is also a refusal to individualize the dispute. It goes beyond an ALJ’s prerogative to believe one set of facts over another; it renders one party’s version of the facts irrelevant to the dispute. By suggesting the appellant resolve the dispute by reapplying, the ALJ denied his authority to scrutinize the agency’s procedural demands.

ALJs also limited their authority by restricting proof to what was accepted on the front lines, where appellants’ words are seldom sufficient and third-party verification is routinely required. Adversarial proceedings permit varied types of proof, including testimonial proof, where appellants’ credibility and veracity can be tested. However, despite a policy encouraging testimonial evidence in lieu of third-party documentation, some ALJs insisted on third-party documentation, especially in work-sanction hearings where appellants claimed good cause, such as illness, for failing to attend a work assignment. ALJs demanded written verification from a physician, even for temporary illnesses that did not require medical care.

Documentary proof was also interpreted very narrowly. An illustrative case involved an appellant challenging a work sanction for failing to attend a work appointment a few weeks before she gave birth. At the hearing, the appellant wove a detailed story about the complications of her pregnancy and the chaos of her life during a high-risk pregnancy. She explained that her labor was induced because of preeclampsia, a serious medical condition. She produced as evidence two notes from her doctor dated May 14, four days prior to the birth, but a few weeks after the work appointment, indicating that at the time she was thirty-five weeks pregnant and “urgently” needed an appointment. Appellant stated that she

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78. An internal administrative policy, issued by the Principal Hearing Officer, specifically provided that the “lack of documentary evidence is not per se a basis for finding the appellant’s testimony incredible.”

79. In the subject state, sanctions can be imposed only if the violations are “without good cause.” According to the state regulations, good cause includes circumstances beyond the individual’s control, such as, but not limited to: personal illness, illness of another household member requiring the presence of the individual, a household emergency, or the lack of adequate child care for children who have reached age six but are under age thirteen.
thought that a note from her physician attesting to this urgent need, followed by a premature birth only a few days later, explained her medical condition during her pregnancy's last stages, and hence her absence from the work appointment.

The ALJ rejected this evidence, explaining that he wanted a note from her physician dated April 28, the day of her work appointment, not May 14. The appellant testified that she did seek medical help on that date, but that she saw the triage nurses, not the doctor, and that it was difficult to get notes from triage nurses. She explained again the complications of her pregnancy, including that her newborn was hospitalized for two weeks after the birth.

The ALJ responded to her testimony by telling her “Alright. I, I believe you”, but then told her it was still insufficient because only what occurred on April 28 was relevant:

But, if you, if you, listen—I’m saying this because it seems to me it would be better for you had you come in with a letter from the hospital saying you were seen on that date. Now, regardless of when you gave birth, regardless of the fact that your daughter stayed in the hospital for a week or two, you’ve been out of the hospital for a while. And, if you knew you were coming in today, why didn’t you go to [the hospital] yesterday, or the day before, or the day before [that] and just get a letter saying that you were seen on April 28?

By reducing the window of facts to a single date, and insisting that only one type of proof (a medical note) would suffice, the ALJ replicated the fragmentation of cases that occurs on the front lines, where each bureaucratic command is separate and distinct, and disconnected from the fuller circumstances of recipients’ lives. The ALJ’s rejection of the appellant’s contextual and detailed narrative, supplemented with medical proof of her condition, even while professing belief in it, also reveals an unwillingness to rely on the more expansive tools available to an ALJ for determining veracity and credibility.

In another example, an appellant challenging a work sanction explained that she missed her work appointment because she had to care for her son. She explained that her child had traumatic brain injuries from being struck by a car and needed continuous care. She submitted a letter from her physician of the child’s brain injury and need for twenty-four-hour care, and testified that the special school he attended was closed that week, requiring her to stay home and care for him. Similar to the case above, the ALJ refused to thread together her testimony and documentary proof, insisting only a letter from the school confirming it was closed the day of her appointment would suffice.

In much the same way, some ALJs refused to thoroughly review agency determinations that an appellant was employable, restricting the relevant evidence to a single bureaucratic employability form completed by an appellant’s treating physician and which contained only minimal information on the appellant’s medical condition, including a diagnosis and check-offs indicating the appellant’s ability to stand, walk etc. An illustrative example involved a
forty-two-year-old man claiming an assortment of medical conditions prevented him from working. At his hearing challenging the agency’s determination that he was employable, he testified that he had both Graves’ disease and hepatitis, neither of which were under control. He also had “stroke-level high blood pressure” and suffered from depression, which also had not yet been treated. He noted that in the past the agency found him unemployable, and that his medical condition had not changed but rather worsened. He also referred to a head injury—“his head was split open”—and that he had had problems with his memory. He attempted to submit additional medical evidence describing these problems.

The ALJ, though, insisted on relying only on the agency’s employability form, which indicated that the appellant could walk or stand for one to two hours a day and that he could work part time with limitations. However, the form provided only the barest of information and did not directly address the multiple effects of his ailments on his ability to work. The ALJ refused to consider the appellant’s more voluminous medical evidence, explaining “it’s not relevant, what’s relevant is whether or not you could work” and that “the issue is employability, not what disease you have.” The ALJ further explained, “I’m not a doctor, I can’t make a diagnosis.”

Such cases demonstrate the limits of hearings for challenging the work rules, including work sanctions and employability determinations. On the front lines, work-sanction cases routinely rely on the failure to attend a single appointment as a proxy for judging appellants’ overall work behavior. Employability determinations are often cursory and superficial. The individualized and professionalized nature of hearings invites a more complex and thorough form of decision making, both of the facts and the law. It can delve more deeply into the former, and consider the larger goals underlying the latter. However, as these cases demonstrate, when an ALJ fails to do either, hearings function as another and repetitive layer of bureaucracy, endorsing poor bureaucratic practices rather than examining them.

D. Adjudicators: Using the Tools of the Adversarial Process

Adjudicators were in many ways the mirror opposite of bureaucratic ALJs. They emphasized the tools of adjudication and the adversarial process rather than bureaucratic processes. They adopted a more neutral stance, refusing to align with the agency. They were also more acutely aware of the power imbalances within the hearing room, using their power and authority to level them. They inventively used even mandatory rituals, such as the opening statement required of all ALJs, to educate and elevate an appellant’s status in the hearing room.

The standard opening script was usually of little use to laypersons unskilled in

adversarial proceedings, and often with low levels of education, because it provided no explanation of evidentiary requirements and rules and made cryptic references to what the agency was required, but may have failed to do. As the following excerpt demonstrates, it was couched in the language of law and the bureaucracy and provided scant information to appellants beyond who was to speak when:

This hearing will be conducted in the following manner: each side will present its case through testimony and the introduction of documents. Each side will have the opportunity to question the other side. Upon completing the hearing the record will be sent to X, where the Commissioner will render his/her decision. If you asked the Agency for documents necessary for your hearing and the Agency failed to provide them, please bring this to my attention.

In contrast, the following statement was from an ALJ who embellished on the standard script in multiple ways:

Let’s first explain how hearings work, and then we’ll introduce everybody around the table here, and then we’ll get into the heart of the matter. First of all, as far as hearings, hearings go this way. Each side presents their case through their testimony and whatever documents you want to submit. Each of you will have an opportunity to question each other back and forth, and of course, I get involved in questioning also. Then, everything, including the tape recording, the entire record of it is sent up to the Commissioner, who reviews it again. He makes a decision on it and sends that decision to you by mail. If you’ve requested any documents from the city, for today’s hearing, and the city failed to provide them to you, I need you to bring that issue to my attention right away. Because that’s very important in the law. Okay? The gentleman seated across from you is the city’s representative. [Both parties identify themselves for the record].

With these types of issues—all the ones you have here—reductions and discontinuing, there’s a thing in the law called the burden of proof. And, what it means is that’s the person who has the responsibility to go first and prove that they have a valid case before the other side contests something wrong with it. That burden is on [the agency representative] for today. Okay? Because, all your issues are those types of that the city has the burden first. So, I’m gonna be asking him to go first. Keep in mind, he doesn’t know you personally. So, he’s not gonna testify. There’s nothing he can testify to. He’s gonna produce his case by handing over a series of documents to me and the same set of documents to you. So that we all have the same exact set. Yours are for you to keep. Mine, I’ll review and I’ll send up to the Commissioner. Keep in mind that all these papers have a lot of your personal information on them. Don’t be casual about them when you take them. If you’re gonna get rid of them, shred them, because you don’t want the public to get any access to your personal information.

