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Policy styles and welfare reform in Britain and the USA: the Conservative-led Coalition government and the Obama administration compared

This article investigates how processes of welfare reform are reflective of different policy styles in the UK and the US. It seeks to assess the extent to which the British and US welfare reform trajectories post-2010 reflected conventional wisdoms regarding the distinctive characteristics of the US and UK policy styles. In particular, it examines whether the traditional vision of a sharp contrast between a rigid, adversarial and conflict-driven style in the US vs. a flexible, consensus-driven policy style in the UK is still useful for characterizing recent reform trajectories in both countries. The empirical analysis shows that the traditional opposition between a highly politicized, rigid and rule-bound regulatory style in the US vs. a flexible, Whitehall-dominated regulatory process with little room for parliamentary scrutiny and legal challenges in the UK remains broadly accurate. In the UK the Conservative-led Coalition governments post-2010 could ignore resistance to cumulative, essentially punitive welfare reform changes in the context of hardening public attitudes towards welfare recipients by adopting a package of regulations with very little parliamentary scrutiny and limited judicial review. In the US, administrative waivers, whereby a federal administrative agency waives statutory requirements, have become major policy instruments to try and implement policy change, but the use of sub-regulatory guidance has become open to political and legal challenge.

Key words: Regulatory style, policy style, welfare reform, waivers, case study.

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Introduction

Although there have been comparative studies of welfare reform in the US and the UK[1], there has been relatively little emphasis on policy making processes in theses analyses. The focus has been more on the evolution of policy making in a specific sector, but not on the national style of policymaking, with some notable exceptions[2]. The present contribution revisits earlier debates regarding the distinctive characteristics of policy processes in the US and the UK, with a specific focus on the period from 2010 onwards.

Empirically, the study focuses on the political and legal challenges surrounding two events: the introduction of work for your benefit regulations by the Conservative-led Coalition government in 2011 in order to intensify the work-conditionality regime for jobseekers, and an information memorandum issued by the Obama administration in July 2012, in an attempt to revisit work requirements for single parent families in receipt of cash assistance.

The case study focuses on the ways in which secondary legislation - statutory instruments in the UK and rule-making activities issued by executive agencies[3] in the US - are being implemented and challenged in different institutional and political contexts. In the US, rule-making is subjected to procedural statutory requirements defined by the Administrative Procedure Act (APA, 1946), especially the informal notice- and-comment process, also referred to as informal rule-making. Executive agencies must issue a notice in the Federal Register. This notice must state the legal authority under which the agency proposes the rule, provide a detail of the language to be used in the proposal or at least a description of the topics. The notice must also include an invitation to any interested persons to submit comments on the rule, accompanied by a cut off date for submitting the comments[4]. In contrast, the law on Statutory Instruments (1946) does not include any obligation on the part

[1] A. Paz-Fuchs, *Welfare to Work: Conditional Rights in Social Policy*, (Oxford: Oxford University Press, 2008). J. Peck, *Workfare States*, (New York: the Guilford Press, 2001).
[2] See T.P. Larsen, P. Taylor-Gooby, P. and J. Kananen, "New Labour's policy style: a mix of policy approaches" ,2006, 35 *Journal of social policy*, 629-649.
[3] C. DeMuth, 'Can the Administrative State be tamed?' 2016, *Journal of Legal Analysis* 8, 121-190.
[4] W. Fox *Understanding Administrative Law*, 6th edtion (New Providence, Mathew and Binder, LexisNexis, 2012), p. 166.

of the Executive to consult interested parties[5]. As Peter Cane observes, "Parliament does not and never will play a truly significant role in scrutinising secondary legislation or in its preparation." [6] The consensual view in much of the comparative political science and administrative literature[7] is that administrative power has been subjected to a much wider range of checks and balances in the American system than in the British one, traditionally characterised by weak parliamentary scrutiny and ex post judicial review (i.e., rules can be challenged in courts after they have been enacted, not before). We would therefore expect policy change in the United States to be more incremental and gradual than in the UK given the structural fragmentation of the American state, itself a product of the separation of powers doctrine. By contrast, the Westminster model is traditionally characterised by a fusion between executive and law-making activities, with comparatively weak parliamentary and judicial control of bureaucratic power. In the UK, administrative rules can be challenged and invalidated on the grounds that ministers have exceeded the powers laid out by the enabling Act, or that ministers have consciously used a statute for a different purpose than the purpose laid by the original statute. Rules can also be invalidated if they are inconsistent with primary legislation, EU law or with the European Convention of Human Rights (ECHR), under the Human Rights Act. However, the grounds on which administrative rules can be challenged are narrowly defined and constrained by the doctrine of parliamentary sovereignty, which, in the words of Peter Cane, makes judicial review a 'very weak form of control of administrative rule-making'[8]

The central question to be addressed is whether the traditional vision of a sharp contrast between a rigid and highly prescriptive policy process in the US vs. a consensus-oriented and flexible policy style in the UK is still useful for characterizing recent welfare reform trajectories. To answer this question, this article examines the contrasting patterns of policy change that have occurred with regard to the provision of income support for socially vulnerable populations in two liberal welfare states, namely the US and the UK. It analyses how the Conservative-led Coalition government (2010-2015) in the UK and the Obama

5 S. Rose-Ackerman 'Executive Rulemaking and Democratic Legitimacy: Reform in the United States and the United Kingdom's Route to Brexit', 2019, *Chicago Kent Law Review*, 94, p. 282.
6 P. Cane, *Controlling Administrative Power* (Cambridge: Cambridge University Press, 2016), p. 295.
7 For an overview of this literature, see A. Edgar, The Westminster Model in Comparative Administrative Law: Incentives for Controls on Regulation-Making, 2019, *U. Tas. L. Rev.*, *38*, p.47.
8 P. Cane, *Controlling Administrative Power* (Cambridge: Cambridge University Press, 2016), p.295.

administration in the US (2009-2016) attempted to implement welfare reform through various regulatory means, and the challenges they faced when doing so.

The research used a qualitative case-study approach based on documentary analysis as well as twenty semi-directed interviews in the US and the UK. In Britain, interviews were conducted with senior civil servants from the Department for Work and Pensions (DWP), members of the House of Commons Work and Pensions Select Committee (2010–2015), and members of the Joint Committee on Human Rights in the House of Lords, as well as members of the Social Security Advisory Committee (SSAC). In the United States, interviews were carried out with senior officials in the Department of Health and Human Services and the Domestic Policy Council (the White House), members of the Senate Finance Committee and the Ways and Means Committee (both committees have jurisdiction over TANF), policy experts in the Congressional Research Service (CRS) and the General Accounting Office (GAO), think tanks such as Brookings, the Center on Budget and Policy Priorities, the Heritage Foundation and the American Enterprise Institute. The oral testimony of different stakeholders was confronted with primary sources such as official government reports, congressional and parliamentary debates, press releases and, in the British case, court rulings following judicial review challenges.

This article is structured as follows. The first section explains the notion of American adversarial legalism as well as the contrasting narratives on British policy styles. The second section seeks to characterize the policy domain, welfare to work from a policy style perspective in both countries. The third section briefly characterises the evolution of British and American welfare to work policies before the 2008-09 global financial crisis. The fourth section examines the ways in which core executives introduced changes to welfare to work rules, and the reasons why they either succeeded in imposing reforms despite judicial review challenges (in the UK), or failed to introduce any substantial change in benefit rules for the poorest of the poor (in the US). To conclude, there remains a strong and profound contrast between the US and UK policy styles, with a high level of adversarial politics in the US vs. a more executive-led policy making process in the UK. This in turn explains the more radical pattern of policy change in the UK compared to the United States, especially in the context of a muted opposition to social policy reforms initiated by the Conservative-led Coalition government between 2010 and 2015.

Policy styles, adversarial legalism and judicial review: a summary

Regulatory styles

If we examine the American and British regulatory style, we find that there is traditionally much less political constraint on rule-making activities in Britain than in the US, where such activities are strongly codified and subjected to several veto points[9]. In the US, the legislative process is used as a tool for controlling the actions of the bureaucracy, especially through the statutory procedural requirements that Congress imposes on agencies[10]. The administrative state[11], a product of modern government unforeseen by the American constitution[12], has been the subject of political controversy to an extent that remains unparalleled in the UK. This enduring malaise can be attributed, at least in part, to institutional design. Indeed, the President and Congress compete for control of the bureaucracy, which has become a fourth power[13]. Adversarial legalism[14] does enable to characterise the US regulatory style, with more constraints and judicial controls on rule-making activities in the US than in the UK. US administrative law is more codified than in the UK, under the Administrative Procedure Act (APA) (1946) and, more recently, the Congressional Review Act (CRA) (1996). There is a

[9] Rule-making activities are distinct from statutory activities: only Congress can adopt statutes. According to the APA, a "rule" is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. U.S.C. § 551(4). The most well-known form of rule-making activities is informal rulemaking, as specified by section 553 of the APA. Rule-making also includes non-legislative rules such as guidance documents. For a detailed analysis of the scholarly debate on the signification of non-legislative rules, see S. Shapiro 'Agency Oversight as "Whac-A-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules', 2014, *Harvard Journal of Law and Public Policy*, 37, p. 528-536.

[10] P. Cane, *Controlling Administrative Power* (Cambridge: Cambridge University Press, 2016).

[11] G.E. Metzger analyses the unprecedented attack on the administrative state unleashed by the Trump administration. She defines the administrative state as follows: "Agencies wielding broad discretion through a combination of rulemaking, adjudication, enforcement, and managerial functions; the personnel who perform these activities, from the civil service and professional staff through to political appointees, agency heads, and White House overseers; and the institutional arrangements and issuances that help structure these activities", G. E. Metzger, "1930s Redux: The Administrative State Under Siege", 2017, *Harv. L. Rev.*, 131, p.8.

[12] See L. Mashaw and D. Berke "Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience" 2018, *Yale J. on Reg.*, *35*, p.552.

[13] This section draws largely upon the comparative account by P.Cane, *Controling Administrative Power*, p. 169, 264. In particular, in the English system the bureaucracy serves its political master, and the executive is very much in the driving seat. The Civil Service is neutral and does not have an-expert based agenda of its own. In contrast, in the US the notion of the administrative state reflects the idea that the heads and personnel of executive agencies and, to an even greater extent, independent agencies and regulatory commissions, have developed a quasi-autonomous power relatively free of political interference or even judicial oversight (the headless fourth branch of government).

[14] R. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, MA: Harvard University Press, 2002), p. 187.

literature on the ossification of the rulemaking process in the US, which analyses attemps by Congress and the President starting in the late 1970s to require executive agencies to undertake regulatory impact assessments. This made the relatively 'simple'[15] notice-and-comment procedure more complex, time-consuming and demanding than in the pre-1980s period. This has been described as the ossification of the regulatory process. The 'ossification' thesis[16] has led to a widespread perception that executive agencies have used non-legislative rules as a short-cut to escape judicial scrutiny as well as interference from the Office of Management and Budget (OMB)[17]. In addition, Congress has also tried to impose a form of legislative veto prior to the promulgation of the rule.This was achieved through the Congressional Review Act (CRA 1996), which allows Congress to revoke by majority vote agency regulations as long as the President agrees[18].

