

Administrative Justice: Guiding Caseworker Discretion

by

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Abstract

This thesis demonstrates how flexibility and constraint arise in the context of Ontario Works, a welfare program with a reputation as both rule-bound and discretion-rich. Based on a qualitative socio-legal study of front-line decision-making in five local offices across two southern Ontario municipalities, this dissertation explores how discretion functions at and behind the front-lines of the Ontario Works program. Drawing on legal and socio-legal literature, it demonstrates how in a formal sense discretion becomes explicitly and tacitly incorporated within discrete legislative provisions and, as these rules cross-reference one another, nested throughout an entire legal framework. Further, it shows how front-line workers animate these text-based grants as they perform operational discretion in their routine interactions with benefits recipients, such that it becomes virtually impossible to distinguish discretion from non-discretion at any specific decision-making moment. This thesis then shifts gears to argue that operational discretion is nonetheless guided by two factors: a shared methodology of normative balancing according to which workers reconcile competing legal and managerial norms; and a systematic diffusion of decision-making responsibilities among human and non-human actors such that decisions are produced and influenced by an aggregation of decision-makers. In doing so, it demonstrates how the effects of ideological divergence among caseworkers, on a spectrum ranging from pro-client social workers to black-and-white efficiency engineers, is minimized by the convergence

prompted by normative balancing and aggregated decision-making. This thesis then reflects on how new regulatory technologies may subtly shift front-line workers' perception of their roles as legal decision-makers, from caseworkers who perform discretion in relation to an audience of coworkers with whom they can reason to individuals who must covertly "manipulate" the legal-technical system with which they are now governed.

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Chapter 1

Studying Discretion in a Rule-Bound Program

It's an environment of discretion. I just assume that if I feel it's right, I can. Or if it's sort of – if I can link it to a policy, I can. I wouldn't even question it, because that's just how it works here. You sort of learn that over time, that it's discretion and everyone gets away with it. Whether you err on the side of being punitive, or – well sometimes you get spoken to if you're too harsh – of course, there has to be a line. But you still get away with it if you're too punitive too. It's the *environment*.¹

A specter of discretion continues to haunt common conceptions of how administrative officials exercise their authority. Though recent developments in legal² and socio-legal scholarship³ demonstrate that discretion is best understood as bounded flexibility rather than an intuitive choice ungoverned by law, when administrative decision-making controversies arise, the phantom reappears and discretion is once again described as unpredictably guided by the personal whims of administrative officials and as a threat to the rule of law.⁴ The persistence of this vision of discretion suggests that it has not entirely been exorcised from public consciousness, particularly in Canada, and its persistence is aided by the relative absence of Canadian legal research into the relationship between legal frameworks and front-line decision-makers. This relationship is at the centre of my thesis.

As this introduction will detail, my thesis explores the puzzling interaction between law and discretion. By analyzing this interaction in the context of Ontario Works, a notoriously rule-

¹ This passage is taken from an interview with one of my research participants, an Ontario Works caseworker who self-identified as taking a balanced approach that fell somewhere between a pro-client rule bender and a black-and-white rule enforcer. For more information about my research methods, quotes, and study participants, see Appendix A.

² Geneviève Cartier, *Reconceiving Discretion: From Discretion as Power to Discretion as Dialogue* (SJD Thesis, University of Toronto, Faculty of Law, 2004) [unpublished] [Cartier, *Reconceiving Discretion*]; Geneviève Cartier, “Administrative Discretion and the Spirit of Legality: From Theory to Practice” (2009) 24:3 CJLS 313 [Cartier, “Spirit of Legality”].

³ Ruthanne Huising & Susan S Silbey, “Governing the Gap: Forging Safe Science Through Relational Regulation” (2011) 5 Regulation & Governance 15.

⁴ Justice Rand's statement about the threat of this specter of discretion is one example: *Roncarelli v Duplessis*, [1959] SCR 121 [Roncarelli], [1959] 16 DLR (2d) 689 at 142. See also the discussion in David Dyzenhaus & Evan Fox-Decent, “Rethinking the Process/Substance Distinction: Baker v Canada” (2001) 51:3 UTLJ 193.

bound program that insiders nonetheless describe as “an environment of discretion,” it will provide key insights into how legal constraints and flexibilities manifest and interact in routine front-line decisions. These decisions affect the crucial last-resort benefits of some of society’s most marginalized members; because they are rarely appealed, they are essentially final decisions. Better grasping the interaction between law and discretion in this context thus has important practical and scholarly implications.

1.1. The Puzzle of Law and Discretion

The relationship between law and discretion is often at issue when administrative officials are criticized for acting too punitively or too generously. In response to perceived abuses of decision-making authority, improved written rules and other regulatory tools may be proposed based on the assumption that they will guide, or potentially eliminate, discretion. For example, recent debates about the practice of police street checks in Ontario have questioned the freedom with which police officers stop visibly black and indigenous individuals in public places to demand and record their personal information. This practice has been denounced because it compiles racialized individuals’ personal information within police databases and virtually criminalizes their presence in public spaces. However, most critiques centre on how street checks provide individual police officers with wide freedom to stop some individuals and not others based solely on an officer’s intuition or hunch, which may disproportionately target racialized minorities who are no more likely to be engaged in criminal activity than others. Advocacy groups have demanded that this practice be regulated, if not abolished entirely,⁵ so as to better structure and guide officers’ discretion, and new provincial regulations have been introduced in response.⁶ Despite these new rules, street checks continue to raise concerns for

⁵ Wendy Gillis & Jim Rankin, “Anti-carding coalition urges a bolder rewrite of Ontario’s rules for ‘street checks’” *Toronto Star* (5 December 2015) A1.

⁶ As of January 1, 2017, a new regulation has come into effect barring police officers from requesting the personal information of individuals arbitrarily, based on a person’s perceived race or presence in a police-identified “high crime” area, in certain circumstances: *Collection of Identifying Information in Certain Circumstances – Prohibition and Duties*, OReg 58/16, made under the *Police Services Act*, RSO 1990, c P15.

disproportionately criminalizing some individuals and not others based solely on how police officers perceive race and criminality.⁷

Similar debates about law and discretion have arisen in Ontario Works, Ontario's welfare program. Recent provincial audits suggest that municipal caseworkers and office managers exercise discretion too freely as they distribute benefits to needy individuals. Like police officers, these workers are governed by a complex legislative regime but they have been critiqued by provincial officials for bending program rules to such a degree that an "environment of discretion" has been created. As with police street checks, provincial officials have introduced a regulatory solution to address the problem of seemingly-unconstrained discretion in Ontario Works. However, rather than amend the written rules, provincial officials have introduced new software that purports to interpret legal rules more consistently (and more strictly), generate simple decisions for caseworkers, and impede workers from overriding its decisions. As my thesis will demonstrate, this software program may have changed caseworkers' perception of Ontario Works' legal framework so that they now understand some rules to be "black and white" rather than "grey," but front-line workers continue to view themselves as working within an institutional context that requires them to perform operational discretion. An environment of discretion thus remains.

Both of these solutions – new rules in the policing context, new technology in social assistance – frame discretion as a phenomenon that can be constrained by stricter regulatory controls. Whether these controls take the form of more precisely-worded legal rules or their narrow translation into computer code, they aim to dispel the specter of discretion and install decision-making practices that more closely adhere to a particular interpretation of legal rules.⁸ Yet, these solutions do not adequately account for discretion as a dynamic phenomenon that is simultaneously bounded and flexible. As more legal-technical boundaries are placed around

⁷ Despite Ontario's new street checks regulation, *ibid*, concerns remain that police officers continue to engage in carding practices that disproportionately discriminate against black and indigenous individuals. Accordingly, the Province has commissioned a review of the practice by Justice Tulloch of the Ontario Court of Appeal: Wendy Gillis, "Ontario judge to review rules around carding; Judge to examine whether new regulations are being applied 'without bias or discrimination'" *Toronto Star* (8 June 2017) GT1.

⁸ Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969); see also Peter Cane, *An Introduction to Administrative Law* (Oxford: Clarendon Press, 1986) at 65-66.

discretion, the opportunities for administrative officials to creatively work within and beyond these boundaries not only increase but may also become more thoroughly scattered and entrenched.⁹

This puzzle of discretion, as a phenomenon that is simultaneously bound and flexible, is central to my research. By examining how discretion is formally incorporated into written legal frameworks and practically operationalized in front-line workers' everyday decisions, my thesis illustrates how discretion can be both governed by law and responsive to individuals' circumstances. The key insight from my research is not that flexibility or constraints exist, but how they manifest in a particular administrative context.

In undertaking this exploration, my thesis implicitly challenges two dichotomies that, while outdated, occasionally resurface in scholarly and public accounts of administrative discretion. Accordingly, this work aims to clarify the relationship between law and discretion, a binary that appears in both legal and socio-legal literature, and between law on the books and law in action, a distinction that is more common to socio-legal work. The first of these dichotomies – law versus discretion – pits law and discretion in opposition to one another, as in the provocative statement, “where law ends, discretion begins.”¹⁰ While this view is by no means dominant, it seems to reappear despite significant shifts in doctrinal, theoretical, and socio-legal conceptions of discretion, which today acknowledge that discretion is vital for administrative functions and that it must be guided by narrower rules and broad principles.¹¹ When law is contrasted with discretion, discretion may be conflated with some of what the quote at the outset of this chapter

⁹ Carol Harlow and Richard Rawlings called this phenomenon “embedded discretion” early on: *Law and Administration*, 1st ed (London: Weidenfield and Nicholson, 1984) [Harlow & Rawlings, *Law and Admin 1st ed*]. As I will argue in Chapter 2, today discretion also appears to be nested across entire written frameworks governing programs such as Ontario Works.

¹⁰ Davis, *supra* note 8 at 3. Anna Pratt & Lorne Sossin, “A Brief Introduction of the Puzzle of Discretion” (2009) 24:3 CJLS 301 trace how this view reappears in legal scholarship.

¹¹ These points are noted in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], 174 DLR (4th) 193 at paras 56, 65-74, per L’Heureux-Dubé J. See also Geneviève Cartier, “The *Baker* Effect: A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law – The Case of Discretion” in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 61 [Cartier, “The *Baker* Effect”]; Roy Sainsbury, “Administrative Justice, Discretion, and the ‘Welfare to Work’ Project” (2008) 30:4 *Journal of Social Welfare & Family Law* 323 [“Welfare to Work”].

expresses, particularly the caseworker's sentiment that "if I feel it's right, I can." Further, law versus discretion frames discretion as a law-free space; thus, the risk of producing arbitrary, inconsistent administrative decisions may seem adequately mitigated if this space is constrained and structured by conventional legal instruments (statutes, regulations, policies).¹² When law and discretion are distinguished in this way, it becomes difficult to conceive of administrative officials as legal decision-makers who exercise discretion in relation *to* law as they animate legal frameworks.¹³

The second binary, law on the books versus law in action, resembles the first as it also differentiates between written law and administrative action. Contemporary socio-legal studies of "street-level bureaucrats" that rely on organizational theory appear particularly inclined to separate legal texts from legal performances.¹⁴ Such scholarship may misread previous research into front-line workers as demonstrating their deviation from anticipated or desired normative practices,¹⁵ rather than as exploring how workers balance institutional principles with on-the-ground realities.¹⁶ This apparent misinterpretation leads some authors to characterize variations in front-line workers' performances as flaws that should be remedied or managed.¹⁷ Ultimately, this misinterpretation is traceable to a disconnect between organizational theory, which assigns

¹² Ontario, Lieutenant Governor of the Province of Ontario, *Royal Commission Inquiry into Civil Rights: Report Number One*, vol 1 (Toronto: Queen's Printer, 1968) [*McRuer Report*], which proposed a hypothetical legal system without discretion and led to statutory reforms throughout the 1960s and 1970s. See Harry W Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17:1 Osgoode Hall LJ 1 [Arthurs, "Dicey Business"] at 5, 28, 54-55.

¹³ Of course, this is a central task of administrative agencies. See Jerry L Mashaw, "Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise" (2005) 55:3 UTLJ 497.

¹⁴ See Ryken Grattet & Valerie Jenness, "The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime" (2005) 39:4 Law & Soc'y Rev 893.

¹⁵ Early front-line worker studies include Jeffrey Manditch Prottas, *People Processing: The Street-Level Bureaucrat in Public Service Bureaucracies* (Lexington, Mass: Lexington Books, 1979); Michael Lipsky *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*. (New York: Russell Sage Foundation, 1980) [Lipsky, *Street-Level Bureaucracy*].

¹⁶ Susan S Silbey, Ruthanne Huising & Salo Vinocur Coslovsky, "The 'Sociological Citizen' Relational Interdependence in Law and Organizations" (2009) 59:1 L'Année sociologique 201 at 224-25.

¹⁷ Patricia Ewick & Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998) [Ewick & Silbey, *Common Place of Law*] at 248.

human actors discrete and formal roles and responsibilities, and sociology, which takes human beings as multifaceted creatures who cannot exclusively perform one role or task.¹⁸ Yet, the “gap” between law as it is written and law as it is performed may be understood differently, as “a space, not a vacuum,”¹⁹ because even when workers appear to deviate from written rules they still must apply generalized norms, or rules of thumb, in contingent and shifting situations. In other words, the “gap” between written rules and administrative action is a space in which governance happens, rather than an area devoid of law.²⁰ If rules and practice appear, to outsiders, to diverge, this should inspire researchers to study what is occurring within this gap rather than to assume that written law is being ignored.

The insights in my thesis unsettle both of these binaries and suggest that law and discretion, or law on the books and law in action, complement rather than oppose one another. Further, my findings indicate that a rich socio-legal environment, one of discretion *and* law, exists behind the front-lines of the administrative agencies that deliver the Ontario Works program. These nuances are traceable in the quote introduced at the start of this chapter. Though its speaker described the Ontario Works program as an environment of discretion in which she and her coworkers freely follow their intuition, it is also clear that she performs discretion in relation to a legal framework that offers her some decision-making flexibility, so long as she can connect her decision to a policy. As Chapter 2 will demonstrate, the framework governing Ontario Works has numerous explicit and tacit grants of decision-making flexibility nested throughout its layers of rules that, as Chapter 3 shows, provide front-line workers with many opportunities to perform operational discretion. In addition to performing discretion in relation to a statutory scheme, the above-quoted caseworker also considers basic norms that mark the outer limits of a range of reasonable decisions. She states that “if you’re too harsh” or punitive towards clients there will be consequences because “there has to be a line.” I explore this phenomenon in Chapter 4. Further, this caseworker indicates that she performs discretion in relation to her colleagues, who educate and regulate one another. She notes that caseworkers learn over time which discretionary

¹⁸ Erving Goffman, *Presentation of Self in Everyday Life* (New York: Anchor Books, 1959).

¹⁹ Ewick & Silbey, *Common Place of Law*, *supra* note 17 at 248.

²⁰ Huising & Silbey, *supra* note 3 at 36.

performances are appropriate and which ones will lead them to “get spoken to” by coworkers, a regulatory phenomenon that I detail in Chapters 5 and 6. Finally, her indication that workers are aware of their colleagues’ discretionary performances suggests that caseworkers’ files and decisions are translucent such that they are aware of what their colleagues are doing and will reprimand each other where warranted, which is made possible by the case management software discussed in Chapter 7. Thus, although her workplace is a permissive environment where everyone can “still get away with it,” it is also intricately governed by a range of mechanisms.

1.2. Ontario Works as a Rule-Bound Program

As a context abundant in rules and new regulatory technologies and dependent on numerous front-line workers, Ontario Works is an ideal environment in which to study discretion. Those familiar with the Ontario Works program and similar welfare²¹ programs in the United States and United Kingdom will recognize its multiple intersecting rules and extensive regulatory mechanisms (forms, questionnaires, case management software, audits) as a characteristic contemporary feature of such schemes.²² As a recently-commissioned review of Ontario Works noted, front-line workers “could be spending as much as 70 per cent of their time just administering the rules arising from the complex benefit structure.”²³ This intricate legal framework may suggest, to outsiders, that discretion has been confined and structured through formal legal tools (laws, regulations, policies) and managerial mechanisms (regulatory technologies, institutional design). Insiders, by contrast, note that discretion permeates their routine decisions as they work with their clients, coworkers, supervisors, and others to bring Ontario Works’ statutory scheme to life. Rules and flexibility have a long history in welfare

²¹ By “welfare,” I include historic and contemporary state-funded programs that provide last-resort financial assistance to individuals who otherwise lack access to such supports.

²² Neville Harris, “Complexity, Law and Social Security in the United Kingdom” (2006) 8:2 *European Journal of Social Security* 145 [Harris, “Complexity and Social Security”]; Martin Partington, “Rules and Discretion in British Social Security Law” in Franz Gamillscheg et al, eds, *In Memoriam: Sir Otto Kahn-Freund* (München: CH Beck’sche Verlagsbuchhandlung, 1980) 619 [Partington, “Rules and Discretion”]; John Gilliom, *Overseers of the Poor: Surveillance, Resistance, and the Limits of Privacy* (Chicago: University of Chicago Press, 2001); Austin Sarat, “‘...The Law is All Over’: Power, Resistance and the Legal Consciousness of the Welfare Poor” (1990) 2:2 *Yale JL & Human* 34.

²³ Ontario, Commission for the Review of Social Assistance in Ontario, *Brighter Prospects: Transforming Social Assistance in Ontario* (Toronto: Queen’s Printer, 2012) [*Brighter Prospects*] at 13.

programs, however.²⁴ This section accordingly details key aspects of the present-day Ontario Works program and connects its design and function to similar last-resort benefits programs elsewhere.

Like its American and British counterparts, Ontario's welfare program underwent dramatic material and discursive reforms in the 1990s. Monthly benefits payments were reduced by over 20 per cent, and access to the additional supports that might supplement these lower monthly benefits was made contingent on regular participation in employment activities. Program language also changed. "General Welfare Assistance" became "Ontario Works," and individuals had to express their commitment to job-seeking and training activities by signing a Participation Agreement before receiving assistance.²⁵ Though these reforms initially reduced the number of people receiving benefits, Ontario Works remains crucial and today provides benefits to almost 450,000 people annually.²⁶ Program delivery costs are shared between the Province of Ontario and municipal governments, with the Province responsible for funding most benefits.²⁷ The Province also creates and amends Ontario Works legislation, regulations, and policy directives, while day-to-day benefits and services are delivered by over 200 municipal social services offices that hire their own staff and develop their own local practices.

The legal framework governing Ontario Works is notoriously complex and explicitly founded on competing objectives, such as effectively supporting the poor, promoting self-reliance through paid employment, and saving tax dollars.²⁸ It includes a statute (the *Ontario Works Act, 1997*, or

²⁴ Dean Herd, Andrew Mitchell & Ernie Lightman, "Rituals of Degradation: Administration as Policy in the Ontario Works Program" (2005) 39:1 *Social Policy & Administration* 65 at 73-4; Margaret Little, *No Car, No Radio, No Liquor Permit: The Moral Regulation of Single Mothers in Ontario, 1920-1997* (Toronto: Oxford University Press, 1998).

²⁵ Janet Mosher & Joe Hermer, *Welfare Fraud: The Constitution of Social Assistance as Crime* (Ottawa: Law Commission of Canada, 2005).

²⁶ Ontario, Office of the Auditor General of Ontario, *2015 Annual Report of the Office of the Auditor General*, Chapter 3, Section 3.12 – SAMS – Social Assistance Management System. (Toronto: AG Ontario, 2015) [*AG Ontario 2015*]; *Brighter Prospects*, *supra* note 23.

²⁷ *AG Ontario 2015*, *ibid* at 472.

²⁸ *Ontario Works Act, 1997*, SO 1997, c25, Sched A [*OWA*], s 1.

“*OWA*”)²⁹ and four regulations (the one most central to my study I refer to as “the Regulation”).³⁰ These instruments detail a byzantine array of benefits and services. To guide how caseworkers interpret and apply the *OWA* and the Regulation, both the provincial Ministry of Community and Social Services and municipal social services departments have developed an array of tools, including policy directives, forms, checklists, flow charts, and case management software. While Ontario Works’ statutory scheme has remained relatively unchanged since its introduction in the late 1990s, these managerial-technical mechanisms have evolved alongside shifting provincial and municipal priorities to regulate benefits delivery.

Ontario Works benefits fall into two broad categories: core benefits; and supplementary benefits. The former includes allowances for food, clothing, and shelter, which are calculated according to the number of individuals living in one household. Supplementary benefits include funds for “employment-related expenses” such as the cost of public transit, training programs, special clothing, and grooming, as well as other miscellaneous items. Core benefits fall far below the actual cost of living in Ontario, making supplementary benefits crucial additional resources.³¹ Unlike some American welfare programs, Ontario Works does not formally require individuals to work as a condition of receiving core benefits.³² Instead, it informally pressures benefits recipients to participate in employment activities, which may include job training and low-wage employment, by linking its most generous supplementary benefits to such participation and setting core benefits rates so low that it is virtually impossible to survive on them alone. To be eligible for Ontario Works benefits, individuals’ income and assets must remain below provincially-set thresholds. In order to continue receiving benefits, individuals must agree to

²⁹ *Ibid.*

³⁰ *General Regulation*, OReg 134/98 [OReg 134/98].

³¹ At the time of my study, a single person in Ontario received \$681/month in basic benefits; a sole-support parent with one child received \$951/month: OReg 134/98, Part VI. Supplementary benefits are caseworkers’ greatest source of flexibility when clients request funding for essential items, such as clothing for their children, dental care, or equipment needed to begin a new job. Because benefits amounts have remained virtually stagnant, while the cost of basic necessities have increased since Ontario Works was introduced, Ontario Works recipients today live in deeper poverty than they did following the dramatic benefit cuts of the 1990s: Canadian Centre for Policy Alternatives, *Ontario’s Social Assistance Poverty Gap* (Ottawa: CCPA, 2016).

³² Kaaryn Gustafson *Cheating Welfare: Public Assistance and the Criminalization of Poverty* (New York: NYU Press, 2011) at 47-50, 156.

share their personal information with federal, provincial, and municipal agencies and must meet regularly with their assigned caseworker to update their file and report on their progress towards obtaining stable paid employment.

As noted above, welfare programs have long regulated both the distributors and the recipients of public benefits. Though research into early programs typically considers how they distinguished between the deserving and undeserving poor as a disciplining technique, this process relied on caseworkers' discretionary performances to regulate actual and potential benefits recipients.³³ For instance, Canadian single mothers' allowances contained a small set of broadly-worded rules that enabled caseworkers to use personal qualities, such as marital status, British subjectship, or being a "fit and proper" mother, to separate those who were deserving of state-funded assistance from those who were not.³⁴ These early programs relied on caseworkers to skilfully assess the homes and personal circumstances of sole-support mothers and to provide some (but not others) with individually-tailored supports. By allowing caseworkers to penalize or reward individuals based on how closely they fit the normative model of a deserving benefit recipient, these schemes used caseworkers' performance of discretion as a regulatory tool. Yet, this same discretion also enabled caseworkers to mitigate the effects of poverty by providing individualized supports to deserving recipients, permitting variation in benefits delivery.

Since the second half of the twentieth century, welfare programs have increasingly targeted both people living in poverty and front-line workers as subjects of regulation. As welfare rights movements gained momentum in the 1960s, caseworkers' discretion became a central concern of rights advocates and policy makers,³⁵ and broader critiques of administrative discretion gained

³³ Frances Fox Piven & Richard Cloward, *Regulating the Poor: The Functions of Public Welfare* (New York: Vintage, 1993); Joel Handler & Ellen Jane Hollingsworth, *The "Deserving Poor": A Study of Welfare Administration* (New York: Markham, 1971).

³⁴ Shelley AM Gavigan & Dorothy Chunn, "Women, the State and Welfare Law: The Canadian Experience" in Shelley AM Gavigan & Dorothy Chunn, eds, *The Legal Tender of Gender: Welfare, Law and the Regulation of Women's Poverty* (Oxford: Hart Publishing, 2010) 47 at 53-57.

³⁵ Premilla Nadasen, *Welfare Warriors: The Welfare Rights Movement in the United States* (London: Routledge, 2005); Karen M Tani, *States of Dependency: Welfare, Rights, and American Governance, 1935-1972* (Cambridge: Cambridge University Press, 2016).

traction.³⁶ Welfare rights advocates challenged caseworkers' ability to deny benefits absent fair decision-making procedures or based on discriminatory notions of deservingness. Government officials, by contrast, were concerned with guaranteeing consistent caseworker decisions and preventing caseworkers from distributing public benefits to undeserving individuals, rather than ensuring that caseworkers provided assistance to all eligible applicants.³⁷ From the 1960s to the 1990s, a number of formal legal mechanisms were introduced to regulate front-line workers. Caseworkers' discretion was thus "legalized," as a large body of laws and policies was introduced to direct caseworker decisions, and "judicialized," as front-line decisions became reviewable by tribunals and courts.³⁸

Legalization and judicialization strategies failed to eliminate opportunities for caseworkers to perform discretion, however, and instead created new spaces in which discretion could flourish.³⁹ Legalization's lasting impact on Ontario Works is apparent in its intricately-layered statutory provisions, regulations, and policies, which, as Chapter 2 will demonstrate, multiply and nest explicit and tacit grants of decision-making flexibility throughout an entire statutory scheme. As a result, formal text-based grants of discretion become dispersed and entrenched deep within a legal framework.

Judicialization strategies have also ineffectively restricted front-line workers' discretion because so few of their decisions are legally reviewable and because benefits recipients are unlikely to challenge those decisions that can be reviewed. Ontario Works legislation, for instance, limits external administrative review of caseworker decisions to a small set of issues involving core

³⁶ Davis, *supra* note 8; *McRuer Report*, *supra* note 12.

³⁷ Handler & Hollingsworth, *supra* note 33.

³⁸ Jeffrey Jowell, *Law and Bureaucracy: Administrative Discretion and the Limits of Legal Action* (Port Washington, NY: Dunellen Publishing, 1975) [Jowell, *Law and Bureaucracy*].

³⁹ For a succinct discussion of legalization's effects, see Keith Hawkins, "The Uses of Discretion: Perspectives from Law and Social Science" in Keith Hawkins, ed, *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 11 [Hawkins, "Uses of Discretion"] at 35-38.

benefits; virtually all supplementary benefits decisions are unreviewable.⁴⁰ Courts, moreover, are loath to review administrative decisions that appear to be “policy” or “legislative” matters.⁴¹ Even where external review is available, empirical research suggests that those who rely on government assistance rarely appeal decisions that reduce or eliminate their benefits.⁴² All of this suggests legalization and judicialization mechanisms are less effective at constraining how caseworkers operationalize flexibility-permitting spaces within a legislative framework. Instead, as this thesis will explore, discretion remains central to the delivery of programs such as Ontario Works.

By contrast to legalization and judicialization, deskilling is the most recent technique to restrain front-line workers’ discretion in welfare programs. From the early 2000s on, Ontario Works and similar programs have increasingly relied on managerial mechanisms, rather than legislation or external review, to regulate how front-line workers deliver publicly-funded benefits. In American welfare programs, deskilling has occurred through changes to program delivery models and hiring and training practices but, as Chapter 7 will demonstrate, Canadian programs have pursued deskilling largely through their use of regulatory technologies. Thus, Ontario Works caseworkers have not yet been replaced with data entry clerks. Instead, new regulatory technologies have become ubiquitous in local offices so that workers have no choice but to use them in their daily interactions with clients. While tools such as case management software may help front-line workers manage the complex interplay between laws, regulations, and policies produced by legalization, they also redirect workers’ attention away from their clients and Ontario Works’ legal framework and towards check-boxes, flowcharts, and drop-down menus. As Chapters 3 and 7 will demonstrate, these tools appear to be altering how front-line workers

⁴⁰ Unappealable decisions include the “prescribed decisions” listed in the *OWA*, s 26(2), para 8 and OReg 134/98, s 68.

⁴¹ Lorne Sossin, “The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada” in Marc Hertogh & Simon Halliday, eds, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004) 129.

⁴² Vicki Lens, “Bureaucratic Disentitlement After Welfare Reform: Are Fair Hearings the Cure?” (2005) 12:1 *Geo J on Poverty L & Pol’y* 13 [Lens, “Fair Hearings”]; Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Oxford: Hart Publishing, 2004) [Halliday, *JR and Compliance*].

perceive program rules such that flexible rules become understood as rigid and providing workers with no options to assist individuals in need.

1.3. Methods

The puzzle of discretion – how administrative decision-making is simultaneously constrained and flexible – is socio-legal. Further, the mechanisms used to guide discretion increasingly extend beyond legislative and judicial functions to include technical-managerial tools.

Accordingly, to investigate how discretion functions within the Ontario Works program, my thesis uses exploratory qualitative empirical research methods common to socio-legal studies. However, it also seeks to bring legal and socio-legal scholars into conversation with one another, and thus draws on statutory texts, case law, and doctrinal and theoretical legal research. While my empirical research methods are set out in greater detail in Appendix A, this section provides some basic information about the scope of my study.

Empirical research into how discretion operates in Canadian public benefits programs remains sparse. I have thus undertaken a qualitative, exploratory study of front-line decision-makers in the Ontario Works program. Qualitative methods, ranging from site visits to focused interviews, provide useful insights into how administrative agencies function, including how “governing inside the organization” works.⁴³ Such research is crucial for studying law, particularly in the context of administrative decision-making, as variations in the decisions of individual administrative officials may appear to be capricious or inconsistent to “outsiders” who are likely unfamiliar with the internal workings of a particular agency.⁴⁴ Research that tries to access and understand decision-making from within an institution may help to reveal the processes at work behind the front lines. To this end, I explore what legitimacy and compliance mean to front-line workers within the municipal offices that deliver the Ontario Works program.

⁴³ Patricia Ewick & Susan S Silbey, “Subversive Stories and Hegemonic Tales: Towards a Sociology of Narrative” (1995) 29:2 *Law & Soc’y Rev* 197 [Ewick & Silbey, “Narrative”]; Silbey, Huising & Coslovsky, *supra* note 16.

⁴⁴ Baldwin & Hawkins aptly describe this phenomenon in Robert Baldwin & Keith Hawkins, “Discretionary Justice: Davis Reconsidered” (1984) *Public Law* 570 at 581-82.

My findings are grounded in a range of qualitative sources, including semi-structured interviews with front-line staff, on-site observation, and relevant documentary evidence. As a study that relied on volunteer participants from five local offices across two southern Ontario municipalities, some of my results may be limited to these research sites or to Ontario Works' institutional context. However, across my research sites, participants were generally consistent as they described their engagement with Ontario Works' legislative scheme, competing program norms, and the aggregating of human and non-human decision-makers. Their accounts were further textured as I read them against my own observations and a range of documentary evidence, including provincial and local policies, government-commissioned reports, and Ontario Works legislation. By drawing on these different sources of data, and on legal and socio-legal scholarship, my thesis offers rich findings into how the puzzle of discretion plays out in a complexly-governed administrative setting.

1.4. Overview of Chapters

My dissertation consists of an introductory chapter (Chapter 1), six substantive chapters (Chapters 2-7) and a concluding chapter (Chapter 8).

Chapter 2 examines how “discretion” is conceived of in legal and socio-legal literature. Because it is a slippery concept, I offer a new nomenclature that reflects discretion's two related but distinguishable senses: formal discretion; and operational discretion. Formal discretion refers to a space within legislative texts that transfers decision-making responsibility from the legislature to administrators, while operational discretion posits discretion as a temporal action or performance by which legislative frameworks are animated for a discrete audience. These two senses of the term “discretion” are complementary rather than exclusive as they overlap in academic and judicial accounts of discretion. This chapter then examines formal discretion at micro and macro scales, leaving operational discretion for Chapter 3. At the micro scale, I show how explicit, open-ended and tacit, open-textured terms formally incorporate grants of decision-making flexibility into individual legislative provisions. At the macro scale, I demonstrate how formal discretion operates system-wide so that explicit and tacit grants become nested throughout a statutory scheme. Using examples from leading Canadian administrative cases and Ontario Works' legal framework, this chapter illustrates how formal discretion can become so deeply entrenched that it is almost impossible to differentiate it from non-discretion at any point.

Chapter 3 examines operational discretion as a performative complement to formal discretion. Drawing on my empirical research, I suggest that it is more useful to conceive of operational discretion as a performative process by which legislative frameworks are translated into action rather than conceiving of it as the “exercise” of discretion. This framing of operational discretion captures its temporal and relational features, which are evident in how my research participants performed decision-making flexibility to a present or anticipated future audience of coworkers, supervisors, and others. I then use my data to illustrate how caseworkers commonly describe Ontario Works’ rule-bound environment as either clearly “black-and-white” or flexibly “grey” and clients’ lives as in flux. I then show how workers may begin to perceive program rules as rigid rather than flexible, despite widespread formal discretion, and how technical and managerial factors both produce an environment that is at once rule-bound and discretion-rich. Finally, this chapter explores three distinct strategies that front-line workers engage in as they perform operational discretion: unlocking the “grey” within the rules; finding grey area nested elsewhere in the legal framework; and selectively gathering and characterizing clients’ information when faced with inflexible provisions.

The balance of my thesis then shifts to demonstrate how performances of operational discretion in the Ontario Works program are constrained by a combination of normative balancing and aggregated decision-making. Chapter 4 examines the first of these mechanisms, caseworkers’ weighing of competing norms. While front-line workers may self-identify along a professional identity spectrum, with pro-client social workers at one end and black-and-white efficiency engineers at the other, I show how their common method of reconciling legal and managerial norms leads to a convergence. As a result, front-line workers modify their performances of operational discretion so that their decisions ultimately fall within a band of reasonable outcomes. The bulk of this chapter examines how workers participate in normative balancing, and details seven discrete but overlapping principles that my data suggests workers regularly reconcile.

Chapters 5, 6, and 7 consider the second force constraining operational discretion: aggregated decision-making. In Chapter 5, I demonstrate how multiple decision-makers are an institutional feature of the Ontario Works program: the norm, rather than the exception. Although an archetypal singular decision-maker is common within legal scholarship, I draw on leading administrative case law and my empirical research to suggest that multiple decision-makers may

be more common across administrative agencies. This chapter then sets the empirical foundation for Chapters 6 and 7 by demonstrating how aggregated decision-making is so widespread within Ontario Works that, for benefits applicants and recipients, a single authoritative decision-maker rarely exists. After detailing the range of decision-makers at work, I show how benefits recipients will be affected by many decision-makers when they first apply for benefits and throughout their experience of the program. Further, I illustrate how managerial practices, including role specialization, service gap alleviation, and caseload rotation, cement aggregated decision-making within the Ontario Works program.

Chapter 6 demonstrates how the structural features that contribute to aggregated decision-making produce a process of divergence and convergence among workers. As they become aware of their coworkers' professional identities, front-line workers may position themselves in relation to these coworkers and elsewhere on the pro-client social worker to black-and-white efficiency engineer spectrum introduced in Chapter 4. However, I use my empirical data to show how workers also use this same knowledge about their coworkers' professional identities to adjust their performances of operational discretion in relation to their colleagues, who they expect will review their decisions at some point in time. By keeping their colleagues in mind, then, front-line workers further temper their decisions so that they converge within a narrower band of outcomes than their professional identity might suggest. I illustrate how workers craft oral and written versions of their performances that they expect will be agreeable, or at least minimally provocative, to an anticipated future audience of colleagues.

Chapter 7 then considers how new regulatory technologies participate in aggregated decision-making, focusing on the most recent of these programs, the Social Assistance Management System ("SAMS"). It first draws on government reports to show how SAMS was explicitly introduced to address concerns, noted above, that front-line workers were too flexibly interpreting formal discretion nested throughout Ontario Works' statutory framework. It then examines how SAMS regulates front-line workers through procedural and substantive mechanisms. By steering workers to its drop-down menus and data entry fields, and by generating decisions that narrow the formal discretion within Ontario Works' rules, SAMS influences how workers perform operational discretion. When workers spend time wrestling with SAMS for one client, they have less time to adjust their data inputs for other clients, which makes SAMS' decisions effectively final for most benefits recipients. This chapter then shows

how SAMS' regulatory effects flow one-way: unlike layers of human decision-makers, SAMS cannot be reasoned with or convinced to make decisions differently. Instead, caseworkers must "manipulate" client data so that SAMS produces decisions that workers believe will correspond with program norms and their coworkers' contrasting professional identities. As front-line workers view themselves as performing in opposition to "the system" and are redirected away from clients and Ontario Works' legal framework, I suggest that SAMS may have unintended long-term consequences for administrative discretion.

Finally, Chapter 8 reviews my key findings and charts a future research agenda.

Chapter 2

Making Sense of Discretion

“Discretion” is a slippery concept in scholarly and judicial analyses, as it is used in two overlapping but distinguishable senses. To establish a conceptual foundation for the balance of my thesis and to situate my claims within a broader scholarly landscape, this chapter examines how discretion is framed in legal and socio-legal literature and suggests a new nomenclature to navigate the scholarly terrain. One strand of thinking uses discretion to refer to legally authorized decision-making flexibility. I call this meaning of the term “formal discretion,” which refers to the spaces within legislative texts that explicitly or tacitly permit decision-makers to exercise reasoned judgment. The second strand of thinking refers to what I call “operational discretion,” which is best understood as the action that animates legislative frameworks over time for a discrete audience. As I will demonstrate, these two senses of the term are complementary rather than mutually exclusive and shade into one another.

After reviewing these two senses of discretion, this chapter examines formal discretion in greater detail, leaving an in-depth analysis of operational discretion to Chapter 3. Here, I argue that formal discretion can be studied at both micro and macro scales. A micro scale analysis, which focuses on formal discretion within individual legislative provisions, reveals two components in action – explicit, open-ended grants of an option, and tacit grants of decision-making flexibility by way of vague, open-textured language. A macro scale analysis considers how formal discretion functions systemically so that it becomes nested within an entire legal framework when intersecting provisions, which contain explicit and tacit grants, lead to further provisions and policies that contain further grants of formal discretion. To illustrate how formal discretion functions at both scales, I use examples taken from leading Canadian administrative law cases (*Roncarelli*, *Baker*) and from Ontario Works’ legal framework. Ultimately, I demonstrate that formal discretion is so widespread within the legislative scheme governing Ontario Works that it is unfeasible to distinguish discretion from non-discretion. This chapter closes by considering the phenomenon of false taxonomy within Ontario Works’ legal framework, in which matters that are explicitly labelled as discretionary or mandatory are less or more flexible in practice than their labels suggest.

2.1. Senses of Discretion: Formal Discretion, Operational Discretion

It is nearly impossible to study administrative decision-making, even in an apparently rule-bound program such as Ontario Works, without addressing discretion. Yet “discretion” is a slippery word, which legal and socio-legal texts use to loosely refer to many different things.⁴⁵ Its expansive meaning has allowed the term to stand in for an abundance of administrative, political, and practical matters in socio-legal literature. In legal scholarship, it may flexibly refer to technical legislative grants of authority and, if it is bound up with liberal notions of individual freedom and the rule of law, also highlight significant control and justification concerns that affect individual rights.⁴⁶ Today, “discretion” continues to denote both text-based grants of decision-making authority as well as the performance of that authority by administrative officials without clearly distinguishing between the two.⁴⁷ The problem is not that both meanings are drawn on simultaneously, but that legal and socio-legal scholars may fail to differentiate which meaning they are using at particular points in their work. Ultimately, the term’s slipperiness can lead scholars to speak past one another or debate fundamentally different aspects of a perceived problem. To situate my work in relation to broader debates about administrative decision-making, and to set a conceptual basis for the balance of my dissertation, this chapter draws on a wide range of scholarship to show how complementary meanings of the term “discretion” coexist and do slightly different work.

⁴⁵ This is the case despite long-standing critiques that the term is too elusive. For an early example of such critique, see: William H Simon, “Legality, Bureaucracy, and Class in the Welfare System” (1983) 92:7 Yale LJ 1198 at 1223.

⁴⁶ Nicola Lacey, “The Jurisprudence of Discretion: Escaping the Legal Paradigm” in Keith Hawkins, ed, *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 361 [Lacey, “Jurisprudence of Discretion”] at 363-68.

⁴⁷ Canadian scholarship on discretion, including writing on the Supreme Court of Canada’s decision in *Baker*, remains vulnerable to this critique. See generally the collection of essays in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart Publishing, 2004); see also Lorne Sossin, “An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law” (2002) 27 Queen’s LJ 809 [Sossin, “Intimate Approach”]. Cartier is an exception to this general rule, though her conceptualization of discretion as power and discretion as dialogue do not untangle the overbreadth of “discretion” within legal literature; her focus is instead on how appellate court judges have approached the task of substantively reviewing performances of operational discretion by administrative officials. See Geneviève Cartier, *Reconceiving Discretion*, *supra* note 2; see also Geneviève Cartier, “Administrative Discretion as Dialogue: A Response to John Willis (Or, From Theology to Secularization)” (2005) 55:3 University of Toronto Law Journal 629 [Cartier, “Response to Willis”].

I demonstrate how two related, but distinct, “senses”⁴⁸ of discretion are at play within legal scholarship and socio-legal literature: the first, I call “formal discretion;” the second, “operational discretion.” The formal sense of the term uses “discretion” as a noun to reference the decision-making authority that legislative texts redistribute from one branch of government (the legislature) to another (the executive). Because this redistribution can occur explicitly or tacitly, “discretion” according to this conception may be simultaneously tangible and elusive. Operational discretion, by contrast, encompasses distinct performative uses of the term. It conceptualizes discretion as a temporal decision-making process that administrative officials carry out for an audience pursuant to a formal, text-based permission. Rather than being mutually exclusive, these two senses of discretion are complementary; accordingly, my discussion of one will necessarily refer to the other.

2.2. Formal Discretion

Scholars and judges alike use “discretion” in a formal sense: that is, to refer to formal transfers of decision-making authority from the legislature to administrators, which are accomplished, expressly or implicitly, by legislative texts. Formal discretion is sometimes described as a thing that administrative officials possess or as a decision-making space, rooted in legislative texts, in which administrators have some freedom to choose between options. For instance, in *Discretionary Justice*, Davis defined discretion in this way: “A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.”⁴⁹ Not only is discretion, in Davis’ account, a thing that administrative officials can have, but it also exists in relation to constraints that constitute a space in which legal decision-making occurs. While Davis’ reference to the effectiveness of such limits touches on the notion of operational discretion (which I analyze below),⁵⁰ his discussion centres on formal text-based grants of decision-making authority and the decision-making boundaries created by legislative and policy instruments. This focus on formal discretion and its effective

⁴⁸ Here, I allude to Denis J Galligan’s account of the different senses of discretion in *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986) at Chapter 1.

⁴⁹ Davis, *supra* note 8 at 4 [*emphasis added*].

⁵⁰ Chapter 2, section 2.3.

limits is evident in the balance of *Discretionary Justice*, in which Davis grapples with how to eliminate “unnecessary” discretion and regulate the remaining, necessary discretion. He proposed that this regulation might take three forms, two of which involved greater precision in legal texts: confining mechanisms (i.e., specifically-worded written rules); structuring tools (i.e., normative standards, from tightly-worded rules to broader principles); and checking processes (i.e., external reviews of administrative decisions).⁵¹ Instead of the traditional “rule of law” model, which relied on courts to review and remedy administrators’ decisions after the fact, Davis favoured using written rules to guide administrative officials as they made the legal decisions assigned to them by the legislature.⁵² Davis thus proposed that “[t]he general objective should be to go as far as is feasible in making rules that will confine and guide discretion in individual cases.”⁵³ Thus, although Davis posited “discretion” as decision-making power that is created or transferred by legislative texts, he also believed that it could be reined in by more precise, text-based guides.⁵⁴ This reliance on rule-making may be a particularly American solution to the fear of unconstrained administrative officials,⁵⁵ nonetheless, Davis’ approach to

⁵¹ These mechanisms are explored in Chapters 3, 4, and 5 of Davis, *supra* note 8.

⁵² See Carol Harlow, “Law and Public Administration: Convergence and Symbiosis” (2005) 71:2 *International Review of Administrative Sciences* 279 [Harlow, “Convergence”]; Hawkins, “Uses of Discretion,” *supra* note 39 at 16-17; Cane, *supra* note 8 at 66-69.

⁵³ Davis, *supra* note 8 at 221.

⁵⁴ Lacey, “Jurisprudence of Discretion,” *supra* note 46, at 361-62 notes this irony in Davis’ work. Social scientists, of course, would find this approach to be problematic. For instance, see Robert A Kagan, “On Regulatory Inspectorates and Police” in Keith Hawkins & JM Thomas, eds, *Enforcing Regulation* (Boston: Kluwer Nijhoff, 1984) at 58 notes that increasing rules may simply increase defensiveness and rigidity within an administrative agency rather than the “substantive achievement” of agency goals.

⁵⁵ As Harlow and Rawlings note, Davis’ focus on rule-making occurred during a period of time in which the *American Administrative Procedure Act* was top of mind for administrative lawyers in the United States, particularly its requirement for public input into the creation of certain rules: Carol Harlow & Richard Rawlings, *Law and Administration*, 3rd ed (Cambridge: Cambridge University Press, 2009) [Harlow & Rawlings, *Law and Admin 3rd ed*] at 201-02. Rule-making seems to be a persistent preoccupation of American administrative law scholars: see William H Simon, “The Organizational Premises of Administrative Law” (2015) 78:1-2 *Law & Contemp Probs* 61 [Simon, “Organizational Premises”]; see also Mashaw, “Agency Statutory Interpretation,” *supra* note 13, which draws on agency rule-making as its primary empirical examples.

“discretion” remains an influential starting point in many legal and socio-legal studies of discretion,⁵⁶ including those written by Canadian scholars.⁵⁷

Formal discretion is also traceable throughout legal scholarship, from practice-oriented pieces to theoretical explorations that examine the decision-making power or responsibility permitted by a legislative framework.⁵⁸ Legal scholarship may conceive of discretion in this way because of its methodological conventions. Legal scholars tend to study judicial decisions, and part of what judges do in their decisions is identify the authorization (or lack thereof) for the administrative action at issue.⁵⁹ The term “discretion” is occasionally used to reference something found in specific legislative provisions, such as discretionary “loopholes” within statutes,⁶⁰ or a “sphere of autonomy” in which administrators’ decisions are a matter of personal assessment and

⁵⁶ Davis’ definition, from *supra* note 8, is relied on, to some extent, in much theoretical and doctrinal writing on discretion. See Arthurs, “Dicey Business,” *supra* note 12 at 24-25; Cartier, “Sprit of Legality,” *supra* note 2 at 314, 324; Nicola Lacey, “The Path Not Taken: HLA Hart’s Harvard Essay on Discretion” (2013) 127:2 Harv L Rev 636 [Lacey, “Path Not Taken”] at 647. Davis’ definition has also had a lasting influence in socio-legal studies of discretion. See: Baldwin & Hawkins, *supra* note 44; Lorne Sossin, “Boldly Going Where No Law Has Gone Before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance” (2004) 42:3 Osgoode Hall LJ 363 [Sossin, “Call Centres”] at 367; Sainsbury, “Welfare to Work,” *supra* note 11 at 327; Roberto RC Pires, “Beyond the Fear of Discretion: Flexibility, Performance, and Accountability in the Management of Regulatory Bureaucracies” (2011) 5 Regulation & Governance 43 at 44-45; Michael J Piore, “Beyond Markets: Sociology, Street-level Bureaucracy, and the Management of the Public Sector” (2011) 5 Regulation & Governance 145 at 146; Susan Rutz et al, “Enhancing Responsiveness and Consistency: Comparing the Collective Use of Discretion and Discretionary Room at Inspectorates in England and the Netherlands” (2017) 11:1 Regulation & Governance 81 at 83.

⁵⁷ For instance, in a special issue of the Canadian Journal of Law and Society on discretion, Pratt & Sossin offer a definition of discretion that paraphrases Davis’ original definition. They write, “Discretion arises when an official is empowered to exercise public authority and afforded scope to decide how that authority should be exercised in particular circumstances.” See Pratt & Sossin, *supra* note 10 at 301.

⁵⁸ See, for instance, HLA Hart, “Discretion” (2013) 127:2 Harvard L Rev 652 [Hart, “Discretion”] at 655, where Hart sets out a taxonomy of discretion that includes “Express or Avowed” discretion; that is, instances where the legislature explicitly transfers discretionary powers to administrative officials. Hart contrasts these instances, at 656, with “Tacit or Concealed Discretion,” which refers to cases in which discretionary authority is not overtly transferred to an administrative official; rather, the administrator discovers that legal rules do not produce a single correct answer in a particular situation and thus must “exercise” discretion.

⁵⁹ Simon, “Organizational Premises,” *supra* note 55.

⁶⁰ Jocelyn Stacey, “The Environmental Emergency and the Legality of Discretion in Environmental Law” (2016) 52:3 Osgoode Hall LJ 985 at 998; see also at 1002, where she describes discretion as something that is “transferred.”

judgment.⁶¹ Galligan, for instance, writes that “[d]iscretionary authority” is a thing that is “peripheral to the core of settled rules in terms of which legal order is characterized.”⁶² He identifies a central meaning of discretion as text-based, spatial, and quantifiable. Discretion is “a defined area of power”⁶³ or “an express grant of power conferred on officials where determination of the standards according to which power is to be exercised is left largely to them.”⁶⁴ While this definition also hints at discretion’s second, performative sense through its reference to action (i.e., the “determination” of applicable standards), at its core it uses the term in a formal sense to suggest an area in which administrative officials are authorized to make legal decisions, including decisions about the parameters of their decision-making power. Galligan proposes that this sense of discretion – what I call formal discretion – captures the term’s central meaning as a delegation of power that gives officials “scope” – space – to settle how they will go about making a defined set of legal decisions.

Other legal theorists have proposed similar accounts of discretion as a legally permitted decision-making space. Jowell, for instance, suggests that a continuum exists, from “high” to “low” amounts of discretion, with the quantity of discretion each decision-maker possesses varying according to the legal tools (rules and/or standards) that regulate it.⁶⁵ Similarly, in his recently discovered essay on discretion, HLA Hart proposed that, in cases where it is difficult to lay down legal rules in advance, we might describe administrative officials as having “a discretionary jurisdiction” explicitly or implicitly conferred upon them, from the outset, by statute.⁶⁶ Hart thus proposes that we might distinguish between different types of formal discretion, based on whether legislative texts explicitly grant decision-making authority to administrators (which Hart

⁶¹ Galligan, *supra* note 48 at 8.

⁶² *Ibid* at 1.

⁶³ *Ibid* at 21-22.

⁶⁴ *Ibid* at 1.

⁶⁵ Jeffrey L Jowell, “The Legal Control of Discretionary Decision-Making” (1973) Public Law 178 at 201.

⁶⁶ Hart, “Discretion,” *supra* note 58 at 661.

calls express or avowed discretion) or whether their imprecise provisions implicitly grant such authority (which Hart identifies as tacit or concealed discretion).⁶⁷

Formal discretion is also used by appellate court judges as they describe the legislative context at issue in a given administrative law proceeding. For instance, in *Baker v Canada (Minister of Citizenship and Immigration)*, Justice L’Heureux-Dubé indicated that reviewing courts should note how much discretion has been “left” to a decision-maker when deciding how closely or deferentially to review an administrator’s decision-making performance.⁶⁸ In other cases, members of the judiciary have used the term “discretion” to refer to a tangible, quantifiable power transfer, noting where legislation permits “a measure of discretion”⁶⁹ or describing discretion as something that “may be received” by administrators.⁷⁰ Discretion also commonly refers to an authorizing provision easily located within the text of a statute, in a “grant of discretion,”⁷¹ or as a thing that the Minister possesses, “has,” or receives.⁷² Thus, appellate courts reinforce the formal sense of discretion, as a relatively clear and measurable distribution of decision-making power rooted in legislative texts.

While socio-legal scholars less frequently use the formal sense of “discretion,” those with legal training occasionally describe discretion as quantifiable (i.e., “a measure of discretion”), or as an official grant of decision-making power.⁷³ For instance, in their critique of Davis’ work, Baldwin and Hawkins allude to formal discretion when they describe discretion as a substance that statutes and regulatory tools transfer from one area of a legal system to another, like toothpaste

⁶⁷ *Ibid* at 658.

⁶⁸ *Baker*, *supra* note 11 at paras 55-6.

⁶⁹ *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504, per Binnie J (for the Court) at paras 14, 21, 54.

⁷⁰ *Ibid* at para 26.

⁷¹ *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*] at para 24, [2012] 1 SCR 395; see also the Court’s review of humanitarian and compassionate discretion, which locates discretion within legislation in *Kanthisamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthisamy*] at paras 11-24, [2015] 3 SCR 909.

⁷² *Kanthisamy*, *ibid* at paras 1, 10, 11.

⁷³ Hawkins, “Uses of Discretion,” *supra* note 39 at 11-12.

being redistributed within a single tube.⁷⁴ However, as my discussion of operational discretion demonstrates in section 2.2, socio-legal scholars are less concerned with formal discretion and instead tend to focus on its operational sense; that is, how discretion is performed by administrative officials.

Formal discretion supports a particular set of research questions about discretion. Where do we find discretion? How much of it exists? Who is exercising it? These questions, in turn, produce tailored knowledge about discretion. For instance, they have inspired scholarly efforts to catalogue, quantify, and measure discretion, such as Anisman’s enumeration of federal discretionary powers⁷⁵ and Tucker *et al*’s more recent division of employment standards laws into those that confer discretion and those that require judgment.⁷⁶ Further, formal discretion underlies regulation scholars’ suggestion that “discretion,” as an explicit grant of decision-making authority, can be identified and quantified according to the regulatory tools used to constrain it. Coglianesse and Mendelson, for instance, propose that different regulatory forms allow for “distinct amounts” of discretion, with conventional rule-based regulations allowing the least amount of discretion and self-regulation strategies providing regulated subjects with greater discretion.⁷⁷ Likewise, scholarship on social assistance regulation has used formal notions of discretion to propose that an optimal point on a rules-to-discretion scale exists and can be implemented, provided that law-makers better design the written framework governing the program in question.⁷⁸

⁷⁴ *Ibid* at 32, 36. See also Baldwin & Hawkins’ description of discretion as a tube of toothpaste, *supra* note 44.

⁷⁵ Philip Anisman, *A Catalogue of Discretionary Powers in the Revised Statutes of Canada* (Ottawa: Law Reform Commission of Canada, 1975), in which Anisman charted almost 15,000 discretionary provisions in the Revised Statutes of Canada.

⁷⁶ Eric Tucker et al, “Making or Administering Law and Policy? Discretion and Judgment in Employment Standards Enforcement in Ontario” (2016) 47:1 CJLS 65.

⁷⁷ Cary Coglianesse & Evan Mendelson, “Meta-Regulation and Self-Regulation” in Robert Baldwin, Martin Cave & Martin Lodge, eds, *The Oxford Handbook of Regulation* (Oxford: Oxford University Press, 2010) 146 at 146. For a similar description of conventional regulation and its reliance on rules, see: Eugene Bardach & Robert Kagan. *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982).

⁷⁸ Nathalie des Rosiers & Bruce Feldthusen, “Discretion in Social Assistance Legislation” (1992) 8 JL & Soc Pol’y 204.

2.3. Operational Discretion

Legal and socio-legal scholars also use “discretion” to denote a temporal and performative sense of the term, which I call operational discretion. Operational discretion is a counterpart to formal discretion, as it refers to the administrative decision-making processes that occur within the spaces created by text-based authorizations. Yet, operational discretion also does slightly different conceptual work, as it is administrative officials’ performance of operational discretion that animates legislative frameworks over time. While operational discretion is explored in greater detail in Chapter 3, this section sets out how this sense of the term “discretion” complements and diverges from formal discretion in legal and socio-legal scholarship.

Though operational discretion is a central object of study for socio-legal scholars, it also occupies legal analyses of discretion. For instance, as alluded to in the previous section, operational discretion coexists with formal discretion in Davis’ writing. Davis’ approach is arguably more legalistic than socio-legal, given his belief that formal legal mechanisms might restrain and guide discretion.⁷⁹ Yet, his attention to the dynamics of choice and to the effectiveness of various text-based guiding mechanisms demonstrates how two different senses of discretion supplement each other. Davis ultimately focused on the formal legal mechanisms (statutory amendments, regulatory rules, external review) that might constrain performances of operational discretion, but he also indicated an awareness of the complexities of operational discretion as he acknowledged that administrators’ decisions are constituted and guided by “effective limits” beyond formal legal mechanisms.⁸⁰

Operational discretion is also detectable in other doctrinal and theoretical legal analyses of discretion. Across this literature, scholars use “discretion” to suggest both formal grants of decision-making authority to administrators and the process by which administrative officials make such decisions. Authors who conceptualize discretion as a text-based permission also use

⁷⁹ Lacey, “Jurisprudence of Discretion,” *supra* note 46. Though Davis’ study was initially characterized by attention to the effectiveness of limits on discretionary power (which Lacey identifies as a social science matter), his proposal that discretion be confined, structured, and checked, fell back on conventional legal tools such as external review and administrative rules without sustained consideration of the effectiveness of such tools. On this point, see Harlow, “Convergence,” *supra* note 52.

⁸⁰ Davis, *supra* note 8 at 4.

the term to reference something that decision-makers perform or “exercise.” For instance, in her recent study of discretion within environmental law, Stacey frequently uses the term “discretion” to denote formal grants, such as statutory loopholes that leave the executive “unconstrained.” Yet, she also uses the term to suggest performance, or something that administrative officials “exercise.”⁸¹ Similarly, both Galligan and Hart’s theoretical accounts use “discretion” to reference a method of determination. Even Galligan’s “central sense” of discretion, which corresponds with formal discretion, incorporates the idea of a “determination” process left to administrative decision-makers.⁸² Accordingly, Galligan proposes a second type of discretion that arises within and between rules, and which is observable in how rules are applied.⁸³ Hart’s essay on discretion also discusses operational discretion, though he more carefully distinguishes between formal and operational senses of the term. As noted in the previous section, Hart differentiates between two types of formal discretion according to the mechanism by which a legislative text transfers decision-making authority to administrative officials (i.e., an express authorizing statement versus an implicit grant of authority). At the same time, his overarching definition of discretion suggests that the term has a concurrent performative meaning. Hart proposes that discretion is a special form of deliberative choice exercised in relation to constraints on possible decisions; it is a process of reasoned judgment that falls somewhere between freedom to choose according to personal whim and decisions that are governed by clear rules.⁸⁴

Likewise, appellate courts conceive of discretion as an action or performance even as they use the term to refer to formally authorized decision-making spaces. In *Baker*, for instance, Justice L’Heureux-Dubé depicted discretion as authority that legislatures transfer to administrative officials by statute,⁸⁵ and as a space where the law does not dictate a specific outcome, or where

⁸¹ See, for instance, Stacey, *supra* note 60 at 999, 1000, 1003.

⁸² Galligan, *supra* note 48 at 1.

⁸³ *Ibid*, Chapter 1.

⁸⁴ Hart, “Discretion,” *supra* note 58 at 657-58.

⁸⁵ Reviewing courts should take into account how much discretion is “left” to an administrative decision-maker when deciding on the appropriate standard of review: *Baker*, *supra* note 11 at paras 55-6.

the decision-maker is given a choice of options within a statutorily imposed set of boundaries.⁸⁶ While invoking formal discretion, she also described discretion as operational, a process performed within a governing framework of statutes, societal values, and legal principles. She writes, “discretion must be *exercised* in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.”⁸⁷ This conception of discretion, as “exercised” within a particular legal and institutional context, permeates Canadian appellate courts’ accounts of discretion and complements their references to the formal sense of the term. Even when courts refer to its formal sense, they also use “discretion” operationally to signal an action⁸⁸ that must not be unduly restricted by too-narrow policies.⁸⁹ For instance, Justice Binnie describes discretion’s temporal, performative elements in his concurring reasons in *Dunsmuir*. He notes that “administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is *no* single ‘correct’ outcome.”⁹⁰ This portrayal of “discretion” suggests operational discretion is dynamic, and that its performance (or “exercise”) may produce a range of results.

Operational discretion also appears throughout socio-legal literature. For instance, in his analysis in *The Uses of Discretion*, Hawkins describes discretion as an operation, method, or transformative process, as “the means by which law [...] is translated into action.” Though Hawkins also uses the formal sense of the term, stating that discretion “might be regarded as the space, as it were, between legal rules in which actors may exercise choice,” he connects this authorizing space to the performance that operationalizes it. Hawkins writes that “[i]t is in the everyday discretionary behaviour of judges, public officials, lawyers, and others that the legal

⁸⁶ *Ibid* at para 52.

⁸⁷ *Ibid* at para 56 [*emphasis added*].

⁸⁸ *Doré*, *supra* note 71, considered whether administrative decision-makers exercised their discretion in light of constitutional guarantees of freedom of expression, at paras 26, 33, 35, 42, 45.

⁸⁹ See *Kanhasamy*, *supra* note 71.

⁹⁰ *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], [2008] 1 SCR 190 per Binnie J at para 146 [*emphasis in original*].

system distributes its burdens and benefits, provides answers to questions, and solutions to problems.”⁹¹ Accordingly, operational discretion suggests that written rules are not the only source of information about discretion’s form and function; rather, we can learn from studying the performance of and relationship between administrative decision-makers and others who animate legislative frameworks.

Other socio-legal scholars study discretion primarily as a temporal, performance-based phenomenon that occurs in relation *to* regulatory forces, rather than in its formal sense. Many use “discretion” to loosely suggest operational discretion and examine how it is performed, in which circumstances, and with which methods. While some scholars may frame discretion so broadly that it risks losing its meaning,⁹² ultimately a critical mass of socio-legal work uses the term to refer to a temporally-specific performance that animates formal written laws. This work expects that operational discretion is performed in relation to legal, managerial, and social constraints. “Discretion” is, in other words, regulated decision-making. Though operational discretion may be guided by a combination of legal and managerial rules, and social relations between coworkers, supervisors, and service users, socio-legal scholars approach it as a dynamic process that administrative officials “use” or “exercise”⁹³ to tailor and mobilize institutional mandates.⁹⁴ Because these scholars conceive of “discretion” as a means by which legal-managerial rules and contextual facts are brought into conversation with one another, studying discretion requires

⁹¹ Hawkins, “Uses of Discretion,” *supra* note 39 at 11.

⁹² For instance, McBarnet’s earlier work approaches discretion as a method for managing the lack of fit between legal rhetoric and everyday reality: Doreen McBarnet, *Conviction: Law, the State, and the Construction of Justice* (London: Macmillan, 1981). Meanwhile, Sainsbury suggests that performances of discretion can be placed on a continuum of rule-filled decision-making processes: Roy Sainsbury, “Administrative Justice: Discretion and Procedure in Social Security Decision-Making” in Keith Hawkins, ed, *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 295 [Sainsbury, “Discretion and Procedure”] at 296-97.

⁹³ Vic Satzewich, “Visa Officers as Gatekeepers of a State’s Borders: The Social Determinants of Discretion in Spousal Sponsorship Cases in Canada” (2014) 40:9 *Journal of Ethnic & Migration Studies* 1450 at 1451-52; Joe Soss, Richard C Fording and Sanford F Schram. *Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race*. (Chicago: University of Chicago Press, 2011) [Soss, Fording & Schram, *Disciplining the Poor*] at 233, 235, 251, 258.

⁹⁴ Discretion as a tailoring and mobilizing process is described by Celeste Watkins-Hayes, *The New Welfare Bureaucrats: Entanglements of Race, Class, and Policy Reform* (Chicago: University of Chicago Press, 2009) at 54-55.

researchers to do more than locate and analyze explicit or implicit transfers of decision-making authority within legislative texts; it also requires that they examine the method by which administrative officials interpret legislative frameworks and individuals' circumstances to bring laws to life.

Operational discretion thus prompts a different set of research questions. While a formal sense of discretion has inspired scholars to locate, measure, and classify the authority-transferring provisions within legislative frameworks, an operational sense of the term prompts researchers to explore the qualities of discretion's performance. How is discretion performed? By whom? With what effects? These different types of questions produce varied knowledge about discretion, framed broadly, which ultimately enriches and supplements the knowledge generated by scholars who study discretion in its formal sense. How administrative agencies encourage flexibility and compliance among front-line workers who perform operational discretion tells us something about law's inner workings, as the bounded flexibility that "discretion" – in both senses – permits is central to how law functions.⁹⁵ Legal scholars may glean useful insights from those who study how operational discretion is performed within administrative agencies. As later chapters will demonstrate, this vein of research reveals useful information about how reasonableness functions in practice.

Because formal discretion is a fundamental component of the broader concept of "discretion," the balance of this chapter examines how legislative frameworks redistribute decision-making authority. An analysis of Ontario Works' written legal framework and leading appellate court decisions on discretion shows that formal discretion is better understood as existing at two different scales: the first is a micro, or text-based, scale, where decision-making authority is expressly or tacitly transferred by the wording of specific legislative provisions; the second scale is a macro, or structural, scale. Here, grants of decision-making authority are nested throughout the architecture of a legislative scheme, which disperses and embeds discretion-granting provisions across layers of statutes, regulations, policies, and other instruments. Below, I

⁹⁵ John Bell, "Discretionary Decision-Making: A Jurisprudential View" in Keith Hawkins, ed, *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 89 at 92.

examine both scales of formal discretion and demonstrate how they function in the context of the Ontario Works program.

2.4. Two Scales of Formal Discretion: Legislative Text, Legislative Structure

When scholars analyze discretion in its formal sense, they may discuss how legislative provisions transfer decision-making authority and, through this transfer, empower administrative officials to perform operational discretion. This analysis tends to focus on formal discretion at the micro scale of individual legislative provisions; the broader macro, or systemic, scale at which formal discretion becomes nested throughout a legislative scheme is rarely studied. In rule-bound programs such as Ontario Works, however, this systemic scale is central to how “discretion,” broadly speaking, functions. This section demonstrates how formal discretion can be located at these two different scales in the Ontario Works program. First, I show how formal discretion operates at a micro scale, within the text of discrete legislative provisions that explicitly or tacitly grant decision-makers decision-making space. Then, I illustrate how formal discretion also functions at a macro scale, within the structure of a legislative framework that disperses interconnected discretion-granting provisions across an enabling statute, regulations, and policies to such a degree that it becomes unfeasible to distinguish between discretion and non-discretion at any one point.

These two scales of formal discretion shade into one another, yet each has distinct characteristics. At the micro scale of legislative provisions, formal discretion is incorporated within texts through two mechanisms: first, through explicit, open-ended legislative provisions that grant decision-makers an option (mapping onto Hart’s notion of express or avowed discretion); and, second, through broad, open-textured language that tacitly permits operational discretion by allowing for multiple interpretations (roughly corresponding with Hart’s concept of tacit or concealed discretion).⁹⁶ A macro scale analysis reveals that formal discretion becomes systemically embedded throughout a legal framework by virtue of that framework’s design, and characterizes contemporary rule-bound benefits programs, including Ontario Works. My concept

⁹⁶ Hart, “Discretion,” *supra* note 58; see also HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) [Hart, *Concept of Law*].

of formal discretion at a macro scale expands on Hart's concepts in ways that he could not have anticipated; at this systemic level, formal discretion disperses and links a byzantine array of expressly open-ended and tacitly open-textured provisions, essentially nesting formal grants of decision-making space throughout a legislative scheme. This macro scale reveals how the many rules introduced to guide administrators' performance of operational discretion may exponentially expand the options available to administrative officials, creating rather than constraining interpretive opportunities, contrary to what Davis may have anticipated.

By undertaking an additional macro scale analysis of formal discretion, I offer system-level insights into how "discretion" functions in highly regulated administrative contexts, which may enrich more traditional legal scholarship. Such scholarship typically examines formal discretion at the micro scale of individual legislative provisions, particularly examples that use easily-recognizable key phrases (i.e., the Minister may do X; the administrator shall do Y if an applicant fails to make reasonable efforts to do Z). As a result, the systematic nesting of formal discretion throughout legislative frameworks remains relatively unexplored. Yet, this nesting phenomenon is vital to how rule-intensive legal frameworks function. Its relative absence from conventional legal scholarship should not be taken to suggest that it, or a macro scale analysis, is less significant than formal discretion at the micro scale of individual legislative provisions; instead, it may be an unintended consequence of legal scholars' doctrinal methodologies. As I note elsewhere, by relying on appellate court judgments and the statutory provisions at issue in such judgements as primary data in their analyses of discretion, legal scholars inadvertently focus on a smaller set of discretion-transferring provisions. Consequently, their work may highlight the micro, statute-based scale of formal discretion while leaving the macro, system-wide scale relatively underexamined. Shifting our analysis to this macro scale, I suggest, allows us to consider how legislative frameworks as a whole may transfer and disperse decision-making authority. This shift in emphasis draws attention to how vague terms become nested within the regulatory and policy provisions that cascade beneath a single explicit or tacit grant of formal discretion, which ultimately enriches our knowledge of how formal discretion functions. By analyzing formal discretion at these distinct macro and micro scales, then, I show how they together disperse and entrench discretion-permitting spaces across a legislative framework.

One implication of this analysis is that it should prompt us to reconsider whether it is possible for legislators, administrators, or scholars to locate an optimum point between broad, formal

transfers of decision-making authority and specific rules that regulate the performance of that authority. The general idea that “discretion” (in its formal and operational senses) can and should be balanced against guiding rules repeats across legal scholarship, as scholars propose that an appropriate balance can be achieved between prescriptive regulation (telling administrative officials what to do and when to do it) and decision-making freedom (allowing them space to tailor their decisions to evolving circumstances). For instance, Davis proposed that legislators and administrators must find “the optimum point on the rule-to-discretion scale”⁹⁷ as they go about structuring “discretion” with written rules. Similarly, in their recommended reforms to Ontario’s social assistance programs, des Rosiers and Feldthusen suggested that “it is useful to think in terms of a continuum between discretion and rule precision, and to think of more or less discretion, more or less precision. In practical terms, the goal is to attempt to strike the correct balance between discretion and rule precision.”⁹⁸ Yet, a rule-to-discretion scale seems unhelpful because the simple balancing idea, which weighs rules against discretion, does not fully capture the relationship between text-based legal frameworks, the range of formal discretion contained within such frameworks, and the performances of operational discretion permitted by these frameworks. As the balance of this chapter will suggest, attempts to minimize “discretion” by finding an ideal balance of written rules and decision-making freedom may simply disperse formal discretion more completely throughout a legislative framework.

2.4.1. Micro Scale: Discretion in the Wording of Legislative Provisions

Formal discretion exists at the micro scale of legislative provisions. At this scale, formal discretion is observable in the wording of particular statutory rules, phrases, and terms.⁹⁹ These text-based permissions may include open-ended terms that explicitly grant administrators a decision-making option (i.e., the Minister may do X), vague, open-textured phrases that tacitly grant decision-making flexibility (i.e., reasonable efforts; compassionate and humanitarian

⁹⁷ Davis, *supra* note 8 at 15.

⁹⁸ des Rosiers & Feldthusen, *supra* note 78 at 206.

⁹⁹ Marianne Constable, *Our Word is Our Bond: How Legal Speech Acts* (Stanford, CA: Stanford University Press, 2014). This preoccupation with the precise relationship between law and language is not new, and can be traced to Hart, *Concept of Law*, *supra* note 96.

grounds), or some combination of the two (i.e., the administrator may provide Y if satisfied that an applicant cannot meet their own basic needs and that this will endanger the applicant's health). Below, I explore both explicit and tacit examples of this micro scale of formal discretion.

Explicit grants of decision-making authority, by way of open-ended permissions to choose, incorporate few express constraints on the administrative officials in question.¹⁰⁰ In Hart's taxonomy, they correspond with express or avowed discretion: legislative provisions that do not specify in advance how operational discretion should be performed.¹⁰¹ These provisions will be immediately recognizable to legal scholars, and are relatively easy for administrative outsiders to locate because of their use of standard key phrases. Open-ended terms and phrases, such as "the Director may do X," are commonly employed by statutes and regulations to signal when the legislature is empowering administrative officials to perform operational discretion. This wording incorporates few to no conditions on the use of the authority granted to a particular administrative official. The explicitness of this variation of formal discretion at the micro scale lies in the term "may," which overtly transfers responsibility, or grants an option, to administrators to make a decision and take some action. As I will demonstrate below, other terms may texture this explicit transfer; such terms guide, but do not eliminate, the formal grant of discretion.

Because of their open-ended phrasing, explicit grants of discretion may appear to pose the greatest risk to the rule of law. Their relative lack of conditions may give the outward impression that they empower administrators to perform operational discretion free from the constraints imposed by a more detailed set of legislative and regulatory provisions. Accordingly, these circumstances may seem most likely to produce arbitrary results or to threaten the rule of law.¹⁰² Because explicit grants are also typically at issue in judicial review proceedings, they may be top

¹⁰⁰ Of course, administrative law doctrine tells us that these officials would still be subject to a number of legal principles. See L'Heureux-Dubé J in *Baker*, *supra* note 11, at para 53.

¹⁰¹ Hart, "Discretion," *supra* note 58 at 655, 661.