Now, before we start that, I want to get a couple of things as far as background. Keep in mind, I’m a neutral, ____. State ALJ, looking at your
dispute with _____. So, I don’t know a lot about your case. You’re gonna have to be, you’re gonna have to be my teacher. You’re gonna have to give me as best an explanation, as detailed an explanation as you can so I get the full picture. And, if you brought documents, don’t be shy about pulling them out. They help fill in the blanks. A little bit of background helps me also with the case itself. I’m gonna do a quick questionnaire with you and then we’ll let [the agency representative] present his case.

This lengthy opening statement communicated many things that level the playing field. It provided a step-by-step description of the process to come, while also educating appellant on legal terms, such as the burden of proof. It explicitly communicated the ALJ’s neutrality (“I’m a neutral, _____ State ALJ, looking at your dispute with _____. So, I don’t know a lot about your case.”) It invited the appellant’s full participation (“You’re gonna have to give me as best an explanation, a detailed an explanation as you can so I get the full picture. And, if you brought documents, don’t be shy about pulling them out. They help fill in the blanks.”). It also positioned the appellant as an equal participant; for example when the ALJ explained that the agency representative is “gonna produce his case by handing over a series of documents to me and the same set of documents to you. So that we all have the same exact set.” In sharp contrast to a bureaucratic environment, where official records routinely trump participants’ personal knowledge and experience, the ALJ elevated appellants’ status and positioned them as the authority on their own case (“You’re gonna have to be my teacher.”).

Adjudicators were also more flexible and inventive when confronted with cases involving procedural compliance with the agency’s demands. Rather than enforce those demands, as did the bureaucratic ALJs, they tried to work around them. This meant more actively intervening in the dispute before them, remedying the consequences of a missing document rather than focusing on the reason for its absence. Doing this ensured that the goals and purposes underlying the law and regulations were met, and that otherwise-eligible participants were not denied aid because of agency-imposed barriers to claiming welfare benefits.81

An illustrative example involved an appeal of the denial of an emergency utility grant because of the alleged failure to submit the required verification that the appellant was unable to enter into an agreement with the utility company for reduced payments in order to avoid the shutoff. Rather than decide the case based on the missing document, the ALJ requested that the agency give the appellant additional time to submit it. The ALJ suspended the hearing for a few hours to give the appellant time to secure the document, which he did, resolving the dispute. In a similar case, this one involving a denial of day care reimbursement because of a failure to submit required documents, the ALJ refused to take at face value the agency’s assertion that the appellant had failed to submit the required

81. See Brodkin & Majmundar, supra note 14, for an empirical study on the barriers to claiming welfare benefits.
documents. He requested that the agency representative contact the appellant's worker to confirm receipt of the records and to approve ongoing and retroactive day care benefits.

Such ALJs demonstrated a similar flexibility concerning the types of proof accepted. In contrast to bureaucratic ALJs, they were more likely to solicit appellant's testimony rather than request the same third-party verification demanded on the front lines. They chose instead to develop a contextual and detailed narrative from which to judge credibility. In an illustrative case, one appellant claimed she missed her work appointment because she and her child were ill. At the hearing, the agency asked whether she had documentation of the illness. When she did not, the ALJ interceded to ask a series of questions eliciting a detailed story of family illnesses:

ALJ: I want to ask a couple of questions, if I may, for starters. With the kids, let's start with that. Did you take them to a doctor?

Appellant: I took them to the doctor uh, before the appointment date.

ALJ: When did you?

Appellant: Uh, that was a Saturday. I think I took them that Thursday because they were complaining about stomach and, you know, the whole swine flu thing. I was just, you know, very concerned about that.

Agency: So, the condition got worse?

Appellant: No. It didn't get worse. I just took 'em to the doctor as soon [inaudible] about...

ALJ: What's the doctor's name?

Appellant: Uh, Dr. V.

ALJ: Okay. And, what did Dr. V. give them or what did he say?

Appellant: She said uh, just to treat, to treat it, this is before they were sick with uh, you know, stomach and everything, she said to treat it like a regular cold. You know, [inaudible] 'cause...

ALJ: She didn't prescribe any medication?

Appellant: She didn't give 'em, she told me to give 'em like Motrin and, you know, whatever.

ALJ: Okay.

Appellant: Uh, she advised me not to take them to the hospital because it's not sick, you know, only to take them if their condition gets worse, because if they're not sick with that, taking them to the hospital will put them at risk of getting sick.

ALJ: And by Monday, you had it, you said, correct?

Appellant: Yes, by Monday I was sick, sick with my stomach. I was throwing up. I was not feeling well.

82. While documentary proof is helpful in all legal proceedings, including administrative hearings, it is not required, and which the ALJ relies on—the written or the spoken word—is a discretionary decision. As one ALJ explained in an interview, while "paper talks[,]" they are in fact encouraged to rely on the testimony of the appellant. Another ALJ explained that there is an "unwritten policy" that documentation is not needed for credibility. Thus the bureaucratic ALJs applied a stricter standard of proof than required.
Adjudicators were also more skeptical of the accuracy of agency records than the bureaucratic ALJs, at times even dismissing the veracity of such records. For example, despite a notation in an agency record that the appellant was working and hence was ineligible for assistance, the ALJ described the records as only “internal worksheets”, and that “it could be somebody else with a similar social security number or something.” They were also more likely to cast a wider net than bureaucratic ALJs that reached beyond agency records.

A contrasting example is the ways in which two ALJs, one a bureaucrat and one an adjudicator, handled the identical issue of whether an appellant was medically able to comply with work rules. As described in Part III-C above, the bureaucratic ALJ relied solely on an agency-approved employability form. Her refusal to consider the appellant’s evidence had all the trappings of front line decision making, limiting an individualized inquiry and privileging agency records over participants’ knowledge and experience. In contrast, the adjudicator treated the agency’s employability form as only one piece of evidence. He methodically gathered additional evidence from the appellant, eliciting through her testimony and the medical records she had brought with her a detailed description of her many ailments, the treatments she was receiving, and a list of medications. Hence, he fulfilled one of the primary tasks of judging, to conduct an individualized inquiry while eliciting testimony and evidence from each side of the dispute, in order to reconcile conflicting facts.

Such cases demonstrate the value of a judicial space within a bureaucracy, with hearings acting as an antidote to the often mechanized judgments of the front lines. They provided a more individualized determination, while also allowing appellants to replace the bureaucratically prescribed version of events with their own account. However, even among adjudicators, agency practices relating to the work rules often escaped scrutiny. Examples include the agency’s practice of unilaterally scheduling appointments that conflicted with appellants’ other obligations, or failing to maintain communication systems that prevented appellants from notifying the agency when they were unable to attend an appointment. Work-sanction hearings were also narrowly focused on whether the appellant had a good reason for missing a work appointment, while neglecting other relevant factors, including whether the agency had provided the necessary work support, or whether it might have erred by determining the recipient employable.83

E. The View from Above: How ALJs Describe their Work

The work of an ALJ was both demanding and unpredictable. Half of their time was spent presiding over hearings, the other half writing decisions.84 The number

83. In such cases, the ALJs’ standard practice was to advise the appellant to request a separate hearing on whether the agency had properly determined they were employable.

84. More specifically, in a two-week cycle, ALJs are assigned calendars on five of the ten working days, the other five days are reserved for writing decisions.
of hearings or decisions was difficult to predict. Hearing calendars varied; as one ALJ explained, "there's no typical day." A long list of scheduled hearings can shrink to very few when appellants fail to appear. The agency may decide to withdraw the adverse action being appealed, thus obviating the need for a full hearing. Most appellants were unrepresented, which could result in less-thorough and shorter hearings.\(^8^5\) Conversely, there could be few "no-shows" on any particular day, or a seemingly simple case could become complicated and require more time. Irate and frustrated appellants required additional attention, as did those who lacked counsel, because the ALJ had to spend additional time understanding and unraveling the case. In short, ALJs constantly needed to readjust their pace, speeding up or slowing down as the day progressed.