The use of administrative discretion through the granting of waivers represents a potential pathway around multiple vetoes in the US system. Waivers represent a popular policy instrument that enables Congress to instil a flexibility that is otherwise lacking in American administrative law. There has been a broadly positive reassessment of waivers in the early 21st century: delegations of authority to suspend statutory requirements have been praised for allowing to update stale legislative frameworks that would otherwise remain in place[19]. Section 1115 of the Social Security Act, established in 1962, enables the executive branch and state administrators to experiment with policy change without having to modify the statute.[20]

[15] The US notice and comment procedure is not so simple in comparison to the UK. In the UK there is no general administrative procedure regarding SIs, in contrast to the statutory requirements of the APA. See S. Rose-Ackerman 'Executive Rulemaking and Democratic Legitimacy: Reform in the United States and the United Kingdom's Route to Brexit', 2019, *Chicago Kent Law Review*, 94, p. 276.

[16] See for instance T.O. McGarity, Some thoughts on deossifying the rulemaking process, 1991, *Duke Lj*, 41,1385.

[17] In fact, the claim that executive agencies use non-legislative rules in lieu of notice and comment rules has no strong empirical basis, athough the fact remains that guidance still draws less attention from Congress or the White House than a notice and comment rule. Moreover, an information memorandum still needs to be published in the Federal Register, which does not make it completely an under cover operation. See C.N. Raso 'Strategic or Sincere? Analyzing Agency Use of Guidance Documents', 2010, *The Yale Law Journal*, 1, 782-824.

[18] W. Fox explains the main stages of the CRA process: 'Agencies must submit their rules accompanied by a written report to Confgress and the Government Accountability Office (GAO) prior to the rules goinginto effect. If the rule is not a major rule, the rule may take effect as required by the agency. For major rules, the GAO has 15 days from receipt of the original rule to give its report to Congress. The GAO must assess whether the agency complied with its statutory obligations when making the rule. While this part of the process is going on, all major rules have their effective dates suspended for at least 60 days. During this review procedure, Congress may vote a joint resolution of disapproval. The joint resolution is then presented to the President, who may veto the resolution or approve it,, in which case the regulation is void. W. Fox *Understanding Administrative Law, 6th edtion* (New Providence, Mathew and Binder, LexisNexis, 2012), p. 53-54.

[19] D. J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 2013, *Columbia Law Review*, 265, 346.

[20] F. Thompson and C. Burke, "Federalism by waiver: MEDICAID and the transformation of long-term care" (2009) 39 *Publius*, 22, 46.

Waivers can of course be legally challenged, but they have been extensively used in social security to bypass a potentially recalcitrant Congress.

In Britain, the rule-making process remains dominated by the executive, with limited parliamentary scrutiny of delegated legislation. This enables the development of a less codified and procedural body of administrative law than in the US.[21] Broad delegations of power are therefore common in relation to social security in Britain. Indeed, very much of the legislation underpinning the benefit structure consists of delegated legislation.[22] Rules laid before Parliament are rarely examined on their substance; they are mostly subject to technical scrutiny undertaken by the Joint Committee on Statutory Instruments or by the Select Committee on Delegated Legislation (a permanent committee in the House of Commons). In addition to parliamentary controls, a specialist advisory committee, the Social Security Advisory Committee (SSAC), monitors social security regulations (with exceptions, such as where the regulations are issued within six months of the parent statute),[23] therefore acting as a supplementary check on the actions of the executive. The SSAC engages with a wide range of outsider groups[24].

The image of a top-down, highly discretionary benefit system amended at ministerial will on behalf of a centralized government department (the DWP), with limited parliamentary and judicial control needs to be nuanced, for three main reasons. First, there is a 'poverty lobby' in Britain[25], which at times has been able to exert some influence in Westminster. In particular, the Child Poverty Action Group (CPAG), has been committed to reducing poverty and inequality, using a wide range of tactics and strategies (including training for social security advisers and social workers as a source of revenue) to campaign for the poor.[26] Today, the CPAG continues to run an active litigation test case strategy. Second, the SSAC has generally been critical of regulatory attempts to clamp down on benefit claimants' rights. The ways in which the SSAC assesses government regulations is therefore congruent with

[21] T.M. Moe and M. Caldwell, "The institutional foundations of democratic government: A comparison of presidential and parliamentary systems" (1994) 150 *Journal of Institutional and Theoretical Economics* 171-195.
[22] N. Harris, *Law in a Complex State* (Oxford: Hart, 2013). See also G. McKeever, "Legislative scrutiny, coordination and the Social Security Advisory Committee: from system coherence to Scottish devolution" (2016) 23 *Journal of Social Security Law* 126-149.
[23] G. McKeever, "Legislative scrutiny, coordination and the Social Security Advisory Committee: from system coherence to Scottish devolution" (2016) 23 *Journal of Social Security Law* 126,-149.

[24] Page, *Governing by Numbers* (Oxford: Hart, 2001), pp.134-135.
[25] P. Whiteley and S. Winyard "The poverty lobby in British politics" (1983) 41 *Parliamentary Affairs* 195, 208.
[26] T. Prosser, *Test Cases for the Poor* (London: Child Poverty Action Group, 1983).

Mabbett's[27] remarks on the role of expert committees in mitigating majoritarian government impulses and preserving the rights of weak minorities. In fact, the SSAC has over the years issued a series of critical reports and has on the whole preserved its independence.[28]

Third, the Human Rights Act (HRA) introduced in 1998 has opened up new avenues for challenging the legality of administrative decisions. The HRA makes the rights contained in the European Convention of Human Rights (ECHR) legally enforceable in the UK. The courts must take into account any relevant decisions of the European Court of Human Rights when considering human rights issues. This has extended the scope for judicial reviews. However, in the area of social security, these requirements have not been as onerous on the government as other areas of the law (civil and political rights). Entitlements to social security fall under the scope of Article 1 Protocol 1 of the Convention (peaceful enjoyment of possessions). They are qualified rights, which means that interference with such rights is not necessarily incompatible with the convention provided that this interference pursues a legitimate aim, has a clear legal basis and is proportionate[29]. Judges can, in effect, overturn secondary legislation but not statutes.[30] High profile judicial review challenges remain relatively rare in social security due to the existence of a well-developed infrastructure of volunteer and paralegal expertise that provides counsel for benefit claimants. However, while statutory appeals remain the preferred route for challenging administrative decisions[31], there nevertheless have been a series of judicial review challenges in recent years, some of which went all the way to the UK Supreme Court, a point that will be elaborated further in this article.

Two contrasting narratives have emerged in relation to British policy styles.[32] Jordan and Richardson[33] describe the British policy style as characterised by bureaucratic accommodation and the institutionalization of compromise in each sector, thus keeping

[27] D. Mabbett, "The regulatory rescue of the welfare state" in D. Levi-Faur (ed.), *Handbook on the Politics of Regulation* (Cheltenham: Edward Elgar, 2011), p.1-25.
[28] A. Ogus, "SSAC as an independent advisory body: its role and influence on policymaking" (1998) *Journal of Social Security Law*, 156, 168.
[29] Ministry of Justice, *Making sense of human rights, a short introduction*, 2006, p. 3-4. See also N. Harris, 'Welfare rights, austerity and the decision to leave the EU: influences on UK social security law' (2018) 25(1) J.S.S.L. 9-33.
[30] J. King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012).
[31] R. Robson, "Judicial review and social security" in T. Buck (ed.) *Judicial review and social welfare* (London: Pinter, 1998), p. 90-113.
[32] G. Jordan and P. Cairney, "What is the 'dominant model' of British policymaking? Comparing majoritarian and policy community ideas" (2013) 8 *British Politics* 233, 259.
[33] G. Jordan and J. Richardson, "Policy communities: the British and European policy style" (1983) 11 *Policy Studies Journal* 4, 603, 615.

conflict outside the world of policy-making. Ministers rely on civil servants for advice, and civil servants rely on specialist organizations' expertise, with organizations trading information and advice in exchange for access to and influence within the government. This consensual style of policy-making is in sharp contrast with the majoritarian government narrative characterized by top-down policy making and imposition[34]. Jordan and Cairney argue that the top down narrative never fits the empirical reality of the British policy process. The formation of relatively stable and enduring policy communities has been a key feature of the British policy style because the reliance on outsider expertise helps to deal with 'cognitive overload', making the segmentation and specialization of policy process a functional necessity of modern government. However, Richardson[35] notes that the Thatcher government de-stabilized seemingly stable policy networks and communities, with the old policy communities losing control of policy framing and agenda setting in several sectors. Rapid policy change did take place during the Thatcher and Major years. As we shall see in the third section of this article, in the case of welfare reform, especially in relation to increased conditionality and benefit sanctions, the policy style of the Conservative-led Coalition government was reflective of an impositional style of policy making: dissenting and critical voices of the government's attempts to recast the social security system were marginalized.

American adversarial legalism

In *The American Way of Law*, Kagan[36] contends that American adversarial legalism is best seen as a form of governance embedded in the political structure that is unique to the United States. Adversarial legalism refers to the legal structures and rules that foster an adversarial and legalistic style of policy making as well as increased scrutiny of rule-making activities Kagan argues that while the day-to-day practice of adversarial litigation and enforcement may vary by policy domain, the legal structures that provide incentives for such litigation practices to occur are enduring. Adversarial legalism stems from the inherent tensions between the demands for an activist government, especially since the civil rights revolution of the 1960s, on the one hand, and the rising distrust of national government authority, on the other[37]. Government is seen as one of many competing interests in an open, pluralistic society, a

[34] G. Jordan and P. Cairney, "What is the 'dominant model' of British policymaking? Comparing majoritarian and policy community ideas" (2013) 8 *British Politics* 233, 259.
[35] J. Richardson "Government, interest groups and policy change" (2012) 48 *Political Studies* 1006, 1025.
[36] Kagan, *Adversarial Legalism: The American Way of Law* (Harvard: Harvard University Press, 2001).
[37] R. Melnick, "Federalism and The New Rights" (1996) 14 *Yale Law. & Policy Review* 32, 354.

distinctive characteristic of the US regulatory style. It follows that the federal government's capacity to implement policy change is traditionally more limited in the US than in the UK, where administrative law is less developed and codified.

Judicial review

Delegated policy-making in the US has also been subjected to a greater level of judicial scrutiny than in the UK. Shapiro[38] argues that in the US the bulk of jurisprudence concerns the lawfulness of the delegated legislation, i.e., whether the regulations issued by the executive agency are faithful to the congressional statute. This is not the case in the UK where judicial review is mainly about assessing whether the secondary norms are within the limits of the delegated powers granted to someone else by Parliament, under the ultra vires doctrine. Judicial review is therefore much more limited in scope in the UK than in the US. In particular, federal courts have been willing to scrutinize administrative agencies' decisions not just on the basis of procedural requirements such as due process but on the basis of the rationality of the decision. Heightened scrutiny of agencies' administrative decisions is based on the separation of power doctrine[39], reflecting the unique position of federal agencies in the machinery of the US federal government. The scope of judicial review of agency's action under section 706 of the APA in the US is much greater than in the UK[40]. As noted by Peter Cane, 'the structural independence of courts and tribunals had not been, until recently, an important feature of the UK constitution'[41]. This changed with the enactment of the tribunals, Courts and enforcement Act in 2007, partially as a result of the requirements of article 6 of the Convention protecting the right to a fair trial, in particular the right to a public hearing before an independent and impartial tribunal.

