

THE MANAGEMENT SIDE OF DUE PROCESS: SOME THEORETICAL AND LITIGATION NOTES ON THE ASSURANCE OF ACCURACY, FAIRNESS, AND TIMELINESS IN THE ADJUDICATION OF SOCIAL WELFARE CLAIMS*

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Virtually no American is likely to live out his life without making a claim under some federally funded or administered benefit or compensation program. Our system of national social welfare legislation includes among its major programs Old Age, Survivors, and Disability Insurance (Social Security),¹ Medicare and Medicaid,² Veterans' Pensions and Compensation,³ Categorical Public Assistance (Aid to Families with Dependent Children⁴ and the new federal Supplementary Security Income Program under title XVI of the Social Security Act),⁵ Unemployment Insurance,⁶ and Workmen's Compensation.⁷ These programs provide basic protection against a multitude of serious economic hazards which may at some time affect us all. Because of the magnitude of the

* Much of the background research for this Article was done in connection with a report submitted to the Administrative Conference of the United States. On the basis of that report the Conference adopted its Recommendation 73-3, "Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits on Compensation," reprinted in the *1972-73 Report of the Administrative Conference of the United States*. The Conference, however, is in no way responsible for the assertions and conclusions made in this Article. A Conference Recommendation is not an approval or adoption of the underlying consultant's report. Moreover, the discussion here goes considerably beyond the scope of the original report to the Conference.

My thanks to Don Hemke of the third-year class at the University of Virginia Law School for his able assistance in preparing this Article for publication.

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¹ 42 U.S.C. §§ 401-429 (1970).

² *Id.* §§ 1395-1396(g) (1970).

³ 38 U.S.C. §§ 301-361 (1970) (compensation); *id.* §§ 501-562 (1970) (pensions).

⁴ 42 U.S.C. §§ 601-644 (1970).

⁵ *Id.* §§ 1381-1383(c) (Supp. II, 1972).

⁶ *Id.* §§ 501-504 (1970).

⁷ 33 U.S.C. §§ 901-950 (1970) (Longshoremen's & Harbor Workers' Compensation Act); 5 U.S.C. §§ 8101-8193 (1970) (Federal Employees' Compensation Act).

public expenditures under these programs,⁸ the virtual universality of their coverage,⁹ and the value of the benefits available under them to individual claimants or recipients,¹⁰ there has developed

⁸ Appropriations for "human resources" increased from \$2.7 billion in 1945 to \$35.4 billion in 1965 to \$113.7 billion in 1973 to \$157.6 billion recommended for 1975. The total federal budget also increased, but at a dramatically lower rate—from \$95.2 billion in 1945 to \$118.4 billion in 1965 to \$246.5 billion in 1973 to \$322.1 billion recommended for 1975. OFFICE OF MANAGEMENT & BUDGET, *THE BUDGET OF THE UNITED STATES GOVERNMENT 1973*, at 75 [hereinafter cited as 1973 BUDGET]; OFFICE OF MANAGEMENT & BUDGET, *THE BUDGET OF THE UNITED STATES GOVERNMENT 1975*, at 51 [hereinafter cited as 1975 BUDGET]. Veterans' benefits and services, which in 1945 made up nearly 40% of the human resources budget, while increasing from \$1.1 billion in 1945 to \$12.0 billion in 1973 to \$14.1 billion recommended for 1975, accounted for just over 10% of the human resources budget in 1973 and less than 10% of the recommended human resources budget for 1975. Income security, which increased from \$1.2 billion in 1945 to \$25.7 billion in 1965 to \$73.1 billion in 1973 to \$104.0 billion recommended for 1975, makes up nearly two-thirds of the present human resources budget. Of the income security programs in 1973, Old Age, Survivors, and Disability Insurance was allocated \$48.3 billion, net of offsetting receipts (\$65.1 billion recommended for 1975), Unemployment Insurance, \$5.4 billion (\$6.6 billion recommended for 1975), Old-Age Assistance, \$1.6 billion, Aid to the Blind, \$65 million, Aid to the Permanently and Totally Disabled, \$946 million (\$4.7 billion recommended for Supplementary Security Income in 1975, which replaces assistance to the aged, blind, and disabled), Aid to Families with Dependent Children, \$4.3 billion (\$4.6 billion recommended for 1975), and Emergency Assistance, \$26 million.

The federal budget for health programs, likewise, has increased dramatically. In 1945, \$200 million was spent on health programs, in 1965, \$1.7 billion, and in 1973, \$18.4 billion. President Nixon has recommended \$28.0 billion for 1975. Of the health budget in 1973, \$9.5 billion net of offsetting receipts was spent for Medicare (trust funds) (\$16.7 billion recommended for 1975) and \$4.6 billion for Medicaid (\$6.6 billion recommended for 1975). 1973 BUDGET 144, 154, 157; 1975 BUDGET 119, 125, 127.

⁹ In fiscal year 1973, an estimated 2.6 million veterans and survivors received \$3.8 billion in compensation for service-related injuries, and 2.4 million beneficiaries received \$2.7 billion in pensions for nonservice-related injuries. 1973 BUDGET 164-65. More than one million veterans in 1973 shared approximately \$2.5 billion in federal outlays for veterans' medical care. 1975 BUDGET 132, 135. An estimated 4.7 million aged persons were reimbursed through Medicare for hospitalization expenses in 1973, and 10.8 million aged persons were reimbursed for physician and other outpatient costs. 1973 BUDGET 147. An estimated 24 million low-income persons received Medicaid benefits in 1973. *Id.* For 1975, 28.6 million Medicaid recipients are forecasted. 1975 BUDGET 121. An estimated 17.5 million retired persons and their dependents and 3.1 million disabled workers and their dependents received Social Security benefits in 1973. 1973 BUDGET 155. In 1975, the total number of Social Security beneficiaries is expected to reach 32.6 million. 1975 BUDGET 126. The National Center for Social Statistics (NCSS) reports that 14.9 million persons received public assistance maintenance payments in May 1973; 1.3% less than the 15.1 million receiving such benefits in May 1972. Of these 14.9 million, 11.0 million received Aid to Families with Dependent Children, 1.2 million, Aid to the Permanently and Totally Disabled, 78,300, Aid to the Blind, 1.9 million, Old-Age Assistance, 780,000, General Assistance and 15,900, Emergency Assistance. U.S. Dep't of Health, Education & Welfare, Public Assistance Statistics May 1973, Sept. 10, 1973, table 3 (NCSS Report A-2).