Hovering over time constraints and workload concerns was the fact that hearings were often the last resort for citizens trying to secure or retain life-sustaining benefits. While disputes are adjudicated in the context of regulations and laws, they are, at bottom, a plea for help. ALJs occupy a ringside seat for viewing the costs and consequences of poverty. Every day a steady stream of people come before them with a fresh story of distress and despair. Some appellants were angry; as several ALJs explained, they often felt ignored and frustrated by their workers and wanted to "let it rip" at hearings. Others were scared, or felt helpless. Many had difficulty navigating the demands of the adversarial process, which required the making of legal arguments and the submission of often elusive evidence.

Several of the ALJs expressed frustration with the law's often punitive and harsh approach and their inability to rule for appellants in dire need. As noted above, the PRWORA made it more difficult for people to obtain public assistance. These ALJs could readily recall cases where appellants were denied help with medical bills or lost housing assistance because they were a few dollars over the income limits. As one ALJ colorfully put it, he's "afraid there's a place in hell for him for taking benefits away from people." Another ALJ described the hardest part of hearings was seeing "so many people who are desperate and really need assistance. It pains me that they look to me and think I can always resolve their problems when I can't always do so." Another explained how she "couldn't leave work at the end of the day without thinking about it [other people's problems], and feeling really sorry for the dire circumstances of people." Especially difficult, she explained, were cases with "people in dire circumstances who can't pay the rent and are facing eviction." Some ALJs found inventive ways to communicate their frustration to appellants. For example, one ALJ described how she included language in certain decisions that the appellant's "testimony was honest and genuine." As she explained, this allowed her to communicate to

85. See Brodoff, supra note 16, at 625 n.81 (documenting the lack of attorneys for low income people, including those on public assistance). See also Parkin, supra note 21, at 1352-56 (identifying the lack of representation as a major problem at fair hearings).
revisiting the promise of Kelly v. Goldberg

appellants that "they were heard and believed but that [she] can’t do anything." When the harsh terms of the law required a certain result, another ALJ would sometimes state in her decision that an appellant’s testimony was "sympathetic, but has no legal merit."

Some ALJs were less sympathetic to appellants, expressing distrust and suspicion of them. They questioned their repeated use of the fair hearing system, describing them as "frequent fliers" or as "repeat offenders" who continually "infracted" or broke the rules. Appellants who had difficulty presenting their cases or securing documents were sometimes viewed as manipulative rather than inept. As one ALJ explained, "nine out of ten people know what's going on" even if they don’t seem to know. They depicted the system as riddled with "fraud and waste," and described recipients as having an incentive to lie to obtain benefits or "game the system." They described some recipients as less-than-exemplary citizens, as someone "you wouldn’t want to babysit your kids." While virtually all of the ALJs noted that appellants were at times angry and frustrated with the system, these ALJs painted with a broader brush, negatively depicting the population of welfare recipients. As one ALJ explained, "I keep it professional because otherwise it is a 'set-up to brawl,' and people may attack the agency representatives. In more formal courts, it’s more well-behaved, like a church. Our clientele are on the edge."

Unlike the employees of social service organizations, who have chosen a career path that involves working with low-income populations, ALJs come from more diverse backgrounds. While several of the ALJs interviewed had previously worked as legal aid or legal services lawyers, most came from either the private sector or other forms of government employment, including state or local law enforcement. Their motivations for becoming ALJs varied: some sought the security of state employment, others expressed a commitment to public service, and others were attracted to the professional status and challenge of being an ALJ. Some ALJs also expressed a mix of these reasons. This diversity of experiences and motivations likely contributed, in part, to the different reactions the ALJs had to the nature of their work and to the population of citizens they serve.

The ALJs themselves identified two different "camps" which in many ways paralleled the two different styles of judging described above. As one ALJ explained, there are two types of ALJs: the "bureaucrats" and the "social workers." According to this ALJ, the bureaucrats were unsympathetic to appellants and just wanted to "get through the day," looking for technicalities or shortcuts to reduce their workloads. Another ALJ confirmed this assessment of some of his colleagues, explaining how "it is very difficult for ALJs to view these...

86. This distinction is reminiscent of the history of the development of the modern welfare bureaucracy, where social workers, who provided assistance tailored to the needs of the individual, were replaced by bureaucrats operating in a rule bound system. See Simon, Legality, Bureaucracy, and Class, supra note 27, at 1199.
people neutrally or sympathetically especially since they came from such a
different background than the ALJs.” According to him, they had to be pushed by
the supervisors, who acted as a “check against unsympathetic ALJs,” to consider
the agency’s mistakes. A much smaller group of ALJs were more like “social
workers,” who “want to help people.” Echoing this characterization of some
ALJs, one ALJ explained, “I’m not a social worker, but the job lends itself to that.
I spend a little more time doing social work efforts.”

So-called “social worker” and bureaucratic ALJs differed as to the scope of
their role. “Social worker” ALJs were more likely to problem-solve and mediate
disputes, not unlike judges in court settings may do. As one such ALJ explained,
“My job is really just to see if the county did something wrong, if there is some
way the appellant can be helped. I make them feel comfortable and fix the
situation.” She further explained that while agency representatives have the
ability to settle cases, “the ALJ usually has to be the one to advocate for that.”
A bureaucratic ALJ described his role in wholly opposite terms, stating, “I consider
myself as an enforcer of the law, not as a mediator or to do conflict resolution.
Our job is not to resolve complaints; we are fact finders, enforcers of the law. We
never act as mediators.”

ALJs also differed over procedural rules governing who speaks during the
administrative hearing. Some ALJs felt it was “important to keep the procedural
order” and to be a “little strict” with appellants. As one ALJ explained, “if
appellants went first I would get a very confused account and it’s not an effi-
cient use of time.” In contrast, another ALJ explained that while some ALJs are
“strict,” he was willing to deviate from the procedural order because it was more
important that the appellants felt “comfortable.” Letting them speak out of order,
he explained, makes it less likely they will “lose their train of thought.”

Virtually all of the ALJs sought to simplify the hearing process for appellants,
who often didn’t understand the rules and demands of the adversarial process. A
common approach was to simplify the official opening script and to translate
legal terms, such as “the burden of proof,” into laypersons’ language.\footnote{87} However,
some ALJs went further and addressed the power imbalance between the
appellants and agency representatives. As one ALJ explained, “appellants are the
amateurs and the agency[,] the pros.” These ALJs leveled power imbalances by
eliciting testimony and other evidence to help appellants prove their cases.\footnote{88}
To “make sure the appellant and the agency [are] on equal footing,” one ALJ
made sure the agency and the appellant had equal time: “the agency wouldn’t talk
for thirty minutes while the appellant had only five minutes.” Several ALJs

\footnote{87. Although this was mentioned by most of the ALJs, as the observations revealed, many failed to do
this.}

\footnote{88. In the subject state, the regulations permit ALJs to elicit evidence, particularly where the appellant
demonstrates difficulty doing so. Several ALJs also spoke of the need to develop a factual record on
which to base their decision, making it necessary to assist appellants in presenting their cases.}
distinguished themselves from ALJs who “rushed” through hearings without drawing sufficient information from appellants.

These ALJs were also more likely to stress the need to “educate” appellants about welfare law and how to navigate the welfare bureaucracy. They drew a line between advocacy and educating, but believed it important, as one ALJ put it, “to teach them [appellants] how the system works.”

Equally attuned to social dynamics as to the law, some ALJs sought to minimize appellants’ anxiety:

I want to make sure the appellant is relaxed and understands they will be heard. I try to keep it simple. I don’t like to talk over them. I have an opening script. Technically I am supposed to read it. But I want people to understand the script so I will use easy-to-understand language to explain it. I want to be simple. I consider it a success if the appellant says they couldn’t sleep the night before worrying about the hearing but that it turned out okay. I put myself in their place. Not in terms of their life, I can’t do that. But how they feel coming into the hearing room, who is going to be there, what’s going to be asked, what it’s going to be like.