[38] M. Shapiro, "Judicial delegation doctrines: the US, Britain, and France", 2002, 25 *West European Politics* 173, 199.
[39] S. Shapiro and R. Levy, 'Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Decisions for Agency Decisions', 1987, *Duke Law Journal 387*.
[40] In the UK, administrative rules can be invalidated on the basis that the rule-maker pursued an 'improper' purpose', on the ground of unreasonabless, or when they are ultra vires. See P. Cane, *Controlling Administrative Power*, p.297. By contrast, as explained by W. Fox, an American court 'has the power to decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of an agency decision.'See W. Fox, *Understanding Administrative Law*, p. 329. On paper, the powers of US courts are therefore much greater than those of their British counterparts.
[41] P. Cane, *Controlling Administrative Power*, 2016, p. 348.

In short, national stereotypes regarding regulatory styles in both countries would therefore hold that delegated legislation is much more precise, detailed and politicized in the US than in the UK, with more activist courts to boot.

Applying the regulatory lens to welfare reform

The low salience of administrative law in political debates, particularly in the UK, explains why core executives have increasingly relied on regulations for enacting potentially controversial changes. Indeed, inserting new or more stringent work tests for benefit receipt, devising mechanisms to enforce compliance with work availability rules while ensuring minimum procedural and substantial fairness often requires the insertion of new schemes within the existing legal framework. The legislator, precisely because she wants to update the operation of the benefit system according to new or rediscovered principles, as with activation, relies on government agencies' interpretation of broad or narrow legislative guidelines.

Welfare reform has played a key role in the recasting of the welfare state since the 1980s. The term has become a catch all expression that encompasses various attempts to redesign the rights and obligations of working age individuals in relation to social provision. Under the activation turn advocated in 1994 by the OECD[42], receipt of cash assistance has been increasingly made conditional upon enrolment in targeted active labour market schemes that aim to improve the employability profile of the long-term unemployed. The priority was no longer to provide a modicum of economic security to the poor, as per the traditional logic of entitlements prevalent in the Keynesian welfare state, but to make welfare recipients economically self-sufficient by preparing them for entry-level jobs in the service economy, under a work-first logic. The activation turn is therefore part of the emergence of the 'welfare state 2.0', characterised by a neo-liberal, monetarist and pro-market stance on economic and social regulation[43].

How to enable the non-working poor to enter or re-enter the world of paid employment has been at the centre of welfare reform over the past three decades. We can identify two

[42] OECD, *The OECD Jobs study: Facts, Analysis, Strategies* (Paris: OECD, 1994).
[43] D. Garland, *The Welfare State: A Very Short Introduction* (Oxford: Oxford University Press, 2016).

different views of the causes of welfare dependency, which gave rise to different sets of policy prescriptions and regulations in Britain and the United States:
(1) Behavioural deficiencies: Economic inactivity, underemployment and long-term unemployment (all different phenomena in labour market terms) are the result of a lack of work ethic. The portrayal of the non-working poor as lacking the drive to take up available jobs means that there is an emphasis on churning people into low paid jobs or maintaining them in a perpetual state of job readiness[44]. The policy instruments deployed for getting people into jobs rely on a mix of sticks (benefit sanctions in case of non-compliance with work related activities, time-limited benefits), close monitoring of claimants to ensure that they comply with the requirements, and incentive reinforcement, or carrots such as in work credits or income disregards.
(2) While work first measures rely on rapid attachment to the labour force with an emphasis on stick and carrots, with strong disciplinarian and authoritarian tendencies, human capital approaches insist on the importance of individual barriers to employment such as lack of professional skills. The human capital approach holds that there is fierce competition for jobs at the bottom end of the low waged sector. This can lead to a vicious circle as low-skilled workers can only take up unstable, low paid employment, leading to a pattern of "labour market churning", whereby people cycle back and forth between low-paid, low skilled employment and welfare benefits. The lack of relevant skills in a highly selective labour market is seen as the primary cause of long-term unemployment and, increasingly, the widespread experience of economic marginality. There is an emphasis on up-skilling the labor force[45] by providing on the job training, basic skill sets (including literary and numeracy), or post-graduate diploma.

The emphasis on behavioural deficiencies as a root cause of economic inactivity is associated with semi-authoritarian schemes designed to maintain a constant supply of cheap, docile labour in order to meet the needs of local businesses. In this perspective, the primary aim of state regulation is not the compensation of distributional injustice or the protection against loss of income due to long-term unemployment. Instead, state regulation aims at maximizing the participation of socially disadvantaged groups (low-skilled

[44] J. Peck, *Workfare States* (New York: the Guildford Press, 2001), p.12.
[45] G. Bonoli, G. *The origins of active social policy: Labour market and childcare policies in a comparative perspective* (Oxford: Oxford University Press, 2013).

workers, ethnic minorities, single mothers, and increasingly, claimants of sickness benefits) in the service economy through persuasion, economic incentives and targeted, personalized intervention. This represents a form of social policy for the markets.

Ideally, a modern form of pro-market welfare should rely on self-regulation, when jobseekers have internalized the moral imperative to work, therefore minimizing their reliance on taxpayer money. This perspective is associated with radical retrenchment efforts advocated primarily by right wing parties and think tanks in the United States and the United Kingdom. The primary aim of activation is to ensure that non-core workers engage with the labour market as effectively as possible, entrenching a particular Anglo-American labour-intensive growth model based on household consumption and the constant mobilization of a lower-paid and more flexible workforce in the service economy. Work-first schemes occupy an important function in Anglo-American capitalism: they serve to undermine labour power, defined as the capacity to refuse undesirable employment[46]. These disciplinary objectives are accompanied by the increased regulation of individual behaviours[47]. Personalised micro-management aimed at instilling strong market discipline and work ethic is the predominant mode of administrative intervention, which runs counter to the rhetoric of individual rights and autonomy upheld by conventional rule of law doctrines. There is, therefore, an inherent tension between the administrative practice of coercion and persuasion that characterizes work-first policies and the logic of political liberalism according to which the state should restrain from needlessly interfering into citizens' lives.

On the other side of the political spectrum, a left of centre regulatory stance can be characterized as social policies with the markets. The Blair/Clinton trans-Atlantic network, particularly active in the mid- to late 1990s, emphasized the need to maximize labour market participation for disadvantaged groups. But in contrast to the more punitive and disciplinarian activation policies endorsed by conservatives, New Democrats and New Labour underlined that marginalized individuals needed to be provided genuine social

[46] J. Wiggan writes: 'the incremental curtailment of eligibility and strengthening of work-related conditionality attached to working age out of work benefits under the Labour and Conservative governments reflect a gradual closure of social security benefits as a route to sustaining oneself outside of the employment relation', 'Reading active labour market policy politically: An autonomist analysis of Britain's Work Programme and Mandatory Work Activity', 2015, 35 *Critical Social Policy*, p.379.
[47] C. Berry 'Quantity over quality: a political economy of 'active labour market policy' in the UK' 2014. 35 *Policy Studies*, pp.592-610.

support in the form of training opportunities. In this perspective, the state steers the markets so as to ensure equality of opportunities throughout the life course[48]. Post-2008, the Obama administration endorsed the mantra of up-skilling the labor force through education. For Obama officials, failure to participate in the service economy was not the symptom of moral deficiency but the result of structural barriers such as lack of adequate childcare, poor transportation links and lack of marketable skills.

Whether policymakers endorse a 'nice' or 'nasty' activation approach determines the intensity and the nature of the conditionality regime for benefit claimants. Primary legislation establishes broad policy frameworks but much detail is left to delegated legislation, also because of the sheer complexity of benefit schemes. Regulatory techniques are used in different jurisdictions because they help de-politicize salient issues. In the words of Edward Page, obscurity and seclusion characterize the privatized world of policymaking with regards to delegated legislation in the UK[49], whereas administrative policymaking is more controversial and open to a wide range to interest groups in the US. There should be a high degree of deference to administrative and executive decisions in the UK as opposed to a more open and fragmented welfare field in the US, with a higher degree of litigation and politicization of social welfare law than its British counterpart.

In the US, welfare refers to means-tested schemes such as Temporary Assistance for Needy Families (TANF), previously Aid to Families with Dependent Children (AFDC), food stamps (Supplementary Nutrition Assistance Programme, or SNAP), health insurance for poor families, Medicaid, and Supplemental Security Income (SSI). In Britain, the main social assistance schemes of recent years have been Income Support, Jobseeker's Allowance (JSA), housing benefit, and Employment and Support Allowance (ESA), all of which are gradually being replaced under a new, unified scheme, Universal Credit. Social assistance benefits traditionally carry a strong stigma, as shown by the derogative use of the term 'welfare'[50]. The stigmatization of social assistance is by no means limited to the UK and the US but it is in these two nations that support for the poor has been most contested over the past forty years. It is precisely because of their weak legitimacy and

[48] G. Esping-Andersen *Why We Need a New Welfare State* (Oxford: Oxford University Press, 2002). See also N. Morel, B. Palier and J. Palme *Towards a Social Investment Welfare State? Ideas, Policies and Challenges* (Bristol: Policy Press, 2012).
[49] E. Page, *Governing by Numbers* (Oxford, Hart, 2001), p. 15.
[50] D. Garland, *The Welfare State: A Very Short Introduction* (Oxford: Oxford University Press, 2016).

popularity that means-tested benefits have been the primary targets of welfare retrenchment[51].

Although Britain and the United States belong to the same family of nations[52], there are significant differences in the ways in which the safety net is designed and administered in each country. First, there is an extreme fragmentation of social assistance in the United States with no overall responsibility of a single government agency with regard to the design and delivery of in cash and kind benefits. The monitoring of welfare programmes at the federal level is shared between the Department of Health and Human Services (TANF and Medicaid), the Social Security Administration (SSI, pensions), and the US Department of Agriculture (SNAP, i.e. food stamps). States have the capacity to calculate and distribute benefits as they see fit when the federal statute does not stipulate minimum benefit amounts, as in the case of cash aid for single parent families and their children, AFDC/TANF. Medicaid, created in 1965, is also a joint federal and state government programme characterised by a tremendous amount of geographical variation[53].