¹⁰ For example, in June 1973, the average monthly payment per recipient of Old-Age Assistance was \$78.78, of Aid to the Blind, \$110.51, of Aid to the Permanently and Totally Disabled, \$107.85, of Aid to Families with Dependent Children, \$54.19 (\$188.63 per family), of General Assistance, \$73.21 (\$111.97 per case), and of Emergency Assistance, \$173.92 per

an increasing interest in the accuracy, fairness, and timeliness of the adjudication of claims for social welfare benefits.¹¹

A similar interest informs this Article. But, before developing its somewhat peculiar perspective, it is necessary to attempt to specify what is meant by "accuracy," "fairness," and "timeliness" of "adjudications" in the context of the social welfare claims process. "Adjudication" encompasses any determination of eligibility or amount of benefits at any stage of a social welfare claims process. This is a reasonably straightforward usage, but it is considerably broader than the lawyer's customary image of an adjudication as a decision made after a trial-type evidentiary proceeding. "Accuracy" involves the correspondence of the substantive outcome of an adjudication with the true facts of the claimant's situation and with an appropriate application of the relevant legal rules to those facts. Accuracy is thus the substantive ideal; approachable but never fully

family. U.S. Dep't of Health, Education & Welfare, Public Assistance Statistics June 1973, Oct. 16, 1973, tables 4-7, 9, 10 (NCSS Report A-2). In fiscal year 1975, the average monthly payment per retired worker in the Social Security retirement program will be \$203. 1975 BUDGET 126. These amounts represent not only the margin between survival and destitution, but a substantial lump sum as well, if the stream of income is capitalized to current worth.

¹¹ See Boasberg, *Washington Beat: Toward an Adjudicative System for Welfare Reform*, 4 URBAN LAW. 348 (1972); Davis, *Veterans' Benefits, Judicial Review, and the Constitutional Problem of "Positive" Government*, 39 IND. L.J. 183 (1964); Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681; Dooley & Goldberg, *Search for Due Process in the Administration of Social Welfare Programs*, 47 NOTRE DAME LAW. 209 (1971); Fontaine, *The Constitutional Law of Remedies in Welfare Litigation*, 23 MAINE L. REV. 41 (1971); Klein & Willging, *Beyond Java: Redistribution of Risks in the Administration of Unemployment Compensation*, 24 CASE W. RES. L. REV. 490 (1973); Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia*, 57 VA. L. REV. 818 (1971); O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, 1970 SUP. CT. REV. 161; Packard, *Fair Procedure in Welfare Hearings*, 42 S. CAL. L. REV. 600 (1969); Pevar, *Welfare and Its Administration in South Dakota*, 18 S.D.L. REV. 62 (1973); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Reinstein, *The Welfare Cases: Fundamental Rights, the Poor, and the Burden of Proof in Constitutional Litigation*, 44 TEMP. L.Q. 1 (1970); Rosenberg, *Overseeing the Poor: A Legal-Administrative Analysis of the Indiana Township Assistance System*, 6 IND. L. J. 385 (1973); Scott, *The Reality of Procedural Due Process—A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker*, 13 WM. & MARY L. REV. 725 (1972); Smith, *On the Waterfront at the Pier's Edge: The Longshoremen's and Harbor Workers' Compensation Act*, 56 CORNELL L. REV. 114 (1970); Thornock, *Exclusive Remedy Provision of the Federal Employees' Compensation Act—Fact or Fiction?*, 42 MILITARY L. REV. 1 (1968); Washington, *Welfare Grievance Machinery in New York City*, 7 HOUSTON L. REV. 620 (1970); Comment, *Judicial Review and the Governmental Recovery of Veterans' Benefits*, 118 U. PA. L. REV. 288 (1969); Note, *California Welfare Fair Hearings: An Adequate Remedy*, 5 U.C.D.L. REV. 542 (1972); Note, *Constitutional Law: Due Process and Compliance with Processing Requirements for Welfare Applications*, 50 N.C.L. REV. 673 (1972); Note, *General Assistance Programs: Review & Remedy of Administrative Actions in Indiana*, 47 IND. L.J. 393 (1972); Note, *Right to Counsel in Public Welfare Hearings*, 48 BOSTON U.L. REV. 468 (1968).

attainable. "Fairness" is the degree to which the process of making claims determinations tends to produce accurate decisions. That a decision is "timely" simply means that it was made within a reasonable or a statutorily prescribed period of time after presentation of the claim.

The thesis of this Article is that the elements of fairness or fair procedure normally associated with due process of law in adjudicatory proceedings are inadequate to produce fairness in social welfare claims adjudications. Due process in the social welfare context therefore requires redefinition to include management processes which will tend to assure the accuracy of claims adjudications.

The customary focus of constitutional adjudications concerning whether a particular adjudicatory process is "fundamentally fair" is on the extent to which accurate decisionmaking should be supported by providing a directly affected party with a trial-type hearing. Claims of unfairness are made in terms of the denial of one or more of the attributes of trial-type procedure—specific notice of adverse factual and legal claims, opportunity to produce testimony and to argue orally, opportunity to cross-examine adverse witnesses, a neutral adjudicator, a decision based wholly upon the evidentiary record compiled. As a result, various combinations of these adversary procedures have come to define due process of law in particular judicial and administrative contexts.¹² This approach has been as typical in due process decisions concerning social welfare claims adjudications as in other substantive areas.¹³ It is not, therefore, a significant overstatement to suggest that, from the traditional perspective of the legal system, adjudicatory processes which contain adequate procedural safeguards in hearings and appellate checks on initial decisions are considered self-correcting mechanisms for the accurate finding of facts and the authoritative application of law to fact.

This Article argues to the contrary that the purposes, necessary modes of operation, and clientele of social welfare programs so severely limit the value of procedural safeguards and appellate checks in assuring accurate and timely adjudication of social welfare claims that there is a need for additional safeguards on the integ-

¹² See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Jenkins v. McKeithen*, 395 U.S. 411 (1969).