The ALJs also differed in how they applied the rules. All of the ALJs were very cognizant of their duty, in the words of one ALJ, to “follow the rules.” As one ALJ explained, it was very important to follow the rules or “otherwise you could get someone from across the street” to be the ALJ. Another ALJ explained, “I’m not looking to overhaul the system. My job is to make sure that the law was applied correctly with respect to the person before me.” Echoing this view, another ALJ explained that while they may “dislike it, [hearings] are not the place where you can change [the rules].” As yet another ALJ put it, “you have to choose legal over fair.” One ALJ was very explicit about the particular responsibilities of ALJs in administrative settings. As he explained, “An ALJ is a creature of regulations and does not sit in equity. We are limited in the scope of our rulings and the remedies we can provide by the regulations which, as an administrativearbiter, we must enforce.”

However, some ALJs viewed the law more flexibly than others. One ALJ sought ways to rule for appellants, explaining that “rules can be bent to a degree but not outrageously.” As another ALJ explained, agency files contained so many defects that there were “legitimate” ways to find for appellants. As he further explained, people often get “screwed by the system” and while they may have “technically” erred, it “really wasn’t their fault.” Like “Supreme Court judges [who] find a way to get the outcome they want,” there were valid ways to rule for appellants.

ALJs also found inventive ways to apply rules they disagreed with. For example, one ALJ spoke critically of work rules that excluded attendance at a four-year college because it “penalizes people for being in college.” He directed the agency to find a work assignment close to the school, or alternatively provide
sufficient time in between school and the work assignment for appellants to get to both.

In sum, ALJs differed in their attitudes towards appellants, how they managed their hearing rooms, the flexibility with which they applied the law, and their willingness to resolve disputes, not just adjudicate them. Their differences roughly paralleled the two distinctive types of ALJs found in this study, with the ALJs themselves acknowledging these two opposing and conflicting styles among their colleagues.

F. The View from Below: Appellants' Experiences

A significant fact about welfare fair hearings is how few welfare participants use them. Earlier studies, conducted in the decade before Goldberg, found appeal rates rarely exceeded 1%, and although appeal rates increased after Goldberg, they still remained low, ranging from 1% to 10%. More recently, a multi-state study of appeal rates in New York, Wisconsin, and Texas, conducted by this Author in 2005, found appeal rates of about 1% in Wisconsin and Texas and 3.5% in New York State, excluding New York City, which had appeal rates between 21% and 35%. Studies on welfare participants' experiences with the welfare system, although not the fair hearing system, suggest that participants do not appeal because they are unaware of agency error or their appeal rights, and, in any event, are reluctant to challenge workers because they fear retaliation. However, this Author found that most participants know when mistakes are made and are aware of their appeal rights. Skepticism, not fear, keeps them from appealing; they believe the fair hearing system is indistinguishable from the welfare agency, which they view as inflexible, intractable, and arbitrary.

For those who do appeal, hearings play an ongoing role in their relationship to the welfare system. Restrictive laws and agency practices that divert people from the rolls provide many opportunities to appeal. An appeal can also temporarily

91. See JOHN GILLIOM, OVERSEEERS OF THE POOR: SURVEILLANCE, RESISTANCE AND THE LIMITS OF PRIVACY 15 (2001) ("[A]s they live in a world that is marked by fear, by dependency, and by poor access to information, it is little wonder they do not boldly assert their complaints about welfare administration"); HANDLER, supra note 30, at 32 (noting "the fear, if not the fact, of retaliation may prevent recipients from appealing"); JOE SOSS, UNWANTED CLAIMS: THE POLITICS OF PARTICIPATION IN THE U.S. WELFARE SYSTEM 115 (2002) (discussing the tendency of clients to acquiesce to worker's decisions and to "appear appreciative, respectful, and nonassertive in dealing with workers").
92. Vicki Lens, Administrative Justice in Public Welfare Bureaucracies: When Citizens (Don't) Complain. 39 ADMIN & SOC’Y 382, 401 (2007) (qualitative study consisting of interviews with welfare recipients that found that recipients knew they were wrongfully sanctioned and were aware of their right to appeal).
93. Id. at 401.
94. See Brodkin & Majmundar, supra note 14, at 842; Fazzolari, supra note 38, at 421.
forestall the loss of benefits. Many appellants viewed hearings as essential, describing them as the "only thing you got," and as an "umbrella of protection." They calculated the value of appealing against inaction: "If I appeal I get a better chance . . . I get more of a chance than just letting them say no." They saw hearings as a bulwark against agency error and arbitrariness: "Thank God for fair hearings. You know, because if we didn't have fair hearings I think the [agency] would just really take us through the mill." They also saw hearings as a distinctly different space than the agency, where they would finally have an opportunity to tell their story, as reflected in the following quote from an appellant:

The hearings are a little bit more compassionate than the center itself. Absolutely. Without a question. Without a question. This is why people like myself ask for fair hearings because it is what they say it is. It's a chance for you to get a fair hearing . . . . You know, for me it gives me a chance to speak to someone other than them. Someone that's higher than them to hear my story . . . . Sometimes at the center they don't care about you and what your situation is. As long as you come to your appointment and do what you're told to do, that's all they're concerned about. But if you get a fair hearing you get a chance to tell your story, a chance for someone to hear you other than the workers at the center.

Appellants, of course, appealed to secure their benefits, but they also cared about their treatment in the hearing room. As leading scholar Tom Tyler has shown, the fairness of the process, or procedural justice, matters to people, especially in their interactions with government authorities. They want an opportunity to tell their story to an unbiased decision-maker. They also want to be treated with respect, which means dignified and courteous treatment. Appellants' experiences at hearings, not surprisingly, were as divergent as the two ALJ camps—bureaucrat and adjudicator—described above. Some appellants indicated that they believed the ALJ was biased, that they had not been treated respectfully, and that they did not have an opportunity to tell their story. Others reported more positive experiences, and reported that they believed the ALJ was neutral and respectful, and gave them an opportunity to present their side of the dispute.

95. In the subject state, recipients who request a hearing within ten days of the date of the notice are entitled to have their aid continued until a decision is issued.
96. See generally TYLER, supra note 29 (finding that people care not only about substantive outcomes, but also whether they were treated fairly in their interactions with government officials, such as the police). For earlier research on the importance of procedural justice, see JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE (1975).
97. TYLER, supra note 29, at 163-64.
98. Id. at 164.
1. The Importance of ALJ Neutrality

Appellants did not assume that ALJs were impartial; in fact, many appellants questioned the ALJ's independence from the welfare bureaucracy that denied them benefits. Unlike the formal court system, where judges and prosecutors are organizationally distinct, the difference between the local welfare bureaucracy that makes the initial decision and the state welfare apparatus, including fair hearings, that reviews the decision, was not clear. Many appellants viewed the local and state welfare office as a single entity. As one appellant described it, "they're both one"; as another said, "it was all just social services." If not one unit, they still "side together" as another appellant put it. Appellants considered ALJs to all be government officials whose interests lay with the state. As one appellant noted, "You're [the ALJ] for social services. You're not for the people. So I don't really know what kind of ALJ you are. I think you're a social services ALJ or a state ALJ, to be able to keep contributions of the state, in the state." Even if distinct from the agency, ALJs, similar to workers, were viewed as motivated to preserve state monies, compromising their independence.

Appellants intensely scrutinized the relationship between the ALJ and the agency representative for favoritism and bias. They were acutely aware of their outsider status, and closely watched how the ALJ and agency representative interacted during the hearing. They were quick to notice the easy familiarity between these two government officials, who worked together daily. Ordinary social interactions were imbued with signs of collusion. As one appellant explained:

I'm coming in, and they're already in the room, they're already talking to each other and, they know each other of course. They're calling each other by first names, they're laughing. I'm nervous, you know. I'm not in the atmosphere as they are. Honestly, I'm the enemy and they're the friends... And when I come in, they 'Alright, we're here on the case of Miss R. versus the Department of Soc'—you know and it's like, oh I know I'm gonna lose.