TANF and SNAP[54] (food stamps) represent the functional equivalent of Income Support and JSA in Britain. In contrast to the American situation, in the UK benefit levels remain determined at the national level through primary and secondary legislation (albeit with a degree of devolved legislative autonomy for some welfare benefits in Scotland[55]), and are primarily designed by civil servants and policy advisers in the Department for Work and Pensions (DWP). Although this traditional unitary, centralised framework for social security has been subjected to local variation in the name of experimentation and devolution, benefit levels remain centrally controlled. Differential treatment and

[51] P. Pierson, *Dismantling the Welfare State*? (Cambridge: Cambridge University Press, 1994).
[52] F.G. Castles and D. Mitchell, "Worlds of welfare and families of nations" in. F.G. Castles (ed), *Families of Nations: Patterns of Public Policy in Western Democracies* (Dartmouth: Aldershot, 1993), p.93-128.
[53] N. Huberfeld N. "The universality of Medicaid at fifty", 2015 *Yale Journal Policy Law and Ethics* , vol. 15, p. 67-88. See also F. Pennins and P. Secunda, 'Towards the development of governance principles for the administration of social protection benefits: Comparative lessons from Dutch and American experiences', 2015, *Marq. Benefits & Soc. Welfare L. Rev.*, *16*, explaining that 'Medicaid operates like an insurance programme, paying participating healthcare professionals and institutions for covered services furnished to enrolled persons', p. 338.
[54] SNAP benefits can only enable to buy non-prepared food and non-alcoholic drinks. This rule reflects the puritanical and agrarian ethos of a programme that is designed to help farmers sell their products by feeding the poor. In particular, low-income populations should not be allowed to make 'immoral' purchases with taxpayer money. This is a recurrent theme in the politics of poverty.
[55] M Simpson, 'Brexit and Devolved Social Security in Scotland: a Tale of Two Referenda' (2018) 25 JS*SL* 56-73.

compensation for certain categories of social risks are the exception rather than the norm in the UK, at least with regard to cash assistance.

Second, although there is no constitutionally guaranteed right to social security in neither the UK nor the United States, there remains a much more solid statutory basis for social protection in Britain than in the USA. While the cumulative impact of the Coalition government reforms represents a major step towards the adoption of a residual welfare model of last resort, the disentitlement of the poor is much more pronounced in the USA than in the UK. In Britain, low-income individuals remain entitled to cash assistance regardless of whether or not they have dependent children or are disabled or old[56]. This is not the case in the USA where eligibility criteria for accessing cash benefits (General Assistance and TANF) is extremely restricted. In contrast, in kind benefits programmes such as SNAP and Medicaid are governed by less strict eligibility criteria than TANF. This is partially the reason why SNAP and Medicaid have come to serve a much larger share of low-income citizens than TANF and General Assistance.

Third, although British and American policymakers have espoused activation, i.e. participation into paid employment, as a central objective of welfare reform since the mid-1980s, the ways in which they have pursued similar policy objectives have varied. In particular, there is broader use of central government regulations in Britain than in the United States regarding the content of the welfare to work contract as well as the relationship between caseworkers and benefit recipients. In the UK at least, administrative discretion has been significantly reduced as "welfare benefits have been governed by ever more numerous and complex rules"[57].

Welfare reform in the UK

In the UK in the 1980s and 1990s the Thatcher and Major governments implemented a general tightening of welfare to work benefit rules, culminating in a major reform of unemployment benefits in 1995. JSA replaced unemployment insurance, and the length of contributory-based JSA was limited to a maximum of 6 months instead of 12 months. Moreover, claimants had to sign a contract, the Jobseeker's Agreement. The legislation tried to strike a balance between asking claimants to be immediately available for work, and claimants' right to negotiate restrictions on their availability for work (disabilities, caring

[56] N. Harris, *Law in a Complex State* (Oxford: Hart, 2013).
[57] N. Harris, *Social Security in Law in Context* (Oxford: Oxford University Press, 2000), p. 7.

responsibilities, location of available jobs, the number of hours a claimant might be deemed available for work, and so on). The conditions of entitlement, duration of benefits and benefit sanctions in case of non-compliance with work requirements, are detailed by JSA regulations and additional guidance,[58] now replicated under the Universal Credit scheme.[59] Between 1997 and 2010, Labour governments launched various New Deal schemes for young people and the long-term unemployed, with an emphasis on compulsion, especially for young people. The obligation to participate in some work related activities (through work focused interviews, in particular) was extended to some single parents and ESA claimants but with a socially inclusive rhetoric that stressed the need to address structural barriers to employment, in line with a social investment and anti-social exclusion approach[60].

There is a question whether the evolution of welfare legislation from the mid-1980s onwards reflects the permanence of a Westminster model based on the domination of a strong, centralized decision-making apparatus, or if it is more indicative of a power-sharing model between the Department of Social Security (before its transformation into the DWP in 2001) and relevant civil society and expert groups. The argument here is that, by and large, welfare policy making has reflected the distinctive party-political priorities of successive governments, from the Thatcher-Major and Blair-Brown years to the Coalition-led Conservative government of 2010-15. There was a cross-party consensus for the need to make benefit receipt closely linked to 'genuine' efforts to participate in paid employment for working age claimants, including for those with health and disability conditions as well as caring responsibilities, with a stepping up in terms of quasi-contractual responsibilities for welfare claimants. Successive UK governments have taken as a fait accompli the marginalization of trade unions in the formulation and implementation of employment and training policies, choosing instead to side with business interests[61]. In this respect, there was a strong continuity between the Conservative and New Labour policies of the mid-1990s and

[58] Jobseeker's Allowances Regulations, 1996 (SI 1996/207).
[59] Universal Credit Regulations 2013 (SI 2013/376).
[60] A. Daguerre 'Welfare Reform in the United-Kingdom: Helping or Forcing People Back into Work?', in *Active Labour Market Policies and Welfare Reform* (Palgrave, Basingstoke, 2007), p. 57-81.
[61] D. Marsh, 'Youth employment policy', in D. Marsh and R.A.W Rhodes (eds.) *Policy networks in British Government* (Oxford: Oxford University Press, 1992), p.174.

early 2000s[62]. The intensive monitoring of benefit claimants as part of a demanding conditionality regime has been portrayed as a key element of the British success story with regard to high employment rates compared to other EU countries. Until the summer of 2015, when Jeremy Corbyn became leader of the Labour Party, there was a broad cross-party agreement regarding the legitimacy of benefit sanctions in case of non-compliance with behavioural requirements. The political and administrative consensus regarding welfare conditionality is nevertheless underpinned by substantial policy differences over the circumstances, level and duration of benefit sanctions. While political and administrative elites have consistently demonstrated their preference for work-first, relatively cheap employability measures as part of the modern, enabling welfare model, significant policy divergences over what constitutes the 'right' combination of 'help and hassle' for benefit claimants remain. The range of mitigating circumstances to be taken into account when assessing the extent to which JSA claimants can be reasonably expected to comply with activation directions is extremely varied and complex. The huge volumes of administrative guidance are indicative of an increasingly legalistic approach which nevertheless leaves the DWP a tremendous amount of administrative discretion, especially as guidance is a tertiary rule and not subjected to judicial review. Consultation with NGOs and welfare rights advocates has often been perfunctory, despite the above-noted role of the SSAC in monitoring delegated legislation, thus 'plugging the parliamentary scrutiny gap[63]'. Two right-leaning think tanks were particularly influential in government circles: the Centre for Social Justice (CSJ), funded by Secretary for Work and Pensions Iain Duncan Smith in 2004 and his adviser Philippa Stroud, and Policy Exchange, set up in 2002 by Nick Boles, Francis Maude and Michael Gove. While the CSJ had a compassionate conservative ethos as a result of the strong Christian beliefs of both Philippa Stroud and Iain Duncan Smith, Policy Exchange had a pro-

[62] In 2006, the then Secretary of State for Work and Pensions John Hutton commissioned David Freud, a City banker and former FT journalist, to write a report on welfare reform. David Freud's ideas and recommendations were partially carried out by the Labour government, notably the idea of implementing a payment scheme for delivering welfare to work programmes. David Freud also recommended the implementation of a more demanding conditionality regime for single parents and disabled individuals. David Freud was made a peer by Labour and defected to the Conservative party in 2009. He became Minister of State for Welfare Reform in 2010, overseeing Universal Credit reforms alongside Ian Duncan Smith. N. Timmins, Universal Credit: From disaster to recovery (London: Institute for Government, 2016). See also N. Timmins, Major projects: why political leadership is vital, Institute for Government, December 2016, https://www.instituteforgovernment.org.uk/blog/major-projects-why-political-leadership-vital

[63] G McKeever, 'Legislative scrutiny, coordination and the Social Security Advisory Committee: from system coherence to Scottish devolution' (2016), 23 *Journal of Social Security Law*, 132-133.

market, free enterprise and limited government agenda, which sat better with the Treasury [64]. The poverty lobby was marginalised, just like it had been during the Major and Thatcher years. The CSJ was influential largely because Duncan Smith, its founder, was nominated by David Cameron to implement far reaching reforms as advocated by the 2009 CSJ report *Dynamic Benefits*[65]. Universal Credit was very much the brainchild of Duncan Smith and Stroud. Policy Exchange became influential at a later stage, between 2011 and 2013, when Matthew Oakley, Head of Economic and Social Policy, led an influential research programme on welfare reform. Policy Exchange had closer links with the Treasury than the CSJ, and some of Policy Exchange's proposals, for instance the recommendation to require that jobseekers spend 35 hours a week to look for employment, made its way into DWP's Universal Credit policy[66]. Moreover, Policy Exchange made constant references to opinion surveys and argued that its policies were popular with the public[67].

The Human Rights Act and the power of the judiciary were criticised by the Conservative-led Coalition government, especially Chris Grayling, Minister of State for Employment (2010-2012) and Justice Secretary (2012-2016). This extended to social security rights, the undercutting of which were challenged by special interest groups in some high-profile cases. The main basis for judicial review in the UK – based on the notion that there is undue interference with citizens' rights, which extend to socio-economic rights – is the ECHR, and to a much lesser extent the IECSR.[68]

[64] Policy Exchange describes itself as an 'independent think-tank whose mission is to develop and promote new policy ideas which will foster a free society based on strong communities, personal freedom, limited government, national self-confidence and an enterprise culture.' In this respect, the think tank is more closely aligned with a right wing populist limited government agenda that is at the heart of Conservative government policies.

[65] Economic Dependency Working Group (EDWG), *Dynamic Benefits* (London, Center for Social Justice, 2009).

[66] M. Oakley and P. Saunders wrote in the first Policy Exchange report, *No Rights without Responsibilities*: 'The ambition should be that job search becomes more like the typical 35 hour week of those in employment. This should apply for all of those in receipt of state benefits (including in-work recipients). This means that conditionality should be about helping people move to become totally self-reliant and free from state support, not just moving people into 16 hour jobs.' M. Oakley and P. Saunders, *No Rights without Responsibilities* (London, Policy Exchange, 2011), p. 6.

[67] M. Okaley and P. Saunders wrote: 'Some of the areas of reform we suggest will not be popular with some groups. They would increase links between contribution history and benefit receipt; require claimants to do more in order to be eligible for benefit; and place tougher sanctions on those claimants that choose not to comply with the requirements placed on them. However, while they will be unpopular with some, evidence from two polls commissioned by Policy Exchange shows that the approach is strongly supported by the British public. In particular the public are supportive of increased requirements on jobseekers', *No Rights without Responsibilities* (London, Policy Exchange, 2011), p. 7. Constant reference to favourable opinion polls helped the Coalition government ignore opposition to benefit cuts and increased conditionality.

[68] See N Harris, 'Welfare rights, austerity and the decision to leave the EU: influences on UK social security law' (2018) 25(1) J.S.S.L. 9-33.