¹³ See, e.g., *Richardson v. Wright*, 405 U.S. 208 (1972); *Richardson v. Perales*, 402 U.S. 389 (1971); *California Dep't of Human Resources Dev. v. Java*, 402 U.S. 121 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

rity of this very important segment of the administrative process. One such additional safeguard—a management system for assuring adjudication quality in claims processing, sometimes called a quality control or quality assurance system—will be described here in broad outline. The remainder of the discussion is concerned with the due process implications of such a management system and with the possibilities for its judicial imposition on certain social welfare programs as a matter of constitutional due process or statutory construction. The purpose of the discussion is not to provide a detailed analysis of the issues raised, but rather to stimulate new ways of thinking about due process of law in the context of social welfare programs.

I

LIMITATIONS OF TRIAL-TYPE HEARINGS AND APPEALS IN ENSURING ACCURATE, FAIR, AND TIMELY ADJUDICATION OF CLAIMS

In adversary judicial proceedings, procedural safeguards and appellate review are generally viewed as the guardians of fairness and accuracy. In this context, problems of accuracy and fairness tend to cluster around two dominant issues. The first is the problem of designing systems in which a fair opportunity to contest does not result in an equal opportunity to obfuscate and to delay. The solution to difficulties of this type has been sought largely through adjustments in either the procedural rules or the evidentiary system, the adjective law governing the process of adjudication. Efforts over the past several decades to develop rules which strike an appropriate balance between the information-seeking and the harassment potential of various discovery devices provide obvious and familiar examples of these kinds of adjustments to the adjudicatory process in the courts.¹⁴

The second problem has been the development of cost-allocation principles to ensure that the adversary process is generally available. For if it is the adversary process which gives judicial adjudication its assurance of fairness and accuracy, that assurance cannot be maintained when some parties lack the resources to be

¹⁴ See W. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* (1968); Frank, *Pretrial Conferences and Discovery—Disclosure or Surprise?*, 1965 *INS. L.J.* 661; Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 *STAN. L. REV.* 455 (1962); Rosenberg, *Changes Ahead in Federal Pretrial Discovery*, 45 *F.R.D.* 479 (1968); *Symposium: Criminal Discovery*, 7 *U. SAN FRAN. L. REV.* 203 (1973); Note, *The Use of Discovery to Obtain Jurisdictional Facts*, 59 *VA. L. REV.* 533 (1973).

effective adversaries. Although complete equality of adversaries is not a realistic goal, certain types of resources have been recognized as critical for success in adversary presentation. Legal counsel is such a resource, and in criminal¹⁵ and quasi-criminal¹⁶ proceedings, constitutional due process has come to require the availability of counsel as well as the waiver of court fees for other necessary defense items.¹⁷ Civil proceedings have not yet had their "adversariness" subsidized by constitutional requirements.¹⁸ Occasionally

¹⁵ See *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (requiring counsel at trial in state court for misdemeanor if possible sentence includes jail term); *Gilbert v. California*, 388 U.S. 263 (1967) (counsel not required at taking of handwriting exemplar); *United States v. Wade*, 388 U.S. 218 (1967) (requiring counsel at post-indictment line-up); *Douglas v. Illinois*, 372 U.S. 353 (1963) (requiring counsel on first appeal); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring counsel at trial in state court for noncapital felony); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (requiring counsel for criminal defendant in federal court); *Powell v. Alabama*, 287 U.S. 45 (1932) (requiring counsel at trial in state court for capital felony).

¹⁶ See *In re Gault*, 387 U.S. 1 (1967) (requiring appointed counsel, notice, and confrontation at certain juvenile proceedings). But see *Morrissey v. Brewer*, 408 U.S. 471 (1972) (appointed counsel not required at parole revocation). Because the supposed purpose of juvenile court—"to determine the best way to correct the child's unlawful behavior"—differs from the purpose of criminal courts—"to convict and dispose of guilty adults"—some attorneys view their role in juvenile proceedings as only "modified advocates." Ferster, Courtless & Snethen, *The Juvenile Justice System: In Search of the Role of Counsel*, 39 *FORDHAM L. REV.* 375, 388-89 (1971). But see *McMillian & McMurtry, The Role of the Defense Lawyer in the Juvenile Court—Advocate or Social Worker?*, 14 *ST. LOUIS L.J.* 561, 563 (1970) (attorney's "true role" in juvenile proceedings is that "of an advocate to protect his client's legal rights").

¹⁷ See *Mayer v. Chicago*, 404 U.S. 189 (1971) (free trial transcripts for appeal from misdemeanor); *Roberts v. LaVallee*, 389 U.S. 40 (1967) (free transcripts of preliminary hearing); *Draper v. Washington*, 372 U.S. 487 (1963) (limited furnishing of transcripts unconstitutional); *Lane v. Brown*, 372 U.S. 477 (1963) (free transcripts of post-conviction hearing); *Burns v. Ohio*, 360 U.S. 252 (1959) (waiver of filing fee for second level appeal); *Griffin v. Illinois*, 351 U.S. 12 (1956) (free transcripts on appeal). See generally Note, *The Indigent's Right to a Transcript of Record*, 20 *KAN. L. REV.* 745 (1972); Comment, *Criminal Procedure—Free Transcripts for Indigents*, 51 *N.C.L. REV.* 621 (1973); Comment, *Criminal Law—Free Transcripts—Indigent Misdemeanants*, 8 *GONZAGA L. REV.* 321 (1973).

¹⁸ However, 28 U.S.C. § 1915(d) (1970) (proceedings in forma pauperis) empowers federal courts to appoint counsel for indigents in civil cases, and while the statute grants no "right" to counsel, failure to make an appointment may be an abuse of discretion. See *Peterson v. Nadler*, 452 F.2d 754, 757 (8th Cir. 1971) (requiring appointment of counsel to prosecute indigent prisoner's claim of conversion of his automobile). There is no explicit statutory authority for compensating counsel "requested" to act for an indigent under 28 U.S.C. § 1915(d). *Dreyer v. Jalet*, 349 F. Supp. 452, 486 (S.D. Tex. 1972). One district court has noted, however, that appointment authority implicitly authorizes the commitment of federal funds for compensation in a proper case. *Allison v. Wilson*, 277 F. Supp. 271, 275 (N.D. Cal. 1967). But see *DeMaris v. United States*, 187 F. Supp. 273, 275 (S.D. Ind. 1960).