Appellants perceived "quiet" or "passive" ALJs as biased towards the agency because they allowed the agency representative to control the hearing. As one appellant explained, when an ALJ was "passive" it "makes you feel like the ALJ is out to let them [the agency representative] run over you and say nothing." Another appellant criticized the ALJs who "don't say much. They should say more. They should be the ones really to ask the questions." The appellants also closely observed the time each party was given to speak. If the agency spoke more than they did, appellants sometimes interpreted this as evidence of the ALJ's bias towards the welfare agency.

ALJs could, however, overcome appellants' assumptions of bias towards the welfare agencies by actively questioning the agency and closely examining its evidence. Some appellants were fearful, or hesitant, to question the agency. By
asking the agency “real questions,” as one appellant put it, ALJs established their neutrality. Similarly, ALJs who closely examined agency exhibits and documents and questioned the agency on discrepancies also dispelled appellants’ fears of bias. However, ALJs who clashed with agency representatives, as some did, did not necessarily reinforce their neutrality to appellants. More convincing were ALJs who “went about [their] business” and were “serious,” treating agency representatives and appellants in a similar manner.

2. Wanting an Opportunity to be Heard

The chance to tell one’s story is at the heart of due process. It also is the aspect of hearings that appellants find the most difficult. As Lucy White describes in her classic recounting of the hearing of Mrs. G., it is difficult for appellants to speak with “confidence and clarity” in the hearing room. While the adversarial process presumably provides an equal opportunity for parties to speak, not all parties are equal. The agency has several institutional advantages, including knowledge of the law, access to official records, and a familiarity with the fair hearing process. In contrast, welfare participants have less knowledge of the law, less familiarity with the process, and little understanding of agency records that are often opaque, confusing, and inaccessible. They also have more at stake. For the agency, hearings are a staple of organizational life, with a loss having little, if any, repercussions. To the appellant, an unfavorable decision means a loss of life-sustaining benefits.

These institutional handicaps are exacerbated by appellants’ social disadvantages. Welfare participants are often burdened by stigmas and stereotypes that suggest that welfare participants are undeserving of aid and are personally defective. The suspicion and distrust that permeate the front lines can also pervade the hearing room. Although it is appellants who trigger appeals, as one appellant explained, “You walk into those things as the guilty party.” According to some appellants, the default assumption by ALJs and agency representatives was disbelief in what they said, and they were convinced the agency had the upper hand: “They’ll take their word over yours.”

Narrative styles can also clash in the hearing room, with appellants at a distinct disadvantage. Legal talk is unlike ordinary conversation. It is linear and sequential, focused on arguing cause and effect within the confines of the law. It emphasizes the narrow and limited application of specific rules. It is concerned with “legal,” not “social” facts. This “rule-oriented” discourse was very different than appellants’ styles of discourse, which was more conversational and relational. They sometimes had difficulty responding to open-ended questions.

100. See generally Murray, supra note 4; Mead, supra note 4; Hasenfeld, supra note 40.
or making formal presentations. Social facts were also often central to their explanations. While welfare is distributed based on rules, its purpose is to fill social and economic needs, and hence implicates notions of need and social worth. To appellants, their story was incomplete without reference to this social context. However, ALJs often viewed such context as intrusive and irrelevant.

As a consequence, both ALJs and appellants found fault with how the other spoke or listened. ALJs complained that appellants “rambled” and were unable to stay on point. Appellants complained that their stories were cut short by the ALJs. Each group also had different notions of what facts were relevant to the issue being decided. An illustrative case involved an appellant who missed a mandated appointment because it conflicted with a post-surgical doctor’s appointment. Recounting her hearing experience, the appellant explained that she wanted the ALJ to know she was not a “couch potato.” She told the ALJ, “If you go back, I’ve been off social services. I went back to work and the whole bit. I went to school through social services and so on and so forth. I was able to support my family but then I became ill.” The ALJ, she reported, cut her off and told her to “keep it simple,” asking why she did not just change her doctor’s appointment. Another appellant, also recovering from surgery, wanted to tell the ALJ about the illness that stopped her from working and her desire to return to work. She described the ALJ as wanting only very “blunt answers, either yes you made the appointment, no you didn’t make the appointment.” She believed the ALJ’s “mind was made up before [she] came into the room.”

The common thread of these cases was the larger story appellants wove, where missed appointments were intertwined with the social facts of their lives. Aware their work and other behaviors were being judged, appellants wanted to paint a fully drawn portrait of their daily struggles. ALJs, however, wanted to hear less, not more, of appellants’ stories. Guided by reductionist and rigid welfare rules that slice eligibility into discrete and separate parts, ALJs sometimes interrupted appellants’ narratives. As a consequence, appellants often felt rushed and unheard in the hearing room. One appellant described hearings as a “chicken processing plant . . . . They [ALJs] don’t want any conversation.” Another complained of only getting “a little bit of time to explain herself” and that “it’s not like you can sit there and go well, ‘I live off this and dadadadada.’”

litigants.). See also JOHN M. CONLEY & WILLIAM M. O’BARR, JUST WORDS: LANGUAGE AND POWER 58-59 (1990) (discussing the different conversational styles based on ethnicity, class and gender, and finding that a relational litigant is more likely to be an individual with low social status and little power, such as women, the poor, or ethnic minorities).

102. The denial of life-sustaining benefits also implicates what Gilkerson calls the “every day meaning of rights,” which includes the belief that “one should not be abused, mistreated, taken advantage of, harassed, insulted, or denied access to the means for securing life’s necessities without adequate justification.” Christopher Gilkerson, Theoretics of Practice: The Integration of Progressive Thought and Action: Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories, 43 HASTINGS L.J. 861, 901 (1992).
Another said, “the ALJs want paperwork, proof, and facts. They don’t want to hear it. You’re in and you’re out and they don’t have time for you.”

ALJs who allowed appellants to stray, at least in part, from a rigidly defined legal narrative were more in sync with appellants’ styles of talking, which, as described above, included social as well as legal facts. Appellants, however, also appreciated ALJs who helped them formulate narrowly drawn legal narratives by soliciting testimony that supported their case. Simply ensuring a space for appellants to speak, especially when confronted with over-bearing agency representatives, also helped reassure appellants. Hearings were a place, unlike the front lines, where “at least you can get a word in edgewise.” Another appellant described the ALJ as “fair, because he allowed me to talk at times when [the agency representative] would not allow me to talk . . . the ALJ [would say], ‘No, I want to hear his side. I want to hear what he has to say.’ And that was important to me because that’s all I needed, just to be heard.”

Legal storytelling often incorporates the written as well as the spoken word. Within welfare bureaucracies, nearly every transaction is reduced to writing. These official documents, while considered highly selective and partisan accounts, are often viewed as repositories of truth. To appellants, this bureaucratic version of the facts and circumstances of their lives took on an undeserved solidity and importance. As one appellant put it, “You can talk until you’re purple. You don’t actually exist in that room. It’s what they have on their paper.” Echoing this complaint, another appellant said, “They don’t really care about you. All they care about is documents.”

The sheer weight and volume of the agency’s records intimidated appellants. As one appellant described, “they bring out this big file with all, and they just have all this documentation, documentation, over my little letter.” Echoing this reaction, another appellant explained, “[you are] bombarded, because they come out with all these papers, saying you haven’t done this, you haven’t done that, and you know, giving a breakdown of your history, and you’re so unprepared that you’re like, oh my gosh, what am I to do?” This accumulation of information was a one-way street; the welfare agency knew much about appellants, but appellants knew very little about the agency. As one appellant explained, “They got a folder on us they know all about. I don’t have any particulars or any supporting depositions, or any folder, or nothing.” These official documents were difficult to contest. As one appellant put it, “that’s almost like suing a doctor: that’s pretty hard to say the agency did wrong.”