¹⁰² This was certainly the case in *Davis*, *supra* note 8. It is also characteristic of liberal notions of the rule of law: Lacey, "Jurisprudence of Discretion," *supra* note 46.

of mind when legal scholars, lawyers, and judges discuss administrative “discretion” and how it might be better regulated.¹⁰³

A familiar example of explicit, open-ended granting language can be found in the legislative provision at issue in the landmark case of *Roncarelli v Duplessis*.¹⁰⁴ This provision typifies the express examples of formal discretion that legal scholars may have in mind when writing about administrative “discretion” more broadly. In *Roncarelli*, the following open-ended section of Quebec’s alcohol control legislation was at issue:

The Commission *may cancel any permit at its discretion*.¹⁰⁵

[emphasis added]

In this statutory provision, the provincial legislature expressly grants the Quebec Liquor Commission with an option, empowering Commission officials to cancel any permit, including a permit to sell alcohol, “at [their] discretion.” It uses open-ended key phrases – “may cancel any permit” and “at its discretion” – to mark this transfer of decision-making and to signal to those working at and behind the front-lines of the Liquor Commission that the legislature has afforded them space in which to perform operational discretion. This explicit grant is open-ended, as the legislature has specified none of the conditions relevant to cancelling a permit. These matters are instead left to be determined by Commission members.

In addition to explicit, open-ended grants of an option, legislative provisions may tacitly grant decision-making flexibility. These tacit grants use broad, open-textured language, and it is their vague, imprecise terms and phrasing that permits administrative officials to perform operational discretion as they animate the legislative framework in question. My suggestion that open-

¹⁰³ The influence of open-ended grants is apparent in Geneviève Cartier, “Administrative Discretion: Between Exercising Power and Conducting Dialogue” in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery, 2013) 381 at 382; Mary Liston, “Witnessing Arbitrariness: *Roncarelli v Duplessis* Fifty Years On” (2010) 55:3 McGill LJ 689 at 696-97; Matthew Lewans, “Deference and Reasonableness Since *Dunsmuir*” (2012) 38:1 Queen’s LJ 59.

¹⁰⁴ *Roncarelli*, *supra* note 4.

¹⁰⁵ *An Act Respecting Alcoholic Liquor*, RSW 1941, c255, s 35.

textured language authorizes administrators to perform operational discretion roughly corresponds with Hart's concept of tacit or concealed discretion. Hart reasoned that when apparently clear legislative rules fail to supply an answer to a given dilemma, thus revealing vagueness in their wording, operational discretion may be required out of sheer necessity. In these cases, the lack of fit between rules and facts compels administrators to use their own reasoned judgment to guide how they perform operational discretion and reach a decision.¹⁰⁶ Like explicit grants of decision-making options, tacit grants are commonly at issue in leading appellate court decisions, and are thus relatively well-examined in legal scholarship on discretion.¹⁰⁷

As noted above, tacit, open-textured language may coexist with explicit, open-ended grants in a single legislative provision, or it may function on its own. When tacit and explicit grants appear together (i.e., the Minister may do X if satisfied that compassionate or humanitarian grounds exist), they may imply that an administrative official has been constrained, for instance, by listing factors that an individual must consider as they exercise discretion pursuant to the explicit grant. In the above example, the explicit grant ("may") thus appears to be limited by the requirement that an official determine whether compassionate or humanitarian grounds exist. However, the phrase "compassionate or humanitarian" grounds still permits the administrator a margin of manoeuvre. Tacit grants also exist apart from explicit ones, as in legislative provisions that use mandatory terms such as "shall," (i.e., the administrator shall cancel benefits if satisfied that a client has failed to make reasonable efforts to obtain employment). Here, the tacit grant inserts vagueness in a legislative provision that might appear, on a quick reading, to include none. In either case, whether tacit grants appear alone or together with explicitly open-ended language, by increasing the number of words that administrators must interpret they may also expand the vague, open-textured language in a particular legislative provision and overall interpretive room as a result.

¹⁰⁶ Hart, "Discretion," *supra* note 58 at 661-62.

¹⁰⁷ Dyzenhaus & Fox-Decent, *supra* note 4 at 223-24.

An illustrative example of a tacit grant of decision-making flexibility can be found in the regulatory provision at issue in *Baker*. This provision combined an explicit, open-ended grant of an option with vague, open-textured language that broadly authorized immigration officials to perform operational discretion, subject to one constraint:

The Minister is *hereby authorized to exempt any person* from any regulation made under subsection 114(1) of the Act *or otherwise facilitate the admission to Canada of any person* where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated *owing to the existence of compassionate or humanitarian considerations*.¹⁰⁸

[emphasis added]

In this regulatory provision, the Minister for Citizenship and Immigration, and the Ministry's immigration officials, were explicitly granted wide permission (through the phrase "hereby authorized") to exempt a permanent residency applicant from the rules that would normally apply to their application for permanent residency. Additionally, administrative officials were overtly granted broad authority to facilitate any applicant's admission into Canada. These explicit grants were qualified by a tacit grant: namely, the condition that the Minister must be satisfied that humanitarian or compassionate grounds existed so as to justify the Minister's use of the exemption and facilitation powers. Though it may appear to constrain immigration officials, this condition ("the existence of compassionate or humanitarian considerations") tacitly permits decision-making flexibility, as it signals to those working at the Ministry of Citizenship and Immigration that the legislature has granted them broad latitude to perform operational discretion as they determine whether compassionate or humanitarian considerations exist.

Examples of both explicit and tacit variations of formal discretion can be found within Ontario Works' legislative framework. Some provisions, such as those detailing the provision of emergency assistance, combine explicit and tacit grants. Others, such as the rules governing when an individual's benefits may be cancelled or reduced, include only tacit grants. To give a sense of this diversity, both of these examples are explored briefly below.

¹⁰⁸ *Immigration Regulations*, 1978, SOR/78-172, as amended by SOR/93-44, s 2.1.

The provisions detailing emergency assistance combine explicit, open-ended language with open-textured terms that tacitly permit decision-making flexibility. The *OWA* states that emergency assistance “*may be provided* in accordance with the regulations to or for the benefit of a person who meets the prescribed conditions.”¹⁰⁹ The Regulation further details the broad formal discretion granted to “the administrator” (a term that includes municipal social service managers, supervisors, and caseworkers):

56. (2) The administrator *may* provide emergency assistance under this section *if the administrator is satisfied* that,

- (a) the applicant *does not have enough money or assets* and is *unable to obtain credit necessary to provide for the basic needs and shelter needs* for his or her benefit unit; and
- (b) a failure to provide the emergency assistance *will result in danger to the physical health* of a member of the benefit unit *or in one or more dependent children being unable to continue to reside with his or her parent* who has requested the emergency assistance.¹¹⁰

[*emphasis added*]

These provisions resemble the combination of explicit and tacit grants that were at issue in *Baker*. Both provisions combine express grants of an option (the Minister was “hereby authorized” in the immigration regulation considered in *Baker*, while in the above Ontario Works regulation, the administrator “may” provide emergency assistance) with vague language that tacitly permits flexibility even as it purports to guide decision-makers. Unlike the provision at issue in *Baker*, which included a relatively succinct tacit grant (satisfaction that “compassionate or humanitarian considerations” existed), the emergency assistance provision includes numerous open-textured phrases that multiply the interpretive spaces available to front-line workers. These phrases place conditions on the workers who may grant emergency assistance. For instance, they require these officials to satisfy themselves, first, that an emergency assistance applicant is unable to pay for their basic needs and, second, that this lack of resources will endanger the

¹⁰⁹ *OWA*, s 9 [*emphasis added*].

¹¹⁰ OReg 134/98, s 56(2). Section 56(1) stipulates that front-line workers are empowered to grant emergency assistance benefits for “a period of not more than one-half of a month,” after which point emergency assistance will only be paid if the individual who has requested assistance submits a standard Ontario Works application.

applicant or their family members' health or place their children at risk of apprehension by child welfare authorities.¹¹¹ However, these conditions also incorporate many vague terms into the provisions governing emergency assistance, which require further interpretation (i.e. establishing that an applicant “does not have enough money or assets” and is “unable to obtain credit necessary to provide for ... basic needs and shelter needs;” verifying that there will be “danger to the physical health” of an applicant or their family members; finding that a failure to provide emergency assistance “will result in ... dependent children being unable to continue to reside” with their parents). In this way, both the provision at issue in *Baker* and Ontario Works' emergency assistance provisions use recognizably broad phrases that permit administrative officials to exercise discretion. Further, both provisions exempt an individual applicant from the rules and related waiting periods that would otherwise apply to them, whether as applicants for benefits (in Ontario Works) or for permanent residency status (in the Citizenship and Immigration scheme at issue in *Baker*).

Tacit permissions may also function on their own in provisions that impose “reasonable efforts” requirements, such as those that require Ontario Works recipients to search for paid employment while receiving benefits. Unlike the emergency assistance provisions examined above, these provisions include mandatory language stating that front-line workers “shall cancel or reduce” an Ontario Works recipient's benefits if that individual fails to make “reasonable efforts” to seek and maintain employment “for which he or she is physically capable,” or to participate in activities such as job training sessions.¹¹² Ultimately, the vagueness of the “reasonable efforts” standard tacitly authorizes decision-makers to perform operational discretion as they determine whether a particular individual's attempts to secure paid employment are sufficient to meet the standard. Though such tacit grants of decision-making flexibility impose some constraints, because they use vague or open-textured terms they maintain a wide space in which administrative officials may perform operational discretion.

¹¹¹ This outcome is signaled by the regulatory provision's elusive reference to dependent children being unable to continue to reside with their parents.

¹¹² OReg 134/98, s 28, 29, 33. For further discussion of these provisions, see Chapter 4, section 4.2.4.

2.4.2. Macro Scale: Discretion Nested Within Legislative Frameworks

In addition to operating at the scale of individual legislative provisions, formal discretion functions at a macro scale across a legislative framework's structure. Considering formal discretion at this scale requires that we take a systemic perspective that uses the statutory scheme as a whole, rather than individual legislative provisions, as our unit of analysis. Because of the ambiguities inherent to language, formal discretion is pervasive in any legislative framework.¹¹³ Yet, the legal architecture of rule-bound programs such as Ontario Works reveals how thoroughly the micro instances of formal discretion – the explicit and tacit grants of authority examined above – can become entrenched throughout the framework as a whole. I describe this phenomenon as formal discretion being “nested” within a wider legislative framework. As this section demonstrates, when examined at the scale of a legislative framework, we can see how formal discretion is fractured, multiplied, and embedded in layers of statutes, regulations, and policies that cross-reference one another. Although these numerous provisions may aim to guide how administrative officials animate the micro scale examples of formal discretion within individual legislative provisions, they paradoxically have a multiplicative effect on formal discretion's conferral through open-ended choices between options and vague, open-textured language. The macro scale analysis undertaken in this section reveals that formal discretion can never be fully eliminated, particularly in a rule-bound program such as Ontario Works. Though it may be guided to a certain degree by written rules, it also exponentially increases as numerous rules intersect, overlap, and cross-reference one another, each explicitly or tacitly permitting some degree of decision-making flexibility. To fully appreciate this macro, systemic scale of formal discretion, we must grasp how at any one point within a legislative scheme formal discretion nests among layers of prior, subsequent, and parallel provisions, each of which includes various explicit, open-ended and tacit, open-textured flexibility-permitting phrases. Ultimately, these findings complicate the usual method of isolating and distinguishing between discretion or no discretion within individual legislative provisions. Taking Ontario Works'

¹¹³ Hart, *Concept of Law*, *supra* note 96, especially Chapter 7; See Constable, *supra* note 99, especially Chapters 1-3. Constable goes further than Hart to propose that we understand law not merely as containing the imperfections of language, but law *as* language. She argues that, like language, law may be prone to uncertainty as well as error, but that because it relies on another to “hear” it, law is also interactive, transactional, and social.

legislative scheme as a whole, rather than examining particular provisions separate from one another, reveals how vast formal discretion can become in rule-bound programs.

This analysis of how formal discretion is nested within a legislative structure enriches not only socio-legal and theoretical accounts of the relationship between formal and operational discretion, but also debates about whether rules, standards, or some combination of the two best regulate front-line workers' performance of operational discretion. In terms of legal theory, my notion of nested formal discretion builds on Hart's analysis of how legislative texts confer the authority to make discretionary decisions on administrative officials. Though my provision-based analysis of explicit and tacit grants of formal discretion generally accords with Hart's notions of express and tacit discretion, the idea that formal discretion also becomes structurally embedded within a legislative framework enriches and extends Hart's account to highly regulated contemporary contexts, such as the Ontario Works program, that were less common in Hart's time.¹¹⁴ As the rest of this section will show, the nesting phenomenon I identify within the Ontario Works program builds on, but is distinct from, Hart's micro scale categories of express and tacit discretion. The vast complexity of this macro scale of formal discretion is trickier to capture as compared to its text-based explicit and tacit grants, which can generally be studied by reviewing particular legislative provisions.

As for the rules-versus-standards debate, my analysis of formal discretion as nested throughout a legislative scheme may require that we reassess how and why scholars distinguish between rules and standards, especially in highly regulated social benefits programs. Scholarly debates about rules and standards typically centre on which of the two – precise written rules or broadly-worded standards – are better decision-making guides in specific contexts. The actors at issue in this literature vary from enforcement officers tasked with implementing health and safety, environmental, or criminal justice regimes to members of the public, and a commonly addressed question is whether rules, standards, or some combination will best guide the subject actor(s). Rules are typically distinguished from standards based on their volume and their precision: rules

¹¹⁴ During his mid-1950s visit to Harvard Law School, American legislative schemes were characterized by wider, more open-ended grants of formal discretion rather than the highly layered, technocratic legal frameworks that characterize contemporary social benefits programs. See: Geoffrey C Shaw, "HLA Hart's Lost Essay: Discretion and the Legal Process School" (2013) 127:2 Harv L Rev 666.

are numerous and narrowly-worded, while standards are fewer and broadly-framed. While this distinction may correspond with some administrative contexts, the phenomenon of systemic, nested formal discretion, which layers open-ended and open-textured terms throughout seemingly-clear rules, may unsettle both volume and precision as defining characteristics of rules. I will expand on these theoretical contributions further below.

Nested discretion is produced by three interrelated factors: first, explicit and tacit grants of formal discretion within individual legislative provisions, which the previous section examined; second, a massive body of rules that further specify the meaning and limits of explicit and tacit grants; and, third, cross-references among these numerous rules so that one provision leads to many more, thus nesting and layering formal discretion at the systemic level. As socio-legal scholars and some legal theorists have noted, legislative frameworks almost always contain vagueness because of the open texture of language and the multiple, indeterminate purposes that underlie statutory schemes.¹¹⁵ As discussed in the preceding section, legislative provisions may explicitly grant decision-making flexibility, but in many cases such provisions also include “open-textured and flexible”¹¹⁶ phrases that tacitly permit formal discretion. Additionally, as the previous section illustrated, even those provisions that use mandatory terms (i.e., “the administrator shall”) may contain discretion-authorizing language, especially if the mandatory term depends on a series of conditions that include vague, open-textured phrases common to tacit grants of formal discretion. Likewise, seemingly-mandatory provisions may have discretion-permitting language layered beneath them, in cross-referenced regulatory and policy provisions that each include their own tacit grants of formal discretion (i.e., by using terms such as “reasonable efforts;” “necessary;” “essential;” “exceptional”).¹¹⁷ The meaning of these terms cannot be settled by looking to the underlying aim of the statutory scheme in question because

¹¹⁵ Some of these points are from Hart, *Concept of Law*, *supra* note 52, but are also traceable throughout Galligan, *supra* note 48. See also Timothy O Endicott, “Linguistic Indeterminacy” (1996) 16 *Oxford J Leg Stud* 667, who notes that vagueness cannot be eliminated from legal rules because law governs complex subjects that change over time; given that task, precise limits in legal rules are therefore unwieldy; Evelyn Z Brodtkin, “Inside the Welfare Contract: Discretion and Accountability in State Welfare Administration” (1997) 71:1 *Social Service Review* 1 [Brodtkin, “Inside Welfare Contract”].

¹¹⁶ Harlow & Rawlings, *Law and Admin 3rd ed*, *supra* note 55 at 205.

¹¹⁷ These examples are taken from Harlow & Rawlings, *Law and Admin 1st ed*, *supra* note 9 at 617.

legislative purpose is rarely unified. As legal and socio-legal scholars have demonstrated elsewhere, legislative frameworks are often created to achieve plural and divergent goals, especially those frameworks that govern social benefits programs, and these contrary goals may manifest in the open-textured provisions of such schemes.¹¹⁸ Rather than provide decisive guidance to administrative officials, legislators task officials with ensuring that benefits programs function *despite* their divergent goals.¹¹⁹ Thus, legislative frameworks may remain “as silent as possible” on particularly complex or controversial matters,¹²⁰ leaving administrators to decide these issues at the front lines. The Ontario Works program bears the mark of this legislative practice. As Chapter 4 will explore, my research participants regularly explained how they would balance and reconcile conflicting objectives, such as assisting vulnerable individuals, promoting self-sufficiency, and minimizing government spending, among others, while performing operational discretion.

In addition to individual, provision-based grants of decision-making freedom, nested discretion depends on the multiplicity of these written rules. Some scholars have called this practice “legalization”¹²¹ or “juridification,”¹²² and it is often a practical response to demands that explicit and tacit grants of formal discretion be structured, as advocates tend to propose the introduction of further rules to guide those officials tasked with operationalizing formal discretion.¹²³ Legalization characterizes contemporary social programs, such as Ontario

¹¹⁸ Sainsbury, “Discretion and Procedure,” *supra* note 92 at 188. Evelyn Z Brodtkin, “Accountability in Street-Level Organizations” (2008) 31:3 *International Journal of Public Administration* 317 [Brodtkin, “Accountability in SLOs”]

¹¹⁹ Baldwin & Hawkins, *supra* note 44 at 574; Jerry L Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven: Yale University Press, 1983) [Mashaw, *Bureaucratic Justice*].

¹²⁰ Hawkins, “The Uses of Discretion,” *supra* note 39 at 12.

¹²¹ Jowell, *Law and Bureaucracy*, *supra* note 38.

¹²² Martin Partington, “The Juridification of Social Welfare in Britain” in Gunther Teubner, ed, *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Berlin, New York: de Gruyter, 1987) 419.

¹²³ While some of these calls may be inspired by Davis’ work, many more recent calls to structure broad formal discretion stem from practical concerns that officials will abuse formal discretion; in these cases, more numerous, precise guiding rules are viewed as a practical solution to the risk that administrative officials will exercise discretion in ways that are perceived as being contrary to public policy. See, for instance, the debates about police street check practices across Ontario detailed by Gillis & Rankin, *supra* note 5.

Works,¹²⁴ which use a vast number of rules to guide front-line workers.¹²⁵ Beyond structuring social benefits decisions, some scholars have suggested that these numerous rules also serve to discourage those in need of financial assistance from applying for benefits.¹²⁶ Ironically, additional rules may also embed explicit and tacit grants more thoroughly within a legal framework, as detailed rules become layered beneath the open-ended and open-textured provisions they embellish.

This leads to the third factor that nested discretion relies on, which is the interconnectedness between these multiple rules. Thus, nested discretion is not just produced by the volume of rules, but by the relationship between them, as one rule refers to another, and that rule in turn leads to a third provision, and so on. This third factor gives formal discretion, analyzed at the macro scale, its “nested” quality: when considered at a systemic level, formal discretion resembles a series of nesting dolls. Although a statutory provision may use mandatory terms (i.e., “the administrator shall”), giving the appearance that the opportunities for operational discretion have been eliminated, the overall design of the legal framework, including the regulations and policies that further detail the meaning of a particular statutory provision, functions so that each additional rule or provision “opens up,” as it is read and applied, to reveal multiple additional explicit and tacit grants of formal discretion and new cross-references to other rules. Because the vagueness inherent to language increases when written rules overlap, intersect, and diverge, formal

¹²⁴ Ontario, Commission for the Review of Social Assistance in Ontario, *A Discussion Paper: Issues and Ideas* (Toronto: Ministry of Community and Social Services, 2011), which at 25 cites Deb Matthews, “Report to the Honourable Sandra Pupatello, Minister of Community & Social Services: Review of the Employment Assistance Programs in Ontario Works & Ontario Disability Program” (Toronto: Queen’s Printer, 2004). *Brighter Prospects*, *supra* note 23 recommended a reduction in the number of rules in Ontario Works and the Ontario Disability Support Program. See also Wendy A Bach, “The Hyperregulatory State: Women, Race, Poverty, and Support” (2014) 25 *Yale JL & Feminism* 317.

¹²⁵ Christopher J Jewell, *Agents of the Welfare State: How Caseworkers Respond to Need in the United States, Germany, and Sweden* (New York: Palgrave Macmillan, 2007).

¹²⁶ Ronald T Kneebone & Katherine G White, “Fiscal Retrenchment and Social Assistance in Canada” (2009) 35:1 *Can Pub Pol’y* 21 at 27-28; See also Janet Mosher, Patricia Evans & Margaret Little, *Walking on Eggshells: Abused Women’s Experiences of Ontario’s Welfare System* (Toronto: Women and Abuse Research Project, 2004) online: <http://www.yorku.ca/yorkweb/special/Welfare_Report_walking_on_eggshells_final_report.pdf>, which examines how multiple rules and evidence requirements discourage women fleeing violence from applying for or continuing to receive Ontario Works assistance.

discretion may exponentially increase throughout a legislative framework as rules cascade beneath other provisions and intersect with one another.¹²⁷

An example drawn from Ontario Works' legislative framework illustrates how formal discretion becomes nested throughout a statutory scheme. Specifically, this example shows how a combination of explicit grants of an option (i.e., "if the administrator is satisfied"), tacitly open-textured phrases (i.e., "reasonable efforts;" "as prescribed;" "fails to comply with;" "fails ... to meet a condition of eligibility"), and numerous interconnected rules embeds formal discretion deep within Ontario Works' legal architecture. The rule in question is the requirement that benefits recipients must make reasonable efforts to seek and take up paid employment, which was discussed in the preceding section.

To ground this discussion in a factual context, I have drawn a scenario from my fieldwork that meaningfully illustrates how formal discretion is nested throughout Ontario Works' layered statutory and policy framework. Let us imagine an Ontario Works recipient, "Shayna," who receives, as a single person, a combination of core benefits (i.e., basic financial assistance, including "income assistance" for basic needs and shelter)¹²⁸ and supplementary benefits (i.e., employment assistance benefits, including funds for a public transit pass).¹²⁹ Shayna enrolls in a resume writing workshop offered by her local social services office. However, when the workshop date arrives, she fails to attend. Two weeks later, Shayna meets with her caseworker. The caseworker suggests attending an upcoming job fair offered by a local shopping centre, but Shayna rejects the suggestion, telling her caseworker that she is "not a people person" and not interested in pursuing retail employment.

The *OWA* uses mandatory language to describe what should happen in this case. However, as I will demonstrate, it also leads this front-line worker deep into the Regulation and a series of related policies, all of which contain key phrases that together expand formal discretion across

¹²⁷ Hawkins, "The Uses of Discretion," *supra* note 39.

¹²⁸ *OWA*, s 2, 5.

¹²⁹ *OWA*, s 2, 4.

the program’s overall legal framework. First, the *OWA* provision on non-compliance (the “statutory non-compliance rule”) states:

14. (1) If an applicant, recipient or dependant *fails to comply with or meet a condition of eligibility* in this Act or the regulations, *the administrator shall*, as prescribed:

1. Refuse to grant assistance.
2. Declare the person ineligible for assistance for the prescribed period.
3. Reduce or cancel assistance or that part of it provided for the benefit of the person who has failed to comply.
4. Suspend assistance or suspend that part of it provided for the benefit of the person who has failed to comply.

(2) If assistance is suspended, reduced or cancelled under this section, it shall be returned to its former level or reinstated only in accordance with the regulations.

[emphasis added]

This provision states that “the administrator shall” do one of four listed things, including reduce, suspend, or cancel benefits, if a benefits recipient fails to comply with or meet an Ontario Works eligibility condition. This mandatory language suggests that opportunities for performing operational discretion have been narrowed. Yet, it also directs front-line workers to look deeper within the Regulation to sections that further detail which of these four options might apply to Shayna’s situation. The Regulation contains a series of relevant provisions. Part I of the Regulation specifies numerous eligibility conditions, while Part IV lists a range of non-compliance examples that may lead to the reduction or termination of Ontario Works benefits. Other eligibility and non-compliance provisions are scattered throughout the Regulation. For instance, Part III details conditions that apply when an Ontario Works recipient participates in employment training activities in exchange for supplementary benefits; if these conditions are not met, then a benefits recipient’s supplementary benefits could be in jeopardy.

In the above factual scenario, a series of regulatory provisions come into play that might affect Shayna’s eligibility for both basic benefits and supplementary benefits. All of these provisions contain key phrases that explicitly or tacitly permit the caseworker to perform operational discretion while also requiring that worker to consult further regulatory provisions, agreements,

policies, and local managerial documents. Thus, the meaning of each provision cannot be ascertained without reference to this broader web of legal and managerial sources.

On the question of whether Shayna is eligible for core benefits, the Regulation indicates that her “income assistance” (basic needs, shelter) funding may be in jeopardy because she appears to be failing to participate in employment assistance activities, given her absence from the resume workshop and her refusal to attend the upcoming job fair.¹³⁰ It states:

3. A person who fails to comply with the conditions of eligibility regarding employment assistance that apply to the person is not eligible for income assistance.

By failing to attend the resume workshop and declining to participate in an upcoming job fair, Shayna may be “fail[ing] to comply” with conditions of her employment assistance eligibility (specifically, the conditions that the caseworker attached to the client’s public transit pass funds), depending on how those conditions were framed in previous caseworker-client meetings. Because section 3 of the Regulation uses open-textured language (“the conditions of eligibility regarding employment assistance that apply to the person”), this provision embeds formal discretion deeper within Ontario Works’ legal framework. The caseworker must trace, review, and interpret any conditions placed on Shayna’s transportation funding or on any other employment assistance funds that she receives to determine whether she should be found “not eligible for income assistance” (i.e., core benefits that pay for food, clothing, and shelter). Of course, these conditions may also be broadly worded, thus further nesting formal discretion within the rules that this caseworker must consider.

As for Shayna’s supplementary benefits, including further employment assistance funds, section 33 of the Regulation details how her failure to attend the resume workshop and her refusal to attend the upcoming job fair may affect her “assistance,” a term that includes both core and supplementary benefits. Like other provisions, section 33 of the Regulation uses mandatory language to state that this client’s benefits “shall” be canceled or reduced, which is followed by open-textured references to a “reasonable efforts” condition. This condition adds another tacit

¹³⁰ OReg 134/98, s 26.

grant of formal discretion into the regulatory provisions that are supposed to guide workers as they apply the statutory non-compliance rule:

33. (1) An administrator shall cancel or reduce *the assistance provided to a recipient in accordance with this section* if a participant in the recipient’s benefit unit,¹³¹

(a) fails to comply with *section 28* [i.e., the “reasonable efforts to obtain employment” section of the Regulation, examined below]; or

(b) refuses, or *fails to make reasonable efforts*, to participate in an employment assistance activity that has been required under subsection 29.

[...]

(2) If the recipient is a single person, the assistance shall be reduced under clause (1.1) (a) or cancelled under clause (1.1) (b),

(a) for three months if clause (1) (a) or (b) applies and assistance or income support under the *Ontario Disability Support Program Act, 1997* with respect to the person has been previously refused, cancelled or reduced for a reason referred to in one of those clauses; or

(b) for one month otherwise.

[...]

(4) The one or three-month period referred to in subsections (2) and (3) shall be calculated from the date of the administrator’s decision based on a reason referred to in clause (1) (a) or (b).

[*emphasis added*]

This section further nests formal discretion within Ontario Works’ legal framework by cross-referencing other regulatory provisions as well as employment assistance requirements that may have been imposed on Shayna, each of which may include explicit and tacit grants of decision-making flexibility. In terms of the cross-referenced regulatory provisions, they link the potential reduction or cancellation of Shayna’s assistance with open-textured “reasonable efforts” obligations: the requirement to make reasonable efforts to obtain employment, which appears in

¹³¹ The phrase “a participant in the recipient’s benefit unit” may be confusing to those unfamiliar with the Ontario Works program, but it includes the single person in my example. Because they have no dependent family members attached to their Ontario Works file, a single person receiving Ontario Works benefits has a benefit unit of one.

section 28 of the Regulation;¹³² and the requirement to make reasonable efforts to participate in employment assistance activities, which appears at section 29 of the Regulation.

The obligation to make reasonable efforts to obtain employment is detailed in section 28 of the Regulation, which states:

28. (1) Every participant *shall make reasonable efforts* to accept and maintain full-time, part-time or casual employment *for which he or she is physically capable*.

(2) Subsection (1) also applies with respect to a participant who is employed but not employed full-time.

(3) Every participant who is employed *shall make reasonable efforts* to seek, accept and maintain employment *for which he or she is physically capable* and that would increase his or her income from employment.

[*emphasis added*]

Two vague phrases – “shall make reasonable efforts” and “for which he or she is physically capable” – tacitly implant formal discretion beneath the initial OWA statutory non-compliance rule that a caseworker shall reduce, cancel, or suspend a client’s benefits if that individual fails to meet ongoing eligibility conditions (or, as my research participants would put it, if a client ends up “in non-compliance”).

Section 29 of the Regulation adds an additional layer of formal discretion beneath the statutory non-compliance rule. This section of the Regulation permits caseworkers to make participation in employment assistance activities a condition of receiving benefits for select clients:

29. (1) An administrator *may require* a participant to participate in one or more employment assistance activities *for which he or she is physically capable under the terms and conditions and for the periods of time specified by the administrator*.

[*emphasis added*]

This provision is then followed by a series of conditions that may apply to clients participating in specific employment assistance activities, such as literacy screening and mandatory addiction

¹³² Discussed at Chapter 2, section 2.4.1, and Chapter 4, section 4.2.4.

treatment, as well as targeted rule exemptions for clients with learning disorders or substance addictions. Ultimately, section 29 *may* require the caseworker in the above example to cancel Shayna’s assistance *if* her caseworker or another front-line worker makes participation in a specific employment assistance activity a condition of her receipt of Ontario Works benefits. The condition that such employment assistance activities must be ones that a benefits recipient is “physically capable” of performing implants further formal discretion within the legal framework because it uses additional vague language to guide front-line workers. In the above example, it is unclear whether Shayna’s self-diagnosis as not being a “people person” would meet this physical capability standard. The provincial policies underlying these regulatory provisions offer no guidance on this question, leaving front-line workers the flexibility to decide whether Shayna is physically capable of participating in employment assistance activities directed at retail sector employment.

Unlike the question of physical capability, provincial policy does offer some guidance as to what “reasonable efforts” might include. But, like the Regulation, the policy uses vague, open-textured terms to describe what reasonableness requires, adding yet another tacit grant of decision-making flexibility to the overall legal framework.¹³³ This policy indicates that front-line workers should apply a “reasonableness test” as they assess non-compliance and decide whether to reduce, suspend, or cancel a client’s benefits:

The focus of the reasonableness test should be to determine if non-compliance was *intentional* or if it was the result of an employment barrier or factor affecting the employability *outside the recipient's control*.

A determination of reasonableness should be made in accordance with current business practices and should be based on the “best fit” between a[n Ontario Works] recipient’s interest and/or skills and available opportunities.

Delivery agents are expected to *use the reasonableness test identified in their approved business plans*. The reasonableness test should have the flexibility to respond to the different expectations as required within the employability continuum.

Reasonable criteria could include:

¹³³ Ontario Works Policy Directive 9.1: *Reviewing Eligibility* (last updated December 2016) [OWPD 9.1].

- temporary illness;
- absence of appropriate child care;
- court appearance or detainment;
- change or shift in the recipient’s personal needs;
- change or shift in the recipient’s individual circumstances;
- inappropriate “fit” for the [employment assistance activity] participant;
- program resources or services to support employability not available within the local community;
- failure of transportation arrangements and no alternative; and/or
- extreme inclement weather which affects mobility.

[emphasis added]

The text of this policy continues to nest formal discretion within Ontario Works’ legal architecture. It combines a variety of open-textured terms, such as “reasonable,” with references to what are likely equally vague local office policies and managerial tools, such as “current business practices” and an “employability continuum.” These additional texts will almost certainly include their own vague terms and may cross reference other rules, further embedding tacit grants of formal discretion within the framework that governs what, at first, appeared to be a simple question of non-compliance.

Examining formal discretion at this macro scale thus reveals how discretion-granting language becomes nested throughout a legislative scheme such as that which governs the Ontario Works program. This nesting phenomenon is the combined product of open-ended and open-textured phrases (or formal discretion at a micro scale), the layering of these phrases throughout numerous written rules, and the cross-referencing of these rules to further legal and policy instruments, including regulations, provincial policies, agreements between caseworkers and clients, and local office practices. Thus, nested formal discretion requires more than explicit grants of an option or tacit decision-making flexibility; likewise, it involves more than the multiplication of such phrases within numerous rules.¹³⁴ Instead, formal discretion becomes entrenched deep within the structure of a legal regime as a result of the intersection, deviation, and connection of numerous open-ended and open-textured rules. Formal discretion at the micro

¹³⁴ In this way, nested discretion extends beyond the notion of “embedded discretion” proposed in Harlow & Rawlings, *Law and Admin 1st ed*, *supra* note 9, which Sainsbury adopts in “Discretion and Procedure,” *supra* note 92 at 298.

scale of individual legislative provisions is thus rendered more complex by the system-level nesting phenomenon explored above.

As noted at the beginning of this section, a macro scale analysis may enrich theoretical approaches to formal discretion. First, the nesting of formal discretion throughout a legislative framework may extend Hart's concepts of express and tacit discretion, bringing them to bear on today's byzantine legal frameworks that Hart likely did not imagine at the time he was writing. In his essay on discretion, Hart proposed that tacit or concealed discretion arises when a legal system does not explicitly grant discretionary authority to an administrative decision-maker, but an administrator discovers that seemingly clear rules do not produce a determinate result, making "discretion" (reasoned judgment, for Hart) necessary.¹³⁵ Nested formal discretion also "conceals" interpretive room throughout a legal framework, but does so broadly by installing multiple open-ended and open-textured terms across the framework's different interconnected layers. In other words, the systemic embedding of explicit and tacit grants of decision-making flexibility exponentially increase and interconnect instances of Hart's express and tacit discretion, rendering operational discretion (or Hart's reasoned judgment) the rule rather than the exception in programs such as Ontario Works. Though it is beyond the scope of my thesis to undertake this analysis in greater detail, further consideration of Hart's work in light of the contemporary phenomenon of systemically nested formal discretion would enhance the theory that Hart began developing in this early essay.¹³⁶

Further, this analysis of nested formal discretion may offer a new perspective on debates about rules versus standards. Legal scholars have long contemplated whether numerous precise rules, fewer broad standards, or some combination of the two might best guide administrative decision-makers. Some scholars, such as Davis, suggest that clearer, more detailed rules are most effective

¹³⁵ Hart, "Discretion," *supra* note 58 at 661, 655.

¹³⁶ See, for instance, a recent examination of interdependent terms and the structural complexity of legal frameworks in another context – American income tax law – notes that tacit grants of discretion appear to be interwoven in such a way that formal discretion becomes nested throughout the law's architecture: Sarah B Lawsky, "Formalizing the Code" (2017) 70 Tax L Rev 377.

at directing administrative decision-makers and narrowing the choices available to them.¹³⁷

Other scholars, such as Braithwaite, propose that a balance might be struck between precise rules and broad standards, depending on how suitable each tool is for the context in question.¹³⁸ After reviewing a range of organizations, from nursing homes to international financial institutions, Braithwaite concludes that the suitability of either instrument depends on the entity being regulated and the interests at stake.¹³⁹ Broad standards may appear to multiply opportunities for individuals to perform operational discretion and may thus lead to inconsistent results. However, Braithwaite concludes that officials who work with binding standards more often reach consistent results than those who rely on multiple narrowly-worded rules because, in contexts governed by broad standards, “consistency” is defined and assessed more generously as compared to those regulated by precise rules.¹⁴⁰ Still others, such as Shiffrin, propose that standards are superior to rules as decision-making guides for primarily democratic reasons.¹⁴¹ Shiffrin argues in favour of “hazy” standards, rather than clear rules, to direct a wide variety of decision-makers because the opacity of standards requires individual decision-makers to exercise reasoned judgment. Shiffrin assumes that vague standards will force the individuals governed by them to more regularly and actively participate in democratic debate, thus ultimately enriching the broader polity. While each of these accounts is compelling, my analysis of nested formal discretion suggests that we may need to reconsider on what basis we differentiate rules from standards. Envisioning legal frameworks as comprised of easily-distinguishable rules and

¹³⁷ Davis, *supra* note 8 at 4-5. Davis feared that the prospect of unconstrained administrative officials would produce situations where decision-makers were guided by their own intuition rather than legal principles. See also des Rosiers & Feldthusen, *supra* note 78, who express similar concerns. As I argue throughout my thesis, the risk that decision-makers are ever truly unconstrained by legal and managerial norms, or free of the social regulation that accompanies aggregated decision-making, seems exaggerated, at least in institutions characterized by aggregated decision-making arrangements.

¹³⁸ See John Braithwaite, “Rules and Principles: A Theory of Legal Certainty” (2002) 27 *Australian J Leg Phil* 47.

¹³⁹ *Ibid* at 65.

¹⁴⁰ John Braithwaite & Valerie Braithwaite, “The Politics of Legalism: Rules and Standards in Nursing-Home Regulation” (1995) 4:3 *Social & Legal Studies* 307. Standards may function as “certain” where other institutional safeguards are in place, such as where decision-makers consult with one another about their decisions. A duty to consult with one’s colleagues may thus add an element of certainty even where decision-makers are tasked with applying broad standards.

¹⁴¹ Seana Valentine Shiffrin, “Introducing Moral Deliberation: On the Occasional Virtues of Fog” (2010) 123:5 *Harvard L Rev* 1214.

standards may not reflect how the seemingly-precise rules within these frameworks integrate both explicitly broad, open-ended grants of options and tacitly vague, open-textured terms that effectively permit decision-makers to perform operational discretion. In other words, numerous rules may at first appear to be precise, but if formal discretion is nested throughout they may permit as much flexibility and require as much reasoned decision-making as broad standards. All of this suggests that separating rules from standards may be less workable in practice, particularly in a context like the Ontario Works program, and that legal scholars may need to revisit the basis for this distinction in theory.¹⁴²

2.5. False Taxonomy and Hidden Formal Discretion

While the previous section demonstrated how formal discretion is rendered more complex when open-ended and open-textured terms are nested within numerous intersecting legislative texts and policy instruments, this section shows how formal discretion may be concealed by false taxonomical distinctions. These distinctions, which identify particular Ontario Works benefits as “mandatory” or “discretionary,” sow confusion among front-line workers as to whether they are permitted some flexibility in their benefits decisions, which can lead to heated conflicts between workers and undue stress for benefits recipients. To illustrate this point, I use the example of transportation benefits. These benefits span the mandatory-discretionary distinction and offer front-line workers numerous options for addressing the transit needs of Ontario Works recipients.

Further, I use the phenomenon of false taxonomy within the Ontario Works program to preclude a potential misreading of this chapter. One might view my analysis of formal discretion as offering a means to track and count how much discretion exists within a given statutory scheme. This section, however, will demonstrate that such a task may be virtually impossible. The written legal framework governing Ontario Works provides only partial details as to where discretion is located, how much exists, and who exercises it. If researchers embark on a journey to “find” and

¹⁴² While it is beyond the scope of my thesis to explore these questions in detail, they signal further research questions gestured towards by my research. One such question would be whether the distinction between rules and standards is similarly complicated in other rule-heavy public benefits programs, such as disability support programs, employment insurance, and veterans’ benefits.

understand discretion by studying a particular legal framework, pinpointing open-ended and open-textured phrases common to formal discretion at a micro scale, they may reach potentially misleading conclusions. As I will demonstrate below, legislative frameworks may use a deceptive taxonomy to distinguish benefits according to whether they are “mandatory” or “discretionary.” If individual provisions are examined apart from how they function in practice, and how they relate to the broader legal framework, researchers may overlook the nuanced ways in which discretion, broadly speaking, persists regardless of whether a benefit is labelled as mandatory, discretionary, or otherwise.

Taxonomical distinctions may influence where legal scholars look for formal discretion. If searching for micro level examples of explicit and tacit grants of decision-making flexibility, scholars may simply turn to the text of legislation and regulations to “locate” formal discretion, as I have done throughout this chapter. Using this approach, they may find formal discretion in two places. First, they may search statutes and regulations for the easily-recognizable open-ended (i.e., the administrator may do X) and open-textured (i.e., the administrator may do X if satisfied that a benefits recipient has made reasonable efforts to do Y) phrases, which administrative lawyers commonly identify as transferring discretionary authority from the legislature to the executive. As I have shown above, these explicit and tacit grants are nested within discrete micro scale provisions and throughout Ontario Works’ macro level legislative architecture. Second, legal scholars may look to the overt distinctions drawn by a statutory scheme, such as the line drawn between matters that are “discretionary” from those benefits identified as “mandatory.” In the case of Ontario Works, the program’s legal framework creates a class of so-called “discretionary” benefits (i.e., funds for transportation, training, moving, dental care, and so on), which supplement the program’s core benefits. This same framework also identifies a separate group of benefits as “mandatory,” which includes both core and supplementary benefits. While this distinction between mandatory and discretionary benefits is alluded to by the *OWA* and the Regulation,¹⁴³ it is most clearly articulated in provincial

¹⁴³ The *OWA* indicates that regulations may distinguish between discretionary and mandatory benefits covering “items, services, and payments”: *OWA* s 74(4), see also s 74(1) para 7. However, the Regulation does not clearly categorize particular benefits as “mandatory;” it only establishes a category of “discretionary” benefits that are not appealable to the Social Benefits Tribunal: OReg 134/98, s 59. Confusingly, Ontario Works Policy Directive 7.7: *Other Benefits* (last updated November 2015) [*OWPD* 7.7], states that Ontario Works benefits “are either mandatory

policies.¹⁴⁴ The benefits that these policies classify as mandatory include many that can be appealed to the Social Benefits Tribunal (e.g., guide dog funding, the full-time employment benefit, the employment assistance activity benefit), while “discretionary” benefits are those that have no associated appeal rights. Further, the policies use confusing eligibility language to subtly distinguish mandatory from discretionary benefits. They describe mandatory benefits as those that “*are provided to all eligible Ontario Works recipients,*” while discretionary benefits are those that “*may be provided to eligible recipients.*”¹⁴⁵ As one can imagine, this language causes confusion among front-line workers in local offices, which is amplified by the legislative provisions and local policies that govern these benefits as well as their technological representations.

Despite this explicit distinction between mandatory and discretionary benefits, the written rules governing so-called mandatory benefits include formal discretion-signaling terms. Mandatory benefit provisions give the appearance of containing no formal discretion by using terms such as “shall,” but they incorporate phrases common to the explicit and tacit grants of decision-making flexibility discussed above in section 2.4.1. Thus, regardless of the overt taxonomical distinction between mandatory and discretionary benefits, determining eligibility for either type of benefit still requires decision-making flexibility. For instance, legal scholars searching for formal discretion-signaling phrases would likely take notice of the explicit grant of formal discretion included in the introductory clause to Part VII: Other Basic Financial Assistance, which is the part of the Regulation that governs so-called “mandatory” benefits:

55. (1) The following benefits *shall be paid* with respect to each of the members of a recipient’s benefit unit *if the administrator is satisfied* that he or she meets the criteria for them and income assistance [i.e., basic needs and shelter funding] is being paid on his or her behalf [...]

[*emphasis added*]

or discretionary” and that “[m]andatory benefits are listed in [the] Regulation and are provided to eligible recipients and their dependents.”

¹⁴⁴ See Ontario Works Policy Directive 7.1: *Summary of Benefits* (last updated January 2016) [OWPD 7.1]; Ontario Works Policy Directive 7.4: *Employment and Participation Benefits* (last updated May 2016) [OWPD 7.4]; OWPD 7.7, *ibid*.

¹⁴⁵ OWPD 7.1, *ibid* [*emphasis added*].

While this passage begins with mandatory language (“shall be paid”), it also clarifies that the mandatory “shall” depends on an open-ended grant of decision-making flexibility. Specifically, it depends on a front-line worker’s assessment of the facts and the law (“if the administrator is satisfied” that a series of conditions are met), and their performance of operational discretion in light of both. Because this and other provisions governing mandatory benefits include explicit and tacit grants of formal discretion, it is unclear (aside from an Ontario Works recipient’s access to appeal rights) whether the division between discretionary and mandatory benefits is at all crucial for benefits recipients, front-line workers, or anyone else. During my fieldwork, caseworkers occasionally relied on this distinction to signal which decisions required that they locate grey areas within Ontario Works’ legal framework. However, overall my research participants did not use this distinction for any consistent purpose. Legislative provisions governing mandatory benefits often contained explicit and tacit grants in their text, and formal discretion tended to be nested throughout related legislative and policy provisions, suggesting that front-line workers must perform operational discretion when evaluating an individual’s request for so-called mandatory benefits. Meanwhile, some “discretionary” benefits were essentially mandatory as front-line workers described themselves as bound or obligated by office practices and legal and managerial norms to provide such benefits to Ontario Works recipients in certain circumstances.

Front-line workers used this distinction between discretionary and mandatory benefits to explain to me, as an outsider, how they performed operational discretion. Participants would clarify their use of this distinction by referring to a technical term: “EREs,” which stands for “Employment-Related Expense” benefits. This term refers to a group of benefits that Ontario Works legislation classifies as “discretionary.”¹⁴⁶ The term “Employment-Related Expense” is not found in the *OWA* or the Regulation, but instead comes from a non-exhaustive list in a provincial policy directive that itemizes the matters for which front-line workers may grant funds (all of which are associated with participating in “employment activities”).¹⁴⁷ The “ERE” short form, along with the finer distinctions between ERE benefits (such as “ERE-Transportation,” “ERE-Clothing and

¹⁴⁶ OReg 134/98, s 59; see also *OWPD 7.4*, *supra* note 144.

¹⁴⁷ See *OWPD 7.4*, *ibid*.

Grooming”) is also absent from Ontario Works’ statute, its regulations, or its policies. Instead, it originates from the computer software used to gather data from and issue benefits payments to Ontario Works recipients.¹⁴⁸ This further subdivision into different categories of ERE benefits may seem purely bureaucratic, but these distinctions influence how front-line workers perceive and locate formal discretion within Ontario Works’ legislative framework, and ultimately how they perform operational discretion. As one participant stated, in response to my question about whether clothing and grooming benefits involved an element of discretion, “No, it’s not discretionary. They’re Employment-Related Expenses – ERE. And it’s not ERE either, it’s ERE-Clothing and Grooming. It’s not mandatory, it’s not discretionary, it’s just under the Employment Supports in the computer software.”

Participants rely on these bureaucratic-technical distinctions between mandatory and discretionary benefits as they interpret Ontario Works’ legal framework, pinpointing formal discretion and evaluating whether they were permitted to perform operational discretion. For instance, research participants noted that they might use ERE benefits to help pay the cost of basic items, such as a haircut or public transit fares, especially when Ontario Works’ core benefits were inadequate. One front-line worker noted how she would combine two separate ERE benefits (Transportation plus Clothing and Grooming) to ensure that clients had sufficient funds to pay for basic needs, but only after she had exhausted all of the mandatory benefits available to her:

After that initial \$250 [the Other Employment and Employment Assistance Activities Benefit, a mandatory benefit], there’s \$30 monthly grooming benefit that we can issue, ok? So, if a client’s in a program full-time, we can issue [over \$100] for transportation which doesn’t cover the cost of a monthly transit pass. But to make up for that, I can issue \$30 monthly grooming. That’s for haircuts, hygiene products, or whatever. You *can*; hardly anybody does. So, if I see that a client is eligible and they’re saying, “I’m still having a hard time getting by,” I’ll say, “You know what? You’re getting ERE-Transportation, you are in this training program, I can issue the \$30 if that’ll help out.” So, I’m always reviewing to see what I can do.

¹⁴⁸ The “ERE” short form can be traced back to the software program that preceded SAMS, the Service Delivery Model Technology, or “SDMT.”

While front-line workers used the mandatory-discretionary taxonomy as they initially described how they performed operational discretion during our interviews, this distinction would quickly break down as they further detailed their decision-making practices and provided examples of situations where they located or lacked formal discretion. The taxonomy used by Ontario Works' legal framework thus only tells us, as researchers, a tiny piece of information about where decision-makers find formal discretion and how they animate explicit and tacit authorizations of the same.

2.5.1. Example: Transportation Benefits

Transportation benefits illustrate how fuzzy the distinction between mandatory and discretionary benefits is in practice, as front-line workers approach so-called “discretionary” transportation funding as though it is obligatory. Thus, just as “mandatory” benefits may have formal discretion incorporated within the rules that govern their distribution, caseworkers approach some discretionary benefits as effectively compulsory. Additionally, front-line workers have relatively broad scope for performing operational discretion as they decide which transportation benefit(s) to issue. Ontario Works' legislative framework provides caseworkers with at least six distinct benefits, including issuing individual public transit tickets, that they can use to address clients' requests for transportation assistance.¹⁴⁹ These benefits span the mandatory-discretionary divide, and the eligibility criteria for each benefit are dispersed across the *OWA*, its regulations, related provincial policies, regulatory technologies, and local office practices.

The phenomenon explored below is distinct from, but related to, the nesting of formal discretion analyzed above in section 2.4.2. My earlier discussion of the statutory non-compliance rule, and

¹⁴⁹ The six mechanisms I have identified include: (1) the *ad hoc* distribution of in-kind public transit funding by customer service representatives or receptionists, which seems to be an unwritten local policy in many offices; (2) the “mandatory” transportation benefit (identified as “Transportation-Medical” in SAMS); (3) the “discretionary” transportation benefits (“ERE-Transportation” in SAMS) for out-of-pocket transportation costs, regulated by Ontario Works Policy Directive 7.4; (4) the “mandatory” Employment Assistance Activity Benefit, also referred to as the “Part-Time Employment Benefit,” which provides \$253 once every 12 months to clients who require assistance covering the costs of employment assistance activities, and which provincial policies indicate must be exhausted first before workers provide clients with ERE-Transportation; (5) other “discretionary” benefits to assist benefits recipients who need to leave Ontario for work or to be reunited with family members, which Ontario Works Policy Directive 7.7 distinguishes from the above benefits; and (6) the “mandatory” Full-Time Employment Benefit, which provides Ontario Works recipients with \$500 once in a 12-month period for the costs associated with beginning a full-time job, which may include transportation costs.

its reasonable efforts requirement, illustrated how formal discretion may cascade throughout a more or less linear set of intersecting provisions that stem from a single initial statutory provision. In the case of transportation benefits, not only is formal discretion nested in discrete groups of provisions related to the six different transportation benefit options, but it expands as a result of the multiple options available to front-line workers within the rules. With the statutory non-compliance rule, an initial statutory provision functioned like a large nesting doll. When interpreted, this provision “opened” to reveal another provision within it that also contained formal discretion and which would lead caseworkers to a further provision or policy containing formal discretion and linked to a further rule, and so on. Transportation benefits, by comparison, have as their starting point six different initial provisions that can each be “opened” as they are applied to a particular client’s circumstances to reveal further provisions or policies. Each of these six starting points leads to further provisions or policies, all of which include explicit or tacit grants of decision-making flexibility. Depending on a client’s circumstances, caseworkers may have a greater or smaller number of the six initial provisions as options. Confusion may arise, however, because the legislative framework classifies some transportation benefits as “mandatory” and others as “discretionary.”

Although many transportation benefits are formally identified as “discretionary,” caseworkers generally treat them as though they are mandatory. Many workers stated that if a client met the criteria for transportation funding (especially the “discretionary” ERE-Transportation benefit), then that person should receive this funding without hassle. Even workers who self-identified as strict rule interpreters indicated that they believed transportation funds to be vital. One compared transportation funding with other essentials, such as a cell phone, that her clients needed so that they could search for employment and meet with her regularly:

I need to stay connected with clients, and they need to be able to connect with employers. I think it’s – I just, to me, I think that should be a given that people have money for cell phones. And transportation costs too.

Another worker noted how ridiculous it was to spend her time policing transportation funding. She stated:

I don’t want to be the transit fare police. I hate that role. But if I see someone come in and they’re asking for transit fares, I say, “You know what? You weren’t issued your ERE-Transportation benefit after your second appointment. We’re allowed to issue it, it’s an eligible benefit. I’m going to issue it, right?”

Because so many workers approach transportation funding as obligatory, many local offices have established policies to guide their staff in allocating this funding, particularly those transportation benefits that Ontario Works rules categorize as discretionary. These policies are not typically recorded in a database or stored in a binder; instead, they are communicated through emails and at team meetings. Yet, workers would routinely recite these policies from memory during our interviews, suggesting that they are as binding in practice as any formally published policy. One participant stated:

Sometimes we issue individual transit fares, but at other times we might need to issue, like, the equivalent of 10 transit fares so then we would issue funds and then the client can buy individual transit fares themselves. For those who attend *school*, there's different amounts. If they attend school once a week, we give [\$X] a month, because that would be the equivalent of two trips a week. If they attend two days, three days or more, or two to three days, we issue [\$Y] because then there's two or three appointments a week. But if they attend full-time, then we issue the full +\$100 Employment-Related Expenses-Transportation benefit. So, this way, based on identified need, we will be able to assess and issue accordingly.¹⁵⁰

Likewise, another front-line worker described her office's well-known policies:

So, if they come in – generally we're not supposed to issue more than 6 transit fares. That's the word on the street, that's what I've heard from supervisors throughout my time here. If someone comes in and they say, "I have an interview. I need transit fares," I'll issue two. Then sometimes people come in and they say, "I need transit fares for my job search." We don't issue that, we *don't*. You have to be in a program and then we'll issue the transportation funds on your monthly benefit cheque. But then I get in this back-and-forth with clients: "But I *need* to get around! I need to go buy, you know, I need this, I need that." Yeah, so it gets heated.

Though local policies might be clear and structure decisions about benefits that are categorized as discretionary, the sheer number of different benefits that front-line workers can use to provide transportation funding to Ontario Works recipients ensures that opportunities to perform operational discretion persist and entrenches the nesting of formal discretion throughout the statutory scheme. This point comes through in a final interview quote. Although this worker describes transportation funding as highly regulated by local policies (or "unwritten rules"), she

¹⁵⁰ Exact figures may reveal the location of my research sites; I have thus used "\$X" or "+\$100" to give a sense of the highly-detailed content of these policies without compromising my research participants' anonymity.

also notes that workers may be able to consult with their supervisors to determine whether they can use a different benefit to provide a client with requested transportation funds:

You know, transit fares are very hard. We don't just give transit fares to anybody anymore, right? So even the transportation piece of OW is very difficult. There's a lot of *criteria*: that's what I mean by "difficult." There's a lot of things needed before we're able to issue the transportation funds. I think every office, like I say, does it a little bit differently. There's never any written rule because we don't want it to be black-and-white. So, what we generally say here is that six transit fares is kind of the unwritten rule. Anything above six transit fares has to be discussed with a supervisor. Because maybe we *can* give them a monthly transit pass! Why aren't we giving them a monthly transit pass as opposed to always giving them six transit fares?

Thus, it is *both* the detailed local policies regarding ad hoc transportation funding as well as the multiplicity of other transportation benefits that make these requests "very hard." Regardless of how they are categorized, transportation benefits are treated as though they are mandatory even as they are governed by a legislative framework shot through with interpretive spaces that permit front-line workers the option to deny such funding. This phenomenon complicates the notion of formal discretion that this chapter has established and demonstrates the value of empirical research into how discretion, framed broadly, functions in practice.

Whether they are categorized as mandatory or discretionary, virtually all Ontario Works benefits contain formal discretion at the micro scale, in explicit or tacit grants of decision-making flexibility. Further, at the macro scale, many provisions within the Ontario Works framework appear to intersect, overlap, and diverge such that formal discretion becomes nested throughout the program's legal architecture. As a result, most questions about access to Ontario Works benefits and services seem to permit, and even require, some performance of operational discretion as front-line workers animate a network of program rules. Yet, even though front-line workers may appear, to outsiders, to have vastly expansive formal discretion within the written rules, my research reveals that their performances of operational discretion are substantially constrained. The above discussion of false taxonomy and my brief illustration of how workers may feel required, or mandated, to provide so-called "discretionary" transportation benefits in most cases, suggests that we must look beyond the written legal framework to better grasp how discretion functions in both senses, formally and operationally. To more deeply understand this interplay between decision-making freedom and constraints, the balance of my thesis investigates the socio-legal questions set out earlier in this chapter. By examining how discretion

is performed, by whom, and with what effects, what follows will provide insights into administrative decision-making that should be of interest to both legal and socio-legal scholars.

Chapter 3

Operational Discretion

In the previous chapter, I explored two senses of how the term “discretion” functions within legal and socio-legal literature. In some instances, the term refers to formal discretion and stands in for text-based permissions that transfer decision-making authority from the legislature to administrative officials and institutions. In others, it may refer to the performance of that decision-making authority by administrative officials, which I call operational discretion. I noted how these two senses of the term support different research questions about discretion: formal discretion aligns more closely with the questions conventionally asked by legal scholars (where is discretion found? how much of it exists? who is authorized to exercise it?), while operational discretion corresponds with matters commonly explored by socio-legal scholars (how is discretion performed? by whom? with what effects?). I also demonstrated how, in its formal sense, discretion can be examined at two scales. At the micro scale of individual provisions, formal discretion functions through a combination of explicit, open-ended grants of options and tacit, open-textured terms that implicitly permit administrators to perform operational discretion. At the macro scale of an entire legal framework, I suggested that formal discretion may be nested throughout a legislative scheme and becomes embedded through the combined effect of explicit and tacit grants within numerous rules that cross-reference one another and link to regulations, policies, managerial tools, and local office practices, each of which contains further explicit and tacit grants of decision-making flexibility. Accordingly, I suggested that it may be impractical to distinguish discretion from a lack of discretion at different points within a legal framework, particularly as a written framework alone cannot reveal the dynamics of its performance.

This chapter further develops the concept of operational discretion. As complementary to formal discretion, operational discretion captures the performative aspects of the term “discretion” within legal and socio-legal scholarship. While academic literature alludes to this second sense of the term when it describes discretion as something that is “exercised,” my empirical research suggests that a performative account better captures how operational discretion functions as a socio-legal phenomenon, as my research participants performed decision-making flexibility to a present or anticipated future audience of coworkers, supervisors, and others. Framing operational discretion as performative thus encompasses its temporal and relational features. The qualities of

operational discretion's performance depend on its institutional context, its performers, and its audience members. As the balance of my dissertation will show, operational discretion is inseparable from constraints, as caseworkers perform it together with a common method of reconciling competing norms, which I examine in Chapter 4, and in relation to their decision-making colleagues, which I detail in Chapters 5, 6, and 7.

To lay the groundwork for the balance of my thesis, this chapter explores how operational discretion is performed in a notoriously rule-laden administrative context. Drawing on my empirical data, I analyze how caseworkers commonly describe this rule-bound environment and how they categorize rules as either "black-and-white" (precise, clear) or "grey" (vague, flexible) while viewing clients' lives as grey or in flux. I then demonstrate how workers may come to perceive Ontario Works' rules as black-and-white, despite widespread formal discretion, and reveal how a combination of technological and managerial practices can create an institutional environment that is paradoxically both rule-bound and an "environment of discretion." Building on this analysis, I argue that front-line workers use three distinct strategies as they perform operational discretion. First, when front-line workers perceive formal discretion (or "grey areas") within the rules, they may use the facts of their clients' lives to widen and operationalize this micro scale interpretive space. Second, when workers perceive program rules to be rigid or black-and-white, they may turn to other legislative provisions that they believe will offer more flexibility. Here, workers activate the macro scale systemic nesting of formal discretion as they search across a legislative scheme for rules that offer greater interpretive space. The existence of these other provisions allows caseworkers to navigate multiple instances of nested formal discretion that may offer more than one means to reach a particular outcome. Third, where workers perceive rules to be rigid, they may also strategically characterize the facts of their clients' lives so that they fit within a black-and-white rule. While socio-legal scholars have suggested that those working in rule-heavy environments may selectively apply or abandon rules, my findings suggest instead that front-line workers in the Ontario Works program turn *to* the rules, working with them as they perform operational discretion.

3.1. Operational Discretion: Temporal and Relational Performance

Operational discretion is best understood as performed in time and in relation to an audience. Here, I develop this conception by contrasting it with accounts of discretion as something that is “exercised” or that “translates” law into action. The performance idea accords with how front-line workers engage with discretion. The more I reflected on academic studies of discretion in light of my empirical data, the more “performative” seemed to best correspond with how front-line workers enacted discretion as performers, aware of their role as actors in the Ontario Works program, in relation to their clients, and significantly in relation to their coworkers. A performative notion of operational discretion also alludes to its collaborative functioning, in that operational discretion is played out by an ensemble cast of human and non-human decision-makers. This notion is taken up in greater detail in Chapters 5, 6, and 7, but the discussion below gestures towards the influence that individual decision-makers have on one another’s performances.

As noted in Chapter 2, legal and socio-legal scholars gesture towards a notion of operational discretion when they suggest that administrative officials “exercise” discretion by putting a formal, provision-level grant of discretion into action. However, exercising discretion simultaneously suggests that discretion is the power or authority to make a decision (which one can be said to “exercise”)¹⁵¹ and that discretion is a choice or judgment (which are also things that one “exercises”).¹⁵² Yet, my data suggests that the socio-legal phenomenon of discretion expands beyond conventional notions of legal authority or judgment. By developing a concept of operational discretion, I treat discretion as something that administrative decision-makers “perform” rather than exercise so as to capture something distinct from power or authority, and wider than independent choice or judgment. I aim to avoid the particular pitfalls of a “choice” model because choice risks oversimplifying discretion as equivalent to an ideal unconstrained

¹⁵¹ See Cartier’s analysis of discretion as power in “Response to Willis,” *supra* note 47 at 631-38.

¹⁵² Davis, *supra* note 8, at 4 frames discretion as existing when the effective limits on one’s power leave one free to choose among possible courses of in/action. Hart, meanwhile, frames discretion as reasoned judgment: “Discretion,” *supra* note 58 at 661.

freedom to choose.¹⁵³ Conceiving of discretion as a temporal and relational performance may also sidestep some of the risks of framing discretion as “judgment,” as judgment may suggest that discretion is (or should be) performed by a disembodied, rational individual who is unconnected to a specific administrative context or moment in time.¹⁵⁴ I do not claim that there is no relationship between discretion and authority or judgment; rather, I propose that discretion, and specifically operational discretion, is not reducible to one or the other. Specifically, as the balance of my thesis explores, operational discretion is constrained in ways that may not be captured by these other terms.

Conceiving of operational discretion as performative incorporates the crucial roles that time and audience play as legislative frameworks are animated. In this way, it expands on Hawkins’ idea that discretion “translates” law into action. While discretion as translation does evoke a time-based process, the danger of approaching discretion as a method of translating law *into* action is that it inadvertently draws a line between law and action that may imply a one-way flow of influence. In other words, operational discretion as translation approaches law as influencing action rather than capturing the mutual exchange between the two.¹⁵⁵ A performative account of operational discretion highlights the significance of the “gap” that early socio-legal scholars employed to distinguish between law on the books and law in action, suggesting that this gap is not a disconnect but rather a crucial moment of becoming when written rules are animated by

¹⁵³ Davis’ analysis of discretion seems to conflate discretion with freedom to choose, particularly as he notes that discretionary decisions risk being influenced by the personal whims of front-line decision-makers. Although they may be guided by law, most discretionary decisions involve the use of a decision-maker’s intuition. Thus, Davis writes, legal principles or values can be “crowded out” by the other non-legal influences unique to a particular decision-maker, and decision-makers may be less conscious of the non-legal factors that shape how they use their discretion in a given decision: Davis, *ibid* at 5-6.

¹⁵⁴ This danger arises particularly when socio-legal scholars rely on Dworkin’s framing of discretion without addressing how his idealized model, and his imagined judge Hercules, might apply in very different administrative settings. See, for instance, Sainsbury, “Work to Welfare,” *supra* note 11 at 327-28; see also Anna Pratt, “Dunking the Doughnut: Discretionary Power, Law and the Administration of the Canadian Immigration Act” (1999) 8:2 *Social & Legal Studies* 199. Administrative decision-makers’ independence is qualitatively different as compared to judges, particularly given their role as policy implementers: France Houle & Lorne Sossin, “Tribunals and Policy-Making: From Legitimacy to Fairness” in Laverne A Jacobs & Anne L Mactavish, eds, *Dialogue Between Courts and Tribunals: Essays in Administrative Law and Justice 2001-2007* (Montreal: Les Éditions Thémis, 2008) 93. Moreover, in some contexts (i.e., labour boards), administrative decision-makers are appointed *because of* their affiliation with a particular industry or point of view.

¹⁵⁵ Hawkins, “Uses of Discretion,” *supra* note 39 at 11.

decision-makers. Further, operational discretion accounts for the regulatory significance of an audience whose members inspire, observe, and respond to performances of operational discretion. Rather than conceiving of discretion as a translation process, which (like power, authority, choice, and judgment) risks implying that discretion is exercised by individuals separate from and uninfluenced by one another, operational discretion suggests the possibility of performance by multiple individuals in relation *to* one another.

A performative account of operational discretion thus captures two key elements of the second sense in which “discretion” is used in academic literature – temporality and relationality –and which are observable in my research data. First, this conceptual framing signals operational discretion’s temporality, suggesting that operational discretion is dynamic and shifting. Other socio-legal scholars have alluded to the importance of temporality through their attentiveness to the method of operational discretion. For instance, Hawkins suggests that discretion involves a time-based process when he describes it as a “means” or method by which legal rules are brought into contact with the people or problems they are meant to address.¹⁵⁶ Similarly, in their analysis of regulatory decision-making, Silbey and Huising suggest that the passage of time is significant for the iterative and ongoing process of achieving regulatory compliance.¹⁵⁷ Operational discretion as something that is performed highlights decision-makers’ participation as a process: as performers, they actively construct legality, drawing from and contributing to notions of “discretion” and “law” as they locate or overlook in-text authorizations and use operational discretion to animate legislative frameworks.¹⁵⁸ This performance requires administrative officials to look both forwards and back in time as they build relationships with one another, supervisors, and members of the public.¹⁵⁹

¹⁵⁶ *Ibid* at 11-12. See also Michael Lipsky “Towards a Theory of Street Level Bureaucracy” in Willis Hawley et al, eds, *Theoretical Perspectives on Urban Policy* (Englewood Cliffs NJ: Prentice Hall, 1976) 196.

¹⁵⁷ Silbey, Huising & Coslovsky, *supra* note 16; see also Huising & Silbey, *supra* note 3 at 18.

¹⁵⁸ Ewick & Silbey *Common Place of Law*, *supra* note 17 at 247 describe legal consciousness as a process in which individuals participate in constructing “legal meanings, actions, practices, and institutions.” While I do not address whether operational discretion *is* legal consciousness in action (especially because I did not collect my data with this question in mind), it does bear some resemblance to the phenomena that Ewick & Silbey identify, particularly the temporal performance of legality by many different actors.

¹⁵⁹ Hawkins, “Uses of Discretion,” *supra* note 39 at 12-13, 41-42.

Second, a performative account of operational discretion emphasizes relationality; specifically, that front-line workers locate formal discretion and animate these spaces in relation to an audience, whether that audience is physically present or anticipated as a future observer. It also corresponds with the increased scrutiny of performance that new public management strategies have introduced into administrative agencies, which continually reinforce to administrative officials the importance of keeping one's audience in mind. As social scientists have long noted, authority and judgment are not self-actualizing concepts; rather, they are constituted as individuals enact them before an implied audience.¹⁶⁰ While I distinguish operational discretion from authority and judgment, they nonetheless remain connected. Operational discretion's performance within an administrative agency occurs in relation to a specific type of implied audience – coworkers, supervisors, auditors, benefits seekers, even case management software – that may become present at any moment. Performance to an audience can motivate administrative officials to justify why operational discretion produces a particular result, which ultimately reins in the range of possible results (as I claim in Chapter 6's analysis of aggregated decision-making). It also encompasses the possibility of workers performing operational discretion so as to demonstrate to audience members that they have “no choice,” by pointing to “the system” or “the legislation” as dictating an outcome when an individual requests a particular benefit or service (which I explore in this chapter as well as in Chapter 7's analysis of new decision-making technologies).

In addition, operational discretion as a performative concept speaks to the contemporary reality that administrative officials are today increasingly conscious *of* performance, as a result of new public management reforms. As new public management strategies have become increasingly prevalent in administrative agencies since at least the early 1990s, performance-based regulatory tools have come to characterize contemporary public benefits programs, including Ontario Works.¹⁶¹ These techniques are now indispensable for regulating how front-line workers

¹⁶⁰ Goffman, *supra* note 18; Matthew S Hull, *Government of Paper: The Materiality of Bureaucracy in Urban Pakistan* (Berkeley, CA: University of California Press, 2012); Ewick & Silbey, “Narrative,” *supra* note 43.

¹⁶¹ Michael Barzelay, *The New Public Management: Improving Research and Policy Dialogue* (Berkeley, CA: University of California Press, 2000) [Barzelay, *New Public Management*]; Donald J Savoie, “What is Wrong with the New Public Management?” (1995) 38:1 *Canadian Public Administration* 112; David Cowan & Simon Halliday

perform operational discretion. They achieve their regulatory goals by continually assessing the performance of individual workers and entire offices, which are then compared to one another and held against institutional targets.¹⁶² This comparison is made possible because new public management strategies require administrative agencies to make individual and collective performances measurable and reviewable.¹⁶³ As a result, in programs such as Ontario Works, new technologies and procedures have been introduced to monitor, measure, and audit front-line workers' functions. The ever-present potential of the observation, quantification, and evaluation of workers' performances means that front-line workers consciously perform operational discretion for an anticipated audience of coworkers, supervisors, and auditors. A performative notion of operational discretion can thus bring legal academic analyses of discretion into conversation with the regulatory and managerial realities that characterize contemporary public administration.

If performance is so central to operational discretion, one might ask whether it is appropriate to describe the second sense of discretion as “operational.” Why not simply refer to “performative discretion?” I retain the term “operational discretion” to underscore two features of this second sense of discretion. First, operational discretion suggests omnipresence, as operational discretion is used in everyday administrative tasks, on the ground, as front-line workers interpret and apply the legal framework governing Ontario Works. In this way, it is routinized and, because it is a common feature of Ontario Works operations, it risks going unnoticed. Second, operational discretion is institutionally operationalized, as an aggregation of decision-makers at and behind Ontario Works' front lines (caseworkers, employment workers, customer service representatives, family support workers, supervisors) locate or overlook, and use or forgo the formal discretion within Ontario Works' legislative framework. Describing this phenomenon as operational, then, gets at the fact that the performance of operational discretion is not a solo but rather an ensemble

discuss the influence of new public management in UK social housing administration in *The Appeal of Internal Review: Law, Administrative Justice, and the (non-)Emergence of Disputes* (Oxford: Hart Publishing, 2003) at 22.

¹⁶² See Gwyn Bevan & Christopher Hood. “Targets, Inspections and Transparency” (2004) *British Medical Journal* 328

¹⁶³ Pires, *supra* note 56 at 45-46. Simon terms this phenomenon “post-bureaucracy” in “Organizational Premises,” *supra* note 55, but that terminology obscures the ubiquity of these techniques within contemporary administrative agencies.

performance by multiple individuals who together produce “the administrator’s” decisions. This point will be taken up in greater detail in my discussion of aggregated decision-making in Chapters 5 and 6.

Because the moments at which operational discretion is performed cannot be easily identified by reviewing legal rules, forms, or policies,¹⁶⁴ it must be studied using research methods that are well-suited to investigating the routine, operational decisions of front-line workers. Such a study reveals that front-line workers perceive some Ontario Works rules to be more black-and-white than legal scholars would interpret them to be, and that in such cases workers use a series of identifiable strategies to perform operational discretion despite this initially perceived lack of interpretive space within the rules.

3.2. Basic Concepts: “Black-and-White” versus “Grey Area”

In this section, I explore basic concepts that front-line workers use to describe how they perform operational discretion. In doing so, I show how front-line workers paradoxically perceive the Ontario Works program’s legal framework as at once “black-and-white” and an “environment of discretion.” Though Ontario Works’ written rules are replete with examples of explicit and tacit grants of formal discretion that legal scholars would recognize, other managerial and technical mechanisms (such as office practices and software programs) generate an understanding among workers of “the system” as both flexible and inflexible. To explain this duality, I explore how front-line workers perceive the legal, technological, and institutional context in which they perform. This section shows how they envision the “rules” governing Ontario Works to broadly include legislation, regulations, and policies, as well as local office practices, forms, and their digital representations in SAMS. Further, it illustrates how workers use a tonal spectrum to contrast rules from one another (black-and-white versus grey) and to distinguish clients’ lives (often described as grey or chaotic) from a rigid rule-based benefits program. I argue that the Ontario Works program is aptly described as both bound by rules and full of discretion, and suggest that the grey areas in Ontario Works’ legal framework can evolve into black-and-white

¹⁶⁴ Hawkins, “Uses of Discretion,” *supra* note 39 at 11.

rules through a combination of office practices and technological functions, a thread that I pick up again in sections 3.2.2 and 3.2.3, below.