The softness of social security rights in the Convention means that it is relatively easy for a government to explain why they are eroding these rights if there is significant cost to the public purse, as explained by the legal adviser of the Joint Committee on Human Rights in January 2014:

> 'This convention doesn't really include expressly any kind of social rights apart from property rights but it has been interpreted by the courts over the years to include statutory entitlement including benefits and that started very slowly. To begin with it was only contributory benefits because obviously they were more closely linked to property but now it includes non-contributory benefits. Generally speaking if you are entitled to income support if the government wants to legislate in a way that changes your entitlement in some way detrimentally to you that is going to be within the scope of Article One, that means they are going to have to justify the interference. Generally speaking it is very easy to justify interference with an Article One Protocol One because it is a much lower threshold than civil rights for example.'[69]

Welfare reform in the United States

AFDC was historically the most unpopular antipoverty programme in the US[70]. Based on state mothers' pensions developed in the Progressive era, AFDC provided assistance for children of poor fatherless households.[71] Under the model of cooperative federalism[72], states received federal matching grants to pay benefits to all persons eligible under the 1935 statute. States were required to submit plans to the federal government to ensure compliance with federal regulations and had to seek permission each time they wanted to amend their state plan. In fact, AFDC, albeit an extremely modest part of the safety net, had always been entangled with high politics and controversies regarding the role of the states vs. federal

[69] Interview legal adviser to the Joint Committee on Human Rights, London, January 2014.
[70] There is an abundant literature on the unpopularity of AFDC. See M. Gilens, *Why Americans Hate Welfare* (Chicago: the University of Chicago Press, 1999); K. Weaver, *Ending Welfare as We Know It* (Washington, Brookings Institution Press, 2000). More recently, see M.E. Gilman, 'The Return of the Welfare Queen,2014, *The American University Journal of Gender, Social Policy & the Law*, *22*, 247.
[71] T. Skocpol, "The limits of the New Deal system and the roots of contemporary welfare dilemmas" in M. Weir, A.S. Orloff and T. Skocpol (eds.) *The Politics of Social Policy in the United States* (Princeton: Princeton University Press, 1998), p. 293-311.

[72] C. Cimini, "Welfare entitlements in the era of devolution" (2002) IX *Georgetown Journal on Poverty Law Policy* 89, 134.

government as well as judgment calls regarding the deservingness of single parent families and their children.

A legal-bureaucratic model of public assistance had emerged in the late 1960s following the War on Poverty and the welfare rights movement. In 1970, in *Goldberg v. Kelly*[73], the Supreme Court held that due process protections applied to public assistance benefits considered as statutory entitlements. The partial standardization of welfare benefits gave rise to the establishment of a legal-bureaucratic model "predicated on detailed rules of general applicability issued by central authorities".[74] The ruling concluded a series of test cases designed to obtain constitutional recognition of a right to subsistence income[75]. But immediately after *Goldberg*, a stricter approach to public benefits started to manifest itself, paving the way to welfare reform in 1996, which formally ended statutory entitlement to cash assistance.

From the 1980s onwards, attempts to retrench AFDC involved the rediscovery of administrative discretion at the state level through the use of waiver authority. Initially such experiments were restricted in scope and duration[76]. However, in the 1980s and 1990s waivers turned into a Trojan horse to experiment work-first changes in several states, starting under Reagan and ending with a 'stampede' of waivers under Clinton[77]. This change entailed a careful reinterpretation of section 1115 of the Social Security Act by Health and Human Services (HHS). Extensive waiver policy paved the way towards a major social policy reform, the Personal Responsibility Welfare Reform and Work Opportunity Reconciliation Act (PRWORA), signed by President Clinton into law in August 1996.

The Act significantly diminished the significance of cash assistance for single parent families, transforming AFDC into Temporary Assistance for Needy Families (TANF). The legislation aimed to fight welfare dependency by promoting job preparation, work and marriage. TANF

[73] Goldberg v. Kelly, 397 US 254 (1970) (No.62).

[74] M. Diller, "The revolution in welfare administration: rules, discretion, and entrepreneurial government" (2000) 75 *New York University Law Review* 1121, 1220.

[75] See M. Diller, Poverty lawyering in the golden age. *Michigan Law Review*, 1994, vol. 93, p. 1406.

[76] S. Bennett and K. Sullivan, "Disentitling the poor: waivers and welfare reform" (1993) 26 *University of Michigan Journal of Law Reform* 741, 784. See also L.A.Williams, The abuse of Section 1115 waivers: welfare reform in search of a standard. 1994, *Yale Law & Policy Review*, *12*, 8.

[77] J. Peck, *Workfare States* (New York: the Guildford Press, 2001).

ended entitlement to cash assistance and imposed a five-year time limit on cash transfers. TANF's funding mechanism was a block grant, the level of which was fixed and based on the level of expenditure in the mid-1990s. This funding mechanism provided a financial incentive for states to move families off welfare: if their caseloads declined, states could retain more of the block grant money that was principally used to pay cash assistance benefits. The1996 law included a "caseload reduction credit" (CRC), which reduced the target states were required to achieve by a percentage point for every percent of caseload decline since 1995. Because cash assistance caseloads declined very sharply during the early years of TANF, most states had very low, or zero, effective participation rate requirements by the early 2000s.[78]

The transformation of AFDC into TANF led to a 50 percent decline in the caseload between 1997- 2011. Nearly 4m families received TANF in 1997; by 2011, just under 2m families were on the TANF rolls.[79] The shift away from a needs-based welfare system towards a work-reward system is in line with a core American belief: individuals should be encouraged to find a job and become self-reliant.[80] As in the UK, the primary goal of the American legislator in 1996 was to implement a work-first approach, but the means to deliver these objectives differed. Fiscal federalism – especially the block grant - was used as a policy instrument to encourage state administrators to wean single parent families off welfare. This was a performance management system in lieu of a traditional legal-bureaucratic, rule compliant-based process which remained the norm in the UK. While in the UK the content of the Jobseeker's Agreement is subject to detailed requirements, in the US there is no statutory requirement regarding the content of the jobseeker agreement[81]. States only have to make an

[78] R. Haskins and R. Blank, "Agenda for reauthorization" in R. Blank and R. Haskins (eds), *The New World of Welfare* (Washington DC: The Brookings Institute Press, 2001), p.3-32.
[79] P. Loprest (8 March 2012) How has the TANF caseload changed over time? *Urban Institute*, https://www.acf.hhs.gov/sites/default/files/opre/change_time_1.pdf [retrieved 16 August 2019].

[80] R. Haskins, "How to help work help the poor" (2017) 30 *National Affairs* 84, 99.
[81] This said, the statute is more prescriptive about the type of work-related activities that states have to report to the federal government. The 1996 statute defined countable work activities as follows: unsubsidized employment, subsidized private sector employment, subsidized public sector employment, job search and readiness, community service, work experience, on-the-job training, vocational educational training (limited to 12 months in a lifetime), full- or part-time employment in the public or private sector that is not subsidized by TANF or any other public programme, the act of seeking or obtaining employment, or preparation to seek or obtain employment, including life-skills training and substance abuse treatment, mental health treatment, or rehabilitation activities, job skills training directly related to employment, education directly related to employment (for those without a high school or equivalent degree), completion of a secondary school program (for those without a high school or equivalent degree). The definition of countable work-related activities was narrowed down in 2006.

initial assessment of the TANF recipient[82]. In this respect, state administrators have a lot of leeway although in practice all states require TANF recipients to comply with the terms of individual responsibility agreements. States must implement benefit sanctions, but are allowed to determine the amount of benefit reduction in case of non compliance: "if an individual in a family receiving assistance under the State program refuses to engage in work required (…), the State shall—(A) reduce the amount of assistance otherwise payable to the family pro rata (or more, at the option of the State) with respect to any period during a month in which the individual so refuses; or '(B) terminate such assistance subject to such good cause and other exceptions as the State may establish. " (42 U.S. Code § 607).

TANF came up for reauthorization in 2001, but because Republicans and Democrats were unable to draft a compromise bill , the programme was maintained through a series of short-term extensions between 2001 and 2005. The G.W. Bush administration wanted to strengthen work requirements, but the final reauthorization consisted essentially in programme adjustment. The most fundamental change was precisely the recalibration of the caseload reduction credit, which was calculated on the basis of federal year 2005 instead of 1995. Because these rates were set on current caseloads the work participation rates were de facto much higher than prior to 2006. As the vast majority of the remaining caseload faced strong barriers to employment, moving them into work-related activities raised serious challenges, and was more difficult to achieve than simply reducing existing caseloads. States adopted various strategies to meet increased work participation requirements. One strategy consisted in expanding workfare programmes such as community services and work experience, where claimants typically work in exchange for benefits. Several states also switched from partial sanctions to full family sanctions. Indeed, if a state imposes a full family (rather than a partial) sanction when a parent fails to participate in a work programme, the family will not be counted as a non-participating family because it will no longer be receiving assistance. States also expanded income disregards and workers support programmes so that they could count

[82] J. Levin-Epstein writes: 'The federal statute only binds states to conduct an assessment; while the law lists types of obligations that might be imposed in a plan following the assessment, the statutory list is illustrative, not obligatory' , *The IRA: Individual Responsibility Agreements and TANF Family Life Obligations*, 1998, Washington: The Center for Law and Social Policy (CLASP).

individuals whose level of income would have made them ineligible for TANF cash assistance under normal rules[83].

Welfare reform has been celebrated as a success story. Bill Clinton, writing in the *New York Times* in 2006, claimed that 'sixty percent of mothers who left welfare found work, far surpassing predictions of experts'[84].

In 2009, Obama officials were therefore well aware that any attempt to revisit work requirements could raise significant political challenges. This is why they chose to use to tinker with TANF work requirements through non legislative rules, i.e, guidance. In recent years, as a result of congressional gridlock, the executive branch has increasingly relied on rule-making powers and intergovernmental relations, especially waivers, to implement policy change. But in an increasingly politically polarized climate, even this form of 'federalism by waiver' has been fraught with political and legal difficulties, as the case study regarding the revision of welfare to work rules illustrates. In the UK, by contrast, the executive faced only minor opposition when implementing controversial social policy change through regulatory means.

Welfare to work policies and their contestation

The Coalition's welfare to work agenda in the UK

The 2008 financial crisis posed a massive challenge to the welfare state globally, but the policy responses were very different in the UK and the US, although the first initial reaction in both countries consisted of a massive injection of public spending. In the UK, this policy came to an abrupt halt in May 2010, when David Cameron and George Osborne embarked on a program of drastic spending cuts.[85] Although the Coalition did build on previous Labour policies, it is nevertheless clear that Ministers resurrected a moral underclass discourse according to which the poor were to blame for their plight. In a speech to the Conservative

[83] L Pavetti, L. Rosenberg and M. Derr, "Understanding Temporary Assistance for Needy Families Caseloads after Passage of the Deficit Reduction Act of 2005." 2009, Washington, DC: Mathematica Policy Research.

