The Justice Implications of 'Activation Policies' in the UK

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Introduction

This chapter is divided into three parts. The first part analyses the development of social security provisions for the unemployed in the UK and describes the shift away from a more *passive approach*, in which the main function of social security was to prevent hardship, towards a more *active approach*, in which the main function of social security is to get unemployed people back into work. This shift has involved the integration of social security policies and employment policies, which were formerly relatively autonomous policy areas in the United Kingdom. The passive approach was in the ascendancy for the first 40 years after World War 2 while the active approach has increased in importance over the last 15-20 years. The first part of the chapter concludes by describing the two main elements of the active approach, the Jobseekers Allowance, which was introduced by the Conservatives in 1996, and the New Deal, a set of programmes that have been introduced by New Labour after its return to government in 1997 and are one of its flagship welfare reforms. These developments are analysed at a macro and a micro level. The second part of the chapter focuses on these developments to the macro level. It refers to the government's dissatisfaction with the emphasis in the passive approach on rights and its neglect of responsibilities. It explores the shift away from a *contribution-based approach to citizenship*, in which rights to benefit are derived from work and the payment of insurance contributions, first to a *status-based approach to citizenship*, in which rights to benefit apply to everyone who qualifies on income grounds, and then to a *reciprocity-based approach to citizenship*, in which rights to benefit

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are dependent on the individual's behaviour. The third part of the chapter focuses on these developments to the micro level. It explores the shift away from a more *bureaucratic* and *legalistic* type of decision-making towards a more *professional* and *managerial* one, and examines the implications of this shift for rights of redress and accountability.

The development of social security provisions for the unemployed in the UK and the shift from a passive to an active approach

The Beveridge Legacy

The Beveridge Report[1] proposed and the post-war Labour government introduced, with some modifications, a universal scheme of contributory social insurance against a range of misfortunes that people encounter in the course of their lives.[2] In return for what were initially flat-rate, but soon became earnings-related, contributions, people received flat-rate benefits when they were no longer able to support themselves financially, e.g. as a result of an accident at work or through unemployment, sickness, disability or old age. The aim was to prevent want (or poverty) by providing a decent level of income as of right and without resort to a means test.

Beveridge had assumed that, in peacetime, men would go out to work and earn enough to support their wives and children, while their wives would stay at home and look after the family. However, to contribute to the costs of child rearing, the government introduced flat-rate family allowances financed out of taxation[3]. Men who were unable to work could claim social insurance benefits, which were intended to meet the needs of everyone in the household. Thus, men could claim allowances for their wives and dependent children. Although successive governments did not abolish means-tested social assistance, it was widely believed that, over time, the number of people who were forced to rely on it would decline to a bare minimum. This optimistic prognosis followed from two assumptions. The first of these was that, by introducing a free National Health Service, the health of the population would improve and the number of people who would not be able to work on grounds of sickness would decline. The second was that, through Keynesian demand management, full employment would be achieved and the number of people unable to find work would be very small indeed. Although an employment service was set up, its main functions were to provide careers advice, particularly for young people, and to match potential employers with potential employees – it

[1] Beveridge (1942).

[2] The legislation introduced by the post-war Labour Government did not implement the Beveridge Report in full. For an account of the ways in which the legislation differed from Beveridge's proposals, see, for example, Glennerster (1995, chapters 2 and 3).

[3] These were originally for the second and subsequent children. Grants were also introduced to contribute to the costs of important 'life cycle' events such as birth and death

was certainly not to pressurise the unemployed back into work. Policy makers assumed that everyone would prefer work to unemployment.

As it turned out, both the assumptions referred to above turned out to be false. In spite of a free National Health Service, the demand for health care continued to rise and, after a period of near full employment, unemployment began to rise too. Both of these developments had major implications for social security and, contrary to the optimistic prognosis outlined above, the number of benefit claims from sick and unemployed people did not decline. In this chapter, I shall focus on the implications of rising unemployment for social security.

As unemployment began to rise in the 1960s, people experienced longer spells of unemployment and many of them exhausted their rights to contributory unemployment benefit. Although Beveridge had recommended that unemployment benefit should last until the unemployed person had found another job, the post-war Labour government had limited the payment of unemployment benefit to 12 months. After that, the increasing numbers of long-term unemployed had to rely on means-tested social assistance. In addition, because many young people were unable to find employment, they did not acquire the contribution records that would have entitled them to unemployment benefit. They, and others who experienced intermittent spells of unemployment, also had to rely on social assistance. The number of single parent households headed by women, most of whom had not paid contributions and were therefore not entitled to unemployment (or any other contributory) benefit also increased. Thus, by the 1960s, it was clear that more and more people were falling through the social insurance net and becoming dependant on social assistance. However, instead of increasing the scope and coverage of social insurance, as it might have been expected to do, the incoming Labour government[4] decided instead to strengthen social assistance, which was 're-launched' as supplementary benefit (the forerunner of today's income support and the social fund) in 1966.

These developments had a number of consequences. As far as the unemployed were concerned, it institutionalised a two-tier structure of social security provisions, comprising unemployment insurance for those who met the contribution conditions for 12 months and supplementary benefit for those who did not.[5] Those who were dependent on supplementary benefit, comprised school leavers and other young people who had not been in work long enough to fulfill the contribution requirements and the 'long-term' unemployed who had exhausted their entitlement to unemployment benefit.

Until 1966, unemployment (and sickness) benefit were paid at a flat rate that did not take into account previous earnings. However, in 1966, earnings-related supplements (ERS) to these benefits were introduced – in the case of unemploy-

[4] After 13 years of Conservative rule, Labour was returned to office in 1964. In opposition, Labour had been antipathetic to means testing. See Atkinson (1969).

[5] Although supplementary benefit was paid at two rates, a lower rate for the first 24 months and a higher rate after that, the unemployed were not paid at the higher rate. They were the only claimant group who were excluded from the higher rate.

ment benefit, the earnings-related supplement lasted for six months. Unemployment (and sickness) benefits were not taxable and those who were unemployed for short periods often received tax rebates and were subject to less tax if/when they returned to work.[6] By the end of the 1960s, the average replacement rate for the first 13 weeks of unemployment was 87% and, for 35.2% of the unemployed, it was higher than 90%.[7] The government soon began to express concern that this situation might reduce the incentive for the unemployed to move into paid employment.

This phenomenon, known as the *unemployment trap*,[8] had been recognised by Beveridge who had argued, in his 1942 Report, that 'it is dangerous to allow benefit during unemployment or disability to equal or exceed earnings during work… …[and that]… the gap between income during earning and during interruption of earning should be as large as possible'[9]. This was achieved by keeping benefit levels for the unemployed low and, for low paid workers, by resorting to the *wage stop*, which limited the amount of social assistance an unemployed person could receive to what that person would be earning if he/she had been in work. However, because the government was, in due course, persuaded that it was wrong for the social security system to pay benefits at less than subsistence level during periods of high unemployment, the wage stop was used less and less and it was eventually abolished in 1975.

The government introduced a series of measures to deal with the disincentive effects of the unemployment trap. These involved a mixture of carrots and sticks. During the 1970s, it introduced a range of means-tested benefits, which were designed to boost the incomes of people in low paid employment. These included Family Income Supplement (the forerunner of today's Tax Credits) – introduced in 1971[10] – for families with dependent children, and rent and rate rebates (the forerunners of today's Housing and Council Tax Benefit) – introduced in 1972 – which provided assistance with rent and rates. Between 1979, when the Conservative Party (led by Margaret Thatcher) returned to office, and 1988, a plethora of policy changes,[11] which included abolishing the earnings-related supplement and making benefits liable to taxation, led to a substantial reduction in the incomes of the un-

[6] The size of the rebate and the reduction in tax liability depended on when in te tax year the person had become unemployed.

[7] See Dilnot, Kay and Morris (1984, p. 58).

[8] The unemployment trap refers to the lack of financial incentives for unemployed people to return to work. It is caused by high replacement rates, i.e. by incomes for people who are unemployed that approach (and in some cases exceed) incomes they did or could obtain from work. Income out of work included unemployment benefit, supplementary benefit, child benefit, housing benefit and tax rebates while income in work comprised wages, child benefit and housing benefit net of income tax and national insurance contributions. The calculations assume that people claim all the benefits to which they are entitled.

[9] Beveridge (1942, p. 154, para 411).

[10] After six years in opposition, the Conservatives were returned to office in 1970.

[11] Atkinson and Micklewright claim that a total of 38 significant changes to unemployment benefit and to supplementary benefit and housing benefit for the unemployed were implemented in the 10-year period from 1979 to 1988. A small minority of these changes favoured the unemployed, a few were neutral but the large majority were unfavourable. See Atkinson (1989), chapter 8.

employed. By the early 1980s, the average replacement rate for the first 13 weeks of unemployment had fallen to 60% and, for only 2.9% of the unemployed, was it higher than 90%.[12] However, the increased reliance on means-tested benefits created another problem, known as the *poverty trap*.[13]

During the 1980s, some low paid workers faced marginal tax rates of more than 100 per cent.[14] This meant that an increase in earnings could actually leave them worse off than they were before unless their earnings rose substantially and this fuelled demands for substantial wage increases. By reducing tax rates and altering the rates (known as 'tapers') at which means-tested benefits are withdrawn, the number of people experiencing marginal tax rates of 100 per cent was reduced, although the numbers experiencing marginal tax rates of 60-80 per cent actually increased. More recently, the introduction of a national minimum wage in 1997 has undoubtedly reduced the severity of this problem.