Caseworkers categorize the Ontario Works program's rules along a tonal spectrum, but these "rules" extend beyond the legislative and regulatory provisions that legal scholars might have in mind. In my fieldwork, front-line workers frequently distinguished between situations where they perceived Ontario Works rules to be rigid, or "black-and-white," and cases where the rules provided them with some flexibility or "grey area." This use of a spectrum is not unique to my research sites,¹⁶⁵ nor is the reference to black-and-white versus grey rules surprising. What is significant is that, when describing this spectrum, caseworkers would identify a broad range of mechanisms as authoritative "rules." While research participants would point to formal, written rules (i.e., the *OWA*, its regulations, provincial policy directives) as binding, they would also describe performing operational discretion in relation to a wider set of "rules," including office practices, performance targets, forms, and commonplace software. Thus, the rules of Ontario Works, for front-line workers, include written rules that legal scholars would recognize, a wider institutional, managerial, and social "system" that socio-legal scholars would identify, and the technological instantiations of both.

Front-line workers also used a tonal spectrum to conceptualize the life circumstances of Ontario Works applicants and recipients vis-à-vis Ontario Works rules. Research participants would explain that they needed to use operational discretion in particular cases because clients' lives are not black-and-white. Of course, front-line workers may perform operational discretion by finding formal discretion that would exist regardless of a client's circumstances, for instance, by locating explicit and tacit discretion-permitting language within legislative texts. Yet, workers rationalized that they must perform operational discretion because the greyness or chaos of their clients' lives mandated them to find flexibilities nested somewhere among the written rules or their digital counterparts in SAMS. Such performances of operational discretion might be too subtle for outsiders to recognize, particularly because the easily-identifiable key phrases of

¹⁶⁵ Baker Collins identifies this phenomenon from the perspective of social work administration in her study of Ontario Works caseworkers in a municipality that is distinct from my research sites: Stephanie Baker Collins, "The Space *in* the Rules: Bureaucratic Discretion in the Administration of Ontario Works" (2016) 15:2 Social Policy & Society 221.

explicit and tacit grants – “the administrator may do X if satisfied of Y;” “reasonable efforts” – do not necessarily correspond with the intersecting layers of rules in which front-line workers locate performance opportunities. Nonetheless, when front-line workers would describe their clients’ lives as grey, in flux, or chaotic, this greyness seemed to highlight the rigidity of certain Ontario Works rules and, in some circumstances, inspire front-line workers to “bend” an inflexible legal-technical rule or “look outside of the box” to other legislative provisions, underlying program norms, and clients’ circumstances to justify a particular decision.

Not all front-line workers would bend the rules; some would strategically use the broad notion of program “rules” to de-emphasize their own responsibility as legal decision-makers.¹⁶⁶ Here, workers would perform operational discretion by gesturing towards the rules as determinative, or by refusing to look beyond technical representations of these rules, such as forms or data entry screens, to the legislative framework itself. Thus, some research participants recounted how they would decentre their role as performers (which is itself a particular type of performance) in cases where, as they put it, decisions were straightforward, streamlined, or did not permit flexibility. These participants would explain that they were unable to locate and use operational discretion because “it’s all legislated,” or because “the legislation on discretionary benefits is very clear.”¹⁶⁷ When pushed by a client about a particular decision, front-line workers might point to the legislation as the decision-maker – “the *legislation* makes that decision” – to redirect that client’s attention away from themselves and towards the law. Similarly, some front-line workers would personify SAMS as an authoritative decision-maker, stating that, “the computer will spit out a decision,” or “the computer’s like, ‘Well, no. I’m not issuing,’” again referring to the black-and-white “system” as responsible and downplaying their own role in an ensemble institutional performance.

Despite the seeming ubiquity of operational discretion, a paradox underlies how front-line workers perform it. On the one hand, research participants consistently noted that they were

¹⁶⁶ Hull, *supra* note 160, describes similar behaviour by planning officials in urban Pakistan.

¹⁶⁷ As noted in Chapter 2, section 2.5, this distinction between mandatory and discretionary benefits is itself misleading, and caseworkers who take time to read the rules will recognize that formal discretion is nested throughout the rules regulating both sets of benefits.

trained to find grey area within the rules. Many would identify themselves as consciously taking a “pro-client” approach to their work, which management supported, and some even described their local offices as “an environment of discretion.” On the other hand, office practices and technological designs clearly set a narrower, black-and-white version of the rules in place that front-line workers accepted as authoritative. Even those workers who identified as pro-client would take the “rules” or “the system” to be black and white, based on office practices, software design, and their coworkers’ performances of operational discretion, regardless of whether the applicable legislative scheme contained formal discretion in its specific provisions or embedded throughout its overall framework. This phenomenon arises throughout my dissertation; I note it here to highlight the importance of front-line workers’ perception of rules as either black-and-white or grey, as this dictates which operational discretion strategies they believe to be available to them in a given situation.

An example illustrates how “grey” rules, those that explicitly or tacitly incorporate formal discretion, can transform into ones that front-line workers interpret as “black-and-white,” as offering limited opportunities for performing operational discretion. The following passage recounts a dilemma in which a caseworker hoped to grant a sole-support parent (her “client”) funds so that she could attend a training program. The caseworker who is speaking perceives the rules in this example to be black-and-white; in her view, she must have a letter from this client’s school stating that the client is enrolled before she provides a special type of transportation funding (Employment-Related Expenses Transportation funding, one of the many supplementary benefits within Ontario Works’ legislative scheme). However, the client is unable to provide such a letter until weeks after the program has begun. The caseworker states:

Sometimes clients tell you things and you just wholeheartedly know and you believe them, but the legislation says that they don’t have proof, right? You need *proof* of this in order to get this. And meanwhile, I’m like, “But I *know* this person. I’ve been working with them for two years. I know that they’re going to school.” A simple thing like they’re going to school, they need to bring a letter to prove they are attending, and then they tell you, “Well the school says that I can’t get a letter for two weeks.” Well I would like to just, you know, give them Transportation [ERE-Transportation benefits] or whatever based on the fact that *I’ve* been working with you, *I* know you and I know that you’re being truthful. But really legislation says that that doesn’t count, right? It says that I need to have that paper documentation that says, you know, you’re moving to this place or you’re going to school before I give you the money. I’m not allowed to go on just that intuition, or the rapport that you build with people over time. You *can* give a client some leeway, but you’re taking a risk. If there’s no documentation, the supervisor can hold it.

And I know, I have taken that risk *many* times. For instance, when I had the young moms, you know, they're slow at getting documentation. They don't know what to ask for. They ask for the wrong thing. So, I would at least give them one month of ERE-Transportation funding. I'm like, "I'm going to give you one month. Make sure, *make sure* you bring me proof that you've paid your registration, that you're registered for school." But *really*, legislation says it's *not* supposed to be done like that, right? And you take a chance by doing that, right, because then it's like, oh, well they didn't provide documentation but, you know, what are you going to do? [throws hands up] Stop them from going to school? You know? [laughs]

This caseworker describes the "legislation" as requiring her client to submit documentary proof of enrollment in a training program before she can release funds to cover a monthly transit pass, but in her account this worker is actually referring to a combination of policies, practices, and software functions. If she followed what she perceives the legislation to dictate in this case, her client would have no funds to secure a transit pass before the training program begins, which could lead program administrators to cancel the client's enrollment if she fails to attend. The rule that this worker describes as being black-and-white has crystalized over time through a combination of office practices (supervisors overturning coworkers' decisions to issue similar funds before receiving necessary documentation) and software functions (as SAMS requires that caseworkers indicate that they have seen such documentation before issuing funds).¹⁶⁸ It is not the product of "legislation." In fact, Ontario Works legislation and regulations are silent on the documentation requirements at issue in this instance. Policies, meanwhile, merely require workers to ensure that "adequate documentation" is on file, and they anticipate that caseworkers may grant clients ERE advances if funds are needed prior to the start of an employment training program.¹⁶⁹ However, this caseworker and other research participants referred to documentation requirements as an example of a rigid program rule that they would have to bend or work around, risking supervisory scrutiny, to provide funds to clients. This phenomenon – of grey legislative

¹⁶⁸ SAMS requires caseworkers to indicate that they have seen and verified documentary proof that a client is attending school, such as a letter confirming their attendance. SAMS enforces this rule by "flagging" evidence fields with differently-coloured indicators. These indicators change colour or disappear once a front-line worker has noted in SAMS that they have received the required documentary evidence.

¹⁶⁹ The *OWA* does not specify documentary requirements, and the Regulation merely indicates that Ontario Works recipients may obtain additional funding for participating in educational and training opportunities approved by the administrator: OReg 135/98, s 26, para 5. *OWPD 7.4*, *supra* note 144, indicates that "adequate documentation" must be on file to support decisions to issue different types of benefits, but it also contemplates issuing Employment-Related Expense benefits, including transportation funding, in advance of the start of a training program. Presumably, this would require that funds be provided to an Ontario Works recipient *before* the program has begun.

rules becoming narrowed by other mechanisms, such as office practices, regulatory technologies, or otherwise – influences which strategies front-line workers understand as being available to them within the Ontario Works program and which strategies might attract their supervisor’s scrutiny or sanction. It positions front-line workers so that they perceive their performances of operational discretion as existing in tension with the “rules” (regardless of whether they may conform with broader program norms) and as risking conflict with managerial staff or coworkers.

Operational discretion is thus performed in a context where front-line workers navigate the greyness of clients’ lives and a system of rules that varies between grey and black-and-white. While operational discretion may include elements of authority and judgment, it animates a legal framework in relation to a particular institutional context and, specifically, a particular audience of coworkers, supervisors, clients, and others. Operational discretion encompasses widening spaces in rules that were previously narrow and how caseworkers look to formal discretion nested elsewhere in alternate benefits and services when they perceive a particular rule or “the system” as too rigid or inflexible. Further, operational discretion may include the selective collection and characterization of client information, shaping which rules may/not apply to a particular client. These three performative strategies – unlocking the grey area in rules, looking to other benefits, and strategically collecting and interpreting evidence – are examined below.

3.3. How is Operational Discretion Performed?

This section demonstrates that operational discretion is performed widely throughout Ontario Works offices to open up formal discretion within rules and, in cases where the rules are understood to be inflexible, to find formal discretion nested throughout alternative rules or to fit the facts of peoples’ lives into black-and-white rules. Scholarship on discretion has for some time noted that the distinction between situations in which front-line workers believe they have flexibility and situations in which they believe rules dictate an outcome is more theoretical than real. Handler, for instance, cautions against exaggerating this distinction because discretion (understood broadly to include formal discretion in and between legal texts and as an operational

performance) is ubiquitous.¹⁷⁰ The key to operational discretion’s ubiquity lies in its performance, thus the remainder of this chapter explores how front-line workers engage with operational discretion and pays particular attention to its location and use. First, I examine how front-line workers locate what they call “grey area” (which largely corresponds with the range of formal discretion analyzed in Chapter 2) within Ontario Works’ legislative framework and how they put that formal discretion into action. Next, I examine how front-line workers respond in situations where they are unable to easily locate grey area, or explicit and tacit grants of formal discretion, within program rules. My data suggests that workers use two distinct strategies when they perceive the rules or the system to be black-and-white. They may search for flexibility elsewhere in Ontario Works, by looking to other benefits or services for which a client may be eligible, navigating layers of formal discretion nested throughout Ontario Works’ legal architecture. Additionally, or alternatively, they may creatively gather and characterize (or ignore) client information so as to fit that client’s circumstances within a black-and-white rule using operational discretion elements typically studied by socio-legal scholars.

3.3.1. Unlocking Grey Areas: Between Facts and Rules

My data suggests that front-line workers search for grey area within the rules that most directly apply to a particular request for assistance and use the details of their clients’ lives to “unlock” and expand explicit and tacit formal discretion within individual legislative provisions.

Operational discretion is accordingly performed between Ontario Works’ legal framework and the facts to which these rules apply. It involves both interpreting and applying rules (including their technical-managerial manifestations in forms, checklists, drop-down menus, computer software, etc.) to fit an individual client’s circumstances, and interpreting or “fitting” a client’s circumstances into the rules that regulate access to Ontario Works benefits and services. These findings echo those of earlier socio-legal scholars, such as Prottas, who identified this fitting of rules to facts and facts to rules as a key component of what front-line workers do.¹⁷¹ They are

¹⁷⁰ Joel F Handler, “Discretion: Power, Quiescence, and Trust” in Keith Hawkins, ed, *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 331 at 332. See also Robert A Kagan, “Inside Administrative Law” (1984) 84:3 *Columbia L Rev* 816; Gilbert Smith, “Discretionary Decision-Making in Social Work” in Michael Adler & Stewart Asquith, eds, *Discretion & Welfare* (London: Heinemann, 1981) 47; Lipsky, *Street-Level Bureaucracy*, *supra* note 15.

¹⁷¹ Prottas, *supra* note 15.

likely also familiar to legal scholars, as locating authorizing provisions in the form of explicit or tacit grants and interpreting legal rules are common components of administrative decision-making. This exercise works both ways: it can make clients eligible for Ontario Works benefits, but can just as easily bar clients from receiving benefits.¹⁷² However, my research also suggests that this process is particularly fraught in last-resort programs given their high stakes. Because benefits levels are set far below subsistence levels in programs such as Ontario Works, the urgency of benefits recipients' requests for assistance is intensified and front-line workers may be under greater pressure to find grey areas that will empower them to provide assistance beyond meagre core monthly benefits.

Although front-line workers acknowledge that rules must be flexible because peoples' lives are not black-and-white, they also desire clear rules and may even develop practices by which rules ossify. Workers commonly made contradictory statements about rules, regardless of whether they identified themselves as sympathetic to clients' needs or more concerned with making efficient, consistent benefits decisions. Even research participants who identified as being strongly in favour of black-and-white rules noted that such rules might be unworkable in practice because benefits recipients' diverse needs required an individually-tailored response. This vacillation comes across in the following quote:

It *would* help us, I think, in some ways, to have more black-and-white policies. *But*, at the same time, it's never black-and-white when you're dealing with people. Like, it just isn't. So, Ontario Works, welfare, has been around for a long time. Clearer rules probably wouldn't work because it's shades of grey all the time, and caseworkers have to be comfortable working with that. And if someone's saying, "*That's* what the policy is:" No, it's not. It's very bendable and flexible because that's how people are. It *does* create difficulty, but I don't know if the rules could be yes or no, black or white. I don't think it would work. I don't know. There's room to tighten, perhaps.

This research participant noted later in our interview that, although she was more inclined to read Ontario Works rules as black-and-white, she would also perform operational discretion by

¹⁷² Joe Soss, Richard C Fording & Sanford F Schram, "The Organization of Discipline: From Performance Management to Perversity and Punishment" (2011) 21:i Journal of Public Administration Research and Theory: J-PART 203 [Soss, Fording & Schram, "Organization of Discipline"], who note that front-line workers may also tailor or bend client details to keep clients from applying for or receiving Temporary Assistance for Needy Families ("TANF") benefits.

locating and using formal discretion within Ontario Works' legislative framework. This technique enabled her to address the "shades of grey" in her clients' lives, which she saw as central to her work within the Ontario Works program.

This contrast between benefits recipients' lives and program rules persisted during my fieldwork, regardless of whether research participants identified themselves as taking a "pro-client" or "black-and-white" approach to Ontario Works' legislative scheme. Many participants would describe performing operational discretion to manage the tension between a "cookie cutter" approach to the Ontario Works program and the fact that "life happens." This wavering may be unique to Ontario Works and similar benefits programs. As last resort institutions, these "catch-all bureaucracies" serve individuals who have complicated needs common to people living in poverty.¹⁷³ Further, because such programs offer individuals extremely low levels of financial assistance, they aggravate the multiple barriers facing benefits recipients and exacerbate the "chaos" of clients' lives. For instance, extremely low monthly benefits and precarious housing may put Ontario Works recipients at risk of becoming homeless, having their utilities shut off, losing custody of their children, and suffering from chronic health conditions. Unsurprisingly, then, research participants consistently described their clients' lives as not easily fitting within the categories of support available in Ontario Works' legislative framework. One supervisor put it this way:

We constantly have to bend policies and find workarounds to the legislation. For example, the addictions clients don't live at all a stable life. Their lives can be chaotic. They constantly lose their money, or they lose their transit pass, so we need to consider how we're going to replace their money within or outside of legislation, because the legislation isn't supposed to allow us to replace lost funds or transit passes.

This worker then described how the coworkers on her team might comb Ontario Works' legislative scheme and local office policies to find formal discretion to provide support in such cases. Where program rules had been rigidly manifested in SAMS, her coworkers might attempt to input grey area back into the rules by using technological procedures to "override" SAMS. Similarly, a caseworker who championed himself as a no-nonsense rule enforcer noted that,

¹⁷³ The term "catch-all bureaucracies" is coined by Watkins-Hayes, *supra* note 94, and will be discussed in greater detail in Chapter 4.

while legislation may be strict on some matters, such as caps on core benefits, flexibilities might exist elsewhere because of an overarching need to “treat people fairly:”

The legislation is not very tight; it gives you discretion because you *have* to be flexible in certain circumstances. With people, we need to do what we can. Legislation dictates and we work within that framework, *but* we need to treat people fairly. If they want \$700, \$800, I cannot give it! The legislation doesn’t allow it; it is very strict. But it involves ethical decisions. You want to do the best, right? Legislation looks black-and-white, but there is actually a lot of grey area.

Accordingly, workers may perform operational discretion to locate and unlock these grey areas, or formal discretion, within Ontario Works’ legislative framework that outsiders might not easily perceive or to widen grey areas that have been narrowed by the practices of their colleagues. The approach that these participants articulated reflects the findings of other socio-legal scholars. For instance, in their critical review of Davis’ *Discretionary Justice*, Baldwin and Hawkins noted that “[p]ractical notions of justice ... require that rules are applied with a degree of discretion that caters to individuals and particular circumstances.”¹⁷⁴ In their view, Davis’ proposal that rules can and should be used to constrain operational discretion did not adequately account for the day-to-day balance that administrative officials must achieve between adhering to rules and responding to individual circumstances. More recently, both DeHart-Davis and Maynard-Moody and Musheno have suggested that, contrary to earlier public administration studies, administrative agencies may employ relatively large cohorts of workers who make it a practice to interpret rules flexibly so as to meet broader program goals and to serve the individuals who ask them for assistance.¹⁷⁵ The relationship between workers’ professional identification and normative balancing will be examined more closely in Chapter 4. For now, I merely note that its effects may be intensified in programs, such as Ontario Works, characterized by byzantine legislative and technological frameworks that theoretically provide individuals with basic benefits but which, in their narrowest instantiations, aggravate and intensify hardship.

¹⁷⁴ Baldwin & Hawkins, *supra* note 44 at 578.

¹⁷⁵ Leisha DeHart-Davis, “The Unbureaucratic Personality” (2007) 67:5 *Public Administration Review* 892; Steven Maynard-Moody & Michael Musheno, “State Agent or Citizen Agent: Two Narratives of Discretion” (2000) 10:2 *Journal of Public Administration Research & Theory*: J-PART 329.

Two examples illustrate how workers use operational discretion to open up grey areas in rules that, over time, have had the formal discretion within and across their texts converted so that many workers perceive them as black-and-white. The first example involves a municipally-created and funded employment program that I call the Local Employment Program.¹⁷⁶ To govern access to this program, the municipal social services department in question established an eligibility policy that was flexibly worded but was routinely applied in a narrower, black-and-white manner. This Local Employment Program provided Ontario Works recipients with the chance to gain employment experience by connecting them to year-long employment opportunities offered by non-profit agencies. To be eligible for this program, Ontario Works recipients had to meet three relatively clear criteria: they must be receiving Ontario Works; they must reside in the municipality in which the program is offered; and they must be “distant” from the labour market. Typically, labour market distance was measured by staff in this local office according to the number of years since a client was last employed. Two years had become the standard measure, despite the formal discretion tacitly included in the open-textured “distant” criterion, so clients would be found to meet this requirement if they had not been regularly employed within the two years preceding their application to the Local Employment Program. During my fieldwork, a front-line worker recounted a recent situation in which she and her supervisor used the facts of a client’s circumstances – that the client was employed in a survival job rather than a long-term vocation – as well as contextual facts – that there was low enrollment in the Local Employment Program at the time – to unlock this tacit grant of formal discretion within the municipal policy regulating this program:

One client, she was actually working, so really, she’s not eligible for [Local Employment Program] positions because she’s *working*. But it was a survival job. She had a diploma, a two-year diploma from college in social service work, but she was working in a capacity that was – I think it was retail or customer service. So, it was a survival job. So even though she had a full-time job, *technically* the policy for [the Local Employment Program] says she’s ineligible. But I was able to go to the manager to say, “Okay, yes. Based on policy, she’s ineligible. But this is a *survival* job. This is not a career option for her. So, given the fact that we have limited candidates, she should be afforded the opportunity,” which they agreed to. Whereas I think if it was more rigid, if we had a more solid policy, it might be harder to do something like that, right? To just look at individual

¹⁷⁶ To safeguard the anonymity of my research participants, I have changed the name of this program. Programs with similar eligibility criteria are common among many southern Ontario social services departments.

circumstances. Because yes, she's employed, and the policy says "should not be employed". It doesn't say anything about "should not be employed unless in survival job," it doesn't have that, right?

This front-line worker performed operational discretion by recognizing, unlocking and widening the grey area tacitly incorporated within the written rules governing the Local Employment Program policy. The above example highlights the temporal and relational elements of operational discretion, illustrating how its performance activates the formal grant of discretion as part of a longer-standing set of interpretive practices and in relation to coworkers who are committed to different interpretations. It demonstrates how front-line workers actively construct legality, for instance, by animating rules more narrowly than their text allows and building up an office practice of a two-year rule of thumb. Yet, it also illustrates how operational discretion may be performed in other ways, rooted in workers' long-term knowledge of a particular client, their relation to a trusted supervisor, and their willingness to depart from colleagues' interpretive practices, so as to reexamine the written rules and animate the tacit grants of formal discretion found within their text. Ultimately, this performance revisits the "distance from employment" criterion to permit someone like this client, an aspiring social worker who had taken up a survival job, to participate in a placement program that might offer her the experience and contacts needed to secure stable employment in her chosen field. In a situation where spots were available in this program *and* where a benefits recipient might obtain experience in what could become a long-term employment prospect, this front-line worker used these facts together with her knowledge of this client's circumstances and her supervisor's support to activate the formal discretion in the policy, despite her colleagues' well-established narrower interpretation.

A second example, involving the "Living with Parents" rule, demonstrates how front-line workers mobilize the facts of clients' lives to unlock interpretive spaces in and across Ontario Works' legal framework that have been otherwise narrowed by technologies such as SAMS. The so-called Living with Parents rule is actually an amalgam of multiple provisions dispersed across the Regulation and a provincial policy directive. These provisions collectively describe when an adult who lives with their parents may be found to be "financially independent" and thus eligible

for Ontario Works benefits.¹⁷⁷ Many of these provisions include tacit grants of decision-making flexibility. Additionally, those that detail what “financially independent” includes nest formal discretion among the legislative framework’s many layers. The Living with Parents rule guides front-line workers when they receive a benefits application from an individual who is over 18 years old, living with their parents, and who applies for assistance independently (i.e., not as a member of their parents’ benefit unit, if the parents are themselves Ontario Works recipients). The rules set out in the Regulation and elaborated in the provincial policy establish criteria that front-line workers must apply to determine whether such an applicant is a “financially independent adult” and, thus, eligible to apply for Ontario Works benefits on their own. An independent application for benefits would allow an adult who lives in their parents’ home to have their application assessed independently, unaffected by their parents’ assets and income. To determine whether such an applicant is “financially independent,” workers must assess the following characteristics: if the applicant is or has ever resided with a spouse; if the applicant is or has been eligible for government student loans as a financially independent student; if at least five years have passed since the applicant attended secondary school; if the applicant has received a post-secondary degree or diploma; if the applicant does or did at one time have custody of their child; or if, over a cumulative two-year period, any combination of listed circumstances occurred (i.e., the applicant’s net monthly income exceeded Ontario Works’ monthly benefits for a single person,¹⁷⁸ the applicant lived away from their parents’ home, the applicant’s basic needs and shelter were provided by a source other than their parents or an institution, and/or the applicant received Ontario Works benefits in their own right).¹⁷⁹ Any of these characteristics can, on their own, justify finding an applicant who lives with their parents to be financially independent. These criteria have not been fully integrated into SAMS, however.

¹⁷⁷ OReg 134/98, ss 2(1)-(2), 11, 41, 42(2), and 44(2)-(4); see also Ontario Works Policy Directive 3.4: *Living with Parents* (last updated October 2016) [OWPD 3.4]. Section 11(3) of the Regulation states that an individual who resides with their parents is not eligible to apply for income assistance on their own *unless* they are found to be “financially independent” within the meaning of section 2(2) of the Regulation. As with the “reasonable efforts” criteria discussed in Chapter 2, section 2.4.2, the meaning of “financially independent” is detailed across a wide range of provisions, thus nesting formal discretion throughout multiple rules that cross-reference one another.

¹⁷⁸ At the time my fieldwork was conducted, this amount was \$656 per month.

¹⁷⁹ These criteria are set out in OReg 134/98, s 2(2), and are repeated in *OWPD 3.4*, *supra* note 177.

As a result, SAMS represents the Living with Parents rule as inflexible. Further, SAMS routinely categorizes an applicant who lives with their parents as a financially *dependent* adult regardless of their personal circumstances and the formal discretion within and between the written rules.

A research participant with experience conducting intake appointments explained how, despite SAMS' virtual elimination of the Living with Parents rule's flexibility, she would use an applicant's circumstances to activate the formal discretion tacitly incorporated through open-textured terms that are broadly nested throughout the overall legislative framework. In doing so, she would prevent SAMS from automatically deeming an applicant who lives with their parents to be ineligible for Ontario Works, thus pushing back against SAMS' black-and-white version of Ontario Works rules:

“Living with Parent” is one of the policies that needs to be looked at because if an applicant is living with a parent, you then need to know whether they've worked for a period of, like, two years where they've had income that exceeded Ontario Works, and then we need to look at, like, do they have a post-secondary education, and have they ever applied for OSAP [Ontario Student Assistance Plan, a government-funded student loan]. But you can have a 40-year-old who has never applied for OSAP, who does not have post-secondary education, and does not have grade 12, and has never had income that's more than Ontario Works, but this client is 40 years old, right? And would I say this client is financially dependent on their parents? Right? I would think obviously not, right? Obviously if the client is 20 or 22 or 23 and they have not experienced life as an independent person, that's different. But for the 40-year-old client, it just may mean that they've never had income, a great job, and they never had the skill or the smarts to finish grade 12, right? And they may have never lived *away* from home because rent is so expensive, right? So, if you can live at home, and there is space, and you pay rent, like, why not? In those circumstances, to me, it's a given that this person, I can definitely say, is not financially dependent. SAMS could force you to go one way. But it's one of those things where I apply discretion. Like, SAMS is set up even so that financially “dependent” versus “independent” – like, so SAMS might ask, “Do you live with your parents?” And you click “lives with parent” and then SAMS says that applicant is ineligible. But then, really, the client is 35 or 40. So I unclick it [the “lives with parent” box]. The client is living with his parents, but I could put that in the note as opposed to clicking that box because the box affects eligibility, but a 35-year-old is not financially dependent on his mother or father, right? If they've been out of school, and even if they don't have grade 12, right? So... so yeah, so there are instances like that where I just, I just forget what SAMS wants me to do [laughs] just to make sure that the client is eligible. But then, some caseworkers might apply the policy to a “t”, right, to say, “Well, you're not eligible.” But if you think about it, to me, it makes no sense to say that.

While this intake worker may appear to be describing an instance of gaming the system,¹⁸⁰ she recounts how she would perform operational discretion by activating the formal discretion nested throughout the Living with Parent rule framework. In the example she uses, a 35- or 40-year-old applicant who lives with their parents but has not engaged in post-secondary schooling should qualify as financially independent because of the time that has passed since they attended secondary school. The written legal framework provides tacit grants of formal discretion and nests these open-textured provisions throughout its legal architecture, and this intake worker puts the formal grants of discretion into action as she locates and unlocks grey areas in the Regulation and the related provincial policy. She performs this operational discretion in light of the more rigid rule interpretation wrought by SAMS, and in relation to SAMS as a constraining decision-making force. By recording client information in an alternate format (making a note instead of clicking the “lives with parent” box), she ensures that an adult who has always lived with their parents, but who also fits the financial independence criteria of the Living with Parents rule, can access Ontario Works benefits and services, including training opportunities, employment counseling, and high school completion programs. Yet, this performance also ensures that an anticipated future audience who might later review this decision can grasp her reasons for taking this approach by reviewing the accompanying notes.

The above examples detail how front-line workers perform operational discretion where they recognize grey areas within the rules: that is, where workers are aware of explicit or tacit grants of decision-making flexibility in a particular rule, or where they acknowledge that for a particular matter formal discretion is embedded throughout the legal framework. Even if they would prefer the rules to be more rigidly black-and-white, many research participants recognized the need for this permissive flexibility within and across the rules so that they could respond to their clients’ complex needs. Thus, they may use their clients’ circumstances and other available tools to open up grey areas that local office practices or regulatory technologies might have otherwise narrowed or eliminated.

¹⁸⁰ Gwyn Bevan & Christopher Hood, “What’s Measured is What Matters: Targets and Gaming in the English Public Healthcare System” (2006) 84:3 Public Administration 517.

3.3.2. Finding Alternatives Within the Rules or the System

By contrast, when front-line workers perceive the rules at issue to be black-and-white, lacking formal discretion, front-line workers may (but do not necessarily) undertake two strategies. First, as this section explores, they may look for alternative benefits that would meet a client’s needs and for which that client may be eligible, navigating the interpretive opportunities that nested formal discretion offers. Additionally, or alternatively, front-line workers may creatively gather and characterize (or ignore) client information to mitigate the effects of black-and-white rules, which I examine in the next section. Using these strategies, workers locate formal discretion in alternate provisions or across the legislative scheme more broadly, or rearticulate the facts of their clients’ lives so that these clients meet the requirements of an otherwise black-and-white rule.

The first strategy – finding flexible rules, policies, or practices elsewhere in the same legal framework – is the corollary of the macro scale “nesting” of formal discretion examined in Chapter 2.¹⁸¹ It is evident in how front-line workers respond to personal identification (ID) policies, as they navigate the pathways created by the embedding of formal discretion throughout Ontario Works’ legal architecture. At the time of my fieldwork, municipal policies had recently been amended to purportedly tighten ID rules. Yet, the legislative provisions on ID requirements remained unchanged. The *OWA* states that no one is eligible for income assistance (i.e., core benefits) unless they provide identification as required by the Regulation.¹⁸² The Regulation appears to preserve broad explicit grants of formal discretion to municipal social services providers, who “*may* require an applicant to provide information necessary to determine and verify the applicant’s eligibility for basic financial assistance,” such as a social insurance number, health insurance number, and other documents that confirm an individual’s name and birth date.¹⁸³ However, it also stipulates that Ontario Works applications must be made “in the

¹⁸¹ Chapter 2, section 2.4.2.

¹⁸² *OWA*, s 7(3)(c) [*emphasis added*].

¹⁸³ OReg 134/98, s 17(2).

form and manner” approved by the Province,¹⁸⁴ which incorporates, by reference, the mandatory forms and checkboxes built into provincially-instituted tools such as SAMS. A provincial policy directive further elaborates ID requirements, including the use of computerized forms to record ID details, and indicates that front-line workers *must* visually verify a series of ID documents and retain photocopies of others.¹⁸⁵ The ID “rules,” then, combine legislation, regulations, provincial policies, and SAMS’ representations of these texts. Collectively, these rules were fairly clear at the time of my study: they required that an Ontario Works applicant present personal identification – a social insurance number, a health card – plus an additional identifying document to confirm their date of birth at the time that they applied for assistance. Examples of the documents that would satisfy these requirements were listed in the provincial policy. However, local offices did not enforce these rules as strictly because, if so enforced, they may delay some Ontario Works applicants from receiving benefits for up to six weeks, while they waited to obtain the necessary government-issued identification. The ID rules had thus become greyer in some offices because, in keeping with local office practices, caseworkers regularly applied them more flexibly.¹⁸⁶

In response to these local office practices, new municipal ID policies were introduced. One worker described the reasons for tightening the local ID policies in this way:

They found that was happening, they found there were so many files where ID had never been bothered to follow through on, like tons. So, they didn’t know if there were duplicates of people, so they clamped down and said you absolutely have to have ID. It used to be that OW applicants could go to the ID clinic and at least just prove that you applied for your ID, but so many people don’t bother to get it.

¹⁸⁴ OReg 134/98, s 17(1).

¹⁸⁵ Ontario Works Policy Directive 2.1: *Application Process* (last updated January 2013) [*OWPD 2.1*]. Documents that must be visually verified include social insurance numbers and health numbers, which can be verified by seeing a copy of an applicant’s SIN and OHIP cards or by reviewing other government documents that would include these numbers. This policy also states that front-line workers must copy at least one of a number of other documents, such as a birth certificate, driver’s licence, or passport, to establish the date of birth and identity of the applicant and all family members included in their application.

¹⁸⁶ Ontario, Office of the Auditor General of Ontario. *2009 Annual Report of the Office of the Auditor General*, Chapter 3, Section 3.11 – Ontario Works Program. (Toronto: AG Ontario, 2009) [*AG Ontario 2009*] at 260 supports this inference.

A second front-line worker recounted how local ID policies had changed to become “pretty black-and-white.” Because management was “cracking down” on ID rules, and ensuring that caseworkers recorded clients’ ID data, this participant noted that space for operational discretion had been effectively eliminated:

ID is pretty black-and-white now. ID is required from the intake appointment forward. We can only issue OW if they have primary ID or at least are in the process of getting it back, and then we assess on a month-to-month basis. Applicants won’t be eligible for assistance without ID. They’re really cracking down on it. Really, I don’t think any worker can issue, for example, employment support or Housing Funding for a new place unless we have documentation. There’s no discretion there; I would say none. *Well*, let me just think – just a second. Yeah, there really isn’t.

In response to these newly-tightened local policies, and increased managerial review of front-line workers’ ID documentation, both of these research participants described how they now looked for discretionary space *elsewhere* in Ontario Works’ legal framework, navigating the pathways along which formal discretion was nested. While ID was still required for regular Ontario Works applications, if someone applied for assistance without the proper government-issued documents, these workers explained that they could turn to emergency assistance provisions and use formal discretion embedded within that set of rules. By doing so, they could at least provide Ontario Works applicants with temporary assistance and give these individuals time to apply for the ID documents needed to support a regular benefits application. The first research participant described how she performed operational discretion using this strategy:

I guess there have been times where I’ve issued one month of emergency benefits and I’ve said, “Okay, I’ll issue one month based on your verbal,” but it’s in exceptional circumstances. And I think then you have another couple of weeks to get it [a copy of the client’s ID] in and then it stops, right?

Similarly, the other participant described how grey area reappeared in office practices:

So, following the policy clarification, it became that now you have to wait 6 weeks, so we won’t issue you anything until we see the actual ID. And, so, then they bent the rule here and said, “Ok, well we’ll let you have OW benefits for one month only, but that’s it.” So, there’s a lot of grey there again.

Both workers perform operational discretion *within* the legislative framework governing emergency assistance. The emergency assistance rules generally limit such assistance to one month, after which point individuals must ultimately apply for regular Ontario Works

benefits.¹⁸⁷ In this way, clarifying one set of rules to eliminate interpretive room merely displaces workers' performance of operational discretion to another area of the Ontario Works legislative framework where formal discretion is easier to locate and use. This process resembles Hawkins and Baldwin's description of discretion as toothpaste contained within a tube.¹⁸⁸ When the rules in one area of a legislative framework are squeezed or narrowed to eliminate explicit and tacit grants of formal discretion, they do not necessarily eliminate opportunities for performing operational discretion. Instead, they may redistribute performances elsewhere – to other explicit or tacit grants, and across a macro scale network of nested grants of formal discretion – and to other moments in time.

In cases where newly-tightened ID policies might prevent someone from receiving Ontario Works benefits, others research participants would draw on a well-established body of office practices regarding client identification. These were largely unwritten, longstanding practices, accepted by a critical mass of colleagues. For instance, one municipal social services department had recently clarified their ID policy so that individuals would be required to first present a piece of personal identification before picking up their benefits cheques. While this policy appeared neutral on its face, hard-copy cheques were usually only provided to homeless clients who, because they had no fixed address, rarely had a bank account. Most other clients had monthly benefits payments deposited directly into their bank accounts. When a homeless individual requested his benefits cheque without ID, the following research participant performed operational discretion by looking beyond the new ID policy and applying an older office practice for proving a client's identity. She explained:

So, with ID, normally when someone comes in to pick up a cheque they're supposed to bring ID and, so, a client that I saw the other day that came in with the community worker. He was 61, he didn't have any ID. I'd never met him before. So, I went upstairs and got his file and hoped there was some picture ID in there so that we could compare, so normally we do that. But there was no picture ID in his file. There was a copy of his social insurance card in there, and a copy of his birth certificate in there. I asked him

¹⁸⁷ See discussion in Chapter 2, section 2.4.1. The Ontario Works framework restricts emergency assistance for a two-week period. Practically speaking, however, Ontario Works payments are issued for an entire month, which explains why these research participants describe providing one month of benefits to individuals who lack the necessary government-issued identification.

¹⁸⁸ Baldwin & Hawkins, *supra* note 44 at 582.

what his SIN number was, and he was able to tell me that. Another thing we can do is we can get them to write saying that “I am this person” and they sign three times. And that just goes in the file so then, as caseworkers, we can just tell the counter staff, the admin staff, “release cheque by worker’s permission.” So that’s what I did.

This worker identified this practice as “a flexible one, or a discretionary one,” which she turned to so that she could perform operational discretion in this case and release this client’s benefits cheque. By relying on this practice, this caseworker re-activated the explicit grant of formal discretion in the Regulation that was otherwise being narrowed.¹⁸⁹

Similarly, another caseworker described how she would use an office practice of waiving ID requirement for clients who could be identified through other means. Such instances might arise if, for example, a client previously enrolled in an addiction treatment program that required them to present a health card as part of the initial enrollment process or if they were defendants in a criminal justice proceeding. In such cases, she explained, front-line workers could use the fact that another agency had at one time identified the client in question as a proxy for a physical, government-issued, identification document:¹⁹⁰

Because they have to be able to verify that this is who they are. So, we have to take the Drug Treatment Program’s word for it. If the courts are involved and the Local Mental Health Services Provider is involved and the Local Women’s Agency is involved and John Howard’s involved and Salvation Army’s involved, our office cannot stop that process. But they need us. Without that money from Ontario Works, everything falls apart. So that actually got escalated to a problem where the manager had to get involved and she said, “That’s it.” We do not have to follow that policy on ID. They [the clients who are temporarily exempted from the ID requirement] have to be working on getting their ID, but we can grant Ontario Works benefits without verifying who they are. But you can’t make that a rule across the board because ID’s been a really big problem in our department.

The above passages illustrate that, when Ontario Works rules are perceived to be black-and-white, front-line workers may find and use formal discretion nested elsewhere within the layers of the legislative framework, such as its emergency assistance provisions, or in other sources of law, such as well-established office practices. Even when front-line workers identify pressing

¹⁸⁹ OReg 134/98, s 17(1).

¹⁹⁰ This approach is in harmony with *OWPD 2.1*, *supra* note 185, which allows the use of proxy government documents as verifying sources for individuals’ social insurance or health numbers.

reasons in favour of establishing clearer policies, as in the case of ID rules, they may still find a way to perform operational discretion in situations that they believe warrant such intervention.

These findings contrast with earlier studies of front-line workers in rule-heavy programs by suggesting that workers creatively turn to the broader legislative framework governing Ontario Works, rather than selectively applying or abandoning program rules. This observation indicates that administrative context matters, as officials in different institutional settings likely have varied relationships to program rules, underlying norms, and potential audience members (coworkers, supervisors, benefits applicants, etc.). In his analysis of street-level bureaucracies, for instance, Lipsky suggests that front-line workers may strategically abandon or selectively apply rules when they become overwhelmed by a byzantine legal framework and burdensome caseloads. The more detailed and numerous rules become, and the more often they change, Lipsky claimed, the more inclined front-line decision-makers will be to selectively engage with a subset of rules that they view as the most central or, in particularly rule- and caseload-heavy environments, to abandon the rules entirely.¹⁹¹ A similar rule-abandonment, or fatalist, thesis has been proposed by other socio-legal scholars.¹⁹² However, my research suggests that something distinct from selective application or rule abandonment occurs within Ontario Works, despite the program's high caseloads and many rules. Instead, as this section demonstrates, front-line workers draw *on* Ontario Works' many rules, including legislation, regulations, office practices, and SAMS' functioning. In doing so, they use this vast assortment of rules, and formal discretion at its micro and macro scales, as a resource, particularly in cases where they perceive that formal discretion elsewhere in the rules has been narrowed or eliminated. While the above examples demonstrate how this technique can be used to find permissive flexibilities that support caseworkers in granting benefits, other outcomes are possible. Indeed, an altered version of this technique is used when caseworkers gesture broadly towards "the system" or "the legislation" as providing them with no options.

¹⁹¹ Lipsky, *Street-Level Bureaucracy*, *supra* note 15 at 14.

¹⁹² Robert A Kagan, "The Organisation of Administrative Justice Systems: The Role of Political Mistrust" in Michael Adler, ed, *Administrative Justice in Context* (Oxford: Hart Publishing, 2010) 161.

A final example demonstrates how, in performing operational discretion, front-line workers may combine looking to other rules with the strategic collection and use of a client's information to activate formal discretion within Ontario Work's legal framework. Front-line workers may use this strategy when rules seem especially inflexible. For instance, Ontario Works' legislative framework rigidly caps the total amount of core benefits that can be paid to a benefit recipient each month. Despite the names that the legislation gives to some core benefits – such as “Basic Needs” or “Shelter” benefits – these funds are not pegged to a recipient's actual food, clothing, or shelter costs. Instead, the legal framework governing Ontario Works limits the total value of monthly core benefits that front-line workers can provide to their clients based on the number of people in each client's benefit unit.¹⁹³ These benefit caps are clear, yet virtually all front-line workers acknowledge that core benefits are insufficient to pay for basic needs and shelter costs in Ontario.¹⁹⁴ In response, some front-line workers perform operational discretion by looking to other places within the statutory scheme to find open-ended or open-textured rules that fit a client's circumstances so that they can provide this client with funds even though they expect these funds to be used to pay for basic needs and shelter. A front-line worker explained how she used this strategy as follows:

A lot of my coworkers I expect would say that the legislation is so restrictive – and in some ways, related to Basic Financial Assistance and Shelter Allowance, it is – there is no grey area there. There is no grey area with Housing Funding, there is no grey area there. But with those other things that I work with more, those other Employment-Related Expenses, there's a lot of discretion. If you read the policy, we could give clients \$30 for a haircut if we wanted to every month. Like, is that necessary? Are we necessarily going to go out and do that? No, but if I have a client that's in desperate need, and I say “Oh, but you need to go for a haircut, *right?*” [raises eyebrows] then I'll issue it based on their request. So, I think we do have a lot of discretion.

This worker describes turning to the supplementary Employment-Related Expenses benefits to pay for items that are simply not covered by extremely low core benefits. Her approach also demonstrates the second performative strategy that front-line workers use in response to black-

¹⁹³ OReg 134/98, s 41 and 42, lists maximum payments for basic needs (s 41) and shelter allowance (s 42) benefits, which are built into SAMS. Together, both basic needs and shelter allowance make up “Income Assistance” under OWA, section 5, one of the benefits that I refer to as “core benefits” throughout.

¹⁹⁴ Canadian Centre for Policy Alternatives, *supra* note 31 notes that Ontario Works benefits are worth less now than they were in the late 1990s because benefit amounts have failed to keep up with inflation.

and-white rules: creatively gathering and categorizing information from their clients to support a particular outcome under Ontario Works' legislative framework. In the above example, the caseworker suggestively asks her client whether they may "need" to go for a haircut, and waits for that client to confirm these facts. She trusts that this individual will understand her cue (the eyebrow raise) and participate in her performance of operational discretion by verifying the information she needs to collect before providing that individual with an extra \$30 in Employment-Related Expense benefits "based on their request." As the next section explores, this creative assembling and categorizing of client information is a second strategy that front-line workers use in situations where they perceive "the rules" or "the system" to be inflexible.

3.3.3. Selectively Gathering and Characterizing Information

In addition, or as an alternative, to searching for grey area throughout the legislative scheme, front-line workers perform operational discretion by cleverly gathering and characterizing client information to fit clients within black-and-white rules. As noted earlier, the practice of adjusting facts to fit (or fall outside of) the rules reflects a broader socio-legal conception of operational discretion, one that encompasses a myriad of decision-making activities that workers undertake when they perceive the rules to include little formal discretion.¹⁹⁵ This section analyzes what it means to bend clients to fit within the rules. My data suggests that front-line workers do more than simply manipulate clients' data to fit the specifics of Ontario Works rules. Instead, they strategically collect and overlook information about clients' circumstances so that these individuals may fit within some rules and evade others. In some cases, this strategy ensures that individuals can access benefits and services, while in others front-line workers may dig for information that will lead a client to be caught by the rules and have their benefits reduced or cancelled.¹⁹⁶

These techniques come into play in circumstances where front-line workers perceive a rule, whether situated in a legislative text or embedded in a computer program, to be inflexible or, as

¹⁹⁵ See discussion in Chapter 2, section 2.3; see also Chapter 4, section 4.2.1 where I challenge Prottas' suggestion (*supra* note 15 at 91-3, 166) that workers use this practice to increase their autonomy.

¹⁹⁶ Also discussed in Soss, Fording & Schram, "Organization of Discipline," *supra* note 172.

research participants would describe it, “black-and-white.” For instance, one caseworker explained how she would fit a client’s circumstances into program rules particularly if that client was undertaking socially productive activities that might, ultimately, lead to employment:

Yeah, and I find it *so* frustrating – if they don’t fit into that *box*, then whose fault is it? Is it your fault? Is it their fault? You’re trying to squeeze them into something and I don’t even think on that level. I just don’t. And so, you are doing something that’s productive to your life, leaving you less isolated? Good for you, there’s money. [...] Of course, I have to look to the policy, is there potential for eligibility there? I always ask myself, “Is there potential for grey, for discretion?” Like, if somebody’s exhausted their benefits, I always ask myself, “How can I look at this differently to fit? How can I...” I don’t try and get the policy to fit them, I try to get them, their situation, to fit the policy. I squeeze even the littlest grain into it so I can pull out something.

This front-line worker described an overt strategy of trying to massage the details of her client’s circumstances so that they would “fit the policy,” which would enable this worker to “pull something out” for this individual by way of an additional benefit.

Research participants often found grey area in their clients’ lives when they had to apply family status rules that they perceived as containing no explicit or tacit grants of formal discretion. In such cases, workers would carefully gather information that they would use to characterize an Ontario Works recipient’s family or living circumstances, which could ultimately set off a series of unpleasant consequences for an individual benefits recipient. By “family circumstances,” I mean information detailing an individual’s intimate relationships, their housing arrangements, the dates when new children arrived, and other details required by Ontario Works laws, policies, and software programs to determine whether an individual was single or connected to other adults. Many participants explained how they may adjust this client data in response to rigid legal and technical rules. These rules could have particularly harsh effects for benefits recipients; some might limit the funding available to new mothers for their infant children, while others may classify adult children living with their parents as “dependents” and thus ineligible for Ontario Works benefits and services that might otherwise help them complete secondary school or connect them to community organizations, counselors, and other services. These front-line workers selectively assessed, classified, and articulated clients’ circumstances so as to limit the influence of these rigid legal-technical rules.

The effects of this practice are most clearly observable in relation to the obligation to pursue support from previous intimate partners. Front-line workers consistently identified these rules as

ones with few grants of decision-making flexibility, and as black-and-white barriers to eligibility. One front-line worker noted:

There's very little that can actually hold up an OW applicant's eligibility. One barrier is support. So, if somebody was not willing to complete or follow through or pursue support, then they wouldn't be eligible for Ontario Works.

By “support,” this participant refers to the legislative requirement that all sole-support parents, who are predominantly single mothers, do two things when applying for Ontario Works. First, they must provide the names (or determine the identity) of the biological father(s) of their dependent children, as well as the names of anyone else who may have a legal obligation to support these children. Second, they must actively pursue financial support from anyone who is legally obligated to support their children, which can be done with the help of a family support worker (a specialized municipal caseworker who helps Ontario Works recipients navigate family court proceedings and obtain child support payments).¹⁹⁷ In cases where an Ontario Works applicant or recipient receives child support or spousal support payments from a former partner, those payments must be reported to their caseworker and will be deducted dollar-for-dollar from their monthly Ontario Works benefits.¹⁹⁸ If those monthly support payments exceed what this individual would receive in core benefits for herself and her children, then she will be found ineligible for Ontario Works, including its associated supplementary benefits and services, such as prescription drug coverage, language classes, vocational training, and housing supports.

The legislative provisions detailing the obligation to pursue support actually include explicit and tacit grants of decision-making flexibility, and these are nested throughout the overall legal scheme that regulates sole-support parents. However, as with other examples explored in this chapter, for all intents and purposes the obligation to pursue support functions as an inflexible, black-and-white rule through the combined effects of office practices and regulatory technologies. The Regulation articulates the obligation to pursue support using broad, open-

¹⁹⁷ See *OWA*, s 59 and *OReg* 134/98, s 65.1, which detail the powers of family support workers.

¹⁹⁸ This was the rule at the time that my fieldwork was conducted in 2015. Since that time, the Ministry of Community and Social Services has announced that they will no longer be clawing back support payments at this ratio.

textured phrases similar to those discussed in Chapter 2.¹⁹⁹ It states that Ontario Works recipients have an obligation to make “reasonable efforts” to realize the financial resources that they may be entitled to, including spousal and child support payments.²⁰⁰ Similarly, the related provincial policy states that benefits recipients must make “every reasonable effort” to pursue support, thus layering formal discretion deeper within the legislative regime.²⁰¹ Despite these tacit and nested grants of formal discretion, a combination of local office practices and regulatory tools (i.e., questionnaires, SAMS checkboxes) are so commonly relied on that virtually all front-line workers are ignorant of the formal discretion that exists within these written rules. As a result, front-line workers respond to the perceived rigidity of these rules by strategically gathering and characterizing client data rather than trying to use this data to unlock the grey area within the written rules, as described in section 3.3.1.

Participants responded to the perceived black-and-white nature of the obligation to pursue support with a range of operational discretion performances, from sensitively gathering and characterizing client information so as to provide sole-support parents with some form of benefits to strictly enforcing the support obligation rule. A few passages from my interviews demonstrate this variation in workers’ performances of operational discretion even when they understood the rules to foreclose flexibility.

In some instances, caseworkers may perform operational discretion as they collect, classify, or ignore client information. Some research participants noted their use of operational discretion in how they would ask questions about an Ontario Works applicant’s personal history and a child’s biological father, or in how deeply they would dig for details. For example, one front-line worker explained that the obligation to pursue support required caseworkers to ask very invasive questions to benefits recipients. These questions made this participant noticeably uncomfortable.

¹⁹⁹ See Chapter 2, section 2.4.1.

²⁰⁰ OReg 134/98, s 13, which sets out the obligation to pursue resources that all Ontario Works recipients are subject to.

²⁰¹ Ontario Works Policy Directive 5.1: *Income and Exemptions [OWPD 5.1]* states: “All necessary information and supporting documentation must be provided to show that the member of the benefit unit has *made every reasonable effort* to obtain available income, including child and/or spousal support” [*emphasis added*].

Although she indicated that it was the “rule” that she was *supposed* to ask these questions, she suggested that she may discreetly alter how she asked these questions to avoid discovering information that would require her to dig deeper into a client’s family life. She might do this by telling her clients up front what would happen if they provided her with certain information, what would happen if they did not know other information, and so on. This technique gave her clients the opportunity to withhold the type of data that would provoke further questions or trigger an obligation to pursue support from a former intimate partner. She noted:²⁰²

OW recipients have to pursue support from the parents unless there’s violence – a threat of violence against them or the children. They have to pursue support. So, in terms of discretion with support, there’s not a – there’s no discretion in terms of that we have to tell them that they have to pursue support. In terms of doing that, so let’s say I meet with a client and the client says, “I don’t know who the father is, I don’t know who the mother is” – with sole-support parents, we’ll get a lot of “I don’t know who the father is of my baby.” Um, so then we have to ask them for a Statement of Live Birth, and we would give them money to get that information. And so, the Statement of Live Birth would have information about the father on it. And so, if there’s information, then we would do a location services referral and try to find that person. If there’s nothing on it, then there’s nothing we can do. They say they don’t know, we don’t know. So, that’s probably – support is probably the place where we use the least amount of discretion, I’d say. But I think different workers, depending on the caseworker, how much they sort of push for it. Like we’re *supposed to* ask really... invasive questions that I – other people might be more comfortable with it, but some caseworkers aren’t as *comfortable* with it. So, for instance, we’re supposed to say, if the kid is six, “Where did you meet the father?” So, the woman says she doesn’t know, “Where did you meet him? How many times did you go out with him?” Get really detailed, so anyway. Like, sometimes we’ll get, “I was at a bar” or “I had sex with three guys and I don’t know who they are” and so we’re supposed to ask for all three guys names, and it’s – yeah, it’s just [laughs/sighs]. And support is deducted at 100%, so we don’t have ... yeah, discretion on that either.

Another research participant who worked on an intake team described how she and her coworkers performed operational discretion in their scrutiny of Ontario Works applicants and as they decided which answers they would accept as “true” during an intake appointment. This participant noted that her coworkers went farther than she would to gather facts about sole-support parents who sought Ontario Works assistance:

²⁰² This participant was very aware of the potential that sole-support parents may be fleeing intimate partner violence when they apply for Ontario Works, which she highlights in this passage by mentioning the “violence” exception to the strict rule about pursuing support. This exception allows the support obligation to be waived in cases where pursuing support may put a welfare recipient at risk of violence by a former intimate partner.

I've seen it where caseworkers use their discretion and one client could be fortunate in that they get OW and another may not, because then a client comes in and the client says, "I only know the father's first name," and another client comes in and says, "I don't know the father at all." And sometimes we have it where if they know the system, or maybe often it's true, they would say that they don't know the father's identity, and it works better for them. Whereas a client could be honest and say, "Well, I know his first name," and then the caseworker would say, "Well, you *have* to provide the last name or you're not eligible," and turns the client away. Whereas, you know, for me personally, I would treat that client the same as the one who says, "I don't know the father's name. It was a one-night stand." And even because, you know, why put the client who is truthful and says, "I know the first name," in a position where we're forcing them to always say, and then, again, we're criticizing them for *not* knowing about the person, right? And so, they're providing a first name. My thing is, make them eligible, send them over to the active worker, and then the family support worker can meet with them and find ways for them to provide that information. So, you will see where maybe one caseworker will say, "You're not eligible," whereas I would hear them and think, "I would just make them eligible and send them over and let that discussion take place with the appropriate people," right? Yeah. Because, how I look at it, is at the end of the day, especially if there are children, the *children* suffer, right? You give them \$800, it's still not enough to have a decent life, you know, in the city, right? And, yeah. Even for us who work, how I look at it is, *we* work and we make decent money, and sometimes that's still not enough, much less for the clients, right?

This account demonstrates the range of operational discretion that may exist within the same social services office and even among colleagues who work in close proximity to one another. Even though this participant made clear that *she* might not require a benefits applicant to provide a biological father's last name as a precondition to finding them eligible for benefits, she strategically performed operational discretion to collect just enough information to find an individual eligible for benefits, deferring the ultimate decision about Ontario Works eligibility to other front-line workers: the "active worker," which would be the caseworker assigned to this particular client; and the "family support worker," a specialized front-line worker who would assist this client to obtain ID documents for her child(ren), if such documents were missing, to locate the father(s) of her child(ren), and to pursue financial support through family court proceedings.²⁰³

Yet, operational discretion could also be performed to reduce flexibility and indicate that a rigid "system" is making decisions. One participant compared her "black-and-white" sheriff's

²⁰³ See Mosher, Evans & Little, *supra* note 126.

approach with that of a “bleeding heart” caseworker whose caseload she had recently been assigned to cover:

This person [her predecessor] had a bleeding heart and overlooked all of this, so now I’ve gotta be the new sheriff in town and deliver what is a *very* black-and-white message and what we are bound to by legislation. So, you get people who don’t want to do spousal support, overlook child support at the time of intake, or the pursuit of it, people who have almost a soft side and want to grant. But again, you need to understand that we are strongly encouraged. We attended a professional development day, and the speaker said, “Look for ways to find people eligible. Don’t look for ways to find them ineligible.” And I was like, “The *legislation* makes that decision”. I tell everybody, “This is not personal. I don’t know you. I enter the information into the system as you give it to me and the *system* decides whether you’re eligible for this program or you’re not.” So, while I have a heart and peoples’ hardships and horrible situations are not lost on me, that legislation applies to everyone across Ontario.

This participant performed operational discretion to work against the practice that she perceived among her colleagues – namely, a general rule that front-line workers should look for ways to find clients eligible for Ontario Works. Instead, she performed operational discretion by asking her clients for all of the information that the other research participants quoted above were less comfortable gathering. In doing so, this caseworker would demonstrate to her clients that the rules were black-and-white and that she had no interpretive room available to her. She would point to “the legislation” and “the system” as responsible for finding an applicant ineligible, thereby decentring her own role in an ensemble institutional performance of operational discretion and her part in making contentious decisions. Instead, she would direct clients’ frustration towards the “legislation” that she is bound to follow and “the system” into which she inputs client information.

Thus, while some caseworkers may selectively collect and bend clients’ information to fit them within benefits-granting rules or avoid triggering benefits-denying mechanisms, they may also perform operational discretion to catch clients with rules that they believe clearly bar access to Ontario Works benefits and services.²⁰⁴ This variation in outcomes is illustrated in a final example. Here, a front-line worker contrasts her approach to collecting data about an Ontario Works recipient with that of her coworker, who is more inclined to scrutinize a client’s reasons

²⁰⁴ Soss, Fording & Schram, “Organization of Discipline,” *supra* note 172.

for requesting particular benefits. In the following passage, this worker describes her colleague's persistent questioning when evaluating a request for a full-time employment benefit.²⁰⁵ While she would not grill this client about their request for new work boots required to begin a new job, her colleague would press clients for further information to find details that might make them ineligible for the requested funds:

The client is asking for boots for employment, and this caseworker wants to know what make, what brand, you know. He said, "You needed boots when you were working last year. Didn't you have boots last year? So why do you need boots now?" But who's to say that the client had the right boots then? Like, it may not be the right safety boot, or maybe, like, people go through – like we change shoes, right? Every so often, with the season and everything, right? But, like, there's things like that where you can find that caseworkers are a little bit difficult and, like, you know our argument, we would say, "The client needs these boots for employment." So why give the client a hard time when it's for employment? Like, the client is trying to better him or herself, right?

This participant expressed frustration with her coworker's conduct. As his colleague, she was familiar with his tendency to enforce black-and-white interpretations of rules and find clients ineligible for benefits. Yet, she also acknowledged that this was one of the seemingly inevitable aspects of operational discretion, noting that "sometimes caseworkers have to sort of use their discretion. But not *everyone* will use the same discretion" as they collect and assess the facts of clients' lives. Thus, finding, overlooking, and characterizing facts all contribute to the performance of operational discretion when caseworkers perceive the rules as inflexible.

Everything up until now suggests that discretion, broadly framed, is everywhere. Formal discretion is explicitly and tacitly incorporated in individual legislative provisions and structurally nested throughout the Ontario Works' legal framework so that it is practically omnipresent. When the rules appear to be rigid, either because they include few grants of

²⁰⁵ See false taxonomy discussion in Chapter 2, section 2.5. "Mandatory" full time employment benefit provisions include explicit and tacit grants of decision-making flexibility, as well as formal discretion being nested across the related regulations and policy provisions that detail this benefit. For the benefit in question, the Regulation stipulates that funds "shall be paid ... if the administrator is satisfied" that the benefit applicant "meets the criteria for them" and is receiving income assistance (core benefits): OReg 134/98, s 55(1). Paragraph 5.1 of s 55(1) stipulates the criteria for the full-time employment benefit, which include that an individual must be starting full-time employment, that the funds requested are "reasonably necessary" to begin full time employment, and that the individual must not have received the full-time employment benefit in the previous 12-month period. This paragraph also places a \$500 cap on full-time employment benefit payments.

decision-making flexibility or because local practices or regulatory tools have effectively made the rules appear as though they are black-and-white, caseworkers may still perform operational discretion by looking for formal discretion embedded elsewhere in the legislative scheme or by massaging the facts of clients' lives to fit within a black-and-white rule. However, the ubiquity of formal and operational discretion is only one part of the picture.

The balance of my thesis shifts gears and demonstrates how performances of operational discretion in the Ontario Works program are constrained by two procedural features of front-line decision-making: first, how workers balance between competing program norms; and, second, how workers consider and adjust their performances in relation to the anticipated response of other human and non-human decision-makers in the Ontario Works program. The first of these forces – weighing contrasting norms – is examined in Chapter 4. My empirical research shows that front-line workers subtly draw on a range of norms that push and pull in competing directions as they perform operational discretion. The second force – reflecting on the performances of an aggregation of decision-makers – is considered in Chapters 5, 6, and 7. In these chapters, a close analysis of how Ontario Works functions exposes the myth of the individual decision-maker. Instead, I argue, decisions in the Ontario Works program are produced by multiple actors performing operational discretion as an ensemble cast, with each other and to one another. “Aggregated decision-making” refers to these layers of decision-makers, each of whom influence an individual applicant or recipient's access to the Ontario Works program. Because they constantly review one another's decisions, and because their decisions are regularly reviewed by their colleagues and others, I argue that aggregated decision-making leads front-line workers to perform operational discretion in relation to this anticipated future audience.

Chapter 4

Weighing Norms to Guide Operational Discretion

All front-line decision-makers, regardless of their professional identity, engage in a common method of balancing roughly the same set of legal and managerial values. Though they engage in a similar process of weighing competing norms, they may reconcile them differently from their coworkers and from one case to the next. This chapter traces the normative balancing that front-line workers undertake and produces two key findings. First, the norms that workers reconcile reflect a combination of objectives underlying the *OWA* and managerial principles traceable to new public management initiatives. Second, rather than function separately from one another, these norms operate together within the Ontario Works program so that workers find ways of harmonizing principles that outsiders might view as in conflict. Front-line workers may indicate that they are guided by just one of these norms, but I demonstrate that this is rarely, if ever, so. Rather, by engaging in a shared process of balancing divergent norms, workers moderate their performance of operational discretion so that their decisions fall within a band of reasonable outcomes. This common balancing method, I argue, is one of two mechanisms that regulate how front-line workers perform operational discretion in the Ontario Works program, with the second being widespread aggregated decision-making.

This chapter begins by first addressing the influence of professional identity on how front-line workers perform operational discretion. My research participants aligned themselves across a professional identity spectrum that ranged from pro-client social workers on one end and black-and-white efficiency engineers on the other. While this identity spectrum corresponds with the findings of American socio-legal scholars, many of my research participants located themselves somewhere between the spectrum's poles rather than at either end. Further, even those workers who explicitly aligned themselves as pro-client social workers or black-and-white efficiency engineers demonstrated that they, like their mid-spectrum colleagues, would balance divergent norms to justify how they performed operational discretion rather than rely on a subset of principles that reinforced their professional identity. The bulk of this chapter analyzes how workers engage in this normative balancing act, tracing seven discrete and overlapping principles evident in my empirical data. The existence of competing norms is not unique to Ontario Works, but is a common feature of the legal-managerial regimes governing other administrative

agencies.²⁰⁶ However, because they serve particularly divergent goals, social assistance and other programs of last resort may be subject to an even wider range of norms. The normative tensions revealed by my research are not evidence of a deficit in the Ontario Works program or in its legal architecture; if anything, they suggest that front-line workers are doing the difficult job that provincial legislators have delegated to them. Most importantly, as this chapter demonstrates, these front-line decision-makers feel bound by conflicting norms and perform sophisticated balancing acts in ways that might diverge from (but are no less reasonable than) the weighing and balancing that administrative scholars have in mind in their analyses of discretion and reasonableness. By demonstrating how front-line workers reconcile norms, this chapter presents a snapshot of reasonableness as it is practiced behind the front-lines of an administrative agency.

4.1. Professional Identity as a Determinative Factor?

Before embarking on an analysis of how the process of balancing between norms constrains operational discretion, I first address whether operational discretion is primarily guided by front-line workers' sense of professional identity. While socio-legal studies of public administration tend to dichotomize between two stylized professional identity types and assess how front-line workers operate in relation to these categories, I focus on the space between these poles. Front-line workers may initially associate with either end of a professional identity spectrum, but their performances of operational discretion – specifically, their normative balancing and their consideration of how coworkers will receive their decisions – ultimately nudge them towards a middle range, mitigating the effect that their professional identity might otherwise have. This chapter explores the impact of normative balancing, while Chapters 5 through 7 will examine the influence of layers of fellow decision-makers.

Socio-legal studies of public administration, especially in the context of American public benefits programs, tend to categorize the front-line workers who deliver these programs into two

²⁰⁶ Mashaw, *Bureaucratic Justice*, supra note 119, Brodtkin “Accountability in SLOs,” supra note 118, Baldwin & Hawkins, supra note 44. See also the discussion in Chapter 2, section 2.4.2.

stylized professional identity types.²⁰⁷ Much like Ontario Works, the administrative environment in which these workers function routinely presents them with a consistency versus responsiveness tradeoff: do they make decisions that are internally consistent en masse, or do they respond to the unique needs of those who request assistance?²⁰⁸ The stakes of this tradeoff are intensified by the environment in which it occurs, which Watkins-Hayes describes as a “catch-all bureaucracy:” an agency created to implement particular public policies but that ends up, because of its client population, acting as a safety net that catches individuals who have few alternate supports available to them.²⁰⁹ Though the benefits programs delivered by catch-all bureaucracies are typically rule-heavy, front-line workers in this context develop styles of delivering messages and navigating legal rules, based on their beliefs about what they should be accomplishing, their social group membership, and their perception of administrative cues.²¹⁰ As workers become socialized within a catch-all bureaucracy, Watkins-Hayes suggests that two professional identities emerge; the first is efficiency engineers – a rules-observant, efficient bureaucrat role; the second is social workers – a client counseling, rules-bending role. These identities shape how workers navigate program rules and deliver benefits and services to the public.²¹¹ While she acknowledges that these identities exist at either end of a continuum, Watkins-Hayes analyzes how these professional identities intersect with front-line workers’ social identities (i.e., class, race, gender) and shape their understanding and performance of their roles as welfare caseworkers.

This focus on polarized professional identities characterizes other American studies of front-line workers within benefits-delivering agencies. For example, in her study of municipal service

²⁰⁷ See, for instance, Watkins-Hayes, *supra* note 94; Zachary W Oberfield, *Becoming Bureaucrats: Socialization at the Front Lines of Government Service*. (Philadelphia: University of Pennsylvania Press, 2014); Jewell, *supra* note 125.

²⁰⁸ Jewell, *ibid.*

²⁰⁹ Watkins-Hayes, *supra* note 94 at 30-32.

²¹⁰ Maynard-Moody and Musheno, *supra* note 175; Brodtkin, “Inside Welfare Contract,” *supra* note 116; Oberfield, *supra* note 207.

²¹¹ Watkins-Hayes, *supra* note 94, especially at 10-12, 14-16,

providers, DeHart-Davis proposes that workers can be roughly categorized as bureaucratic or unbureaucratic personalities, with bureaucratic personalities adhering closely to rules, similar to efficiency engineers, and unbureaucratic personalities bending rules to meet broader program goals, akin to Watkins-Hayes' social workers.²¹² Similarly, Maynard-Moody and Musheno claim that a state-agent and citizen-agent dichotomy represents the performance of front-line workers in a variety of catch-all bureaucracies. Based on their study of police officers, teachers, and employment counsellors, Maynard-Moody and Musheno suggest that most front-line workers identify as citizen-agents rather than state-agents. State-agents, they argue, conceive of their role in relation to rules, self-interest, and bureaucratic efficiency, but Maynard-Moody and Musheno note that most of their research participants identified as citizen-agents who make decisions in response to their interpersonal interactions with citizens rather than program rules or norms.²¹³ While these studies offer insights into how workers in other contexts ascribe to professional identity types, they conceive of front-line workers as falling and typically remaining at one of two ends of a continuum. The space between these poles thus remains underexplored.

While my research data suggests that these two stylized identity types operate within the Ontario Works program, it also shows that many front-line workers occupy the in-between space. My work highlights this space where workers' professional identities function more ambiguously than public administration literature has previously suggested. Further, in this chapter I claim that the potential influence of workers' professional identities on their performance of operational discretion is tempered by a common method of balancing between conflicting norms. Thus, although my research participants might identify themselves and their coworkers as "black-and-white" efficiency engineers or "pro-client" social workers, their performances of operational discretion suggest that they converge towards a middle range somewhere between these two ideal types.

These findings may be unique to benefits delivery in the Ontario Works program, or within a Canadian public administration context, but I suspect that their divergence from earlier American

²¹² DeHart-Davis, *supra* note 175.

²¹³ Maynard-Moody & Musheno, *supra* note 175.

public administration studies has a methodological and disciplinary explanation. Because my methods focused equally on the “legal” and the “social” elements of front-line decision-making, my study attends as closely to regulating forces and formal legal structures as it does to how workers’ professional identities shape service delivery. This different focus produces insights that are distinctive from studies of service delivery, administration, or management within catch-all bureaucracies. Further, my analysis is particularly attentive to the intersecting legal-managerial norms apparent in my research data and their roots in both Ontario Works’ legal framework and the new public management strategies popularized around the time that Ontario’s welfare program was transformed in the 1990s. Thus, a similarly-focused study within American states that are comparable to my Ontario research sites may produce analogous findings.²¹⁴

Because my study involved a relatively small set of research participants, I do not propose a personality typology that maps onto all Ontario Works offices, or other administrative contexts. Despite this small sample size, however, my research participants were diverse enough to articulate a range of professional identities, including more polarized pro-client social workers and black-and-white efficiency engineers, and many individuals situated somewhere between these two types. Thus, despite the risk of bias inherent in any empirical research project (i.e., the risk that those who agree to participate will over-represent one subset of the total group being studied – maybe more pro-client social workers and fewer black-and-white efficiency engineers), the diversity among my participants’ professional identities, the way in which they positioned themselves in relation to their colleagues,²¹⁵ and their complementary and divergent views on how they perform discretion all suggest that my participant base is large enough to provide insights into a range of front-line workers. While I do not draw quantitative conclusions about professional identities in the Ontario Works program, a quantitative breakdown of professional

²¹⁴ This point could be explored through a comparative study using similar research methods and attending to the formal legal and institutional structures of public benefits programs in other contexts. Because public administration scholars do not typically consider these features, their findings may overlook how front-line workers, regardless of their professional identity, are influenced by elements that legal scholars might find significant, including competing norms and anticipated substantive review by one’s peers.

²¹⁵ This point is discussed in greater detail in Chapter 6, section 6.2, where I demonstrate how front-line workers come to know one another’s professional identity, or “style” of performing operational discretion.

identities is not needed to support my findings about how multiple norms and aggregated decision-making regulate operational discretion.

I do not suggest that identifying as a black-and-white efficiency engineer or pro-client social worker has *no* effect on how front-line workers perform operational discretion. Indeed, my research participants would identify themselves and their colleagues along a spectrum of professional identities, with efficient “black-and-white” rule enforcers at one end and “pro-client” rule-benders at the other, and distinguished their own approach in relation to that of their colleagues.²¹⁶ However, although research participants’ decision-making processes appeared at some points to be guided by norms corresponding with one professional identity, at others they were directed by norms closer to a contrasting professional identity. This heterogeneity will be recognizable to socio-legal scholars who are familiar with research that demonstrates how individuals do not work with one cognitive structure or rely on previously-constructed interpretations, but shift between them.²¹⁷ My argument builds on this literature and suggests that the divergence that polarized professional identities might produce as between front-line workers is tempered by the normative balancing act that all decision-makers, regardless of their professional identity, described. Their orientations may be different, but virtually every front-line worker appears engaged in a common method of weighing and reconciling legal and managerial norms that outsiders may perceive to be incompatible. This normative balancing act may correspond to a reasonableness exercise recognizable to administrative law scholars, with reasonableness being first and foremost a decision-making process.