[83] B. Clinton, 'How we ended welfare, together', 2006, *New York Times*, https://www.nytimes.com/2006/08/22/opinion/22clinton.html

[85] D. Mabbet, "The second time as tragedy? Welfare reform under Thatcher and the Coalition" (2013) 84 *The Political Quarterly* 43, 52.

party conference in October 2012, the then Chancellor of the Exchequer, George Osborne, laid out his ambition of finding £10 billion of welfare savings "while delivering the most radical reform of our welfare system for generations with a Universal Credit so work always pays. Because it's not just about the money - it comes back to fairness and enterprise. For how can we justify the incomes of those out of work rising faster than the incomes of those in work?"[86] This narrative was popular with voters. A Labour MP, member of the Work and Pensions Select Committee explained that her own constituents felt they were being unfairly treated by the social security system:

> "They've usually got an example to give you which isn't drawn from the newspapers but is drawn from their own observations and experience. They will say something along the lines of, you know, him down the road who is obviously on drugs or I see him going to the chemist's for his methadone and he seems to get his benefits without any trouble and he gets his rent paid and he gets his council tax paid and I can't get anything and it is not fair."[87]

In this context, ministers were confident they could pass sweeping conditionality and benefits sanctions for welfare claimants without much parliamentary opposition, because Labour was conflicted on the issue.[88] The main legislative change was the Welfare Reform Act 2012. This is the measure that re-packaged several income maintenance schemes into Universal Credit (UC) (noted above). While there was a consensus around the simplification of the benefit system, benefit cuts and tougher eligibility requirements were more controversial, which explains why the 2012 Act left much detail to delegated legislation. Other changes included the introduction of benefit caps for working age claimants, the devolution of aid of last resort to local authorities under a new localism and devolution agenda.[89] The reforms had three main objectives: first, a dramatic reduction in welfare spending; second, the promotion of participation in paid employment, and third, the simplification of the benefit and sanctions system under a new, more demanding contract between social assistance claimants and the state.

[86] *The New Statesman* (8 October 2012) George Osborne's speech to the Conservative conference, https://www.newstatesman.com/blogs/politics/2012/10/george-osbornes-speech-conservative-conference-full-text, Accessed 17 June 2019.
[87] Interview Labour MP, London, December 2013.
[88] M. Russell and D. Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (Oxford: Oxford University Press, 2017).
[89] J. Meers, "Shifting the place of social security: Social rights under austerity in the UK" in S.C. Matteucci and S. Halliday S (eds.), *The Fate of Social Rights in an Age of Austerity: Law and Legal Challenge within Europe* (London: Routledge, 2019) p. 122-146.

Although the drive towards the adoption of a more stringent sanctions regime had started well before 2010, there was a significant qualitative and quantitative difference between the benefit sanction regime prior to 2010 and the policy framework post-2012. The length of sanction periods was extended. The minimum sanction period increased from one week to four weeks and the maximum from 26 weeks to three years, a policy that was rescinded in May 2019 after evidenced-based pressure from the House of Commons Work and Pensions Committee [90].

Higher job search expectations were imposed on benefit recipients through regulations, with increased pressure on individuals to accept any employment offer even if the new job pays much less than the one they held before becoming unemployed. The DWP also made full use of its regulatory powers to strengthen conditionality and benefit sanctions for claimants. Increased conditionality has also been associated with additional administrative discretion and self-regulation through the Claimant Commitment (above).

In sum, the Coalition clearly delivered on its promise to roll out an extremely demanding conditionality regime. Post-2011, JSA sanctions increased from a low of 3.5 per cent of cases in April 2012 to 5.8 per cent in December 2013. Benefit sanctions for all benefits reached a peak in 2013, with 1.1 million for all benefit categories, including ESA and Income Support.[91] But there has been a downward trend since the 2013 peak, mainly because adverse decisions for ESA recipients were successfully challenged in the specialized tribunal system.[92] This said, statutory appeals have a much lower political profile than judicial reviews. Judicial reviews remain underused in social security contrary to other policy areas such as immigration and asylum[93].

[90] In May 2019, secretary of state for work and pensions Amber Rudd rescinded this policy, stating 'I agree with the Work and Pensions Select Committee that a three-year sanction is unnecessarily long and I feel that the additional incentive provided by a three-year sanction can be outweighed by the unintended impacts to the claimant due to the additional duration. For these reasons, I have now decided to remove three year sanctions and reduce the maximum sanction length to six months by the end of the year.' Amber Rudd, 9 May 2019, Labour Market Policy Update :Written statement - HCWS1545

[91] D. Webster (13 May 2015) Briefing: The DWP's JSA/ESA Sanctions Statistics Release. http://www.spicker.uk/blog/wp-content/uploads/2015/05/15-05-sanctions-stats-briefing-d-webster-may-2015.pdf [accessed 16 August 2019].

[92] *The Guardian* (12 February 2018) DWP spent £100m on disability benefit appeals, figures reveal, https://www.theguardian.com/politics/2018/feb/12/disability-benefit-appeals-department-for-work-and-pensions-figures [accessed 17 August 2019].

[93] M. Ahluwalia M and J. Tomlinson, 'Benefit Sanctions, Illegality and Administrative Justice: After Judicial Review?' (2018), 23 *Judicial Review*, 225-231.

In 2010, the Coalition introduced two new sets of regulations, the Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations (SI 2011/688), and the Jobseekers Allowance (Employment, Skills and Enterprise known as ESE) Regulations 2011, (SI 2011/917). Judicial review challenges questioned the legality of the conditionality schemes in terms of their compatibility with the EHCR. The challenges were brought by Caitlin Reilly, who took part in the 'sector-based work academy' against her wishes, and Jamieson Wilson, who refused to participate in the Community Action Programme after he was told that he had to clean furniture for 30 hours per week for six months without pay[94]. Reilly believed she could contest the regulations on the grounds of the prohibition of forced labour (Article 4), but the main issue in the action was that the regulations failed to describe in sufficient detail the schemes as required by the Jobseekers Act 1995. When the Court of Appeal quashed the regulations in January 2013,[95] the DWP lodged an appeal to the Supreme Court challenging the Court of Appeal's judgment (the Supreme Court upheld the Court of Appeal's decision[96]). The DWP introduced emergency legislation, the Jobseekers (Back to Work Schemes) Bill, on 14 March 2013 to reinstate its capacity to sanction JSA claimants. The emergency legislation effectively cancelled the effects of the Court of Appeal's ruling. Both the Joint Committee on Human Rights and the House of Lords Constitution Committee raised strong objections to the Bill.[97] However, parliamentary opposition to the Bill was weak. Not only did the Labour party agree to the emergency timetabling of the legislation, the whips also instructed MPs to abstain, effectively ensuing the Bill's passage. This lack of opposition created a lot of discomfort amongst Labour ranks[98].

In Spring 2013, judicial review proceedings against the Jobseekers (Back to Work Schemes) Act 2013 were brought on behalf of Reilly and Daniel Hewstone.[99] They argued that the Act

[94] *R. (on the application of Reilly) v Secretary of State for Work and Pensions* [2012] EWHC 2292 (Admin); (2012) 156(32) S.J.L.B. 31. See A.Daguerre, 'The Coalition government, the unemployed and the moral case for benefit sanctions" (2015) 22 *JSSL* 147,150. See also P. Larkin, "A permanent blow to workfare in the united Kingdom or a temporary obstacle? Reilly and Wilson Secretary of State for Work and Pensions" 2013 J.S.S.L. 110.
[95] *R. (on the application of Reilly) v Secretary of State for Work and Pensions* [2013] EWCA Civ 66; [2013] 1 W.L.R. 2239.
[96] *R (Reilly & Anor) v Secretary of State for Work and Pensions* [2013] UKSC 68

[97] S. Kennedy et al (2013) Jobseekers (Back to Work Schemes) Bill 2012–13 (2013), House of Commons Library, standard note SN06587.
[98] Interview Labour MP Work and Pensions Select Committee, January 2014.
[99] *R. (on the application of Reilly (No.2)) v Secretary of State for Work and Pensions* [2014] EWHC 2182 (Admin); [2015] Q.B. 573.*R. (on the application of Reilly (No.2)) v Secretary of State for Work and Pensions* [2014] EWHC 2182 (Admin); [2015] Q.B. 573.

was incompatible with their Article 6 rights. In July 2014, Justice Lang issued a declaration of incompatibility with the Human Rights Act. Mrs Justice Lang observed that "the lack of scrutiny by the Joint Committee on Human Rights and the SSAC may have led to some misconceptions about the legal justification for the retrospective legislation."[100] Mrs Lang did not comply with the light touch review that is customary in British case law, and explicitly criticised the lack of proper oversight on primary and secondary legislation by both the Joint Committee of Human Rights and the SSAC[101]. The DWP appealed the High Court's decision but the Court of Appeal upheld the High Court's decision in April 2016[102]. The litigation illustrates the antagonism that has developed between the judiciary and the executive branch in recent years. Indeed, as explained by a CPAG lawyer, the courts were "willing to trip up the Secretary of State if at any point he is not procedurally fully correct and they are willing to impose quite heavy obligations on him to treat claimants fairly"[103].

Although judicial review challenges filled to some extent the parliamentary opposition gap to benefit sanctions, what is striking is how Ministers have been able to carry out a series of reforms that seriously undermined statutory entitlements to social security despite the mounting criticisms from a variety of stakeholders. Philip Alston, the UN rapporteur on poverty in the UK, wrote in his 2019 report:

> "The country's most respected charitable groups, its leading think tanks, its parliamentary committees, independent authorities like the National Audit Office, and many others, have all drawn attention to the dramatic decline in the fortunes of the least well off in this country… But through it all, one actor has stubbornly resisted seeing the situation for what it is. The Government has remained determinedly in a state of denial[104]".

The American case: adversarial politics block the softening work-first rules

[100] I observe that the absence of any consultation with representative organisations, and the lack of scrutiny by the Joint Committee for Human Rights or the Social Security Advisory Committee, may have contributed to some misconceptions about the legal justification for the retrospective legislation. Q.B. [96] per Lang J. See J.S. Caird and D. Oliver, "Parliament's constitutional standards" in A. Horne and A. Le Sueur (eds.), *Parliament Legislation and Accountability* (Oxford: Hart, 2016), p.63-88.

[101] C. Harlow (3 October 2014) Judging Parliament: the Jobseekers Case, *UK Constitutional Law Blog*, https://ukconstitutionallaw.org/2014/10/03/carol-harlow-judging-parliament-the-jobseekers-case/[Retrieved 16 August 2019].

[102] *Reilly & Anor v Secretary of State for Work and Pensions* [2016] EWCA Civ 413)

[103] Interview CPAG lawyer, January 2015.

[104] See P. Alston, 'Visit to the United Kingdom of Great Britain and Northern Ireland', 24 June–12 July 2019, Human Rights Council, United Nations, p.4.