The Balance between Help and Control

Policies towards the unemployed have always involved a mixture of *help* and *control*.

> *Help* has taken two forms. First, social security benefits have provided a substitute income that, however inadequate it may have been, has prevented destitution; second, employment services have provided help, which has sometimes included training, in finding new employment.
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> *Control* has taken a number of forms. From the start of the contributory unemployment benefit scheme in 1911, unemployed persons could be disqualified from benefit if:
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> - **they left work 'without good cause',**
> - **they were dismissed for 'misconduct', and**
> - **they refused to accept suitable offers of work or training.**

The justification for these penalties is that they were needed to protect the integrity of the national insurance fund. In private insurance, people who are deemed to be responsible for their own misfortune do not receive insurance payments. In social insurance, the rules are not quite so strict but it has always been argued that those who bring their misfortune on themselves should not be able to make a claim on the

[12] See Dilnot, Kay and Morris (1984, p. 58).

[13] The poverty trap refers to the situation in which a low-paid worker could find that, if his/her earnings were to increase, he/she would not only have to pay more in income tax (then 30p in the £1.00) and national insurance contributions (then 9p in the £1.00), but would also experience a withdrawal of their means-tested benefits (housing benefit at between 28p and 33p in the £1.00, FIS at 50p in the £1.00, as well as un unspecified amount of 'passport' benefits). Thus, for a low paid worker, an increase in earnings of, say, £1.00 might well lead to, say, 80p being lost due to a combination of increases in taxation and reductions in benefits. This would be equivalent to an effective 'marginal rate of taxation' of 80 per cent – far higher than anything experienced by those with higher earnings.

[14] This assumes that they claimed all the benefits to which they were entitled when they were out of work.

fund in the same way as those who experience misfortune through no fault of their own.

Although unemployed persons could be disqualified from unemployment benefit for periods of up to six weeks[15], they could still claim means-tested social assistance, although this was reduced to below subsistence level (the deduction was 40 per cent of the value of the personal allowance for a single claimant of their age).

The Paradox of Control

During the years of low unemployment, from the 1940s until the 1960s, the control function was relatively unimportant. However, during the years of high unemployment, from the 1970s until the 1990s, it became much more important. There is something of a *paradox* in this: one might think that, as far as the unemployed are concerned, controls against abuse of the benefits system would be greater when work was easy to obtain (because unemployment was low) than when work was hard to find (because unemployment was high). In fact, the reverse is the case.

In the early 1970s, the government decided that the employment service was too closely associated with the system of unemployment benefits – unemployed persons 'signed on', they were assessed for benefit, and they sought information about employment opportunities in the same place. The following quotation, from a Department of Employment publication[16], makes it clear why a change of policy was thought to be necessary.

> *'The majority of workers who register with the employment office are those claiming unemployment benefits. For this reason, the service is regarded by many workers as a service for the unemployed – and mainly for manual workers at that. … The task facing the service is to break out of the situation where employers do not use it because they doubt – somewhat rightly – whether it has suitable people on its books and where workers seeking jobs do not visit the local employment office because the vacancies they want are not notified by the employer.'*

The Government decided that, if the employment service was to be an active force in the labour market, its links with the benefit system would have to be weakened. In accordance with this philosophy, it set up a network of Job Centres, run by the Manpower Services Commission. Many of these Job Centres were located in shop fronts in the main shopping areas of our towns and cities where they still are today. However, one consequence of this divorce was that, because employment service staff were reluctant to get involved with the control mechanisms referred to above, social security staff were instructed to enforce them more strictly.

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[15] The 1911 National Insurance Act imposed a blanket six-week disqualification but the 1920 National Insurance Act replaced this by a period of 'up to six weeks'. This provision was carried forward into the National Insurance Act 1946 and remained the statutory position until it was increased, first to 13 weeks in 1986 and then to 26 weeks in 1988. See Section 1.5 below.

[16] Department of Employment (1971), cited in Hill (1990, p. 135).

In the late 1980s, the policy was put into reverse. The Manpower Services Commission was abolished and its functions were taken over by the Department of Employment. A quotation from a later Department of Employment publication[17] makes the thinking behind the policy reversal clear.

> *'Many of those who are genuinely unemployed have lost touch with the jobs market. That is why the separate management of the Job Centre network and the Unemployment Benefit Service no longer makes any sense. Over recent years, unemployed people have continued to attend benefit offices, but their contact with Job Centres has often been limited to occasional scrutiny of the self-service displays. There has been no opportunity for Job Centre staff to advise them regularly and individually about the jobs, training and other opportunities available. It is in no-one's interest that unemployed people remain out of touch with the jobs market and become passive recipients of unemployment benefits.'*

Thus, the wheel came full circle. The last 15-20 years have seen the increasing integration of help and control for the unemployed, with the two functions now discharged by a single agency, Jobcentre Plus. This agency administers the payment of benefits for the unemployed but its main function is to 'persuade' the unemployed, using a mixture of carrots and sticks, to get back into the labour market, either directly by finding a job or indirectly by undertaking training to improve their employability.

The establishment of Jobcentre Plus in 2002 reflected a new mode of governance for social security. The Employment Service, which had been part of the Department for Education and Employment (DfEE), was transferred to the Department of Social Security (DSS) and the DSS was renamed the Department for Work and Pensions (DWP). This change was associated with the introduction of an individualised service in which Personal Advisers meet claimants to discuss their work aspirations and options; assist them in searching for jobs; explore their training needs and the availability of training programmes; advise them on childcare and the availability of specialist services, such as services for those with drug or alcohol dependency; and make indicative calculations about whether or not they would be better off in work or on benefit.[18] It was made possible by the transfer of front-line staff from the Employment Service, who had a more 'professional' orientation to their work than their counterparts from the Benefits Agency, whose orientation was more 'administrative'.[19] In parallel with this change, the role of the Treasury changed from that of providing resources for the DSS to enable it to implement its

[17] Department of Employment (1988), cited in Hill (1990, p. 136).
[18] Stafford (2003, p. 221).
[19] Emloyment staff were, for example, expected to have an in-depth knowledge of local labour markets, to understand the employment needs of employers, to be able to offer specialist help and advice to employers on training, rates of pay, equal opportunities and employing people from overseas, to be well informed about disability and equal opportunities issues, to be able to identify those who would benefit from training, to be able to match applicants with jobs. Their work involved the application of this knowledge to the needs of jobseekers. By contrast, the work of most Benefits Agency Staff involved the application of rules to the circumstances of claimants and was more routinised.

agenda (which had been its role in the past) to that of monitoring the services provided, on a quasi-contractual basis,[20] by the DWP and its agencies.[21]

Active and Passive Intervention

It is sometimes said of the Beveridge scheme of social insurance that it was essentially passive.[22] By this is meant that the post-war social security system that was inspired by Beveridge was designed to respond to the circumstances of people's lives but not to influence them.

This *passive approach* implies that the main function of social security is to prevent hardship. It does so by providing a replacement income for the male breadwinner who loses his job. Unemployment benefit was initially regarded as a temporary expedient that would only be required for a short period (it lasted for 12 months) until the unemployed man found a new full-time job. Although single women were eligible for unemployment benefit, married women were regarded as being outside the unemployment benefit scheme because their role was that of wife and mother and, if they worked, they only did so on a part-time basis when the children had left home.

When unemployment began to increase and the two-parent household began to break down, the inadequacies of unemployment benefit became apparent. The number of long-term unemployed persons and the number of single parents started to increase and social assistance became the main source of support for them. In an attempt to prevent hardship, the government responded by introducing higher benefit rates for the long-term unemployed who were dependent on supplementary benefit (the forerunner of income support), and additional payments to lone parents in receipt of child benefit and income support. However, this approach did not last for long and soon gave way to the more active approach that has been adopted in the last 15-20 years.

The *active approach* implies that the main function of social security is to change people's labour market behaviour – mainly by placing much greater emphasis on getting unemployed people into work and discouraging them from relying on benefits. This involved reducing benefit levels, tightening up on the eligibility rules for unemployment insurance, increasing the use of means-tested unemployment assistance and attempting to change people's lifestyle choices, e.g. by reducing bene-

[20] These comprised a Public Service Agreement, in which the Department set out its policy objectives for the next three years, and a Service Delivery Agreement, in which it specified how these objectives would be met and the indicators against which its performance would be measured.

[21] Carmel and Papadopoulos (2003, p. 40).

[22] This characterisation has been vigorously challenged, in particular by my Edinburgh colleague, Adrian Sinfield, who has argued that social security policy in the UK, and elsewhere, has always involved a mixture of 'active' (labour market) and 'passive' (income replacement) measures. See, for example, Sinfield (2003). I accept that this is the case but would, nonetheless, argue that the balance between these of 'active' and 'passive' measures has changed and that is the argument I attempt to advance in this section of the paper.

fits for single parents with the aim of making life as a lone parent less attractive and encouraging them to take work, live with relatives or find a new partner.

The first approach, which is the one put forward in the Beveridge Report, was the dominant one for more than 40 years while the second approach has been increasing in importance over the last 15-20 years. It began to take hold in the late 1980s under the governments of Margaret Thatcher and John Major and should not only be associated with Tony Blair and Gordon Brown.