The statute also authorizes federal courts to waive certain fees and costs and to have a trial record printed at government cost. 28 U.S.C. §§ 1915(a), (b) (1970). Moreover, the Supreme Court found a constitutional right of access to courts for divorce litigation in *Boddie v. Connecticut*, 401 U.S. 371 (1971), invalidating the imposition of court fees and costs for service of process which restricted petitioners' access to the courts.

The Court has refused to extend *Boddie* to bankruptcy (e.g., *United States v. Kras*, 409

statutes¹⁹ and judicial decisions²⁰ do ameliorate the problem of the unavailability of counsel to develop facts and arguments in worthy claims by making lawyers' fees a cost^d to be borne by the losing, and sometimes even the winning²¹ party.

There are, however, limits on the extent to which courts and legislators can refine adjective law without making it a disproportionate concern in litigation that purports to deal with matters of substance. And the wisdom of increasing the potency of adversaries through public subsidies is always open to serious question,

U.S. 434 (1973)), and has denied certiorari in cases involving the applicability of *Boddie* to child guardianship and welfare claims (e.g., *Meltzer v. C. Buck LeCraw Co.*, 402 U.S. 954 (1971)). See *Lindsey v. Normet*, 405 U.S. 56 (1972) (sustaining Oregon statute requiring trial on actions to evict within six days of service of complaint unless security posted, and striking down as violative of equal protection double-bond requirement for certain appeals in such actions). See generally Note, *Constitutionality of Cost and Fee Barriers for Indigent Litigants: Searching for the Remains of Boddie After a Kras-Landing*, 48 IND. L.J. 452 (1973).

¹⁹ Numerous federal statutes authorize or require the award of attorney's fees in certain situations. Some provide that the prevailing party "shall" recover reasonable attorney's fees. E.g., 7 U.S.C. § 210(f) (1970) (certain actions against stockyards); 15 U.S.C. § 15 (1970) (antitrust); 29 U.S.C. § 216(b) (1970) (Fair Labor Standards Act). Other statutes provide that courts "may" award reasonable attorney's fees. E.g., 15 U.S.C. § 77k(e) (1970) (Securities Act of 1933); 17 U.S.C. § 116 (copyright infringement); 35 U.S.C. § 285 (1970) ("exceptional" patent infringement cases); 42 U.S.C. §§ 2000a-3(b) (1970) (Civil Rights Act of 1964; public accommodations); *id.* § 2000e-5(k) (equal employment opportunity); *id.* § 3612(c) (fair housing). See Annot., 8 L. Ed. 2d 894 (1963). Even when the statute is merely permissive, judicial discretion in the award of attorney's fees may be limited by underlying statutory policy. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (Civil Rights Act of 1964; public accommodations). See also *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) (Securities Act of 1934).

²⁰ See, e.g., *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), noted in 38 U. CHI. L. REV. 316 (1971). Courts have been particularly willing in racial discrimination cases to award attorney's fees even in the absence of statutory authorization. See, e.g., *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971). But see *Kemp v. Beasley*, 352 F.2d 14 (8th Cir. 1965). Attorney's fees also have been awarded without statutory authorization outside the racial discrimination context. See, e.g., *Yablonski v. UMW*, 466 F.2d 424 (D.C. Cir. 1972), cert. denied, 412 U.S. 918 (1973) (Labor Management Reporting & Disclosure Act); *Jinks v. Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972) (maternity leave); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972) (reapportionment). See generally Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. REV. 301 (1973); Note, *Allowance of Attorney Fees in Civil Rights Litigation Where the Action is not Based on a Statute Providing for an Award of Attorney Fees*, 41 U. CIN. L. REV. 405 (1972).

²¹ See, e.g., *McEnteggart v. Cataldo*, 451 F.2d 1109, 1112 (1st Cir. 1971) (plaintiff awarded attorney's fees although defendant prevailed on merits, "since plaintiff was forced to go to court to obtain the statement of reasons to which he was constitutionally entitled"); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 430 (8th Cir. 1970) (plaintiff awarded attorney's fees in absence of monetary or injunctive relief because plaintiff's lawsuit, by prompting defendant's compliance with civil rights statute, "performed a valuable public service"); *Sierra Club v. Lynn*, 5 E.R.C. 1745 (N.D. Tex. 1973) (attorney's fees awarded because plaintiffs rendered "public service" by ensuring purity and continued viability of certain water supplies). See also *Globus, Inc. v. Jarroff*, 279 F. Supp. 807 (S.D.N.Y. 1968).

unless litigation is viewed as an ultimate rather than as an instrumental end. Hence, it is not surprising to find that in recent years a search has begun for alternatives or additions to adjective law reform and subsidies as devices for improving the quality of adjudicative justice. This search is evidenced by a concern for the development of techniques of judicial administration to make the process of adjudication more efficient, and by an increasing willingness to view the adjudicatory process as one in which the positive management of cases and case flow to achieve accurate and fair results is an appropriate role for the adjudicator.²² This new focus suggests some movement away from passive judicial reliance on adversary processes and toward positive judicial management of adjudication.²³ When dealing with adjudications of social welfare claims, a posture of positive management of the adjudicatory process to ensure quality is not only appropriate, as in the judicial system, but essential.

A. *The Positive Focus of Social Welfare Claims Adjudication*

Perhaps the most general consideration which supports a management strategy for assuring accuracy, fairness, and timeliness in social welfare adjudications is the positive focus inherent in the administration of programs involving benefits and compensation. The purposes of claims adjudication in social welfare systems are somewhat different from the purposes served by most judicial adjudications. The adjudication of claims in social welfare programs is an outgrowth of a positive legislative program to insure or protect qualified claimants against certain economic hazards. The claims adjudicator's role, whether at the initial consideration of a completed claim file or after an oral hearing, is essentially the same—to provide benefits to eligible individuals and to deny the claims of ineligible individuals.