Before examining how this method of weighing diverse norms moderates workers’ performance of operational discretion, I will illustrate how my research participants fluctuated between

²¹⁶ Front-line workers seemed to be very aware of their colleagues’ approaches. For an in-depth discussion of this phenomenon, see Chapter 6, section 6.2.

²¹⁷ These observations about social and cognitive heterogeneity, in which individuals invoke alternate meanings in a single utterance and switch between “different registers of voice” stem from Bakhtin’s concept of “heteroglossia,” which is rooted in the specific literary form of the novel: Mikhail M Bakhtin, *The Dialogic Imagination: Four Essays*, ed by Michael Holquist, translated by Caryl Emerson & Michael Holquist (Austin: University of Texas Press, 1981). Though rooted in literary studies, Bakhtin’s concept of heteroglossia has influenced how socio-legal scholars approach apparent disunity and incoherence in a variety of individual and institutional settings: Ewick & Silbey, *Common Place of Law*, *supra* note 17 at 50-51; Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale, and Governance* (Abingdon, Oxon: Routledge, 2015).

professional identities. Some participants explicitly described themselves as “black-and-white” decision-makers who took a clear-cut approach to operational discretion so that they could justify their decisions as rooted in “the legislation” in the event that a client complained about a particular decision to a supervisor or office manager. One front-line worker noted:

I’m also very black-and-white: “Yes I can. No I can’t.” And it’s not personal. I can justify every answer I give to anybody because I may have to. So, I think about, “Ok, if I say no, what does this look like? Is my supervisor gonna support me, and does the legislation support my answer?” If it’s yes, then that’s how I move forward. If I believe it, that’s how I move forward.

However, later in the interview this same worker tempered how she described her black-and-white approach, noting that she might find “grey area” within the rules, provided that she could justify her decision to avoid potential future conflicts with clients:

I’m a black-and-white person. I can work in a grey area, but I have to be able to justify it in a way that actually agrees with me, right? And I have a means of operating where I think – like, I’m very careful not to make promises I can’t keep to my clients.

Other participants identified themselves as “pro-client” decision-makers inclined to locate and operationalize formal discretion wherever they could, even if it required “bending” the rules. A number of these front-line workers had experience working with very marginalized Ontario Works recipients with histories of chronic homelessness or alcohol and drug addictions. Others described themselves as risk-takers who were not afraid to advocate to management staff for an out-of-the-ordinary legislative or policy interpretation, or a creative use of regulatory technologies, to ensure that particularly needy or sympathetic clients received benefits. These workers attributed their approaches to a different outlook. As one participant put it:

I would say our discretion’s pretty vast, yeah, but I guess that’s because I’m coming from a different mindset. A lot of people I expect would say that the legislation is so restrictive – and in some ways, related to Basic Financial Assistance and Shelter Allowance, it is – there is no grey area there. There is no grey area with Housing Funding, there is no grey area there. But with those other things that I work with more, those other Employment-Related Expenses, there’s a lot of discretion.

Another participant described herself as a rule-bender who sought the best outcomes for her clients within the confines of anticipated managerial review:

How much discretion you feel you have really has to do with workers’ personality. It’s a matter of what is your level of fear or concern about management coming to you. And

my practice has always been – my coworkers laugh at me for it – ‘cause I always say, “I *bend* rules. I don’t break them.” So, *I* feel that as long as I just bend the rule, I didn’t *break* it, I shouldn’t be able to get in trouble for it, right? And just measuring things by best outcome for the client within guidelines. So, if you have to *bend* the rule a little bit to support a client, how much trouble will I actually get into for maybe bending the rule or stretching it a little bit too far?

Participants who identified themselves as “black-and-white” decision-makers recalled instances where they would broadly interpret narrow rules so that their decision in a given case balanced between conflicting program norms and the pressures imposed by aggregated decision-making. Likewise, those participants who identified closer to the “pro-client” side of the spectrum would describe situations where they were unable to bend the rules far enough to provide a client with a particular benefit because one norm weighed more heavily in their decision (i.e., promoting self-sufficiency over preventing hardship) or because the anticipated input or review of their coworkers or supervisors made a particular outcome virtually impossible. Regardless of whether workers identify as black-and-white efficiency engineers or pro-client social workers, they used a common method to reconcile overlapping and conflicting norms rather than to simply adhere to those norms that reinforced their professional identity. The balance of this chapter explores the range of norms that guide front-line workers, their sources, and their relationship to one another.

4.2. The Multiple Norms Guiding Operational Discretion

As front-line workers recognize or overlook the formal discretion available to them, they weigh and reconcile complementary and conflicting norms. These norms, and the process of balancing between them, guide workers’ decisions to find, or not find, opportunities to perform operational discretion in particular cases and guide their performances. In some instances, research participants would explicitly identify these norms as guides, by describing how their decisions were influenced by a particular principle, such as not creating hardship for clients. In many others, these norms appeared to underlie decisions that participants identified as directed by a *different* norm (e.g., the norm of efficient case management often functioned in this beneath-the-surface capacity). Whether some norms were directly referred to by caseworkers or functioned more implicitly is less important for my argument. What is significant is their effect: front-line workers feel bound, to some degree, by these norms; and they have an apparent impact on how caseworkers perform operational discretion.

As I trace below, these norms have both managerial and legal sources. They mirror the “new public management” strategies that have transformed public service delivery for at least the past two decades,²¹⁸ as well as the *OWA*’s stated legislative objectives. New public management is, admittedly, a slippery term because authors stress varied elements when conceptualizing it. The components of new public management that are evident in my empirical research are uncontroversial, however. They include commitments to individualized customer service, performance-based evaluations of service delivery, operational efficiency, and horizontal disaggregation of public services.²¹⁹ Though its effects are outside the purview of most legal scholarship, new public management has pervasively influenced how Ontario Works services are delivered and, arguably, is reflected in the *OWA*’s legislative purposes.²²⁰ Further, many new public management goals identified by regulatory governance and public administration scholars are embodied in the managerial initiatives and regulatory mechanisms common to Ontario Works offices, such as performance-based employee reviews, regular randomized audits, and customer service initiatives.

The fact that the norms I identify in this chapter overlap, complement, and diverge from one another does not indicate a shortcoming in the norms themselves. Rather, their overlapping character echoes the intersections and tensions embedded within the *OWA* itself, including its explicitly-stated legislative purposes. The legislative purposes section of the *OWA* reads:

1. The purpose of this Act is to establish a program that,

²¹⁸ Both public administration and regulatory governance scholars have written about the rise of new public management: Barzelay, *New Public Management*, *supra* note 161; Patrick Dunleavy & Christopher Hood, “From Old Public Administration to New Public Management” (1994) 14:3 *Public Money & Management* 9.

²¹⁹ For a more nuanced treatment of the different conceptualizations of new public management, see: Patrick Dunleavy et al, “New Public Management is Dead – Long Live Digital-Era Governance” (2006) 16:3 *Journal of Public Administration Research and Theory: J-PART* 467.

²²⁰ Indeed, socio-legal scholars have begun to recognize that managerial and legal standards may cross-pollinate over time, which might partially explain the synergy between new public management goals and the *OWA*’s objectives. See, for instance, Lauren B Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* (Chicago: University of Chicago Press, 2016). Edelman meticulously demonstrates how legal and managerial norms influence one another over time. While her study focuses on private sector employers in the United States, this blurring echoes in my research participants’ accounts of how norms guide their operational discretion. Further study on this point, specific to management strategies and their effects in the public sector, would be enlightening.

- (a) recognizes individual responsibility and promotes self-reliance through employment;
- (b) provides temporary financial assistance to those most in need while they satisfy obligations to become and stay employed;
- (c) effectively serves people needing assistance; and
- (d) is accountable to the taxpayers of Ontario.

The crux of the matter is that the legal framework governing Ontario Works, like those that govern other public benefits programs, incorporates a range of values and interests all of which must be considered by front-line workers as they routinely perform operational discretion.²²¹ Although these norms may conflict and intersect, workers nonetheless use them as guides and balance between them when implementing the Ontario Works program.

As I demonstrate below, these norms regularly overlap in practice. Front-line workers are always reconciling between them, which is evident in my data. To detail the content of each norm, I tease out its distinct features, but I also demonstrate that it is virtually never the case that only one norm is at work. Not only do different norms overlap, but front-line workers are almost always considering them simultaneously rather than in a compartmentalized fashion. The discussion that follows, then, inevitably reflects this overlap, as my description of one guiding norm will allude to others that are concurrently at work.

Finally, the theoretical conflicts that legal scholars might identify between these norms may not arise in practice and, if it does, it may be resolved in unexpected ways as workers perform operational discretion. For instance, the norm of not creating undue hardship might hypothetically conflict with the norm of advancing a client towards self-sufficiency, particularly if some amount of hardship is understood as essential to promote self-sufficiency or to discipline clients who disregard program rules. In practice, however, front-line workers may find that these two norms complement each other, noting that clients need to be supported if they are to exit the Ontario Works program. The performance of operational discretion, which includes this

²²¹ Similar to the indeterminacy of aim noted by Hart, *Concept of Law*, *supra* note 96 at 126-33.

normative balancing act, demonstrates its constraints as front-line workers identify different norms, weigh them, and decide how they will govern a particular decision.

My research suggests that the following norms govern how front-line workers perform operational discretion in the Ontario Works program:

- (1) do not create undue hardship;
- (2) act in a client's best interests;
- (3) safeguard taxpayer-funded benefits;
- (4) promote self-sufficiency;
- (5) efficiently manage one's overall workload;
- (6) move clients from Ontario Works to an alternative means of support; and
- (7) keep the peace among one's coworkers.

These norms overlap with one another, but front-line workers also distinguish between them and suggest that they function in different ways; for this reason, I have articulated each one as a distinct principle. The first four norms require that caseworkers consider the effect of operational discretion on a particular Ontario Works applicant or recipient. While they are arguably connected to new public management goals, these four norms are more strongly tied to the goals underlying the *OWA*. The last three norms are more managerial than legal, as they mandate front-line workers to evaluate how a particular performance of operational discretion will affect their overall occupational environment, such as their ability to manage their caseload or to maintain harmony with their coworkers and supervisors. Two of these norms (efficient workload management; moving clients off of Ontario Works) are closely linked to new public management strategies, though they are also traceable to the *OWA*'s goals. The last norm – keeping the peace among coworkers – is more of a common-sense principle of organizational culture than a legal or managerial one. It appears to be always operating in the background, and is traceable to aggregated decision-making's pervasiveness in the institutional design of contemporary Ontario Works delivery agencies.

Below, I connect these norms to a mix of legislative and new public management objectives, identify how they arise in my research data, and show how navigating this normative landscape regulates caseworkers' performance of operational discretion.

4.2.1. Do Not Create Undue Hardship

When describing how they used operational discretion, my research participants indicated that they relied on a principle of not creating hardship for Ontario Works recipients. Occasionally this principle was framed as preventing hardship. Because both articulations blended in my research data, I have grouped them together here. This norm is linked to two of the *OWA*'s four stated legislative objectives: to “provid[e] temporary financial assistance to those most in need;” and to “effectively serv[e] people needing assistance.”²²² Arguably, intentionally creating hardship for Ontario Works recipients is an *ineffective* means of serving people who need assistance. A desire to not create hardship also parallels new public management's goal of reorienting public service provision from a hierarchical bureaucratic model to one that values individualized “customer service.”²²³

Front-line workers clearly identified this principle and noted that they considered whether a particular use of operational discretion would create undue hardship for an Ontario Works applicant or recipient. Where the written rules were unclear, some described this norm as requiring that they “err on the side of the client” because they “didn't want to cause any hardship.”

This norm is a strong guide in situations where front-line workers find that they have some space to perform operational discretion. For instance, a worker who connects Ontario Works recipients with employment training opportunities explained how this norm may lead her to not suspend an individual's benefits even if that client is not participating in employment activities. In the situation, she describes a “youth” benefits recipient (i.e., a client who is under 30 years old) who repeatedly failed to complete the vocational training activities set out in his Participation Agreement. She noted that he might be able to obtain employment, but that his erratic behaviour would likely lead him to lose any employment shortly afterwards. She stated:

²²² *OWA*, ss 1(b)-(c).

²²³ Christopher Pollitt, *Managerialism and the Public Service*, 2nd ed (Oxford: Blackwell, 1993); Soss, Fording & Schram, *Disciplining the Poor*, *supra* note 93, Chapter 10, notes how “customer” terminology has infiltrated Florida's TANF program and other social services. See also Cowan & Halliday, *supra* note 161, Chapter 4.

This young man's on a youth caseload assigned to that neighbourhood. So, the caseworker he's assigned to works specifically with youth that live in the nearby community undergoing social housing redevelopment. And she has tried to address the issue with him, but it just hasn't worked. And she's given him opportunities. We've sent him to other training programs as well, and it didn't work out. He was aggressive with staff – and she [his caseworker] knew this – but still referred him to a local shopping centre job fair because she said she's noticed some progression, right? Some positive progression, so let's give him a chance, right? But it's not... yeah. He still definitely has challenges that he needs to overcome before he's going to be able to maintain work. He can probably get the job because he does have a kind of winning personality, so I could see him securing a job, but he won't keep it. Yeah, he won't keep it. Like, this young man, his assigned caseworker has tried to get him to attend these vocational programs: he refuses, 'cause he says there's nothing wrong. He refuses to access any of those services, so it makes it that much harder, 'cause then now the problem is, "Okay, so what do we do with him?" He's not employable, he's refusing programming, there's nothing that we *can* do. We're not going to cut his cheque off because you're creating a hardship that's unnecessary, right? So, we kind of have to just wait for something to happen.

In this case, the employment worker recognizes that she and the client's assigned caseworker are in a bind and must perform operational discretion. The young man is not attending vocational training programs and has a spotty employment record. Though his erratic behaviour suggests that he may experience barriers to participating in employment activities, he does not identify as having a disability or as experiencing other impediments to participation. It is unclear whether his caseworker has made undertaking particular employment activities a formal condition of receiving his "cheque" (which, in this example, would include both basic financial assistance for food and shelter, plus supplementary employment assistance). If this condition has been formalized, violating it would trigger a series of provisions in which formal discretion is nested and that, together, permit these workers to cancel or reduce his benefits.²²⁴

In the above situation, Ontario Works' written legal framework does not prescribe one particular outcome; it allows for a range of possibilities. The relevant *OWA* provision is unclear as to what should happen in this case. Instead, it directs front-line workers to look to the Regulation for details about when to reduce, cancel, or suspend assistance, indicating that such matters are

²²⁴ See OReg 134/98, ss 29(1), 33(1)(b), which together permit a front-line worker to, under certain circumstances, require that an Ontario Works recipient participate in a particular employment assistance activity "for which he or she is physically capable." If the same benefits recipient refuses or fails to make reasonable efforts to participate in the specified employment assistance activity, the worker may cancel or reduce that recipient's income and employment assistance.

“prescribed.”²²⁵ The Regulation, in turn, states that assistance “shall” be reduced or cancelled if a benefit recipient fails to “make *reasonable efforts* to accept and maintain full-time, part-time or casual employment for which he or she is *physically capable*.”²²⁶ Whether this young man is making reasonable efforts to pursue employment, and whether he is physically capable of doing so, are open questions.²²⁷ These legal provisions do not require that the employment worker or this client’s assigned caseworker cancel or reduce his benefits, despite his refusal to attend vocational training programs, although they *do* tacitly contain an open-textured permission to do so. In this case, the employment worker and her colleague, the client’s assigned caseworker, decided against reducing, suspending, or canceling his Ontario Works benefits for the time being because taking such action would create unnecessary hardship for this client. As I will demonstrate below, other workers may balance the principle of not creating hardship against other norms, such as promoting self-sufficiency, which could lead them to a different outcome. Both of these outcomes are within the range of options permitted by the written legal framework governing Ontario Works.²²⁸

Not creating hardship has a strong normative influence within Ontario Works offices, even among front-line workers who do not identify themselves as being particularly “pro-client.”²²⁹ One caseworker who self-identified as a “black-and-white” efficiency engineer described this norm as having such a strong pull that it would lead her coworkers, and even herself in certain circumstances, to “bypass” legislation: “People scream bloody murder and we just generate those funds for them. The legislation is often bypassed, as we, as they say, try to avoid hardship or however it’s justified, right?” Another caseworker, who also identified as taking a “black-and-

²²⁵ OWA, s 14(1).

²²⁶ See OReg 134/98, ss 28, 33(1)(a) [*emphasis added*].

²²⁷ See discussion of these provisions in Chapter 2, section 2.4.2.

²²⁸ Efficient case management and keeping the peace with one’s coworkers are also arguably at play in the above situation.

²²⁹ This norm appeared to be a particularly strong guide for caseworkers, and may be connected to the pull of “humanitarian reason,” which Fassin identifies is the central value underlying contemporary international politics: Didier Fassin, *Humanitarian Reason: A Moral History of the Present*, translated by Rachel Gomme (Berkeley, CA: University of California Press, 2012).

white” approach to Ontario Works legislation and policies, described the predominance of the principle against creating hardship in her initial training and in her everyday work:

When I first started, we were told in training that “You will never get in trouble for issuing the client too much money. You will only get in trouble for *not* issuing the client money.” [laughs] We might be called into a supervisor’s office and asked, “You issued this much money. Why did you do that?” But in my 13 years, it’s never happened. I’ve never been called in to say, “Why did you do this?” So, we’re given the direction to do what’s best for the client. Always err on the side of the client, avoid hardship for the client, so then we make decisions throughout our day following that line of thought.

This norm is so ingrained that some caseworkers use “hardship” as a code word when they need supervisory approval to issue a particular benefit.²³⁰ One of my research participants frankly noted how effective hardship references can be for obtaining supervisory approval to assist clients, including those recovering from drug or alcohol addictions who could be particularly demanding:

Before issuing additional benefits, you have to have spoken to a supervisor to say, “Listen, my client lost their money and I need a double issuance this month.” Or “I’ve already issued this, but they need it. I can’t get the cheque back from the landlord but they need it today. They swear that the money went this place.” And you just run that word “hardship” and they get frightened. They do! [laughs] It’s like saying to an 85-year-old man the word “menopause”, they just get frightened. [imitating supervisor] “Ohhh! Don’t say the word ‘hardship’! Give it to them!”

Another caseworker, who also worked with individuals who were undergoing treatment for drug and alcohol addiction, described how the principle of not creating hardship guided her decisions:

I just, you just want to try to help clients in any way you can so that they’re not isolated and alone and feeling stressed, because all of that contributes to a worsening of their situation. So, yeah, I guess there has to be need, you have to consider policy, and I really look at what is their situation. If there is anything I can do to alleviate just a little bit, I will.

While participants explicitly identified this principle as a particularly strong normative guide, not creating hardship also intersected with other norms such as efficient case management. For instance, participants noted that granting clients benefits could make volatile clients easier to work with, encourage them to comply with program requirements, and ultimately decrease

²³⁰ See discussion in Chapter 6, section 6.4.

potential conflicts with clients. This overlap and complementarity between norms comes through in the following passage, where a different caseworker describes how she uses operational discretion to prevent hardship and make it easier to manage high-needs clients:²³¹

So, if it says, “they may be eligible if they are in an activity,” or whatever, I feed on that word “may” because it’s not absolute. And I think if a client is experiencing hardship I just really try – if I can hear they’re struggling, I don’t care. I’ll just do whatever I can. I don’t like to hear clients struggling because they’re harder to work with when they are in crisis. And they can be at risk of so many things.

Contrary to the findings of earlier socio-legal studies of “street-level bureaucrats,” this caseworker grounds her account in a combination of norms that underlie Ontario Works’ managerial and legal framework rather than in an assertion of her autonomy as a worker.²³²

While autonomy assertion may partly inspire this caseworker and others as they tailor outcomes to individual clients, the process of balancing between norms is done in relation to their coworkers as a way of ensuring that their decisions roughly correspond to what these coworkers and what a reviewing supervisor or auditor might do for the same client.²³³

Thus, the norm of preventing hardship may, in some circumstances, be coloured by the norm of efficiently managing one’s caseload and even the norm of promoting self-sufficiency. This reconciling between norms shone through in the accounts of research participants who had worked with addicted or homeless clients, but it was also mentioned by many other front-line workers who used supplementary benefits as an incentive for clients to return to their next appointment. Research participants might explicitly identify these decisions as preventing hardship for particularly desperate clients, but it was also clear that distributing additional benefits enabled them to reward responsible clients (i.e., those who kept appointments) and to oversee large caseloads, especially as they were increasingly experiencing management-level

²³¹ This participant’s account echoes Prottas’ finding decades earlier that front-line workers use discretion not only to bend rules to fit their clients, but also to bend clients’ circumstances to fit within the rules: Prottas, *supra* note 15. Prottas claimed that front-line workers engage in this dual bending to assert their own professional autonomy, but my findings suggest that more is at play, as noted in Chapter 3.

²³² This was Prottas’ argument, *ibid*, and is also reflected in other public administration literature such as Maynard-Moody & Musheno, *supra* note 175.

²³³ This phenomenon is discussed in greater detail in Chapter 6.

pressure to meet their clients more frequently. The norms identified here, then, interact in ways that are more sophisticated than simply being either in harmony or in conflict.

4.2.2. Act in a Client's Best Interests

In addition to not creating undue hardship, many participants indicated that their operational discretion was guided by a commitment to acting in a client's best interests. This norm was also described as "erring on the side of the client" or doing what would benefit the client. What might be in a client's "best interests," of course, is flexible. Because of this flexibility, this norm can be linked to three of the *OWA*'s legislative objectives: the two objectives noted in the previous section – providing temporary assistance to those most in need and effectively serving people needing assistance – and a third *OWA* objective, "recogniz[ing] individual responsibility and promot[ing] self-reliance through employment."²³⁴ Acting in a client's best interests also echoes the influence of "customer service" within new public management strategies that aim to deliver individualized public services.²³⁵ To outsiders, it may seem bizarre to conflate "customers" with the marginalized individuals who rely on last-resort programs such as Ontario Works, particularly as these individuals cannot easily shop around for the basic supports that they seek from such programs. Despite this dissonance, concerns about customer satisfaction have motivated welfare delivery reforms in the United States²³⁶ and the United Kingdom.²³⁷ The language of customer service was explicitly behind some of the most recent policy initiatives in the local offices that I studied.

Acting in a client's best interest clearly overlaps with the norm of not creating undue hardship and others, such as promoting self-sufficiency. While they share common normative ground, I

²³⁴ *OWA*, ss 1(a).

²³⁵ Dunleavy & Hood, *supra* note 218.

²³⁶ Matthew Diller, "The Revolution in Welfare Administration: Rules, Discretion and Entrepreneurial Government." (2012) 75:5 *NYUL Rev* 1121 at 1127. See also Soss, Fording & Schram, "Organization of Discipline," *supra* note 172.

²³⁷ Simon Halliday, "Institutional Racism in Bureaucratic Decision-Making: A Case Study in the Administration of Homelessness Law" (2000) 27:3 *JL & Soc'y* 449 notes, at 457, that in some offices UK homeless persons applying for housing supports were referred to as "customers." See further discussion in Cowan & Halliday, *supra* note 161.

distinguish between acting in a client's best interests and other principles because front-line workers explicitly referenced each of them during my fieldwork. Further, each one of these principles appear to perform different normative work and to balance differently. Acting in a client's best interests seemed to be a foundational norm; like efficiently managing one's caseload, it is almost always operating in the background. Preventing hardship and promoting self-sufficiency, by contrast, appear to be more concrete variations of acting in a client's best interest. Where a particular performance of operational discretion would clearly create hardship for an Ontario Works applicant or recipient, the norm of preventing hardship might exercise strong pull (a distinctive, stronger pull than acting in a client's best interests) as workers balanced it against other program norms. The same can be said about the relationship between the principles of acting in a client's best interests and promoting self-sufficiency. Thus, despite their overlapping content, I consider these norms separately from one another because all three had varied effects on my research participants.

The principle of acting in a client's best interests influences whether front-line workers will find and use operational discretion within the legal and managerial frameworks governing Ontario Works. One participant described it this way:

We tend to be a bit more lenient in our Social Services Department. There's a lot more grey areas because we, as a Department I think, we always want to try to act in the best interests of the client.

While the term "best interests" may be vague, this norm was frequently referred to by research participants as an influential rule of thumb. Front-line workers who identified their performance of operational discretion as guided by a general principle of acting in clients' best interests would note how this principle led them to locate "grey area" in legal rules and to adjust how regulatory technologies, such as SAMS, applied these rules so that the resulting benefits decisions responded to the particular needs of each Ontario Works recipient. One front-line worker described the strength of this principle, noting that it would encourage her to "go around" policies to support benefits recipients:

There's an overlying policy that we have to *adhere* to, but if you're creative enough to get around that in your procedures, to support the people that you're serving, then every office will do things differently. And I know I have in my own work, for sure. If it benefits the client at the end of the day, I will do what I have to do to go around that policy and make sure that we're assisting them.

A supervisor explained how he considers what is in the best interests of a client when making challenging decisions. When a client asks for assistance that may not, on first glance, fit within Ontario Works' written rules or with how case management software interprets these rules, this supervisor explicitly rejected the possibility of de-centring his own decision-making responsibility by blaming the legislation or the computer. Instead, the "best interests of the client" norm guided where he would locate operational discretion so that his decisions would respond to clients' "special circumstances:"

If you see the program and laws as trying to help people, that should guide how you do things. I consider the best interests of the client. I can't tell a client, "The computer says X or the legislation says Y." The Act itself is just a framework, and even then, it's not written in stone. Policies are written by people and the regulations change. Who identifies when they need to change? It's *us*, we're responsible for that. If you see there's room for improvement, then we need to identify it and tell managers about it. We tend to look at legislation, provincial directives and our own Department's policies, and *most* of the time they are in synch. But sometimes the provincial directives don't cover everything, so then you go to the office policy. The best interests of the person guide me ultimately, if I've done what was in the best interests of the person given their special circumstances.

While this norm might seem to polarize workers, between pro-client workers who strive to act in their clients' best interests and black-and-white workers who efficiently manage their large caseloads, workers instead balanced the principle of acting in a client's best interests with others, such as efficiently managing their caseloads and preventing hardship. This balancing is evident in the following passages, in which research participants describe how they would determine a benefits start-date for an applicant who recently lost their job. A number of participants used this example to demonstrate how they performed operational discretion. Their explanations illustrate how acting in a client's best interests work in conjunction with other norms to guide their performance of operational discretion.

One research participant explained that she might tweak how she enters a recently-unemployed individual's income information, to "act in the best interests of the client," so that SAMS would find that person eligible for Ontario Works:

All these legislative rules are built into case management software. And sometimes peoples' lives don't reflect legislation, and that's when you end up kind of having to manipulate SAMS. That's when the decision-making comes in, 'cause we want to act in the best interests of the client. People are not black and white. One of the things is, for example, income. A client applies for assistance, so we look at what's called "income in the month of grant." So, they may have made \$1200 in October, so they're not eligible

for assistance, right? But we *know* these clients need the money starting in November, we don't want to have to have them come back, so that's when things get kind of tricky. We have to sort of play with the income record to get it to issue assistance starting in November, yeah. Things like that.

A different front-line worker explained how this norm would inspire her to find flexibility in income reporting deadlines and effective eligibility dates. This approach would ensure that a newly-unemployed individual who had earned some income in the same month that they applied for assistance, which would otherwise render them ineligible for benefits during that month and potentially in the next, would become eligible for Ontario Works benefits starting in their first month without income. Ultimately, this decision would prevent a shortfall in this individual's finances that would otherwise occur if they were told to return to the office the following month, when they had no income, and reapply for Ontario Works:

I don't know if it was ever explained to you, income reporting and what the client declares. So, it's not income for the month received that would affect that month's Ontario Works benefits, now we're in the month of October – oh, November entitlement has already been issued, so now we're gonna consider the benefit month of December. So, income received from the 16th of October until the 15th of November will affect the December entitlement, okay? So, we don't deduct up front. It's sort of a month later. So, if someone applying now at this time, like today, and they lost their job last week, we would look at all of the income that they had received in the month of grant. So, there is a bit of a different way that we look at it. It depends on what are the expenses that they had, and what happened. We may *not* do the deduction based on the income statement period, or we look at maybe not issuing for the month of October anymore but looking at November and trying to support them. So, *those* are the cases that sometimes the caseworker checks with the supervisor as to what would be the best approach to take, not to be punitive towards the applicant, to see if there's a way that we can support them.

In both of these examples, front-line workers describe a situation where the law does not dictate a particular outcome. Many workers find this situation tricky and prefer to check with a supervisor to confirm how they will perform operational discretion, but they also weigh multiple norms as they consider their options. When an individual applies for Ontario Works assistance shortly after losing their job, Ontario Works legislation and regulations are silent on how front-line workers should treat that applicant's recent employment earnings; instead, these details are set out in a provincial policy. The *OWA* does include some eligibility requirements for benefits applications. For instance, applicants must be residents of Ontario, their budgetary expenses must exceed their income, the value of their assets must fall below amounts set out in the Regulation (which vary according to family size), and they must provide a municipal caseworker

with all of the information needed to determine eligibility.²³⁸ However, details about the amount, timing, and manner of providing both income assistance (core benefits) and employment assistance (supplementary benefits) are left to the Regulation.²³⁹ Though the Regulation states that front-line workers “shall” make certain inquiries into an applicant’s circumstances, it leaves the details of these inquiries to provincial policies and local office practices.²⁴⁰

The Regulation gives caseworkers freedom to set an effective date for benefits eligibility decisions and flexibility in how to treat income from a recently lost job. In terms of a decision date, front-line workers are empowered to set the date on which their decisions take effect, which may include the day that they met with an applicant or a previous or future point in time.²⁴¹ Front-line workers cannot, practically speaking, make decisions that would take effect too far into the future, but if they receive evidence from an applicant establishing that individual recently lost their job, as well as the requisite documentary proof (i.e., bank account statements, proof of residence, housing costs, etc.), workers are empowered, but not required, to look forward in time to the next month in which the benefits applicant will have no income and grant Ontario Works benefits beginning in that month. Additionally, though the Regulation includes asset ceilings and formulas for calculating eligibility, it is silent on how to treat income from a recently lost job. Instead, provincial policies clarify that unspent employment income received before an individual submits an Ontario Works application should be treated as an asset. Meanwhile, income that is earned, but not received, during the month of application should not

²³⁸ *OWA*, s 7(3). This section is negatively worded to read, “No person is eligible for income assistance unless...” and then lists a series of conditions.

²³⁹ *OWA*, s 16.

²⁴⁰ *OReg* 134/98, s 22 states, “In determining the eligibility of an applicant who applies for basic financial assistance, the administrator shall make or cause to be made an enquiry into the living conditions and the financial, employment and other circumstances of the members of the benefit unit.”

²⁴¹ *OReg* 134/98, s 25(1) states, “A decision of the administrator shall be effective from the date fixed by the administrator, whether it is before, on or after the date of the decision.” Subsection 25(2) then sets out a series of rules for calculating budgetary requirements (shelter, basic needs) which allow front-line workers some ability to calculate shelter costs to be lower than an applicant’s actual shelter costs and that require basic needs costs be prorated for those applicants who apply for benefits mid-month.

be considered income until it has been received by a benefits applicant.²⁴² Because front-line workers can (but are not required to) make eligibility decisions that take effect in the future, a front-line worker may decide that someone is eligible for assistance at a specific point in time that falls *after* the date on which the worker and the benefits applicant met in person. Such a decision would be based on information that the benefits applicant provides to the caseworker at this meeting.²⁴³ The applicant would have to report any unpaid income, once it is actually received, to their local Ontario Works office. If, in the following month, it turns out that they received more income than they reported at the earlier meeting, their assigned caseworker can establish an overpayment on their file which would be gradually collected from any future Ontario Works benefits.²⁴⁴

While both of the above caseworkers describe being informed by a desire to act in their clients' best interests, their performance of operational discretion is shaped by other norms, such as efficient case management and preventing hardship. As one of the above-quoted workers puts it, "we don't want to have to have them come back." Requiring an applicant to return the following month and reapply for Ontario Works almost certainly creates undue hardship for that individual, but it is also an inefficient approach to case management. A delay in receiving Ontario Works benefits could jeopardize an individual's housing (i.e., if they are unable to pay rent in the month following the one in which they lost their job), their ability to pay utility bills or to purchase groceries. Moreover, additional work is created (or deferred into the future) by rejecting an applicant and requiring that they return to the same Ontario Works office the following month, attend a new appointment, and go over the same details and documentation a second time. Thus, the norm of efficiently managing one's caseload can be understood as balanced together with the norm of preventing hardship in the above examples in a way that arguably both reinforces and textures the result that acting in a client's best interests would produce on its own.

²⁴² Both rules are included in *OWPD 5.1*, *supra* note 201.

²⁴³ *OWA*, s 25.

²⁴⁴ *OWA*, s 19.

I do not mean to suggest that the best interests of the client norm cannot also be balanced against other norms that might theoretically be in greater conflict, such as safeguarding taxpayer funds or promoting self-sufficiency. In other examples described by research participants, the best interests norm was weighed against other norms so as to moderate workers' performance of operational discretion that, if they were guided by one norm alone, might have resulted in a more generous outcome.

4.2.3. Safeguard Taxpayer-Funded Benefits

While my research participants indicated that they were guided by “pro-client” principles such as preventing hardship or supporting a client’s best interests, many also described being steered by a need to be accountable to taxpayers and to conserve publicly-funded benefits. When evaluating a particular use of operational discretion, participants explained that they had to keep in mind that they were spending the Province’s money, even in cases where they were actually deciding access to municipally-funded benefits. They would also indicate that they must be “accountable” – that is, able to explain why they issued funds – through a combination of recorded reasons and evidentiary documentation. I identify this norm as safeguarding taxpayer-funded benefits, as it reflects one of the *OWA*’s stated aims: to establish a program that “is accountable to the taxpayers of Ontario.”²⁴⁵ This preoccupation with “accountability” also mirrors new public management strategies, which aim to decrease program spending through the use of performance targets and competitive, incentive-based mechanisms that ensure workers will meet those targets.²⁴⁶ This need to safeguard taxpayer-funded benefits can also be linked to accountability as a technical tool, particularly the widespread use of auditing as a primary means of assessing the performance of front-line workers and their managers, literally holding administrators “to account” using accountants’ interpretations of the law.²⁴⁷

²⁴⁵ *OWA*, s 1(d).

²⁴⁶ Pires, *supra* note 56 at 47; Michael Barzelay, *Breaking Through Bureaucracy: A New Vision for Managing in Government* (Berkeley, CA: University of California Press, 1992).

²⁴⁷ Michael Power, *The Audit Society: Rituals of Verification* (Oxford: Oxford University Press, 1997).

As with the norm of acting in a client’s best interests, the content of safeguarding taxpayer-funded benefits is somewhat ambiguous. This ambiguity is reflected in my interviews, in which some participants refer to a rule of thumb that they should “err on the side of caution,” rather than “on the side of clients,” when using operational discretion so that they can judiciously steward taxpayer-funded benefits. Others would indicate that this norm required them to carefully weigh all of the relevant factors in a particular decision because they were distributing taxpayer-funded benefits:

In terms of issuing, it’s not my money. Just like I say to the other workers too, it’s not – it’s the Province’s money. I have to really think, I *do*, or else I wouldn’t be in this specialized role [the Customer Service Representative role] if the supervisors thought I wasn’t being responsible.

Some participants noted how powerful this norm could be, particularly for those who, as black-and-white efficiency engineers, were more inclined to “err on the side of caution.” One front-line worker explained how her colleagues would narrowly interpret Ontario Works’ legal framework to protect taxpayer-funded benefits and would operationalize discretion to *not* issue benefits:²⁴⁸

I see some caseworkers who don’t issue the clothing allowance. But because they often put the word “may” in Ontario Works rules, “you *may*,” “may” means, to me, “can,” “might be able to.” But some interpret it as “you might be able to, but you also might not be able to.” And so often they’ll err on the side of caution. They can take things quite literally. “Well, if you’re not in an [employment] activity...” So, a lot of clients who access methadone – you know, the methadone maintenance program? – if you’re doing that, you should get the \$250 right away in Employment-Related Expenses benefits. You’re out in the community, you have to go out every day, but other workers don’t see that as reason enough. And it doesn’t actually say hard and fast that you get clothing allowance when you get methadone maintenance. But it does say if you are tied to an activity that has an “employment focus.”

²⁴⁸ *OWPD 7.4*, *supra* note 144, provides that out-of-pocket expenses may be covered for individuals who are participating in employment activities, with a maximum monthly average of \$250. Methadone maintenance would likely be included as one of these measures, though it is uncertain whether \$250 would automatically be justified because the policy requires a connection between the amount granted and the out-of-pocket expenses associated with a particular program. See also OReg 134/98, ss 2(5)(b), 25(1), and 26 para 8.1, which together confirm that a methadone maintenance program undertaken to treat substance addiction is an “employment assistance activity” that qualifies an individual for employment assistance under the *OWA*, ss 4, 6. This participant correctly notes that methadone maintenance is an employment assistance activity, but the written legal framework is silent on what amount of funding should be granted for someone attending such a program, thus tacitly permitting workers some flexibility.

This principle of protecting taxpayer-funded benefits and of being “mandated by the Province” could lead front-line workers to overlook formal discretion within Ontario Works rules or strategically collect client data so as to deny benefits to a particular client.²⁴⁹ Where rules were perceived to be black-and-white, such as caps on monthly basic benefits payments, this norm might support caseworkers to ignore alternatives within the rules. For instance, one caseworker explained how safeguarding taxpayer-funded benefits helped her rationalize denying clients’ requests for assistance:

So, people struggle. We feel for them as well, and we *get* it. There’s nothing that we can do! And people come to us and say, you know, they think that we kind of hold the purse strings. And they say, “Can you give me more?” And we’re like, “We really can’t. We’re mandated by the Province and the rates are what they are.” So, it’s difficult. It’s a challenge for us.

This norm also guides front-line workers in situations where they are aware that formal discretion might exist somewhere, but are uncomfortable with using it. One research participant described how conserving taxpayer-funded benefits strongly influences a decision that others consistently identified as fraught: determining whether two roommates who receive Ontario Works benefits as single persons should be considered co-dependent members of one “benefit unit” (and, as a result, receive reduced overall monthly benefits payments). She stated:

When couples live together and say, “Oh, we’re just roommates.” And we need to investigate a little bit further whether they have joint bank accounts, whether they’re perceived by their friends as a couple, or are they on the lease together as a family unit, or just – like, there are different things where we need to look at things together to make the best possible decision. And it’s not always about really penalizing the client, making them ineligible. It’s just us being the stewards, applying the assistance or assessing the eligibility. We need to make sure we do it the best way possible so that it’s equitable to anybody else who applies being in similar circumstances. Because we’re accountable for what we do. It’s the taxpayers’ money that we assign, so there *has* to be compliance with the policies and guidelines and with the Act. We’re accountable for every benefit that we issue. So, there has to be justification for any of that.

Because Ontario Works’ monthly benefits do not cover basic living expenses, adult benefit recipients may establish shared living arrangements with other Ontario Works recipients. In these cases, the written legal framework governing Ontario Works permits a range of outcomes,

²⁴⁹ See the discussion of this strategy in Chapter 3, section 3.3.3.

depending on how a caseworker interprets a particular client's circumstances. Some options may be foreclosed to a caseworker. For instance, if a worker discovers that a client is legally married to a roommate, or if a client and their roommate are parties to a court order requiring one to support the other, they must be considered members of the same benefit unit.²⁵⁰ However, as a number of research participants noted, many shared accommodation situations are unclear. In these murky situations, caseworkers must evaluate whether “the extent of the social and familial aspects of the relationship between the two persons” and “the extent of the financial support provided by one person to the other or the degree of financial interdependence between the two persons” are “consistent with cohabitation.”²⁵¹ The *OWA* and the Regulation provide no guidance as to what “consistent with cohabitation” means. While a series of regulatory tools, including a provincial questionnaire, guide how front-line workers perform operational discretion,²⁵² the interview passage cited above illustrates how norms such as conserving taxpayer-funded benefits also steer workers towards a particular outcome. Further, it shows how this norm may overlap with and temper others, such as not creating undue hardship by “penalizing” a client. By balancing these contrasting principles, this caseworker explains, she aims to “look at things together to make the best possible decision,” but this normative balancing act also tempers the result that she might reach if her professional identity as a pro-client social worker solely guided her operational discretion. Ultimately, this balancing mitigates the risk that front-line workers will perform operational discretion according to their own personal preference or professional identity, instilling a kind of reasonableness practice throughout the Ontario Works program.

As with the acting in a client's best interests principle, the norm of conserving taxpayer-funded benefits both converges and conflicts with many of the other norms identified in this chapter. For instance, one participant noted how accountability concerns might lead him to operationalize discretion so as to suspend the benefits of clients who miss scheduled meetings or appointments,

²⁵⁰ See the definition of “spouse” in OReg 135/98, s 1(1).

²⁵¹ *Ibid* at paragraph (d).

²⁵² The “Questionnaire,” or “Form 2764,” discussed in Ontario Works Policy Directive 3.3: *Co-Residency* (last updated July 2008) [*OWPD 3.3*].

reasoning that, “Of course, some clients get nasty about it, but the Department has to be accountable.” He then explained why he needed to take a stricter approach with some individuals to ensure that tax dollars were spent wisely, even though he acknowledged that in some cases he might make a more pro-client decision and release a benefit payment to prevent hardship or ensure that a client’s rent was paid. This participant stated:

All the client wants is the money, so they come in for their appointment. The cheque is held until you come in for the interview. [mimicking client] “Ok, I’ll be in for the interview.” There are a few resisters. There are those who would *swear* on the Bible, “I need to pay the rent. Will you *please* release the cheque?” And once in a while, you know, you give in and release a cheque and the file is *still* to be updated. [laughs] “You’ll come in next week?” I give you a time: not showing up. [laughs] So that’s what your tax dollars have to do!

This caseworker may appear to be solely concerned with protecting taxpayer-funded benefits, but his decision to hold cheques until clients attend meetings represents a balance between this norm and others, such as efficiently managing his large caseload and even acting in his clients’ best interests. By using this technique to ensure that clients attended their appointments, this worker explained that he was able to keep his files up to date and meet the performance targets set by his office manager and the head of his municipal social services department.²⁵³ Further, his desire to keep in regular contact with clients may be in his client’s best interests, as it enabled this caseworker to more regularly ensure his clients’ needs were being met as compared to his colleagues who had not met with their clients in months. Thus, as with other norms, conserving taxpayer-funded benefits may be weighed against others. The flexibility of this balancing process may suggest that any decision can be rationalized as supporting many norms simultaneously, but I argue that this balancing act nonetheless imposes some basic constraints on how operational discretion is performed. While workers may weigh things differently from case to case, their common method of reconciling norms mitigates against the most potentially egregious outcomes that outsiders might fear would result in a program that is shot through with formal discretion.

²⁵³ Caseworkers are typically required to meet with each of their clients every 3 to 6 months to review their files, update their Participation Agreements, and so on. Office managers and supervisors can track the frequency of caseworkers’ meetings using SAMS, and front-line workers were provided with “reports” (printed spreadsheets) identifying those clients whom they had not met with in over 6 months. At the time of my research, there was an additional push to get clients’ files up-to-date post-SAMS, but these standards for seeing clients and pressures on front-line workers pre-existed SAMS.

4.2.4. Promote Self-Sufficiency

My research suggests that a fourth distinct norm of promoting clients' self-sufficiency or responsibility also guides Ontario Works caseworkers. Participants explained how, when performing operational discretion, they would consider whether a particular decision might support a client who was taking steps to become self-sufficient or whether it would encourage such efforts in the future. Relatedly, front-line workers would consider whether their decisions encouraged or discouraged responsibility and accountability among their clients. This norm is linked to the *OWA*'s legislative purpose of "recogniz[ing] individual responsibility and promot[ing] self-reliance through employment,"²⁵⁴ as well as its goal of assisting individuals who are taking steps to obtain paid employment.²⁵⁵ Promoting self-sufficiency is also traceable to new public management's influence on administrative reforms, though it is less closely connected to new public management strategies as the other norms discussed in this chapter. New public management-inspired reforms to social service agencies, in particular, have institutionalized the view that receiving public benefits, especially from catch-all programs like Ontario Works, is a temporary state of affairs and that such programs will eventually transform benefits recipients into self-sufficient, stably-employed individuals.²⁵⁶ These reforms indirectly promote client self-sufficiency goals through their use of measurable performance targets and indicators to evaluate front-line workers' performance, as positive or negative performance is linked to how successful workers are at promoting self-sufficiency among their clients.²⁵⁷ By auditing how freely caseworkers distribute benefits and how often they meet with clients, front-line workers' interactions with clients are held against auditors' interpretation of Ontario Works laws, which tend to favour workers who operationalize discretion less generously. This

²⁵⁴ *OWA*, s 1(a).

²⁵⁵ *OWA*, s 1(b).

²⁵⁶ Diller notes that this self-sufficiency narrative has had substantial influence in American welfare programs: *supra* note 236 at 1127-28; see also Marcia K Meyers Norma M Riccucci & Irene Lurie, "Achieving Goal Congruence in Complex Environments: The Case of Welfare Reform" (2001) 11:2 *Journal of Public Administration Research & Theory: J-PART* 165; Vicki Lens, "Work Sanctions Under Welfare Reform: Are They Helping Women Achieve Self-Sufficiency?" (2006) 13 *Duke J Gender L & Pol'y* 255.

²⁵⁷ Barzelay, *New Public Management*, *supra* note 161; Peter Aucoin, *The New Public Management: Canada in Comparative Perspective* (Ottawa: Institute for Research on Public Policy, 1990).

evaluative strategy seems to have a normative trickle-down effect, as it encourages front-line workers to teach their clients lessons by increasing, reducing, or suspending their benefits to reward clients who are showing progress towards self-sufficiency and punish others.

As with the other principles identified in this chapter, this norm's content is somewhat fluid. Promoting self-sufficiency may guide caseworkers to both reward and punish clients for behaviours that they associate with one's ability to become self-sufficient. Based on the belief that caseworkers can promote behaviours that will ultimately help clients to become independent, front-line workers describe themselves as teaching clients "soft" and "hard" lessons about the importance of self-sufficiency. Thus, front-line workers may grant clients access to benefits or services to clients who demonstrate their responsibility, such as those who keep a commitment identified in their Participation Agreement or who attend an appointment. It can also direct workers to withdraw benefits or services in order to teach clients a "lesson" in self-sufficiency if a client has failed to do something their caseworker requested. For instance, a caseworker might grant a client one month of transportation funding to attend a two-month training program on the understanding that this client will provide documentary proof of their enrollment in the training program once it has begun. If such documentary proof is not forthcoming, the same worker may refuse to issue a second month of transportation funds so that this client experiences a consequence for failing to do what they agreed to. This norm can thus direct front-line workers to perform operational discretion ranging from softer encouragement, such as providing a client with instructions and guidance, to rigid punitive lessons, such as delaying the payment of monthly benefits to a client who failed to meet with their caseworker, even if this delay jeopardizes the stability of that client's housing or their access to food.

An example will illustrate this point. Caseworkers, such as the next-quoted participant, may operationalize the formal discretion nested within supplementary benefits rules to provide clients with funds for public transit passes and cell phones. As demonstrated in Chapter 3, the written legal framework governing these supplementary benefits is flexible, explicitly and tacitly permitting caseworkers to issue such benefits if a client demonstrates that they are participating in or about to begin an employment assistance activity.²⁵⁸ This sort of funding gives clients a

²⁵⁸ See: OReg 134/98, ss 25-26; *OWPD 7.4*, *supra* note 144; *OWPD 7.7*, *supra* note 143.

chance to learn self-sufficiency lessons on their own time, as described below by a participant who identified more closely as a black-and-white efficiency engineer than a pro-client social worker. If clients use these funds for a public transit pass and cell phone, then they are better equipped to search for a job or attend vocational training sessions and, it is assumed, become self-sufficient. However, if clients “blow” their benefits on something else, then they learn the importance of responsibility the hard way by having to walk all month or losing telephone access:

This sounds bad, but I’m very much a pick-my-battles kind of person. I would *never* deny someone a public transit pass, because if they call the supervisor they’re getting a public transit pass, you know what I’m saying? And the thing is, if you blow your public transit pass money, I don’t *care*. That just means you’re walking all month, ‘cause you’re not getting another one. So, the thing is with the benefits is that I’m very inclined to support – so my \$250 ERE, I rarely give the full ERE. Most of my clients get in the neighbourhood of about \$140 a month for a public transit pass and cell phone money. I like to leave the other \$100 for wiggle room so that in case they’d like to take CPR or other courses, forklift training, that type of stuff. Whether or not you actually bought the public transit pass is irrelevant. I gave you your transportation money. If you make a shitty choice, now you’re walking all month and that *sucks*, you know what I’m saying? So, honestly, that’s where I’m at with that. If they tell me that they’re job searching, they’re never going to be denied from me a public transit pass or cell phone money, ever. Those are the staples in my opinion.

Though this participant identified as a black-and-white decision-maker, here she demonstrates how she strategically operationalizes discretion to promote self-sufficiency. Her performance of operational discretion also appears to balance promoting self-sufficiency with a number of norms, including safeguarding taxpayer-funded benefits (withholding money), acting in a client’s best interests (creating a reserve of funds in case future opportunities arise), and even efficiently managing her caseload (as keeping a reserve obviates additional approvals if her clients request additional funds in the same month, while granting a transit pass reduces the potential for conflict with her clients and with management staff).

Promoting self-sufficiency may also direct front-line workers to adjust deadlines if they are satisfied that a particular client is making diligent efforts towards self-sufficiency. One caseworker responsible for clients who were participating in a self-employment program suggested that she might extend the deadline for meeting particular program milestones (i.e., having business cards printed by X date, or having earned a certain amount of small business income by Y date) for those clients whom she knew were trying hard to get their small

businesses up and running or who may have experienced hardships affecting their ability to meet these milestones. Extending a milestone deadline would reward these clients for their efforts and give them an extra month or two to meet the goals set out in their business plans, while progressively warning those who did not appear to be acting responsibly that they may be withdrawn from the self-employment program. The milestones she refers to are not the subject of any formal legal rule in the *OWA* or the Regulation; rather, they are the product of a standard-form agreement designed by a third-party self-employment training program. Though the content of these agreements can be slightly modified, each client must sign one as a condition of participating in the self-employment program and obtaining assistance for their business. When asked how she determined whether a client had met a business income milestone, this caseworker stated:

I think it would depend on the individual case. Again, like, if I had a discussion with a client and had said, “What have you been doing to try to get clients? How have you been working on your business?” If you just get a sense that there doesn’t seem to be any commitment there, or maybe they’ve lost interest but they’re just not *saying* it, you know what I mean? Like, they’re not just coming out and saying, “I don’t want to do this anymore.” In that case, I might be a bit more stringent and say, “Well, you know, this income milestone is coming up. Just as an f.y.i. If you don’t meet it, we might need to have a look at you doing something else,” right? But, like in that case where a client had not met her business income milestone, I knew she was trying so I almost kept, like, extending it. And there are certain other situations too where, you know, either they have health issues or personal issues and, then, it’s like the milestone might be just *extended* for a month or two, because you know they’ll meet it by that point.

It is unclear whether any of these clients would actually meet their self-employment milestones, as this participant noted elsewhere in our interview that many businesses failed to take off. However, she believed in the sincerity of clients’ efforts to meet these milestones and thus used operational discretion to reward these clients for taking steps towards being self-sufficient.

The self-sufficiency norm guided a distinct minority of research participants to perform operational discretion more punitively, especially towards clients who were unable to satisfy Ontario Works’ many rules and who placed heavy demands on their caseworkers. These front-line workers indicated that benefits recipients needed to learn how to be “accountable” and that they, as caseworkers, could help instill this accountability and ultimately nudge these clients towards self-sufficiency. These workers viewed responsibility and accountability as prerequisites to self-sufficiency, even though they simultaneously recognized that many clients faced

significant barriers (i.e., mental health issues, precarious housing) to demonstrating their ability to maintain employment, complete vocational training programs, or attend appointments. The following example shows how the norm of promoting self-sufficiency may guide workers' operational discretion towards harsher accountability lessons. This front-line worker described his awareness of clients' challenges and their need to obtain the "soft skills" necessary for self-sufficiency:

There are very few clients who actually take the opportunity to attend job training. And because of their lack of skills and experiences and whatever other challenges that they may face, after all of that was done, and they still are not successful in getting a job, they become very despondent because they lack the basics. Since pre-high school, they've been running away from home, getting involved in drugs, getting in fights, you know, mental health issues, lack of education, social skills are shot in the worst way, you know. So, that's the general population that we have to work with. I personally believe that if – and it has to take more than just the Social Services Department, it would take other community members, other members of government, to change the attitude of the recipients. There's got to be some training. If they're not training these soft skills, then even when they're mature enough to hold a job, because they lack discipline and skills to conduct themselves socially in the world, they won't maintain employment.

Yet, in this worker's view, it was appropriate to use operational discretion and grant Ontario Works benefits as rewards for those clients who kept appointments or attended training and, conversely, to quickly suspend the benefits of clients who acted irresponsibly:

We need to change what it is that we do to make clients accountable, to show up for the appointments, to follow through with what they say they want to do. We have all of these contracts with these opportunities. [Imitating client] "Oh, I want to get my AZ licence." I say, "Ok." We go on the computer, we do the clicking, we refer them here, go call the training agency, set up the appointment. They're supposed to call the agency, but even if they don't call the agency the agency will call us. They're not going. The agency calls the client, or they call and say, "Oh, I'm coming in tomorrow." And I say, "Ok, come in at 10 o'clock" [throws hands up, gesturing that the client does not show up for their appointment]. So, I said the only thing these clients respond to is the money. In order to get them to do what they need to do for *their* good, we need to put some stipulations in place and suspend benefits accordingly. But the Social Services Department is reluctant to do that because, you know, there's too much politics involved. So, I don't see it as – it's not a way of punishing clients. If the dog only responds when you hand him a bone, withdraw the bone and see what happens. You're not withdrawing the bone because you don't want to feed the dog. The dog will eventually come to you, you know?

This participant then described how he had begun suspending the benefits of clients who did not attend scheduled appointments as soon as they had missed one appointment. By promptly

“withdrawing the bone” of assistance payments, rather than adhering to his coworkers’ office practice of waiting until two or three missed appointments, this caseworker performed operational discretion to teach clients the soft skills that he believed they lacked. However, he also indicated at other points that this practice helped him manage his large caseload, suggesting that his operational discretion was simultaneously guided by the norm of efficient workload management. Ontario Works’ statute and regulations do not clearly state how frequently clients must attend meetings and what consequences, if any, should follow from a missed appointment.²⁵⁹ Failing to participate in employment assistance activities may affect a client’s monthly assistance payments, but most caseworker meetings do not fit within the Regulation’s listed examples of “employment assistance activities.”²⁶⁰ The obligation to attend meetings may be inferred from the stipulation that Participation Agreements must be reviewed every three to six months, but this interpretation is a bit of a stretch.²⁶¹ Caseworkers are empowered to cancel, reduce, or suspend assistance for anyone who fails to make “reasonable efforts” to seek, accept, and maintain paid employment;²⁶² attending regular caseworker meetings could be interpreted as an indicator of whether a client is making reasonable efforts to obtain employment, but it does not exactly correspond. Finally, the Regulation states that front-line workers “shall” render a client ineligible for Ontario Works benefits “if the person fails to provide the information the [worker] requires to determine initial or ongoing eligibility for income assistance,” listing a series of non-exhaustive examples,²⁶³ but provincial policies only require caseworkers to review

²⁵⁹ The requirement for regular meetings is not explicitly stated in the *OWA* or the Regulation, but can be inferred from the indication that Participation Agreements can be amended: OReg 134/98, s 30. The clearest signal that regular caseworker-client meetings may be required is in *Administration and Cost Sharing*, OReg 135/98, s 4, which states, “An administrator shall review at regular intervals the eligibility of recipients and the amount of assistance payable with respect to them.”

²⁶⁰ OReg 134/98, s 26.

²⁶¹ *OWPD 9.1*, *supra* note 133.

²⁶² OReg 134/98, ss 28, 29, 33.

²⁶³ OReg 134/98, s 14(1) which states:

The administrator shall determine that a person is not eligible for income assistance if the person fails to provide the information the administrator requires to determine initial or ongoing eligibility for income assistance, including information with respect to,

- (a) new or changed circumstances;

their clients' files to determine ongoing eligibility once every two years.²⁶⁴ As a result, the written legal framework governing Ontario Works is silent on what should occur if a client misses a previously scheduled appointment, though it does suggest that caseworkers should meet with their clients between every three months to at least once every two years. The legal scheme is sufficiently flexible on this question; accordingly, caseworkers are permitted to operationalize discretion and reach a range of results supported by the normative balancing act this chapter explores.

As with the other norms analyzed here, workers reconcile the principle of fostering self-sufficiency with others as they perform operational discretion. The following passage illustrates how front-line workers' commitment to other norms – preventing undue hardship or acting in a client's best interests, for example – may be balanced against and moderate the effect of a promoting self-sufficiency principle. The participant quoted below did not have an assigned caseload at the time of our interview. Instead, she worked in a “customer service” role and was responsible for walk-in benefits recipients who were unable to meet with their assigned caseworkers. Here, she contrasts how she encourages responsibility and accountability with some of her colleagues' practices, describing a situation in which a client's monthly benefits payment was delayed because they failed to submit necessary documents to their caseworker before the payment processing deadline:

If someone comes in, say there's been a long weekend and it's August fourth or what have you, you're already into the month and a client comes in about his cheque or her cheque. What I'll often do is I'll take away, I'll remove the direct deposit for that day and request an instant cheque. That's so they can have it today, so they don't have to wait two days for the cheque to be deposited into their bank account. At the same time, I'm educating and informing, “You know, really you should try to clear this up before the end of the month, before cutoff. You need to have better communication with your worker if possible but because you're saying that it's urgent, you need to pay your rent, your landlord's asking for rent, I'm going to issue it today in a paper cheque to prevent hardship.” I find that there's some workers who like to teach lessons and who will leave it for direct deposit. So that's where the teaching of lessons isn't really, it doesn't sit well with me 'cause it's not our role. But it comes up and I've had conflict with workers about

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- (b) participation in employment assistance activities;
 - (c) the receipt or disposition of assets; and
 - (d) the receipt or expected receipt of income or some other financial resource.

²⁶⁴ *OWPD 9.1, supra* note 133.

that. I've actually said, "What are you trying to do?" and they've said, "Well, they need to learn." Ok, so you want to teach them a lesson? That I don't, I just don't understand. Like, I *guess* I understand but I don't like it, you know?

As with the question of how to treat a client who misses one appointment, Ontario Works' legislative scheme is silent on this matter. This front-line worker describes balancing between the norms of promoting self-sufficiency, preventing hardship, and acting in a client's best interests as she locates and performs operational discretion. Issuing same-day benefits protects against immediate hardship while teaching this client a lesson about how to avoid receiving late Ontario Works payments the following month, which is both in the client's best interests and promotes self-sufficiency. Her stricter colleagues are likely also guided by the norm of efficient caseload management, though, especially at the very busy start of the month. Not only is it less time-consuming for caseworkers to leave the benefits payment to be made by direct deposit, but it also teaches clients the importance of meeting documentation deadlines and promotes behaviour (i.e., timely documentation submission) that may enable these caseworkers to more easily manage their caseloads in the future. Thus, even when front-line workers have no written rules to guide their operational discretion, their decisions are still regulated by the process of balancing between norms. It may seem that some of the norms discussed above are subsets of one another (i.e., self-sufficiency and avoiding hardship may appear as subsets of acting in a client's best interests), but their relationship to one another is not static. Instead, it is constituted as they are weighed and reconciled with one another based on the caseworker, the client's circumstances, and the influence of aggregated decision-making.

4.2.5. Efficiently Manage the Workload

A fifth norm of efficient workload management informs where front-line decision-makers locate and use operational discretion. This norm combines the consistent treatment of individual benefits recipients with other elements, such as timesaving decision-making practices, continuous improvement strategies, and individually-focused customer service. As with the principles explored above, efficient case management reflects the normative commitments underlying the *OWA* and new public management literature, though it is primarily linked to managerial goals that appear to have found their way into Ontario Works' legal framework. Because efficient workload management would ideally lead caseworkers to review and respond to their clients' requests in a fair and timely manner, it arguably furthers two of the *OWA*'s four

stated purposes: effectively serving people who need assistance; and remaining accountable to taxpayers.²⁶⁵ Yet, this principle is more strongly linked to new public management's goals of improving administrative agencies' overall efficiency and increasing their responsiveness to service-users' concerns. These goals are typically pursued through managerial tools, such as output indicators and performance incentives, and quasi-legal instruments, such as internal complaint and review mechanisms and agencies' mission statements, all of which embed an efficiency ethos throughout the institutional environment in which the Ontario Works program is delivered.²⁶⁶

Efficiency concerns permeate the contemporary legal-managerial reality of municipal social services departments and, thus, my research data. They are especially prevalent because of the expectation that each caseworker will manage a caseload of 100-140 "benefit units," with a benefit unit ranging from a single client to a primary client plus their dependents (i.e., spouse/partner, children, other family members). A combination of provincial policies, case management software, and municipal customer service campaigns have placed mounting pressure on caseworkers to frequently meet clients, return telephone calls, wrangle with unpredictable software, review new local and provincial policies, cover the files of vacationing or ill coworkers, and promptly address those clients who drop into the office unannounced. In an administrative environment characterized by policy and managerial flux, efficient case management has such strong pull that it appears to influence virtually every normative balancing act caseworkers recounted. Efficiency appears as a ubiquitous, if unstated, normative guide throughout my data, though it may direct workers to reach different results based on their assessment of what would be most efficient in a given situation.

Like the other norms explored above, efficient case management is flexible. This norm is not equivalent to addressing clients' requests in the shortest time possible, nor does it require similar requests to be treated alike. Instead, it is shaded by the other principles that a front-line worker balances while performing operational discretion. Thus, efficiency may lead one caseworker to

²⁶⁵ OWA, ss 1(c) and (d).

²⁶⁶ Dunleavy & Hood, *supra* note 218; Barzelay, *New Public Management*, *supra* note 161.

provide all clients with the same degree of attention and interpret Ontario Works rules as “black-and-white.” This caseworker, out of a concern for efficiency, may operationalize discretion narrowly to strictly interpret Ontario Works’ written rules. In client meetings, this worker may blame the law, the computer, or “the system” as a way of showing the client that nothing can be done and to redirect that client’s frustration towards bigger, immovable forces in the hopes that this client will not complain to a supervisor, manager, or local politician. Yet, efficient case management may lead another caseworker to accommodate a particularly demanding client so as to prevent this client from returning with further demands, or to provide a client with some sort of assistance, even a token benefit, in the hopes of reciprocity (i.e., that this client, perceiving their caseworker as helpful, will return the favour and make that worker’s job easier by attending appointments, signing forms, and providing necessary documents). Both of these approaches are justified by efficiency concerns, as both caseworkers expect that their performance of operational discretion will help them manage their larger caseloads more easily in the future.

Despite this variety in outcomes, efficient case management is an observable and discrete guiding norm. Because it appears to always be at work, this section demonstrates how efficiency is weighed against, and shaded by, other norms as front-line workers perform operational discretion. For instance, one participant explicitly compared herself to her colleagues as she determined which approach she would take. Though her coworkers would perform operational discretion to “police” clients, reading rules narrowly and closely scrutinizing clients’ behaviour, she noted that this approach was time-consuming and exhausting given her other responsibilities as a caseworker:

The whole idea is the exit plan, so are we progressing towards an exit plan from Ontario Works to paid employment. And I think everyone’s path is different, so I guess I’m not ... *stringent* on some of those rules. ... You know, it becomes a lot of work if you’re going to start policing people, if that’s the way you choose to do it. And you *can*. Legislation is there, so you can choose to police people stringently. But, I strive for a good work-life balance. I want to go home happy at the end of the day.

This worker identified herself as a black-and-white rules enforcer, but the broader norm of efficiently managing *all* of her files meant that she could not focus too intently on any one particular client.

Efficiency’s normative content is influenced by the other principles at play in a particular discretionary decision, but caseworkers also develop their own views about what constitutes

efficient case management from their coworkers' practices. Like the previously-quoted worker, the following caseworker initially considered herself as taking a black-and-white approach. When she first began front-line work, her operational discretion was strongly steered by safeguarding taxpayer-funded benefits and promoting clients' self-sufficiency. Over her four years as a caseworker, however, she discovered that policing clients was ineffective and prevented her from staying on top of the rest of her workload. She compared the principles that now guide her operational discretion with those her coworkers used as follows:

There are a ton of caseworkers that come in every day and go hard, hard, *hard*, and see people once a week and try and turn them around. I tried it. Everyone will tell you, "The only thing that exits people is frequency of contact." It *doesn't*, man. So, you put on what we call a Friday morning special, or a Sunday morning special. You see clients religiously every Monday morning. They *will* turn and leave Ontario Works, but a month later you're going to walk by your colleague and they're going to be at *their* intake. Every time. So, I think that if you stay true to your role and true to the legislation, you're not going to have a hard time doing your job. But it's the people who think it's their job to, as a taxpayer, to ensure that every dollar going out the door's legitimate: what the hell you going to do with that? To the tune of \$250 a month? Do you think you're impacting anything? I can't *change* Ontario Works, I can't. I can make life easier or harder for 120 people, and I'm telling you, when I make life easier on them, I make life easier on me. So, it's not like I'm there to fluff through my day, but it's just common sense: I pick my battles.

Efficiency concerns led this front-line worker to reconsider the expectations she had for her clients and for herself. Even when she might suspect that a client was not making reasonable efforts to secure paid employment (e.g., if a client said they were job searching but had not activated their cell phone's voice mail), she would not locate formal discretion within Ontario Works' legislative framework and reduce or suspend their benefits.²⁶⁷ Such an approach would be both inefficient and ineffective, as it would inspire her clients to resist her future requests for information and ultimately make her job more difficult. This front-line worker thus performed operational discretion so as to strategically "pick [her] battles:"

I tell clients, "Initialize your voice mail! You're job searching, right? So how are you getting those calls?" It kind of all comes full circle if it doesn't add up. If you're singing me a song, it doesn't add up very quickly. But again, I get 120 potential songs to listen to, so you gotta pick your battles. All of my clients are adults and the reality is that I'm

²⁶⁷ OWA, s 14; OReg 134/98, ss 28, 29, 33.

mandated to see them only once every three months. I am not – it’s delusional to think that I am going to change the course of any of these peoples’ lives. How I approach every day is that I’m at work today, I’m getting paid to service these people essentially, and I can make life harder or easier for 120 people. That’s my reach. Nothing greater than that. I can’t fix OW. I can’t fix the Province. I can’t fix these peoples’ lives. I can make life harder or easier for 120 people. That’s it. And the thing is, is that whole “catch more flies with honey” thing, man I *live* by it. Easy on you, easy on me.

Efficient workload management supports a range of approaches to operationalizing discretion, depending on the other norms that are balanced together with efficiency concerns. One end of this range is aptly characterized as keeping things “easy on you, easy on me:” workers find formal discretion somewhere in the legal framework and perform operational discretion to keep their clients happy, minimize potential conflicts, and encourage clients to comply with program requirements. At the other end of this range, caseworkers suspend or reduce benefits to incentivize clients to attend appointments and to penalize those who routinely fail to meet program requirements. In both approaches, front-line workers have efficiency in mind. Given the pervasiveness of new public management strategies, their performances are continuously measured and assessed against quantifiable performance indicators, such as the policy that clients’ Participation Agreements should be updated every three to six months at an in-person meeting.²⁶⁸ Enabled by new software programs, managers and auditors are omnipresent and caseworkers regularly receive reports about how their individual performance and that of their local office measures up against that of others in the same municipal social services department. Efficiency concerns are always present but may inspire a variety of outcomes.

According to the “easy on you, easy on me” version of efficiency, front-line workers may grant benefits and services or overlook ambiguous details of a client’s circumstances that, if investigated further, might require a worker to suspend, reduce, or cancel a client’s benefits. Workers may expect that this approach will make it easier to work with their clients and, ultimately, to meet managerial performance standards. Some participants noted that when they demonstrate to their clients, through their performance of operational discretion, that they respect their clients’ needs and are willing to help, these clients often become more forthcoming and

²⁶⁸ OWPD 9.1, *supra* note 133.

provide the information, documents, and forms that workers require to meet their office-specific file management targets:

I'm not able to provide them with a lot of money. If someone is trying to get on their feet or is trying to live with dignity, they need funds in order to be able to do so because things aren't that cheap, even in this city. And in turn, my clients have shown me nothing but respect – they're *lovely*. They will submit forms and receipts, because I ask them for things that they need; so, I don't always assume that they need it. I ask them to submit requests for things that they need and the amounts that they need as well as receipts for funds issued, so they have verification, and they'll do that. I let them know to submit these documents to ensure that they get everything that they're entitled to no matter who their case manager is, because if I'm away from the office I want to make sure that they get everything.

Caseworkers help both their clients and themselves by demonstrating empathy and providing even small benefits to clients as rewards for achieving certain goals, such as attending file updating appointments, meeting with an employment worker, or finding a family doctor as a first step towards completing an Ontario Disability Support Program application. Using monetary incentives to meet the legal and administrative requirements of the Ontario Works program, from employment-seeking obligations to document submission, helps caseworkers keep their computerized files updated and avoid managerial scrutiny. Though other principles, such as acting in a client's best interests or promoting self-sufficiency, are weighed together with efficiency, efficient workload management plays a central guiding role. One caseworker explained:

What I understand is that if you acknowledge and listen to somebody's story, you might not feel connected to them, you might not remember them, but they will remember you. And if I acknowledge your hardship and that you need this benefit, then they think you understand them and they're more open to coming back to see you. And, so, I find that I can meet somebody and, within 15 minutes, figure whatever out. I will see them in three weeks even if I don't have to see them for months if I book that appointment because they feel like something happened there and there's potential for something to happen again, not necessarily money, but a step forward to their future. So, it's such a connector, a tool that I think is under-recognized for rapport, if that makes sense.

Efficient caseload management also motivates front-line workers to perform operational discretion and focus on clients who seem most likely to exit the Ontario Works program. By doing so, caseworkers use their finite working hours to help those clients who appear to be closest to the labour market and most employable. Once these clients move from Ontario Works to paid employment, they will reduce a caseworker's overall workload (at least until a new client

is added).²⁶⁹ Here, efficient case management functions together with other norms – moving clients to alternative means of support, safeguarding taxpayer-funded benefits, acting in a client’s best interests – to influence how front-line workers perform operational discretion for differently-situated clients. A caseworker explained how she operationalizes discretion to issue supplementary benefits for those clients who are closer to exiting Ontario Works:

One example of discretion would be the discretion with which I issue those benefits. I think people’s sincerity matters. I think I’m really normal in the sense that if I pull out your file and it has a volume three sticker on it, I might not be putting the most energy into trying to help you exit. So, the time that someone’s been on Ontario Works kind of determines my reasons, you know what I’m saying? Not really my *treatment* of that person, ‘cause it might not – you might be completely illiterate and grew up on the system– social assistance is so generational. That person might as well have not had an opportunity to exit in all of those 10 years, right? But, I don’t know. It’s kind of hard. It’s really a hard question, because someone who’s working or who just secured employment or who you know is genuinely job searching ‘cause they called you, ‘cause they got an interview call, those people you can’t do enough for. They’re a breath of fresh air. People who have never been on Ontario Works before, I find myself most eager to help.

This strategic performance of operational discretion helps caseworkers reduce their overall workload (however temporarily) and provides them with some sense of satisfaction, as they feel that they are positively impacting their clients’ lives. As a result, this approach may keep caseworkers motivated to address their more challenging clients and to meet managerial performance targets.

By contrast, efficient caseload management can also guide front-line workers to penalize those clients whose behaviour impedes workers’ ability to meet performance targets. As the following passage demonstrates, efficiency concerns may inspire some front-line workers to perform operational discretion to reduce, suspend, or cancel the benefits of non-compliant clients in the hopes of achieving performance targets:²⁷⁰

We’re supposed to see our clients once every three months but they don’t respond to the appointment letters, so sometimes we have to put the cheques on hold if they’re not

²⁶⁹ This approach to efficiency recalls Lipsky’s observation that adding additional capacity to an agency will not necessarily improve its ability to serve the public, as any additional capacity will inevitably be overcome by new requests for service from members of the public: Lipsky, *Street-Level Bureaucracy*, *supra* note 15 at 33-39.

²⁷⁰ OWA, s 14; OReg 134/98, ss 28, 29, 33.

showing up for appointments. And, of course, some of them get nasty about it, but the department has to be accountable. So sometimes, with some clients – it’s not the norm. For me, personally, if you don’t show up for the appointment, I put your cheque on hold, then you call. Clients are aware that they’re not keeping the appointments. They’ll give you a lot of excuses: they didn’t get the letter, or the letters come but they didn’t open the letters. They become very apathetic about life. They don’t even open the letters to read them. So, even if *gold* came in the letters! They tell you, “Oh yeah, I saw the letter.” You know? But if the cheque doesn’t come and they have to pay the rent, they’ll call. So, I’ll say, “Ok, you’ll come?” I don’t get any arguments from them. Unfortunately, I have to hold the cheques, but if they don’t show up so I can review the file, then I hear it. Everything is computerized, and the managers of the offices, they’re challenged by *their* managers, so it’s like you have 100 cases and 98% of them are outdated, so *they* have to meet their bosses mandate and we have to try and meet the clients’ needs and the clients are not responding! So, sometimes we, as front-line workers, are caught in the middle.