Following the example of the Reagan administration in the USA, the first two Conservative governments led by Margaret Thatcher[23] adopted an increasingly neo-liberal approach to policy – employment rights were reduced, wages councils abolished and benefit levels reduced. After the 1987 general election, the government's approach to the unemployed and the welfare state government changed quite dramatically. The overall aim of policy became that of reducing welfare dependency by restricting benefit eligibility and policing the job-seeking behaviour of the unemployed more closely. The Department of Employment was given the primary task of re-motivating and improving the employability of those who had given up looking for work.

By the end of the decade, new legislation had re-defined the position of those without work. Most unemployed 16 and 17 year olds lost the right to Income Support, in return for which they were offered a place on a Youth Training Scheme (YTS), and the claims of those above that age, in particular the longer-term unemployed, were scrutinised more rigorously. The previous requirement that claimants should be 'available for work' was replaced by a stronger requirement that they should be 'actively seeking work'. In addition, everyone who had been unemployed for six months was offered a 'voluntary' Restart interview, in which they were given advice and information about training and encouraged to agree on a course of action that would get them back into work.

By 1995, a much stricter benefits regime was in place. Compulsory conditions were imposed on those who failed to find employment and the use of sanctions for those who did not meet them was stepped up. However, 'carrots' were used as well as 'sticks'. The Department of Employment became involved in promoting in-work benefits, and claimants were increasingly given in-work benefit assessments alongside the reviews of their job-seeking activities. These in-work benefits (involving assessments of entitlement to Family Credit, for those with dependent children, Housing Benefit, for tenants, and Council Tax Benefit) were intended to ameliorate the unemployment trap and encourage the low-paid to take jobs that were increasingly being generated in the deregulated labour market.

When the Labour Party was returned to government in 1997, it did not attempt to put the clock back but set out to develop a new 'Third Way' which incorporated some of the neo-liberal ideas that had been put in place by the Conservatives, while maintaining its social democratic commitment to social justice.[24] Its centrepiece

[23] Elected in 1979 and 1983.
[24] See Giddens (1998).

was the New Deal, a set of policies that the new government announced in its first budget in 1997. The avowed aim of these policies was to get young people, single parents and the long-term unemployed into work, in the belief that, for those who are able to work, work is the best guarantor of welfare. A distinction was made between those who were able to work, who were to be helped and/or cajoled into work by one of six New Deal programmes – the New Deals for Young People (under 25), the Over 25s, for Over 50s, the Partners of Unemployed People, Disabled people, and Lone Parents – and those who were not able to work, who would continue to receive 'unconditional' support from social security. A number of separate 'businesses' were set up to deliver benefits and services, one of which (Jobcentre Plus) has agency status and provides benefits and services to everyone, except disabled people and their carers, who is of working age.[25].

Initial funding for the New Deal was provided by a £5 billion 'windfall tax' on the profits of recently privatised public utilities. The key feature of the New Deal, which distinguished it from previous initiatives, was the provision of support tailored to the needs and circumstances of its client groups. Programmes are specific to target groups (such as young people or lone parents), a range of provision is offered within each programme, and, most importantly, each participant has a New Deal Personal Advisor (NPDA) whose role is to provide individualised and continuous support during the period of participation in the New Deal.[26]

Although the periodic, work-related interviews (known as 'Restart interviews'), which were introduced for the longer-term unemployed in 1986, were compulsory, in the sense that claimants' benefits could be reduced or withdrawn if they refused to attend 'without good cause', and attendance at work-focused training courses such as 'Employment Training' was a condition of entitlement to benefit, New Labour chose to emphasise the punitive elements of the Conservative legacy.[27] Under compulsory New Deal programmes,[28] increased sanctions, including the 'full family sanction', which allows for the reduction of all the benefits claimed by the household, were introduced and the extent of compulsion has increased.

Jobseekers Allowance and the New Deal

Jobseekers Allowance (JSA), which replaced the combination of contributory unemployment benefit and means-tested income support by a single benefit with uni-

[25] The others are the Child Support Agency, which is also an executive agency and is responsible for running the child support system; the Disability and Carers Service, which is part of the Department for Work and Pensions and administers benefits for disabled people under pension age and their carers; and The Pension Service, which is also part of the DWP and provides a dedicated service for present and future pensioners.

[26] It has been argued that the provision of support that is tailored to the needs and circumstances of different client groups distinguishes the New Deal from activation programmes in other liberal welfare states, e.g. in Australia and the USA. See Carney (2005).

[27] See Bryson (2003, p. 82).

[28] The New Deals for Young People and for the Over 25s are compulsory, while those for Lone Parents, Disabled People, the Over 50s and Partners are voluntary.

fied rules, was introduced in 1996. It was designed to emphasise the responsibility of the unemployed to take advantage of every opportunity offered to them to return to work.[29] Since then everyone in receipt of JSA has been required to enter a 'Jobseekers Agreement' specifying the detailed weekly steps that they are expected to take in looking for work. These activities are monitored at fortnightly intervals. In addition to imposing sanctions for misconduct, voluntarily leaving work without just cause and refusal or failure to apply for or accept a job vacancy, JSA officials were given a new discretionary power to issue a 'Jobseekers Direction', which requires those in receipt of JSA to look for jobs in particular ways, take specific steps to 'improve their employability' or take part in a training scheme.

The duration of the sanction for misconduct, voluntarily leaving work without just cause and refusal or failure to apply for or accept a job vacancy is a discretionary matter and claimants can now be disqualified from benefit for a period of up to 26 weeks.[30] By contrast, claimants who breach a 'Jobseeker's Direction' are disqualified from benefit for a fixed period of two-weeks or, in the event of a further breach within the next 12 months, for four weeks.[31] Since the introduction of the New Deal, the sanctions that formerly applied only to work have been extended to cover prescribed training schemes and employment programmes.[32] Table 1 below lists the number of cases between 2000 and 2005 referred by Jobcentre staff, who had doubts about a claimant, to a Sector Decision Maker who decided whether the doubts were sufficiently well founded for a sanction to be imposed.

[29] It contains a contribution-based element, which lasts for 6 months (contributory unemployment benefit lasted for one year), which does not contain any dependent's allowances, and an income-based or means-tested element, which is intended to cover the needs of the unemployed person and his/her household. JSA is paid at different rates for different age groups – there is a very low rate for those exceptional cases of people under 18 who are entitled to it, a reduced rate for those aged 18-24, and a standard rate for those aged 25 or over. Considering that average earnings for full-time adult employees were £457 pw in April 2007, that median earnings for men in full-time employment were £498 pw for men and £394 pw for women, and that the standard rate of means-tested JSA is £60.50 pw, it is clear that Jobseekers Allowance provides very inadequate protection for most people. It is uprated annually in line with prices rather than wages and, in recent years, has fallen further behind the average increase in wages.

[30] For details see Wikeley and Ogus (2005, p. 373, n. 324).

[31] See Wikeley and Ogus (2005, p. 375).

[32] Like the sanctions for breaching a 'Jobseeker's Direction', the training-related sanctions are non-discretionary. Claimants are disqualified for two weeks for a first breach, for four weeks for a second breach within 12 months and for of 26 weeks for another breach within 12 months of the second breach. The latter penalty is particularly draconian. For a detailed account of the sanctions themselves, see Wikeley and Ogus (2005, pp. 375-6). For a review of the sanctions regime, which includes an account of its impact on claimants, see Peters and Joyce (2006).

Table 1: Sanctions imposed on Unemployed Claimants, April 2000 – August 2005

Type of decision	Cases referred for decision	% leading to adverse decision	Sanctions imposed
Variable length:			
Leaving employment voluntarily	1,385,590	32	443,388
Refusal of employment	439,490	40	175.796
Lost employment through misconduct	358,490	26	93,207
Neglect to avail of an opportunity of employment	1,100	25	275
Discharge from H M Forces	230	15	35
Fixed length:			
Giving up a place on a training scheme or an employment programme	36,990	55	20,345
Losing a place on a training scheme or an employment programme	67,510	62	41,856
Refusal of a place on a training scheme or an employment programme	4,600	66	3,036
Neglect to avail of a place on a training scheme or an employment programme	3,930	51	2,004
Failure to attend a place on a training scheme or an employment programme	197,950	61	120,750
Refusal to carry out a Jobseekers Direction	41,510	64	26,566

Source: Peters and Joyce (2006, Table D2).

From the above, it is clear that, although most referrals do not result in the imposition of sanctions, this is a commonplace event. 927,458 sanctions were imposed over the period April 2000-August 2005, corresponding to an annual rate of 173,898 sanctions per year. Of this total, 133,631 (76.8 per cent) related directly to the circumstances in which a claimant left their previous employment or the refusal of an offer of employment, while 40,266 (23.2 per cent) were fixed-term sanctions imposed on those who did not fulfill their training or job search responsibilities. Claimants who disagree with the imposition of a sanction can ask for the decision to be 'reconsidered' and it is reported that approximately 20 per cent of the sanctions imposed for leaving work voluntarily are lifted in this way.[33] However, no

[33] Peters and Joyce (2006, p 67). In some of these cases, the claimant may have applied additional information which was not available when the original decision was made.

systematic data is available. There is likewise no systematic data on the number of appeals against the imposition of sanctions or the outcome of these appeals although anecdotal evidence suggests that appeals against sanctions are now relatively uncommon.[34]

Although most people appear to support the government's commitment to securing employment for those who are out of work, and there is some evidence that the measures introduced by the government have contributed to the high employment rate and the relatively low levels of unemployment in the UK,[35] there is a danger that its approach may become excessively authoritarian. The government's obsession with social security fraud and the widespread use of television advertisements,[36] which encourage the public to treat those in receipt of social security with suspicion, reinforce the efforts of social get claimants off benefit and into work. As a result, claimants who are not really capable of work may be pressurised into seeking work and subjected to sanctions when they fail to obtain it and this emphasis on work may lead to the stigmatising of people on benefit. The application to recipients of Incapacity Benefit of many aspects of the regime that was developed for recipients of Jobseekers' Allowance, e.g. frequent attendance at work-focused interviews with a Personal Adviser, was intended to produce a further shift in the boundary between those who can and those who cannot work, and to result in further reductions in the number of people on benefit.