In 2009, Barack Obama inherited a social policy landscape radically different from the one that was left to his British counterpart. Indeed, since the 1990s there has been a redistribution of cash transfers away from the poorest single parent families to those with higher incomes, older people and people with disabilities, including children.[105] The erosion of cash assistance for the non-working poor was compensated for by the expansion of in kind programmes such as Medicaid and food stamps, with local social services provided on an ad-hoc basis, but extreme poverty had been rising. In this context, the Great Recession severely tested a welfare system that had already left 37 million people living in poverty in 2007; by 2010, 46 million people, one in seven Americans, were poor.[106] The priority for the Obama administration was to reverse the tide of deprivation that was spiralling out of control. In February 2009, just one month after his inauguration, Barack Obama signed into law the American Recovery and Reinvestment Act (ARRA). At $787 billion, it was the largest countercyclical fiscal stimulus in American history. The legislation expanded existing public assistance programs such as Earned Income Tax Credit (EITC), Child Tax Credit, unemployment insurance (UI) and food stamps, and provided an additional $5 billion emergency funding for TANF. While the expansion of food stamps, UI and EITC accounted for most of the administration's social policies, TANF played a minimal role in its antipoverty efforts. In 2013, 47,636 million individuals received SNAP benefits[107]. In June 2013, 55 million were enrolled in Medicaid[108]. In contrast, only 4.1 million individuals received TANF that year[109]. The Obama administration did not change eligibility rules for SNAP but did encourage states to achieve maximum participation rates by simplififying enrolment processes[110]. Only the Affordable Care Act (2010) did include a susbstantial change to eligibility criteria for Medicaid. The Affordable Care Act was the biggest antipoverty initiative of the Obama administration, as explained by senior officials in the Health and Human Services:

> "To be honest the antipoverty thing that this administration did is the Affordable Care Act. We don't talk about it that way because we want the middle class to be reassured that it helps them but it will have the biggest impact, assuming it continues to be successful, in reducing poverty because it will reduce the economic burdens that so many low income people face or the

[105] R. Moffitt, "The deserving poor, the family, and the US welfare system" (2015) 52 *Demography* 729, 749.

[106] T. Clark and A. Heath, *Hard Times* (Yale: Yale University Press, 2014).

[107] These are the figures provided by USDA in April 2020, see https://fns-prod.azureedge.net/sites/default/files/resource-files/SNAPsummary-4.pdf

[108] Kaiser family Foundation, Medicaid Enrollment: June 2013 Data Snapshot, Issue Brief, January 2014.

[109] Congressional Research Service, The Temporary Assistance for Needy Families (TANF) Block Grant: Responses to Frequently Asked Questions, 2019, p. 26.

[110] See A.Daguerre, *Obama's Welfare Legacy* (Bristol, Policy Press, 2017), especially chapter 2.

> bankruptcies that result from having a huge health care bill... So when they write the history books the real antipoverty thing will be the Affordable Care Act and the expansion of Medicaid and things like that." [111]

People with annual incomes below 138 per cent of the federal poverty level, or $26, 347 for a family of three and $15, 417 for an individual, became eligible for Medicaid. The law covered previously excluded individuals such as low-income, able-bodied working age adults. The ACA, by suppressing categorical eligibility criteria, effectively recasts Medicaid as public insurance for all non-elderly low-income Americans[112]. The ACA (nicknamed Obamacare) partially reversed the logic of the traditional two-tiered social protection system, where states are responsible for the 'undesirable poor' while the federal government covers the deserving poor (the elderly and disabled adults, as in Medicare and SSI). The Medicaid expansion came with extremely generous funding: prior to the ACA, the federal government paid on average 57 per cent of Medicaid costs. With the ACA, Federal Medical Assistance Percentage (FMAP) covered 100 percent of the costs for the newly eligible population for the first three years, gradually declining to 90 percent thereafter. This was, in principle, an offer that no state could refuse. Cecilia Munoz, the director of the Domestic Policy Council under the Obama administration between 2012 and 2017, explained:

> "We were very focused, along with our allies in Congress, on making sure that we provided robust funding through the states on the assumption that they would be crazy to turn down 100 percent federal match. We were essentially covering their costs for providing the benefits. A number of states were crazy enough to turn it down for ideological reasons."[113]

> Indeed, in an era of asymmetrical polarization, with the GOP shifting much more to the right than the Democrats had been shifting to the left[114], there was a pattern of near-systematic Republican obstruction to any programme that came with an Obama label attached to it. Florida became the leader of the 25 states that filed lawsuits against the federal government within hours of Barack Obama signing the ACA into law. In 2011,

[111] Interview Health and Human Services, Washington DC, March 2015
[112] S. Rosenbaum and T.M. Westmoreland "The Supreme Court's surprising decision on the Medicaid expansionHow will the federal government and states proceed?"2012, *Health Affairs*, 31, p. 1667.

[113] Interview Cecilia Munoz, Washington DC, February 2017.
[114] J.S. Hacker, J.S. and P. Pierson, 'The Dog That Almost Barked: What the ACA Repeal Fight Says about the Resilience of the American Welfare State', 2018. *Journal of Health Politics, Policy and Law*, 43, 551-577.

the Supreme Court agreed to hear the suit brought by Florida as well as a challenge brought by the National Federation of Independent Business. Emboldened conservatives challenged the requirement that almost all Americans buy health insurance by 2014 (the so-called individual mandate) or pay a penalty as a fundamental encroachment of individual liberty. The other challenge concerned the Medicaid expansion. Republican lawmakers argued that the expansion would require states to implement a fundamentally different programme from the pre-ACA Medicaid. Even if states disagreed with the objectives and philosophy of what was essentially a new programme, they would be powerless to refuse to participate into the expansion because of their dependence on federal government funds[115].

The Chief Supreme Court judge Roberts confirmed the constitutionality of the individual mandate on very narrow grounds but he sided with the states on the issue of the Medicaid expansion. The majority found that "the threatened loss of over 10 percent of a State's overall budget is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion. The expansion thus violates the Constitution by threatening States with the loss of their existing Medicaid funding if they decline to comply with the expansion."[116] Justice Roberts objected to the transformation of Medicaid from a categorical eligibility programme aimed at the poorest of the poor into "into a program to meet the health care needs of the entire non-elderly population with income below 133 percent of the poverty level." "It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage."[117]The Supreme Court undermined the expansion by making it optional for states. Initially, 18 out of 30 Republican governors, under pressure from conservative legislatures, made a great show of refusing billions of dollars of federal funds. However, a string of 'pragmatic'governors changed their minds as they faced the discontent of health-care operators and seniors relying on Medicaid to pay for long-term care. HHS gave

[115] N. Huberfeld, 'Federalizing Medicaid', 2011, *University of Pennsylvania Journal of Constitutional Law*, 14, 431, 484.

[116] National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012), 54.

[117] National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012), 54.

Republican governors maximum flexibility to operate their Medicaid programmes as long as they complied with the new income-related eligibility requirements[118].

Defending health care reform was the Obama administration's main priority. Any attempt to strengthen the safety net could backfire, as the Tea Party protests that spread throughout the summer of 2010 in opposition to Obamacare demonstrated. In this context, political advisers were unwilling to re-open the welfare debate. Cecilia Munoz declared:

> "Frankly, the debate which led to the creation of TANF in the 90s ended for a long time any kind of capacity to have a bipartisan conversation in regards to putting money back into people's pockets in any other way besides work."[119]

Jason Furman, chairman of the Council of Economic Advisers between 2013 and 2017 explained that the administration did not think of TANF as an effective tool for addressing the challenge of deep poverty:

> "We didn't propose a big structural change. We studied it and looked at it but ultimately decided that the evidence said the program works quite well but doesn't have enough money, and too much money is being diverted from it and as a result it's not covering all the people it should cover and we need to fix that first and foremost."[120]

TANF was due for reauthorization in 2011, but HHS was unwilling to put forward a reauthorization proposal. A counsellor to HHS Secretary Kathleen Sebelius explained why the Obama administration tried to focus on other policy areas:

> "In the early years of the administration we focused on other areas that we thought were more likely to be bi-partisan, such as child welfare, you know foster care programmes or child support enforcement. We were worried that TANF would become partisan gridlocked and so the reaction to the waiver proposal kind of proved that case. A large TANF reauthorisation proposal from the administration would probably not yield a constructive legislative debate and so we would be better off putting our emphasis in other areas of the safety net." [121]

[118] T. Callaghan T. and L. Jacobs, 'Process Learning and the Implementation of Medicaid Reform' 2014, P*ublius* 44, 541-563. It must be noted that the ACA did put in place more safeguards in relation to section 1115 waivers. See Kaiser Family Foundation, The New Review and Approval Process Rule for Section 1115 Medicaid and CHIP Demonstration Waivers, March 2012, https://www.kff.org/wp-content/uploads/2013/01/8292.pdf. However, as noted by E.H. Stiglitz, these additional safeguards "represent a sort of notice-and- comment "lite," and they might be further strengthened in a number of ways. Most relevant, they do not sufficiently force the state and federal agencies to consider and justify the merits of the application" E.H. . Stiglitz ', Forces of Federalism, Safety Nets, and Waivers' 2017, *Theoretical Inquiries in Law*, 18, 125, p.145.

[119] Interview Cecilia Munoz, Washington DC, February 2017.

[120] Interview Jason Furman, chairman Council Economic Advisers between 2013 and January 2017, Washington DC, February 2017.

[121] Interview senior political adviser, HHS, Washington DC, March 2015.

Political appointees such as Mark Greenberg, an expert and welfare advocate nominated by Barack Obama as Administration for Children and Families (ACF) Assistant Secretary, wanted to try and make the program work in more redistributive ways. But HHS officials were also keen to avoid a confrontation with House Republicans. ACF officials, assisted by departmental lawyers, tried to find ways of bypassing Congress, chosing guidance instead of formal notice and comment procedures. To this end, Mark Greenberg resurrected section 1115 of the Social Security Act, which allows the HHS secretary to exempt states from statutory provisions for experimental purposes. On July 12 2012, HHS issued an information memorandum stating that

> "HHS is encouraging states to consider new, more effective ways to meet the goals of TANF, particularly helping parents successfully prepare for, find, and retain employment. Therefore, HHS is issuing this information memorandum to notify states of the Secretary's willingness to exercise her waiver authority under section 1115 of the Social Security Act to allow states to test alternative and innovative strategies, policies, and procedures that are designed to improve employment outcomes for needy families"[122].

Officials reasoned that because the state plan requirements in section 402 include reference to section 407 (the work requirements), and because section 402 can be waived under section 1115 of the Social Security Act, HHS could allow states to test approaches and methods other than those set forth in section 407, including definition of work activities. Congressional Republicans reacted with outrage and accused the administration of violation of Congress's original intent.