Appellants were highly attuned to whether the ALJ paid attention to their documents. Appellants worked hard to secure written proof, knowing full well its value. Indeed, the most common advice appellants gave to other appellants was to secure documents to prove their cases, to “get all your paperwork together.” They were dismayed when the ALJ returned their documents without copying them or failed to read through them carefully, “brush[ing] them to the side.”
Some reported not being given an opportunity to even show their documents.\textsuperscript{103} Even appellants who won their hearings expressed disappointment if the ALJ failed to look at their documents. One such appellant, who won her case, nevertheless described the process as “unfair because [the ALJ] wasn’t really concerned with my evidence.” Such actions convinced them they were not being heard. That even appellants who won their cases were troubled by the lack of attention to their evidence demonstrates the singular value in telling one’s story, no matter the outcome.

3. Seeking Respect

Respect, or courteous treatment, is often an overlooked component of procedural justice. Like the opportunity to be heard, being respected was equally as important to appellants as winning or losing.\textsuperscript{104} Hearings offered appellants, who are often disrespected and demeaned by workers, an opportunity to repair social identities and welfare relationships.\textsuperscript{105} In the hearing room, appellants most feared the agency representative, describing them variously as “rude,” “nasty,” “horrible,” and “angry.” Although they were aware they would be questioned, they were nonetheless disturbed by the agency’s harshness, which they construed as disrespect. As one appellant described his experience, “I didn’t get no eye contact from [the agency representative] whatsoever.” He left the hearing room feeling “disgusted.” Another complained that the agency representative was “flashin’ papers,” and talking as fast as “speedy González.” As he explained, ALJs should “give the person time to hear what you’re saying. Give them that respect . . . Be considerate, polite and kind.”

Appellants hoped for, and expected, better from the ALJ. When the ALJ treated them in similar ways, it intensified their experience of being disrespected. At times appellants felt invisible, and criticized ALJs who “won’t look at you. The body language is, you’re not there.” They felt “attacked” by some ALJs, who they described as “hostile” or who wanted to “lecture” them or use their power to “downgrade” them. They described the ALJ’s questions as “badgering,” and said they felt “chastised” or “stupid.” As one appellant observed, “I’m not here for instructions. You [the ALJ] are here to hear me.” Lecturing, rather than listening,

\textsuperscript{103} In at least some instances, the ALJ may have failed to take the appellant’s evidence because he or she had already decided in favor of the appellant because of deficiencies in the agency’s case.

\textsuperscript{104} Tyler, supra note 29, at 164 (finding that being treated fairly also communicates social inclusion and worthiness, which people value highly in their interactions, especially with government authorities, and which can lead to enhanced self-esteem); see also Robert MacCoun, Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness, 1 ANN. REV. L. SOC. SCI. 171, 183 (2005) (finding psychological benefits from being treated fairly, including enhanced self-esteem).

\textsuperscript{105} For a discussion of the extra-legal benefits of fair hearings, see Vicki Lens, Contesting the Bureaucracy: Examining Administrative Appeals, 20 SOC. & LEGAL STUD. 421, 428 (2011) (finding that beyond individual redress, participants view appealing as an opportunity to expose and repair social injuries and to renegotiate social relationships, social identities, and their status as citizens).
was construed as a sign of disrespect to appellants, reserved for people of low social status. Fairness, as one appellant defined it, meant, “not being so judgmental” and “to listen a bit more” and not thinking “Oh, that couldn’t be me.”

Politeness was important to appellants, and when they received it from the ALJ they noted its presence, describing ALJs whom they liked as “courteous,” “gentlemanly,” and “polite.” Along with the opportunity to be heard by an unbiased decision maker, politeness, and the respect it implied, was essential to fairness, as demonstrated by this appellant’s assessment of the ALJ who presided at her hearing: “He treated me fair. He listened to what I had to say. Also, he made his judgment based on what I told him. He was polite to me.” Another appellant echoed this sentiment, saying, “when you deal with administrative law judges, they’re usually very nice, very compassionate, understanding and they’re not biased, you know they listen.” Another appellant emphasized that she “felt like a human being” when the ALJ “took the time to hear what [she] had to say.” In short, how ALJs spoke to appellants was as important as what they said.

IV. RECOMMENDATIONS FOR IMPROVING THE FAIR HEARING SYSTEM

Over forty years ago, the Supreme Court’s decision in Goldberg v. Kelly triggered an expansion of administrative hearings, making them a fixed feature of welfare bureaucracies. As Professor Lisa Brodoff observes, hearings are the “primary social justice system for poor people in the United States.”

Hearings are more accessible to the poor than the state and federal judiciary, and, further, are the primary venue for securing and maintaining public assistance. As this study’s findings indicate, fair hearings both succeed and fail as a vehicle for contesting the errors of the administrative state. On the one hand, bureaucratic ALJs eviscerate the promise of Goldberg by acting as super bureaucrats, replicating the flaws of the welfare system rather than challenging them. On the other hand, adjudicators, although constrained by the limits of the law, fulfill some of Goldberg’s original promise. Significantly, they are able to level some of the inherent power disparities and institutional barriers by allowing appellants to take advantage of their hearings and challenge some of the harshest provisions of welfare reform. However, even the adjudicators failed to fully uncover and scrutinize the full gamut of bureaucratic practices underlying the work rules or to consider each case in its bureaucratic context.

A. Improving the Adversarial Process

The strategies used by the adjudicators suggest ways to improve the fair hearing system, some of which also parallel common protocols for assisting

pro se appellants. Such protocols include a more detailed opening statement that explains the order of the hearing, what each side needs to prove, what the burden of proof means, and what kind of evidence is required. The expansive and detail-rich opening script described in this study is an example that comes close to this model. It demonstrates how ALJs, by providing information on how the adjudicatory process works, can transform perfunctory and obligatory official statements into interactions that readjust asymmetries of power.

Information alone, though, is insufficient, and must be accompanied by an encouragement to use it. In short, it must be provided in a way that invites appellants’ participation in their own hearings. The script described above accomplishes this also. For example, the ALJs assigning to appellants the more powerful role of “teacher” (“You are going to be my teacher today.”) disrupts and inverts welfare relationships that cast appellants as the unknowing and powerless subordinate. It suggests that the opportunity to speak is not simply a formality, but that their words will be valued. Other sentences throughout the script (“Don’t be shy about pulling them [documents] out. They help fill in the blanks.”) similarly emphasize the relevance of appellants’ participation. These examples demonstrate how the strategic use of language, spoken in an encouraging and easy to understand vernacular, can alter the tone of a hearing and encourage appellants’ participation.

The ways in which adjudicators solicited testimony from appellants also provide guidance for improving fair hearings. Adjudicators were more skilled than bureaucratic ALJs in finding a balance between legal storytelling and everyday storytelling. They allowed appellants some leeway when presenting extraneous facts, listening politely and respectfully. But they also helped appellants develop legally sufficient narratives. An illustrative example is the excerpt in Part III-B, where the ALJ led the appellant through the story of her family’s illness and visit to the doctor. The ALJ structured the appellants’ testimony so that it cohered into a legally relevant rendition of the facts, with a beginning and end point and sufficient detail to establish the legal elements of her case (that she had good cause to miss her work appointment) and her credibility (by eliciting confirming facts, such as the name of the doctor and what he said). Notably, this dialogue occurred after the agency solicited testimony from the appellant that she lacked written verification from her physician. The ALJ went beyond the bureaucratically scripted version of events and sanctioned

107. See Cynthia Gray, Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants, 27 J. Nat’l Ass’n Admin. L. JudicIary 97 (2007) (arguing that it is within the judicial Code of Ethics to assist pro se appellants, and providing examples of how to do so).

108. See Barbara Bezdek, Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process, 20 Hofstra L. Rev. 533, 561-72 (1992) (finding tenants’ knowledge of claims or rights is not in itself sufficient to overcome a landlord’s claims in housing court).

109. For a description of how ALJs can help appellants structure their testimony see Baldacci, supra note 16, at 477.
notions of proof. In short, he refused to permit the agency to define the legal and evidentiary parameters of the dispute.