Under the Welfare Reform Act 2007, the process is being accelerated with the aim of getting 1 million of the 2.7 million claimants who are currently in receipt of Incapacity Benefit back into employment. Incapacity Benefit, and Income Support paid on the grounds of incapacity, will be scrapped in October 2008 and replaced by a new Employment and Support Allowance (ESA), which will have a new, stricter test of disability than the test that was used for Incapacity Benefit.[37] Those who cannot engage in work-related activity will receive a 'support component'. Those who can engage in work-related activity will receive a 'work-related activity component' but may be required to undertake a work-focused health-related assessment aimed at providing additional information about their functional capacity; to attend a work-focused interview to discuss what steps they can take to move towards work; or to undertake activities, such as work trials, training, or attending a programme designed to help them manage their condition, which would increase their likelihood of getting a job.

Claimants who are assessed as not being able to take part in any work-related activity (the minority who are most severely disabled) will not be expected to take part in work-focused activities unless they want to and will not be subject to any sanctions. They will receive a minimum of £89.50 a week and will be given a guar-

[34] Wikeley (personal communication).

[35] The evidence is summarised in National Audit Office (2006).

[36] In particular, 'Targeting fraud' and 'We're onto you'. See Grover (2005)

[37] The revised disability test aims to assess what an individual can do, rather than what an individual cannot do and will look at things such as a person's ability to use a computer keyboard or mouse. Some 20,000 people a year are expected to come off benefit as a result of the change. See DWP (2007).

anteed income of £102.10 a week. Everyone in this group will benefit since the long-term rate for Incapacity Benefit is currently £84.50 a week but the poorest will benefit most. Claimants who are assessed as capable of taking part in some form of work-related activity (the majority who are less severely disabled) will be entitled to claim ESA at £84.50 a week, i.e. at the same rate as Incapacity Benefit. They will be required to attend work-focused interviews, which are intended to help them overcome barriers to work and support them into sustainable employment, and their benefit may be cut if they do not do so.[38]

The shift from a contribution-based approach first to a status-based approach and then to a reciprocity-based approach to citizenship

The Balance between Rights and Responsibilities

Underpinning the New Deal is a shift in the way government perceives the relationship between the state and the claimant. The government referred to this as 'a change in the contract between the state and the individual',[39] which involved new rights for the claimant in return for the acceptance of new responsibilities. The new rights included the right to expect government to guarantee the availability of good quality job-search advice, training opportunities and employment (in a normal, unsubsidised job or in a job subsidised by the state). The new responsibilities involved an obligation to take full advantage of these opportunities. A 'hand-up' rather than a 'hand-out' became the new mantra: work rather than benefits became the main route to social security, and the New Deal was central to the new strategy.[40]

This new approach reflected, in part, the government's dissatisfaction with the emphasis in the passive approach outlined above on rights and the neglect of responsibilities. In order to understand its concern, it will be helpful to clarify the meaning of rights and responsibilities and their relationship to citizenship.

A right is an enforceable claim and individuals who have rights can enforce their claims against other individuals, corporate entities or the state. *Moral rights*, which are enforceable by appeals to morality, can be distinguished from *legal rights*, which are enforceable by appeals to the law, if necessary through appeals to the courts. If we were to say that everyone has a right to a job then, in the absence of any commitment by government to enforce this, we would be asserting a moral right. However, if, by acting as employer of last resort, the government

[38] DWP (2008)
[39] Department of Social Security (1998).
[40] The new strategy contained a number of other components, e.g. the introduction of a national minimum wage and much greater emphasis on in-work benefits delivered through tax credits. For accounts of the new strategy, see Millar (2003) and Adler (2004).

were prepared to guarantee that jobs could be found for everyone, e.g. by acting as employer of last resort, we would be asserting a legal right. What is at issue here are legal rights that people might wish to enforce against the government, for example the right to social security, and whether these rights should entail responsibilities for the rights holder.

Citizenship as a Contested Concept

Citizenship is one of a set of moral and political concepts known as 'essentially contested concepts'[41]. As such, it can be defined in relatively uncontentious, uncontroversial way but is open to a range of interpretations. Thus, it can be defined in terms of the rights and duties that people enjoy as a result of being members of a community. However, this leaves open the nature of the rights and duties, the balance between them, and the identity of the community (which may be a nation state but may equally be the international community) referred to in the definition. Disagreements over these issues are unlikely ever to be finally settled and it is this fact that, in my view, makes citizenship an 'essentially contested concept'.

The traditional view of citizenship, which is associated with the writings of T. H. Marshall[42,] is that social rights, which include the right to social security, are an essential component of citizenship. Marshall defines citizenship as 'a status that is bestowed on everyone who is a full member of a community' and draws attention to the tension or contradiction between the idea of citizenship and the operation of markets in a capitalist society. This is because citizenship is an egalitarian concept while capitalism inevitably involves economic and social inequalities. Marshall believed that citizenship could not only co-exist with and ameliorate these inequalities but could also legitimate them and make them more acceptable, and that the post-war welfare state provided the institutional means for resolving the conflict between individual choice, freedom, markets and capitalism on the one hand, and collective welfare, equality, politics and socialism on the other.

Marshall argued that citizenship comprises *three clusters of rights*: civil rights, political rights and social rights.

- *Civil rights* refer to rights which are necessary for individual freedom (freedom of movement, freedom of assembly, freedom of speech and freedom of religion), the right to own property and conclude valid contracts, and the right to justice (habeus corpus, i.e. freedom from arbitrary arrest, the assumption of innocence until proven guilty, and the right to a fair trial)
- *Political rights* comprise the right to participate in the exercise of political power both as a voter and as a candidate

[41] Gallie (1964).
[42] Marshall (1963).

- *Social rights* embrace the right to 'a modicum of economic welfare and security and to live the life of a civilised person according to the standards of society'.

Each of the three clusters of rights is associated with a different set of institutions. Thus, civil rights are intimately bound up with and, in theory, protected by the courts; political rights are linked to parliament; while social rights are − at least in Britain − associated with the social services, i.e. with the provision of benefits (like social security) and services (like health care and education) by the state.

According to Marshall, citizenship as such did not exist in feudal society. The formative period for civil rights was the 18th century (more exactly the period between the Reformation and the first Reform Act in 1832), for political rights it was the nineteenth century and for social rights it was the twentieth century, although there was clearly some overlap. Thus, the process was both *sequential* and *evolutionary* (civil rights came first, political rights next and social rights last) and the welfare state was to be understood as the culmination of this evolutionary process.

Although Marshall's thesis has been very influential, it has also generated a great deal of criticism. It has been criticised by comparative scholars (like Michael Mann[43]) on the grounds that it is entirely about Britain and other countries do not fit the British model and because the evidence from other countries suggests that citizenship is not necessarily built up in the sequence Marshall describes. The experience of other countries makes it clear that capitalism does not necessarily lead to the welfare state

This criticism has enabled right-wing liberals (like Norman Barry[44]) to criticise Marshall for presenting a left-wing justification for the welfare state. These critics argue that citizenship is made up of civil and political rights only and that 'social rights' are not really a component of citizenship because they can only be achieved at the expense of other, more fundamental, rights, in particular property rights. Thus, for example, a 'right' to social security pre-supposes a social security system paid for out of taxation but the principle of taxation is inconsistent with respect for property rights.

It has also been criticised by internationalists (like Yasemin Soysal[45]) for adopting a national conception of citizenship and for ignoring its international dimension, i.e. the rights (and responsibilities) people have in common as citizens of states that are governed by international treaties and conventions. Soysal develops a more universal conception of citizenship, based on 'universal personhood' rather than 'national belonging', that finds expression in international treaties and conventions like the UN Declaration on Human Rights, the European Convention on Human Rights, and numerous agreements of international bodies like the ILO, the WHO and other UN agencies. Although some of these interna-

[43] Mann (1987).
[44] Barry (1990).
[45] Soysal (1994).

tional treaties and Conventions, e.g. UN Declaration on Human Rights, lack any means of enforcement and are merely aspirational, others, e.g. the European Convention on Human Rights, can be enforced and clearly do add an extra dimension to the meaning of citizenship.

Another criticism has come from feminists (like Ruth Lister[46]) who criticise Marshall for focusing on the effects of citizenship on class inequalities and for ignoring its effects on other forms of inequality, in particular gender inequalities. Marshall conceived of the citizen as an independent, autonomous male actor who participates as an individual in the labour market and in the political process and receives benefits and services on the basis of individual entitlement. However, this conceptualisation does not fit the circumstances of women with dependent children who are often excluded from full participation in the market, whose participation in politics is frequently limited by their caring responsibilities, and for whom the receipt of benefits may reflect their dependent status within the household.