This caseworker explicitly connects efficient case management with the managerial pressures that were common to all of my research sites. Efficiency here is weighed with other norms, such as promoting self-sufficiency, but it strongly guides this caseworker’s performance of operational discretion when clients fail to attend scheduled meetings. Rather than conflict with the other norms identified throughout this chapter, efficiency is coloured by the range of principles that guide caseworkers in a particular instance of operational discretion. Workers who may be inclined to be more generous or strict with the rules all consider how their potential approach would stand up to efficiency principles.

4.2.6. Move Clients to Alternative Means of Support

Front-line workers are also guided by the norm of moving clients from Ontario Works to an alternative means of support. Like efficient caseload management, this norm is closely linked to managerial concerns, though it also arguably underlies the entire Ontario Works program.²⁷¹ It appears to be strongest when aligned with other norms in the face of perceived black-and-white rules that threaten to bar a client from exiting Ontario Works. This principle connects to some of the *OWA*’s stated legislative goals, such as “promot[ing] self-reliance through employment” and

²⁷¹ Some authors note that Ontario Works rules and the program’s administration appear designed to discourage people from using it as a last-resort source of support: Herd, Mitchell & Lightman, *supra* note 24 at 70-1, 74. There is an interesting tension here, particularly as the multiple rules that make Ontario Works so unattractive can also trap people within the program.

assisting people “while they satisfy obligations to become and stay employed.”²⁷² Because Ontario Works is purportedly designed to provide last resort benefits rather than a long-term support system, in some senses the entire legislative scheme is motivated by a desire to move people *off* of Ontario Works benefits, though individual rules may suggest otherwise.²⁷³ Moving clients to alternate means of support is also closely connected to the new public management principles set out above and their associated customer service commitments, program performance targets, and regulatory technologies.²⁷⁴ Program-wide performance indicators, for example, emphasize the importance of moving clients from Ontario Works to paid employment or other income supplement programs as appropriate (i.e., Ontario Disability Support Program, Employment Insurance, Canada Pension Plan). These indicators are most visibly influential in regular provincial and municipal audits, which measure municipal social services departments’ ability to move benefits recipients off of Ontario Works benefits.²⁷⁵ The deep impact of this norm is also reflected in the substantial personal data disclosure agreements that Ontario Works applicants and recipients must sign as a condition of receiving assistance, and the multi-agency information-sharing abilities of case management software programs, such as SAMS, that exchange and consolidate client data with other government agencies so as to quickly redirect clients to any other income supplement program to which they may be eligible.

When it complements the other principles identified in this chapter, this norm is strongly influential. It guides front-line workers most noticeably in situations where they are faced with written rules, office practices, or regulatory technologies that may trap a client within the Ontario Works program as they bar caseworkers from granting a client one last benefit needed to obtain paid employment. Research participants recounted their creative performances of operational discretion, bending legal rules or departing from office practices, to get clients off of Ontario

²⁷² OWA, s 1(a)-(b).

²⁷³ Herd, Mitchell & Lightman, *supra* note 24 at 71.

²⁷⁴ Pires, *supra* note 56 at 46; Paul Henman, *Governing Electronically: E-Government and the Reconfiguration of Public Administration, Policy and Power* (Basingstoke, Hampshire: Palgrave Macmillan, 2010).

²⁷⁵ They are also reflected in Commission-based reviews of Ontario Works, such as *Brighter Prospects*, *supra* note 23. Power, *supra* note 247; Pires, *ibid.*

Works. However, the legal rules that workers assumed to be black-and-white were rarely inflexible.²⁷⁶ As noted in Chapter 3, many such rules contained formal discretion (whether explicit, tacit, or nested), but workers' repeat performances of operational discretion transformed flexibly written rules into fixed practices that they felt bound to replicate.²⁷⁷ In some cases, regulatory technologies such as SAMS contribute to this hardening of rules. Front-line workers may describe their performance of operational discretion as covert or heroic, sometimes requiring their colleagues' collaboration to overcome rigid rules that would otherwise prevent them from liberating a client from Ontario Works. Closer analysis, though, finds that they often had many options available under Ontario Works' legislative framework.

Transportation benefits provide the clearest example of how the norm of moving clients to alternative means of support may direct front-line workers to perform operational discretion. As noted in Chapter 2,²⁷⁸ transportation benefits are one of many supplementary benefits within the Ontario Works program, with at least six discrete options available to front-line workers for granting transportation funds within Ontario Works' legal framework. Nonetheless, many front-line workers believe limited formal discretion exists for certain types of transportation funding requests. For instance, if a client asks for financial assistance to secure a drivers' licence that could be used for both paid employment activities and to meet personal needs (i.e., a car or motorcycle licence rather than a specialized transport truck or bus licence), caseworkers commonly perceive Ontario Works' rules to bar this sort of assistance. This presumed inflexibility persists because workers routinely overlook the written laws governing this request. As a result, the common belief in a blanket prohibition on funding standard drivers' licences has coalesced into an office practice that is practically more binding than the legislative framework governing Ontario Works. As the passages below will demonstrate, this rule only seems to be challenged in cases where caseworkers recognize an opportunity to help a client exit Ontario Works. In such instances, the norm of moving clients to alternative means of support is weighed

²⁷⁶ SAMS, which represents a particular interpretation of these rules, was another story. Its inflexibility was not absolute because workers could override its functioning, but this would require a substantial input of their energy and take away their ability to address the rest of their caseload.

²⁷⁷ Chapter 3, section 3.2.

²⁷⁸ Chapter 2, section 2.5.1.

together with others so as to encourage caseworkers to depart from set office practices and perform operational discretion.

One front-line worker indicated her surprise when she discovered that the seemingly hard “rule” against providing clients with funds to cover the costs of maintaining a driver’s licence was not written down anywhere:

I remember working in a larger social services office and having ideas about things that we wouldn’t cover and not really understanding the reason why, and then when I became a caseworker, reading over the policy directives and there was *nothing* in there that said we couldn’t provide money and I’ve never met a supervisor coming across those requests that would deny those requests. So, an example would be a driver’s licence. I remember a long time ago hearing that we would never cover a driver’s licence, but then when I became a case[worker] I couldn’t think of a reason why we *wouldn’t* cover that, especially in this area as there’s very little public transit to get to work, right? And there’s the ERE disbursement of \$250 per month. So, we have access to \$253 once a year through employment dollars – that’s a mandatory benefit [the Part-Time Employment benefit] – and then \$250 per month for regular ERE-Employment benefits.

This worker noted that a driver’s licence was essential for some clients, who needed to drive to certain employers and training opportunities that were virtually inaccessible on public transit. Others noted that, when a driver’s licence was the only thing preventing a client from obtaining paid employment, they and their supervisor or manager would together perform operational discretion to grant funds so that a client could secure the necessary licence. One front-line worker described a situation where a client’s access to a well-paying job hinged on his ability to renew his basic driver’s licence. Because Ontario Works benefits are so low, and because he had some unpaid traffic tickets, he could not pay his licence renewal fees without extra financial support. In this case, the worker mobilized others in her office to locate and activate the formal discretion within supposedly black-and-white rules so that this client could renew his licence, leave Ontario Works, and start a new job:

We don’t pay for drivers’ licences, that’s not something that we do. But when we had a client come with an employment letter that he was going to be hired earning \$50,000 a year which, for him, was...unbelievable, he had tickets that needed to be paid and needed to renew his licence. We don’t do that: we *did* it. The manager approved it and we paid for it, because we’re not going to stand in the way of that. I think it still fell under an Employment-Related Expense because even the words itself – “Employment-Related Expense” – that could be anything. We’re not going to pay for someone to relocate, but a \$150 fee to pay for a licence, I understand that we don’t *do* that but – like, and the guy is working and he’s financially independent, so...

In both of the above examples, Ontario Works' legal framework permits caseworkers to provide clients with the funds needed to renew a driver's licence, especially if a client needs that licence to begin a new employment opportunity. Depending on the client's particular circumstances, this supplementary benefit could be provided as a once-a-year part-time or full-time employment benefit.²⁷⁹ If these benefits have already been exhausted, funds can be provided as an Employment-Related Expenses benefit to help offset the costs of participating in vocational training programs or meeting the licensing requirements of a new employment opportunity.²⁸⁰ The relevant provincial policies confirm the breadth of this formal discretion,²⁸¹ but it is not uncommon for front-line workers to perceive this assistance to be an exception to a general rule against paying for such licensing fees. In these cases, a confluence of norms – preventing hardship, acting in a client's best interests, promoting self-sufficiency, even efficient case management – function together with the norm of moving clients off of Ontario Works to inspire workers to locate formal discretion nested throughout the legislative scheme and to perform operational discretion.

This norm is a strong guide even for those self-identified black-and-white efficiency engineers who are less likely to go out of their way to grant benefits. For instance, one caseworker who described himself as an efficient rules enforcer recalled how he performed operational discretion to provide a client with the funds needed to obtain a motorcycle licence so that he could drive to British Columbia and take up a summer job in an orchard:

²⁷⁹ *OWA* ss 3, 4; *OReg 134/98* s 55(1) paras 5.1, 6.

²⁸⁰ Participants commonly referred to "ERE" or the "Employment-Related Expense" benefit. This reference encompasses the benefits listed in the "Discretionary Benefits" provision of *OReg 134/98*. On the issue of funding drivers' licences, this provision states:

59(1) A delivery agent may pay or provide one or more of the benefits set out in subsection (2) to or on behalf of a person referred to in section 8 of the Act in the amount determined by the administrator.

(2) For the purposes of subsection (1), the benefits are the following:

[...]

3. The cost of vocational training and retraining.

4. The cost of travel and transportation.

²⁸¹ *OWPD 7.4*, *supra* note 144.

I had one client just two weeks ago, he's going to BC. He wants to go to BC picking fruits for the summer. And many clients wanting to go to another province will come to us and ask us if we can pay their transportation to get there. We can't *do* that. We can't do that. And sometimes, in this client's case, he wanted to go to BC, he wanted transportation money, but he knew that I couldn't give him transportation, so he was riding out there – he has a motorbike and he was riding out there. He didn't have his M, they're supposed to have an M1 licence, and we don't pay for licences, right? We don't pay for a G licence. Only if you're doing a DZ, AZ or BZ for the bus driving, we'll send you to one of our contracts and we'll pay for that, but your basic driver's licence, we don't pay for that. So M1, we couldn't. But to get his M1, it only cost \$100 or \$100-and-something. So, I made a decision around giving him \$120 for ERE-Transportation costs because he's looking for work, technically, so I give him \$120 so that he can use it to – I usually tell them, “Look, I'm giving you this money for transportation. Don't use that for another worker to say my worker gave me that” – because they like to develop patterns quickly to get what they want, you know? [laughs] So, you have those leeways, you know?

As in the first two examples, this front-line worker anticipated that the rules regarding drivers' licence funding were strict; his initial response to his client's request was, “We can't *do* that.” However, his performance of discretion is key, because the written legal framework governing Ontario Works enables (but does not require) caseworkers and supervisors to provide funding to help a client cover the costs of traveling to a new place of employment.²⁸² The norm of moving clients to alternative means of support had a strong pull for this particular caseworker because, as he weighed it against other norms, it aligned with so many of the other principles explored above. Providing this client with drivers' licence funds prevented hardship and promoted self-sufficiency, as it gave him an opportunity to engage in paid employment instead of having to continue to rely on Ontario Works. It was also in this client's best interests not just because it allowed him to work in a job that he wanted to pursue but also because, as this caseworker noted elsewhere, participating in employment is a huge boost to clients' self-esteem and confidence. While paying for a motorcycle licence may appear to be a poor short-term use of taxpayer-funded benefits, particularly to those front-line workers who might be unconvinced that this client would use this licence to pursue employment, it arguably safeguards taxpayer funds long-

²⁸² The same *OWA* and *OReg 134/98* provisions, cited just above, support this funding. In addition, *OWPD 7.7*, *supra* note 143, indicates that s 59 “discretionary” benefits may be provided “when the Administrator considers travel and transportation reasonable and appropriate.” It then uses the example of traveling to a new place of employment as a situation where an administrator may find it reasonable and appropriate to provide a client with financial assistance.

term if this client continues to be employed or becomes eligible for other privately-funded assistance programs, such as Employment Insurance.²⁸³ Finally, and perhaps most important for this particular caseworker, this use of operational discretion efficiently reduced his workload, at least for the short-term, and improved his file management statistics.

4.2.7. Keep the Peace with Coworkers

Finally, in addition to the six norms explored above, front-line workers are also guided by an overarching common-sense principle of keeping the peace with their coworkers. By this, I mean that caseworkers seem to always be considering how their performances of operational discretion will be viewed by an anticipated future audience of their colleagues, management staff, and external auditors. Unlike the six norms articulated above, keeping the peace with one's coworkers appears unconnected to Ontario Works' legislative scheme. Instead, it is produced by the institutional design of municipal social services departments. Arguably, it can be connected to the new public management strategies that have shaped these departments, and particularly the persistent surveillance and auditing of front-line workers' decisions. Yet, this principle is rooted in organizational culture and, in particular, the culture produced by the layering of decision-makers that I take up in Chapters 5, 6 and 7.

The dispersed decision-making authority within local Ontario Works offices thus has a normative effect. Other socio-legal scholars have noted the influence that "socially situated bureaucrats" may have on one another,²⁸⁴ but the combination of layered and diffused decision-making responsibilities, mutually permeable files, and expected review by one's coworkers seem to be unique regulatory features within the Ontario Works program. Because of the ubiquity of this norm, I will take up the discussion of its influence throughout the chapters that follow.

²⁸³ By "privately funded," I mean programs that provide benefits based on funds collected from employer and employee contributions, such as Canada's federal Employment Insurance program.

²⁸⁴ Watkins-Hayes, *supra* note 94 at 38-39, 56; Oberfield, *supra* note 207.

Chapter 5

The Aggregation of Decision-Makers

In Chapter 4, I illustrated how front-line workers participated in a shared method of balancing multiple legal and managerial norms. By reconciling between complementary and contradictory norms, these workers moderated how they performed operational discretion such that even those who self-identified as pro-client social workers or black-and-white efficiency engineers considered a range of norms as they went about animating Ontario Works' legal framework. I ended my discussion by introducing one final organizational principle – keeping the peace with one's coworkers – which is always considered as part of this normative balancing act. This principle is crucial for the second mechanism that regulates operational discretion: aggregated decision-making. The rest of my thesis will analyze how aggregated decision-making guides front-line workers. Aggregated decision-making refers to the layers of decision-makers who may each influence an individual benefits recipient and who are aware of their fellow decision-makers' professional identity and style of performing operational discretion. Aggregated decision-making diffuses operational discretion, decision-making authority, and responsibility across these multiple decision-makers, while maintaining the external appearance of a unified institutional decision-maker (“the administrator” in the Ontario Works program). In this chapter, I demonstrate how, behind the front lines, several disparate human and non-human decision-makers are together producing decisions to grant or deny benefits to an individual Ontario Works recipient.

This chapter establishes an evidentiary base for my claims about the regulatory effects of aggregated decision-making, which I will advance in Chapters 6 and 7. It begins by tracing the archetypal singular, independent administrative decision-maker common within legal scholarship and addressing a potential misreading of Chapter 4; namely, that caseworkers balance norms on their own, in relation to their clients, with minimal influence from their colleagues or others. Instead, using leading cases on discretion, I demonstrate how multiple decision-makers appear to be common in other administrative contexts. Then, drawing on my empirical research, I illustrate how multiple decision-makers are the norm rather than the exception in the Ontario Works program so that, for benefits applicants and recipients, a single authoritative decision-maker rarely exists. After outlining the range of decision-makers that animate Ontario Works'

legislative framework, I illustrate how Ontario Works recipients will encounter layers of decision-makers when they initially apply for benefits and as their life circumstances or benefits needs change. Additionally, I argue that managerial practices, such as role specialization, service gap alleviation, and caseload rotation, make aggregated decision-making endemic within Ontario Works program delivery.

5.1. The Singular Administrative Decision-Maker

Operational discretion's performance depends on and is shaped by the institutional context in which formal discretion is animated. Yet, because their research methods privilege appellate court decisions, theoretical and doctrinal legal scholars may overlook the factual intricacies of discrete institutional contexts, including how decision-makers working in the same administrative agency are connected and influence one another. As a result, an archetypal singular administrative decision-maker may slip into even recent legal scholarship proposing a dialogic model of discretion. This section traces this phenomenon not to argue that conventional legal scholars are incorrect, but to offer a basis on which legal scholars may broaden their analysis of operational discretion beyond the matters that they typically study. After exploring the ubiquity of the singular administrative decision-maker in legal scholarship, I suggest that even the facts of leading administrative law cases suggest that layers of decision-makers may be the norm rather than the exception within administrative agencies. This section closes with a brief discussion of how socio-legal scholarship unsettles the notion of a discrete, independent administrative decision-maker and enables studies of decision-making at different stages and in varied administrative settings.

The dominant picture of discretion in judicial review cases and scholarly analyses of these cases takes for granted that administrative decisions are made, and operational discretion is performed, by individuals who do (or who should) act on their own. Yet, this formal legal version of decision-making diverges from the everyday reality within administrative agencies. As anyone who has worked behind the front lines of an administrative agency knows, contemporary institutions are constituted by a range of human and non-human decision-makers who collectively stand in for "the Minister," "the Director," or "the administrator," including front-line workers, managerial staff, and policy writers, as well as new decision-producing technologies. These decision-makers are arranged in relation to one another and to the members

of the public who seek assistance. The configuration of these arrangements may be invisible to those who are “outsiders” and unfamiliar with the inner workings of a particular administrative agency. Yet, the arrangements between and among decision-makers matter. Like the method of reconciling norms explored in Chapter 4, the layering and dispersal of decision-makers within an administrative agency also influences how each decision-maker performs operational discretion. The regulatory effects of these arrangements are crucial not only for benefits applicants and recipients, but also for legal scholars who seek to understand how operational discretion might be more effectively guided or constrained.²⁸⁵

Though it may now be a dated view, legal analyses of discretion occasionally presume that administrative decision-makers perform operational discretion as singular, rational human beings. By “singular,” I mean that institutional decisions and “exercises of discretion” are analyzed as though they are produced by individual, identifiable people whose decisions are largely independent from one another. Thus, legal scholars conceptualize “discretion” as both a “property of individual behaviour” and “essentially rule-guided, as if legal decisions were the product of individual knowledge, reflection, and reasoning.”²⁸⁶ Davis’ practitioner-oriented analysis of discretion may represent the epitome of this view, as it presents discretionary decisions as potentially dictated by the personal whim and intuition of individual decision-makers.²⁸⁷ Because Davis approaches discretion as something that individuals perform separate from one another, discretion can be easily influenced by personal preferences that are unconnected, he assumes, to the legal and institutional regime in which discretion functions. The potential authority of intuition risks allowing legally irrelevant factors to influence discretionary decisions, a problem that Davis solves by proposing that clear written rules be used to confine and structure how individuals perform operational discretion.²⁸⁸ While contemporary

²⁸⁵ These regulatory effects are taken up in Chapters 6 and 7, while Chapter 8 plots future directions for legal scholars.

²⁸⁶ Hawkins, “Uses of Discretion,” *supra* note 39 at 18.

²⁸⁷ Davis, *supra* note 8 at 5.

²⁸⁸ Hawkins, “Uses of Discretion,” *supra* note 39 at 17-18, who notes that this feature is common to Davis and to legal scholarship more broadly. See also Lacey, “Jurisprudence of Discretion,” *supra* note 46.

administrative law scholars may have moved beyond Davis' view, his concerns that operational discretion may allow administrators' personal preferences to rule are echoed in public debates on how to constrain police officers as they engage in the practice of "street checks"²⁸⁹ and, as noted in Chapter 2, are taken as the starting point in socio-legal studies of front-line bureaucrats.

More theoretically-inclined legal scholars have also developed their analyses of discretion using the archetype of an individual rational decision-maker, even those, such as Galligan,²⁹⁰ familiar with socio-legal studies of discretion, or those who aligned their approach with "descriptive sociology," such as HLA Hart.²⁹¹ Galligan, for instance, conceives of discretion as something that is exercised by administrative officials and others, citing judges, police, tribunal members, and immigration ministers as examples.²⁹² These individuals, according to Galligan, must exercise discretion and apply legal standards to specific cases guided by an understanding of their relationship vis-à-vis other legal officials.²⁹³ While Galligan notes a sort of relationality at work between officials from different government bodies, such that an immigration minister will exercise discretion while considering their role in relation to a superior court, he assumes that individual administrative officials within the same agency act relatively independently from one another. The relation between administrative colleagues, then, is not within Galligan's analytical scope.

²⁸⁹ Also known as "carding." See Gillis & Rankin, *supra* note 5.

²⁹⁰ At the time *Discretionary Power*, *supra* note 48, was published, Galligan was affiliated with the Oxford Centre for Socio-Legal Studies. In its introduction, Galligan notes that his analysis of discretion may offer theoretical and practical insights into matters that socio-legal scholars were investigating at the time.

²⁹¹ Hart, *The Concept of Law*, *supra* note 96 at v, in which Hart describes his approach as combining analytical jurisprudence and descriptive sociology.

²⁹² See Galligan, *supra* note 48 at 3; see also Galligan's references to a hypothetical minister who must decide to deport or not deport a non-citizen, at 7, 10.

²⁹³ See Galligan's discussion of how officials consider one another, *ibid* at 12-14. Galligan appears concerned with how administrators consider officials from other administrative agencies who may have some say in their decision-making and officials from other branches of government (i.e., the legislature, the judiciary) who may review and respond to their exercise of discretion. Aggregated decision-making, i.e., how officials from within the same administrative agency regulate one another's performance of operational discretion, is not Galligan's concern.

Similarly, in his essay on discretion, Hart also approaches discretion with an individual decision-maker in mind. For Hart, discretion in the second, operational, sense is a specific type of decision-making that falls between individual preferences and rule-dictated behaviour. Hart imagines discretion to be a special form of reasoned decision-making, closely resembling judgment, in which the possible options available to a decision-maker are constrained.²⁹⁴ Thus, discretion is different from free choice or personal whim; it is something that administrative officials must exercise whenever they are faced with the interpretive spaces that unavoidably arise within a written legal system.²⁹⁵ However, Hart frames individual decision-makers as acting alone, using judgment, and reaching reasoned decisions. For instance, he uses the example of a young hostess giving her first dinner party to demonstrate how discretion involves more than mere personal whim. He imagines the hostess exercising discretion as she chooses between using her best silver knife set and a second-best set of knives to serve her dinner guests. This hostess acts independently and makes her decision alone (though she does seek the advice of an “old lady” who, Hart tells us, is an experienced hostess).²⁹⁶ Others working within the same “institution” or household are absent from Hart’s example: most notably, the individuals (presumably not the young hostess) who will have to locate, wash, and polish the silver knives if they are used.

The archetype of the singular rational decision-maker remains powerful in Canadian legal scholarship on discretion, including recent studies that propose taking a relational approach to administrative discretion. Scholars working in this area, such as Sossin and Cartier, may not be surprised by my findings; however, my empirical research highlights areas where their arguments for a dialogic engagement between administrative officials and individual members of the public tend to rely on a singular, identifiable administrative decision-maker. For instance, in some of his post-*Baker* scholarship, Sossin proposed that a relational approach to decision-making might help to reimagine how administrative law doctrine characterizes the relationship

²⁹⁴ Hart “Discretion,” *supra* note 58 at 658.

²⁹⁵ *Ibid* at 661-64.

²⁹⁶ *Ibid* at 659.

between front-line workers and members of the public.²⁹⁷ To advocate in favour of eliminating legal barriers that inhibit personal, relationship-like encounters between administrative decision-makers and members of the public, Sossin begins from the presumption that individual bureaucrats act as singular decision-makers (albeit ones who make decisions in relation to the members of the public that their decisions will affect). He suggests that readers should reconsider how administrative law doctrines conventionally distinguish between those at the front lines of a program and the adjudicative decision-makers who are one or more steps removed from front-line encounters. However, this focus seems to overshadow how administrative law doctrine might account for the interaction between front-line decision-makers within the same agency, the production of administrative decisions, and the performance of operational discretion. As Sossin proposes that we should reimagine discretion as being exercised by individual decision-makers in relation to those members of the public who are affected by their decisions, the process by which these decision-makers may perform operational discretion in relation to each other remains unexplored.²⁹⁸ While my findings need not be seen as contradicting Sossin’s dialogic decision-making model, I suggest that my research provides valuable empirical insights that Sossin and others might use to enrich and broaden their analysis of administrative discretion.

Similarly, Cartier takes singular decision-makers as an administrative norm in her scholarship on discretion as a dialogue between decision-makers and those who will be affected by their decisions. She frames administrative decision-makers as engaging in a dialogic exchange with members of the public and, then, reflecting on these exchanges to produce a decision. Thus, she writes that approaching discretion as dialogue “seeks to foster a reciprocal relationship between the decision maker and the individual affected by the decision.”²⁹⁹ While, at points, Cartier alludes to the decision-maker’s institutional elements – i.e., that “the” decision-maker stands in for a larger executive³⁰⁰ – at others, the decision-maker is personified as an individual who has

²⁹⁷ Sossin, “Intimate Approach,” *supra* note 47.

²⁹⁸ *Ibid* at 844-57.

²⁹⁹ Cartier, “Response to Willis,” *supra* note 47 at 644.

³⁰⁰ *Ibid*, where Cartier describes the parties to a decision as “the executive” and “the private participant.”

been delegated “a choice” that must be made independently within a bounded “margin of manoeuvre”³⁰¹ and evaluated as such. For instance, Cartier writes that a decision-maker must demonstrate openness, and must “truly listen” to the individual who is before them.³⁰² But what does listening require when a multiplicity of decision-makers influence an individual benefits recipient and, collectively and nominally, produce “the administrator’s” decision in a given case? Accounting for the behind-the-front-lines dialogues that occur between decision-makers requires that we reconsider what it would mean for an aggregation of human and non-human decision-makers to produce a decision in conversation with an individual member of the public. Although addressing these questions is beyond the scope of my thesis, I offer some thoughts about how my findings complement and extend Cartier’s discretion as dialogue model in Chapters 6 and 7.

The singular, rational, or dialogical, decision-maker may endure throughout legal scholarship on administrative decision-making because theoretical accounts of “discretion” occasionally blur the distinction between administrative and judicial discretion. As Galligan notes, much of the theoretical literature on discretion within legal orders focuses on the discretion of Superior Court judges.³⁰³ Other legal scholars may rely on this work without accounting for the salient differences between judicial and administrative decision-making. For instance, theoretical accounts of judicial discretion may assume that judicial discretion is performed by independent, rational decision-makers who are (or who ought to be) uninfluenced by external pressures.³⁰⁴ This conception of discretion can inadvertently seep into writing on administrative discretion that

³⁰¹ *Ibid* at 645.

³⁰² *Ibid* at 645, 647; Cartier, *Reconceiving Discretion*, *supra* note 2; Cartier, “Spirit of Legality,” *supra* note 2, uses the example of an individual decision-maker (an Associate Dean) and a student.

³⁰³ Galligan, *supra* note 48, at 1-2 acknowledges this at the outset.

³⁰⁴ But see Malcolm Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russell Sage Foundation, 1979), especially at xviii, 20-21. Feeley notes that judicial decision-making within a local courthouse in New Haven, Connecticut was more the product of a collective of actors rather than individual judges. Because rules cannot cover every situation, Feeley observed, gaps must be (and are) filled by decision-makers’ views of substantive justice. However, substantive justice values are tempered by the collective nature of decision-making: low-level courts are a collection of people whose routines, values, and interaction affect decisions “which they jointly make” (at 20). Feeley notes, at 21, that those judicial decisions that appear rapid and routine actually reflect complex processes and a balance between individual judges and a wider group of courthouse actors.

borrowed from judicial review literature without close consideration of whether it corresponds with specific administrative practices.

Relying too heavily on legal scholars' accounts of discretion, then, may overemphasize the influence of relationships between individual decision-makers and members of the public and overshadow the regulatory work that is accomplished by relationships between decision-makers. Conventional legal scholars might expect that, in the Ontario Works program, an individual's requests for assistance will be decided by one easily-identifiable decision-maker. Further, in programs that adopt social work language (i.e., in which caseworkers with assigned "caseloads" treat and manage "clients"), outsiders may assume that there is a direct caseworker-to-client relationship and that decisions about individual benefits recipients are made by individual caseworkers.³⁰⁵ This one-on-one relationship intensifies the potential threat posed by a caseworker's discretion, as an individual's ability to access benefits and services appears to be subject to the tyranny (or generosity) of a single caseworker from whom they have no escape: the rule of law becomes the rule of one's assigned caseworker. Taking this view, a benefits recipient's experience of the Ontario Works program is solely determined by the luck of the draw.³⁰⁶ Yet, this is only part of the story. My empirical research does suggest that individual caseworkers are crucial determinants of which benefits and services a client will be able to access – or, as one participant stated, "if it's not a client's lucky day and they get a caseworker who might not look and try to help the client, then they are at a disadvantage." However, my data more strongly indicates that an *aggregation* of front-line workers influences whether a client will be able to access Ontario Works benefits and services, because of the degree to which these workers, management staff, and non-human decision-makers regulate each other's performance of operational discretion, pushing decisions into a grey zone between "pro-client" and "black-and-white" decisions. The crucial issue is not whether a client is lucky enough to be assigned a pro-client rather than a black-and-white caseworker, as the research participant suggests above,

³⁰⁵ This resembles the professional treatment paradigm in Mashaw, *Bureaucratic Justice*, *supra* note 119, as individual, rational professionals diagnose and treat problems according to a set of standards that may be drawn from their professional community.

³⁰⁶ This observation reflects the findings of large-scale empirical studies in immigration decision-making: Sean Rehaag, "I Simply Do Not Believe: A Case Study of Credibility Determinations in Canadian Refugee Adjudication" (2017) 38 Windsor Rev Legal Soc Issues 38.

but whether that client has the good fortune to receive benefits from a local office comprised of decision-makers – caseworkers, specialized workers, supervisors, managers – with performance styles that include a range of black-and-white efficiency engineers and pro-client caseworkers, all of whom are inclined to balance the Ontario Works program’s conflicting norms and who are compelled by the organizational principle of keeping the peace with one another.

Two iconic administrative law cases allude to the plurality of decision-makers behind the front-lines of administrative agencies whose operational discretion produces institutional decisions:

*Roncarelli v Duplessis*³⁰⁷ and *Baker v Canada (Minister of Citizenship and Immigration)*.³⁰⁸

While *Baker* is a stronger illustration of the routine diffusion of decision-making authority, even cases that are now read as indictments of the power of individual decision-makers, such as *Roncarelli*, contain evidence of multiple decision-makers at play. The facts of *Roncarelli* are admittedly unique, but it is nonetheless useful to note the range of decision-makers who contributed to the administrative decision at issue because so many discussions of *Roncarelli* centre on its broad legal principles³⁰⁹ or on Premier Duplessis’ role in the decision to cancel Roncarelli’s provincially-issued liquor licence.³¹⁰ However, the facts of the case raise complex questions about institutional decision-making and individual authority as the question of which decision-maker(s) were legally responsible for cancelling Roncarelli’s licence was not so easily settled.³¹¹ Although Premier Duplessis discussed the revocation of Roncarelli’s liquor licence

³⁰⁷ *Roncarelli*, *supra* note 4.

³⁰⁸ *Baker*, *supra* note 11.

³⁰⁹ *Cartier*, *Reconceiving Discretion*, *supra* note 2; see also *Liston*, *supra* note 103.

³¹⁰ David Mullan, “Roncarelli v. Duplessis and Damages for Abuse of Power: For What Did It Stand in 1959 and for What Does It Stand in 2009?” (2010) 55:3 McGill LJ 587 [Mullan, “Abuse of Power”]; Derek McKee “The Public/Private Distinction in *Roncarelli v. Duplessis*” (2010) 55:3 McGill LJ 461. This focus likely occurred because of the unique procedural circumstances in *Roncarelli*, as the subject lawsuit was brought against Duplessis personally so that Roncarelli could obtain compensation for the lost profits resulting from the surprise cancellation of his restaurant’s provincial liquor licence and the seizure of his alcohol.

³¹¹ Indeed, the Superior Court found in *Roncarelli*’s favour (i.e., that Duplessis had instigated the cancellation of Roncarelli’s licence), the Quebec Court of Queen’s Bench, Appeals Division, found that Archambault, as head of the Quebec Liquor Commission, had already decided to cancel Roncarelli’s licence before he telephone Premier Duplessis, and the Supreme Court of Canada splitting 5-3 in favour of finding in favour of Roncarelli. For a fascinating social and political account of these judgments, see Roderick A Macdonald, “Was Duplessis Right?” (2010) 55:3 McGill LJ 401.

with the head of the Quebec Liquor Commission, Archambault, the facts reproduced in the Supreme Court of Canada's judgment suggest that Archambault telephoned Duplessis, on behalf of the Commission to seek the Premier's opinion on the *Commission's* decision to cancel Roncarelli's liquor licence. Many of the justices presiding over the earlier stage hearing at the Quebec Court of Queen's Bench (Court of Appeal), in fact, found that Archambault, as head of the Commission, had already decided to revoke Roncarelli's licence when he telephoned Premier Duplessis to discuss the matter. These justices noted that the Premier merely confirmed Archambault's decision.³¹² Further, a number of institutional actors appear to have contributed to the licence cancellation decision. The Commission's decision-making process was prompted by communications from a Crown Prosecutor representing the City of Montreal, who contacted Archambault to complain that Roncarelli was habitually posting bail for many Jehovah's Witnesses who were the subject of numerous charges under the City's anti-pamphletting by-law. In the Crown Prosecutor's view, by bailing out repeat offenders, Roncarelli was interfering with the administration of justice and destabilizing the activities of the municipal police force and the local courts. Cancelling the liquor licence of Roncarelli's restaurant would stem the flow of money that was funding the release of Jehovah's Witnesses and perpetuating a prosecutory circle that saw these individuals, upon their release, return to distribute religious pamphlets on the streets of Montreal, be arrested, and then revisit the Montreal court on new charges for violating the same municipal by-laws.³¹³ Further, while Archambault is the only Commission member named in the Supreme Court of Canada's decision, its inspection and enforcement functions must have been carried out by others on its behalf.

All of this suggests that the decision at issue in *Roncarelli* was produced by more than one human decision-maker. It was the creation of a number of individuals including at the very least Duplessis, Archambault, and the Crown Prosecutor. Further, the decision was almost certainly given effect by others, such as the Commission officials who likely wrote the decision letter, the

³¹² *Roncarelli*, *supra* note 4, especially per Taschereau J, whose judgment includes excerpts of the trial and discusses the appellate decisions and per Martland J, at 148-51, who provides an overview of lower court findings. See also Mullan, "Abuse of Power," *supra* note 310.

³¹³ *Ibid*, per Martland J at 146-47. Similar by-laws were found to be unconstitutional in the 5-4 decision in *Saumur v Quebec (City of)* [1953] 2 SCR 299, [1953] 4 DLR 641, as the majority found that by-laws that were outside of the province's (and the municipality's) jurisdiction.

liquor inspectors who seized Roncarelli's alcohol, and so on. The decision at issue was produced by many actors across a range of institutions. Regardless of whether the Supreme Court of Canada found Duplessis legally responsible to compensate Roncarelli for his losses, the image of the individual, rational decision-maker as "the" decision-maker in this case seems misleading.

The facts recounted in *Baker* also reveal that more than one administrative official contributed to the decision that was the subject of the Supreme Court of Canada's judgment, in a routine distribution of decision-making authority more akin to what I have found in the Ontario Works program. While it was "the Minister" who nominally refused to grant Baker a humanitarian and compassionate exception to the rule that she must apply for permanent residency outside of Canada, Justice L'Heureux Dubé's judgment indicates that at least two immigration officials participated in this decision. Officer Caden signed the letter, on behalf of the Minister, communicating to Baker that her request for an exception to the permanent residency application rules was denied, but this letter contained no reasons supporting the Minister's decision.³¹⁴ To remedy this situation, the Ministry of Citizenship and Immigration provided Baker's legal counsel with the notes of a second immigration official, Officer Lorenz. The portions of these notes reproduced in the Court's decision suggest that Officer Lorenz had gathered, assessed, and commented on the evidence of Ms. Baker's circumstances. Justice L'Heureux-Dubé treated these notes as the "reasons" for the decision denying Ms. Baker a humanitarian and compassionate exception to the Immigration Regulations, describing them as the notes "used by Officer Caden when making his decision."³¹⁵ However, this interaction between Officer Caden and Officer Lorenz suggests that it may be difficult to pinpoint a single decision-maker in this case and in others that use a similar decision-making process (i.e., where a lower-level, or front-line, officer reviews materials submitted during a paper hearing, prepares a report that recommends an outcome, which a second officer relies on to render a formal decision communicated by a letter). Both officers represent "the Minister," and both contribute to the Minister's institutional decision. While one may exist in a hierarchical relationship to the other, or be formally delegated more or less decision-making authority, a socio-legal analysis would suggest that both decision-

³¹⁴ *Baker*, *supra* note 11 at paras 4.

³¹⁵ *Ibid* at para 5, per L'Heureux-Dubé J.

makers (and potentially other Ministry officials who may have collected Baker’s information, prepared memoranda about her situation or the applicable immigration laws, regulations, and policies, etc.) participated in this performance of operational discretion and the “making” of the decision at issue. Other administrative case law suggests that the existence of layers of decision-makers who contribute to particular decisions is common within other administrative agencies.³¹⁶

Socio-legal scholars acknowledge that administrative decision-makers are more numerous and layered than conventional legal scholars might imagine. Given their different research methods, they observe that decision-making responsibility is dispersed among many people within an institution and that administrative decision-making is more often a collective enterprise than legal scholarship might otherwise suggest.³¹⁷ The “effective power to decide” may be distributed among or assumed by individuals who are distinct from, but together constitute, the institutional decision-maker (i.e., the Commission in *Roncarelli*, the Minister in *Baker*, the administrator or the Director in Ontario Works) formally allocated discretion-exercising authority. Further, some note that what outsiders identify as an administrative “decision,” such as a formal letter, may simply ratify another actor’s earlier “opinion” or “recommendation,”³¹⁸ such as Officer Lorenz’ notes in *Baker*.

Socio-legal scholars also insist that decision-makers’ practices influence one another, as few opportunities exist within administrative agencies for individuals to make solitary decisions uninfluenced by their colleagues, supervisors, or decision-making technologies. In some cases, administrative institutions explicitly incorporate group-based decision-making (i.e., internal review teams, tribunals, special-purpose boards), which enables “interactional effects” between

³¹⁶ See *IWA, Local 2-69 v Consolidated Bathurst Packaging Ltd*, [1990] 1 SCR 282 [*Consolidated Bathurst*], 73 OR (2d) 676; *Tremblay v Qc Social Affairs Commission*, [1992] 1 SCR 952 [*Tremblay*], 90 DLR (4th) 609; *Ellis-Don Ltd. v Ontario (Labour Relations Board)*, 2001 SCC 4 [*Ellis-Don*], [2001] 1 SCR 221.

³¹⁷ Hawkins, “Uses of Discretion,” *supra* note 39 at 27, 29; see also Huising & Silbey, *supra* note 3, who observe the significance of relationships between individuals who are responsible for enforcing environmental standards within a large research university.

³¹⁸ Hawkins, *ibid* at 29.

decision-makers as they engage in the process of reaching a decision.³¹⁹ In others, administrative agencies implicitly rely on decision-makers' coordinating techniques to deliver a program or implement policy, such as the power of interpersonal authority to negotiate and resolve differences between front-line workers.³²⁰ By recognizing the regulatory potential of these interactions between administrative decision-makers, socio-legal scholarship unsettles the notion of a single influential administrative decision-maker.

Given these findings, socio-legal scholars call on researchers to broaden their scope of study, recommending that scholars move beyond individual cases to consider how administrative actors engage in successive, routine decision-making. This serial perspective better captures how cases, clients, or files may be shared or traded off between decision-makers until they are resolved.³²¹ It also enables researchers to recognize how a group of decision-makers may work with and against one another over time, and how these dynamics moderate each group member's performance of operational discretion for individual benefits applicants and recipients.

Building on these insights, my empirical research suggests that something slightly different occurs in the Ontario Works program as compared to the decision-making contexts previously studied by socio-legal scholars. While Ontario Works recipients are assigned to an individual caseworker who is nominally responsible for moving that "client" from the Ontario Works program to something else (i.e., paid employment, another income support program, university or college enrollment), each client will also interact with many other front-line workers who will also make decisions to grant or deny that client benefits and services. These additional decision-makers are aware of one another's location on the professional identity spectrum set out in Chapter 4. Though they take this ideological divergence into account, its potential impact on workers' operational discretion is minimized by the convergence impelled by aggregated decision-making. The remainder of this chapter will analyze how extensively decision-makers

³¹⁹ Baldwin & Hawkins, *supra* note 44 at 585. See also Mary P Baumgartner, "The Myth of Discretion" in Keith Hawkins, ed, *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 129; Rutz et al, *supra* note 56.

³²⁰ Hawkins, "Uses of Discretion," *supra* note 39 at 28. See also Watkins-Hayes, *supra* note 94.

³²¹ Hawkins, *ibid* at 28-29.

are diffused and aggregated throughout the Ontario Works program, setting the evidentiary basis for my discussion of how aggregated decision-making regulates workers' performance of operational discretion in Chapters 6 and 7.

5.2. Aggregated Decision-Making in Ontario Works

This section shows how a multiplicity of decision-makers animate Ontario Works' legal framework to such a degree that their diffusion and aggregation characterizes the program's institutional design. From the outside, it may appear that a cohesive, authoritative human decision-maker exists and is responsible for each individual who seeks assistance. Within local offices, however, it is clear that numerous decision-makers constitute what, to outsiders, appears to be a unified administrative official, and that these multiple decision-makers may simultaneously correspond, compete, and contrast with one another. The tension and complementarity among front-line decision-makers regulates their decision-making as they perform operational discretion in relation to one another.

The balance of this chapter explores the multiplicity of decision-makers at work behind the front lines of the Ontario Works program. First, it traces the numerous individuals who, through their performance of operational discretion, bring Ontario Works to life. Next, it uses a series of illustrative examples to show how extensively layered decision-making practices are dispersed throughout the Ontario Works program, including at the point of an initial benefits application and when commonplace issues arise for a benefits recipient, such as a change in their family status or a need for additional financial assistance. This chapter then demonstrates how decision-makers are further aggregated through managerial practices that aim to specialize front-line workers and streamline overall decision-making processes. Though these practices may not have been intentionally designed to regulate front-line workers, my research suggests that they nonetheless substantively influence how front-line workers perform operational discretion.

5.2.1. Multiplicity of Decision-Makers

Outsiders may be surprised by just how many different decision-makers operate within the Ontario Works program. To give a sense of the number of decision-makers working at and behind the front-lines of Ontario Works, I have listed some of the decision-makers most frequently encountered during my fieldwork. This list does not purport to represent "how many"

decision-makers exist within Ontario Works, but a quantitative accounting of decision-makers is unnecessary to support my claim that the multiplicity of decision-makers *qualitatively* affects how operational discretion is performed within the Ontario Works program. Further, any attempt at quantifying may give a false sense of complete or total knowledge of Ontario Works' administrative mechanics across the province. The following list merely sketches the diversity and segmentation within local offices to suggest the range of possible decision-makers. Each benefits applicant and recipient will experience a different set of these decision-makers depending, for instance, on the management practices of their local social services office and their individual circumstances as benefits applicants or recipients. These factors will influence which caseload they are assigned to and who, other than their assigned caseworker, will assess their requests for benefits and services.

Many decision-makers perform operational discretion within the Ontario Works program. The following individuals animate formal grants of discretion within the legislative framework when members of the public apply for, receive, or are denied access to Ontario Works' benefits and services:

- Call Centre workers, who receive and process initial telephone applications for benefits;
- Intake workers, who may be restricted to completing initial tasks, such as meeting with individuals who have applied online or through a local Call Centre, working through forms, and determining if an applicant is eligible for Ontario Works benefits;
- Caseworkers, who are assigned to manage the “cases” of individual benefits recipients, and who may work with a more general or specialized group of these “clients,” depending on local office practices;
- Employment or community placement workers, who do not have a caseload of individual benefits recipients assigned to them, but who see other caseworkers' clients and, drawing on the additional training they have received in employment counselling programs, link these individuals to job training programs, workshops, and employment initiatives;
- Specialized decision-makers – housing funding workers, special diet workers, family support workers, etc. – who, like employment workers, do not have an assigned caseload, but instead receive, assess, and determine applications for supplementary benefits (housing funding, special diet allowances) made by other caseworkers' clients or, in the

- case of family support workers, guide these clients through family court proceedings used to secure spousal and child support from anyone with a legal obligation to support a client or their children;
- Customer service workers and back-up workers, who are responsible for addressing the needs of individuals with walk-in inquiries (in the case of customer service workers) or who are temporarily on-call to cover the files of colleagues who are on vacation, sick, or otherwise unavailable; both groups address the needs of Ontario Works applicants and recipients who show up without an appointment to drop off paperwork, reinstate suspended benefits, or request additional assistance to participate in upcoming job training programs or secure or maintain housing;
 - Software programs, which include technologies that assess client data and generate decisions about whether such individuals are eligible for Ontario Works benefits or suitable for employment training and other employment assistance opportunities;
 - Specialized software support workers, who are trained as caseworkers but now assist front-line workers in gathering client information, adjusting data inputs, and navigating decision-making software to produce benefits decisions that accord with Ontario Works' legislative framework;
 - Supervisors, who must approve certain decisions before caseworkers can issue funds to their clients, and who consult with caseworkers as they balance between competing norms or resolve conflicting approaches between coworkers;
 - Managers, who help supervisors administer their teams of caseworkers, and who may become involved at the front lines when a client frequently requests internal review of a caseworker's decision or when decision-makers (caseworkers, supervisors, software) reach conflicting decisions;
 - Public health officials, who may assess benefits recipients' ongoing eligibility for specialized programs that are the product of partnerships between municipal social services departments, public health units, and other agencies such as recreation providers;
 - Workers in third-party vocational training agencies, who may set milestones that Ontario Works recipients must meet to continue participating in the training program and thus remain eligible for the employment assistance and other benefits associated with that program; and

- Internal review caseworkers, who review and decide Ontario Works applicants' and recipients' formal requests for internal review, which challenge other front-line workers' decisions to deny requests for benefits.³²²

Many of these decision-makers are discussed throughout this chapter, as well as in Chapters 6 and 7. As these chapters will show, even though layers of decision-makers may be responsible for an individual benefit recipient, their overlapping authority may produce tension in cases where workers become territorial about “their” clients. Further, they may encourage patchwork approaches to responsibility as workers assume responsibility in some cases involving “their” clients and, in other cases, deflect it towards their coworkers, supervisors, or other decision-makers.

To better illustrate the extent to which decision-making is layered and diffused within the Ontario Works program, the next section examines two common instances of aggregated decision-making: first, initial intake processes; and, second, changes to Ontario Works recipients' family units or financial need.

5.2.2. Common Instances of Aggregated Decision-Making

At virtually every point in the Ontario Works program, decision-making is aggregated. This arrangement of workers is the result of managerial strategies that aim to streamline how Ontario Works benefits and services are delivered to clients and to tailor the flow of work between and among caseworkers. Though they are managerial, these arrangements have unanticipated regulatory effects on how front-line workers perform operational discretion. This section analyzes how aggregated decision-making exists and persists in commonplace interactions, including applications for Ontario Works assistance and everyday encounters where workers engage with clients (e.g., changes to family membership, needs for additional financial assistance).

³²² In some local offices, this work may be performed by supervisors or managers; in others, it is assigned to a handful of former caseworkers who, while performing this specialized role, do not have a regular caseload.

5.2.2.1. Applications for Ontario Works

Applications for Ontario Works involve three distinct stages. Each stage incorporates a range of human and non-human decision-makers to determine whether an individual is eligible for benefits. These potential decision-makers include Call Centre employees, intake workers, and assigned caseworkers, as well as eligibility screening technologies, electronic questionnaires, and case management software. The first stage of any Ontario Works application requires an individual who seeks assistance to submit an application either by telephone or online.³²³ Here, the number of decision-makers a benefits applicant will encounter depends on their application method. If they apply through a Call Centre, applicants may interact with Call Centre employees and the software that these employees use to make preliminary eligibility assessments. One caseworker, who had previously worked in the Call Centre, commented on how crucial automated forms were to her telephone eligibility assessments:

When I was at the Call Centre, you would have two computers! [laughs] And you would have one computer that has all your technical stuff [with automated application forms], and then one computer that has – well, not even a computer, but like your computer screens. So, one is your technical forms, and one is your resources. And you had to be able to toggle between them during your calls. So, the skill is not to *know* everything, but to know where to find it.

If they apply online, Ontario Works applicants may encounter a technological decision-maker as a software program will initially estimate their eligibility. In both cases, a mix of human and non-human decision-makers collect and review applicants' personal details, such as their assets and income, monthly expenses, household size, and access to other support programs such as Employment Insurance or Canadian Pension Plan disability benefits. Based on this information, the Call Centre worker or eligibility-estimating software will provide an Ontario Works applicant with an initial determination of their eligibility to receive Ontario Works assistance.

Publicly available information about Ontario Works applications directs potential applicants to use online application software before applying via telephone, which can add an extra layer of decision-makers into the application process. For instance, one such website recommends that

³²³ Sossin, "Call Centres," *supra* note 56. Computer software and intake procedures have changed since Sossin conducted his study so that decision-making is even more fragmented today than it was in the early 2000s.

applicants “[u]se the Ministry of Community and Social Services' eligibility estimator³²⁴ to see if you might be eligible and if you are, an estimate of how much money you may receive. If your results indicate that you may qualify, you should begin the application process.” Some departmental websites also warn applicants of “longer than usual telephone wait times due to a new computer system”³²⁵ and suggest that individuals apply online rather than to a Call Centre. However, as some of my research participants noted, the online application software often produces an incorrect record of applicant data, which requires additional intensive questioning at an in-person intake meeting, bolstering the necessity of an additional layer of human decision-makers at a later stage in the application process.³²⁶

One might wonder whether someone in need of assistance could simply show up to an Ontario Works office and apply for benefits, thus avoiding Call Centres and online application forms altogether. Benefits applicants cannot easily escape these layers of additional decision-makers, however, as the design and function of local offices redirects applicants towards them. If someone enters their nearest Ontario Works office to apply for assistance, a receptionist will redirect them to the telephones positioned at the office entrance, which dial directly to the local Call Centre, and direct them that they must first complete a telephone application. If they prefer, a benefits applicant may instead be able to complete an online application using the office's publicly-accessible computers, which are also typically located near the reception area.³²⁷ These additional layers of decision-makers are exceptionally rigid; even homeless individuals who

³²⁴ At the time of my research, the link to the “eligibility estimator” provided by one of my research sites' websites led one to a general webpage for the Ministry of Community and Social Services: <http://www.mcsc.gov.on.ca/en/mcsc/index.aspx>. Further clicking would lead to a webpage that housed an eligibility calculator, but this webpage (<https://saapply.mcsc.gov.on.ca/CitizenPortal/cw/PlayerPage.do?&id=116163821772>) was only accessible if you first indicated that you intended to apply for Ontario Works online.

³²⁵ This statement appeared on some social services departmental websites as late as in November 2016, two years after the computer system in question, SAMS, was first introduced across Ontario.

³²⁶ This resembles Lipsky's notion of bureaucratic disentanglement, as the process of feeding potential applicants to an online eligibility estimator and the warnings that they may experience delays extended long after SAMS was implemented: Michael Lipsky, “Bureaucratic Disentanglement in Social Welfare Programs” (1984) 58:1 *Social Service Review* 3 [Lipsky, “Bureaucratic Disentanglement”].

³²⁷ The office design layout described here was especially prevalent in recently renovated research sites; based on my interviews with management staff, it appears to be a feature of almost all local offices today.

show up to a local office seeking assistance will be redirected to a telephone or computer before they can engage in person with an in-office decision-maker. Similarly, requests for emergency assistance must first be processed by a Call Centre before local office staff will address their substance. Once they have completed an initial screening of such applications, Call Centre workers will then direct particularly time-sensitive requests to the workers at a local office.³²⁸ Those applicants who fall outside of the emergency assistance criteria will be assigned to a regularly-scheduled intake appointment, which will be set approximately two weeks from the date of their telephone or online application.³²⁹ An intake team supervisor described how his office was designed to support this layered decision-making process:

We have the Call Centre phone – a telephone here on the second floor [in the workspace in which intake workers sit] that is always staffed. It is a direct line from the Call Centre and there is always someone here to answer it so that, if someone calls with an emergency, we are able to respond. We have two different intake workers who are assigned to that phone, so when one of them is away from their desk the other one is there.

This diffusion of decision-making continues at the second stage of the application process: the in-person intake appointment. After completing an initial telephone or online assessment, every applicant is provided with an in-person intake meeting at their local social services office, including those applicants who are told they are ineligible for Ontario Works. For individuals denied benefits at the first stage, this in-person appointment is a formality. It occurs so that unsuccessful applicants can formally complete their application for Ontario Works, receive a “decision” (in the form of a SAMS-generated decision letter), and, if they are one of the small number who are so inclined, formally appeal this ineligibility decision.³³⁰ The location of the in-person intake meeting is determined based on the postal code provided by the applicant during their initial telephone or online application, and is typically scheduled within two weeks of that initial application.

³²⁸ For instance, one participant noted that emergency assistance requests may occur if an individual’s family member has died and their religion requires deceased family members to be buried on the same day.

³²⁹ See the discussion of emergency assistance in Chapter 2, section 2.4.1.

³³⁰ Appeal rates are very low for early stage Ontario Works denials, similar to the findings in American welfare programs. See Lens, “Fair Hearings,” *supra* note 42.

The in-person intake appointment adds an additional layer of decision-makers to the application process. The meeting is held with a front-line worker who conducts an intake interview, reviews a number of provincial and municipal forms and information sheets, collects financial and personal information, inputs some of this data into SAMS, and adds some of it to paper forms. After reviewing a series of forms, information sheets, and checklists with an applicant, the intake worker will request that the applicant sign many of these documents. Throughout this meeting, intake workers engage with the individual benefits applicant, performing operational discretion, while simultaneously interacting with SAMS as a decision-making technology, filtering and adjusting the applicant data that they input into SAMS to temper SAMS' decisions.³³¹

While online eligibility assessments conducted at the first stage may appear to eliminate a layer of human decision-makers (i.e., Call Centre workers) early in an Ontario Works application, they actually entrench the need for a different layer of human decision-makers (i.e., intake workers) at the second stage of the benefits application process. This entrenchment occurs because online applications are plagued with inaccurately-recorded applicant data. Telephone assessments, while marginally better, may still provide a partially-complete record of an applicant's circumstances that is insufficient to determine their eligibility for Ontario Works. Online application tools, meanwhile, are notoriously troublesome. In many cases, applicants' information is not transferred from the online eligibility estimator and populated within SAMS by the time applicants attend their in-person intake appointments; in others, applicants may incorrectly input personal data or mistakenly request multiple in-person intake appointments. One intake worker described the problems with these technological decision-makers in this way:

With the online application, applicants come into the office and they're thinking, "Okay, I did it online, so it should be quicker." But then when they see us, as caseworkers, we're still filling out forms, getting the information. And they're like, "But we did this online!" They did it online, but their information isn't populated in SAMS, so then you have to sit with the client again and get that information and be writing the information on paper. So then, it seems like, okay, well, we're not as efficient because they did it online but now we're doing it again, right? Whereas if they called the Call Centre and completed an application over the telephone, it would be done, that information would be in the system.

³³¹ This interaction between front-line workers and SAMS is examined in detail in Chapter 7.

Some Ontario Works applicants will input the wrong information into the online form, or will mistakenly submit multiple online applications. For instance, a newcomer to Canada who has a partner and two children may misinterpret the online form and apply for Ontario Works as a single person without dependent family members. As one participant explained:

The problem is that some clients will apply 100 times – they can't fill out the forms, they have literacy issues, or maybe they're not sure that they submitted the form so they submit it a few times. Sometimes they've put in the wrong information, like they put their last name as a first name or they mix up their birthdate and the month. We need to meet with people because of this to determine who they are, whether they're already receiving benefits from another program like ODSP [Ontario Disability Support Program] or Employment Insurance, and to decide if they're eligible for OW.

As a result, intake workers remain a crucial additional layer of decision-makers. At the second-stage meeting, they review an applicant's situation and decide whether that individual is eligible for Ontario Works. It is not until this appointment has been completed and a benefits applicant has been formally granted or denied access to Ontario Works, by way of a SAMS-generated letter, that an appealable "decision" will be made on their application for Ontario Works.

Throughout this decision-making process, intake workers do not act alone. Rather, they consider Call Centre workers' findings, the applicant's online data entries, SAMS' interpretation of an applicant's circumstances, and their own assessment of what an applicant tells them at this in-person appointment. Intake workers move back and forth between what applicants tell them at these second stage meetings and the information recorded during the first stage of the application process. One research participant stated:

If they apply through the Call Centre, I sort of review the notes to get an *idea* of what's going on before the intake appointment. But at the same time, when I meet with the client, I give them the space to sort of explain their situation, why are they here. And then, also, I don't spend too much time reviewing the application because sometimes they come in and the application is supposed to be in the system but it's not there. So, I will just focus more on the client and then leave some of the Call Centre application for later when I get back to my desk.

Intake workers thus tease out the potential inconsistencies or gaps in information that may exist between the first and second stages of a benefits application and consider them in light of Ontario Works' legislative framework.

If found eligible at the second stage, an applicant will proceed to the third stage of the application process to complete their profile as an Ontario Works recipient at an additional in-person meeting. This third stage may trigger yet another layer of decision-makers, as the new “client” is assigned to a caseworker and given a new appointment date to meet this caseworker.³³² At some smaller local offices, a new benefits recipient may be assigned to the same caseworker who conducted the in-person intake appointment. However, if this benefits recipient attends a larger local office, they may be assigned to a different caseworker based on their personal characteristics. For instance, if an applicant is a single person under 30, they may be assigned to a caseworker with a “youth” caseload. If they are a sole-support parent, they may be connected to a caseworker who works with single parents. If they self-identified during their intake meeting as addicted to alcohol or drugs, they may be directed to a caseworker who specializes in addictions. If they are homeless and their local office serves a large number of homeless individuals, they may be assigned to a homelessness caseworker. Their second in-person meeting with an assigned caseworker occurs between two weeks and one month after the in-person intake meeting.

At this additional meeting, a benefits recipient will encounter further tiers of decision-makers, including their assigned caseworker and a series of decision-making technologies that will generate outcomes based on their employability, which benefits and services might best suit them, and their commitments to employment assistance activities. The decisions that these technologies contribute to, and the client data that they collect in the process, serve as the basis for *other* decisions that may affect a benefits recipient later on in their interaction with the Ontario Works program.

Once an individual is assigned to a caseworker and becomes their client, this caseworker will review and update this client’s personal information in SAMS and any paper documentation collected from that individual at the intake meeting. The caseworker will also engage with a

³³² This is my term, and I use it to distinguish between front-line workers who have a specific group of benefits recipients to which they are responsible (and to whom they will often refer as their “clients”) and those who do not have an assigned caseload but who are instead responsible for providing specific, targeted services to all benefits recipients within a single local office, such as employment or community placement workers, or workers who receive and review special diet allowance or housing funding applications.

number of computerized forms and questionnaires to produce a Participation Agreement (also known as an “outcome plan” in SAMS),³³³ which expresses their client’s commitment to engage in employment assistance activities. This second appointment is a necessary corollary to the intake meeting. While the intake meeting focuses on an individual’s eligibility for Ontario Works and reviews their income, assets, and right to other benefits and support payments, the second meeting addresses the Ontario Works program’s treatment elements and how to transition a client from a state of unemployment to paid employment (or at least from Ontario Works to another income support program). The means for achieving this transition include life skills workshops, job training programs, and other supports; these matters are accordingly the focus of this second in-person meeting.

One participant, who worked in an office where intake workers would typically become an individual’s assigned caseworker, explained the difference between initial intake meetings and the second client meeting. She noted the centrality of decision-making technologies at this second meeting, particularly to assess a client’s “self-sufficiency” and to measure their distance from the labour market. Ultimately, the indicators from this assessment would then be used by caseworkers and SAMS to create a tailored exit strategy in the forms of a Participation Agreement. She stated:

After you have an intake meeting with somebody, you have to meet with them within 30 days to complete the employment information session and, now that we have SAMS, the MCSS assessment. The Ministry of Community and Social Services assessment is a self-sufficiency assessment. It’s new with SAMS. So, basically if you can get it done at the time of intake, great, get it out of the way. But you have to meet with that client within 30 days anyways, and that 30-day meeting is designed to do that MCSS assessment and also to talk about earnings exemptions and all that stuff. The intake is actually a lot of information, and you do get people who’ve never been on Ontario Works before, for whom it’s the most devastating day of their life, and it’s a lot. You have to be, like, “So, why did you leave your last job?” The MCSS is a little bit out of context from the actual Ontario Works application that you go through at intake. So, MCSS questions include,

³³³ “Participation Agreement” is the term used in OReg 134/98, s 18. It refers to the paper form that all Ontario Works recipients must sign indicating that they agree to participate in a series of vocational training and life skills activities that they have identified with their caseworker. SAMS’ platform replicates the Participation Agreement, but renames it as an “Outcome Plan.” Research participants use both terms interchangeably. One caseworker clarified: “An Outcome Plan is sort of their plan of, okay, what’s the client doing in terms of moving towards employment. An Outcome Plan *is* a Participation Agreement. This is the plan of the client. The PA is the signed form.”

“How would you describe your current housing situation? Temporary, renting, do you own? Have you had to move more than once in the last 6 months? Are you living in or leaving an abusive relationship? Are you worried about your personal safety? Do you have any physical limitations that would affect your ability to get or keep a job? Do you have any addiction issues that would affect your ability to get or keep a job? Um, ... any education or training outside of Canada? Do you have a child for whom childcare would be needed if you went to work or school? Is there anyone else in the home that would need care if you went to work or school, like an elderly person? Have you got EI [Employment Insurance] in the last 5 years? When was the last time that you had a job that you were paid for? And why did you leave that job?” I think that’s all of them! [laughs] The initial intake appointment is very much, “Sooo, you’ve got three bank accounts. Do you have the bank statements with you? And what’s going on with you that you’re applying for assistance today? Do you have your rental agreement with you? It says you’re paying \$500 rent. Oh, I see something in the Call Centre worker’s notes about your pending EI application.” You’re doing that. So, intake’s really focused on eligibility, whereas that MCSS assessment at the second meeting is all about self-sufficiency.

To outsiders, the indicators tabulated through this MCSS assessment tool may seem inconsequential, but they may influence future decisions about a client’s access to crucial supplementary benefits. These indicators also form the basis of a client’s Participation Agreement. The Participation Agreement, in turn, acts as a touchstone for a range of Ontario Works decision-makers, should questions arise regarding this client’s compliance with the obligation to make reasonable efforts to secure employment, or should this client request access to vocational training activities, job fairs, and other employment assistance activities (and associated supplementary benefits) that may not align with the commitments set out in the Participation Agreement.

As caseworkers engage with online forms to create a Participation Agreement, the client data that they collect and input into these decision-making technologies is stored for later use by other Ontario Works decision-makers, both human and non-human. Client details are input into a municipal intranet database that is accessible to workers beyond a client’s assigned caseworker, including specialized decision-makers (i.e., housing funding workers, special diet workers), back-up caseworkers, employment workers, and supervisors. One caseworker explained how Participant Agreements build on one another over time, as workers add new information with each new client interaction, so as to create a record of a benefits recipient’s goals and progress towards long-term paid employment:

Participation Agreement details are recorded in an online database, so when you meet with a client after their initial application, at either a follow-up appointment, or at a services and supports interview – those are the ongoing appointments that we do – the online database form is to be completed at all of these appointments. You update information into the online database, which is a municipally-maintained database that reads information from SAMS about where the client is at, what they’re doing, and the idea is that it’s supposed to build – they’re supposed to build on each other. So, the client may have started out in an ESL [English as a Second Language] program, and then they completed ESL and moved onto a skill training program, and then they completed that and they’re working. So, all of that is recorded.

This practice is essential for aggregated decision-making. It articulates and records a benefits recipient’s short and long-term training and employment goals, which provides the multiple decision-makers that this individual may encounter with a snapshot of this client’s history and future plans. Information sharing between tiers of human decision-makers enables them to cross-reference one another’s notes about a client’s history and one another’s previous decisions as they perform operational discretion related to a new request for supplementary benefits. In addition, these data inputs may be interpreted by SAMS at a future point in time, as SAMS contributes to decisions about this client’s access to supplementary benefits and services based on their history in the Ontario Works program.³³⁴

Decision-making technologies act as authoritative decision-makers at these early caseworker-client meetings. Their influence is illustrated by the following quote, in which a front-line worker describes how SAMS’ Outcome Plan screen (which replicates the Participation Agreement required by Ontario Works’ legislative scheme) requires caseworkers to fit their clients into a drop-down menu selection when characterizing their distance from the labour market. She states:

The assigned caseworker will have a meeting with the client two weeks to a month after the intake meeting, which is just employment-related stuff, right? And then they will fill in the Outcome Plan. So, they fill out this form [she reads from the Outcome Plan screen in SAMS]: “goals,” everyone is “moving towards self-sufficiency.” That’s SAMS *rule*. “Objectives,” so “life stabilization.” A lot of our clients, if you look at the objectives, [clicks to open the drop-down menu of options, then reads from this menu] there’s “finding employment,” “life stabilization.” You have to choose one of these for the Outcome Plan to be complete. So, in terms of these, like, “life stabilization” is for people who are really far from the labour market, right? So, they’re dealing with addictions, they could be dealing with housing issues, right? So, when they showed this Outcome Plan

³³⁴ This will be discussed further in Chapter 7.

tool to us, we were told, “You’re very far, or you’re very close to the labour market.” But maybe a client falls somewhere in between, right? So, with “training,” that’s for clients who are going to school, “maintaining employment” is for clients who are employed. “Preparing for employment” is, you know, they’re still sort of getting ready to work, but something might be missing, right? “Finding employment” is job searching. So, they have their own objectives in the Outcome Plan. Now, as I said, for a lot of our clients, they’re marked as “life stabilization”, right? And Outcome Plans are really something that, because we were dealing with financial stuff [i.e., with SAMS’ early errors, during which point it did not issue sufficient benefits to eligible Ontario Works recipients], people are just starting to get a really good grip of how it’s supposed to work. But it goes back to that box again, right? You have to satisfy the box. It doesn’t give you a lot of leeway, right? SAMS has got its rules and that’s it.

Once this in-person meeting with an assigned caseworker is complete, a benefits recipient’s Participation Agreement details will have been entered into SAMS’ Outcome Plan interface and this individual will have signed a Participation Agreement form confirming their commitments to training and employment activities.

Following this meeting with an assigned caseworker, an Ontario Works recipient is expected to meet with their assigned caseworker in three months, or if their obligation to participate in employment activities is marked as “deferred” in SAMS, in six months.³³⁵ As the next section illustrates, from this point forward benefits recipients may encounter many other decision-makers in addition to their assigned caseworker. Each of these decision-makers’ performance of operational discretion will determine which Ontario Works benefits and services this client can access.

5.2.2.2. Changed Circumstances

Over the entire period during which an individual receives Ontario Works benefits, they will almost certainly encounter several decision-makers in addition to their assigned caseworker. These extra layers of decision-makers may be mobilized in response to changes in a client’s personal or financial circumstances, which I explore in this section, or as a consequence of

³³⁵ A client’s obligation to undertake employment assistance activities may be deferred if that individual is the sole caregiver for dependent children who are too young to attend school: OReg 135/98, s 27(2). Likewise, if an Ontario Works recipient has a medical condition that prevents them from participating in employment activities and they are waiting for an application for Ontario Disability Support Program benefits to be decided, their obligation to participate in employment assistance activities may be marked as “deferred.” Even in these instances, one is never “exempt” from participating in job training and other activities aimed at reintegration into the paid labour force.

managerial practices, which I demonstrate in the last section of this chapter. Each decision-maker will determine a client's access to benefits and services, based on how that decision-maker performs operational discretion in relation to the client in question *and* in relation to their decision-making colleagues. This section examines two changes in circumstances that are common among Ontario Works recipients – changes in family status (i.e., the addition of new family members to a recipient's benefit unit), and other changes to one's life circumstances, such as a loss of housing or a new job training opportunity, that prompt a client to seek additional benefits and services. As I will demonstrate, these ordinary changes in clients' circumstances can trigger a cascade of additional decision-makers.

Multiple decision-makers are the rule, not the exception, in the Ontario Works program. The number of decision-makers encountered by benefits recipients partly depends on the size of their local social services office. Smaller offices may have only a handful of specialized caseworkers with more limited areas of expertise (i.e., addictions caseworkers, employment or community placement workers), while most workers in the same office may have mixed, or “community-based,” caseloads consisting of single persons, sole-support parents, adult spouses, and individuals who are in the process of applying for disability benefits.³³⁶ Meanwhile, offices with a larger client base and a greater number of caseworkers will typically assign caseworkers to focused caseloads, which include Ontario Works recipients who share common life circumstances (i.e., newcomers, sole-support parents, youth, Ontario Disability Support Program applicants, homeless individuals, and so on). While my fieldwork sites may not represent the entire range of aggregated decision-making practices that exist across Ontario, some layers of decision-makers – such as family support workers³³⁷ and SAMS – are common province-wide

³³⁶ During my fieldwork, many participants noted that it may take individuals a year or longer to access Ontario Disability Support Program benefits, partly because of the vast amount of supporting evidence and lengthy forms that each application required and the long waiting period while one's application was assessed (which participants explained could take anywhere from three months to a year). Further, over half of all Ontario Disability Support Program applications are initially rejected, which triggers further delays as individuals must then appeal this rejection decision to the Social Benefits Tribunal. See John Fraser, Cynthia Wilkey & JoAnne Frenschkowski, *Denial by Design... The Ontario Disability Support Program* (Toronto: Income Security Advocacy Centre, 2003); Ontario, Ombudsman Ontario, *Losing the Waiting Game: Investigation into Unreasonable Delay at the Ministry of Community and Social Services' Ontario Disability Support Program's Disability Adjudication Unit* (Toronto: Queen's Printer, 2006).

³³⁷ See the discussion in Chapter 3, section 3.3.3. Family support workers are a specific type of decision-maker identified in Ontario Works' legislative scheme: *OWA*, s 59; *OReg 134/98*, s 65.1. While some very small local

regardless of differences between local social services departments or individual offices. Aggregated decision-making was a well-established institutional feature of all of my research sites.³³⁸

The involvement of multiple decision-makers may be triggered if a benefits recipient's family status changes. Some changes to family status, such as entering a spousal relationship, may require that an individual be reassigned to a new caseworker whose caseload consists of families rather than single persons. Other changes, such as additions of new children to a client's family, may prompt the transfer of that client to a different caseworker, and may initiate a cascade of interactions with other front-line decision-makers. For instance, if an Ontario Works recipient in her mid-twenties receives benefits as a single person and gives birth to a child, she may be reassigned from a caseworker whose caseload consists of "youth" clients to one whose clients are sole-support parents. In addition to her new caseworker, this benefits recipient may also be directed to consult with a specialized front-line worker who administers municipal programs for sole-support parents in partnership with public health or parks and recreation departments. Further, her assigned caseworker will very likely direct this benefits recipient to a family support worker, who will help her pursue child support from her child's biological father. And, of course, SAMS is always operating in the background as an additional decision-maker in these cases, as are the workers who have become SAMS specialists and who assist when layers of human and non-human decision-makers produce unexpected consequences.

When a single Ontario Works recipient adds a new child to their benefit unit, family support workers become a virtually inescapable layer of additional decision-makers. Like other specialized workers, family support workers transition into this role after they have gained decision-making experience working on general caseloads. They are experts in assisting (or convincing) benefits recipients to pursue support from former intimate partners. The pursuit of support raises sensitive issues, and risks revictimizing sole-support parents who have

offices may not have a family support worker, all of the offices in which I conducted research had at least one such worker, including the smallest office.