Arguably, the ALJ did nothing more than follow standard procedures for eliciting narrative testimony, using the power granted him under state regulations to assist appellants in developing their testimony. Commentators such as Gilkerson and Alfieri contend that much more is required to transform legal spaces, such as fair hearings, into forums where appellants can actually be heard. Rather than forcing appellants to adapt to the more structured style of legal talk, they suggest ALJs should be required to conform to the appellant’s mode of speaking. Appellants would be invited to converse in the style they are accustomed to, and to tell their stories as they see and experience them. However, such an approach would likely divert ALJs from the task at hand, diluting the utilitarian benefit in individual cases the system now provides. It requires time, something in short supply in fair hearing systems that process many cases each day. An ALJ’s power is also limited. They are constrained by the harshness of welfare law, which is ungenerous towards welfare participants and punitive in its intent and application. Compelling and unfettered appellant narratives will not change this essential fact and may lead appellants to wrongly believe the drama and details of their lives will transform a weak legal argument into a winning one. While such narratives may better inform and educate, ALJs can make little use of them as the hearing system is limited to the correction of individual error, and ALJs do not have the power to effect system-wide change. Arguably the best ALJs can do under the present system is to validate appellants’ perspectives by listening closely and deeply to their narratives and restating and refashioning them to fit, as much as possible, the demands of the law.

B. Replacing the Adversarial Process with the Inquisitorial Model

Ensuring that all ALJs, including bureaucratic ALJs, use the approach described in Part IV-A requires structural changes that go beyond tinkering with how ALJs ask questions. As Baldacci explains, “enhanced judicial assistance” is not enough because of “the fundamental power imbalance between represented and unrepresented parties or between an unrepresented party and a government agency, coupled with the disempowering effect of the pro se litigant’s lack of

110. See supra note 84.
111. See generally Gilkerson, supra note 103 (arguing for the supremacy of client centered narratives and advocating for a critical storytelling approach in poverty law practice); Anthony V. Alfieri, Reconstructing Poverty Law Practice: Learning Lessons of Client Narrative, 100 YALE L.J. 2107, 2145 (1991) (advocating for the integration of client narratives in lawyer storytelling as a way of empowering disenfranchised groups, including “client asserted legal argument and cross examination” at administrative hearings).
112. Gilkerson, supra note 103; Alfieri, supra note 112.
113. See Lens & Vorsanger, supra note 15, for a discussion of success rates for appellants, which range from forty percent to eighty percent depending on the jurisdiction.
familiarity and facility with legal categories." The ease with which bureaucratic ALJs in this study deviated from judicial conventions and adopted the norms and practices of the welfare bureaucracy virtually guarantee these weaknesses will be exacerbated rather than overcome.

A more radical restructuring of the ALJ’s role is required to address both the inherent power imbalance between appellants and the agency and, further, the propensity for some ALJs to identify as bureaucrats rather than judicial officers. One system that would address both these concerns is the inquisitorial system. Under such systems, more prevalent outside the United States, ALJs conduct investigations, define the issue, and manage the presentation of evidence. Designating the ALJ as a truth-seeker, rather than an impartial referee, addresses

114. Baldacci, supra note 16, at 482.
115. As far back as 1975, Justice Friendly, in a law review article examining what kind of due process is required in administrative hearings, suggested abandoning the adversarial model, particularly in welfare hearings, in favor of a more inquisitorial model. J. Henry J. Friendly, “Some Kind of Hearing,” 123 U. PA. L. REV. 1267, 1289 (1975) (These problems concerning counsel and confrontation inevitably bring up the question whether we would not do better to abandon the adversary system in certain areas of mass justice, notably in the many ramifications of the welfare system, in favor of one in which an examiner—or administrative law judge if you will—with no connection with the agency would have the responsibility for developing all the pertinent facts and making a just decision. Under such a model the ‘judge’ would assume a much more active role with respect to the course of the hearing; for example, he would examine the parties, might call his own experts if needed, request that certain types of evidence be presented, and, if necessary, aid the parties in acquiring that evidence).

For more recent commentators calling for importing aspects of the inquisitorial system into fair hearings, see, e.g., Baldacci, supra note 16, at 484 (“[J]udicial techniques used by judges in the inquisitorial model followed by most jurisdictions outside of the United States, Great Britain, and other countries that have adopted the English common law system could provide guidance for ALJs in devising methods and interventions by which to fully develop the record.”). Generally, several commentators have suggested judges adopt a more activist role to correct inherent power imbalances when litigants appear pro se or are members of disadvantaged groups. See Russell Engler, And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks, 67 FORDHAM L. REV. 1987, 2028-31 (1999) (arguing for a more activist role for judges in more formal court proceedings involving pro se litigants); Russell G. Pearce, Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help, 73 FORDHAM L. REV. 969, 977-78 (2004) (“Rather than serving as a passive umpire, judges should be active umpires responsible for remediying process errors that would deprive the court of relevant evidence.”) (noting however, that this change would not require a switch to an inquisitorial system because the parties would still maintain control with the judge intervening only when the process had failed).

116. See BALDWIN ET AL., supra note 35, at 116-23 (discussion of the use of inquisitorial methods in administrative proceedings involving social security claims in Britain). Joan L. Dwyer, Fair Play the Inquisitorial Way: A Review of the Administrative Appeals Tribunal’s Use of Inquisitorial Procedures, 22 J. NAT’L ASS’N ADMIN. L. JUDGES 81 (2002) (description of the inquisitorial model as used in administrative appeals in Australia). While the inquisitorial system is unfamiliar to most American trained lawyers, aspects of it have been incorporated into our current system, specifically in the area of government benefits. For example, Social Security Disability hearings incorporate several of its features, requiring the ALJ to play a more active, investigatory role, including gathering evidence and identifying the legal issues. See Baldacci, supra note 16, at 482.
a glaring defect in the adversarial process created when two parties, as in the instant case, have vastly different resources, knowledge, and access to documents. Rather than placing the burden on disempowered and outmatched appellants to prove their cases, the inquisitor model harnesses the judge’s superior knowledge of the law and evidentiary requirements.

The ALJ’s transformation from passive listener to active gatherer and prober of the facts may also render him less susceptible to capture by the agency. While passivity is assumed to ensure impartiality under the adversarial system, as demonstrated by the bureaucratic ALJs, the greater threat of such passivity is acquiescence and acceptance of bureaucratic practices. A more active investigatory role would require ALJs to delve more deeply into both sides of the dispute, including, for example, how agency practices may impede compliance with agency demands. It would also require ALJs to not only listen to what the agency (and appellant) says, but to actively investigate its truth. In short, it would require a professional distance and restraint when interacting with the agency that is too easily circumvented under the present system, where ALJs and agency representatives sometimes appear to be on the same side.

In tandem with instituting an inquisitorial system, other changes are necessary. As this study’s findings reveal, procedural rules and responsibilities can be circumvented. ALJs in the subject state are already required to assist appellants in developing their testimony, but they do not always do so. Investigatory responsibilities also require time and resources, which are in short supply, and not likely to increase. Thus, as described next, altering the role and responsibilities of the other government official in the room, the agency representative, might address some of these gaps.

C. Changing the Role of Agency Representatives

Currently, as dictated by the adversarial system, agency representatives consider themselves an adverse party, whose role is to advocate for the agency. They often do so zealously, as noted in Part III. The appellants are most fearful of the agency representative. As expected under an adversarial system, agency representatives use their superior knowledge of the law and the bureaucracy to

117. See Karen S. Lewis, Administrative Law Judges and the Code of Judicial Conduct: A Need for a Regulated Ethics, 94 DICK. L. REV. 929, 957 (1990) (arguing that the primary threat to an ALJ’s impartiality is their status as an employee of the agency, where they are subject to pressures to conform to agency standards and practices).

118. In over half the states, the fair hearing system is part of the state welfare bureaucracy with regulatory and supervisory oversight of local welfare agencies. Other states rely on a separate and independent agency to hear appeals. Brodoff, supra note 16, at 618. These central panels were constituted in part to preserve the independence and impartiality of ALJs. Lewis, supra note 118, at 943. Central panels do provide a greater degree of separation between agency representatives and ALJs; however, they are still the “repeat players” who work together daily, in contrast to “one shot” appellants.