It has also been criticised by communitarians (like Amitai Etzioni[47]) for its emphasis on rights and its neglect of responsibilities. These critics argue that citizenship should take account of responsibilities as well as rights and that it should attempt to seek a proper balance between them. Such a balancing act could provide the basis for an active form of citizenship in which people are required to do things for society as well as expecting society to do things for them.

It is the fifth criticism that concerns us here. The passive approach to social security regards social security as an unconditional right, i.e. as something which those who are citizens should be able to claim 'as of right' and without any conditions attached. The active approach to social security is critical of this one-sided emphasis on rights, arguing that a 'something for nothing' approach results in people making demands against the state without feeling any obligation to contribute anything to society, that it leads to 'welfare dependency' which is not only costly for society because it involves supporting people who ought to be able to support themselves, creates 'perverse incentives', undermines the work ethic and the nuclear family, and is conducive to anti-social behavior.

Contribution-Based, Status-Based and Reciprocity-Based Conceptions of Social Citizenship

In a series of articles, the political theorist Raymond Plant[48] has argued that, over a long period, the British welfare state has oscillated between two contrasting notions of social citizenship and has analysed recent reforms to the social security system associated with welfare to work programmes and the New Deal in terms of these contrasting notions.

[46] Lister (1997).
[47] Etzioni (1993).
[48] Plant (1998, 1999 and 2003).

The first of these notions regards citizenship as a status that is not fundamentally altered by the virtue (or lack of it) of the individual and is not concerned with whether (or not) the individual is making a recognised contribution to society. On this view, *status* and *membership* are the crucial issues rather than whether the person lives a life which others approve of or makes a positive contribution to society as a whole. This notion of citizenship is associated with negative rights (rights not to be interfered with) and positive rights (rights to what Plant calls 'the socio-economic conditions of citizenship', i.e. to health care, education and welfare. Thus, whether or not a person lives a life that is approved of by others, as long as that person does not interfere with others, he or she should be secure in his or her rights, both negative and positive.

The second of these notions places less emphasis on rights and focuses instead on *virtue*, *contribution* and *reciprocity*. According to this view, citizenship is not a pre-existing status but is, rather, something that people earn by fulfilling their obligations to society. Citizenship is, therefore, an *achievement* rather than a *status*. It follows that individuals do not have a right to the resources of society unless they have contributed to it by working or by engaging in some other socially valued activity, assuming that they are in a position to do so.

Plant argues that these two notions of citizenship have informed the development of the British welfare state. According to him, the Poor Law, which was the earliest form of public provision for those who were unable to provide for themselves, was based neither on contribution nor on contract but on mere membership of the community and it is in this sense it embodied the first notion of citizenship. This is a somewhat unusual claim in the sense that three of the key features of the Poor Law were punishing the 'able bodied', i.e. those who were capable of work, in 'houses of correction'; requiring households to exhaust their own resources before providing relief; and depriving those in receipt of relief of their civil and political rights. However, the Poor Law did provide relief, of sorts, for those who were deemed to lack virtue, whose lives were not approved of, because they were unwilling or unable to support themselves. This approach stands in complete contrast with an insurance-based approach, in which the benefits that people receive when they are no longer able to work are based on the contributions they pay when they are able to do so. In this approach, which embodies the second notion of citizenship, benefits are earned by those who fulfill their obligations to society by working.

Beveridge embraced the contributory principle and made a sharp distinction between insurance and assistance, believing that social security should be based on participation in the labour market and the payment of insurance contributions when in work. As he wrote in his famous report, '[b]enefit in return for contributions, not free allowances from the state, is what the people of Britain desire'[49]. He believed that citizenship had to be earned and was a strong exponent of the achievement view. During the 1960s, 1970s and 1980s, i.e. during the heyday of

[49] Beveridge (1942, p. 11, para 21).

what critics have termed the 'entitlement society', the distinction between insurance-based and tax-financed benefits became rather blurred as the status view came into its own. This was, in part, due to the fact that, because insurance benefits did not provide an adequate level of income support, increasing numbers of people, many of whom had been in employment and had paid insurance contributions, were forced to claim assistance and this development made it impossible to sustain the rigid distinction between insurance and assistance. It was also partly due to the impact of the 'welfare rights movement', which sought to uphold and strengthen the social rights of poor people, many of whom were dependent on social assistance, in order to promote their citizenship. However, the return of a Labour government in 1997, after 18 years in opposition, soon called into question the idea of an unconditional right to benefit. It made its preference for an reciprocity-based notion rather than a status-based notion of citizenship clear.

Plant lists seven reasons for this change in emphasis:

- The government was concerned about dependency and the ways in which recipients of benefits can cut themselves off from 'the disciplines, the sociability, the growth of knowledge and the confidence' that come from being in the labour market.
- It feared that the 'moral hazard' of claiming benefits as of right would foster the 'habits of mind and character' that trap individuals in poverty and prevent them from rejoining the labour market.
- It was concerned with the broader issue of 'free riding', in which non-contributory benefits for some are funded from the taxes that are paid by those in work, many of whom are themselves low paid. It took the view that people should not be free to choose a life on benefit since the costs fall on others who take their obligations to work more seriously.
- It did not believe that taxpayers were prepared to fund benefits at a level that would lift recipients out of poverty.
- It did not believe that taxpayers should fund benefits at this level since, because of globalisation, they have to compete with workers in countries with lower taxation.
- It placed a great deal of emphasis on the development of human and social capital in order to improve their chances in the labour market and help them find a way out of poverty.
- It was committed to promoting equality of opportunity, rather than equality of outcome, and wished to improve the employability of the worst off.

This reasoning, which showed how much the government had been influenced by right wing, free-marketeering critics of state welfare,[50] led the government in the

[50] In particular by Charles Murray and Larry Meade. For accounts of their arguments, see Lister (1996) and Meade (1997).

direction of policies that emphasised reciprocity and obligation. However, it is important to point out that this did not involve endorsing contributory benefits. This is because, in order to prevent large-scale dependence on social assistance, such a strategy would have called for a massively expanded social insurance scheme and the large-scale crediting in of people with insufficient contributions, with all the attendant problems that would have entailed. In any case, contributory benefits, which create rights to benefit, involve a retrospective, *ex ante*, form of reciprocity based on the contributions that an unemployed person paid when he/she was in work, and the government wished to promote a more contemporaneous, current or *ex post*, form of reciprocity in which, in the case of an unemployed person, looking for a job, undertaking training to enhance employability, or undertaking social beneficial activities secure the right to benefit. In a system of contributory benefits, virtue is established through prior attachment to the labour market and the payment of national insurance contributions. In a system of non-contributory benefits, virtue is established through the concurrent fulfillment of reciprocal, work-related obligations. In both cases, the enjoyment of citizenship rights, in this case the right to social security, depends on the establishment of virtue.

As far as welfare to work schemes and the New Deal are concerned, Plant warned that, if work were to become the passport to economic and social citizenship, stringent work tests to distinguish those who can work from those who genuinely cannot would be required. Likewise, there would have to be a very strong commitment to equipping those currently outside the labour market with the skills that employers want. Plant pointed to the limits of what could be achieved with the 'one-off' windfall tax and argued that, to ensure that there was work for everyone who is looking for it, the state would need to act as 'employer of last resort'. He thought this was essential if the government was to keep its side of the bargain but, because it would be very expensive, he thought it was most unlikely that it would be prepared to commit itself to that. Events have proved him right. He also argued that, unless the government was careful with its rhetoric, there was a real danger that those who were not able to work, and thus not able to satisfy the pre-conditions for contribution-based citizenship, would become an increasingly stigmatised group.

The account of changes in notions of social citizenship presented here is somewhat more nuanced than that proposed by Plant. While Plant identified two contrasting notions of social citizenship – a contribution-based notion and a status-based notion – we contend that there are actually *three* contrasting notions– a contribution-based notion, a status-based notion and a reciprocity-based notion. Thus, rather than arguing that the British welfare state has oscillated between a contribution-based notion and a status-based notion, we contend that it has evolved first from a contribution-based notion to a status-based notion and then from a status-based to a reciprocity-based notion of social citizenship. Although the contribution-based notion and the reciprocity-based notion both make social citizenship rights conditional, in the first case on prior attachment to the labour

market and the payment of national insurance contributions and, in the second case, on the concurrent fulfillment of work-related obligations, they represent very different forms of conditionality.

The shift from a more bureaucratic and legalistic type of decision-making to a more professional and managerial one

Normative Models of Administrative Decision-Making

We now turn to an examination of the implications of the New Deal for the accountability of officials and the rights of redress that are available to the claimant. We do so by identifying and comparing a number of models of administrative decision-making and by developing an approach that was originally put forward by the American public lawyer Jerry Mashaw.[51]

In his pioneering study of the American Disability Insurance (DI) scheme,[52] Mashaw detected three broad strands of criticism leveled against it: the first indicted it for lacking adequate management controls and producing inconsistent decisions, the second for not providing a good service and failing to rehabilitate those who were dependent on it, and the third for not paying enough attention to 'due process' and failing to respect and uphold the rights of those dependent on it. He claimed that each strand of criticism reflected a different normative conception of the DI scheme, i.e. a different model of what the scheme could and should be like. The three models were respectively identified with *bureaucratic rationality, professional treatment and moral judgment.*

Mashaw defined 'administrative justice' (i.e. the justice inherent in routine day-to-day administration) in terms of 'those qualities of a decision process that provide arguments for the acceptability of its decisions'.[53] It follows that each of the three models he described is associated with a different conception of administrative justice. Thus, there is one conception of administrative justice based on bureaucratic rationality, another based on professional treatment and a third based on moral judgment. According to Mashaw, each of these models is associated with a different set of *legitimating values*, different *primary goals*, a different *organisational structure* and different *cognitive techniques*. Mashaw's analytic framework is set out in the Table 2 below.