³³⁸ As detailed in Appendix A, these offices ranged from very large, urban and suburban offices to a tiny, small town office.

experienced (and may continue to experience) intimate partner violence.³³⁹ Family support workers supplement a client's assigned caseworker, acting as a "second voice"³⁴⁰ and rearticulating the obligation to pursue support in a register that might be more agreeable to benefits recipients. They explain the requirement that benefits recipients must seek financial support to which they may be entitled, which most assigned caseworkers will have already communicated to their clients, and encourage benefits recipients to disclose information about former intimate partners and anyone else who may have a legal obligation to financially support them or their children. For instance, if a sole-support parent indicates that they know the identity and whereabouts of their child's other biological parent, or that someone else may have an obligation to support their child, their assigned caseworker will refer them to a family support worker. Because caseworkers may be uncomfortable pressing clients for intimate details about their relationships with their children's biological parents, some workers explained that they preferred to have family support workers act as additional decision-makers for clients who were sole-support parents.³⁴¹

In addition to family support workers, new additions to a family unit will trigger the further involvement of SAMS as a decision-maker and of caseworkers who are trained SAMS specialists. Thus, caseworkers, family support workers, SAMS experts, and SAMS itself all function as decision-makers when a single benefits recipient becomes a sole-support parent. One reason that so many decision-makers become engaged is that SAMS presents human decision-makers with complicated data input screens in which they must record vast information about a sole-support parent and their children. For clients with multiple children, each of whom may have different biological parents, negotiating with SAMS can become extremely difficult. In these cases, both a family support worker and a SAMS expert may help a benefits recipient's assigned caseworker navigate how SAMS interprets client data and how SAMS imposes the legal obligation to pursue support. Even deciding how to classify a support payment and recording it in SAMS each month may spur the involvement of many decision-makers. A

³³⁹ See Mosher, Evans & Little, *supra* note 126.

³⁴⁰ One caseworker described family support workers' role convincing clients to pursue support in this way.

³⁴¹ See Chapter 3, section 3.3.3, where caseworkers express discomfort questioning sole-support parents.

specialized SAMS expert explained the challenges workers face when entering support data (or “evidences”) into SAMS, which typically involved numerous decision-makers as well as a multi-page job aid created to help caseworkers and family support workers navigate these data entry fields:

Caseworkers who work with sole-support parents have a heavier amount of work. They do, because of all of the support entries. To put support into the system, it’s actually quite heavy. There’s a job aid for it [reaches across desk and grabs a multi-page document consisting of numerous flow charts]. It’s just step after step after step. There’s like, four or five evidences that must be put into SAMS! And it all depends on what the situation is. Like “support” may be marked as “in pay,” or there might be a court order, you know? They’re not all the same. So, with support, there’s different situations. Sometimes we don’t know where the father is, so that’s one situation where we will do, like, a location services referral where we try and *find* the father. Sometimes there’s violence, so we don’t pursue support because we don’t want to put the woman into harm’s way – we’ll waive support. Sometimes there’s a court order. Sometimes there’s a private agreement with the father, where it’s formalized but it’s not a court order. And there’s situations where a client will say, “Oh, he gives me money for diapers,” you know? That’s “support in kind,” which is complicated for a caseworker to enter in SAMS. [clicks a few times to pull up a sample case] So I can show you, when it comes to support, see [reading from screen] – “spousal absenteeism,” “spousal support,” “spousal support payment,” “absent parent,” “child support enforcement” – just how much stuff can get into the system. See, those are all support-related evidences. The absent parent records *who* the father is. And then each one of these evidences depends on the other.

This research participant then demonstrated how difficult it was for caseworkers and family support workers to enter data about the simplest support scenario – a “waiver” case – in which a front-line worker waives a sole-support parent’s obligation to pursue support and notes this waiver in SAMS. In such cases, a caseworker and family support worker will have discussed the obligation to pursue support with a client, considered evidence provided by that client, and concluded that it is not reasonable for that client to pursue support.³⁴² Evidence bolstering this conclusion may include proof that a former intimate partner who may have a legal obligation to support the sole-support parent or her child(ren) has a history of violence, or documents confirming that the Ontario Works recipient does not know the identity of the child’s biological parent, such as a birth certificate that names only the benefits recipient as a child’s parent. In these instances, a caseworker and family support worker may perform operational discretion,

³⁴² OReg 134/98, s 13.

find it is unreasonable to require this client to pursue spousal or child support, and note that this client's obligation has been waived by making the appropriate selections in SAMS. However, as this research participant explained, SAMS does not make this task easy. If information is entered incorrectly or is missing, then SAMS may decide to suspend this client's benefits:

So, for example [picks up the job aid, turning to a flow chart that illustrates how to input support information into SAMS], see, in the case of a waiver there's no support "in pay." So, we're indicating that it's a "waiver", but there's also other options [reading these options from the computer screen]: "LSU," which is the location services unit [a unit that can be summoned to search for a former intimate partner's whereabouts], "private agreement," or "court." So, then you can see, step one, "absent parent." So, you have to enter the absent parent evidence. And then you have to do the "child support enforcement" evidence. And if you don't have *this* entered [points to one type of evidence], then you can't do *this* [points to related type of evidence]. And then you add the "parent absenteeism" evidence, and then you do the DSM, that's the form, right? And then, you know what I mean? You can *see* [taps four different sections of the printed job aid] how many different types of evidences there are. And that's for the *waiver*. That's the easiest support entry. For other clients who don't have a waiver, there could be court orders for one client's child and a private agreement for another child and it can get complex. And then you're dealing with *multiple* evidences or support deadlines fluctuating. Then we have to deal with income, they have to put in support income every month, 'cause the support is always different, right? That's not as common, but that's when cases, SAMS-wise, [sighs] it gets *really* complicated for our caseworkers. And it's a touchy subject, right, for the clients as well.

This SAMS expert aptly describes how complicated it is to juggle and enter so many different bits of client data into SAMS, but her account also alludes to the complexity of multiple decision-makers. SAMS and Ontario Works' legislative scheme, functioning together as a set of legal rules, *create* a situation that requires multiple decision-makers – a client's caseworker, a family support worker, and possibly a SAMS expert – even for the simplest of entries: inputting data to confirm the waiver of a client's obligation to pursue support by a caseworker and a family support worker. Yet, in addition to representing, in electronic form, Ontario Works rules, SAMS also makes decisions. While SAMS would not deny a sole-support parent Ontario Works benefits if her record was silent on whether she was pursuing or receiving support, if the "evidences" described above are entered in the wrong location or if a front-line worker selects an incorrect drop-down menu option, SAMS may chime in as a decision-maker, interpret evidence,

and generate an unexpected decision about a sole-support parent's benefits.³⁴³ These layers of decision-makers are thus an institutional reality for single parents who rely on Ontario Works benefits and for the front-line workers who serve them.

A second scenario in which Ontario Works recipients commonly experience multiple decision-makers arises when a benefits recipient requests additional supplementary benefits beyond their core monthly assistance payments. Such requests are regularly made to caseworkers because core benefit rates are so low that common changes to an Ontario Works recipient's life circumstances, such as a new training opportunity, a bedbug infestation, or a newly-diagnosed chronic health condition, will have associated costs (new work boots, replacement furniture, nutritional supplements) that well exceed a client's core benefits.³⁴⁴ In addition to these life circumstance changes, Ontario Works recipients may require supplementary benefits simply because their core benefits are so low that they cannot afford basic necessities, such as rent, hydro, food, or clothing. In my research sites, requests for funds to pay for training, employment-related equipment, housing issues, or dietary supplements would lead clients to interact with other specialized decision-makers beyond their assigned caseworker, such as employment workers, housing assistance workers, and special diet decision-makers. These layers of additional specialized workers act as gatekeepers to supplementary benefits and services, and their separation from a client's assigned caseworker is more or less integrated into the design of local offices, depending on an office's size.

Special diet allowances illustrate how changes to Ontario Works recipients' circumstances may initiate their interaction with an additional layer of decision-makers. Clients may come to require special diet allowances if they develop chronic health conditions while receiving benefits.³⁴⁵

³⁴³ See discussion of this phenomenon in Chapter 7, section 7.3.

³⁴⁴ At the time of my research, core benefits for a single person were \$656 per month, and \$941 for a single person with a child. These amounts were supposed to cover all of one's living expenses, including rent, utilities, food, clothing, and other essentials for one month.

³⁴⁵ Poor health and chronic illnesses are more common among Ontario Works recipients than one might imagine, particularly because it is nearly impossible to afford healthy food on the program's meagre core benefits. As a result, many benefits recipients develop health conditions that require a special diet during their time receiving Ontario Works benefits: Ernie Lightman, Dean Herd & Andrew Mitchell, "Precarious Lives: Work, Health, and Hunger Among Current and Former Welfare Recipients in Toronto" (2008) 7:4 *Journal of Policy Practice* 242.

Yet, as with Housing Funding and supplementary Employment-Related Expenses, special diet allowances have become a vital source of funding for benefits recipients. Front-line workers with assigned caseloads recognize that such benefits are essential to meet clients' basic needs, even if Ontario Works' legislative framework treats them as supplementary or fringe benefits. One participant noted:

Special diet allowances, for many clients, are useful because, like, the maximum that they receive from Ontario Works, they can only do so much with especially if they have high rent. We *really* have to think about high rent. Sometimes their rent is just \$400 or \$500 a month, and it's considered high because, as a single person, they only get \$365 for monthly shelter allowance, right? Really, \$400 or \$500 rent is not *high* for living in southern Ontario, but it's high according to Ontario Works' standard. So, in that case, we should be telling them what other benefits they are entitled to because, for some people, the special diet is what they use to help with their food. Because if they have a rent of, say, \$500 or \$600 and they're only getting \$656 [the maximum monthly benefit amount for a single person on OW at the time of this interview], they don't have much for food, right? And can you imagine if they also have to pay hydro, right?

Perhaps because caseworkers are acutely aware that core benefits insufficiently meet clients' basic needs, local offices have hived off decision-making about special diet allowances to distinct groups of decision-makers. If a client asks to apply for special diet funding, or if their caseworker suggests that they may want to apply, their application and supporting evidence is reviewed by a handful of workers who decide special diet allowance applications, not by the client's assigned caseworker. Special diet decision-makers may also act as intake workers, deciding special diet applications on the side, or as members of a separate team that reviews and determines other paper-based requests, such as applications for Housing Funding or for the internal review of a caseworker's decision to deny or reduce one's benefits. Where a particular office is overwhelmed with special diet allowance applications, these applications may be referred to be decided by workers in a different local office.³⁴⁶ Research participants described this arrangement as achieving varied goals, including decision-making consistency and workflow efficiency:

³⁴⁶ This hiving off of particular benefits decisions is enabled by SAMS, which allows workers from other offices and other teams to access numerous client files so long as they have the appropriate authorization connected to the identification code that they must use to access SAMS.

The caseworkers give out the special diet forms to their clients, so upon receiving the form back it's assessed to ensure completion, like it has to have all the doctor's information and whatnot, and then it's stamped and given to the special diet worker that's processing it. So, then, there's a letter that's then produced, and it requires access to additional fields within the computer system [SAMS]. So, it was decided that it would be best if only one or two people were processing special diets to avoid errors and whatnot, so it's centralized. I guess that just about every office has it centralized with one or two caseworkers, depending on office size.

However, using paper hearings for special diet allowances and other supplementary benefits may also reduce how often these benefits are paid to clients, as paper-based hearings are known to correspond with decision-makers being less sympathetic to benefits applicants and more inclined to deny their requests than decision-makers at in-person hearings.³⁴⁷

Dispersing such decisions among others who do not regularly interact with the individuals who will be affected may produce more black-and-white decisions and, as with the family support workers in the previous example, diffuse responsibility and accountability for the Ontario Works program's harsh effects among many workers. Aggregated decision-making allows a client's assigned caseworker to maintain their relationship with their client by gesturing towards these other decision-makers or the broader "system" as responsible for failing to provide their client with supplementary benefits. However, it also creates an additional layer of audience members who have access to, and who will review, an assigned caseworkers' decisions about a particular client. Because these additional decision-makers may be more inclined to read program rules more narrowly as compared to a more flexible, pro-client caseworker, they contribute to the regulatory effects of aggregated decision-making explored in Chapter 6.

5.2.3. Managerial Practices Compound Aggregation

Local office practices, specifically caseload assignments and workflow management, intensify how layered and segmented decision-makers are within the Ontario Works program. These practices effectively multiply the number of decision-makers that benefits recipients will interact with and be affected by as they receive Ontario Works benefits. To demonstrate this dispersal, this section examines three managerial practices: segmenting workers into specialized roles;

³⁴⁷ Mashaw suggests this in *Bureaucratic Justice*, *supra* note 119 at 25-26 in his discussion of the bureaucratic rationality model of decision-making.

routinely rotating workers between these roles; and designating back-up workers to cover coworkers' caseloads. In this section, I suggest that, even if a benefits recipient had no change to their family unit and never requested supplementary benefits while receiving Ontario Works, they would almost certainly encounter multiple decision-makers within the Ontario Works program as a result of these management practices. The following discussion does not emphasize how SAMS enables these practices, but as with the other examples in this chapter SAMS is omnipresent.

First, in all of my research sites, managerial staff assign many front-line workers to specialized roles. As touched on above, these roles can be identified according to particular client types (i.e., sole-support parents; youth; clients with pending disability support applications; clients who self-identified as struggling with addictions). Some offices further segment their front-line workers based on the benefits and services that such workers delivered (i.e., intake procedures; employment services; family support services; special diet allowances; housing funding). Workers are then grouped into teams with other front-line workers who share specialties. This level of segmentation appears to be a relatively new phenomenon within Ontario Works' administration, at least in the sites where I conducted my fieldwork. Research participants with over a decade of experience working in the Ontario Works program (and its predecessor, the General Welfare Assistance program) noted that the managerial practices in their offices fluctuated "back and forth" every few years between increasing and decreasing front-line workers' specialization. Specialization itself is not a novel managerial technique, as some amount of specialization existed previously. For instance, sole support parents and clients who applied for the Ontario Disability Support Program while receiving Ontario Works had, for some time, been grouped together into one caseload and assigned to caseworkers with expertise in disability support applications. However, at this earlier point in time, most individuals who were found eligible for assistance would simply be assigned to the front-line worker who conducted their initial intake appointment; no division existed between intake workers and caseworkers with assigned caseloads.

More recently, local offices have begun intensifying the specialization of front-line workers and dividing clients between different workers' caseloads based on their life circumstances. One research participant described this evolution in managerial practices:

Previously, management intended that whoever saw the client at an intake appointment would keep the case, so there would not be too many hand-offs so the client would not have, okay, somebody being an intake worker, somebody doing an outcome plan with them, and somebody to be their caseworker. But over time, this municipality got involved with providing as many employment supports as possible. So, now there's all these specialties that caseworkers have developed and different programs, like the training programs provided by outside trainers that were purchased to really help support clients.

This move to increase specialization appears to have occurred shortly after the Province of Ontario reformed social assistance in the late 1990s to create two separate programs, the Ontario Works program for unemployed individuals, and the Ontario Disability Support Program for individuals whose disabilities interfered with their ability to support themselves through paid employment. Many factors may have contributed to this managerial trend towards greater specialization and segmentation among front-line workers. For instance, it may have been a response to the growing fragmentation of benefits available in the Ontario Works program, as compared to the previous General Welfare Assistance program.³⁴⁸ Relatedly, front-line workers may have been encouraged to become more specialized as a response to earlier iterations of case management software introduced in the 2000s (the Service Delivery Model Technology, or “SDMT”), as this software drew its own distinctions between a range of benefits that were classified more generally in Ontario Works’ legislative scheme. Finally, dividing caseworkers into specialized groups and ensuring that benefits recipients were affected by many different decision-makers beyond their assigned caseworker may have been a managerial strategy to prevent workers from becoming too attached (and possibly too sympathetic) to “their” clients.³⁴⁹ Dividing workers into groups with extremely focused specialties may also prevent workers from seeing the entirety of a client’s experience or of the Ontario Works program, thus encouraging them to become highly specialized, fragmented, and efficient black-and-white workers and nudge them away from acting as pro-client social workers. Regardless of what motivated this change, over time workers have undoubtedly become more specialized so that, today, their

³⁴⁸ Mosher & Hermer, *supra* note 25.

³⁴⁹ This strategy may be an attempt to unsettle those caseworkers who identify as pro-client social workers and nudge them towards acting more like black-and-white efficiency engineers. Others have noted increased specialization and automation in American welfare programs, such as Soss, Fording & Schram, *Disciplining the Poor*, *supra* note 93.

segmentation essentially divides decisions about one client across many different front-line workers in the same office.³⁵⁰

A second office practice that further layers decision-makers within the Ontario Works program is the regular rotation of front-line workers between different roles or caseloads within the same office and between offices within the same municipality. This rotation practice is not unique to Ontario Works; other scholars have noted similar practices in American welfare programs.³⁵¹ However, movement among caseloads, roles, and even between offices is not only expected within Ontario Works, but also encouraged by municipal social services managers. Management staff deliberately plan for caseworkers to move between different caseloads, roles, and offices, using tools such as employee career development planners to record which roles caseworkers might prefer to move into in the future. When some workers eventually move on to other roles or transfer to different social services offices, management staff will refer to these employment planners to assign other front-line workers to vacant positions. The environment is thus one where workers are constantly circulating between roles; as a result, Ontario Works recipients may end up assigned to more than one caseworker during the period when they receive benefits regardless of how stable their life circumstances (i.e., family size; parental status; age) remain during that period.

Because front-line workers undergo continual specialization, they periodically change roles within the Ontario Works program. Workers may start out in more general roles, such as in a Call Centre or working with the broadest assigned caseload. If they begin work in a Call Centre, workers will typically remain there for one to three years and “work their way up” to a position in a local social services office. If they are initially hired into a local social services office rather

³⁵⁰ Some research participants suggested that their offices would be reverting to an older model in the future. This previous model saw the same worker who conducted an intake appointment taking a successful Ontario Works applicant on as part of their caseload, which resulted in heterogenous caseloads as clients are assigned to workers according to the luck of the draw. A version of this model was in use at one of the two municipalities in which I conducted research, though workers in this municipality were still divided into specialized sub-groups (i.e., clients with addictions and newcomers were assigned to specialized workers, while most others were grouped together in general caseloads). This practice suggests that reverting to this model may not entirely eliminate specialization and segmentation among front-line workers.

³⁵¹ Watkins-Hayes notes this in the context of Massachusetts’ version of the TANF program, *supra* note 94 at 107-8; see also Soss, Fording & Schram, *Disciplining the Poor*, *supra* note 93.

than a Call Centre, workers might instead begin with a generalized caseload (typically consisting of clients between 30-60 years old who have no identifiable complicating factors, such as an addiction, a young child, or a disability) and then move on to more specialized work (for instance, delivering employment assistance services, working with a focused caseload of newcomers, Ontario Disability Support Program applicants, or sole-support parents, and so on). Once they have begun working in a local social services office, front-line workers with assigned caseloads commonly rotate into new positions every two to three years. Those working as employment workers, who counsel numerous benefits recipients on career options and link them to training programs, job fairs, and volunteer opportunities, typically remain in that role for a longer five-year period because they receive additional specialized training to perform this role. Eventually, they will rotate into an assigned caseload and give their colleagues a chance to work as employment or community placement workers. These jobs are highly desirable because employment workers have the opportunity to deliver workshops, undertake additional training, and obtain certification as an employment coach.

This continual movement of front-line workers between different roles produces an institutional environment marked by the fluidity of its legal decision-makers. In their first five years of work, a front-line worker can expect to perform two or three different roles, moving from a general caseload to an increasingly specialized caseload. The following research participant's experience is thus illustrative:

Everybody starts off as the generic caseworker, whatever the different offices call it, with an "employable caseload." We used to call it a "COE": Cannot Obtain Employment. So, I worked on a generalized COE caseload and then moved into the Employment Centre and then, from there, I took on the specialized role I'm doing now [working with clients who self-identify as addicted to drugs or alcohol].

After working for a decade, front-line workers may have acted in four or five different roles, switching between caseloads with assigned clients to other positions that do not have assigned clients, such as employment counseling, intake, family support, or customer service positions. Additionally, they may work in a specialized arm's-length decision-making role, such as housing funding, special diet, or internal review roles, in which they review written requests for additional benefits or formal appeals of their coworkers' decisions to deny benefits or

services.³⁵² The following worker's account of her eleven-year career is illustrative, as she describes the four different positions that she held during that time:

I have worked as a single-led family worker, so I have also worked as a teenage mom or a teenage parent worker. I've also worked with just single individuals as well. I did a file review, investigative-type role as well at one point. And, currently, I am doing employment work, so I am one of the employment resource caseworkers, and I've been doing that for the last four years.

While this rotation practice may have been implemented to achieve managerial goals – for instance, to broaden caseworkers' experience or to keep them engaged while performing monotonous or emotionally draining work – it also multiplies the decision-makers that benefits recipients experience. Because front-line workers move between general roles and specialized caseloads, those individuals who receive Ontario Works benefits for longer than a few months will likely have more than one caseworker assigned to assist them during their interaction with the Ontario Works program.

Finally, local office back-up and file coverage practices further expand the range of decision-makers who may influence an individual benefits recipient's benefits and services. Each municipal social services office aims to ensure that all who arrive seeking Ontario Works supports can have their requests addressed fairly quickly, and at the very least that someone will be available to respond to their inquiries. Back-up practices are one way of achieving this level of service. Some form of back-up arrangement existed at all of my research sites. Typically, back-up workers would fill in for their colleagues who worked on the same team, with team members acting for one another's files.³⁵³ Likewise, team supervisors would act as back-ups for each other, so at some periods of time one supervisor may be responsible for two teams of caseworkers. Supervisors arrange back-up schedules for their teams, pairing caseworkers with one another as back-ups and, in addition, identifying one worker as a back-up for the entire team on each day of the week. For a team of nine caseworkers, this means that every caseworker

³⁵² These internal review workers decide the formal internal review requests that are a prerequisite to a client appealing to the Social Benefits Tribunal: *OWA*, s 27. In some offices, this role is performed by supervisors, but in others it was a specialized task assigned to a small group of former caseworkers.

³⁵³ The teams of front-line workers at my research sites typically consisted of 7-12 caseworkers plus a supervisor.

would typically act as a back-up for their eight coworkers once every seven to nine workdays, if vacations and other absences are taken into account. On the day that a caseworker is assigned as the team back-up, they are supposed to keep their schedule clear of pre-booked client meetings because, as one supervisor stated, “they could be covering off *anything* for that day” if a benefit recipient drops into the office looking for an unavailable team member. When their colleagues take lunch breaks, are in a meeting, or otherwise unavailable, the individual who is assigned as a back-up worker for that day is supposed to respond to drop-in requests for predisposed coworkers. Likewise, if a caseworker is ill or goes on vacation, their assigned back-up partner will respond to any of that caseworker’s clients who drop in or who have scheduled appointments. As a result of this office practice, caseworkers who belong to the same team become aware of and respond to each other’s clients and caseloads, and caseworkers expect that colleagues will at some point interact with “their” clients.

Back-up workers may grant benefits to clients whose assigned caseworkers would not have done so; alternatively, they may deny benefits to a client whose caseworker might grant them in the same circumstances. In this way, back-up workers mediate the distance between pro-client social workers and black-and-white efficiency engineers. This effect comes through in the following passage, in which a front-line worker describes a situation in which she was acting as a back-up worker. In this scenario, a homeless individual’s assigned caseworker had suspended his monthly Ontario Works benefits (both the shelter allowance portion and the portion of core benefits earmarked to cover the cost of food, clothing, etc.) because he had not yet attended a meeting with his assigned worker to verify the address of the temporary shelter where he was living.³⁵⁴ The research participant, who was acting as a back-up for this client’s assigned caseworker, performed operational discretion to pay this individual some of his monthly benefits (the “basic needs” portion, which is to cover food and clothing, but not the shelter allowance portion). She described navigating her role as a back-up worker in this way:

³⁵⁴ Shelters may charge homeless individuals a daily rate for their services; these rates will vary from one shelter to the next. While not as high as rent, this rate is enough to create a burden for those who reside in shelters and rely on Ontario Works benefits. Accordingly, in such cases, Ontario Works benefits may be provided to help offset these costs. However, in these cases, a homeless individual’s caseworker may request formal verification of which shelter that client is frequenting to ensure that they only release a shelter allowance amount reflective of that shelter’s particular fees.

As a back-up worker, if I get a call and a client's on suspend, we use a lot of discretion there. So, to me, my philosophy is, when I'm a back-up worker, I'm going to make the decision. You're [i.e., the assigned caseworker] not here, the client's here, I'm making a decision. So, an example is, a client calls me, he's in a shelter and has been for several months, but I guess the worker hasn't been able to see him to update his file because he's been in this shelter, so she can't verify his address ... This caseworker had suspended the case [i.e., suspended all of this client's Ontario Works benefits, including his basic needs benefits, so that he received no OW benefits each month] and the client called me and was here in the office and wanted his money. And he comes to me and he was like, "I *promise* I will show up for the appointment on Tuesday. I promise, I promise." So, I schedule the appointment for his worker and the worker wasn't here. And, so, when the appointment date came, then, he never showed up, but I had released the cheque. So, I had made that decision.

Even though this homeless individual did not attend the newly-scheduled appointment with his assigned caseworker, the back-up worker did not regret issuing him basic benefits while she covered for his assigned caseworker. In her view, he should have been receiving basic Ontario Works benefits because he was homeless and had no evidence of any income. Because he ended up missing his appointment with his assigned caseworker, it was almost certain that his worker (who interpreted Ontario Works rules more narrowly than the above-quoted research participant) would suspend his benefits again unless he attended a meeting at a later date. Given this client's history of precarious housing, it was likely that he did not show up at a later date, as research participants consistently noted that homeless Ontario Works recipients frequently miss meetings and are very difficult to maintain contact with.³⁵⁵ In this back-up worker's view, at least she had provided this individual with the basic financial assistance that he should have been receiving. She admitted that the outcome was not great, but at least he received benefits that were somewhere between a full core benefits payment and the zero dollars that his caseworker was providing to him.

None of my research participants described situations where they, as back-up workers, had reduced or suspended an Ontario Works recipient's benefits. Instead, many would describe how they granted some individuals benefits that their assigned caseworkers had not, or removed a

³⁵⁵ Many of my research participants would note this point, based on their experience working with homeless clients. Because many homeless individuals struggled with addictions, mental illness, chronic health conditions, and were virtually impossible to notify of upcoming meetings, most would habitually miss scheduled meetings and, instead, stop into a local office to see their assigned caseworker when they needed funds or other assistance.

“suspend” status from a recipient’s file so that they could receive at least one month of Ontario Works benefits. It is reasonable to expect that the opposite also occurs, however, particularly if a back-up worker balances competing norms, such as safeguarding taxpayer-funded benefits or promoting self-sufficiency, differently than an absent coworker who weighs these norms to more strongly favour preventing hardship or acting in a client’s best interests. In any event, when caseworkers act as back-ups and engage with one another’s clients, the significance of aggregated decision-making – and particularly its regulatory effects – becomes more apparent.

Caseworkers and decision-makers more generally may thus be quite fluid for clients. Although some clients might be better served by working with the same caseworker over a long period of time, workers’ roles and caseloads fluctuate so often that the prospect of a stable, singular “decision-maker” to whom one can regularly turn may be a mere fiction for many Ontario Works recipients.

This layering of decision-makers throughout the Ontario Works program diffuses responsibility among many individuals, creating an institutional “administrator” comprised of multiple front-line workers, supervisors, and decision-making technologies. In addition, the phenomenon of aggregated decision-making regulates how each individual performs operational discretion. Chapter 6 will explore how the layering of human decision-makers can moderate operational discretion so that front-line workers who might more radically balance competing norms towards pro-client or black-and-white ends of the professional identity spectrum are compelled to perform differently, keeping their diverse anticipated audience of coworkers in mind.

Chapter 6

Aggregated Decision-Making's Regulatory Effects

In Chapter 5, I illustrated how multiple decision-makers are an institutional feature of the Ontario Works program. Far from exceptional, aggregated decision-making is the norm in Ontario Works offices, and perhaps in other administrative agencies. While an individual benefits recipient will be assigned to and become the “client” of a specific caseworker, many other human and non-human decision-makers will also determine that individual's access to benefits and services. I showed how these decision-makers are distributed throughout the Ontario Works program and aggregated at particular moments, such as at an initial application for Ontario Works benefits and when an individual's personal circumstances change so as to require alterations to their family status or access to additional benefits and services. I also demonstrated how managerial practices circulate front-line workers between one another's caseloads, virtually guaranteeing that individual benefits recipients will interact with many decision-makers. These practices ensure that a range of generalist and specialist workers perform operational discretion at and behind the front lines of the Ontario Works program, together with supervisors, managers, and decision-making technologies, to produce institutional decisions about an individuals' access to benefits and services. The next two chapters will explore how this aggregation of decision-makers guides front-line workers as they perform operational discretion in relation to their coworkers (Chapter 6) and to decision-making software (Chapter 7). Rather than eliminate operational discretion, I argue that aggregated decision-making subtly regulates how workers perform it.

This chapter begins by considering aggregated decision-making in light of legal and socio-legal accounts of relational decision-making. While legal scholars tend to focus on the relations between decision-makers and those affected by their decisions, and socio-legal scholars examine the relations between managers, standards enforcers, and other professionals, my study reveals how front-line workers regulate one another. By analyzing a wider range of decision-makers within local social services offices, I demonstrate how front-line workers use oral advocacy and written notes to adjust their performances of operational discretion in relation to an audience of their colleagues. While workers may initially distinguish themselves from their colleagues based on the professional identity spectrum I set out in Chapter 4, they remain keenly attuned to their

coworkers' professional identities and associated performance styles. Drawing on my empirical research data, I show how front-line workers use this knowledge to craft their own performances of operational discretion so that they fall within a range of outcomes that they expect will be acceptable to their colleagues. By keeping their coworkers and supervisors in mind, front-line workers' performance is undertaken in relation to their colleagues, who they anticipate will review their decisions at some point in the future. Thus, even if a particular front-line worker might reconcile the norms identified in Chapter 4 to reach decisions that are more flexibly pro-client or rigidly black-and-white, my research suggests that these individuals further temper their decisions so that they converge within a narrower band of outcomes that they expect will be acceptable to an audience of peers with varying professional identities. This process thus addresses concerns that operational discretion may be performed according to a decision-maker's personal whims and instead suggests that the combination of normative balancing and appealing to fellow decision-makers may effectively guide front-line workers' performance and generate a broad degree of consistency between decision-makers.

6.1. Relational Regulation of Administrative Decision-Makers: Contrasting Sites of Regulation

Other relational analyses of operational discretion have focused on the regulatory impact of interactions between decision-makers and other actors. The relationality among front-line decision-makers remains an underexplored source of potential guidance. As my research shows, front-line workers have the capacity to regulate one another, particularly in institutions where their decision-making authority is simultaneously concentrated (in an assigned caseload or a set group of benefits or services) and diffused (through managerial practices that enable workers to review and make decisions on each other's caseloads and that regularly rotate workers to new work assignments). Thus, my analysis of the aggregation of decision-makers in the Ontario Works program contributes new insights to relational regulation theories. Most notably, my research suggests that relational regulation between coworkers depends on the existence of three key elements: a range of professional identities among the workers in one office; an awareness of this range of identities among workers; and a degree of uncertainty as to which coworker or supervisor will review any one performance of operational discretion. The significance of these elements will be demonstrated throughout this chapter.

For at least two decades, relational theory has influenced Canadian legal scholarship, particularly work that addresses how administrative officials and other state authorities should interpret and apply laws that directly impact members of the public.³⁵⁶ Cartier, in particular, has developed a focused body of work that advances a novel argument about discretion as dialogue.³⁵⁷ As a legal scholar who draws primarily on doctrinal and theoretical sources, Cartier is chiefly concerned with how “discretion as dialogue” might function as an evaluative standard in the judicial review of administrative decisions. However, she also anticipates that this model may, if instituted by Canadian courts, prompt changes in how administrators perform operational discretion. Cartier’s starting point is that a modern version of the rule of law principle must account for the ubiquitous and essential role of administrative discretion in delivering state social programs, which she argues can be achieved by reimagining discretion as requiring a dialogue between decision-makers and those affected by their decisions.³⁵⁸ Her model of discretion as dialogue contributes to this project by offering a standard with which judges, administrative agencies, and scholars can assess administrative decisions. Judges and administrators, Cartier proposes, can use this model to evaluate whether the discrete discretionary decisions of front-line workers meet the requirements of dialogue.³⁵⁹ Administrative law scholars, meanwhile, can use it to examine how the rule of law and discretion play out in individual cases, and whether administrators approach discretion as an exercise of power or as a mutual discussion in which they are receptive to the concerns of those impacted by their decisions.

³⁵⁶ See, for example, Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011); Sossin, “Intimate Approach,” *supra* note 47; Cartier, “Spirit of Legality,” *supra* note 2.

³⁵⁷ See Cartier, *ibid*; see also Cartier, *Reconceiving Discretion*, *supra* note 2; Cartier, “The Baker Effect,” *supra* note 11; and Cartier, “Response to Willis,” *supra* note 47.

³⁵⁸ Cartier, “Spirit of Legality,” *ibid* at 334-35. Other scholars, such as Harry W Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) [Arthurs, *Without the Law*], might disagree with Cartier’s framing. Instead, they may argue that it is not that discretion has only recently become essential to state operations, but that scholars and judges are only recently catching up with the administrative reality that discretion has always been a part of delivering public services and regulating private enterprises, particularly at moments in history when courts were loath to do so.

³⁵⁹ Nedelsky, *supra* note 356 at 148, footnote 108, suggests that, for Cartier’s model to be effective, it *must* apply to front-line workers, not just to higher-level officials whose decisions are most often judicially reviewed.

Though Cartier intended her discretion as dialogue model to be an evaluative standard applied retrospectively, she suggests that it may have forward-looking regulatory effects. These effects would be achieved if the dialogue standard is applied on the ground, spurring a relational interaction between administrative decision-makers and the individuals affected by their decisions. As a doctrinal legal scholar, Cartier expects that these regulatory effects will flow from judicial review: that is, if judges use the discretion as dialogue standard to evaluate discretionary administrative decisions, and if they return those decisions that do not meet the dialogue standard to administrative agencies to be decided anew, then these agencies will adjust their decision-making practices to meet minimum dialogue standards.³⁶⁰ Ultimately, Cartier hopes that upper-level administrative officials will encourage decision-makers within their agencies to enter into a participatory exchange with those who will be affected by the agency's decisions, genuinely listen to their concerns, and demonstrate their receptiveness to individuals' concerns through attentive reasons for a decision.³⁶¹ Not only would this individuation of operational discretion ensure that decision-makers are accountable to the public (by ensuring they are at least responsive to those members of the public who will be impacted by their decisions), but it would also mitigate the risk that discretion may be used arbitrarily. In other words, by requiring administrative decision-makers to be open and empathetically responsive to the individual parties to a decision, the discretion as dialogue model regulates how these decision-makers perform operational discretion. The ultimate aim is not to eliminate discretion but to make it more likely that a particular discretionary decision's substance responds to the situation of those individuals affected by the decision.³⁶²

³⁶⁰ Socio-legal scholars, of course, have long questioned whether the assumed connection between judicial review outcomes and administrative agency responses plays out in practice: Marc Galanter, "Why the 'Haves' Comes Out Ahead: Speculations on the Limits of Legal Change" (1974) 9:1 *Law & Soc'y Rev* 95; Simon Halliday, *JR and Compliance*, *supra* note 42.

³⁶¹ Cartier, *Reconceiving Discretion*, *supra* note 2 at 1-2 and at Chapter 5, "Power to Dialogue." Interestingly, Cartier's approach runs against the Weberian view of bureaucracy, which proposes that administration should be conducted without regard for persons using objective principles and calculable rules that favour consistency and equal treatment: Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed by Guenther Roth & Claus Wittich, translated by Ephraim Fischhoff et al (Berkeley, CA: University of California Press, 2013).

³⁶² Cartier, *ibid* at 270-72.

Cartier’s work offers compelling insights into why “a bottom-up approach to discretionary power”³⁶³ may be required in the top-down context of judicial review proceedings and, indeed, how one has already evolved in leading appellate court decisions. However, by focusing on the relationship between administrative decision-makers and the individuals impacted by their decisions, Cartier’s proposal inadvertently misses the influence of relationships between decision-makers. This relationality between administrative officials may affect how easily a dialogic model might be implemented in diverse administrative agencies, particularly in the context of front-line decision-making. As a first step to addressing this oversight, I offer my own insights into how this dialogue between decision-makers operates in the Ontario Works program and allude to how my insights might be taken up by Cartier and other legal scholars. My findings suggest that the dialogues between multiple decision-makers produce important regulatory effects, such that front-line workers temper their performances and justify their decisions in relation to *each other* more than in relation to their clients.

Socio-legal studies of regulatory governance and public administration have also recently embraced a relational approach to regulation and demonstrated how decisions-makers’ interactions with other institutional actors can guide their performance of operational discretion. This literature explores the socio-legal elements of regulation and suggests that everyday managerial decisions, such as office design and workload arrangements, can broaden or narrow the possible outcomes available to decision-makers.³⁶⁴ Scholarship in this vein suggests that regulatory effects may be only tenuously connected to the formal legal mechanisms, such as judicial review or written rules, that conventional legal scholars might expect would guide operational discretion.³⁶⁵ Accordingly, regulatory governance and public administration scholars

³⁶³ Cartier, “Spirit of Legality,” *supra* note 2 at 321.

³⁶⁴ An early article charts the conceptual underpinnings of sociological citizenship: Silbey, Huising & Coslovsky, *supra* 16. The most significant collection on relational regulation to date is a special issue of the journal *Regulation & Governance*, edited by Susan S Silbey, which includes Pires, *supra* note 56; Piore, *supra* note 56, among others. More recently, Rutz et al, *supra* note 56 explores relational regulation in the context of youth services inspectorates.

³⁶⁵ As noted above, socio-legal scholarship consistently unsettles assumptions about the effectiveness of external review as a mechanism for regulating administrative decision-makers: see also Lens, “Fair Hearings,” *supra* note 42. Empirical studies also suggest that clear rules may not be as effective at regulating front-line workers as scholars like Davis might assume: Braithwaite & Braithwaite, *supra* note 140; Robert Baldwin & Julia Black, “Really Responsive Regulation” (2008) 71:1 *Mod L Rev* 59.

study how a broader range of managerial and technical tools influence how front-line workers perform operational discretion. These mechanisms may mobilize social factors, such as peer pressure, competition among workers, and conflict avoidance, to achieve regulatory goals.³⁶⁶

Because these scholars are more concerned with governance than legality, they are interested in how institutions produce outcomes that are “close to” compliant with rules and standards. Thus, their scholarly interest is not eliminating a perceived gap between regulatory standards and the enforcement of those standards, but better understanding how administrative actors and the organization they constitute keep their performances nearly compliant with rules and standards.³⁶⁷ Of particular interest to these scholars, then, is how administrative officials ensure that individual decision-making performances fall within a band of acceptable outcomes.³⁶⁸ This work can be viewed as a reverse image of legal scholars’ analyses of discretion: while legal scholars are concerned with guiding performances of operational discretion (which may be misconstrued as performed *absent* constraints), regulatory governance scholars reimagine the content of “compliance” so that a wider set of regulatory outcomes may be understood as compliant with rules. Like legal scholars, regulatory scholars have also recently turned to relational theory to address how social relations contribute to the achievement of broadly compliant outcomes in particular regulatory settings.

The earliest and clearest articulation of the relational elements of regulation is found in Silbey and Huising’s joint work. Developed out of their empirical research into environmental standards enforcement in the United States and Brazil, Silbey and Huising introduce two related concepts: sociological citizenship and relational regulation. Sociological citizenship describes administrative actors (in their case studies, mid-level enforcement officers and managers) who work from a systemic perspective; they understand their institutions to be “complex web[s] of interactions and processes” and themselves to be “links” within a larger administrative

³⁶⁶ Many of these factors are also at work in the new public management strategies discussed throughout Chapter 4.

³⁶⁷ See, for instance, the discussion of what compliance might mean in different settings: Braithwaite, *supra* note 138 at 78-82.

³⁶⁸ Huising & Silbey, *supra* note 3 at 15-16.

system.³⁶⁹ The key feature that distinguishes ordinary administrative actors from sociological citizens is the latter's awareness of the institutions which they comprise as a "product of human collaboration."³⁷⁰ Sociological citizens recognize their institutional home as a set of "interdependent yet malleable relationships" between actors inside that institution and with other external actors and institutions.³⁷¹ Perhaps because of their focus on mid-level officials, Silbey and Huising claim that sociological citizenship is a relatively exceptional professional orientation.³⁷² The majority of the administrative actors they studied did not develop a systemic perspective of their institution vis-à-vis other agencies or a relational approach to achieving compliance with environmental standards; only a handful were sociological citizens.

Relational regulation, according to Silbey and Huising, emerges from the adoption of a stance of sociological citizenship.³⁷³ As administrative decision-makers recognize that their relationships with other administrative decision-makers and other institutions shape the agency in which they participate, they may rely on ongoing transactions between themselves and others to achieve role-specific obligations.³⁷⁴ For instance, environmental enforcement officers may use their relationships with other branches of government and creatively adjust particular enforcement goals to achieve adequate, rather than total, compliance with environmental standards. In other words, their relationship with other institutional actors prompts these officials to adjust what "compliance" looks like and reach a compromise that allows a broader range of outcomes to be considered compliant with the environmental standards regime in question. Thus, unlike

³⁶⁹ Huising & Silbey, *ibid* at 18; Silbey, Huising & Coslovsky, *supra* note 16 at 203.

³⁷⁰ Silbey, Huising & Coslovsky, *ibid* at 218.

³⁷¹ Michel de Certeau, *The Practice of Everyday Life*, trans Steven Rendall (Berkeley, CA: University of California Press, 1984).

³⁷² Silbey, Huising & Coslovsky, *supra* note 16 at 224-25 observe that earlier scholarship characterized the features of sociological citizens as deviations from anticipated or desired normative practices among administrative actors. Their theory is thus built on what scholars previously understood to be exceptions to a normative ideal of efficient, rule-governed organizational behaviour. My study of front-line workers suggests that the exception may instead *be* the rule; that is, that relational regulation among coworkers, which produces discretionary decisions that fall within an acceptable band of variation, may be not only the on-the-ground state of affairs but also a desirable outcome.

³⁷³ Huising & Silbey, *supra* note 3 at 36.

³⁷⁴ *Ibid* at 18.

Cartier's discretion as dialogue model, Silbey and Huising's relational regulation does not require that parties engage in high quality communication with members of the public or work towards common goals. Instead, relational regulation merely requires organizational actors to apprehend social organization as "transactional" and to understand that they cannot achieve broader regulatory goals on their own. These insights inspire them to work with other administrative actors in their own institution and elsewhere to achieve results that fall into a reasonable range of outcomes rather than to achieve perfect compliance.³⁷⁵ Through this process, these administrators "govern the gap" between written rules and their everyday performance by working with others to ensure that their practices remain within a "band of variation" that surrounds, but may not perfectly map onto, specific regulatory standards.³⁷⁶

These socio-legal studies make an important contribution as they acknowledge that perfect compliance with written rules and standards is not only unlikely, but also undesirable. Thus, while legal scholars are concerned with constraining the operational discretion that formal discretion permits, relational regulation scholars are preoccupied with explaining how deviation from seemingly clear regulatory standards may nonetheless achieve the wider aims of a particular regulatory regime. Importantly, this work illuminates how a degree of compromise on standards enforcement necessarily results from relationships between institutional actors, as skillful regulators may work with administrative officials outside of their own agency to achieve close-to-compliant outcomes.³⁷⁷ While Cartier's discretion as dialogue model uses relationality to conceptualize how administrative decision-makers' performance of operational discretion might be constrained, her model may not easily admit decision-making imperfections as a necessary component of compliance with broader legal and managerial aims. Relational regulation scholarship provides important insights that can be used to reimagine what a reasonable performance of operational discretion looks like, understanding that some flaws and compromises may be inevitable rather than evidence of deficient decision-making practices.

³⁷⁵ *Ibid* at 19, 36. See also Mustafa Emirbayer, "Manifesto for a Relational Sociology" (1997) 103:3 *American Journal of Sociology* 281.

³⁷⁶ Huising & Silbey, *ibid* at 36.

³⁷⁷ Rutz et al, *supra* note 56.

While relational regulation literature is insightful, my research suggests two areas in which it may be reconsidered so as to extend the model. First, the concepts of sociological citizenship and relational regulation suggest that relational regulation, as a regulatory phenomenon, depends on relationships between different government agencies. My research suggests, however, that front-line workers in catch-all bureaucracies such as Ontario Works engage in a modified form of relational regulation that is rooted in fostering relationships between coworkers rather than between workers in different government agencies. As this chapter will demonstrate, the layering of decision-makers throughout the Ontario Works program both makes individual decision-makers aware of one another's performance styles and requires that they advocate in favour of and justify their decisions to one another. In doing so, front-line workers appear to engage in a type of transactional bargaining, resembling relational regulation, to achieve broad program goals. Rather than compromise between the goals of different administrative agencies, as did the mid-level actors in Silbey and Huising's work, front-line workers in the Ontario Works program evaluate their performances of operational discretion against an anticipated future audience of coworkers, who might align themselves with different professional identities and differently reconcile the legal and managerial norms underlying the Ontario Works program. Because they also aim to maintain good working relationships with their coworkers, the front-line workers I studied appear to understand the institutions in which they work as constituted by interdependent and malleable relationships, perhaps to a greater degree than the mid-level officials and prosecutors in Silbey and Huising's research. As I will demonstrate below, this awareness of interdependence is evident in how front-line workers adjust their performances of operational discretion so that they are closer to a mid-point that they expect will be acceptable to both pro-client social workers and efficiency engineers.

Second, my research suggests that relational regulation scholars should extend their analysis to consider whether sociological citizenship and relational regulation correspond with the regulatory effects that are observable among front-line workers as compared to mid-level officials. Relational regulation studies tend to focus on administrative actors, such as managers and enforcement officers, who are more independent and may have greater job security than the front-line workers in catch-all bureaucracies. Further, the mid-level actors in these studies – managers, prosecutors, and other administrative officials – are typically freer to implement creative solutions, and thus better situated to act as sociological citizens, as compared to front-

line workers who tend to be more closely monitored and subject to regulatory technologies.³⁷⁸ Yet, my research suggests that sociological citizenship may be a more widespread orientation among front-line workers, at least within the agencies that deliver Ontario Works, as compared to the agencies studied by Silbey, Huising, and others. In the Ontario Works program, it appears as though specific managerial and institutional design decisions have fostered a sociological orientation among caseworkers. Whether intentionally or accidentally, these structural features seem to enable a form of relational regulation in municipal social services offices by layering front-line decision-makers, which gives workers insights into one another's performance styles and ensures that they will, at some point, review and influence one another's decisions.

The balance of this chapter analyzes how the aggregation of decision-makers within Ontario Works produces regulatory effects. First, I argue that the structural features of local offices create an audience for workers' performances of operational discretion. I demonstrate how these structural features ensure that workers are aware of each other's professional identities, and associated "styles" of performing operational discretion, which inspires them to position their own performances in relation to those of their colleagues. The last two sections of this chapter then explore how workers adapt in response to these features and to an anticipated future audience of their colleagues. These two elements – the structural features that create an audience; and workers' adaptation to that potential audience – constantly interact as front-line workers perform operational discretion. This interaction is illustrated by two examples: first, front-line workers orally advocate to each other and their supervisors in support of a particular outcome, tailoring their advocacy style to the professional identity of the individual(s) to whom they are appealing; second, workers also draw on their awareness of the range of professional identities within their office as they record justifications for their decisions to be accessed by future reviewers. In both their oral advocacy and written justifications, caseworkers skillfully reference multiple guiding norms to speak to colleagues who may align with a different end of the professional identity spectrum. This practice ultimately tempers their own performance of operational discretion so that it falls somewhere between a pro-client social worker approach and

³⁷⁸ Indeed, the other articles within the 2011 special issue of *Regulation & Governance* addressed sociological citizenship in the context of regulatory enforcement and management-level decisions rather than at the front-lines of administrative agencies.

a black-and-white efficiency approach. As a result, it ensures that the decisions about an individual's benefits and the strategies used to reach those decisions fall within a range of reasonable results, similar to the band of acceptable outcomes familiar to relational regulation scholars.

6.2. Structural Features Create Awareness of Colleagues' Performance Styles

Front-line workers perform operational discretion with their colleagues in mind, aware of the different approaches that their coworkers take to performing operational discretion. These workers do not simply locate formal discretion within and across program rules and balance competing norms to reach a decision; they perform this process for an audience that extends beyond their clients to encompass coworkers, supervisors, and auditors. This section analyzes two structural features that contribute to caseworkers' awareness of their colleagues' professional identities and associated performance styles, and traces how workers identify their own performance style in relation to their coworkers.

The first of these structural features is the managerial practices within local offices. These practices organize front-line workers into specialized teams that meet regularly and informally consult one another for advice. A second structural feature is the physical design of local offices. Many of the places in which front-line workers perform operational discretion promote workers' awareness of each other's performance styles, as they are open-concept workspaces in which coworkers can see and hear one another's performances. Their awareness of colleagues' performance styles may inspire front-line workers to identify with one of the two divergent poles of professional identities discussed in Chapter 4 (pro-client social workers or black-and-white efficiency engineers). Yet, as I will argue in the next section of this chapter, it also prompts workers to moderate how they perform operational discretion. Just as workers who identify as pro-client or black-and-white nonetheless participate in a common method of reconciling competing norms, they are also simultaneously guided by an overarching principle of keeping the peace, or maintaining good relations, with colleagues whose caseloads they may cover at some point and who will cover their own files. Thus, while workers may be committed to a particular professional identity and use this alignment to distinguish themselves as diverging from their coworkers at the other end of the spectrum, they also adjust their performance of

operational discretion in light of their coworkers' varied professional identities, thus converging with one another so as to avoid conflict. This process of divergence and convergence ultimately regulates front-line workers so that their performances of operational discretion do not depart too radically from how they anticipate that their coworkers would perform in similar circumstances.

In focusing on the mutual regulatory influence of coworkers, I do not mean to suggest that some kind of dialogue between workers and clients is absent from the Ontario Works program. Rather, I propose that legal scholars may wish to consider how coworkers' effect on one another may produce a sort of reasonableness in action. The desire to maintain good relationships with one's colleagues appears to direct administrative actors towards outcomes that they understand to fall within a range of outcomes that their coworkers would find acceptable, despite their varied professional identities.

Managerial practices that place front-line workers onto specialized teams are a first structural feature that promotes workers' awareness of their colleagues' performances styles. Members of these teams may perform similar tasks, such as delivering employment assistance services. Workers grouped into teams may also have caseloads of clients who share personal characteristics, such as sole-support parents, newcomers, or individuals with addictions.³⁷⁹ Teams of front-line workers typically meet with one another and their team supervisor every few weeks to consult on difficult cases or new policies, and to share successful approaches to program delivery issues and other workplace matters.³⁸⁰ At these meetings, front-line workers exchange ideas with their peers and supervisors in ways that resemble full board meetings and other practices that may be more familiar to administrative law scholars.³⁸¹

³⁷⁹ As discussed in Chapter 5, section 5.2.3.

³⁸⁰ This management practice was common among my research sites and between municipalities. The only difference between research sites was the regularity of team meetings. In some offices, teams had shorter, weekly meetings while others held longer meetings once every three to four weeks.

³⁸¹ "Full board meetings" refer to a practice whereby members of administrative decision-making bodies (typically boards, tribunals, and commissions) convene to discuss hearings that may mark a change in how their body interprets a particular policy or statutory provision. They provide members an opportunity to share their experience with one another and to thus ensure some level of consistency. See, for instance, *Consolidated Bathurst*, *supra* note 316; *Tremblay*, *supra* note 316. In cases that may result in fundamental changes to how a body interprets a rule, a matter may be heard by a panel of decision-makers rather than individual members.

Front-line workers also regularly consult with their team members, outside of formal meetings, and strategize how to approach operational discretion in a particular case. These informal consultations may take place throughout the workday, on breaks, or afterwards at a nearby café. Through these exchanges, workers rehearse their options for performing operational discretion and for balancing competing norms. In doing so, they determine if their approach makes sense in a particular case and assess how it compares to their colleagues' practices. These exchanges also educate workers as to which local policies have changed, as such changes are frequently distributed by email and can be easily overlooked, and inform them of how their coworkers are responding. One front-line worker explained:

I also rely on external resources, coworkers. You know, you kind of do that. You look at how other people are doing things, and ask “What’s my sense of purpose here? What am I *really* trying to do? What’s going to work? What doesn’t work?”

Particularly cautious caseworkers may also consult with their supervisors about how to approach hypothetical cases where no one clear answer exists. As one participant put it, this additional consultation helps to “make sure that they’ve crossed their ‘t’s’ and dotted their ‘i’s.’”

When moving from one team to the next, workers would reevaluate their commitment to a particular professional identity and determine where they fit in with their new teammates, modifying their approach accordingly. Some participants noted that, when they were rotated into a new team, their new colleagues may share “helpful” tips about how to manage that team’s particular workload. For instance, a caseworker who was recently reassigned to an intake team explained how her new teammates welcomed her to her new role by sharing their performance strategies:

This was my first time on intake, and right away, like, people would approach me and say, “Let me show you how, like, you can get rid of this client.” That sort of thing, as opposed to saying, “Okay, how can we best serve them?”

Through these interactions, workers learn of which of their colleagues take an “old school” or “black-and-white” approach to operational discretion and which ones use a more “client-centred” approach. Drawing on their coworkers’ experiences and their own assessments of the effectiveness of contrasting approaches, front-line workers determine which performance strategies will be most useful in their new position and how they may need to moderate their performances in light of their coworkers. These formal and informal exchanges with team

members give front-line workers a better sense of how other members of their team navigate particular instances of operational discretion, knowledge that they will draw on as they advocate for or justify their decisions to their coworkers and supervisors.

In addition to working in teams, open concept workplaces are a second structural feature that reveals workers' performance styles to each other. Local offices extend the notion of "open concept" beyond built structures to enable openness between workers' files. As one might expect, these offices are visually and audibly porous; more surprising is how the back-up and rotation practices, discussed in Chapter 5,³⁸² function together with SAMS to create openness between workers' caseloads that allows workers to observe how one another perform operational discretion. In terms of office design, physical workspaces are arranged such that workers witness one another's interactions with benefits applicants and recipients. For instance, although workers meet with clients in private rooms with doors, the sound may bleed between these rooms so that a worker who meets with a client in one room may overhear a colleague in an adjacent room. One research participant recalled how she learned of her team members' different performance styles during such meetings:

Sometimes, in the client meeting rooms I will hear caseworkers, they will be telling the client, "Oh no, you can't apply. You won't be eligible." Or, "You need this." Whereas another caseworker might use discretion and say, "Okay, give the client time." Or maybe say, like in the grand scheme of things, "*This* [taps desk] does not determine eligibility."

A similar experience occurs behind the front lines, where caseworkers are typically seated in shared cubicles within open-concept rooms. Individual workspaces are clustered together, with members of the same team situated in the same cubicle cluster as their team members. As a result of this arrangement, workers become intimately aware of how their coworkers perform operational discretion. Sound travels over and between cubicle walls, and caseworkers readily observe the items on one another's desks and computer screens. Front-line workers thus hear how their coworkers engage with clients on the telephone, see how quickly or slowly stacks of paperwork move from a coworker's inbox into file folders, and witness their colleagues reenact recent performances of operational discretion to their coworkers.

³⁸² Chapter 5, section 5.2.3.

By routinely observing one another's performances, front-line workers become acutely aware of the range of professional identities to which their team members subscribe. This awareness prompts them to align themselves with colleagues who fall into one camp or another, as the following passage illustrates. Here, a caseworker describes her team members' reaction to a coworker's interaction with a difficult client:

Like today, I heard a caseworker say to a client, "I don't understand you and that's because you haven't been going to your ESL course!" [laughs] And this person is on the other side of the cubicle and us caseworkers on our side, we all just look at each other and just go [jaw drops, eyes wide], "Yikes!" So, you know, like anywhere, there's good caseworkers and not-so-good caseworkers.

Though this caseworker aligned herself with her "good" colleagues, she also explained elsewhere in our interview how she would perform operational discretion and balance competing norms with her black-and-white rule-enforcing colleagues in mind, as they may review her decisions at some point in the future with less understanding for clients, like the one described above, who had failed to participate in employment activities or who otherwise fell outside of their rigid interpretation of Ontario Works' legislative framework.

Another research participant in a different office explicitly distinguished between her team members' performance styles. She described two colleagues who, in her view, epitomized the contrasting pro-client social worker and black-and-white efficiency engineer professional identities that she identified as existing within her team:

My coworker, who is 60, she is *very* educated. Not in social work, she has a technology background, but she has also worked in human resources, and so she, like I find she is more too about, "How can I serve the client?" She will spend time with them. Sometimes she will go over and try to address other things. Find ways to empower them or let them feel better than how they came, right? Whereas the *next* person, she is in the same age group, but her mentality is more *old school*. 'Cause I've heard back in the day it was more about, you know, if you were applying as a single parent, they would go into the homes and they would check to see if there's a male roommate or male clothing in the house. So, her mentality is more like that. So, she will be on the phone, investigating, like – "Well, you had this asset in 2012. How come you are applying today?" Right? As opposed to looking and saying, "Okay, what's your current situation? What's your reason for applying?" Instead, she asks, "What did you own *last year*?"

This front-line worker distinguishes between coworkers who perform operational discretion according to a social work approach, balancing norms in ways that "empowered" clients (or at least provided them with financial supports), and those who instead took a more "old school"

approach, more strongly guided by norms such as saving taxpayer dollars and efficiently managing their workloads. Importantly, the porousness of front-line workers' workspaces not only makes them aware of their colleagues' professional identities, but continually overhearing and observing their coworkers also subtly reinforces their dual roles as simultaneous audience members and performers of operational discretion. Thus, they both learn from and teach one another about the various ways that operational discretion could be performed and the consequences that might flow from a particular performance.

As for openness between workers' files, the porosity of workspaces extends beyond cubicles and meeting rooms to include work coverage and rotation practices. These arrangements add additional permeability to the institutional environment of local offices. Acting as a back-up for one's team members, and rotating to a new caseload, very literally give caseworkers insight into their colleagues' files, as they learn about a coworkers' performance history by reviewing the notes, forms, client documents, and other materials that together constitute a coworker's previous decisions. Case management technologies, including SAMS and its predecessor SDMT, intensify the porousness that exists between files and support caseworkers' fluid movement between each other's caseloads.³⁸³ Digital files and worker rotation practices further the mutual awareness of one another's professional identities and performance styles that characterizes decision-making in an open concept office.

6.3. Workers Diverge

As front-line workers become aware of their coworkers' professional identities, they align themselves in relation to a particular camp. My research participants would use these different camps, or two poles at either end of a professional identity spectrum, to explain to me where they fit in: as pro-client social workers, black-and-white efficiency engineers, or somewhere in between. I describe this as an initial process of divergence among workers' identities, which appears linked to an awareness of where along this spectrum their coworkers fall. Yet, as the next section demonstrates, divergence is not the end of the story. Rather, the phenomenon of aggregated decision-making encourages convergence, as the common-sense principle of

³⁸³ See Chapter 7, section 7.3 as well as the discussion in section 6.4, below.

maintaining peace among one's coworkers inspires those individuals who might strongly identify as pro-client or black-and-white to perform operational discretion in a way that falls in the middle of this spectrum.

Two examples illustrate how the initial divergence among workers plays out in practice. First, a front-line worker with a specialized caseload of Ontario Works recipients undergoing addictions treatment explicitly identified herself as a pro-client social worker to distinguish herself from her efficiency engineer colleagues. During our interview, she explained that she would learn of her coworkers' rigid interpretation of program rules while covering their files as a back-up worker. Reviewing their notes in SAMS, she would learn that these workers had refused to issue supplementary benefits to clients in addictions treatment programs, stating "I see clients who have not been issued clothing allowance for years." These clients' assigned caseworkers interpreted addictions treatment programs as falling outside of the employment assistance activity category in Ontario Works' legislative framework, an interpretive act that essentially barred their clients from receiving crucial supplementary benefits. She stated:

I see some caseworkers who don't issue the clothing allowance. Often, they'll err on the side of caution. They can take things quite literally. "Well, if you're not in an employment activity..." So, a lot of clients who access methadone – you know, the methadone maintenance program? – if you're doing that, you should get the \$250 right away. You're out in the community, you have to go out every day, but other workers don't see that as reason enough to provide these clients with ERE benefits. And it doesn't actually say hard and fast that you get clothing allowance when you get methadone maintenance. But it does say if you are tied to an activity that has an employment focus, then you are eligible to receive ERE benefits.

As this caseworker explained, knowing that her colleagues performed operational discretion in this way inspired her to identify as a pro-client social worker. Because she expected that her coworkers would deny marginalized clients supplementary benefits, her initial reaction in such cases was to interpret formal discretion within the rules generously, to weigh competing program norms in favour of granting benefits, and to provide these clients with the maximum amount of supplementary benefits possible while they attended treatment. Awareness of her colleagues' professional identities thus encouraged this caseworker to identify at the other end of the spectrum, opposite from her colleagues.

By contrast, caseworkers who perceived their colleagues as acting too flexibly would identify themselves as black-and-white efficiency engineers. For instance, a caseworker explained how

her coworkers continuously accommodated clients who repeatedly failed to meet basic program requirements, such as reporting their monthly incomes or attending in-person caseworker appointments. She described her team members' approach as "enabling our clients to become disabled." When I asked her to clarify what she meant, she stated:

So, there is an expectation in Ontario Works that OW recipients *are* expected to work. But, you know, for the longest time we haven't really called their bluff. So, we keep on issuing them X, Y, and Z, and every month they check in. You know, depending on the type of worker, if a client doesn't report their income or show up for a meeting, their worker might say, [imitating a caseworker] "Oh, okay. That's *okay*. You'll get to it next time around, you'll get to it next time around" or whatever the case is. You know, I think the ... the attitude of holding people accountable isn't across the board.

This caseworker observed that clients whose coworkers were accommodating still had trouble finding long-term employment and exiting the Ontario Works program. She believed that her pro-client social work colleagues simply perpetuated their clients' reliance on Ontario Works benefits. To contrast herself with her coworkers, she identified as a black-and-white efficiency engineer, and explained how she would apply particular rules, such as those on supporting documentation, as though they contained no grey area when working with benefits recipients who had a history of missing income reporting deadlines or failing to provide other documentation. For example, when an individual who had previously missed income reporting deadlines requested supplementary Housing Funding to help pay for moving into a new apartment, this caseworker demanded documentary proof that his new landlord, who was the son of the apartment's owners, had received legal title to the building from his parents before she would allow that individual to apply for Housing Funding. Ontario Works' legislative framework provided imprecise guidance on this matter: it did not clearly require this level of detail about a new housing arrangement, nor did it forbid a caseworker from demanding this documentation from her client. Caseworkers who identified as pro-client social workers would likely not request this documentation, but those who took a black-and-white enforcement approach to program rules were more inclined to demand this sort of evidence before allowing a client to apply for supplementary benefits. This caseworker justified her approach by saying, "Listen. We're not a bank. At the end of the day, even if you were to go get a loan, you would still require documentation." In her view, this performance of operational discretion would make this client more responsible and self-sufficient, something that she believed her team mates, as a whole, were failing to do.

Although front-line workers may cleave into groups of pro-client social workers or black-and-white efficiency engineers based on how they perceive their coworkers' approaches, the phenomenon of aggregated decision-making, in addition to the normative balancing explored in Chapter 4, guides workers to perform operational discretion somewhere between these two poles. As the next section demonstrates, front-line workers' awareness that their colleagues may identify elsewhere on this spectrum, and that these colleagues may review their performance of operational discretion at some future point, regulates how they go about performing operational discretion. This regulatory effect is observable in how front-line workers advocate to their coworkers and supervisors and how they record evidence and reasons to explain or justify a decision. Through both processes – oral advocacy and written justifications – front-line workers' performance is pushed towards the centre of the spectrum so that they can maintain peaceful relations with coworkers who may have divergent performance styles.

6.4. Workers Adapt and Converge

Front-line workers rely on their knowledge of one another's performance styles as they engage in negotiation and justification processes, such as orally advocating and appealing to coworkers or recording written notes. As they engage in these processes, these processes serve to regulate how caseworkers perform operational discretion. When workers informally advocate to one another and formally appeal to their supervisors to gain support for a particular decision, they learn how to subtly tailor their own performance of operational discretion to avoid disturbing colleagues or to gain the support of supervisors, each of whom may align themselves at a different point on the professional identity spectrum. A similar tailoring occurs in note writing, as workers record evidence and reasons to track, explain, and justify their decisions to future reviewers. In some instances, front-line workers creatively mobilize the norms examined in Chapter 4 as they advocate for or against a particular outcome to coworkers and supervisors who may be compelled by different norm combinations. This section examines how front-line decision-makers use these techniques and how, in doing so, they guide their own and one another's performances of operational discretion.

6.4.1. Oral Advocacy and Appeals

First, front-line workers appeal to one another about how to perform operational discretion, particularly in cases where they strongly disagree with a colleague's performance. Rather than go

over their coworkers' heads and complain to a supervisor (which participants explicitly stated they would *not* do), workers instead informally advocate to each other. To avoid causing too much of a stir among their colleagues, front-line workers will draw on program norms that they believe will persuade the coworker to whom they are advocating based on that worker's professional identity.

This informal advocacy between coworkers comes through in discussions about a new customer service policy that one municipality introduced shortly before I began conducting fieldwork. Before this policy was instituted, caseworkers had few formal, written rules structuring their decisions to meet or avoid clients who visited the office unexpectedly. The caseworkers formally assigned to these drop-in clients might refuse to meet with them if such clients failed to attend a previously-scheduled appointment, even though these workers were under increased pressure to meet clients in person and update the documents in their files. This practice of refusing to meet with drop-in clients was common among caseworkers who self-identified as rigidly efficient rule enforcers. Such workers viewed drop-in clients as an interruption to their planned workday and indicated that these individuals should meet with their caseworkers only at a pre-scheduled meeting. However, when caseworkers would refuse to meet with drop-in clients, these clients, who often showed up seeking urgent assistance to pay overdue rent, purchase food, or attend an upcoming job interview, would become irate in the office reception area, disturbing other clients and front-line workers. To address this circumstance, one municipal social services department introduced a series of "customer service" standards that front-line workers were expected to meet. One of these standards required caseworkers to acknowledge drop-in clients within a certain number of minutes of a client asking for them at reception. If a caseworker failed to meet their client within this timeframe, a receptionist was to announce that caseworker's name on the office intercom system and ask them to come to the front desk. The peer pressure of having one's name announced for all to hear was identified by many participants as being an effective, if frustrating, form of micromanagement.

In response to this customer service policy, some caseworkers interpreted the rule requiring that they "acknowledge" a drop-in client within a certain number of minutes as permitting them to leave a note at the reception desk asking drop-in clients to call from the reception area. Other workers noted that they would acknowledge drop-in clients by calling their office's front desk and having a receptionist tell the client to formally request an appointment. Whether these

practices complied with the new customer service policy is less important for present purposes than the fact that some front-line workers continued to find grey area within the customer service policy in a way that enabled them to achieve their efficient workload management goals (and possibly teach their clients a lesson about the importance of meeting program requirements and attending only pre-scheduled appointments). As a result of this practice, workers who identified as pro-client social workers described advocating to their efficiency engineer colleagues (who were the ones finding the “grey area” in this policy) in favour of a narrower reading of this policy. Rather than complain to a supervisor, the pro-client social workers tried to sway their colleagues by referencing efficiency norms that they expected might be compelling. This advocacy technique is illustrated in the following account by a front-line worker who had experience triaging the requests of drop-in clients:

There’s *also* discretion in seeing clients, okay? If there’s a walk-in client and they say they have an urgent issue, the worker will often just leave a note at the front counter, like a typed note, saying “Ask clients to call me.” And then you’ll see the client go, [slumps down, looking disappointed] “Well I wanted to *see* them,” right? And I’ll say, “Well, the worker just asked you to call them,” and see how that goes. And then the client will be on the phone and they’ll be like, “Oh, you know” [looking disappointed]. And it would have been so much better for the worker to come down. They’ll stay upstairs. *All* the time. They won’t come down, they won’t come down. But what I’ve said repeatedly to these workers is, “These clients might be calling for a quick question but, when you’re in the booth with them, all this stuff comes out. It’s better for you to come down. Can you just come down?” If you have time, like if you’re not in an appointment with another client, technically you should be able to come down. And especially with clients who have language barriers, right? There’s particular workers who are well known to have angry clients. They’re famous for telling their clients to call them, and then the client’s yelling and disrupting the whole Employment Centre [which is located near the reception area]. We’ve said at our office’s Operations Committee meeting that in that case, if you are on the phone and you *do* hear your client escalating, hang up and say, “You know what? I’m coming down.” That’s what I used to do. When I had a caseload, occasionally I would call down if I knew the client. But if had talked to her and she said, “I’m upset, I’d like to see you,” then I’d say, “I’ll be right down.” Right? Or, if a client said, “There’s something wrong. There’s many things I’d like to talk to you about” – if they clients say “*many* things to discuss,” get your ass downstairs! Like, come downstairs. What’s the big deal? This is your job. And you need to see people face to face or you *lose* something, right? So, there’s discretion with, “Am I gonna see them, or not?” And even though we’ve been advised to come down, it doesn’t change.

This worker acknowledges that the new customer service policy has minimally influenced her coworkers’ overall performance of operational discretion; those workers who do not want to engage with difficult, disruptive clients will continue to acknowledge these clients with a phone

call rather than in person and redistribute the responsibility for engaging with such clients to receptionists and customer service workers. To convince these caseworkers to perform differently, and more like pro-client workers, this research participant draws on knowledge of her coworkers' professional identities and mobilizes efficiency language that she anticipates might convince her efficiency-minded colleagues. She notes that meeting clients in person can improve communication, particularly with non-anglophone clients, and that these meetings can help caseworkers better understand their clients' needs, which may ultimately lead to longer-lasting solutions and fewer unscheduled encounters with these clients. By diffusing the frustration of drop-in clients, meeting them in person can have spin-off benefits for the efficient operation of other areas of the office, such as the Employment Centre.

Gesturing towards all of these efficiency gains reshapes how coworkers might consider such situations. Further, the oral advocacy this caseworker undertakes may flow over cubicle walls and influence others who may be otherwise inclined to follow their team member's example and leave notes at the front desk. These other workers might instead perform operational discretion, at least in some cases, so that they reach outcomes somewhere between seeing every drop-in client in person and requiring that every drop-in client schedule an appointment and return later. In addition, by justifying an outcome that might appear to be a pro-client result (meeting clients in person, listening to their concerns) with reference to efficiency objectives, this research participant arguably also reshapes her own understanding of these rules. Although she indicated elsewhere in our interview that she aligned as a pro-client social worker, her creative use of efficiency objectives to justify this outcome seems to subtly shift her own perception of the benefits of meeting clients in-person, potentially nudging her own performance towards a mid-point between pro-client and efficiency engineer poles.

Other workers indicated that they would more subtly advocate to coworkers with conflicting performance styles in favour of a different approach to performing operational discretion. These efforts did not always produce decisions that aligned with the advocating caseworker's own professional identity, but they may have had a wider effect nonetheless. Some participants noted that their colleagues were not receptive to their advocacy efforts, and may even stand their ground. One front-line worker explained that confronting coworkers who interpreted Ontario Works rules very strictly could backfire and further entrench their black-and-white approach. She noted, "Sometimes, you *can't* say anything because there's some caseworkers that will say,

‘But, this is *my* file. It’s for *me* to determine eligibility. It’s not for *you*, or for *you*, but for *me*.’ Right?” She explained how, in cases where a coworker was not receptive to her pleas, she would not turn to a supervisor because “then you create conflict with your colleagues.” However, the process of advocacy itself was a moment in which coworkers’ contrasting performance styles were juxtaposed with one another not only for the two caseworkers involved, but also for their nearby team members. Because most front-line workers appeared to avoid conflicts with one another and their clients where possible, these interactions likely spurred coworkers to regulate their own performance of operational discretion so as to avoid future altercations with colleagues who have different performance styles. Ultimately, this process could nudge their decisions away from the poles of the spectrum towards a middle range between pro-client and black-and-white approaches to animating Ontario Works’ legislative framework.

In addition to informally advocating to their coworkers, front-line workers also formally appeal to supervisors. Appeal processes may be prompted by case management software or by a complaining client. No matter their trigger, they technically or practically require front-line workers to advocate to their supervisors and receive their approval before granting or denying clients access to particular benefits and services. Appeal-prompting mechanisms in software programs flag only those decisions to grant benefits; they require front-line workers to consult with supervisors when, after weighing competing norms, they decide to provide clients with access to particular benefits and services. Decisions to reduce, suspend, cancel, or deny benefits, by contrast, only inspire front-line workers to appeal to supervisors when they expect that a client will protest their decision to management staff or to local politicians. Squeaky-wheel clients thus act as a second mechanism prompting workers to consult with a supervisor before making what they anticipate will be a contentious decision. Though front-line workers may strategically plead to those supervisors whom they expect will sympathize with their position, the act of appealing itself encourages front-line workers to perform operational discretion within a range of reasonable outcomes because the supervisor who receives their request may identify at the opposite end of the professional identity spectrum from the caseworker making the appeal. Further, the act of appealing to one’s supervisor requires caseworkers to trim down the range of results that they might reach if they were truly able to act alone, according to their personal whims. Instead, front-line workers must advance a particular interpretation of Ontario Works’ legal framework, supported by a balance between program norms, that they expect a supervisor

will support. This appeals process has caseworkers developing and advancing oral justifications for a particular outcome not aimed at their clients but tailored to their coworkers and supervisors.