This is a quite different posture from that which is customary for a court in judicial proceedings. A court generally has no responsibility for "administering" the substance of legislative pro-

²² See, e.g., AMERICAN ASSEMBLY, *THE COURTS, THE PUBLIC AND THE LAW EXPLOSION* (H. Jones ed. 1965); Hufstедler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971).

²³ Pretrial hearings commonly will be ordered to narrow issues and force agreement when the judge decides that a trial to find facts would be unnecessary. And the judge has some discretion to find "agreement" on facts when a party vigorously protests that agreement has not been reached. See, e.g., *Life Music, Inc. v. Edelstein*, 309 F.2d 242 (2d Cir. 1962). See generally M. ROSENBERG, J. WEINSTEIN & H. SMIT, *ELEMENTS OF CIVIL PROCEDURE* 736-65 (1970).

grams relevant to the lawsuit before it; and in most cases, the adversaries may compromise their dispute and withdraw it from judicial jurisdiction without judicial approval. This compromise may be quite different from the judgment the court would have rendered, but this difference in result does not mean that the judicial process has failed. Adversaries may use the judicial forum as a vehicle for facilitating their bargaining, and to the extent that compromise resolves their differences, judicial involvement is successful. One of the purposes of judicial decisionmaking—the resolution of conflicts which might otherwise disturb the public peace—is served regardless of the substance of the outcome and the absence of judicial judgment. Additional purposes of judicial decisionmaking, such as developing decisional rules which promote efficient resource allocation, may be served as well (or better) by the parties' bargain as by a judicial decision.²⁴

The same opportunity for "successful" compromise solutions between adversaries is not available in social welfare claims processing. Law in this area is not a loose framework within which private ordering is dominant. A regime of strict law applies, and within that regime adjudicative success can be tested only by whether the allowed claims are consistent with the statutory and regulatory scheme. Although a partially satisfied claimant may decline to appeal, thus in effect compromising his claim, there is no way to satisfy a claimant, even partially, without rendering an initial decision on the validity of his claim.

The notion that claims adjudicators are engaged, not in providing a forum for the resolution of conflicts, but rather in the systematic and affirmative implementation of certain prescribed legislative policies is reflected in the nonadversary and informal procedures of most social welfare claims processes.²⁵ No one acts

²⁴ Plea bargaining in criminal cases may make this feature of judicial process customary in criminal as well as civil litigation.

²⁵ For a description of the Social Security Disability claims process, see Dixon, *supra* note 11, at 688-89. This process is never adversary, and may be "formal," in the sense that claimants are entitled to a highly structured evidentiary process permitting confrontation and cross-examination, only at a de novo appeal hearing before an Administrative Law Judge. Even at a de novo hearing, however, as Dixon found, the process remains largely informal. *Id.* at 694-97.

Social Security claims procedure and applicable evidentiary principles are described in 20 C.F.R. §§ 422.130-205, 404.701-728 (1973), respectively.

The Veterans' Administration claims process is neither adversary nor formal. Initial decisions are made by Rating Boards on the basis of documentary evidence. An informal hearing may be held to "discuss" the claims file, but there is no formal presentation of proof. A similar process is employed on appeal to the Board of Veterans' Appeals. *See generally* 38 C.F.R. §§ 3.100-215, 19.101-156 (1973).

specifically as the representative of the government in these proceedings. Nor is the claimant, who is usually unrepresented²⁶ and

Claims under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8193 (1970), are determined initially by claims examiners in the Office of Federal Employees' Compensation (OFEC), Department of Labor. A review by OFEC may be requested by any claimant who is disappointed by the initial decision. Prior to review there may be a hearing; however, the procedures at both levels are wholly informal. See 20 C.F.R. §§ 02.1-8 (1973). Although it is possible for a government department to oppose an award of compensation, the regulations call for no participation by the employee's department other than a report by the claimant's immediate supervisor. *Id.* § 02.1. In practice a contested claim is virtually unknown. Further appeal may be made to the Employees' Compensation Appeals Board, but review generally is based upon the informally compiled previous record. *Id.* §§ 501.1-13.

The informal claims procedure associated with Unemployment Insurance programs is described in *California Dep't of Human Resources Dev. v. Java*, 402 U.S. 121 (1971). Appeals from initial decisions are permitted under § 303(a)(3) of the Social Security Act, 42 U.S.C. § 503(a)(3) (1970), but federal regulations have not specified the nature of the appeal proceeding beyond requiring that hearings and decisions be accomplished with the "greatest promptness that is administratively feasible." 20 C.F.R. §§ 650.1-4 (1973).

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1970), permits the use of formal adversary hearings, however, the history of this program in practice suggests reliance on mediation rather than formal hearing principles. The practice is given implicit recognition in the January 1973 revamping of claims procedure. See, e.g., 20 C.F.R. §§ 702.134-135, 702.311-316, 702.333-339 (1973).

Public assistance claims procedures are highly informal unless an "evidentiary hearing" is requested. See 45 C.F.R. § 206.10 (1973). At hearings, the claimant is entitled to the rights articulated in *Goldberg v. Kelly*, 397 U.S. 254 (1969); see 45 C.F.R. § 205.10 (1973). ("Public assistance" here includes Aid to Families with Dependent Children (AFDC), Old-Age Assistance (OAA), Aid to the Blind (AB), Aid to the Permanently and Totally Disabled (APTD), and Medicaid.)

On January 1, 1974, OAA, AB, and APTD were replaced by the Supplementary Security Income Program (SSI). Under proposed and interim rules for SSI, eligibility is determined from information filed by the claimant. 38 Fed. Reg. 29,088 (1973). A claimant dissatisfied with the initial determination may request reconsideration. A request for reconsideration is a mandatory first step for appeal except in certain terminations where, for medical reasons, disability payments are stopped. 39 Fed. Reg. 1053 (1974). In part, reconsideration takes place at a "conference" which is generally informal. The claimant is entitled to a "formal conference" only when termination or suspension of benefits is proposed. The availability of subpoena power in the "formal conference" procedure appears to be the only feature distinguishing the two proceedings. *Id.* at 1054.