[51] This account of Mashaw's approach to administrative justice and the ways in which it has been developed is based on Adler (2003 and 2005).
[52] Mashaw (1983).
[53] Ibid, p. 24.

Table 2: Models of Administrative Justice − Mashaw's Analytic Framework

Model	Legitimating Values	Primary Goal	Structure or Organisation	Cognitive Technique
Bureaucratic Rationality	accuracy and efficiency	Program implementation	hierarchical	information processing
Professional Treatment	service	client satisfac-tion	interpersonal	clinical application of knowledge
Moral Judgment	fairness	conflict resolu-tion	independent	contextual interpretation

Although this is very helpful, the association of fairness with one of the models (the moral judgment model), and the implication that the two other models are 'unfair', is unfortunate. In addition, the characterisation of the three models reflects an exclusively internal orientation to administrative justice in that it does not refer to external mechanisms for redressing grievances. With these considerations in mind, Table 1 has been modified and a revised analytic framework is set out in Table 2 below.

In Table 3, the three models have been re-named − they are referred to as a bureaucratic model, a *professional* model and a *legal* model, the ways in which they are characterised have been revised, and redress mechanisms, which include external as well as internal procedures for achieving administrative justice, highlighted. This is important because internal and external procedures should not be seen as alternatives and are, in practice, often combined.

Table 3: Models of Administrative Justice − Revised Analytic Framework

Model	Mode of Decision-making	Legitimating Goal	Mode of Accountability	Mode of redress
Bureaucratic	applying rules	accuracy	hierarchical	administrative review
Professional	applying knowledge	public service	interpersonal	complaint to a professional body
Legal	asserting rights	legality	independent	appeal to a court or tribunal

Mashaw claimed that each of the models is coherent, plausible and attractive and that the three models are *competitive* rather than *mutually exclusive*.[54] Thus, they can and do coexist with each other. However, other things being equal, the more there is of one, the less there will be of the other two. His insight enables us to see both what trade-offs are made between the three models in particular cases and what different sets of trade-offs might be more desirable. His approach is a *pluralistic* one, which recognises a plurality of normative positions and acknowledges

[54] Ibid. p. 23

that situations, which are attractive for some people may be unattractive for others.[55]

The trade-offs that are made, and likewise those that could be made, reflect the concerns and the bargaining strengths of the institutional actors who have an interest in promoting each of the models, typically civil servants and officials in the case of the bureaucratic model; professionals and 'street level bureaucrats'[56] in the case of the professional model; and lawyers, court and tribunal personnel and groups representing clients' interests in the case of the legal model. They vary between organisations and, within a given organisation, between the different policies delivered by that organisation, and between the different stages of policy implementation. They also vary over time and between countries.

Although, in my opinion, Mashaw's approach is a very imaginative and fruitful one, it has been subjected to a number of criticisms. Although Mashaw believed that the three models described above, and only these three models, are always present in welfare administration, this claim can be disputed since the bureaucratic, professional and legal models have, in many countries, been challenged by other models of decision-making, in particular, by a managerial model associated with the rise of new public management, a consumerist model which focuses on the increased participation of consumers in decision-making, and a market model which emphasises consumer choice.

A second criticism is that, in assessing the relative influence of the three models, Mashaw ignored their absolute strengths. Consider two situations in which the strengths of three models are given weights of 30, 20 and 10 units and 3, 2 and 1 units – although they are identical in a relative sense, they are quite different in absolute terms and clearly refer to what are, in reality, very different situations'. 'Strong' balances are very different from 'weak' ones in ways that Mashaw's analysis does not bring out very well.

A third criticism is that Mashaw takes the policy context for granted. However, just as different orientations to administration, i.e. to how programmes should be run, can be understood in terms of a number of normative models which are in competition with each other, so different orientations to policy, i.e. to what programmes aim to achieve, can also be understood in this way. In a study of penal decision-making,[57] I attempted to demonstrate that Mashaw's approach can be applied to competing models of policy as well as to competing models of administration. Each of several competing models of policy may, in theory, be combined with each of several competing models of administration. The resulting 'two-dimensional' model is necessarily more complex but its characteristics are similar in that it not only makes it possible to understand the trade-offs that are made between different

[55] Mashaw's pluralism can be contrasted with the version of pluralism adopted by other writers on justice, most notably by Michael Walzer, who assumes a degree of normative consensus in a given community that stands in stark contrast with Mashaw's assumption of normative conflict. See Walzer (1985, especially chapter 1).
[56] Lipsky (1980).
[57] Adler and Longhurst (1994).

combinations of policy and administration in particular cases, but also makes it possible to see what different sets of trade-offs might be more desirable.

In light of the criticisms above, Mashaw's analytic framework can be extended in a number of ways. A revised and extended analytic framework is set out in Table 4 below.

Table 4: Models of Administrative Justice − Revised and Extended Analytic Framework

Model	Mode of Decision-making	Legitimating Goal	Mode of Accountability	Mode of redress
Bureaucratic	applying rules	accuracy	hierarchical	administrative review
Professional	applying knowledge	public service	interpersonal	second opinion or complaint to a professional body
Legal	asserting rights	legality	independent	appeal to a court or tribunal (public law)
Managerial	managerial autonomy	improved performance	performance indicators and audit	none, other than adverse publicity
Consumerist	consumer participation	consumer satisfaction	consumer charters	'voice' and/or compensation through consumer charters
Market	consumer choice, matching supply and demand	economic efficiency	to owners or shareholders (profits)	'exit' and/or court action (private law)

A brief explanation of this extended analytic framework is called for. During the post-war period, most public welfare services in the United Kingdom were shaped by the bureaucratic and professional models outlined above, although the trade off between them varied from one policy domain to another. However, by the mid-1980s this pattern of administration came under attack. It was variously criticised for lacking neutrality and being biased against certain groups; for having a vested interest in the maintenance and expansion of existing empires and for not promoting the 'public interest'; and, as a 'monopoly provider' for being insulated from competitive pressures to become more efficient and more responsive to the demands and preferences of consumers. New and better forms of management were championed as the most appropriate response to these criticisms. Managerialism, as this approach came to be known, challenged the powers and prerogatives of bureaucrats and professionals in the name of managers who demanded the 'freedom to manage' the attainment of prescribed standards of service. It gave priority to achieving efficiency gains, introduced different forms of financial and management

audit to assess how well the prescribed standards of service had been met, rewarded staff who performed well and, in theory at least, sanctioned those who did not.[58] Inevitably, the introduction of these new managers frequently led to struggles for power and control within welfare organisations. Managerialism can thus be characterised in terms of managerial autonomy, enhanced standards of service, the development of performance indicators and the use of audit. However, it lacks a redress mechanism and, apart from drawing attention to poor standards of service in order to put pressure on management, there is little that a dissatisfied service user can do.

Consumerism has, likewise been a central reference point in the drive for public sector reform from the mid-1980s onwards.[59] Like managerialism, it has been taken up as a response to criticisms of the bureaucratic and professional and the reshaping of welfare services around consumer choice has been visible in a number of reforms, in particular in the introduction in the UK of the 'Citizen's Charter'. Consumerism embodies a more active view of the service user who is seen as an active participant in the process rather than a passive recipient of bureaucratic, professional or managerial decisions. It can thus be characterised in terms of the active participation of consumers in decision-making, consumer satisfaction, the introduction of consumer 'charters', and the use of 'voice'[60] together with the possibility of obtaining compensation if the standards specified in the charter are not met as available remedies.

Markets constitute the final model in the extended analytic framework and have many of the characteristics of the managerial and consumerist models (although the reverse is not necessarily the case). Decision-making in the market involves consumer choice and the matching of supply and demand. Consumers are viewed as rational economic actors who choose what best satisfies their wants or preferences while producers are profit maximisers who compete with each other. The legitimating goal of the organisation is economic efficiency and the prevailing mode of accountability is to the owners or shareholders. In contrast to consumerism, where the consumer can use 'voice' as a remedy, and can obtain compensation through the consumer charters if the specified standards have not been met, markets provide the possibility of 'exit'. In addition, an aggrieved individual may be able to raise a court action for compensation where he or she suffers some measurable loss from an administrative decision. Internal or quasi-markets[61] have some but not all of the characteristics of the market model just outlined.