First, case management software prompts front-line workers to appeal to supervisors in cases where workers want to provide a client with additional benefits, such as benefits that Ontario Works regulations stipulate can only be granted once within a particular time period, or benefits that provincial policies suggest should not exceed a monthly “maximum average”,³⁸⁴ per client. SAMS flags some decisions as requiring supervisory approval, initiating a process whereby front-line workers must consult with supervisors and indicate within SAMS that they have obtained approval.³⁸⁵ This process most commonly arises in transportation funding requests: where a client has received a monthly ERE-Transportation allowance and then requests additional public transit funding, in the form of single-use transit tickets, SAMS will notify the supervisor of that client’s assigned caseworker and prompt the supervisor to approve or disallow issuing the extra public transit fares. For most decisions, though, including those in which caseworkers attempt to issue benefits that exceed the monetary caps built into SAMS, the software simply requires caseworkers to indicate in their notes that they have consulted with a supervisor and received the necessary approvals. In such cases, front-line workers will prepare a “business case” in favour of issuing the benefits in question, present this case to a supervisor, and note their supervisor’s response within SAMS.

Second, the threat of client complaints also spurs front-line workers to appeal to their supervisors. This situation arises in cases where front-line workers expect that performing operational discretion to *not* grant benefits will lead a client to formally appeal their decision (by way of internal review and appeal to the Social Benefits Tribunal, if the decision involves core, appealable benefits) or complain to the office manager, the Social Services Department head, or a local politician. In these situations, caseworkers may advocate *against* granting an Ontario Works recipient additional benefits to confirm that they have their supervisors’ support in case of

³⁸⁴ See *OWPD 7.4. supra* note 144, which proposes such caps on Employment-Related Expenses benefits.

³⁸⁵ SAMS’ predecessor, SDMT, also required front-line workers to signal their supervisors’ approval, but it was less systematic about requiring supervisory approval. For instance, for some benefits payments, SAMS will email a caseworker’s supervisor and ask them to indicate in SAMS that they approve of a benefits payment, whereas SDMT would simply require caseworkers to enter a note that they had received their supervisor’s approval.

a future appeal, to bolster their decision from being “overturned” by management. Additionally, if a particular supervisor is known to interpret Ontario Works’ legal framework more flexibly than the front-line worker in question, appealing to that supervisor may redistribute the responsibility for a more generous decision to another decision-maker and, thus, diffuse the potential scrutiny of a future auditor.

Regardless of the reason for appealing to a supervisor – be it a software prompt or a querulous client – the act of appealing regulates how front-line workers perform operational discretion. Not only does it require workers to justify a particular outcome to a supervisor, by presenting a business case as to why benefits should or should not be granted, but it also enables supervisors to shape the actual outcome. Though front-line workers may tailor their appeal to convince a supervisor who they expect will be more swayed by a pro-client or black-and-white reasoning, a supervisor’s performance of operational discretion may unexpectedly grant or deny a client’s request for Ontario Works benefits or services. One front-line worker who identified as a pro-client social worker described how she approached this appeals process:

There are different opinions about what the best interests of the client might be. So, like, a supervisor might think differently than I think, or a manager certainly would sometimes think differently. I think that the client is the expert in who they are and where they’re going and where they want to go, and our job as caseworkers is to direct them. So, I’m of the mindset that if there is a policy that is saying “no,” I try to find the grey area where we can get a “yes,” and I think most of the time that comes from conversations with coworkers, not so much conversations with supervisors or managers. Like, if I’m going in to speak with a supervisor or a manager about a decision, I need to know what I want out of that conversation before I go in there. I can’t go in with a wishy-washy – I’m basically going in to convince them that this is what we’re going to do, and try to find the policies that can support the decision, or where the grey area may be.

The grey area this caseworker describes has a double meaning. In trying to “find the grey area” where she and her supervisor can “get a ‘yes,’” this worker explains how she advocates to her supervisor so that they will recognize formal discretion within Ontario Works’ legislative framework. However, she also understands the appeal process as moving the overall decision about a client’s benefits into a grey area, or range of reasonable outcomes, between the decisions that caseworkers and supervisors at either end of the professional identity spectrum might reach on their own, if they were not required to appeal to one another. While this caseworker clearly states that her objective is to “convince” her supervisor to support a particular outcome, she also describes a process by which she tailors her own performance of operational discretion so that

she reaches an outcome that she expects will persuade a supervisor who may be more concerned with efficiency or enforcing black-and-white rules than with taking a flexible, client-centred approach. Thus, this worker moderates her own performance of operational discretion so that it loosely sits within a range of outcomes, or a grey area, that would be agreeable to someone who might not share her professional identity.

My research suggests that neither front-line workers nor supervisors alone determine how operational discretion will be performed. In other words, I do not claim that either caseworkers or supervisors have the “final say” over a performance of operational discretion. Instead, they negotiate their positions in relation to one another, which contributes to each other’s performance of operational discretion. Together, they produce an institutional decision. This balancing is social and legal, delicate and somewhat unpredictable. Though we can assume it will produce an outcome that falls within a range of reasonable possibilities, it is virtually impossible to predict where a decision will fall within this range. The inability to predict an exact outcome does not undermine aggregated decision-making as a regulatory mechanism, however, as aggregated decision-making regulates so as to push front-line workers away from extreme outcomes and towards a range of possible performances.

In instances where caseworkers must appeal to supervisors, both parties participate in the performance of operational discretion and produce a decision to grant or deny access to Ontario Works benefits. Both individuals negotiate between supervisors’ authority, as their approval or disapproval will be determinative, and caseworkers’ agency, particularly as caseworkers may “shop” for a supervisor – that is, strategically consult with a supervisor who is known among front-line workers for being a black-and-white rules enforcer concerned with efficient case management and resource conservation, or with one who is more inclined to be pro-client and activate the formal discretion incorporated throughout Ontario Works’ legislative framework and approve additional benefits. Thus, just as front-line workers distinguish between their coworkers’ performance styles, they also know which supervisors to approach for particular approvals. As one employment worker put it:

Sometimes your team supervisor is very rigid. Some of them are not. When I was an active worker [i.e., a caseworker with an assigned caseload], I would wait for my supervisor to be off a day so that I could go to someone else, because I *knew* that my supervisor would say, their practice was to say no to this, while someone else’s practice

was to say yes. So, I'm going to wait for the day that they're not here to go to someone else. Those are the little tricks that we *all* do, sometimes. When we want something, we know who to go to.

While supervisor shopping appears to minimize the regulatory effects of aggregated decision-making, it may not always be possible and, where it is, it may also have unexpected consequences. The timing of a client's request for benefits or services that require supervisory approval may not coincide with a moment when a sought-after supervisor is available or in the office. In addition, a supervisor may take an unexpected approach to performing operational discretion.

This back-and-forth between front-line workers and supervisors is evident in the following example where a technical problem required caseworkers to appeal to a supervisor to release a homeless client's core benefits before a long weekend. Technical malfunctions, with SAMS and other program delivery tools, often requires caseworkers to obtain a supervisory approval so that they can work around or "override" the problem and provide Ontario Works recipients with benefits and services to which they are eligible. In these circumstances, supervisory approval is not required to support a flexible or narrow interpretation of program rules, but to prompt "the system" to release a payment that no one disputes a client is eligible to receive.³⁸⁶ In some municipalities, homeless individuals (who may not have a bank account) are issued benefits payments on electronic cards that they can use like a debit card. In order to access the funds on these cards, the cards must be assigned a PIN (or "PINned") by front-line workers at the local office at which a client normally receives their benefits and where their assigned caseworker is located. However, this system occasionally malfunctions so that clients with this electronic benefits card cannot access their funds and must visit their local office to have their card "re-PINned." In these cases, supervisory approval is needed to unload the funds from the benefit card and issue a manual cheque, as it may temporarily appear in SAMS as though the client who received the malfunctioning benefit card has received two benefit payments for the same month. Some supervisors are willing to approve these requests easily and to commit the additional staff

³⁸⁶ These technical malfunctions are a widespread form of what Lipsky identified as "bureaucratic disentanglement," as they effectively bar Ontario Works recipients from benefits and services that they would otherwise be eligible for: Lipsky, "Bureaucratic Disentanglement," *supra* note 326.

resources needed to adjust that client's electronic records and issue a manual cheque, while others are less likely to agree to the overtime compensation that this extra work may require and may be concerned that this will take additional time away from caseworkers managing their own workloads. Front-line workers may try to supervisor shop to obtain the approvals needed to issue a manual cheque, yet a preferred supervisor may be unavailable. A caseworker, who identified as pro-client, describes how this situation played out on a Friday before a holiday weekend, as her office was closing. She notes that if she had approached a different supervisor, she would not have received "push-back" – i.e., the other supervisor likely would have performed operational discretion to take the extra time after the office closed to ensure that this Ontario Works recipient could access his benefits payment (via a manual cheque) over the weekend:

Last week, a client walked in on Friday at 4:30 p.m. Say he walked in at 10 after 4 and he wanted to get it PINned, we have the power to remove the funds from his electronic card and, in turn, cancel that payment and spit it out as an instant cheque. But at the point he walked in, it was 4:30 on a Friday before a long weekend. So, three of us caseworkers went to the supervisor and I jokingly said, "Just try and say no to us." [laughs] But, the supervisor's like [sighs], you know, "I have the power here." But as it turns out, he could not easily unload the benefits card so we didn't get our way. But, that's part of the decision-making. You make a decision, but then you can get push-back. Depending on the supervisor, you will never get push-back. If it was Shirley, who recently transferred, she would say, "We're staying till 10 to 5. I'm going to pull somebody and we're getting that done." Whereas others are, like, "Well, you *know*, I'm gonna have to pull somebody," and they push the decision onto you and you feel bad. So, you just – like anywhere, person to person, service can differ. And it does differ. We supervisor shop around here. When we want a "yes", we go to certain supervisors.

While supervisor shopping is a common practice in her office, this caseworker was unable to strategically select a supervisor here. More importantly, the supervisor that she *did* advocate to did not give her a clear "no" that a manual cheque could not be issued. Instead, the matter was more subtly regulated: he mentioned that the extra work to unload funds from the electronic card, a step necessary before the computer system would allow a cheque to be issued to the same person, would require that he "pull somebody" (one of this research participant's coworkers) and make them stay late on a long weekend. The caseworker, who was flanked by two of her colleagues in this interaction, did not feel comfortable with this performance of operational discretion because it would force her coworkers to stay late when they likely wanted to leave work on time. Thus, while this pro-client caseworker gives the impression that she is initially in control as she shops for a supervisor, and that the supervisor gains control as he "ha[s] the power

here,” her account suggests that the layering of decision-makers within Ontario Works, and their relation to one another, complicates how she and her supervisor both perform operational discretion in this case. They are not performing alone, independent from one another, but performing *to* an audience: to each other; to the other front-line workers who may have to stay late on a long weekend; and to the client who may have to survive for three days without access to Ontario Works benefits that he is otherwise eligible for.

6.4.2. Writing Notes to Future Reviewers

In addition to oral advocacy and appeals to coworkers and supervisors, the practice of writing notes for future reviewers demonstrates the regulatory effects of aggregated decision-making within Ontario Works. When front-line workers perform operational discretion, they record evidence, explanations, and justifications for their decisions knowing that a range of decision-makers – themselves, their coworkers, supervisors, and auditors – may refer to these written records as they review this performance at some point in the future. Accordingly, the process of note writing also regulates how front-line workers perform operational discretion, as they do so with this future audience in mind. A key distinction between note writing and oral advocacy is that caseworkers typically know who they are advocating to when they informally or formally appeal to coworkers and supervisors. Based on this knowledge, they can more closely tailor their advocacy techniques to their anticipated audience, referencing norms and facts that they expect will convince someone who identifies more closely as a pro-client social worker or as a black-and-white efficiency engineer. When recording notes, however, front-line workers are communicating with a broader potential audience. The only certainty is that someone else will at some point review their notes, but caseworkers cannot know where along the professional identity spectrum these reviewer(s) will be located. Thus, front-line workers compose notes with both ends of the spectrum in mind.

This section demonstrates how these note-writing practices contribute to aggregated decision-making’s regulatory effects. After distinguishing how caseworker notes are different from the reasons for decision that legal scholars might expect to find within an administrative agency, I argue that note writing contributes to aggregated decision-making’s regulation of front-line workers’ operational discretion. The process of note writing pushes the substance of front-line workers’ decisions, including the evidence they record, the competing norms they balance, and

the content of their explanation or justification, to a middle area or a band of acceptable variation.

As I will illustrate below, notes are not written for outsiders, which makes them both more and less than reasons for a particular decision. They record evidence to be used by future decision-makers and explain and justify a decision to a wide range of potential future reviewers. Accordingly, notes are not just proof of reasoned “judgment” exercised by individual caseworkers, as legal scholars might assume.³⁸⁷ Instead, notes perform a more complicated signaling to future audience members. In some cases, this signaling may articulate the reasoning behind a particular performance of operational discretion, but it does so in relation to other administrative insiders using coded language to reference the competing norms underlying the Ontario Works program. Unlike a written tribunal decision or court judgment, then, notes are not written in dialogue with benefits applicants or recipients,³⁸⁸ with other branches of government, or with the broader public. Instead, notes contribute to an ongoing conversation among many layers of administrative decision-makers inside the Ontario Works program who may, at some future point, perform operational discretion in relation to the same client in whose file the notes are recorded.

Notes are written to communicate with a plural audience, which is evident in their strategic use of norm-referencing phrases. In their notes, front-line workers use these key phrases to gesture towards the norms that they have considered when performing operational discretion in an effort to protect their decisions from being “overturned” by supervisors or from causing a stir among their colleagues. Though notes may appear, to outsiders, as though they are written by a thoughtful author and in that author’s own words, many of my research participants would rattle off standard phrases that they would insert into their notes to signal to their colleagues why they had performed operational discretion in a certain way. Thus, notes combined individually-

³⁸⁷ For instance, given Hart’s definition of discretion as a form of reasoned judgment, in “Discretion,” *supra* note 58, those who share this understanding of operational discretion may view notes as evidence of front-line workers exercising discretion-as-judgment. Judgment may be a part of what front-line workers are doing, yet operational discretion is not reducible to judgment because of the role that aggregated decision-making plays in how operational discretion is performed.

³⁸⁸ As Cartier might hope they would be, if front-line workers were engaging in a dialogic approach to discretion.

tailored authorship with routinized, standard-form language. This standard language acts as shorthand for those at and behind the program's front lines, indicating notes are meant for insiders not outsiders.³⁸⁹ Some of these phrases may come from the note-writing policies that local offices have established to ensure consistent note content. However, my research also suggests that front-line workers may develop their own shorthand vocabulary and use this to record, explain, and justify particular decisions in their notes. This vocabulary includes references to underlying legal and managerial norms, such as allusions to the need to prevent "undue hardship" through statements that indicate "child protection" authorities may become involved or that insinuate a client's "medical" needs may not be met if operational discretion is performed differently. Other key phrases may include references to moving a client "closer to the labour market," which suggests that the performance the notes are connected to is supported by the norms of promoting self-sufficiency or moving a client from Ontario Works to an alternate means of support.

These references signal to a front-line worker's coworkers and supervisors the seriousness of a clients' circumstances, flagging why the note's author performed operational discretion in a way that might depart from what a worker who aligns with a different professional identity would do. For instance, one front-line worker who often covered her colleagues' caseloads when they were busy with other clients described how she would use such phrases to record her responses to transit fare requests. She stated that, for "people who regularly ask for transit fares, I'll make a note saying, 'Client said he had a doctor's appointment, I issued two fares but advised him to provide medical documentation next time.'" This reference to a doctor's appointment is strategic and defensive, as it signals to others why this caseworker gave transit fares to someone who did not have the proof needed to support his request (and who, indeed, may have used his transit fares for other purposes). Transit fare decisions are governed by local office policies and involve very small payments of six dollars or less,³⁹⁰ but they often inspire heated disputes. These

³⁸⁹ This standard form language may also be characteristic of court judgments and administrative tribunal decisions. The key point for my argument is that these notes are performing important and discrete communication functions between coworkers and supervisors that seems qualitatively different from other forms of written decisions.

³⁹⁰ These policies are communicated by email and may vary between offices. One rule is consistent, however: transportation funding is not supposed to be provided to assist clients in travelling to and from meetings with their caseworkers, even though their monthly benefits may be suspended or terminated if they fail to attend these

disputes can occur between clients and caseworkers, as there is no right of appeal for transit funding decisions, but they also regularly arise between caseworkers who have interacted with the same client and who would reach different decisions about that client's request. In the notes described above, the front-line worker used standard-form language to communicate the "reasons" behind her decision, as well as to decentre her own decision-making authority by flagging to others that these two transit fares were required for medical reasons, which coworkers would read as preventing hardship.³⁹¹ She explained that she did so because she expected that this client's caseworker, who took a narrower black-and-white approach to transit fare requests, would disagree with her decision to provide this client with additional fares.

Similarly, another research participant described how she would use short-hand vocabulary in her notes to describe a drug treatment program as moving a client "closer to the labour market." She explained why she categorized drug treatment as an employment activity in the drop-down menu options available to her so that her client could receive funds to purchase clothing:

A lot of clients who access methadone are out in the community, you have to go out every day, but other workers don't see that as reason enough to grant a clothing allowance. And legislation doesn't actually say hard and fast that you get clothing allowance when you get methadone maintenance. But it does say if you are tied to an activity that has an "employment focus." I would argue that moving from heroin or opiates to methadone maintenance is one step *closer* to the labour market because, once you're on methadone maintenance and you're doing well on it, you can have carries,³⁹² which is only once a week. That gets you even closer to the labour market. You can spin things, you know? And so, you just put two, three lines of notes [makes typing motion on desk], and if the file gets pulled at least it shows why you're doing it and nobody ever speaks to you about it.

meetings. Some caseworkers view this policy as unfair, particularly given the low levels of core benefits, and will thus interpret local policies and their clients' circumstances flexibly to justify providing funds so that clients can take public transit to and from their meetings.

³⁹¹ This use of language echoes the decentring techniques of land use planning bureaucrats examined in Hull, *supra* note 160.

³⁹² "Carries" are take-home doses of methadone provided to an individual undergoing treatment for opiate addiction and are to be taken at some future point in time. They are typically given to individuals who have already successfully completed earlier stages of treatment and who are considered "stable" (i.e., unlikely to take all of their prescribed methadone at once).

This note writing is simultaneously standardized and creative. The above worker notes that she records these notes strategically, but it is also clear that her creative authorship is somewhat routine, as she matter-of-factly explains how “you just put two, three lines of notes” with the appropriate keywords to justify a pro-client decision to a future audience of colleagues who may take a more black-and-white approach to the rules governing these supplementary benefits. Written notes are not a complete set of reasons for a particular decision designed to be intelligible to outsiders; instead, they are an important communicative device for layers of decision-makers who may need to reference one another’s performances related to the same client.

As the rest of this section will demonstrate, notes serve three interrelated purposes for aggregated decision-makers: preserving evidence; explaining a particular action; and justifying a decision to coworkers, supervisors, or auditors. Although these purposes are directed at internal communication between those who are at and behind the front-lines of administrative agencies, these communicative acts are essential for the regulatory functions of aggregated decision-making. All three purposes of notes, in combination, contribute to the ongoing conversations and conflicts between front-line workers, supervisors, and others who collectively regulate how operational discretion is performed within the Ontario Works program.

6.4.2.1. Three Purposes of Notes: Preserving, Explaining, Justifying Decisions

Front-line workers’ note-writing practices do less and more than record reasons for a particular decision. Individual notes are less than reasons. Not only are they scattered throughout software programs, emails, paper files, and forms, but they also provide an incomplete picture of why a decision was made, especially when read apart from data entries and by outsiders who do not understand the significance of caseworkers’ shorthand. As I explore below, notes are also more than reasons for a decision. They do more than articulate why a decision was made to an individual Ontario Works recipient. Rather, notes are written as a resource for their authors, other caseworkers, supervisors, and auditors. My data indicates that front-line workers’ notes serve at least three purposes: preserving evidence; explaining a decision; and justifying a particular performance of operational discretion. Each of these purposes is connected to the professional identity of one or more intended note readers, and all contribute to regulating how front-line workers perform operational discretion.

First, some notes are written to create an evidentiary record of a client's history, either for its own sake or to improve case management. This record is a precondition for the regulatory influence of notes, and notes contribute to the "paper trail" that research participants explained was a crucial component of their decision-making practice. However, front-line workers' references to a paper trail are misleading. Not only are those notes recorded both electronically, in multiple digital trails or "note strings," and in paper files, but intersecting networks of note trails are spread across case management software, emails, paper files, and elsewhere. Because administrative decisions may be produced by layers of decision-makers and communicated through a combination of drop-down menu entries and written notes, these trails make little sense to program outsiders without one or more trail guides: the caseworkers, supervisors, and others who contribute to the particular decision in question. The intricacy of these note trails suggests that they are created for the use of those working at and behind the front-lines of the Ontario Works program.

Front-line workers understand the creation of a paper trail, or a factual record, to be central to their decision-making practices. Participants remarked that, for a variety of benefits and services – self-employment programs, or special services for youth or families with young children, for instance – they need to "document" benefits recipients' circumstances through more than their drop-down menu selections in SAMS. Instead, research participants suggested that they must record specific, individualized details about their clients because "everything has to be documented," though few explained exactly why extensive documentation is needed. These fact-documenting notes are distinguishable from explanatory or justificatory notes, as they seem solely intended to establish a record of a client's history. For front-line workers whose professional identity fell closer to the black-and-white efficiency engineer end of the spectrum, this record could be used defensively at some future point: for instance, to justify not providing a client with a previously-received benefit. Other caseworkers who were closer to the pro-client social work end of the spectrum explained that creating an extensive client history in their notes could prevent retraumatizing that client in future meetings. These participants assumed that their colleagues and other administrative insiders would be able to find these notes, read them, and refrain from asking clients to retell tragic events, such as the loss of a job, home, children, or spouse. By entering notes into the electronic records of clients who may be assigned to their caseload, and into the records of other caseworkers' clients (i.e., if acting as a back-up worker, or

interacting with that client as a specialized employment or family support worker), front-line workers each contribute pieces to a client's history, which they expect that they and their coworkers will draw on at some point in the future.

Participants also described the evidentiary record of their notes as improving how they manage large caseloads and work across caseloads with one another's clients. Recording client facts in software programs makes a caseworkers' in-office paper files smaller and more manageable. Notes also enable caseworkers to more easily control their work flow and ensure that they and their colleagues are prepared for client meetings, for instance, by identifying that a particular client requires an interpreter or that a client has requested funds to cover the cost of a cell phone but has not yet submitted a receipt to justify the amount of benefits requested. Further, notes preserve evidence of previous discussions which front-line workers can rely on when making future benefits decisions about one another's clients. This function is especially important for aggregated decision-making, given that so many different workers may perform operational discretion in relation to the same client and, to do so, must be able to review a history of that client's previous discussions with their assigned caseworker. Describing her approach to a client's request for transportation funds to attend a college training program, one participant stated:

We can provide transportation funding on an exceptional basis. I just have to decide, like, what is going to cause hardship, right? And I have to review the notes and see, "Did it look like they had discussions about this person going to school, or is it just really random?" If it's out of the blue, then I'll say, "No, you're going to have to resubmit."

Evidentiary notes thus fulfil caseworkers' need for paper trails and client histories. Sometimes they seem necessary for efficient file management or the sensitive individually-tailored treatment of clients, while in other instances they satisfy an institutional practice or individual worker's habit of documenting everything.

Second, notes explain the reasoning behind a particular discretionary decision, a purpose that fits somewhere between preserving evidence and justifying a decision. Explanatory notes articulate why a particular decision was made so that future decisions involving an Ontario Works recipient are consistent with previous decisions about that same client. Consistency is thus the primary goal of explanatory notes: that is, consistency between layers of decision-makers vis-à-vis a single client, not consistency between one caseworker's decisions about the different clients

assigned to their caseload. Because front-line workers have such large caseloads and routinely make decisions about one another's clients, they regularly rely on explanatory notes to refamiliarize themselves as they perform operational discretion. Of course, explanatory notes may also include reasons that justify a particular outcome, but the explanatory purpose of certain notes, traceable in my research data, seems distinct from the intent behind notes that primarily record evidence or justify a particular performance of operational discretion.

Explanatory notes both demonstrate consistency and, by acting as precedents, guide front-line workers as they attempt to replicate consistent decisions among one another's caseloads. These notes are particularly important for front-line workers to achieve "client-centred" interpretations of Ontario Works' legal framework that address each client's unique circumstances; yet they are also important for black-and-white efficiency-minded caseworkers, as they may act as "go-to" reminders of how a front-line worker previously interpreted rules that the worker finds easier to navigate than the layers of embedded discretion within Ontario Works' legal framework. By giving the appearance of consistency among the decisions of many different caseworkers about one client, explanatory notes also provide caseworkers with some measure of protection from criticism or challenge. The appearance of consistency can prevent front-line workers from sticking out from their peers and attracting a supervisor or auditor's scrutiny.³⁹³ In addition, they may also prevent conflict between coworkers, particularly when a front-line worker is performing operational discretion in relation to a coworker's assigned client.

Participants describe using certain notes as "precedents" that they and their colleagues will refer to when making future decisions about the same client. For example, one participant who had recently been assigned to a new caseload explained how she would use her predecessor's notes to learn how to communicate and justify her performance of operational discretion in relation to an unfamiliar caseload.³⁹⁴ Though she contrasted her "new sheriff in town" approach with that of

³⁹³ Protas, *supra* note 15; Oberfield, *supra* note 207.

³⁹⁴ See Hawkins, "Uses of Discretion," *supra* note 39 at 42-43; see also Martha Feldman, "Social Limits to Discretion: An Organizational Perspective" in Keith Hawkins, ed, *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 163. Feldman notes that those working within administrative agencies perform operational discretion anticipating that others have expectations about how they should make decisions, which in turn regulates their performance.

her predecessor, who she described as a “bleeding heart” pro-client caseworker, she also recognized that if she began enforcing a black-and-white interpretation of Ontario Works rules she might ruffle too many of her coworkers’ feathers. In particular, she expected that her new clients would complain to her supervisor, who she expected would tell her to just grant these clients the benefits they requested. To avoid this scrutiny, she used notes as precedents, explaining, “A lot of times you look for precedent when taking over a colleague’s caseload. If I saw you gave a transit pass and 30 bucks cell phone money last month, I’m going to go with that and do the same thing this month.” While she may gradually introduce her new clients to her black-and-white performance style, she would do so slowly, adjusting the precedents in her own notes so as not to cause a stir or attract her supervisor’s attention. Yet, by doing so, she was also adjusting her performance style, as this caseworker was not inclined to grant supplementary benefits given her professional identity as a black-and-white rules enforcer.

Other research participants remarked that the factual context recorded in explanatory notes was essential for them and their colleagues to reach uniform, client-tailored decisions. Describing how software programs fracture caseworker notes and threaten the consistency of decisions (a phenomenon to be explored in Chapter 7), one participant declared that those who designed the new software program SAMS, “didn’t intend us to do notes, but we have to because it’s peoples’ lives. Everybody has a story and we need to understand the context.” Notes thus serve as a tool to demonstrate and replicate consistent, individually-tailored decisions in an administrative environment where one client will be affected by the decisions of multiple caseworkers and where a single caseworker will regularly interact with scores of clients.

Third, notes justify how front-line workers perform operational discretion in particular cases, but they do so to a broad audience. Front-line workers create justificatory notes especially when they are concerned that coworkers or supervisors, who may interact with the same client, may disagree with how they have performed operational discretion in a particular case. However, at the time that they create these notes, front-line workers may not know exactly who this future audience will include, how those reviewers might reconcile competing program norms, and where they would sit on the spectrum of pro-client social worker to black-and-white efficiency engineer professional identities. These uncertainties lead front-line workers to craft justificatory notes so that they speak to a wider assortment of future readers. As the examples below suggest,

the act of justifying to a broader audience further regulates how workers perform operational discretion.

While these notes may resemble the reasons for decision familiar to legal scholars, they are distinguishable on a number of fronts. Not only are they buried within case management software, composed using norm-referencing key phrases, and intertwined with data entries, but they are also designed specifically for administrative insiders. None of my research participants described creating these notes for Ontario Works applicants or recipients, or for a reviewing tribunal or court.³⁹⁵ Instead, they referred to other means of communicating the reasons for their decisions to benefits applicants or recipients, such as in-person meetings or telephone calls which would be followed up with a standard form, SAMS-generated letter.³⁹⁶ If caseworkers referenced notes in meetings with clients, their references would be limited to the first two types of notes (evidentiary records, previous decision precedents). Justificatory notes, by comparison, are written for readers who work at or behind the front-lines of a local office. These justificatory notes strategically present an Ontario Works applicant or recipient's circumstances so as to clarify (and sometimes defend), to other insiders, why their author performed operational discretion to grant or deny access to specific benefits and services. As a result, they blend advocacy and avoidance techniques as their authors creatively assert and obscure their decision-making authority.³⁹⁷

Caseworkers appear to learn how to write these justificatory notes from one another and from their supervisors. For instance, some participants describe supervisors as modelling justificatory language and note-writing techniques for the caseworkers in their teams. Others were encouraged to rely on note writing as a way of becoming comfortable with the “grey area”

³⁹⁵ In this way, these notes may be distinct from those of other administrative decision-makers, particularly immigration officers who write notes expecting them to be read by appellants: Satzewich, *supra* note 93 at 1458.

³⁹⁶ Almost none of my research participants discussed the need to create written records for use at a tribunal or court hearing. In fact, the risk of external review by the Social Benefits Tribunal was only raised by one caseworker, and no one mentioned judicial review as top of mind. Many, however, discussed the possibility of their files being reviewed by municipal or provincial auditors, as well as by their coworkers and supervisors.

³⁹⁷ For a discussion of how this assertion/avoidance dynamic plays out in a different context, see Hull, *supra* note 160 at 132-34.

involved in applying flexibly-worded legal provisions and policies to diverse clients. Just as important, however, justificatory notes appear to both allow front-line workers to assert their agency, by making a decision they expect that others might not initially agree with, and simultaneously moderate the radical inspiration for an initial performance of operational discretion, particularly by using key phrases to demonstrate how they have balanced competing norms or by referencing to other actors, such as supervisors or outside specialists, to show support for their performance.

When front-line workers suspect that a future audience may disagree with a particular performance of operational discretion, they may use their notes to strategically combine norm-referencing key phrases and flexible language that could be interpreted broadly to justify their performance to a wide audience of insiders. A minority of research participants depicted their notes as establishing a “bullet-proof” record of the facts that would solidly buttress a particular decision, especially when they were concerned that a supervisor might weigh norms differently and come to a different conclusion. But these front-line workers would also explain how, in writing these bullet-proof notes, they would adjust their performance of operational discretion to reach decisions that represented a balance between a pro-client and a black-and-white approach in the hopes that they would face less scrutiny if reviewed by a coworker or supervisor. My data thus suggests that the substantive outcome of their performance of operational discretion would change over time. The process of writing a justification for their decision to future readers, who might weigh norms differently and who might ascribe to a contrasting professional identity, nudged these workers’ performances towards a band of acceptable outcomes, even if they identified as being at the far end of the professional identity spectrum. Others described their notes with less combative language, while still clarifying that they would use notes to justify their performance of operational discretion to others. For example, one front-line worker described how she would record receiving a supervisor’s approval for a decision that might seem radical to her coworkers. In this example, she discussed granting funds for two pairs of prescription eyeglasses (an extraordinary decision) to an Ontario Works recipient whose assigned caseworker was unavailable when he stopped by her local office seeking assistance:

Usually we issue one eyeglasses voucher in a two-year period. I mean, it’s pretty certain that I’d have no problem issuing two vouchers, but I just wanted to cover bases and get supervisor approval. There is a clause in the policy that if clients break their glasses or lose them, a supervisor will issue another voucher. So, in that case, I look at what

supervisor the client's worker is attached to and I just go to them. The supervisor just said, "Go ahead, make a note." But usually I only do that if the worker's not here. There were a couple times where I'd gone to supervisors about issues without going to a coworker first, and it's not the best of moves. It just creates bad feelings.

While this participant identified closer to the pro-client end of the spectrum, she described how she would use muted language to reference her discussion with the supervisor so as to not stir up trouble with the coworker who was formally assigned to this client. Yet, this use of muted language subtly changes her own recounting of the situation so that her performance no longer appears to be simply a "pro-client" one; instead, it appears to be a reasonably balanced decision.

A final example demonstrates how the process of creating justificatory notes can move decision-makers' performances of operational discretion towards a middle range of outcomes when decision-makers might otherwise interpret Ontario Works' legal framework and weigh norms more strongly guided by their identity as a pro-client social worker or a black-and-white efficiency engineer. In the following example, a front-line worker describes how she used notes to justify a decision that she expected colleagues and supervisors might perceive as too extreme, or too far from what would be acceptable in a given situation. As she describes justifying her performance, however, she also recounts a process by which her performance moved into a range of outcomes that a future audience would likely recognize as being reasonable, even if they might have reconciled norms and interpreted formal discretion slightly differently. This caseworker described a situation in which an infant was born prematurely to a young couple who were receiving Ontario Works benefits. The infant had a heart condition and other chronic health problems that required a hospital stay at a specialized medical facility far from where the parents lived. On her reading of Ontario Works' legislative framework, this situation did not fit many of the scenarios for which individuals could receive transportation funding, most of which provided funding for benefits recipients to attend employment activities. However, this worker knew that transportation funding could also be granted if it was medically necessary and was familiar with a local office policy that the rules could be interpreted flexibly, widening the formal discretion nested within them, if a rigid black-and-white reading would place a child at risk of being apprehended by child welfare authorities. After reviewing the legislative framework and local policies, and speaking to the social worker assigned to this family by the hospital at which the infant was receiving care, this caseworker performed operational discretion to interpret the

medical transportation funding rules broadly, with supporting documentary evidence and relevant policies recorded in her notes. She stated:

I document it in my note, that “Letter received from social worker at this hospital. Letter indicates that parents are required to go to the hospital daily” – whatever, right? And if you put conclusions in there that are realistic conclusions, like, that there is a risk for this to become a child protection issue if they don’t follow through, and this is why you are issuing, then they leave you alone, right? So sometimes it’s just drawing on those worse outcome type of conclusions and putting that in your note so that management understands why you just didn’t follow the rules that time, right?

Though this front-line worker recalled this situation as one in which she defied management and performed operational discretion as she saw fit, the process of justifying her performance in her notes regulated her performance. Rather than reaching a radical, pro-client decision that ignored Ontario Works’ legal framework, this caseworker recounted a process of working with legal and managerial constraints: she combed through Ontario Works regulations and local policies in search of any explicit, tacit, or nested formal discretion; collected necessary documentary evidence from the hospital social worker and the parents to establish that the parents were required to travel to the hospital on a daily basis to check in with medical staff and their infant child; and weighed competing norms such as avoiding hardship, efficiently managing her workload, and preserving taxpayer-funded benefits. While this caseworker explained that her decision was quite radical, it also represented a cost-effective reconciling of the options available to her and program norms. She explained that she performed operational discretion to grant both parents monthly funds to pay for public transit passes covering the period of time in which their child was in hospital. A more generous alternative would have been to pay for taxi cab fares to and from the hospital, which is the normal practice when caseworkers grant medical transportation funding (particularly where the individual being transported is the person receiving medical treatment); paying for monthly transit passes instead of cab fares thus represented a reasonable alternative. The process of justifying her decision in a note, which this worker expected would be reviewed by a range of supervisors and other decision-makers, spurred her to adjust her performance of operational discretion so that it fell within a range of what she anticipated most other decision-makers would find acceptable in these circumstances.

As noted at the outset of this chapter, these findings suggest that modified forms of sociological citizenship and relational regulation may be more widespread than Silbey and Huising

anticipated. Even those research participants who identified themselves as staunchly pro-client or black-and-white indicated, as they described performing operational discretion, that they would adjust their performances in light of their colleagues. This adjustment included balancing a broader range of program norms and keeping their future audience of coworkers and supervisors in mind as they developed oral arguments and written notes. My data suggests two key and interrelated factors that may support sociological citizenship within a particular office: workers who have a range of professional identities; and workers who are committed to a principle of maintaining good relationships with coworkers who may be committed to divergent professional identities. Workers who understand the importance of cooperating with their colleagues may be starting from a different vantage point that fosters sociological citizenship among their ranks as compared to workers who operate more independently. Further, particularly for relational regulation, a range of professional identities seems essential, as this diversity inspires workers to develop performances that move away from divergent poles and fall somewhere in a band of outcomes that they anticipate their colleagues would accept. My research indicates that these factors may be more common at an administrative agency's front lines, and perhaps within catch-all bureaucracies, than among the mid-level officials and prosecutors studied by Silbey and Huising.³⁹⁸

Further, my findings suggest that an agency's structural features, particularly those which foster aggregated decision-making, may support relational regulation. In Silbey and Huising's research, officials who undertook relational regulation had a less direct influence over one another's files and only infrequent contact with one another largely because they worked in different government agencies. My research suggests that, when front-line workers work in close proximity and are aware of their potential influence over each other's files and clients, this awareness may encourage relational regulation because workers may better appreciate the importance of cooperating with their colleagues. Additionally, the open concept office and workload design features in the Ontario Works program also encourage relational regulation. As demonstrated above, these structural features reveal to front-line workers that their performance

³⁹⁸ This factor may also be linked to gender, but I cannot examine this point in detail because Silbey and Huising's work did not account for their officials' gender identity. Further, my sample size may be too small to support conclusive findings about the role of gender in promoting sociological citizenship or relational regulation.

of operational discretion at one moment in time may create conflict or be undone by a colleague's performance at some future moment. This knowledge may inspire front-line workers to advocate or appeal to one another in a spirit of cooperation (or conflict avoidance) to achieve a performance that their colleagues will accept. Yet, because these workers expect that the traces of their performance will be reviewed by multiple colleagues in the future, they may also adjust how they record, explain, and justify their performances in relation to this anticipated future audience. Through these processes, front-line workers articulate how their decisions are close to compliant with Ontario Works rules and demonstrate how they fit within a band of outcomes that they anticipate will be acceptable to their diverse colleagues and supervisors.

As an aggregation of human decision-makers guide each other's performance of operational discretion, another decision-maker influences every decision to grant or deny access to Ontario Works benefits. Unlike human decision-makers, however, it is staunchly committed to its own decision-making approach and cannot be easily swayed to locate formal discretion in Ontario Works' legislative scheme or to differently reconcile program norms. This decision-maker is SAMS, a privately-developed software program that all local Ontario Works offices now use, and its unique contribution to aggregated decision-making is examined in the next chapter.

Chapter 7

Technologies as an Additional Decision-Maker

The two preceding chapters detailed how an aggregation of human decision-makers regulate front-line workers' performance of operational discretion. In Chapter 5, I demonstrated how the Ontario Works program is so characterized by layers of decision-makers that benefits applicants or recipients will almost certainly encounter multiple decision-makers during their experience of the program. Though outsiders might expect benefits to be administered by a singular decision-maker, I revealed how decision-makers are diffused across local offices. I then claimed, in Chapter 6, that the structural features that contribute to aggregated decision-making produce a process of divergence and convergence among front-line workers. Based on their awareness of their coworkers' professional identities, workers may identify themselves as taking a different approach, at the other end of the professional identity spectrum. Yet, because they perform operational discretion in relation to colleagues who may identify elsewhere across this spectrum, workers adjust their performances so that they converge within a middle-range between the pro-client and black-and-white poles. Front-line workers expect that their performances will be reviewed at some point by their coworkers, supervisors, and others, so they craft oral and written versions of their performances that will be agreeable (or at least minimally provocative) to this future audience.

Throughout this thesis, I have noted that human decision-makers regularly interact with regulatory technologies, including a case management software program called SAMS.³⁹⁹ This program has effects that are distinguishable from the other aspects of aggregated decision-making, however, and requires separate consideration. Accordingly, this chapter does two things: it traces how SAMS operates as part of an aggregated decision-making enterprise; and it demonstrates how this influences caseworkers' performances of operational discretion. To these ends, this chapter first situates SAMS in context, showing that it was introduced in response to provincial concerns that front-line workers were too broadly interpreting the formal discretion nested throughout Ontario Works' legislative framework. Rather than amend this framework or

³⁹⁹ "SAMS" is an acronym for its full name in the Ontario Works and Ontario Disability Support Program context: The Social Assistance Management System.

increase Ontario Works' core benefits to better meet living costs, the provincial Ministry of Community and Social Services introduced SAMS to rein in caseworkers' operational discretion. After establishing these background facts, this chapter explores how SAMS regulates front-line workers through a combination of procedural and substantive mechanisms. Together, these mechanisms influence caseworkers' performance as institutional decision-makers. By redirecting caseworkers to its check boxes and data entry fields, and by generating decisions that diverge from the breadth of formal discretion permissions within Ontario Works' legislative framework, SAMS guides front-line workers' overall performance of operational discretion. The more time a worker spends wrestling with SAMS for one client, the less time they have to do the same for their many other clients, making SAMS' decisions effectively authoritative for a majority of Ontario Works recipients. The last section of this chapter illustrates how SAMS operates as part of an aggregated decision-making enterprise. I argue that SAMS' effects are one way: unlike human decision-makers, SAMS cannot be persuaded to make decisions differently. As a result, caseworkers "manipulate" client data so that SAMS will generate decisions that workers believe better correspond with Ontario Works' underlying norms and their coworkers' diverse performance styles. While this process may appear to be workers bending clients in response to black-and-white rules, which Chapter 3 discussed,⁴⁰⁰ I suggest that it is qualitatively different. Workers perceive their own performances as sneaking things past SAMS rather than as deciding in relation to a legal framework, which may have unintended consequences as workers come to view themselves as performing in opposition to "the system." In addition, these continual data adjustments ultimately direct workers' attention away from their clients and Ontario Works' statutory scheme to instead focus on SAMS.

7.1. SAMS as a Decision-Maker

Contemporary decision-making in the Ontario Works program is characterized by a diffusion of human and non-human decision-makers. Just as a singular client-caseworker relationship fails to capture decision-making relations within Ontario Works, it is virtually impossible to grasp how human decision-makers perform operational discretion without considering how SAMS participates as part of an aggregated decision-making enterprise. Today, SAMS and other

⁴⁰⁰ See Chapter 3, section 3.2.

software programs are always operating at and behind the front-lines of the local offices that deliver the Ontario Works program. SAMS, in particular, purportedly represents Ontario Works' legislative framework through its multiple screens, checkboxes, and drop-down menus, and makes decisions for caseworkers based on their data entries. Both of these elements – its representation of the rules and its decision-making function – change how Ontario Works' legal framework operates for caseworkers and clients alike. What was once a legal framework shot through with explicitly declared and tacitly incorporated formal discretion becomes one that is rigidly black-and-white, at least according to SAMS. SAMS' representation of Ontario Works' rules and its decision-making functions are interrelated: as a software program, it has been explicitly designed and marketed to “generate” decisions using caseworker data inputs, which theoretically provides caseworkers with more time to address the needs of complex or challenging clients.⁴⁰¹ Yet, to perform this function, SAMS reads down the formal discretion nested throughout Ontario Works' legislative framework that otherwise permits caseworkers to perform operational discretion. As a result, the nuanced and layered legislative framework, explored in Chapter 2, is transformed into multiple drop-down menus and check-boxes in SAMS so that the software's algorithm can evaluate the data entered into these fields and produce decisions about an individual's access to Ontario Works' benefits and services.

While SAMS marks a departure from previous case management software, it continues a long tradition of using new technologies to forcefully guide front-line workers. The crucial difference between SAMS and previous regulatory tools, however, is that SAMS regulates through its decision-making design and performance. As I will demonstrate below, SAMS was explicitly introduced into local offices as a technological decision-maker that would regulate human caseworkers. Thus, SAMS' intentionality is distinct from the aggregation of human decision-makers considered in Chapters 5 and 6, which appears to be a managerial strategy that has had unanticipated regulatory side effects.

As this chapter illustrates, SAMS' regulatory effects contrast with the other aspects of aggregated decision-making explored in previous chapters. Computer programs may “speak the

⁴⁰¹ IBM Corporation, “IBM Cúram Social Program Management Platform,” (2012) online, <<http://www-03.ibm.com/software/products/en/social-program-management-platform>>.

language of rules”⁴⁰² because they are constructed from numerous mathematical calculations, but they are less fluent in the language of law because they do not easily permit performances of operational discretion. Law and operational discretion, however, are intertwined. As demonstrated in Chapters 2 and 3, the legislative framework governing Ontario Works is saturated with explicit, tacit, and nested instances of formal discretion that rely on caseworkers’ expertise to animate this legal framework vis-à-vis Ontario Works applicants and recipients. The provincial Ministry of Community and Social Services is of course authorized to create policy tools to guide how front-line workers apply Ontario Works’ legislation and regulations. However, the provincial Legislature has left many of the conflicting aims underlying this legal framework unresolved and delegated the responsibility for reconciling them to the human decision-makers who constitute “the administrator.”⁴⁰³ Although front-line workers may conflate the legislative framework with SAMS, blaming both “legislation” and “the system” for a perceived lack of formal discretion, or grey area,⁴⁰⁴ I argue that SAMS does more than represent the rules. Rather, it simultaneously participates as a decision-maker and thus contributes to the aggregated decision-making within local offices.

Decision-making technologies, including SAMS, do more than simply black-box where and how front-line workers perform operational discretion. They also inspire human decision-makers to work with and against them, as fellow decision-makers, in ways that are qualitatively different from how human decision-makers might perform operational discretion in relation to each other (i.e., by appealing to coworkers, or by recording, explaining, or justifying a particular performance in writing). Unlike front-line workers, who are concerned with maintaining good relations with their colleagues, SAMS’ regulatory effects are unidirectional. SAMS does not record, explain, or justify its decisions to administrative insiders. If anything, the software can make it nearly impossible for front-line workers to understand why it has made a particular decision and to adjust those which radically depart from the band of acceptable outcomes front-

⁴⁰² Harlow & Rawlings, *Law and Admin 3rd ed*, *supra* note 55 at 198, citing I.Th.M. Snellen and W.B.H.J. van de Donk, eds, *Public Administration in an Information Age: A Handbook* (Amsterdam: IOS Press, 1998).

⁴⁰³ See discussion in Chapter 2, section 2.4.2.

⁴⁰⁴ As demonstrated in Chapter 3, section 3.2.

line workers would expect to reach in a particular case. Moreover, while SAMS actively participates as one of many decision-makers, it is not influenced by its decision-making peers. SAMS may inspire coworkers to band together to “override” its decisions, especially those decisions that appear to eliminate formal discretion from Ontario Works’ legislative scheme and that fall well outside of the range of outcomes that caseworkers might reach. Yet, human decision-makers cannot reason with or socially pressure SAMS as they might their colleagues, and SAMS is unconcerned with “keeping the peace” among caseworkers. Instead, when SAMS performs as a black-and-white rule enforcer, it requires a substantial mobilization of front-line workers to adjust the decision that it has generated so that it instead falls within a range of reasonable outcomes. This redistribution of decision-making labour itself regulates human decision-makers at both the pro-client social work and black-and-white efficiency engineer ends of the professional identity spectrum, because they must take extra time away from their caseloads to challenge SAMS as a decision-maker – time they could use to develop client-centred decisions or update their files.

Ultimately, SAMS’ decentring of front-line workers as decision-makers has collective regulatory effects. Interacting with SAMS is inescapable. Human decision-makers must continue to use SAMS to deliver assistance to needy clients and efficiently manage their caseloads, and SAMS design creates roadblocks for humans who wish to challenge it. Because it is more time-consuming for humans to oppose SAMS, caseworkers simply cannot react to every decision that falls outside of the range of reasonable outcomes they would otherwise reach. Regardless of a caseworker’s professional identity, they must keep on top of their data entries or else fail as social workers or efficient case managers. Human decision-makers are also unable to train SAMS to weigh norms differently in future cases. The only option is for humans to adjust their data inputs so SAMS will decide differently. Rather than use the key phrases workers employ in their appeals and notes to colleagues, detailed in Chapter 6,⁴⁰⁵ front-line workers must instead use data inputs to “convince” SAMS to decide differently. Though SAMS may have restructured

⁴⁰⁵ See Chapter 6, section 6.4.

how front-line workers perform operational discretion, and inspired them to “manipulate the system,” it has not eliminated discretion as some might expect.⁴⁰⁶

7.2. SAMS in Context: From Assistive Tools to Regulatory Technologies

This section traces the evolving use of regulatory technologies within social benefits programs, including the regulatory goals that inspired SAMS’ introduction. As noted in Chapter 1, Ontario Works’ legislative framework has remained relatively stable over the past two decades. During this period, the process of delivering benefits and services to individual members of the public has become the subject of increasing automation and regulation.⁴⁰⁷ On this front, both the provincial Ministry of Community and Social Services (“MCSS”) and municipal social services departments have developed a vast array of tools – policy directives, forms, checklists, flow charts, and multiple overlapping software programs – to guide how front-line workers interpret and apply Ontario Works’ legal framework. These tools were initially intended to help workers to manoeuvre through the notoriously intricate legal framework governing Ontario Works,⁴⁰⁸ to manage their large caseloads, and to collect and record client information. At the same time, they subtly impacted how front-line workers performed operational discretion. Like other institutional design features, these assistive devices reshaped how Ontario Works legislation was brought to life.⁴⁰⁹ The latest addition to these tools – case management software – marks a new direction for the management and regulation of front-line decision-makers. Beyond being a sophisticated navigational, case management, or data collection tool, programs such as SAMS today perform

⁴⁰⁶ See Michael Adler & Paul Henman, “Information Technology and the Governance of Social Security” (2003) 23:2 *Critical Social Policy* 139 [Adler & Henman, “IT Governance”], whose broadly-scaled quantitative study of software programs in the early 2000s suggested that such tools might be able to eliminate front-line workers’ discretion.

⁴⁰⁷ Ontario has followed new public management initiatives of other jurisdictions, such as Ohio: Gilliom, *supra* note 22.

⁴⁰⁸ In this way, the complexities of Ontario Works are similar to the complexities noted in the United Kingdom: Neville Harris, *Law in a Complex State: Complexity in the Law & Structure of Welfare* (Oxford: Hart Publishing, 2013) [Harris, *Complex State*].

⁴⁰⁹ Lipsky, “Bureaucratic Disentitlement,” *supra* note 326; Sossin, “Call Centres,” *supra* note 56.

dual functions: they represent legal frameworks in algorithmic form; and they act as legal decision-makers.

Government benefits programs, including Ontario Works and its predecessor, the General Welfare Assistance program, have long sought to control the distribution of public funds by regulating front-line workers. As Chapter 1 notes, legislators and administrators conventionally used legalization and judicialization mechanisms to guide caseworkers' performance of operational discretion. These programs have also tended to be early adopters of new technologies,⁴¹⁰ and many such technologies have had implicit or explicit regulatory objectives. Some of these objectives have included reducing the overall amount of funds caseworkers distribute to clients, detecting fraud that caseworkers might not easily identify on their own, and improving "customer service" by tracking the regularity and speed with which front-line workers meet with benefits recipients.⁴¹¹

From the early 2000s on, Ontario Works and similar last-resort programs elsewhere have increasingly used managerial devices to direct how front-line workers perform operational discretion, particularly devices that purport to deskill the task of assessing need and distributing benefits. American scholars link this deskilling trend in catch-all bureaucracies to two phenomena: shifts in program delivery models, from a social work model to a legal bureaucratic model;⁴¹² and changes in local hiring and training practices that favour data entry clerks over professional social workers.⁴¹³ My research suggests, however, that Canadian programs such as

⁴¹⁰ NJ Smith, *Social Welfare and Computers: a general outline*, (Melbourne: Longman Cheshire, 1985); Paul Henman, *Governing Electronically: E-Government and the Reconfiguration of Public Administration, Policy and Power* (Basingstoke, Hampshire: Palgrave Macmillan, 2010).

⁴¹¹ Gilliom, *supra* note 22, discusses the new computer program introduced into Ohio welfare programs to trim down benefits payments and reduce perceived fraud in the 1990s; Neville Harris explores similar developments in UK welfare programs, discussed in *Complex State*, *supra* note 408; see also Michael Adler & Paul Henman, "Computerizing the Welfare State: An International Comparison of Computerization in Social Security" (2005) 8:3 *Information, Communication & Society* 315 [Adler & Henman, "Computerizing Welfare State"] at 324-26, who note reducing fraud and improving customer service as two regulatory goals in the computerization of Canadian social benefits programs.

⁴¹² Diller, *supra* note 236.

⁴¹³ Oberfield, *supra* note 207; Soss, Fording, Schram, *Disciplining the Poor*, *supra* note 93

Ontario Works have pursued deskilling largely through their use of new regulatory technologies instead of through program delivery models or hiring practices. While the 1990s reforms to Ontario welfare program introduced new norms to guide the delivery of last-resort assistance (i.e., promoting paid employment, conserving taxpayer-funded benefits), municipal social services departments did not follow the lead of American welfare providers, who had begun replacing trained social workers with data entry clerks.⁴¹⁴ In fact, the front-line workers at my research sites were highly trained, regardless of whether they identified as pro-client social workers or black-and-white efficiency engineers,⁴¹⁵ and supervisors and managers also appeared to be situated across the professional identity spectrum.⁴¹⁶ My data suggests, instead, that deskilling is mainly pursued by the provincial MCSS, and specifically, by requiring local offices province-wide to use ostensibly banal new technologies such as SAMS.

Earlier versions of such technologies regulated by targeting decision-making processes. While they helped caseworkers manage the complex interplay between laws, regulations, and policies, these tools also influenced the manner in which front-line workers performed operational discretion by subtly redirecting caseworkers' attention away from clients and Ontario Works' legal framework and towards check-boxes, flowcharts, and drop-down menus. Such tools, ranging from paper forms to computer software, have proliferated since Ontario Works was first introduced and remain in use today. For example, caseworkers must take every new benefits

⁴¹⁴ This point is reflected in my research data as well as in the most recent commission-based review of the Ontario Works and Ontario Disability Support Program: *Brighter Prospects*, *supra* note 23. In *Brighter Prospects*, the Commissioners noted that many of the front-line workers they consulted with across Ontario shared concerns that align with the pro-client professional identity discussed throughout my thesis; these workers wanted to meet with clients, understand their needs, and develop individually-tailored solutions to meet a mix of program objectives, including acting in a client's best interests and promoting self-sufficiency.

⁴¹⁵ All participants had some form of post-secondary education, from college diplomas to graduate-level social work degrees in social work, social sciences, or public services administration. Management staff confirmed that a college diploma is a prerequisite for caseworkers, and both municipal social services departments encouraged their employees to undertake continuing graduate-level education.

⁴¹⁶ Front-line workers noted that their supervisors varied along the spectrum from pro-client social workers to black-and-white efficiency engineers. Accordingly, my data suggests more variation in local management's direction as compared to scholarship on local welfare (TANF) administration in the US, which many scholars characterize as governed by mechanisms that favour efficiency and benefits cancellation over creative, individually-tailored benefits-granting decisions: Gustafson, *supra* note 32; Watkins-Hayes, *supra* note 94; Gilliom, *supra* note 22; Soss, Fording & Schram, *Disciplining the Poor*, *supra* note 93.

applicant through the provincial Application for Assistance document and the Rights and Responsibilities form. Both documents prompt caseworkers to inform their clients about the range of benefits that they may be eligible for and their obligation to participate in employment-preparation activities. Caseworkers are also required to use a co-residency questionnaire to determine whether unmarried clients who live in shared housing are in a spouse-like relationship.⁴¹⁷ This form includes a series of questions that caseworkers must ask about the financial, social, and familial relations between clients and their roommates. Based on their clients' answers, caseworkers must then decide whether they and their roommate are in a dependent, "marriage-like" relationship, a finding which will ultimately reduce or terminate a client's benefits.⁴¹⁸ Although many front-line workers found these tools helpful for navigating Ontario Works statutes, regulations, and policies, some noted that form-filling distracts them from staying up-to-date on local policy changes or from meeting with their clients. Further, they indicated that these forms are incompatible with the nuances of Ontario Works laws and the realities of clients' lives.

Alongside these forms and questionnaires, computer software has become a popular additional tool to regulate the process by which front-line workers perform operational discretion, shifting them away from skilled normative balancing and client-centred decision-making and towards data entry and caseload management tasks. For several decades, case management software has supplemented paper-based tools to guide routine performances of operational discretion by those who deliver social benefits programs.⁴¹⁹ Rather than direct caseworkers to a particular outcome, however, early software regulated their decisions by organizing and revealing particular client data to caseworkers.⁴²⁰ For instance, the case management software that preceded SAMS stored

⁴¹⁷ See discussion in Chapter 3, section 3.3.3.

⁴¹⁸ The "Questionnaire," or "Form 2764," must be used in all cases where a benefits recipient lives in shared accommodations with another adult who is not listed as a spouse on the recipients' documents: *OWPD 3.3*, *supra* note 252.

⁴¹⁹ Adler & Henman explicitly link the introduction of early computing programs in social services from the 1960s on as a tool to assist front-line workers with navigating the notoriously complex rules that typically governed these programs: Adler & Henman, "IT Governance," *supra* note 406 at 147.

⁴²⁰ Sossin, "Call Centres," *supra* note 56; Dean Herd & Andrew Mitchell, *Discouraged, Diverted and Disentitled: Ontario Works New Service Delivery Model* (Toronto: Community Social Planning Council of Toronto, 2002).

and displayed worker-entered data, enabling front-line workers to record notes about their clients, track benefits payments, and perform basic calculations. This software organized client data and benefits payments, but left substantive eligibility decisions to the workers themselves. Municipal social services departments have also developed their own digital tools to help caseworkers manage large caseloads and determine which benefits and services to grant clients facing multiple barriers to stable, paid employment.⁴²¹ These programs prompt front-line workers to enter specific information about their clients' education, training, and progress towards securing employment. They then translate this data into percentage scores that influence how caseworkers link individual clients to specific benefits and services. To help caseworkers manage large caseloads, another job-linking software program organizes client data so that workers can identify all clients in a particular office who are seeking a specific type of job or vocational training so that they can inform these clients of relevant upcoming job fairs or training opportunities. These technologies also subtly regulate front-line workers because they rely on caseworkers to conscientiously enter and maintain vast amounts of client data. Thus, they shift caseworkers' responsibilities away from developing individualized, client-supportive solutions and balancing competing program norms towards managing and updating massive client databases. Further, some scholars have noted that these programs have unintended incidental effects, such as fostering an increased attentiveness to the "customer service" goals associated with new public management.⁴²² Nonetheless, these older technologies still maintained caseworkers' important function as gatekeepers of Ontario Works benefits, employment opportunities, training, and other community-based programs and interpreters of Ontario Works' legal instruments.

The newest regulatory technologies adopted by social benefits programs, such as SAMS, are qualitatively different from earlier software. First, SAMS and its variants in other government programs require front-line workers to fit benefits applicants and recipients into narrow drop-

⁴²¹ As noted earlier, caseload numbers vary depending on the characteristics of a caseworker's clients. Workers whose clients are deemed to need more supports, such as clients with addictions, precarious housing, or sole-support parenting responsibilities, typically have caseloads of 50-80 clients. Those whose clients are deemed to be "close" to the labour market (i.e., who had paid employment in the past two years) have caseloads of 110-140 clients.

⁴²² Adler & Henman, "Computerizing Welfare State," *supra* note 411 at 324-26.

down menu categories; then, using these data inputs, the software “generates” decisions as to whether an individual is eligible for benefits. This functioning distinguishes SAMS from more extensively studied risk management technologies that guide criminal justice officials, which are similar in design to the job-linking software described above.⁴²³ Whereas the latter use data inputs to produce quantified indicators (of risk, in criminal justice; of suitability for employment, in Ontario Works) that administrative officials then use to recommend custodial and release arrangements (in criminal justice) or employment and training opportunities (in Ontario Works), software such as SAMS *itself* generates decisions to grant or deny benefits. The newest version of this software is now common within a range of social benefits programs in North America, the United Kingdom, Germany, Brazil, and Australia.⁴²⁴

In Ontario, SAMS was introduced specifically to decentre caseworkers as decision-makers. This rationale raises normative questions, which were alluded to in the provincial Auditor General’s report that precipitated SAMS. In this report, the Auditor General expressed fear that municipal caseworkers too readily believe their clients’ claims of financial need, too broadly interpret Ontario Works legislation in their clients’ favour, and too quickly distribute provincial funds to benefits recipients.⁴²⁵ In other words, the Auditor General targeted a subset of caseworkers who fell at the pro-client social worker end of the professional identity spectrum. The Auditor General’s fears were rooted in the following principled concerns: how broadly or narrowly should Ontario Works legislation be interpreted, keeping its conflicting policy goals in mind?

⁴²³ Kelly Hannah-Moffat, Paula Maurutto & Sarah Turnbull, “Negotiated Risk: Actuarial Illusions and Discretion in Probation,” (2009) 24:3 CJLS 391; Dale Ballucci, “Subverting and Negotiating Risk Assessment: A Case Study of the LSI in a Canadian Youth Custody Facility” (2012) 54:2 Can J Corr 203.

⁴²⁴ Indeed, for over 15 years, national, provincial, and local governments have procured and introduced virtually identical “off-the-shelf” software packages designed by the same firm that created SAMS. Marketed as adaptable to many benefits programs, SAMS-like technologies now administer programs as varied as workers’ compensation, child protection, veterans’ benefits, health services, and welfare. Today, this software operates in a range of jurisdictions, reaching across institutional boundaries to network client data between administrative agencies and standardize front-line decision-making in multiple government benefits programs: “Ministry of Community and Social Services: SAMS Transition Review” (2015) online: <http://www.mcsc.gov.on.ca/en/mcsc/programs/social/pwc_final_report.aspx>; US Department of Health and Human Services, *Welfare Reform Information Technology: A Study of Issues in Implementing Information Systems for the Temporary Assistance for Needy Families (TANF) Program* (Washington: US Department of Health and Human Services, 2000).

⁴²⁵ AG Ontario 2009, *supra* note 186.

whose legislative interpretation should be taken as authoritative, front-line workers (many of whom are trained as social workers) or provincial auditors (who are accountants by training)? Answering these questions is beyond the scope of this chapter, but keeping them in mind illuminates SAMS' complex regulatory effects.

The Auditor General's pre-SAMS report constructed municipal caseworkers' performance of operational discretion as a problem in need of a solution. In this report, the Auditor General criticized caseworkers for interpreting and applying Ontario Works eligibility policies and documentation requirements too flexibly, for too often relying on their clients to supply the information needed to establish individual eligibility, and for too readily trusting the veracity of client-provided information.⁴²⁶ The Auditor General was not concerned with the overall "correctness" of front-line workers' decisions about Ontario Works benefits, as its report did not address cases in which front-line workers mistakenly denied eligibility or applied program rules more rigidly than their legislative wording permitted. Instead, the Auditor General's focus was on examples in which front-line workers were interpreting Ontario Works laws too flexibly and distributing provincial funds too freely. Program managers were described as lax, allowing legislative rules to be waived, and condoning local practices that appeared to depart from provincial policy directives. The Auditor General was particularly alarmed by the existence of competing municipal and provincial interpretations of broadly-worded laws and policies, with front-line workers' interpretations being more charitable to benefits recipients than those of MCSS officials.⁴²⁷ In contrast with 1990s-era welfare reforms, which aimed to eliminate an ostensible mass of fraudulent benefits claims,⁴²⁸ the Auditor General's recommendations constructed and addressed a new threat to Ontario Works' integrity: the overly-sympathetic, too-generous caseworker.

⁴²⁶ *Ibid* at 256-57.

⁴²⁷ *Ibid* at 260-63, 265.

⁴²⁸ Janet Mosher, "Intimate Intrusions: Welfare Regulation and Women's Personal Lives" in Shelley AM Gavigan and Dorothy Chunn, eds, *The Legal Tender of Gender: Welfare, Law and the Regulation of Women's Poverty* (Oxford: Hart Publishing, 2010) 165.

The Auditor General recommended that MCSS constrain caseworker discretion to better govern Ontario Works, and MCSS proposed SAMS as the most effective response to these concerns. Simplifying and reducing overlapping provincial policies, while helpful, would not address the Auditor General’s perception that municipal workers were innovatively interpreting provincial laws and policies and liberally distributing Ontario Works benefits.⁴²⁹ This problem instead required a solution that would rein in caseworkers while enabling the Province to verify municipal compliance with provincial laws and policies.⁴³⁰ The MCSS proposed SAMS as a managerial-technical response to the dilemma of too-generous caseworkers. Already widely used by social benefits programs worldwide, SAMS promised more extensive remote auditing of front-line workers’ files,⁴³¹ and a “hands-off” approach to decision-making. Designed to produce its own decisions based on caseworker-entered data, SAMS would ostensibly generate easy, routine benefits decisions and free up workers to meet with more complex clients.⁴³²

To say that SAMS failed to function as promised is an understatement, though it did have significant regulatory effects. After going “live” across Ontario in November 2014, SAMS began releasing benefits payments to individuals who were ineligible for Ontario Works and eliminating or significantly reducing payments to benefits recipients. Rather than freeing caseworkers to focus on their most vulnerable clients, SAMS demanded more of their attention by requiring workers to enter extensive client information into multiple data fields buried deep within the software and to “click” multiple times to perform basic tasks. Although some of these malfunctions occurred because of faulty data transfers between its predecessor, SDMT, and SAMS, SAMS continues to impact the process and substance of human decision-makers’

⁴²⁹ The Auditor General’s value-for-money concerns diverge from those stated in a contemporaneous Commission-led review of Ontario’s social assistance programs: *Brighter Prospects*, *supra* note 23. Many of the Commission’s 108 recommendations centred on the need to simplify the legal framework governing social assistance. The Commission also proposed that simpler rules would give caseworkers more time to address their clients’ educational goals, housing needs, and employment plans.

⁴³⁰ Ontario, Office of the Auditor General of Ontario, *2011 Annual Report of the Auditor General of Ontario*, Chapter 4, Section 4.11 – Ontario Works Program (Toronto: AG Ontario, 2011) at 388.

⁴³¹ *Ibid* at 386-87; *AG Ontario 2015*, *supra* note 26 at 471, 474.

⁴³² IBM Corporation, *supra* note 401.

operational discretion, with front-line workers adapting their decision-making practices accordingly.

While SAMS' initial, massive benefit payment errors were widely reported, its regulatory effects have more quietly but fundamentally transformed front-line decision-making. As noted above, SAMS is distinct from earlier software programs, which assisted caseworkers with the procedural elements of decision-making, such as navigating complex rules, tracking benefit payments, and following up with clients. SAMS, by contrast, purports to be a "fully automated service delivery model" that generates its own legal decisions after front-line workers have input a wealth of client information into its multiple data fields.⁴³³ Though SAMS may eventually enable closer auditing of caseworkers' decisions, the threat of external review has had a less immediate regulatory effect on front-line workers. SAMS regulates primarily by displacing caseworkers from their vital role as legal decision-makers, who "mediate" between Ontario Works laws, local office policies, competing norms, and clients' needs,⁴³⁴ and by attempting to transform workers into clerks who collect and input client data for SAMS' use. As the next section argues, SAMS' regulation of front-line workers has both procedural and substantive effects on workers' performance of operational discretion.

7.3. How SAMS Regulates Human Decision-Makers

Compared to previous management tools, SAMS and similar regulatory technologies more forcefully deskill front-line workers through a combination of procedural and substantive mechanisms. SAMS destabilizes caseworkers' authority to make substantive decisions that affect individual applicants' and recipients' access to benefits. It does so through process-oriented techniques, such as diverting workers towards data entry tasks, and through its substantive outcomes, such as applying a narrow version of Ontario Works legislation that essentially nullifies the formal discretion nested across Ontario Works' written legal framework. This combination of regulatory mechanisms influences decision-making outcomes overall, particularly because the more time workers spend inputting data or tweaking SAMS so that they

⁴³³ *Ibid.*

⁴³⁴ Prottas, *supra* note 15 at 149.

can animate the formal discretion within Ontario Works' legislative framework, the less time they have left to work with clients or review relevant legislation and policies. At the same time, many decisions about access to Ontario Works benefits and services are increasingly produced by SAMS. At least some of the time, workers are unable to "work around" SAMS when SAMS makes decisions that very narrowly or incorrectly implement Ontario Works laws because such tasks demand substantial time and resources. "Work arounds" (as front-line workers call them) require caseworkers to pinpoint which data SAMS is using to generate a decision, to adjust their data inputs or, in cases where such adjustments are impossible, to manually "override" the system (with the assistance of supervisors and in-house SAMS experts). The procedural and substantive regulatory mechanisms I examine below functioned regardless of whether front-line workers self-identify as closer to pro-client social workers or black-and-white efficiency engineers. Though efficiency engineers may complain less about SAMS' narrow interpretation of legislation and more about its onerous data entry requirements, during my fieldwork caseworkers from all areas of the professional identity spectrum similarly detailed how SAMS would direct them towards data entry and bar them from performing operational discretion. This section provides evidence that challenges the MCSS' expectation that SAMS would be an effective regulatory tool based on its enhanced ability to audit caseworker decisions. I argue that, instead, SAMS' greatest regulatory impacts stem from how it displaces front-line workers as authoritative legal decision-makers.

SAMS' procedural and substantive mechanisms prevent workers from performing essential decision-making tasks and, ultimately, direct workers towards the decisions that SAMS generates. Below, I explore this phenomenon by tracing four such mechanisms: how SAMS organizes and obscures data; how it impedes workers from recording justificatory notes; how it enforces a narrow interpretation of Ontario Works' legislative framework; and how it bars workers from challenging its decisions.

First, SAMS organizes data in ways that place high demands on front-line workers and simultaneously obscure data from them. As a decision-making program, SAMS is designed to capture workers' data inputs, analyze that data, and make a decision about an individual's eligibility. This design relies on humans to input massive amounts of client information, which SAMS requires as a precursor to generating a decision. As one participant described it, "Ideally

we're supposed to input everything into that system and the system will then produce the outcome: eligible or ineligible.”

In addition, SAMS' organization of client information sometimes amounts to hiding data. This obscuring impedes the layers of human decision-makers within local offices from reviewing SAMS' decisions and ultimately disrupts how aggregated decision-making functions. SAMS fractures, multiplies, and obscures client information, and denies benefits if information is missing from its many evidence fields. SAMS-generated decisions are very difficult for front-line workers to deviate from because the “reasons” for SAMS' decisions (or the algorithm that generates decisions within SAMS) are hidden from caseworkers' view. SAMS requires that caseworkers input the same client information into numerous boxes and screens, and clicking or not clicking a box can mean the difference between a client receiving or being denied benefits. Yet, when SAMS denies benefits to an individual whose caseworker has determined should receive such benefits, front-line workers must struggle to find the data input that is causing the problem. As one participant described:

Clicking a checkbox means the difference between someone getting their cheque and someone not getting their cheque. So, if you don't click into 17 different pages to actually find that checkbox, you won't be able to figure out what is happening with this case.

Further, SAMS buries data detailing the exact benefits payments that an individual has received while simultaneously preventing caseworkers from recording and saving notes to explain their reasons for particular benefit payments. The same participant explained:

SAMS will tell you the case name, the case ID number, who did it, and the date, but it won't tell you the amount. So, you actually have to click into the case and go through to determine what amount was issued and then, if somebody lumped a payment together, like Transportation Funding with another fund, you have to try and decide, “Ok, what is this \$350 for? Is it for what I think it is? Is it different?”

Other participants noted how SAMS makes their own decision-making more difficult because it can obscure whether someone is even receiving assistance. As one participant stated, “It's sometimes very difficult to see whether or not a client's file's on suspend or if it's closed.” Front-line workers cannot easily identify which types of benefits clients have already received or the dates on which payments were made. This data is crucial for determining whether an individual is presently eligible for particular benefits and services. By concealing this basic information, SAMS bars those at the front lines from assessing whether individuals might be

eligible or ineligible for additional benefits and services and discourages workers from making such decisions.