After reconsideration, a claimant who is still dissatisfied may request a hearing. Procedures surrounding the hearing are flexible. The presiding officer, at his discretion, may hold pre-hearing or post-hearing conferences to facilitate the hearing and decision. *Id.* at 5778. The hearing officer may adjourn for new matter if he feels "relevant and material" evidence is available but unpresented. Judicial rules of evidence are inapplicable at the hearing. *Id.* The Appeals Council, upon its own motion or upon request, may review the hearing's determination. *Id.*

In addition to initial determination, the administrators of SSI must redetermine eligibility at least once every 12 months. *Id.* at 1360.

²⁶ There is virtually no reliable information on the extent to which claimants in any social welfare program have assistance, apart from that given by a claims examiner, in applying for benefits at levels of the adjudication process which do not involve a hearing of any sort. It is likely that public assistance and Social Security claimants get some help from various social work agencies. Veterans are assisted sometimes by post service officers in

often uninformed of his rights,²⁷ an adversary in any realistic sense. In this context, the theoretical model of the passive adjudicator ruling on the basis of facts and arguments presented by opposing parties is wholly inappropriate. Hence, agency policy and practice recognize that claims adjudicators must assist in the development of facts, as well as sit in judgment on evidence presented to them. HEW's *Handbook of Public Welfare Assistance* reflects the position of most benefit-determining agencies:

Relying on the individual as a primary source of information does not relieve the agency of the responsibility to recognize the differing capacities of applicants and recipients to discharge their

veterans' organizations and longshoremen, harbor workers, and federal employees get some assistance from union representatives. With the possible exception of veterans, however, there is no reason to believe that a significant percentage of claimants have outside assistance prior to an initial denial of their claims.

Some agencies do collect statistics on representation in appeals. The Bureau of Hearings and Appeals in the Social Security Administration (SSA) reported that in May 1972, 34% of the petitioners in SSA hearings were represented by attorneys—a 14% increase over May 1970—while another 12% of claimants were represented by nonattorneys. Seventy-seven percent of claimants before the Board of Veterans' Appeals had representation. This nonattorney representation is provided free by state and private veterans' organizations. The Labor Department keeps no figures on representation, but it is widely believed that most appellants in FECA cases are represented by the Association of Federal Government Employees. It is believed also that many longshoremen have had attorney representation on their compensation claims because of a possible action in unseaworthiness against third parties, which action would require an attorney's assistance. By contrast, only about 10% of public assistance claimants had representation at hearings during the period January-June 1972. See U.S. Dep't of Health, Education & Welfare, Fair Hearings in Public Assistance January-June 1972, April 23, 1973, table 12 (NCSS Report E-8).

Because appealed cases make up a very small portion of the caseload, or even of the denied claims, a very high rate of representation on appeal would not indicate substantial access to attorneys or other representatives at critical times in the claims process. See notes 32-35 and accompanying text *infra*. Looking at selected statistics, however, one may wonder whether representatives of the sort currently available to claimants do much good anyway. For example, representation increases one's chance of success by only two percent before the Board of Veterans' Appeals. And, a Social Security disability claimant seems to get as much benefit from the Administrative Law Judge calling in a government expert as from having a representative—a 13% increase in his chance of winning. Moreover, when both a representative and a medical advisor are present the claimant's chances of prevailing rise 26%, which perhaps attests to the non-adversariness of the procedure. See generally U.S. Dep't of Health, Education & Welfare, An Evaluation of the SSA Appeals Process, Report No. 7, April 15, 1970. Indeed, a recent study of adverse actions in the Civil Service Administration found that unrepresented claimants fared better before the Civil Service Commission than those who were represented. See Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196, 267-72 (1973).

²⁷ See generally Handler & Hollingsworth, *Reforming Welfare: The Constraints of the Bureaucracy and the Clients*, 118 U. PA. L. REV. 1167, 1174-75 (1970); Mashaw, *supra* note 11, at 818-28, 834; Scott, *Reality of Due Process—A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker*, 13 WM. & MARY L. REV. 725, 745-46 (1972); Comment, *Texas Welfare Appeals: The Hidden Right*, 46 TEXAS L. REV. 223, 236-37 (1967).

responsibilities to the agency. Some can provide or obtain needed information after the agency explains what information is needed; others will need specific directions to sources of information; others may want, or have to rely on, the agency to obtain the information for them.²⁸

Even when the claimant is exercising appeal or de novo hearing rights after an initial denial of his claim, programs involving the payment of public funds employ a nonadversary procedure in which the government is not specially represented and recognize an obligation to aid the claimant in presenting his case.²⁹

B. *The Necessity for "Informality"*

Adversary procedure regulated by procedural safeguards could, of course, be made the principal guarantor of the accuracy and fairness of social welfare adjudications. But the prospects for successful monitoring and regulation of the claims process through adversary procedure seem dim. The principal difficulty with such an effort is that the availability of appeal hearings in which some elements of trial-type procedure are available has an arguably insignificant impact on the initial and most important decisions

²⁸ U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, HANDBOOK OF PUBLIC WELFARE ASSISTANCE, pt. IV, § 2400 (H.T. No. 139, Feb. 8, 1968). See also California Dep't of Human Resources Dev. v. Java, 402 U.S. 121, 126-27 (1971) (describing unemployment insurance claims system).

²⁹ See note 25 *supra*. Compensation programs such as Longshoremen's and Harbor Workers' Compensation, 33 U.S.C. §§ 901-50 (1970), or Federal Employees' Compensation (FECA), 5 U.S.C. §§ 8101-93 (1970), use procedures which place greater reliance on adversary development of the record. But again, adversary procedure is tempered by responsiveness to the basic purpose of these programs—the provision of prompt aid to covered employees—a purpose which the fault system and judicial due process had previously failed to serve adequately.