Decision- Making and Appeals in Social Security

The origins of the system of administrative decision-making in social security can be traced back to the introduction of social insurance under the National Insurance Act of 1911. This established two important principles. The first of these involved

[58] Clarke and Newman (1997).
[59] Ibid., chapter 6
[60] Hirschman (1970).
[61] Le Grand (1991), Le Grand and Bartlett (1993).

the separation of responsibilities for making decisions under the law from the administrative tasks associated with the processing of claims and the second gave claimants the right of appeal against these decisions.[62] These appeals were not to the civil courts but to specially constituted tribunals, comprising a legally-qualified chair, a member representing employers and a member representing trade unions, that were set up to hear them. By the early 1930s, a three tier system of adjudication had evolved. Initial decisions concerning entitlement to benefit were taken by 'insurance officers', appeals from them were heard by 'referees' (the forerunners of national insurance local tribunals) in the first instance, and from them, on points of law, to 'umpires' (the predecessors of the national insurance commissioners), who were lawyers of standing and whose decisions acted as precedents that first and second-tier decision makers were expected to follow. However, there was no right of appeal on purely administrative matters that were deemed to be the responsibility of the Minister. The Beveridge Report recommended the continuation of these arrangements, which were written into the post-war legislation and continued in existence until the early 1980s.

The system of administrative decision-making and appeals in social assistance was very different and can be traced back to the Unemployment Assistance Act of 1934, which created a national assistance scheme for the unemployed.[63] This provided for the right of appeal from the decision of an official to a local tribunal. However, unlike insurance officers, unemployment assistance officers were not expected to make independent decisions but were, rather, expected to carry out the policies of the Unemployment Assistance Board. Unemployment assistance tribunals (which were later renamed national assistance tribunals) were lay bodies that lacked the independence of national insurance tribunals. Since there was no further right of appeal, their decisions were final. The Beveridge Report recommended the continuation of these arrangements and this was written into the National Assistance Act 1946. However, under the impact of the welfare rights movement, the successors of national assistance tribunals, known as supplementary benefit appeal tribunals, were subjected to a great deal of criticism in the mid-1970s.[64] They were widely criticised for their lack of 'fairness, openness and impartiality'[65] and for fail-

[62] These arrangements were intended to protect Ministers from being held to account, and answerable in Parliament, for the huge number of decisions concerning entitlement to benefit.
[63] See Lynes (1975).
[64] See Bell (1975) and Adler and Bradley (1975).
[65] These three principles were put forward in the Report of the Franks Committee (1957). However, Franks regarded National Assistance Appeal Tribunals as sui generis and exempted them from its strictures and recommendations that applied to all the other tribunals it considered. For an account of its thinking, see Bradley (1975).

ing to control the exercise of discretion by the Supplementary Benefits Commission,[66] which replaced the National Assistance Board in 1966.

These criticisms led, first, to a series of piecemeal reforms and, then, to a complete overhaul of the system of decision-making and appeals.[67] Under the Health and Social Services and Social Security Act (HASSASSA) 1983, this involved introduced a unified three-tier system of adjudication comprising Adjudication Officers (who replaced insurance officers and supplementary benefits officers), a unified social security appeal tribunal (which replaced national insurance appeal tribunals and supplementary benefit appeal tribunals), the social security commissioners (whose jurisdiction covered supplementary benefits as well as national insurance benefits). Thus, the principle of independent adjudication was extended, for the first time, to social assistance. The legislation also established the new post of Chief Adjudication Officer (CAO), who was given the job of providing advice and guidance to Adjudication Officers and monitoring standards of decision-making. These arrangements continued until 1998 although, since the establishment of the Social Fund in 1986, challenges to decisions concerning discretionary grants and loans have been handled separately, outside the appeal tribunal system.[68]

The Social Security Act 1998 did away with the principle of independent adjudication and brought to an end the notional independence that adjudication officers had enjoyed since 1911. Adjudication Officers were replaced by 'decision makers' acting on behalf of the Secretary of State.[69] The 1998 Act also abolished the role of the Chief Adjudication Officer and transferred the CAO's role to the Chief Executives of the various agencies that were responsible for the provision of benefits and service to various client groups. These senior managers lack the independence of the CAO, who repeatedly drew attention to the poor standards of social security decision-making, since they have an interest in playing down the poor standards

[66] According to David Donnison, who was Chairman of the Supplementary Benefits Commission, discretionary additions to the basic rate of benefit (known as 'exceptional circumstances additions') and discretionary grants (known as 'exceptional needs payments') were inappropriate in circumstances where the caseload was rising, there were no commensurate increases in staffing, and discretionary decisions were increasingly challenged through appeals to tribunals. See Donnison (1997 and 1982, chapters 5 and 6).

[67] For more detailed accounts, see Bradley (1985) and Sainsbury (2000).

[68] Applicants who wish to challenge the decision of a social fund officer may request an internal review of that decision by the officer who made the decision and by a manager in the local office. Applicants who wish to take the matter further may then request a further review by the Social Fund Inspectorate, which operates from a central office in Birmingham. The work of the inspectors is monitored by the Social Fund Commissioner. For a fuller account of the operation of the Social Fund, which includes an account of the role of the Social Fund Inspectorate and the Social Fund Commissioner, see Buck (2000).

[69] For accounts of the impact of the 1998 Act on first instance and appellate decision making in social security, see Wikeley (2000) and National Audit Office (2003).

achieved by decision-makers for whom they are responsible.[70] The Act also attempted to speed up and streamline appeal procedures by, for example, relaxing the requirement that tribunals should comprise a chair and two members in all cases but these changes do not really concern us here.[71] However, a further change that does concern us, and which pre-dated the 1998 Act, was the requirement that, unless appellants specifically opted for an oral hearing, the tribunal would consider their case 'on the papers only', with no one present.

The 'success rate' of paper hearings is much lower than that of oral hearings[72] and the introduction of paper hearings was at first associated with a fall in the appellant success rate. In 1995, the year immediately before the introduction of paper hearings, 43.9 per cent of hearings were decided in favour of the appellant[73] and this fell to 34.5 per cent in 1997, the year immediately after their introduction.[74] However, in the period 2000-2005 (inclusive), the overall success rate has again been 43.9 per cent.[75] During this period, the proportion of paper hearings has averaged 26.2 per cent.[76]

We are now in a position to consider the implications of these changes in terms of the models of administrative decision-making discussed in Section 3.1.

Changes in the Form of Decision Making

In a study of the adjudication in social security in Britain,[77] John Baldwin, Nick Wikeley and Richard Young characterised the role of Adjudication Officers in the late 1980s as what I have called 'bureaucratic' and that of social security appeal tribunals as what I have called 'legal' (see above).[78] However, I think this is too simple. Readers will recall that Jerry Mashaw pointed out that that his three models of administrative justice were competitive rather than mutually exclusive and that they could and did coexist with each other. He also pointed out that, although one model

[70] To ensure public confidence, the Comptroller and Auditor General was asked to monitor the new arrangements. However, in his assessment of the Secretary of State's Report on Decision Making in 2002 and 2003 (which was published in 2006), he reported that he was 'unable to confirm that a substantial part of the information set out by the Secretary of State is fair or balanced' and concluded that 'unless all such performance data is subject to satisfactory quality assurance processes as to its robustness, the resultant report will be of limited utility as a measure of the Department's success in improving the accuracy of decision making'. See Department for Work and Pensions (2006, p. 20)

[71] For a fuller account of these changes, see Sainsbury (2000).

[72] In 2005, the last full year for which data are available, the appellant success rates for paper and oral hearings were 52.1 per cent and 22.5 per cent respectively. Figures based on statistics accessed at http://www.dwp.gov.uk/asd/qat.asp

[73] Department of Social Security (1997, Table H 5.03).

[74] Department of Social Security (1999, Table H 5.03).

[75] Figures based on statistics provided by Gillian Ferry, Client Statistics Team, DWP Information Directorate.

[76] It has hardly fluctuated, ranging from 25.7 per cent in 2000 to 26.6 per cent in 2004 and 2005.

[77] Baldwin, Wikeley and Young (1992).

[78] In a subsequent article, Wikeley (2000, p. 499) claimed that, as a result of the 1998 Act, the bureaucratic model has 'complete hegemony at the first-tier level' and that the judicialisation of tribunals was 'driven … by the policy imperatives of managerialism'.

tended to be dominant, it could co-exist with the other two models. I think this was the case with first-instance decision makers and appeal tribunals when Baldwin, Wikeley and Young carried out their research.

I accept that, when Baldwin, Wikeley and Young carried out their research, many Adjudication Officers did very little adjudication and that they simply authorised, with their signatures, decisions that had, in practice, been delegated to clerical staff.[79] I also accept that they were increasingly required to give priority to meeting performance targets over fulfilling statutory requirements and that there were strong pressures on them to regard speed as more important than accuracy.[80] Nevertheless, I do not think their characterisation of Adjudication Officers attaches sufficient importance to their independent status or to the fact that claimants could appeal against their decisions to an independent appeal tribunal. I can see elements of the 'bureaucratic' and the 'legal' model of administrative decision-making in their activities and would have characterised them in terms of a trade-off between these two models. I accept that the 'professional' model was important for some Adjudication Officers, especially for those who were responsible for the administration of discretionary provisions within the social security legislation, but that it was less important for most of them. Social Security Appeal Tribunals could likewise be characterised in terms of a trade-off between the 'bureaucratic' and the 'legal' model of administrative decision-making although, in this case, the latter was clearly dominant.

We are now in a position to consider the impact of some the changes outlined in this chapter for the trade-offs between the different normative models outlined in Section 3.1 above and thus, for administrative justice in social security. Since there is little evidence, as yet, of user involvement in shaping the delivery of social security[81] and Jobcentre Plus has almost exclusive responsibility for implementing the New Deals,[82] the discussion will not consider the consumerist or market models and will focus instead on the bureaucratic, professional, legal and managerial models.