The political fallout from the HHS information memorandum was exceptionally strong. Indeed, it was released in July 2012, in the midst of the presidential campaign. Chairman of the Senate Finance Committee Orrin Hatch and Chairman of the Ways and Means Committee Dave Camp sent a letter to HHS Secretary Kathleen Sebelius requesting an explanation. On the 7th of August 2012, the Romney campaign released an ad claiming that 'Under Obama's plan, you wouldn't have to work and you wouldn't have to train for a job. They just send you

[122] TANF-ACF-IM-2012-03 (Guidance concerning waiver and expenditure authority under Section 1115), https://wayback.archive-it.org/8654/20170430194357/https://www.acf.hhs.gov/ofa/resource/policy/im-ofa/2012/im201203/im201203

your welfare check'.[123] Neither Mark Greenberg nor Kathleen Sebelius had anticipated such a dramatic fall out. White House advisers were also taken by surprise. In fact, the Domestic Policy Council was only very superficially aware that HHS was going to issue the guidance and did not think it was an important political issue. This was clearly a political miscalculation. Cecilia Munoz recalled:

> "It was very obscure policy guidance that we put out at the request of a couple of Republican governors. It was sort of a technical decision made at HHS, which I as Deputy Director was aware of, but none of us anticipated it being used by the Republicans in the way that they used it."[124]

Congressional Republicans also argued that the administration had been guilty of executive overreach. They stated that the information memorandum was a rule making exercise, in which case the administration should have consulted Congress under the Congressional Review Act (CRA). The CRA provides that before a rule can take effect, the agency must submit the rule to each House of Congress and the Comptroller General, head of the Government Accountability Office (GAO). Orrin Hatch consulted the GAO, which concluded that the information memorandum was indeed a rule-making activity that had to be submitted to both Houses of Congress before it could take effect.[125]

The information memorandum episode illustrated the degree of mistrust between Congressional Republicans and the Obama administration. Any attempt to revisit the TANF work requirements came to a final end with the advent of the Trump administration in January 2017. Although the Trump administration did not have a specific agenda with regard to income maintenance programmes other than a repeal of the Affordable Care Act, Donald Trump, in his 2011 book *Time to Get Tough* wrote that reformers should apply the 1996 workfare principles to *all* welfare programmes[126]. This was a principle that his administration would try to implement through executive order and guidance documents, steering state policy in a work-first direction, thus applying the TANF playbook to low income

[123] *The Washington Post* (8 August 2012) Spin and counter spin in the welfare debate. https://www.washingtonpost.com/blogs/fact-checker/post/spin-and-counterspin-in-the-welfare-debate/2012/08/07/61bf03b6-e0e3-11e1-8fc5-a7dcf1fc161d_blog.html [accessed 17 August 2019].
[124] Interview with Cecilia Munoz, director of the Domestic Policy Council (20212-2017), Washington DC, February 2017.
[125] Government Accountability Office, Temporary Assistance For Needy Families: Information Memorandum Constitutes Rule for the Purposes of the Congressional Review Act, 2012, Washington DC: GAO.

[126] D. Trump wrote 'Benefits should have strings attached to them'. *Time to Get Tough*, (Washington DC, Regnery Publishing, 2011), p.116

programmes. In August 2017, the Trump administration issued an information memorandum rescinding the July 2012 guidance[127].

Obama appointees had rightly anticipated adverse congressional reactions to any of their welfare reform proposal. As a result, senior officials turned to other forms of under the radar regulatory tools to enact policy goals, which they thought would avoid the negative headlines and obstruction that President Obama so often complained about. But they had underestimated how such a move would play out in the midst of a presidential campaign. When Obama senior officials faced fierce Republican opposition to the administration's guidance trying to steer welfare away from a strict work-first approach, all efforts to reform TANF were immediately stopped. Political and legal challenges focused on other policy areas, mainly the Affordable Care Act.

Conclusion

This article has sought to assess the extent to which the British and US welfare reform trajectories post-2010 reflected conventional wisdoms regarding the distinctive characteristics of the US and UK policy styles. More specifically, it explored whether the traditional vision of a sharp contrast between a rigid, adversarial and conflict-driven policy style in the US vs. a top-down, centralised policy style in the UK is still useful for characterizing recent reform trajectories in both countries.

In the UK, the policy style has been distinctively top-down, centralised and hierarchical, with a somewhat perfunctory approach to consultation and consensus building. Since 2010, successive Conservative governments have been able to reengineer the operation of the benefit system despite the political controversies generated by these transformations. The use of secondary legislation and, perhaps more importantly, guidance, even in the absence of a strong parliamentary majority, has been striking, especially compared to the swiftly abandoned reform of workfare rules for TANF recipients in the US.

[127] TANF-ACF-IM-2017-01.

The notion of policy style is useful in as much as it helps explain how legal and cultural codes affect the calculations by individuals and groups of their strategies and courses of action.[128] In the US, congressional Republicans used legislative procedures as a way to exert political control over a bureaucracy that they thought was in favour of Obama's political agenda. Here, the notion of a strong contrast between an adversarial US style with veto points vs. a flexible regulatory process in the UK that has more leeway for accommodation has been broadly confirmed. Indeed, although US welfare reform under Obama does not reflect a pattern of adversarial legalism in the sense that there was no legal challenge concerning rule-making over TANF, there was no shortage of conflict and controversy. Furthermore, adversarial legalism helps explain what happens in other, more salient policy fields, such as health care, where litigation has been used to settle political disputes. The Supreme Court's decision in *Sebelius* was a victory for states' rights, undermining the attempt to federalise Medicaid in order to reduce income-related and geographic health inequalities. In 2019, Medicaid and Children's Health Insurance Program covered 75 million Americans, but the sheer variability and complexity of the Medicaid rules represents a substantial impediment to access.[129]

With regard to the British case, there has been no pattern of adversarial legalism; the semi-successful judicial review challenges regarding work for your benefits schemes remained the exception rather than the rule. The traditional contrast between a convoluted policy process as a result of several veto-points in the US vs. a more straightforward pattern of policy change due to a lack of strong veto points in the UK does remain relevant. A pattern of regulatory gridlock reflected the presence of a stronger and more active legislature in the US alongside a much more diffused and fragmented model of policy-making than in the UK. In contrast, in the UK the opportunities for contesting governmental actions remained more narrowly defined. Parliament's capacity to keep the actions of the executive in check was still weak

[128] B.G. Peters, "The American policy style(s)" in M. Howlett and J. Tosun (eds.) *Policy Styles and Policy Making* (London: Routledge, 2019) p. 180-198.

[129] J. Hacker J. *The Great Shift Risk*, 2019, (New York: Oxford University Press.), p. 147. The Trump administration has continued to undermine the Medicaid programme through a series of guidance letters allowing state administrators to experiment work requirements as a condition of eligibility. The Trump administration went further in January 2020, issuing guidance to states encouraging them to experiment with block grants, following the AFDC waiver playbook of the 1990s. The letter stipulates: "The Healthy Adult Opportunity (HAO) initiative will allow states to carry out demonstrations under section 1115(a)(2) of the Social Security Act (the Act) to provide cost-effective coverage using flexible benefit designs under either an aggregate or per-capita cap financing model for certain populations without being required to comply with a list of Medicaid provisions identified by CMS. " https://www.medicaid.gov/sites/default/files/Federal-Policy-Guidance/Downloads/smd20001.pdf

compared to its US functional equivalent; the threat of legal action did not seem to act as a strong deterrent[130]. In fact, benefit reform occurred within the existing administrative structures.

The second conclusion is that although institutional and administrative frameworks matter for explaining the pattern of policy change, the characteristics of a specific policy sector are also crucial for the study of public policy. There are some strong commonalities with regard to social assistance policies: in both countries the able-bodied poor represent a weak constituency, with little popular appeal. Benefit recipients do not enjoy direct access to the consultation process, even at the local level. Challenging of government decisions is therefore delegated to advocacy groups that talk on behalf of welfare recipients, but such groups do not hold much sway in government consultations, particularly in the UK post 2010. They depend on the willingness of individual administrations and governments to include them in the decision-making process. In the US, both the Obama and Trump administration have used sub-regulatory rules to implement social policy reforms aligned with their political preferences. The use and abuse of section 1115 waivers through information memorandums and letters to state adminustrators has become entrenched.[131] But, in the main, waivers should be watched with a "weary eye rather than cheered"[132], as they are used as a Trojan horse to implement cuts and undermine statutory protections, making thin entitlements thinner still.

Finally, the analysis highlights the need to take into account prevailing political dynamics. In the UK, although a Coalition government could have been theoretically expected to be significantly weaker than a single-party majority government, in practice this was not the

[130] But see S. Rose Ackerman, noting that in the UK the judiciary is beginning to take a more interventionist stance regarding the use of SIs as a way of implementing Brexit. S. Rose-Ackerman also notes that civil society groups have been allowed to challenge administrative actions through judicial reviews in a variety of policy domains. She anticipates that should the UK government try to use SIs insteatd of primary legislation to pass its post Brexit reform packgage, this could be challenged both in the Lords or by civil society groups, with some help from the courts. S. Rose-Ackerman 'Executive Rulemaking and Democratic Legitimacy: Reform in the United States and the United Kingdom's Route to Brexit', 2019, *Chicago Kent Law Review*, 94, p. 312.

[131] D. Barron and T. Rakoff argue that big waivers are poised to become major administrative tools for updating stale regulatory frameworks that cannot be otherwise modified. " Big waiver thus enables Congress to delegate regulatory authority to address continuously problems of collective concern without first having to clear away all of the encrusted federal legislative impediments that might encumber fulfillment of the administrative mission Congress intends to promote. It gives to the agency the discretion to make such legislative revisions because Congress has decided not to make them, perhaps because it knows it lacks the capacity to make them well. " D. Barron and T. Rakoff, 'In Depense of Big Waiver' 2013, p. 270-271.

[132] E.H. Stiglitz writes 'The forces that operate at the level of state implementation tend to work towards cuts, and due to information problems federal administrators will have difficulty filtering out the meritorious applications from the non-meritorious applications', Forces of Federalism, Safety Nets, and Waivers' 2017, 18, *Theoretical Inquiries in Law*, 125, p.153.

case, for two main reasons. First, the austerity narrative and the need for benefit cuts were popular with the public, to the extent that in May 2015 the Conservative party was re-elected with an enlarged parliamentary majority. Voters did not punish the Conservatives for the cuts; instead, it was the Liberal Democrats that suffered major electoral losses. Second, and perhaps more importantly, parliamentary opposition to benefit sanctions was muted because Labour was conflicted on the issue of sanctions and workfare. In fact, Labour had lost control of the broader socio-economic narrative. In this context, the Conservative party was able to roll out its attack on the benefit system, using the politics of conviction and resorting to an impositional style of policymaking, particularly in England. This suggests that the timing was right to pursue the unfinished business of welfare reform initiated four decades earlier by the Thatcher government. In the UK, consultation on welfare reform between 2010 and 2015 occurred very much on the Government's terms. As a result, the Coalition was able to pursue its reform agenda whilst making only minor concessions to its challengers. There had been some correction post-2015 precisely because the political dynamics changed. When Amber Rudd became Secretary of State for Work and Pensions in 2018, she set a more consultative and listening tone than her predecessors, rescinding the much-criticised three year benefit sanctions. But these corrections do not counterbalance the overall top-down and highly hierarchical policy style of a department committed to the austerity narrative and the notion that UK labour market reforms have been a success story due to the record numbers of people in work.

In the US, the political dynamics were strikingly different. The Obama administration was a majority government for less than two years, between January 2009 and November 2010. Once it lost the House in the mid-term elections, the administration was confronted by a pattern of systematic Republican opposition at both the federal and state level. Republican opposition to the relaxation of work requirements in TANF reflected the strength of the ideological opposition to any expansion or even, in some cases, maintenance, of existing public government programmes. This is related to a pattern of asymmetric partisan polarization. Policymaking in Washington DC has become increasingly reactive due to extreme partisanship.