See Haynes v. Rediri A/S Aladdin, 362 F.2d 345, 350 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020 (1967); Smither & Co. v. Coles, 242 F.2d 220, 222-23 (D.C. Cir.), *cert. denied*, 354 U.S. 914 (1957). See also Bradford Elec. Co. v. Clapper, 286 U.S. 145, 159 (1932); Bernstein, *The Need for Reconsidering the Role of Workmen's Compensation*, 119 U. PA. L. REV. 992, 993-94 (1971). Indeed, the extent to which the beneficent purposes of the compensation scheme are realized depends in large degree upon the extent to which the agency assists in the development of the record and the settlement of claims prior to a contentious hearing. NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, REPORT 99-114 (1972). Thus, in FECA cases, while compensation payments are charged against agency budgets, the contested claim is very rare. M. Gilhooley, *The Federal Employees' Compensation Act*, Jan. 20, 1972, at 11 (staff report prepared for Committee on Grant and Benefit Programs of the Administrative Conference of the United States). And in the Longshoremen's program, potentially the most adversary of the federally funded or administered benefit or compensation programs, over 90% of the cases are disposed of prior to hearing. See M. Checchi, *The Longshoremen [sic] and Harbor Workers' Act*, March 20, 1972, table 1 (staff report prepared for the Committee on Grant and Benefit Programs of the Administrative Conference of the United States).

concerning eligibility. Moreover, as will be developed further below, it is far from clear that formal adversary procedure is appropriate at the hearing or appeal stage of social welfare claims adjudications.

1. *Hearings as a Means for Monitoring the Quality of Initial Eligibility Determinations*

A threshold problem in using adversary process to produce high quality adjudication of social welfare claims is the necessity for relying upon claimant appeals or requests for de novo review as the mechanism for triggering the adversary process.³⁰ Indeed, there are really two types of problems here. First, in such a system there will be no quality check through hearings when favorable action is taken on the claimant's request because, unless the claimant disagrees with the amount of the award, no appeal will be taken.³¹

Even when the decision is negative, appeals leading to hearings are highly and mysteriously selective. For example, in 1970 nearly one-half of the claims for Social Security disability payments (excluding technical denials) were rejected. From this universe of unsuccessful applicants, about eleven percent requested a hearing.³² The appeal rate in public assistance programs for the first six months of 1971 was approximately two percent, and fifty-four percent of those appeals were lodged in three states.³³

³⁰ Presumably, initial determinations of eligibility, ineligibility, and amount of payments would continue to be made informally. There is no reason for an adversary proceeding until a claim has been made and denied, just as there is no reason for a private lawsuit unless a demand for payment or compensation has been rejected.

³¹ Of course, a procedure for government appeals by special reviewing officers could be established to contest affirmative actions, but it would seem more sensible to simply let the reviewer who thinks a decision is wrong reverse it.

³² Computations were done from the figures reported in Dixon, *supra* note 11, at 683 n.12.

³³ The two percent figure results from the ratio of appeals to all appealable decisions, including positive actions which might be appealed on the basis of amount of payment. When only denials and terminations are considered, the appeal rate rises to about six percent. General assistance, Medicaid, and decisions based on the death of the claimant have been excluded from the universe. Computations are based on the statistics reported in U.S. Dep't of Health, Education & Welfare, Fair Hearings in Public Assistance January-June 1971, May 22, 1972 (NCSS Report E-8); U.S. Dep't of Health, Education & Welfare, Reasons for Disposition of Applications Other Than by Approval January-March 1971, Dec. 3, 1971 (NCSS Report A-10); *Id.*, April-June 1971, Mar. 8, 1972; U.S. Dep't of Health, Education & Welfare, Reasons for Discontinuing Money Payments to Public Assistance Cases January-March 1971, Dec. 15, 1971 (NCSS Report A-11); U.S. Dep't of Health, Education & Welfare,

We simply do not know enough about the self-selection process to determine how these appeal rates ought to be interpreted. The rates seem quite low, but do they reflect a high degree of claimant satisfaction, a low error rate for initial determinations, poor information about appeal rights,³⁴ inadequate notice of the ground for decisions, or something else? Without such information we certainly cannot conclude that the opportunity for appeal is an effective check on the fairness and accuracy of even initial denials of claims for benefits or compensation. But one conclusion may be drawn: The initial level of adjudication is by far the most important decisional level. That decision is final in well over ninety percent of the social welfare claims filed.³⁵

Appeals might effectively monitor quality if a limited stream of appeals produced information about where the problems are in initial adjudications and corrected those problems through the force of precedent. But this possibility does not seem very plausible. One difficulty is that the process of hearing appeals does not produce information on patterns of problems which may be emerging at the initial levels of adjudication or on the timeliness of initial claims processing. The appeal or hearing process involves individual claims or claimants—not the quality of the claims process as a whole. The appeals board or examiner does not launch an investigation to determine whether he is dealing with an isolated problem or the tip of an iceberg of similar but unappealed cases.

Nor do appeals really act as a supervisory check on initial decision in most systems. Because facts relating to entitlement constantly change and because the claimant would often be seriously prejudiced if at a hearing he could rely only on evidence originally presented to or developed by the claims examiner, an “appeal” is often not an appeal on the record of the initial

Applications, Cases Approved and Cases Discontinued for Public Assistance January-March 1971, Nov. 30, 1971 (NCSS Report A-9); *Id.*, April-June 1971, Mar. 22, 1972.

³⁴ See note 27 *supra*.

³⁵ The appeal rates in programs other than AFDC and the Social Security Disability program also were very low. Figures for 1971 reveal 440 appeals from 20,000 FECA decisions and 302 formal hearings after 6,000 informal conferences in the Longshoremen's program. Underlying 20,000 appeals to the Board of Veterans Appeals were 325,000 informal decisions on new applications filed for veterans' pensions or compensation and over two million total VA actions on new and continuing cases. M. Gilhooley, Summary of Reports on Federal Disability Procedures, (memorandum prepared by staff of Administrative Conference of the United States, March 31, 1972 for use at Airlie House Conference on Comparative Study of Federal Disability Benefit Procedures, April 23-24, 1972) (on file at the *Cornell Law Review*).

determination. It is rather a *de novo* determination on an open record which may be supplemented.³⁶ Hence, a finding on appeal which diverges from the initial determination on the claim is not necessarily a finding of error. It is merely a different finding which may have been made on quite different facts. Therefore, the rate of "reversals" of initial decisions by adjudicators who conduct hearings is, standing alone, a statistic which tells us nothing about the quality of initial decisions.