119. See Lewis, supra note 118, at 947 (describing the greater responsibilities of ALJs in contrast to trial judges in developing the record).
define the dispute and prevent other versions from emerging. Brodoff suggests that given this enhanced knowledge and resources, the agency should carry a greater burden during hearings than they do now. Specifically, Brodoff proposes shifting both the burden of proof and of persuasion to the agency in all cases, requiring it to show by “clear and convincing” evidence that the appellant is ineligible for benefits. The agency would also be responsible for affirmatively obtaining documents and verifications required for eligibility. The applicant or recipient’s role would be limited to disclosing the sources of this information and signing a release allowing the agency to access it.

Shifting the burden to the agency to secure the many documents required to demonstrate eligibility would likely have far-reaching and advantageous consequences. By focusing on the root causes of agency error, and requiring structural changes within the bureaucracy, it would likely reduce the number of front line errors that trigger appeals. However, a shift in the burden of proof and persuasion at hearings would likely have less of a transformative effect. The “clear and convincing” evidence standard is, in practice, still a subjective standard that may be applied loosely, particularly by bureaucratic ALJs. In the vast majority of cases heard by the fair hearing system, the agency already has the burden of proof, and hence must present their case first. This has the anomalous and unintended effect of allowing the agency to define the parameters of the dispute and, as this study’s findings demonstrate, can be difficult for appellants to redefine.

A more radical transformation of the agency representative’s role is necessary. The agency’s superior knowledge and greater resources should not be used, as they are presently, to simply obtain a favorable outcome at fair hearings. Government, unlike private actors, has an obligation to ensure that what it does is fair and equitable. Instead of an advocate with the goal of upholding the agency’s decision, the agency’s primary objective should be to ensure it acted properly. It should be as equally concerned as citizens that the latter get what they are entitled to under the law and regulations. In short, justice, rather than winning, should be its guiding force.

The rules of the adversarial system invite the opposite, as the adversarial system assumes an antagonistic relationship between the agency and appellants. Thus, in tandem with a more inquisitorial role for the ALJ, the agency representative’s role should be redefined from advocate to a role more akin to an amicus curiae (“friend of the court”), as has been done in other administrative

120. Brodoff, supra note 16, at 606.
121. Applicants often remedy a denial of benefits by reapplying rather than requesting a fair hearing. Most appeals thus involve a discontinuance of benefits, where the burden of proof is on the agency to establish the discontinuance was correct.
tribunals outside the United States. They would be responsible for objectively seeking out information, including evidence favorable to the appellant, to assist the ALJ in assessing the facts and law. Arguments and facts put forward by the appellants would be cause for further evaluation, not opposition, as under the present system. Aggressive questioning of the appellant by the agency representative would be replaced with a more neutral stance.

D. Illustrating How the Proposed System Would Operate

To demonstrate how the proposed system would operate, some illustrative examples are offered, drawing from the cases described in Part III. Several of the work rule cases involved medical claims that prevented appellants from fully complying with agency demands, including an appellant suffering from pre-eclampsia in the last stages of her pregnancy and an appellant residing in a homeless shelter suffering from AIDS and shingles. Under the current system, the appellant is responsible for providing proof of such medical claims. Under the proposed system, claims of illness, disability, or other obstacles that prevented compliance with the work rules would trigger a more expansive investigation by the ALJ, who, with the assistance of the agency representative, would seek to obtain the relevant evidence from medical providers or others on the appellant's behalf.

ALJs would also be able to define disputes more broadly to include agency practices and procedures that may have triggered or contributed to the dispute. Under the adversarial system, the parties, not the ALJ, define the dispute. In the state where this study was conducted, the agency controls the definition of the dispute through adverse notices that refer to a specific act that the appellant allegedly failed to do, such as attend an appointment, and which serve as a basis for appeal. This narrow definition of the dispute often leaves potential agency missteps unexplored. For example, in cases involving the failure to attend a work appointment, ancillary but related issues, such as whether the appellant is employable and hence able to attend the appointment, are not defined as part of the dispute. Appellants are usually advised to request a separate hearing on the specific issue of their employability. An inquisitorial approach would allow for a wider definition of the dispute because of a judge's ability to determine the precise issues of law and fact to be decided. The ALJ could go beyond the failure to attend a single appointment, and include whether the agency properly assessed the appellant's ability to work or provided sufficient supports to do so before mandating work activities.

In a similar vein, under an inquisitorial system, the ALJ would have more

123. See BALDWIN ET AL., supra note 35, at 182 (describing the tribunal system for adjudicating Social Security claims in Britain, where because of inherent power imbalances agency representatives were discouraged from acting as advocates and were instructed to assume a role “most closely analogous to that of amicus curiae.”).
leeway to consider the bureaucratic context and environment. For example, in the case described above where the appellant failed to attend an eligibility appointment because it conflicted with school, the ALJ could consider both what the appellant was required to do and the procedural and substantive steps the agency must take in scheduling the appointment. The latter would include such questions as: Was the appointment scheduled properly? Did the agency facilitate or impede appellant's attendance at the appointment? The defense offered by the appellant—that she tried to call the agency as instructed but could not get through—would be investigated by the ALJ, with the assistance of the agency representative, to determine any flaws in the agency's communication systems. Thus, the burden would not fall on the appellant to show that the agency's phone system did not work, instead the ALJ, with the assistance of agency representatives, would seek out information about the systems' operation. Similarly, the appellant's defense that the agency knowingly scheduled the appointment at a time when they knew she would be in school would also be explored rather than dismissed as irrelevant.

In short, the ability to investigate cases and define their scope would expose bureaucratic practices and procedures that under the present system are often hidden from scrutiny. It would invite ALJs to examine not only the appellant's obligations, but whether the agency facilitated or hindered the performance of those obligations. As previously noted, welfare reform requires more complex decision making than in the past regarding recipients' work behaviors. Bureaucracies have also implemented new systems and procedures for monitoring compliance with the work rules. Many of these practices and decision-making processes escape the notice of the fair hearing system. Under an inquisitorial system, both individualized and subjective judgments, for example about the appellant's willingness to work, as well as the agency's routine and standard operating procedures, would come under enhanced scrutiny.

In sum, the proposed changes would harness the knowledge and experience of the "repeat players" in the system—the ALJ and agency representative—to ensure that all sides of the dispute, including a wider range of post-welfare reform decision making and practices, were examined. ALJs would play a more active role by defining the nature of the dispute, including the legal and factual issues to be resolved, seeking out information and witnesses, and directing the questioning. They would be aided by agency representatives, who would also be responsible for presenting opposing points of view and interpretations of the facts and the law.  

124. The proposed changes would require both statutory and regulatory changes and changes on the ground as fair hearing systems are reconfigured to the new roles and responsibilities of ALJs and agency representatives. Although ALJs presently take a more active role in developing the record than a trial judge, they would require retraining in the inquisitorial approach. Agency representatives, however, would require more than retraining to transform them from an advocate of the agency to an adjunct of the hearing system. As long as they are considered part of the agency, their conflicting duties will likely
E. Conclusion

While the welfare bureaucracy has undergone extensive changes under welfare reform, the fair hearing system has remained the same. The current adversarial system works unevenly, with some ALJs fulfilling their judicial tasks, and others bureaucratizing their work. However, even at its best, the excesses and errors of welfare reform often are not fully scrutinized. Workers’ enhanced power to sanction participants and divert them from the rolls requires a more muscular fair hearing system that focuses on the agency’s behavior, including the consequences of the myriad of new practices and procedures designed to implement and enforce the work rules. The proposed inquisitorial system, which grants ALJs broader powers to define and investigate disputes, and which utilizes the knowledge and skills of government officials to scrutinize administrative practices, will better fulfill the promise of Goldberg in this new era of welfare reform.

impede their ability to act independently and with the required level of scrutiny. It would be difficult for them to detach, both psychologically and practically, from their fellow agency workers’ practices and ways of thinking. One way to address this would be to carve out a more independent identity for them within the local bureaucracy, similar to ombudsman’s offices, and where they are not so closely linked to the workers whose decisions they are scrutinizing. Another approach would be to remove them from the authority and jurisdiction of the local agency, creating a separate organizational entity, but with the same access to agency records and personnel in order to be able to fully investigate cases.