Second, SAMS deters workers from recording notes and multiplies the places where they might find each other's notes. This mechanism has procedural and substantive effects, as it destabilizes caseworkers' decision-making authority, their ability to reference one another's explanations of previous decisions, and ultimately their performance of operational discretion. As identified above, early file management software functioned "on a view basis," showing basic client information to front-line workers, such as a client's name and address. More detailed information about clients and about caseworker decisions was recorded in handwriting in a paper file. In the early 2000s, interactive software was introduced and gradually replaced the paper file as the central location for caseworker notes.⁴³⁵ Since that time, many other software programs, including SAMS, have been implemented and multiplied the places where caseworkers record evidence and reasons for their decisions. SAMS, in particular, has exponentially fractured where caseworkers record notes, as it contains numerous central notes databases and individual comment fields that are linked to its drop-down menus. There are now so many places in which caseworkers can record notes that even in-office software experts have trouble finding their colleagues' written explanations. One participant observed:

I find that, I think, because of the complexity of the system workers are doing less documentation than they used to. I find a lot less information in SAMS, and I think it just has to do with all of the screens they have to go to in order to add a note, and different things like that. So, it makes it much more difficult. It is harder to find information, as well, in SAMS, because unlike our old system there are multiple *places* where workers can put notes. There are business practices where notes should be in one place but, like anything else, as long as there's three options you're going to have people using option one and three even though they shouldn't be using it, right?

To compound the effect of this fracturing of workers' notes, SAMS has character limits built into its notes fields, suggesting by design that detailed reasons for a decision are not required. In response to these limits, front-line workers may divide their notes across different fields. This practice splits their lines of reasoning, making it difficult for workers and their colleagues to locate and review written explanations for past performances of operational discretion.

⁴³⁵ Sossin, "Call Centres," *supra* note 56; Herd & Mitchell, *supra* note 420.

Participants identified notes as a key obstacle to determining why their coworkers had made previous benefits decisions because the notes explaining a decision could be scattered throughout SAMS, recorded in a central database (the “Person Page”), or linked to one of the many check-boxes, drop-down menus, or evidence fields associated with a particular benefit. Thus, by impeding front-line workers’ ability to record and refer to one another’s notes, SAMS increases the amount of time that workers spend tracing one another’s performances of operational discretion in relation to a specific client, ultimately frustrating their ability to regulate one another. Municipal social services departments have created policy guides that recommend front-line workers record particular notes in predictable locations, but research participants indicated that these policies remain flexible, suggesting that policies cannot effectively prevent their coworkers from documenting their reasons for performing operational discretion in multiple places.

Third, SAMS narrowly interprets Ontario Works’ legislative framework. This substantive impact demands time-intensive interventions by front-line workers who find and interpret the formal discretion within Ontario Works’ legislative framework more skillfully than the software engineers who designed SAMS. For instance, as discussed in Chapter 3,⁴³⁶ benefit recipients are required to sign a Participation Agreement as a condition of receiving assistance. Ontario Works legislation and regulations are largely silent on the specific contents of these agreements. Instead, they permit a broad range of activities to count as “employment measures” in a client’s Participation Agreement, including vocational training, community service, and addictions treatment.⁴³⁷ SAMS, however, does not allow for the same flexibility; as compared to the legislation, SAMS has a narrower list of employment activities available to front-line workers. If a caseworker indicates in SAMS that a client has signed a Participation Agreement but fails to select a drop-down menu option from the short list in SAMS’ “Outcome Plan” screen, SAMS will refuse to issue benefits to that client. In this way, SAMS forces front-line workers to engage with its drop-down menu selections even if these options do not capture the breadth of meaning that “employment measures” has within Ontario Works’ legislative framework.

⁴³⁶ See Chapter 3, section 3.2.

⁴³⁷ See OReg 134/98, s 26, 27; see also discussion at Chapter 5, section 5.2.2.1.

Similarly, Ontario Works' legislative framework empowers front-line workers to provide clients with as many supplementary benefits as they are eligible for in one appointment, but SAMS will not generate more than one supplementary benefit payment per client within a 24-hour period.⁴³⁸ One office manager explained how these conflicting interpretations of Ontario Works laws may have particularly stark outcomes for benefits recipients. She described an individual who requested funds to purchase a shirt for an upcoming job-shadowing exercise. This client had received these funds on the previous day but, after buying a used shirt, he discovered that he was required to wear a crisp white shirt to the workplace. She explained:

Because money was given to him the day before, SAMS wouldn't allow authorizing the funds, so the worker and her supervisor, who is very by-the-rules, came to me. I told them we had to work something out because this guy was employment-ready and does it make sense to *not* give him \$25 so he can buy a new shirt at H&M for an interview that will likely get him into a job? We had to call in an in-office SAMS expert to figure out how we could issue him the funds. We had to "trick the system" to get money to the guy.

While front-line workers may be able to "trick the system" so that SAMS provides benefits to legally eligible clients, this task requires that they enlist a team of colleagues – software experts, supervisors, office managers – to reverse SAMS' decision. In other cases, workers may be able to wait 24 hours to issue benefits, but this means they must return regularly to a client's SAMS file to issue one supplementary benefit at a time. Given their large caseloads, caseworkers cannot tweak the system for every client and must selectively ration their efforts.

Finally, SAMS obstructs front-line workers from challenging the substance of its decisions. SAMS not only generates decisions, but its very design bars caseworkers from inserting *themselves* as decision-makers and influencing SAMS' outcomes. As with its effect on caseworker notes, here SAMS influences the process and substance of front-line workers' decisions. For example, SAMS uses personal data to connect the files of present and previous Ontario Works recipients who, at one time, resided in the same household. It then uses this data to form families in ways that one front-line worker described as being "almost like

⁴³⁸ The Regulation (OReg 134/98) and Ontario Works Policy Directives have caps on particular benefit amounts (i.e. the Regulation restricts the timing and amount of assistance provided under particular supplementary benefits, such as the Full-Time Employment Benefit, which provides Ontario Works recipients with up to \$500 once per year for the costs associated with starting a new full-time job: OReg 134/98, s 55(1) para 5.1). However, there is no statutory basis for restricting the number of supplementary benefits that a front-line worker can issue each day.

Ancestry.com.” In doing so, SAMS decides that those individuals it has linked together depend on one another and, accordingly, reduces the total value of Ontario Works benefits provided to each “family” member. SAMS may thus make sole-support mothers dependent on previous household members, such as their former intimate partners or their parents, even where caseworkers have reviewed relevant evidence and determined that these individuals do not live together.⁴³⁹ Front-line workers have great difficulty separating the people that SAMS joins because, as one research participant noted, “SAMS doesn’t tell you, ‘Hey, this data input is what is causing your problem.” This functioning makes it extremely difficult for front-line workers to challenge such decisions because they cannot easily locate which data input(s) triggered SAMS to create a family, and thus cannot correct the inputs causing this decision.⁴⁴⁰ Because SAMS interprets client data unpredictably and reduces or cancels Ontario Works benefits unexpectedly, caseworkers often must review and try to correct SAMS-generated errors throughout their workday or risk conflict with clients whose benefits have been reduced, suspended, or canceled by SAMS, or with coworkers who will make decisions about the same client in the future.

All of these design features redirect front-line workers’ attention away from their clients, Ontario Works’ legislative framework, and their coworkers’ reasons for a particular decision and towards SAMS’ idiosyncratic methods of organizing information and generating decisions. Many research participants described how they are now overwhelmed with administrative work and forced to use time they would prefer to spend meeting with clients or reviewing their caseloads to instead wrestle with SAMS. For example, printing paper forms is now so difficult that some caseworkers will suggest that their clients step out of a meeting so that they can ensure the proper forms print. This situation undermines workers from across the professional identity spectrum: it is as hostile to those who are committed to client-centred decision-making as it is to

⁴³⁹ *AG Ontario 2015*, *supra* note 26.

⁴⁴⁰ In fact, as a SAMS expert informed me, in such cases software experts must become involved as they may need to create an entirely new SAMS file for each of the individuals that SAMS has linked together. SAMS tends to link people who have previously relied on Ontario Works benefits at some point, as their data will also be in SAMS, which has particularly harsh effects for individuals who have a history of needing government benefits. Exploring this punitive functioning is beyond the scope of my thesis, but it eerily mirrors some of the punishment logics of the earliest version of Ontario Works noted by scholars, such as Mosher & Hermer, *supra* note 25; Herd & Mitchell, *supra* note 420; as well as American literature on TANF administration, such as Soss, Fording & Schram, “Organization of Discipline,” *supra* note 172; Tani, *supra* note 35.

those who aim to efficiently manage their caseloads. As one pro-client participant put it, “Somebody’s crying and you have to say, ‘I have to ignore you for 10 minutes and focus on this’ [makes typing sound with fingers on table].” A worker who identified more closely as a black-and-white efficiency engineer noted that even entering very basic client information required workers “to go through and click a thousand times! Like, right now, every so often I’m getting these tingling feelings in my hand because of all the [taps index finger on table] clicking, clicking, clicking, clicking, clicking.”

By demanding that time-pressed caseworkers direct their attention to its interface and data fields, SAMS continually undercuts their skill as decision-makers and repositions them as form-printers, data-inputters, and software technicians. Further, SAMS makes it impossible for caseworkers to oppose every one of its decisions that they believe warrant challenge, which affects overall outcomes for Ontario Works applicants and recipients. As the next section suggests, by decentring and deskilling caseworkers, SAMS obscures and, in some cases, practically eliminates workers’ performance of operational discretion. In turn, caseworkers attempt to re-centre and re-skill themselves in ways that black box their performance of operational discretion to each other and to program outsiders.

7.4. Human Decision-Makers Respond to SAMS: Recentring and Black Boxing Operational Discretion

The human decision-makers at and behind Ontario Works’ front-lines respond to SAMS in ways that illuminate SAMS’ one-way regulatory effects. This unidirectional impact is precisely what distinguishes SAMS, as a decision-making technology comprised of computer code, from the regulatory effects of an aggregation of human decision-makers. Front-line workers cannot debate SAMS or nudge it to perform differently, and SAMS is unconcerned with maintaining good working relations with human decision-makers. Instead, workers can only band together in relation to SAMS, and individually adapt, re-skill, and re-position themselves. As this section demonstrates, workers must “manipulate” client data to work around the barriers that SAMS erects to prevent them from performing operational discretion. This story of worker creativity may initially be reassuring, as caseworkers learn to creatively interpret and enter client data so that SAMS generates outcomes that better match caseworkers’ perception of clients’ needs and their interpretation of formal discretion within the legislative framework, their local policies, and

guiding legal and managerial norms. It may also be familiar, as other scholars have long noted front-line workers' significant capacity to gather, translate, and control access to client information.⁴⁴¹ Yet, this overt turn to data manipulation suggests a fundamental (and potentially troubling) shift in workers' professional identities: from pro-client social workers and black-and-white efficiency engineers to expert data manipulators.

While scholars have for some time now observed that regulatory technologies almost always risk being subverted by the subjects they seek to guide,⁴⁴² my data suggests that there may be a mutual subversion occurring between SAMS and the human decision-makers it regulates. Tools such as SAMS may black box how caseworkers perform operational discretion, making it appear to outsiders and insiders alike that workers are complying with its algorithmic rules. Yet, in practice, caseworkers describe their innovative ways of working with and around SAMS as "manipulating the system." Manipulation has a different character than the oral advocacy and written justification techniques these caseworkers use to sway their colleagues, as manipulation is the only way to influence something that cannot be reasoned with. As one participant aptly put it:

The problem is that people's lives are not a drop-down menu. And that's where we run into problems. And, you know, a system is making decisions, taking it out of the hands of the worker, right? And we have to manipulate the system to make the decisions that we want.

Another front-line worker similarly remarked, "It's just the system – you have to know how to make it work to issue those funds." Yet, SAMS is clearly more than just a "system:" it is simultaneously an interpretation of Ontario Works' legislative regime (albeit in a new digital form), a decision-maker, a repository of client data, and an auditor.

Although front-line workers describe themselves as tweaking the system, they continue to perform operational discretion in a highly regulated administrative environment.⁴⁴³ The effects

⁴⁴¹ Prottas, *supra* note 15, was keenly aware of this role, as was Joel F Handler, "Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community" (1988) 35:6 UCLA L Rev 999 at 1054.

⁴⁴² Soss, Fording and Schram, *Disciplining the Poor*, *supra* note 93 at 229.

⁴⁴³ Baumgartner, *supra* note 319; Mashaw, *Bureaucratic Justice*, *supra* note 119 at 213.

of other regulatory forces may become more difficult for outsiders to perceive, though, as SAMS becomes the focus of caseworkers' attention. The competing norms and aggregated decision-making features explored in earlier chapters continue to operate but, as workers begin framing their actions as covert system manipulation rather than as reasoned justification, they risk black boxing the process by which they perform operational discretion. In other words, layers of human decision-makers may ensure that performances of operational discretion produce decisions that fall within a band of reasonable results, but an aggregation of human and algorithmic decision-makers more starkly pits both types of decision-makers – the human and the algorithmic – against one another. This aggregation of human and non-human decision-makers has different regulatory effects because front-line workers are unable to influence SAMS-generated decisions *unless* they adjust the data that they input into SAMS.

As I will demonstrate below, front-line workers may describe their actions as tweaking client information or manipulating the system, but their accounts include examples that range from correcting obvious program errors to animating formal discretion within Ontario Works' legal framework that permits them to provide assistance to benefits recipients. Even as SAMS directs front-line workers towards particular decisions and displaces them as decision-makers, workers find ways to redirect SAMS so that clients receive the benefits these workers determine they are entitled to according to the formal discretion within Ontario Works legislation, the normative balance and ultimate decisions they anticipate their colleagues would reach in the same case. My data suggests that caseworkers creatively adjust their data inputs in three ways to achieve these results: first, by entering placeholder data when SAMS requires information that is impossible to provide; second, by adjusting dates forwards and back to moderate SAMS' exacting calculation of time; and, third, by strategically articulating clients' needs so that SAMS will find these clients eligible for benefits.

First, caseworkers indicated that they will input placeholder data in fields where SAMS demands information that clients cannot provide. In such cases, Ontario Works' legislative framework does not require this data to determine whether an individual should receive particular benefits, but SAMS compels front-line workers to enter it into numerous data fields. If these fields are left blank, or if a drop-down menu option is unselected, SAMS will stop issuing benefits payments for that client and may deem them to be ineligible for assistance. To prevent SAMS from suspending or canceling clients' assistance, front-line workers will input placeholder information

into these fields even if such information is inaccurate. For instance, SAMS requires that every adult benefits recipient be enrolled in or have graduated from high school and that every dependent child be attending school, regardless of their age. Similarly, SAMS requires that every benefits recipient have an address, even those individuals who are homeless or precariously housed. In response to these requirements, front-line workers have established a practice of marking all adult Ontario Works recipients as high school graduates, even if they have not yet received a diploma, and entering “fake school” into the school data field for children who are too young to be enrolled as students.⁴⁴⁴ For clients who are homeless, caseworkers will input a fictitious address so that SAMS issues these individuals core benefits. SAMS also requires that clients have a specific employment activity selected from the drop-down menu options in its Outcome Plan screen as a condition of receiving benefits. As noted above,⁴⁴⁵ Ontario Works’ statutory framework only requires that individuals make a general commitment to engage in employment-preparation activities. If specific details about a client’s activities are not input into SAMS by a set date, however, the software will find that individual ineligible for Ontario Works and halt their monthly benefits payments. To counter this effect, workers may select any activity from SAMS’ drop-down menu options – life stabilization, finding employment, training, maintaining employment, restriction, deferral, and so on – to ensure benefits are issued, even if their selection misrepresents a client’s circumstances. According to one participant:

We have to make sure all of our Outcome Plans are up-to-date because the cheques are going to be held in September. Again, so I might put an activity in, “independent job search,” and then I’ll put a note, “Client needs to be assessed.” So again, I’m just satisfying the requirement without seeing my client, but I’m putting in the note that this is what needs to happen.

Given their high caseload numbers, it is impossible for caseworkers to meet with all of their clients before the date on which SAMS will suspend payments. Front-line workers thus tweak the data in a client’s computerized file and make a reminder note to themselves to update this information at a future client meeting. During an automated review of this file, it may appear to be in compliance and up-to-date; the caseworker’s creative use of placeholder data will likely

⁴⁴⁴ *AG Ontario 2015*, *supra* note 26 at 487.

⁴⁴⁵ For instance, see the discussion in Chapter 4, section 4.2.1.

remain undetectable unless a human auditor also examines the caseworker's note. Because these notes are scattered throughout SAMS, however, and given the number of digital files within each office, it is virtually impossible for outsiders to comprehensively review this sort of decision.

Second, to temper the exacting way in which SAMS interprets time, caseworkers will modify the dates they enter into SAMS so that their clients receive the maximum amount of benefits possible or so that benefits erroneously paid to a client are not clawed back from that client's future Ontario Works payments. For instance, when a client gives birth to a child, front-line workers may backdate when they add the infant as a dependent to that client's file so that this client receives a larger monthly benefits payment. One caseworker who was experienced working with sole-support parents described this process as follows:

I think I use discretion quite a bit. Like when I'm adding a shelter amount in, adding a baby – so I use discretion, like, with dates. So, if a person had a baby on the sixteenth of August, let's say, or – where are we – August fourth, I might add it August first so that she gets her full entitlement.

Other front-line workers identified situations where they would adjust dates forward to protect a client's benefits. When faced with a decision about whether to note an overpayment on a client's file, research participants described balancing provincial overpayment policies and the norm of not creating unnecessary hardship for their clients. SAMS, meanwhile, was treated as a static obstacle to get around (at least some of the time). One participant explained:

If the client was over-issued money, there's an overpayment. But we look at extenuating circumstances, *always*. So, let's say the client, you know, we issued \$400 for rent to the client for October. The client comes in October fifth and says, "I moved. My rent is now \$300." We will *not* set up an overpayment. Like, you know? Because people – our clients have, like I said – for a lot of our clients, it's hard to function, right? So, we might not set up an overpayment.

Q: So, when you're inputting the new information, then, about the client's circumstances, for their residence and their rent, what would you do?

We would start it as of November. I would decrease the rent as of November so that there's no overpayment that's created.

Q: Yeah, because if you input it for October –

The system will set up an overpayment. Or if we issued the money, the system will say, "Oh we issued \$400, now he's only eligible for \$300, so he was over-issued." So, in that case we

would change it starting in the following month. We just *adjust* it. And we would make a note explaining why we made a decision like that, we *should*.

These adjustments to client data may lead a client to receive a small additional benefits payment. In this situation, Ontario Works' legal framework does not offer caseworkers a single, correct answer; it allows for a range of outcomes.⁴⁴⁶ SAMS, meanwhile, "reads" these rules as black-and-white.

If we accept SAMS' interpretation of Ontario Works laws as authoritative, these data tweaks appear to be problematic. However, the participants who recounted making these adjustments interpreted Ontario Works legislation differently, as they located formal discretion within the legislative scheme, weighed competing program norms, and considered how coworkers or supervisors might react to their decision. They would note that benefits are far lower than the actual costs of rent, food, and clothing, and that small additional payments could mean that clients are able to purchase groceries, pay utility bills, or remain housed. Research participants also identified their decisions to tweak client data as supported by competing program norms. Though many front-line workers described being guided by the norm of preventing hardship, they also understood these decisions as supporting clients' progress towards self-sufficiency. Further, such decisions made it easier to efficiently manage their caseload because establishing an overpayment would require printing a decision letter and may lead a client to complain to a supervisor or office manager.

Finally, front-line workers become adept at rearticulating their clients' circumstances in data that SAMS will use to produce a decision that workers believe accords with Ontario Works' legal framework, underlying program norms, and the confines of aggregated decision-making. This rearticulation of clients' circumstances may require that clients collaborate with front-line workers to access much-needed benefits or services. When clients request funds to pay for an everyday item – a child's clothing or school supplies, for example – that Ontario Works does not cover and that SAMS will not issue, caseworkers may look for alternate benefits to which these

⁴⁴⁶ See discussion in Chapter 3, section 3.3.

clients *are* eligible (as discussed in Chapter 3).⁴⁴⁷ After locating these benefits, caseworkers will input the data SAMS requires to grant these benefits on the understanding that their clients will use these funds to pay for the items for which their clients initially sought assistance. One participant stated:

If someone's in trouble and they haven't used any Housing Funding and they have a three-year-old child, they might not need a bed, but if we were having a conversation, we always try to – I try to look at wherever I can pull money from. Like, that's there. They're eligible for it. You can make a note that the toddler is transitioning into a bed and issue money, that's an option. Some workers – which is good, it's the Province's money – will stay within, like they won't look outside for an alternate means to help. But you can, you can. You're not really breaking the rules, you just have to look outside the box. It's not like we go auditing how they spent the [money] for the bed. I just say, "You know what? I'm issuing this now, so you won't be able to request money for a bed," right? But, at the same time, we have a discussion about how are you going to prevent this next time. Why did you spend your Child Tax Benefit when you know that school's starting? You don't want to blame, but if you need help with budgeting what little finances you have then you can talk to your worker about a referral. It's not just constant, "How can I give you more money?" There still has to be some sort of discussion about next time.

In these situations, front-line workers demonstrate their proficiency as navigators of the numerous supplementary benefits available within Ontario Works' statutory framework and their skillful reconciling of competing norms such as preventing client hardship and promoting self-sufficiency. Similarly, benefits recipients in addiction treatment programs may require clothing funds that do not correspond with the drop-down menu options available in SAMS. In such cases, front-line workers may choose the next-best drop-down category so that a client will receive some assistance. One participant, who worked with clients in addictions treatment programs, described selecting an option within SAMS as follows:

Now you say "Employment," but employment for what? Here's seven categories. Mine don't fit any of them so I just choose any one. For example, I have a client who this is the third time that I'm giving them clothing allowance because they've had such dramatic weight *gain*, but I don't have a specific corresponding benefit in SAMS – I actually have to go into "Employment." They're not in a job, they're not in training, and I have to issue them that money and I just put it under "Employment-Related Expense" but it's not. It's actually something that's more medically-related because they're no longer using intravenous drugs. They're eating and they've put on, you know, 60 pounds.

⁴⁴⁷ See discussion in Chapter 3, section 3.3.2.

Addictions treatment is one of the employment-preparation activities that legally entitles a benefits recipient to supplementary benefits, such as a clothing allowance.⁴⁴⁸ However, because SAMS functionally eliminates the formal discretion embedded within Ontario Works legislation, its interface makes certain funds appear as though they are unavailable. As noted in Chapter 3, front-line workers may conflate SAMS' representation of Ontario Works laws with the legislation itself, particularly as they become overwhelmed with the administrative tasks that SAMS necessitates. Pro-client workers, who aim to provide clients with all of the benefits that they may be entitled to under the statutory framework, must become adept at learning SAMS' language, obtaining the evidence that SAMS requires of their clients, and cleverly inputting this data into the appropriate fields so that SAMS produces a particular decision. SAMS black boxes how these human decision-makers perform operational discretion: their data tweaks may be indistinguishable from data inputs that accurately reflect a client's circumstances, and the explanations underlying these "manipulations" may be imperceptible to coworkers, supervisors, auditors, or Ontario Works recipients.

Although front-line workers re-skill and re-centre themselves as decision-makers in relation *to* SAMS, SAMS does not respond in kind. In the back-and-forth between workers and SAMS, SAMS remains an immovable decision-making force that is not easily swayed to perform differently. Any deviation from a SAMS-generated decision requires that front-line workers undertake more onerous data entry tasks and may necessitate the involvement of their coworkers (especially supervisors and in-house SAMS experts), diverting their attention away from other benefits recipients and Ontario Works' legislative framework. At some point, SAMS forces even the most staunchly pro-client caseworkers to choose between using their finite work hours to help one client, by tweaking that client's data, and ensuring that the digital records of their numerous other clients comply with SAMS' rules so that individuals who meet all of Ontario Works' legislated eligibility requirements are not inadvertently denied assistance.

Front-line workers cannot escape working with SAMS as a decision-maker, nor can they escape its one-way regulation of how they perform operational discretion. SAMS forces caseworkers across the professional identity spectrum to continually engage with its check-boxes and drop-

⁴⁴⁸ OReg 134/98, s 26.

down menus because it threatens to cancel the benefits of clients whose data is incomplete and it implements a narrow version of Ontario Works' legal framework, which can cause hardship for clients and spark complaints to supervisory staff. By threatening to withhold benefit payments from benefits recipients if caseworkers overlook a single data entry, unpredictably deeming individuals to be ineligible for assistance, and refusing to issue the same class of benefits to one individual in the same day, SAMS uses workers' commitments to preventing hardship and to efficient caseload management so as to continually refocus their attention on SAMS. These pressures lead workers away from their clients and Ontario Works legislation to "the system." Even as caseworkers learn its language and adjust clients' data so that they can more effectively "manipulate the system," the system continues to regulate them in response.

Ultimately, SAMS places human decision-makers in a position where they begin to perceive their performance of operational discretion as data manipulation, not as interpreting rules, weighing norms, debating with colleagues, or justifying present performances to future reviewers. With its one-way regulatory effects, SAMS pits human decision-makers in opposition to itself. As Chapters 5 and 6 illustrated, front-line workers regulate one another through coded references to underlying norms and their desire to maintain peace among coworkers with diverse professional identities. While this regulation among coworkers may be imperceptible to outsiders, it still engages workers with Ontario Works rules, underlying norms, and their clients, and requires that they explain and justify their performances of operational discretion to each other. SAMS, by contrast, disrupts this process: it impedes workers from explaining and justifying their performances of operational discretion and obscures its own decision-making methods to those working behind the front lines of Ontario Works. Although SAMS automatically generates form letters articulating "reasons" for some of its decisions, these letters do not fully explain how the software produced a particular decision. The reasoning mechanisms within SAMS – namely, a proprietary algorithm that assesses client data against a coded black-and-white interpretation of laws and policies to generate outcomes – remain obscured to front-line workers, supervisors, and others within Ontario Works' administration.⁴⁴⁹

⁴⁴⁹ Indeed, the only individuals who have access to this knowledge are the software developers who modified SAMS' off-the-shelf platform for the Ontario Works and Ontario Disability Support Program context and the corporation with proprietary rights to SAMS' algorithms and design.

Taking the above findings into account, one might wonder whether Cartier's discretion as dialogue model offers insights not only into how judges review (or ought to review) the exercise of discretion but also into how empirical researchers should study the phenomenon. Specifically, with Cartier's work in mind, my research may be read to suggest that the proximity between administrative decision-makers and those impacted by their decisions correlates to how broadly or narrowly decision-makers operationalize a statutory framework. For instance, one might interpret my data as demonstrating that those workers who more regularly encounter benefits applicants and recipients in person, and who are thus well-positioned to engage in a relational dialogue, are more likely to interpret Ontario Works' legal framework more generously as compared to the remote officials at Queen's Park (i.e., representatives of the provincial Auditor General, MCSS staff who introduced SAMS to regulate improvident caseworkers) or the software engineers who translate Ontario Works' laws and policies into computer code. At the very least, one might wonder how face-to-face encounters affect whether a benefits applicant or recipient's circumstances will be heard and addressed by an administrative decision-maker.

While my study was not designed to address these questions directly, such propositions appear to extend Cartier's discretion as dialogue model. While Cartier anticipated that relational decision-making processes might influence the substance of a broad range of administrative decisions, including those affecting large numbers of people, she explicitly doubted whether front-line workers were well-positioned to engage in the relational dialogue that her model advanced. Cartier acknowledged that in-person communications may occur at the front lines of an administrative agency, but expected that it was likely impossible for a fully relational and responsive dialogue to take place in high-volume institutional settings where administrators managed numerous requests.⁴⁵⁰ Elements of Cartier's model may suggest that those who are closest to the individuals affected by their decisions will perform operational discretion more flexibly than those who are removed from a program's front lines, yet the factors contributing to this variation likely extend beyond the proximity and relationship between administrative officials and those affected by their decisions.

⁴⁵⁰ For instance, see Cartier, "Spirit of Legality," *supra* note 2 at 333; see also Nedelsky, *supra* note 356.

Empirical studies of front-line workers suggest that the interaction between administrative officials and individual applicants or clients unpredictably influences whether, and on what basis, administrators animate the formal discretion within a legislative framework. Scholarship in this area suggests that face-to-face interactions may alter how workers approach a legal framework, making them more inclined to search for and operationalize grey areas.⁴⁵¹ Yet, scholars also note that in-person encounters can exist in settings where a critical mass of workers punitively enforce a legislative framework so as to discipline those with whom they interact. For instance, Maynard-Moody and Musheno note that direct engagement between front-line workers and the public weakens workers' connection to managerial staff, limits the reach of program rules, and encourages workers to address members of the public as individuals rather than abstractions.⁴⁵² They observe, however, that this relationship between workers and individuals can be both caring and brutal. In other words, proximity does not necessarily inspire generous, pro-client interpretations of legal rules; it may, in fact, have the opposite effect as suggested by the caseworkers who would put on the "Sunday morning special" described by one of my research participants.⁴⁵³ Further, when programs are governed by byzantine legal regimes, face-to-face encounters may produce a sense of unfairness, rather than encourage relational dialogue, because they require members of the public to interact with rules and procedures that make little sense to them as outsiders.⁴⁵⁴ Thus, the interaction between front-line workers and benefits applicants

⁴⁵¹ One might take this from Mashaw's observation that, when their cases proceed to a second-level, in-person hearing, disability insurance applicants have a greater rate of success than they do at the first-stage, paper-based hearing used by the Social Security Disability adjudication unit: Jerry L Mashaw, "Small Things Like Reasons are Put in a Jar: Reason and Legitimacy in the Administrative State" (2001) 70:1 Fordham L Rev 17 at 30.

⁴⁵² Maynard-Moody & Musheno, *supra* note 175 at 334. Lipsky also notes the declining influence of managerial actors when front-line workers engage directly with members of the public: Lipsky, *Street Level Bureaucrats*, *supra* note 15.

⁴⁵³ See discussion in Chapter 4, section 4.2.5. This observation is echoed by many other scholars. See Oberfield, *supra* note 207, who studied police officers and social assistance caseworkers in the mid-west United States. Gilliom, *supra* note 22, also notes this diversity in approaches in his study of welfare administration in rural Ohio. Lens observes that face-to-face interactions between second-tier decision-makers and social assistance recipients does not necessarily produce pro-client outcomes: Vicki Lens, "Administrative Justice in Public Welfare Bureaucracies: When Citizens (Don't) Complain" (2007) 39:3 Administration & Society 382 [Lens, "When Citizens (Don't) Complain."]

⁴⁵⁴ Mashaw, *Bureaucratic Justice*, *supra* note 119 at 139-42.

and recipients may only partly explain why caseworkers approach Ontario Works' legislative framework so differently from the provincial Auditor General and MCSS officials.

Varied professional identities may further clarify why front-line workers and provincial officials differently recognize and operationalize the formal discretion nested throughout Ontario Works' legal framework. Though this factor is outside of Cartier's scope of analysis, she and other administrative law scholars may be intrigued by how professional identities likely guide administrative officials as they interpret legislative frameworks in relation to their colleagues and to the individuals who will be impacted by their decisions. As I noted in Chapters 4 and 6, front-line workers in the Ontario Works program ascribe to identities that range between pro-client social workers and black-and-white efficiency engineers, and these identities guide, but do not solely determine, how workers perform operational discretion. By contrast, officials within the Auditor General's office are professionally trained accountants. As such, it is reasonable to assume that they may interpret the formal discretion within the Ontario Works framework more narrowly than would caseworkers.⁴⁵⁵ Similarly, the mid-level MCSS staff who responded to the Auditor General's reports and procured SAMS are likely long-term civil servants with experience in other provincial ministries who ascribe to different professional identities as compared to the Auditor General's accountants and Ontario Works caseworkers.⁴⁵⁶ Finally, the software engineers who translated Ontario Works' statutory scheme into computer code were almost certainly guided by a different variation of professional identities common to entrepreneurial computer programmers trained in mathematics, computer engineering, and systems design. Thus, while the relationship between law-interpreters and the individuals affected by their decisions may influence how administrative actors locate and operationalize formal discretion, based on their prospect of engaging in relational dialogue, these workers' professional identities very likely also contribute to their different approaches to operational discretion.

⁴⁵⁵ Chiarello notes a similar phenomenon with pharmacists, who are trained chemists and who apply controlled substances laws very differently as compared to criminal justice officials: Elizabeth Chiarello, "The War on Drugs Comes to the Pharmacy Counter: Frontline Work in the Shadow of Discrepant Institutional Logics" (2015) 40:1 *Law & Soc Inquiry* 86.

⁴⁵⁶ Indeed, the professional identities of MCSS staff *supra* more closely resemble the approaches of the mid-level officials studied by Silbey, Huising & Coslovsky, *supra* note 16.

Chapter 8

Lessons for Administrative Justice

In examining how administrative decision-making operates in the context of the Ontario Works program, I have posed important challenges to how legal and socio-legal scholars conceptualize and study “discretion.” My project has thus been twofold: first, to reveal the methodological limitations of both disciplinary approaches, rather than the shortcomings of any one particular legal or socio-legal scholar; and, second, to analyze how “discretion” functions in practice within a notoriously rule-bound program. Though not explicitly normative, my research offers insights that enrich normatively-inclined doctrinal and theoretical legal scholarship as well as empirical socio-legal work. Further, my findings suggest many fruitful avenues for research that scholars from both legal and socio-legal circles may undertake to deepen our collective knowledge of administrative governance and its rapidly changing terrain. This chapter briefly reviews the key insights of my thesis and uses these findings to plot a further research agenda.

8.1. Key Findings

First, my study of discretion has offered a careful analysis of the meaning that we ascribe to the term “discretion.” Parsing academic literature on discretion, I have demonstrated the value of more carefully distinguishing between two different senses of an otherwise broad concept: namely, formal discretion (text-based, decision-making space); and operational discretion (temporal, decision-making performance). Further, I have illustrated the range of formal discretion that exists within a rule-bound scheme such as Ontario Works, from the micro scale of explicit and tacit grants to the macro scale of systemically nested formal discretion. My thesis ultimately shows how, when a legal-managerial regime creates a web of interconnected rules and open-ended and open-textured language within these rules, it becomes misleading and perhaps impossible to distinguish discretion from no-discretion at any one decision-making moment. Though my object of study was the Ontario Works program, my findings may apply to many other rule-saturated contexts, such as disability support programs, veterans’ pensions, municipal licensing schemes, taxation systems, and immigration and citizenship regimes, among others.⁴⁵⁷

⁴⁵⁷ Lawsky, *supra* note 136. See also Harris, “Complexity and Social Security”, *supra* note 22.

Second, my research also shows how front-line performances of operational discretion are inextricable from their two constraining features: the process of balancing and reconciling legal and managerial norms; and the pervasive aggregation of human and non-human decision-makers, which leads front-line workers to adjust how they perform operational discretion. Thus, my work illustrates how the potential influence of workers' divergent ideologies – from pro-client social workers to black-and-white efficiency engineers – is mitigated by the convergence that is produced by their common method of weighing seemingly disparate legal and managerial norms and by their individual performance of operational discretion to an audience of human and non-human decision-makers. Further, my research indicates that we may need to reconsider the notion of a singular (human) decision-maker and the constitutive features of an administrative “decision” in light of the layers of human decision-makers and the influence of new decision-making software that I have observed in Ontario Works. Though these findings may be new, they point to longer-standing trends in administrative governance broadly, including the implementation of new public management techniques, the rule saturation of last-resort assistance programs, and the increasing automation of front-line decision-making tasks. My work suggests some of the complex outcomes that these trends may produce for administrative officials and the members of the public who rely on them for assistance, while also providing a basis for further research by legal and socio-legal scholars alike.

8.2. Future Research Questions

My findings are a distinctive contribution to the study of administrative discretion that can, and should, be taken up by legal and socio-legal scholars. Though the methods common to each scholarly group may lead them to overlook some features of discretion in contemporary administrative regimes, my work also suggests a number of avenues that both sets of scholars may pursue to reconceive discretion as well as institutional decision-making. This exploration will help to ensure that legal (theoretical, doctrinal) and socio-legal accounts better capture and respond to the variety of decision-making arrangements used by administrative agencies today. Below, I plot the trajectory of this research agenda by detailing five areas for future research.

First, my findings highlight elements of procedural fairness doctrines that may need to be reconsidered, particularly the principle of non-delegation and the related rule that the one who decides a matter must hear it. The non-delegation principle stipulates that an administrative body

to which a power is delegated by statute cannot further delegate that power unless the statute explicitly or implicitly authorizes it to do so.⁴⁵⁸ Though this principle is often applied flexibly in response to the specific legal and administrative context at issue in a particular judicial review proceeding, it remains unclear exactly how far decision-making powers can be distributed.⁴⁵⁹ My research suggests that the dispersal of decision-makers within the Ontario Works program may make non-delegation almost meaningless, which raises the question of where the outer limits of the non-delegation rule might exist. Likewise, my findings suggest a need to reconsider the rule that the one who decides a matter must hear it. As with non-delegation, it is uncertain how this doctrine might respond to the dispersal of decision-makers I have found in the Ontario Works program, and especially to the volume of decision-making functions that are increasingly ascribed to third-party software in contemporary catch-all bureaucracies. In an era where fragmented and non-human decision-making techniques are becoming ubiquitous, what does (or what should) this principle stand for? Socio-legal academics have begun considering related questions about the impact of dispersed decision-making on contemporary governance, including its influence on authority, accountability, and the bounds of “public” agencies.⁴⁶⁰ Legal scholarship on related matters is at very early stages, however.⁴⁶¹ Much work remains to be done to more deeply consider how administrative law doctrine and foundational legal principles might evolve in light of these contemporary institutional arrangements.

Second, we may need to rethink the effectiveness of conventional consistency-ensuring techniques and how to balance consistency against the value of independence in administrative decision-making. Mechanisms such as consultative “full board” meetings, precedents, and lead cases are commonly used by administrative tribunals, boards, and other decision-makers

⁴⁵⁸ Sara Blake, *Administrative Law in Canada*, 5th ed (Markham, ON: LexisNexis, 2011) at 143-46.

⁴⁵⁹ David Mullan, *Administrative Law: Cases, Text, and Materials* (Toronto: Emond Montgomery, 2003) at 494-95.

⁴⁶⁰ Hannah-Moffat, Maurutto & Turnbull, *supra* note 423; Lyria Bennett Moses & Janet Chan, “Using Big Data for Legal and Law Enforcement Decisions: Testing the New Tools” (2014) 37:2 UNSW L Rev 643; Chiarello, *supra* note 455.

⁴⁶¹ Some of these matters were discussed at the recent *WG Hart Legal Workshop 2017: Law, Society, and Administration in a Changing World* (held at the Institute of Advanced Legal Studies, University College London, 10-11 July 2017), but they are still relatively new for administrative law scholars.

typically one step removed from the front lines or “street level” of a given administrative regime. These consistency-promoting tools tend to be most often scrutinized on judicial review (and, as a result, they are top-of-mind for doctrinal legal scholars).⁴⁶² Yet, as my research suggests, such mechanisms may be less effective at ensuring coherence among decision-makers when compared to the convergence produced by a combination of aggregated decision-making, peer pressure, and the methodical weighing of shared legal and institutional norms within municipal social services offices. It may be especially fruitful for doctrinal legal scholars and socio-legal scholars of regulation to exchange knowledge on this issue. As my findings indicate, a range of institutional, managerial, and technological devices may be highly effective at constraining administrative decision-makers; legal scholars would do well to address the regulatory force of these mechanisms and conceptualize whether or how administrative law doctrine might respond. Because relatively few researchers have studied the behind-the-scenes workings of Canadian tribunals or boards,⁴⁶³ cross-disciplinary engagement on these matters will be essential for scholars to fully grasp how such bodies square decision-making independence with the need to achieve coherent and consistent decisions at the institutional level. Further, such studies might explore whether there is a principled basis for distinguishing the independence generally expected of tribunal-level decision-makers from that which we might demand from those working at the front-lines of a benefits-delivering agency.

Relatedly, the doctrine of fettering discretion is a third matter that legal scholars should revisit in light of the contemporary administrative realities I have detailed above. Fettering exists when administrative officials treat a policy tool as binding, contrary to the discretion-permitting provisions in the related legislative scheme. This binding quality can be determined based on a

⁴⁶² *Consolidated Bathurst*, *supra* note 316; *Tremblay*, *supra* note 316; *Ellis-Don*, *supra* note 316. Full board meetings are common practice and allow decision-makers to discuss possible consequences of interpreting the legal framework in which they operate in one way or another, allowing members to share their professional decision-making experience with their colleagues. Lead cases are another consistency mechanism that appellate courts have commented on, particularly in the context of immigration: *Geza v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, [2006] 4 FCR 377.

⁴⁶³ But see S Ronald Ellis, *Unjust by Design: Canada's Administrative Justice System* (Vancouver, BC: UBC Press, 2013), which is largely a first-hand account of Ellis' experience working in labour relations bodies, and is thus mostly anecdotal. See also Laverne Jacobs, *Fashioning Administrative Independence at the 'Tribunal' Level: An Ethnographic Study of Access to Information and Privacy Commissions in Canada* (PhD Thesis, York University, Osgoode Hall Law School, 2009) [unpublished].

policy’s wording, but it can also be gleaned from a policy’s effects; that is, whether a policy practically eliminates the space in which decision-makers might otherwise perform operational discretion. In some cases, courts have held that seemingly-mandatory guidelines did not fetter administrative officials’ discretion when such tools reminded officials to consider granting an exception to a guideline’s general rules.⁴⁶⁴ In others, mandatorily-worded policies have been found to be improper fetters where the legislative scheme required that an administrative official take a flexible approach.⁴⁶⁵ New regulatory technologies, including SAMS, compel us to rethink the bounds of this doctrine and the principles on which it is based. SAMS and similar programs may impose “black-and-white” interpretations of flexibly-worded statutory provisions as their algorithms generate decisions. Further, as my research indicates, these tools may also concretely influence how front-line workers understand the margin of manoeuvre that a legislative scheme affords them so that these workers begin to perceive and apply statutory provisions as “black-and-white” rather than as flexibly worded. Judicial review of these technologies is unlikely in the near future, especially because those individuals who rely on catch-all bureaucracies, which are the earliest adopters of these tools, rarely engage in complex and lengthy administrative litigation.⁴⁶⁶ Legal scholars should nevertheless begin to analyze the fundamental transformation wrought by such tools, as well as their potential impact on administrative law doctrines and their influence on administrative decision-making processes.

Fourth, my findings suggest a need to reconsider the administrative law concepts of “reasonableness” and “reasons” to ensure that they speak to the decision-making realities of contemporary administrative agencies. At present, it is relatively clear that, where the legislature has explicitly and tacitly permitted administrative officials to perform operational discretion, the substance of discretionary administrative decisions will generally be reviewed using a deferential reasonableness standard.⁴⁶⁷ In Canada, recent appellate court decisions such as *Dunsmuir v New*

⁴⁶⁴ *Canada (Minister of Citizenship and Immigration) v Thamothers*, 2007 FCA 198, [2008] 1 FCR 385.

⁴⁶⁵ *Ishaq v Canada (Citizenship and Immigration)*, 2015 FC 156, 381 DLR (4th) 541, aff’d 2015 FCA 194.

⁴⁶⁶ Lens, “When Citizens (Don’t) Complain,” *supra* note 453. As noted in Chapter 7, social assistance programs are early adapters of this software.

⁴⁶⁷ *Dunsmuir*, *supra* note 90 at paras 51, 53.

Brunswick have clarified that the process used to produce reasons is as important as the substance of the reasons themselves. On judicial review, courts must consider both the method by which reasons were articulated and the substantive decision-making outcome as key sources of evidence as they determine whether a given administrative decision meets the deferential reasonableness standard of review.⁴⁶⁸ The decision-making process is evaluated in search of justification, transparency, and intelligibility, while the actual outcome is scrutinized to determine whether it falls within a range of reasonable outcomes. Given that the reasonableness standard of review would likely apply to many of the front-line decisions examined throughout my thesis, it is uncertain what “reasonableness” might require in this context. Further, it remains unclear whether the reasonableness required on judicial review would differ from the reasonableness practices that I have found within the Ontario Works program. As my research demonstrates, reason-giving is a process that forces (human) decision-makers to articulate how they reconcile norms and ultimately justify their decisions to others. However, unlike the reasonableness of administrative law doctrine, the reasonableness practiced within Ontario Works offices produces justifications designed for an audience of administrative insiders – coworkers, supervisors, auditors, and even software – rather than clients who are directly affected by a particular decision. I do not mean to suggest that this phenomenon is unique to the Ontario Works program, as insider “reasons” for a decision have been used to represent the reasons for a decision in leading administrative law cases such as *Baker*.⁴⁶⁹ A relatively open question remains, however, about whether the degree to which concepts of reasons and reasonableness do, or should, vary depending on the intended audience for whom “reasons” are created: a client, coworkers, auditors, or others. Is the forced articulation of norms and justification that reason-giving produces sufficient to meet the principles that underlie the reasonableness standard of review, no matter the audience, or does the intended audience matter?

Finally, my work raises related questions about the rule of law and governance, which should be of interest to both legal and socio-legal scholars. Just as my research shows that many decision-makers together produce institutional decisions, it also suggests that legislation is updated by an

⁴⁶⁸ *Dunsmuir*, *ibid* at para 47.

⁴⁶⁹ *Baker*, *supra* note 11.

increasingly multifaceted and diffuse executive branch of government. Others have long noted this reliance on the executive rather than the legislature to modify laws through institutional-managerial means rather than through formal statutory amendment procedures.⁴⁷⁰ Yet, my research reveals a degree of segmentation and interaction between the executive's many arms, and alludes to shifting relations between a multi-armed executive and the legislative and judicial branches of government that have yet to be fully theorized. A pluralist view of the responsibilities of each branch of government is not novel,⁴⁷¹ but the degree of fragmented executive authority observed in my fieldwork textures others' accounts of contemporary decentralization and privatization.⁴⁷² More work remains in order to grasp how multiple executive bodies do, or should, relate to one another. Legal scholars concerned with how power and responsibility are balanced between different branches of government would do well to more closely consider how a panoply of executive representatives – municipal caseworkers, MCSS policy makers, the provincial Auditor General, private software developers – are performing different executive functions in relation to the same overall statutory scheme. This exercise, in turn, may require rethinking the bounds of administrative law and the principles that underlie its doctrines, particularly in relation to Ontario Works and similar institutional contexts. Likewise, socio-legal scholars may need to reconsider how governmentality functions; that is, how the state, framed broadly, exercises control over its members now that human and automated mechanisms are increasingly intertwined in service to state agencies. As my research suggests, these combinations of administrative actors may take divergent approaches and produce contradictory outcomes, causing governmental crises at and behind agency front lines. Further, the fragmenting of the executive also raises questions about which of its arm(s) can claim to have interpretive authority and expertise in animating legislative frameworks, such as that which

⁴⁷⁰ Mashaw “Agency Statutory Interpretation,” *supra* note 13; Cass R Sunstein “Is Tobacco a Drug? Administrative Agencies as Common Law Courts” (1998) 47:6 *Duke LJ* 1013; Lipsky, “Bureaucratic Disentitlement,” *supra* note 326.

⁴⁷¹ See, for instance, Arthurs' account in *Without the Law*, *supra* note 358.

⁴⁷² See Harry W Arthurs, “The Administrative State Goes to Market (and Cries ‘Wee, Wee, Wee’ All the Way Home)” (2005) 55:3 *UTLJ* 797; in the United States, see Jody Freeman & Martha Minow, eds, *Government by Contract: Outsourcing and American Democracy* (Cambridge, MA: Harvard University Press, 2009); Gilliom, *supra* note 22.

governs Ontario Works. As my thesis demonstrates, front-line workers display a degree of expertise in navigating legal provisions and policies (though they also take some rules to be more rigid than their written text suggests). Yet, my research also indicates that other administrative actors, including policy writers, the Auditor General, and technicians who translate legislative rules into software algorithms, may also claim varying degrees of interpretive expertise.

Grappling with this problem is essential if legal and socio-legal scholars are to produce work that addresses contemporary administrative realities. Indeed, the technical elements of administration – regulations, policies, software, and managerial arrangements – may have a greater influence over how legislative frameworks function today than either legislative amendments or refinements to administrative law doctrines.

Although my findings may centre on matters that are outside of the chief concerns of doctrinal and theoretical legal scholars, they should nonetheless provide these scholars with important insights. Further, doctrinal and theoretical scholars would do well to undertake some of the explorations charted above because courts will likely have to grapple with at least some of these matters in the future. Further, if legal scholars are concerned with the conceptual integrity and contemporary relevance of broad legal principles, such as the rule of law, reasonableness, and procedural fairness, they will be fascinated by how decisions are being made, and how operational discretion is being performed, in contexts that are largely outside of the (re)view of courts. This knowledge may inspire legal scholars to adjust how they approach legal doctrines, and may even reaffirm some of the principles underlying these doctrines. Either way, this exercise remains crucial if administrative law principles are to continue to be useful guides for the variety of decision-making realities, as well as the new challenges, that play out in contemporary administrative settings.

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Appendices

A. Methods

My research draws on other socio-legal studies of front-line workers as well as my own critical qualitative study of decision-making in the Ontario Works program. Socio-legal research is characterized by its common objects of study – “legal institutions, practices, and meanings”⁴⁷³ – and its methodological pluralism. Socio-legal scholars draw from, and may even combine, the research techniques of a range of disciplinary traditions. Most commonly, these methodological traditions include archival research (history); participant observation and interviewing (anthropology, qualitative sociology); and survey and statistical analysis (quantitative sociology, political science). Methods that are broadly described as “qualitative” may mix elements of all the above approaches, including archival research, documentary analysis, formal interviews, and immersive fieldwork in which a researcher, over months or years in the field, becomes “saturated” with firsthand experience of their research site.⁴⁷⁴ Critical or reflexive qualitative studies share a common goal: they aim to understand their research setting from the perspective of its members by interpreting the meanings, themes, and motifs arising from formal interactions (interviews) and more casual encounters (meetings, site visits, participant observation).⁴⁷⁵ To this end, my project relied on in-depth interviews to provide the rich data needed to explore how discretion functions behind the front-lines of a rule-bound agency. Despite the known limitations of interviewing, it remains the best method for grasping the complicated, multiple perspectives of individuals within the same setting.⁴⁷⁶

⁴⁷³ Harry Arthurs & Annie Bunting, “Socio-Legal Scholarship in Canada: A Review of the Field” (2014) 41:4 *JL & Soc’y* 487 at 488.

⁴⁷⁴ Barney Glaser & Anselm Strauss, *The Discovery of Grounded Theory* (Chicago: Aldine, 1967).

⁴⁷⁵ Michael Burawoy, “Critical Sociology: A Dialogue Between Two Sciences” (1998) 27:1 *Contemporary Sociology* 12 at 16-17.

⁴⁷⁶ Michèle Lamont & Ann Swidler, “Methodological Pluralism and the Possibilities and Limits of Interviewing” (2014) 37 *Qualitative Sociology* 153.

Critical qualitative research is particularly apt for my study of front-line workers because it constructs knowledge inductively. Rather than test a theory against empirical data, the insights of critical qualitative research are built upwards from the data, layer by layer, using a reflexive analytical approach.⁴⁷⁷ The goal is to build theory gradually from empirical materials rather than impose a theory on a set of data. Though my thesis responds to theoretical insights, such as Hart's concept of discretion, Cartier's discretion as dialogue model, and Silbey & Huising's notion of sociological citizenship, these responses are rooted in my qualitative empirical data.

My study used reflexive qualitative methods because of the dearth of empirical research detailing how front-line workers locate and use discretion as they deliver Canadian public benefits programs.⁴⁷⁸ Though such studies are common elsewhere, particularly in the United States⁴⁷⁹ and United Kingdom,⁴⁸⁰ almost no one has examined how front-line workers use discretion in the Canadian context. Instead, scholarship tends to focus on benefits recipients' experiences⁴⁸¹ or the history of early welfare programs⁴⁸² rather than how benefits-delivering institutions animate welfare laws.

⁴⁷⁷ Glaser & Strauss, *supra* note 474.

⁴⁷⁸ But see Baker Collins, *supra* note 165, though she studies discretion from the perspective of social work practitioners and is less concerned with socio-legal questions such as social construction of law. Sossin, "Call Centres," *supra* note 56 considered socio-legal issues, but his methods were fluid and his findings more tenuous.

⁴⁷⁹ American studies include Soss, Fording, Schram, *Disciplining the Poor*, *supra* note 93; Oberfield, *supra* note 207; Watkins-Hayes, *supra* note 94; Jewell *supra* note 125; Gilliom, *supra* note 22. Others have done mixed studies, combining welfare administration with other social programs: Maynard-Moody & Musheno, *supra* note 175; Lipsky, *Street-Level Bureaucracy*, *supra* note 15; Prottas, *supra* note 15.

⁴⁸⁰ Studies of UK welfare and housing support programs include: David Cowan & Morag McDermont, *Regulating Social Housing: Governing Decline* (London: Routledge-Cavendish, 2006); Sainsbury, "Welfare to Work," *supra* note 11; Partington, "Rules and Discretion," *supra* note 22; Cowan & Halliday, *supra* note 161; Halliday, *JR and Compliance*, *supra* note 42; Carol Harlow, "Discretion, Social Security and Computers" (1981) 44 Mod L Rev 546.

⁴⁸¹ Mosher, Evans & Little, *supra* note 126; Herd & Mitchell, *supra* note 420; Herd, Mitchell & Lightman, *supra* note 24.

⁴⁸² Gavigan & Chunn, *supra* note 34.

Data Collection

I ground my claims about how discretion operates at and behind the front-lines of Ontario Works delivery in a variety of data. My research thus draws on a range of sources, including semi-structured interviews with front-line staff, on-site observation, meetings with management staff, and relevant documentary sources including local and provincial policies, government reports, commissioned studies, and statutory texts.

I conducted research in five social services offices across two municipalities in southern Ontario.⁴⁸³ These research sites were chosen because of their varied geographic locations (urban, suburban, rural), local economies (from fast-gentrifying neighbourhoods with multiple nearby employment and training opportunities to communities marked by persistent underemployment and poverty), and office sizes (large, central offices and smaller, satellite offices). Each office also appeared to have an internal culture rooted in its history, geographic location, managerial approach, and institutional design. While these cultures are not the focus of my thesis, I took them into account when evaluating the generalizability of my findings. Despite these varied local cultures, the workers within each office expressed similarly complex approaches to performing operational discretion.

My in-depth, semi-structured interviews with front-line workers began in the summer of 2015. These interviews typically lasted between one-and-a-half to two-and-a-half hours. I sought to interview as many front-line workers as possible, and recruited participants through workplace emails as well as announcements about my project at team meetings. In total, I conducted formal

⁴⁸³ Access to the institutions in which I conducted my research was more challenging than I initially anticipated. Unlike other researchers who have successfully obtained the fly-on-the-wall access necessary for a deep ethnographic study, I was granted more intermittent access to research sites. Access was facilitated by senior level policy staff, who helped me navigate the circuitous path to receive the required approvals from department directors. In all, approximately one year elapsed between the date on which I first requested access to municipal social services offices and when I was formally approved to begin recruiting research participants. At the request of one municipality, I presented my project proposal to senior policy advisors and an Assistant Deputy Minister with the Province of Ontario's Ministry of Community and Social Services to ensure that they had no concerns with the scope of my research. I also contacted the public-sector unions responsible for staff at my research sites to discuss my project, though I received no response. In addition, I prepared memoranda describing my project to senior social services department staff and attended meetings with these staff where I presented my project and received valuable feedback. Based on this feedback, I reformulated my research questions to more broadly investigate discretion. This year-long journey to gain access provided me with crucial opportunities to learn how management-level and senior policy staff understood front-line workers' discretion and to receive their feedback on my study design.

in-person interviews with 25 front-line workers who confidentially volunteered to participate in my research. Interviews were held, according to my research participants' choice, in a private meeting room at their workplace or at a nearby coffee shop or restaurant. All of these interviews were recorded and transcribed, except for two.⁴⁸⁴ Following each interview, I recorded additional notes and observations about the interview, office, and interviewee, replacing each interviewee's name in my notes with a pseudonym and removing any other information that might identify my research sites or the coworkers mentioned by interview participants. I personally transcribed all of my interviews and field notes. Though this was a time-consuming endeavor, it allowed me to review, compare, and analyze my interviews, meetings, and field observations more thoroughly.

At the beginning of each interview, I explained the parameters of my study, answered any questions, and ensured that participants reviewed and signed consent forms (Appendix C). I also provided participants with an information sheet that included information about my study and my contact information (Appendix B). Following this, interviews followed a guide (Appendix D), which included open-ended questions about participants' background, how they came to work for the municipal social services department, and their history working in this context. I asked workers about what a typical workday was like, the details of their present role and how it compared to previous roles. I would then ask workers to describe recent situations in which they felt like they had some discretion, and would inquire as to how these situations compared to decisions in which they felt they had little or no discretion. I also inquired about decisions that were easy or straightforward and those which provided no clear answer. These questions were followed by open-ended conversations about particular examples that my participants had raised to illustrate their points. I took cues from my participants so that interviews flowed towards the particular decision-making dilemmas that they were most interested in discussing. My interest was not to learn whether workers were applying laws "correctly" or not, but to better understand how they approached interpreting Ontario Works' legal and regulatory framework, and how they

⁴⁸⁴ These two participants requested that our discussion not be recorded. I took detailed handwritten notes of these interviews, which I typed up immediately afterwards.

addressed the demands placed on them by their managers and benefits recipients.⁴⁸⁵ This flexible, open-ended interview style allowed me to learn rich details about how caseworkers perform and operationalize discretion, which serves as the basis for Chapter 3, which norms they rely on when making decisions, discussed in Chapter 4, and how decision-making for the same client was dispersed between many different actors, which is the foundation for Chapters 5 and 6. Further, this approach revealed the intricacies of newly-introduced case management software, the Social Assistance Management System (SAMS), which further enriched my findings about aggregated decision-making in Chapter 7.

My research participants represented a cross-section of those working in each municipal social services department. Participants varied in age, citizenship status, ethnicity, and vocational experience; the majority self-identified as women. To ensure that I was engaging participants who were generally representative of the range of workers in each local office, in each interview I provided caseworkers with an opportunity to compare their approach to that of their colleagues. By doing so, I was able to assess how representative my participants were and, in some cases, determine whether I should recruit further participants. This question also provided front-line workers with an opportunity to explain their own approach to Ontario Works, which helped me discern whether they divided along the lines of social workers and efficiency engineers identified by other socio-legal scholars. Allowing participants to describe their own approach in relation to their coworkers also enabled me to analyze my data with their self-identification in mind, and to tease out how their accounts of discretionary decision-making complemented or contradicted their descriptions of decision-making practices at other points during the interview. While some explicitly identified as “pro client” rule benders and others as “black-and-white” rule enforcers, closely reading and coding my data revealed that many participants fell somewhere between these two poles.

To supplement interview data, I consulted with management staff to gain contextual information about my research sites, including office design, history, client demographics, and caseload organization. I recorded these interactions in fieldnotes. I also reviewed government-commissioned reports on Ontario Works, Auditor General reviews of the same program, and

⁴⁸⁵ Prottas, *supra* note 15, describes workers acting between the competing demands of each group.

other empirical and historical studies of welfare programs in Canada, the United States, and the United Kingdom.

Data Analysis

As I drew close to reaching a point of “saturation” during my data collection – the point at which themes and responses begin to repeat from one interview to the next – I turned my focus to data analysis. However, there was some overlap between my data collection and data analysis. After each round of fieldwork, I coded my fieldnotes and interview transcripts, developing emergent themes and keywords that would guide my next round of empirical research. As my research continued, I refined my coding to build on key themes drawn from my data:⁴⁸⁶ locations of discretion; norms guiding discretion; layering of decision-makers; and the influence of regulatory technologies. I created separate documents containing references from various interviews on each theme. To preserve the context for the reference, one or two surrounding pages of interview text were also copied and included in these theme documents. Using these documents, I prepared a series of research memos tracing how these themes played out and interacted with one another, and where front-line workers’ accounts converged or diverged with one another. These research memos formed the basis of my thesis chapters.

To manage the risk of bias and ensure the internal validity of my research findings, I used two strategies common to reflexive qualitative research: member checks and triangulation.⁴⁸⁷

Member checks are a process by which researchers share early stage findings with their research participants to evaluate the plausibility of their conclusions. These checks can be done after data collection is complete,⁴⁸⁸ or at different stages of data collection to guide further empirical research.⁴⁸⁹ My study used the latter approach, and I shared some of my early understandings

⁴⁸⁶ Glaser & Strauss, *supra* note 474.

⁴⁸⁷ Matthew B Miles, A Michael Huberman & Johnny Saldana, *Qualitative Data Analysis: A Methods Sourcebook*, 3rd ed (Thousand Oaks, CA: Sage, 2014); Bernard P Cohen, *Developing Sociological Knowledge: Theory and Method* (Chicago: Nelson-Hall, 1989).

⁴⁸⁸ Calvin Morrill & Gary Alan Fine, “Ethnographic Contributions to Organizational Sociology” (1997) 25:4 *Sociological Methods & Research* 424 at 440.

⁴⁸⁹ Watkins-Hayes, *supra* note 94 at 252-53.

with participants as I collected further data so that they could comment on whether these findings were representative or, alternatively, whether they were based on rare occurrences. Through these interactions, I received feedback from many different front-line workers as to the reliability of my findings and how they related to ongoing shifts within their social services offices. This approach helped to ensure that my findings mapped onto how my research participants understood discretion and clarify where participants' accounts diverged from one another.⁴⁹⁰

My study also used triangulation, which involves assessing data collected from one source (i.e., interviews) against other evidentiary sources (i.e., field notes, policies, government reports, other empirical studies). Reflexive qualitative researchers commonly triangulate interview data and fieldwork observations against other sources, such as organization's internal policies, external government reports, secondary studies, and the perspectives of outsiders.⁴⁹¹ To triangulate interview and site visit data, I reviewed a range of documentary evidence, including internal policies and decision-making guides; Ontario Works' legislative framework; provincial reviews of social assistance programs (including Auditor General reports and arms-length commission reviews); union reports about the effects of regulatory technologies on front-line employees; and earlier studies of welfare reform in Ontario. By incorporating these checks into my research, I was able to ensure that my results were not just legitimate vis-à-vis my research sample, but that they also had a broader validity.⁴⁹²

As with any empirical study, my research has its limitations. While restricting my study to two municipalities and using volunteer participants may limit the generalizability of some of my findings, the breadth of my questions, and the similar legal, policy, and managerial-technical mechanisms within each office allow for reasonable generalizations from many of my findings. Despite its limitations, my research offers insights that might be more broadly generalizable. First, my findings may be specific to the municipalities in which I conducted my research. Both municipalities were identified as "client friendly" by participants, compared to other nearby

⁴⁹⁰ Martyn Hammersley & Paul Atkinson, *Ethnography: Principles in Practice*, 3rd ed (London: Routledge, 2007).

⁴⁹¹ Morrill & Fine, *supra* note 488 at 440.

⁴⁹² Miles, Huberman & Saldana, *supra* note 487.

municipalities, which participants described as much less generous. Further, my findings about professional identity and norms may not correspond entirely with the dynamics in other municipal offices. However, others have found that caseworkers fluctuate between pro-client and black-and-white poles in Ontario Works offices located elsewhere.⁴⁹³ Further, as a number of chapters note, even though participants characterized their offices as environments of discretion, these same individuals perceived Ontario Works' rules to be narrower than their wording suggests, which indicates that my research sites may not have been as client friendly as participants understood them to be.

Second, because my study relied on volunteer participants, my findings may present a picture of Ontario Works administration that skews towards "helpful" caseworkers. This limitation might arise if my volunteer research participants represent a subset of caseworkers who are more helpful or professional as compared to their peers (based on the assumption that this subsection of workers may be more inclined to participate in a qualitative research project than those concerned with efficiently managing their caseloads and going home at the end of their shift). This limitation is always a risk in qualitative research that relies on voluntary participation. However, by asking probing questions into how workers self-identified and how they compared themselves to their colleagues, I was able to confirm that I had a broad cross-section of participants ranging from "pro-client" to "black-and-white" decision-makers, and many in between these two poles.

Finally, although my sample size was relatively small, it did not prevent me from reaching saturation early on in my data collection. Further, a smaller study allowed me to obtain "thick" descriptive data which included a rich variety of perspectives on discretion and Ontario Works administration. As noted above, triangulating my findings with other evidentiary sources also mitigated the risk that my sample size was too small to provide valuable or reliable findings.

A Final Note on Interview Text

Throughout, I have sought to preserve the voices of my research participants while maintaining their anonymity. Voices are mediated in many ways during an empirical research project,

⁴⁹³ Baker Collins, *supra* note 165.

however, and it is romantic to suggest that a researcher can present them in an untampered form.⁴⁹⁴ In preparing my thesis, I had to make decisions about quoting research participants, and particularly about how and when to edit what participants said. Yet, I also wanted to ensure that participants' reflections on discretion retained the uncertainty or conviction that came through in our in-person interviews. I have therefore decided to strike a balance between minimally editing research participants' answers to provide clarity and retaining each speaker's way of characterizing their answers. For instance, where participants used ambiguous pronouns ("they," "you"), I have inserted which individual(s) each participant refers to. I have trimmed some terms, such as "like" or "you know," that may make a participant's description of discretion confusing. Where appropriate, I have retained some of these terms to communicate the hesitation with which some front-line workers described how they used discretion or decisions that they found particularly challenging. Similarly, in many cases I have retained grammatical errors, as I believe that this use of language reveals relevant details about each research participant.

While transcribing interviews, I took care to mark the spaces, emphases, and gestures that occurred as research participants described their decision-making processes to me. These indicators are preserved in the interview quotes that appear below. Ellipses indicate places where research participants paused in their answers for at least two seconds, with longer ellipses signaling longer pauses. Italicized text in interview excerpts indicates emphasis placements by each research participant. Gestures, laughs, and sighs appear in square brackets in interview excerpts and contribute to the meaning of each section of selected text.

To preserve the anonymity of my research participants, proper names, office locations, and the titles of certain local benefits are not identified. Any names in interview excerpts have been replaced with pseudonyms.

⁴⁹⁴ Ewick & Silbey, *Common Place of Law*, *supra* note 17 at 258-60. Blake D Poland, "Transcription Quality" in Jaber F Gubrium & James A Holstein, eds, *Handbook of Interview Research: Context & Method* (Thousand Oaks, CA: Sage, 2002) 629.

B. Participant Information Sheet

This research is being conducted by myself, Jennifer Raso, as part of my doctoral research under the supervision of Professor Denise Réaume at the University of Toronto's Faculty of Law. I am seeking the participation of caseworkers at your office who have at least 6 months of experience working as caseworkers.

What is this study about?

My research investigates the everyday decision-making processes that take place in social services offices and considers how such processes can be guided by broad values such as fairness, reasonableness and respect. I focus on social assistance caseworkers in particular and how caseworkers make routine eligibility decisions regarding social assistance benefits. The challenging nature of caseworkers' jobs is what interests me. For instance, when making decisions, caseworkers must interpret and apply numerous rules, regulations and policies while bearing in mind the significant impact these decisions have on those reliant on social assistance. In cases where there are competing policies, or many benefits and program options to choose from, there may be no single correct outcome. By studying caseworkers, I hope to better understand how difficult decisions are made in demanding circumstances.

I have selected your office because it is located in one of the three geographic areas that my study focuses on. I plan to interview 6-10 caseworkers at your office to better understand the on-the-ground realities of your decision-making. To gather background information about your office, such as the number and diversity of clients it serves, how many caseworkers are employed, I will also be interviewing 1-2 management staff.

What commitment is involved?

The study itself consists of one-on-one interviews with caseworkers. Interviews will be approximately one-hour in length and will take place in a private area in your workplace (such as a meeting room) during a lunch break or at a time convenient for you. During this interview, I will ask questions about your experience making decisions about client eligibility for social assistance benefits. After conducting this first interview, I may have some follow-up questions to clarify my understanding of how social assistance decision-making takes place in practice. If this is the case, I will contact you to discuss the possibility of arranging a brief second interview at your convenience.

Although monetary compensation is not available, refreshments will be offered to you during the interview session.

Is my participation voluntary?

Yes. Although it is greatly appreciated if you answer interview questions as candidly as possible, you are not obliged to answer any question that you find objectionable or that makes you uncomfortable. You may withdraw from this study at any time. Because all interview transcripts and field notes prepared during this study will be anonymized (i.e. they will not contain any identifying information of caseworkers or third parties), it may be impossible to remove your data from research results depending on the timing of your withdrawal from the study.

What risks and benefits are associated with this study?

Your responses to interview questions and my field notes will be anonymous and kept confidential. All personal information identifying you, your co-workers and your clients recorded in interviews will be removed from interview transcripts and will not be recorded in field notes. I will identify individuals using pseudonyms and will not reference the location of my research in field notes or final reports.

Responding to questions about how decisions are made on the job may elicit many different reactions from study participants. You may recount feelings of frustration or disappointment. However, caseworkers' work is often misunderstood and undervalued. As a result, you may appreciate the chance to share your experience as part of a study that sheds light on what you do and why you do it.

What will happen to the research data?

Research data, including interview transcripts and field notes, will only be accessible to me and my supervisor, Professor Réaume. This data may also be published in academic journals, presented at conferences and will appear in my doctoral thesis. Any such presentation or publication will not breach individual confidentiality, as they will not include names, office locations or other information that could identify research participants. I will make a summary of my research results available to all participants.

What if I have concerns?

Any questions you may have about your participation in this study can be directed to me at jen.raso@mail.utoronto.ca or at [telephone number redacted]. Any concerns about your rights as a participant in this study may be directed to the Office of Research Ethics at ethics.review@utoronto.ca or 416-946-3273.

Your interest in participating in my study is greatly appreciated.

C. Participant Consent Form

Name (please print clearly): _____

1. I have read the Letter of Information and have had any questions about this study answered to my satisfaction.
2. I agree to participate in the study called “Administrative Justice: Guiding Caseworker Discretion”. This includes participating in a one-on-one interview of approximately one hour in length and in a possible follow-up interview, to be arranged at my convenience. Though I will not be offered monetary compensation for my participation, refreshments will be provided during the interview.
3. My participation in this study is voluntary and I may withdraw at any time. Should I withdraw, I may choose to remove my data (i.e. interview transcript, field notes) from the study. However, I acknowledge that if I withdraw after my data has been completely anonymized it may be impossible to identify and separate my data from the research results.
4. Every effort will be made to maintain the confidentiality of the data now and in the future. All interview transcripts and field notes will be anonymous, having the personal information of myself and third parties, as well as geographic details, removed. Only the researcher, Jennifer Raso, and her supervisor, Denise Réaume, will have access to interview transcripts and field notes. The data may be published in academic journals, presented at conferences and will be included in Jennifer Raso’s doctoral thesis. Any such presentation or publication will be of general findings and will not breach individual confidentiality as presentations and reports will not include names, office locations or other information that could identify research participants. Should I be interested, I understand that I am entitled to a copy of the findings.
5. If I have any questions, concerns or complaints I may contact Jennifer Raso, at jen.raso@mail.utoronto.ca; Professor Denise Réaume, at d.reaume@utoronto.ca. Should I have questions about my rights as a participant I may contact the University of Toronto’s Office of Research Ethics at ethics.review@utoronto.ca or 416-946-3273.

I have read the above statements and freely consent to participate in this research:

Signature: _____

Date: _____

D. Interview Guide

Introductory Statement: Thank you for agreeing to participate in my study. I am researching how caseworkers go about making decisions, particularly in situations where they feel that they have some amount of freedom or discretion to choose between options. Such situations may arise when caseworkers are faced with competing or overlapping policies, or when they can recommend (but must choose between) a number of different services and benefits for a particular client. Accordingly, I will ask you a series of questions to help me better understand what you do as a caseworker and the types of decisions that you make. Some of these will cover more specific aspects of your work (for instance, how long you have worked as a caseworker, your caseload, training, etc.), while others will provide you the opportunity to share your decision-making experiences with me in greater detail.

- 1) How long have you worked as a caseworker? What drew you to this type of work?
- 2) What training did you undertake before becoming a caseworker? What type of training do you receive through your workplace?
- 3) Please tell me about your work as a caseworker. What does a typical day look like? How many cases/clients are you responsible for? How would you characterize the client population that you work with?
- 4) Walk me through what happens when you meet a client for the first time [or] when someone applies for Ontario Works for the first time.
- 5) How do you go about deciding whether someone is eligible for Ontario Works? What sources do you look to as guides in making these decisions (i.e. forms, policies, rules, checklists, electronic databases/software, other co-workers or managers)?
- 6) What happens if there are barriers to communicating with a client? What if a client seems confused or does not have the information they need to apply for certain benefits?
- 7) Please describe the process you follow when deciding whether someone should receive additional benefits (i.e. Employment Related Expenses, Housing Stabilization Fund, Special Diet Allowance). How are these benefits brought to a client's attention?
- 8) Please describe a time when you had to make a complicated decision about benefits, for instance, where it was unclear which benefit might best meet a client's needs. How did you approach this issue?
- 9) In the situations that we have just discussed, what sort or amount of discretion do you feel that you had? How would you describe the amount and type of discretion that exists within your job? How does it vary? If you feel you have little to no discretion, why is that the case?

10) Based on your experiences (such as your relationships with clients and co-workers, how you go about your work, etc.), how would you characterize your approach as a caseworker?

11) If there was one thing that you would like me, as a researcher, to know about your work as a caseworker, what would it be?

12) Is there something important that we did not cover in this interview?

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