When Baldwin, Wikeley and Young undertook their fieldwork in 1989, the key decision-maker in the Department of Social Security was undoubtedly the Adjudication Officer in whose name all the decisions about whether or not claimants were

[79] This was in large part due to the HASSASSA Reforms of 1983 which, in theory, extended the principle of independent adjudication to supplementary benefit but, in practice, diminished its impact as the existing body of Adjudication Officers became responsible for a greatly increased number of decisions. According to Wikeley (personal communication), the old tradition continued to be evident in some offices but had been swept away in others where pressure of work had forced Adjudication Officers into doing 'spot checks' and signing off decisions relating to supplementary benefit that were made by clerical staff.

[80] Baldwin, Wikeley and Young (1992 pp. 40-41) noted that officers responsible for determining claims to national insurance benefits gave much higher priority to accuracy than officers responsible for determining claims to unemployment benefit and income support, who gave higher priority to speed.

[81] Lister (2001).

[82] There has been some small-scale experimentation with private and voluntary sector involvement in the New Deals (Stafford, 2003, p. 226) and more can be expected in the future (National Audit Office, 2006, para. 34).

entitled to benefit were made. However, this is no longer the case. Adjudication Officers were abolished under the Social Security Act 1998 and, when Jobcentre Plus was established in 2002, one of its aims was to create a unified workforce from staff who previously worked for the Benefits Agency and the Employment Service. It is my contention that the key decision-maker in Jobcentre Plus is now the Personal Adviser, who manages a caseload of jobseekers and has considerable discretion in carrying out this task. The decline of the Adjudication Officer and the rise of the Personal Adviser reflect a shift from a predominantly bureaucratic to a much more professional model of administrative decision-making.[83]

Although Adjudication Officers were, at least notionally, independent, they were, in practice, increasingly accountable to their line managers. Accountability has increased greatly in recent years and Personal Advisers are now subject to various forms of performance management and are expected to give priority to meeting a variety of nationally and locally set performance targets.[84] This change reflects the increase in importance of the managerial model of administrative decision-making. At the same time, the ending of the Adjudication Officers' independent status and the abolition of the role of the Chief Adjudication Officer in 1998 have undoubtedly led to a reduction in the importance of the legal model of decision-making. The weakening of claimants' appeal rights, which resulted from the removal of social fund decisions from the jurisdiction of appeal tribunals and the introduction of 'paper' hearings, have had a similar effect.

The changes described above suggest than, on the one hand, the bureaucratic and legal models of decision-making have decreased in importance while, on the other hand, the importance of the professional and managerial models of decision-making has increased. The final section of the chapter considers the implications of these changes for rights of redress and accountability.

The Implications of Changes in the Form of Decision Making for Rights of Redress and Accountability

In their study of adjudication in social security, Baldwin, Wikeley and Young described what happened when a claimant attempted to challenge a decision relating to their claim to benefit.[85] The claimant could either request a review of the initial decision or lodge an appeal. Reviews were conducted either by the officer who

[83] In Australia, where activation measures have been contracted out to private and voluntary sector providers, Carney (2005) has identified a shift from a bureaucratic mode of decision making, which emphasises rules ad procedures, to a to a market mode of decision making, which emphasises discretion.

[84] In an attempt to reduce the burden that performance measurement places on Personal Advisers, Jobcentre Plus replaced its former Job Entry Target with a Job Outcome Target in April 2006. However, Job Outcome Target data will be collected at district level and will not make it possible to attribute job outcomes to individual offices and advisers. Jobcentre Plus has also developed a set of alternative performance measures for Personal Advisers that focus on the content and quality of their work. See National Audit Office (2006, paras. 44 and 45).

[85] Baldwin, Wikeley and Young (1992, pp. 65-67).

made the initial decision[86] or by a specialist officer[87], while appeals were heard by an independent social security appeal tribunal. However, in practice, the receipt of an appeal would trigger off an informal review to establish whether the initial decision should stand and this would often lead to a formal review. If, after a formal review, the claimant's case was met in full, that would be the end of the matter, but, if it was only met in part or not at all, the case would proceed to a tribunal.[88]

These two procedures (reviews and appeals) constitute the characteristic modes of redress associated with bureaucratic and legal models of decision-making (see right-hand column in Tables 2 and 3 above).[89] The characteristic modes of redress associated with professional and managerial models of decision-making are much less well-developed. In discussing this issue (in Section 3.1 above), we suggested that the characteristic mode of redress associated with the professional model was a second opinion or a complaint to a professional body. However, although these mechanisms are usually available when the decision maker is a professional, this is rarely the case when the decision-maker is a semi-professional[90] or a 'street-level bureaucrat'[91]. In such cases, it is unlikely that a second opinion will be an option or that there will be a professional body to complain to. We also suggested that there was no effective mode of redress associated with the managerial model and that the only option available to someone who wished to make a complaint was to create adverse publicity.

It is the contention of this chapter that the shift away from a situation in which bureaucratic and legal models of decision-making were dominant to one in which professional and managerial models of decision-making have greatly increased in importance has made it extremely difficult for anyone who is required to take part in any of the New Deal programmes to complain about the advice and help they are given or about any sanctions that may be imposed on them.[92] In Jobcentre Plus, Personal Advisers have many characteristics associated with semi-professionals

[86] In the case of contributory (social insurance) benefits.
[87] In the case of means-tested (social assistance) benefits.
[88] When Baldwin, Wikeley and Young carried out their research, tribunals could consider the claimant's situation at the time of the hearing. However, under section 12 (8) of the 1998 Act, they were precluded from taking into account circumstances that did not apply when the appealed-against decision was made and, under section 36, they could no longer consider issues that arose for the first time on appeal.
[89] If a claimant wants the decision-maker to look again at a decision, he/she can ask for it to be reconsidered. Decisions may be revised if they are incorrect or superceded in light of fresh evidence. For the latest data on revisions and supercessions, see Department for Work and Pensions (2006).
[90] A semi-professional is someone, like a librarian, who works in an occupation which has some but not all the characteristics of a profession. The domain in which a semi-professional can make independent decisions is smaller than that in which a professional can. See Etzioni (1969).
[91] A 'street-level bureaucrat' is an official, like a policeman on the beat, who works without direct supervision and is required to take 'on-the-spot' decisions by exercising his/her judgment. See Lipsky (1980).
[92] In Australia, Carney (2005) has noted that it has likewise become difficult to challenge the imposition of sanctions and the quality of the activation measures that are provided.

and street level bureaucrats.[93] They wield a great deal of power − they meet claimants to discuss their work aspirations and options, assist them in searching for jobs, explore their training needs and the availability of training programmes, advise them on childcare and the availability of specialist services, such as services for those with drug or alcohol dependency, and make indicative calculations about whether or not they would be better off in work or on benefit. Many of them, undoubtedly, do their jobs very well and levels of user satisfaction are reported to be high.[94] Although they are involved in the assessment of claims to Jobseekers Allowance (JSA), standards of decision have not, until recently, been monitored on a national basis.[95]

As described in Section 1.5 above, Jobcentre Plus staff can impose a range of sanctions, not only on claimants but also on their families, on those who fail to attend work-focused interview with them, on those who cannot demonstrate that they are 'actively seeking work', on those who fail to attend a work interview and on those who turn down offers of 'suitable' work'. However, tribunals hear very few appeals against the imposition of sanctions and the staff who impose them are therefore effectively immune from challenge. The culture of independent adjudication and appeal has pretty much disappeared. Thus, staff are not really accountable, through internal or external audit, for their performance or to members of the public for the decisions they make.

Conclusion

It is the contention of this chapter that, however laudable the aims of the New Deal may be, each of the shifts that it has entailed − from a more *passive* type of intervention to a more *active* type of intervention; from a *contribution-based approach*, first to a *status-based approach* and then to a *reciprocity-based approach to citizenship*; and from a primarily *bureaucratic* and *legalistic* type of decision-making to a primarily *professional* and *managerial* one − is fraught with problems. The first shift is problematic because there is a real danger that those who are not really fit for work will be required to look for work and will be penalised – and feel a sense of failure – when they are unable to find it. The second shift is problematic because, by refusing to become the 'employer of last resort', there is a very real

[93] Wright (2003) has used Lipsky's theory of street-level bureaucracy to analyse the ways in which the staff in a Jobcentre placed claimants into administrative and moral categories and traced the consequences of these processes for the services they received. Her study which was carried our in 1998, i.e. before the merger of the Benefits Agency with the Employment Service into Jobcentre Plus, drew attention to the discretion exercised by staff. She notes that the, as a result of subsequent policy developments, the importance of discretion has undoubtedly increased since then.

[94] According to the National Audit Office (2006, paras. 21 and 31), Jobcentre Plus' customer survey shows that 77 per cent of jobseekers and 90 per cent of employers are satisfied with its performance.

[95] Department for Work and Pensions (2006, p. 11). According to this report, a monitoring scheme was introduced in 2005 and will provide the basis for future reports on standards of decision making in Jobcentre Plus.

danger that if, and when, unemployment starts to rise, the government will lose credibility by not being able to deliver. The third shift is problematic because, although Jobcentre Plus staff exercise a great deal of power over those who are looking for work, it is increasingly difficult for job-seekers to challenge what the staff do or do not do for them. Although 'Welfare to Work' is a fine ideal, it should not be implemented without due regard to justice and fairness.

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