There also appear to be special problems with the development and dissemination of precedent in social welfare claims systems. Cost is clearly a major factor. Adjudicators in large programs such as Aid to Families with Dependent Children or Social Security Disability Insurance process thousands of hearings per month. This workload cannot be managed at an acceptable cost if each adjudicator is expected to write a full narrative description of his cases and his reasons for decision. Nor does it seem likely that the benefits of "sanitizing" (eliminating all identifying characteristics to ensure confidentiality of medical and other personal information), printing, indexing, and circulating these decisions would exceed the costs involved. Initial claims adjudicators would not have time to read them as they came out. Their relevance would therefore have to be discovered by the examiner in the context of new claims, usually without the aid of a represented or knowledgeable claimant. And he might discover that there were hundreds, if not thousands, of potentially relevant precedents.

Difficulties of this sort perhaps explain the widely divergent practices of various social welfare systems with respect to the precedential value of prior adjudications. HEW requires by regulation that AFDC hearing decisions be synopsized, and made available to the public by the states,³⁷ but it does not enforce the requirement, and the states do not comply.³⁸ The Board of Appeals and Review in the Civil Service Commission keeps a file of

³⁶ All of the public benefit programs use an open file approach, and one should expect that the facts might appear quite different at a hearing than they did upon initial application. For one thing, having once been denied, a claimant may pursue appropriate evidence of entitlement more seriously in preparation for a hearing. For another, time affects eligibility in some situations: disabilities may become worse, for example, or public assistance claimants may expend financial resources which previously made them ineligible.

³⁷ 45 C.F.R. § 205.10(a)(19) (1973) (also applicable to Old Age Assistance and Medical Assistance for the Aged, Aid to the Blind, Aid to the Permanently and Totally Disabled, and Medicaid).

³⁸ Scott, *The Regulation and Administration of the Welfare Hearing Process—The Need for Administrative Responsibility*, 11 WM. & MARY L. REV. 291, 341-42 (1969).

precedent decisions, but these are not available to the public because they are not "sanitized."³⁹ The Social Security Administration⁴⁰ and Labor Department⁴¹ issue "sanitized" precedent decisions in disability and Federal Employees' Compensation (FECA) cases respectively, but these are a selected group of decisions which, at least in the disability program,⁴² seem to deal with peculiar legal issues rather than with the more usual application of broad standards to complex facts. And the Veterans' Administration (VA) simply refuses to give its appeals decisions any precedential value.⁴³

In short, administrative appeal or de novo hearing provides a very unsystematic check on the quality of initial adjudications of claims. The process of social welfare claims adjudication therefore necessarily places heavy reliance upon the initial claims adjudicator as a developer of facts, as a formulator of syntheses which subsume facts under relevant standards, and as a counselor to both the claimant and the unrepresented interests of the program he administers. Accuracy, fairness, and timeliness depend largely upon the competence and vigor with which the initial adjudicator performs these functions, as well as the function of ultimate decision.

2. *Appeal Hearings and Adversary Process*

To a limited degree the Supreme Court has recognized that a fully adversary hearing may be inappropriate even at the hearing stage of social welfare claims proceedings. In Social Security disability hearings, for example, no one appears to represent the agency. The Administrative Law Judge (ALJ) therefore has the obligation to develop facts adverse to the claimant if he considers such development necessary to a full and fair determination of the merits. Similarly, the ALJ aids an unrepresented claimant in presenting his case. And ultimately, he decides whether the claimant is entitled to benefits. In short, the procedure is inquisitorial rather than adversary, but the Supreme Court nevertheless rejected a

³⁹ M. Gilhooley, Civil Service Disability Procedures March 17, 1972, at 16 (staff report prepared for Committee on Grant and Benefit Programs of the Administrative Conference of the United States).

⁴⁰ Dixon, *supra* note 11, at 709.

⁴¹ M. Gilhooley, *supra* note 29, at 15.

⁴² See Dixon, *supra* note 11, at 709 n.128.

⁴³ 38 C.F.R. § 3.101 (1973); see *id.* § 19.103; 38 U.S.C. § 4004(c) (1970) (VA regulations, administrator's instructions, and precedent opinions of general counsel binding).

combination-of-functions challenge to it in *Richardson v. Perales*.⁴⁴ In a discussion marked by broad and somewhat impatient language, and little analysis, the Court stated:

Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity.⁴⁵

The difficulty with "bringing down" the inquisitorial procedure approved in *Perales* is not difficult to fathom. The only logical replacement for one man wearing three hats is three men, each wearing one: a neutral hearing officer, and separate representatives for the claimant and the social welfare agency. A hearing officer limited to deciding on the basis of facts presented by others would have to be informed of the basis for the government's denial of the claim by a representative of the relevant social welfare agency. Given the educational level, cultural background, economic and medical problems suffered by most social welfare claimants,⁴⁶ and the complexity of some benefits

⁴⁴ 402 U.S. 389 (1971).

⁴⁵ *Id.* at 410.

⁴⁶ The groups in greatest need of social welfare programs, the nation's poor and disabled, are less educated than the nation at large. Nearly 23% of families whose head had eight or less years of formal education were poor in 1966, while only 7.5% of the families whose head graduated from high school, and only 3.4% of the families whose head graduated from college were poor. S. LEVITAN, PROGRAMS IN AID OF THE POOR FOR THE 1970's, at 5 (1969). Moreover, blacks are more likely to be poor than whites. In 1970, less than 10% of the nation's white population was poor, compared to more than 32% of the nation's blacks. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 329 (1972).

In 1971, more than 43% of the women heading AFDC families were black. U.S. Dep't of Health, Education & Welfare, Findings of the 1971 AFDC Study: Part III, National Cross Tabulations, April 1973, table 32 (NCSS Report AFDC-3). Of 81% of the AFDC women family heads whose educational levels were known, over 25% had no more than an eighth grade education, another 30.7% failed to graduate from high school, and only 3.2% had attended college. *Id.* table 26.

A recent study indicated that the nation's disabled are generally older, poorer, non-white, and uneducated. Allan & Cinsky, *General Characteristics of the Disabled Population*, 35 SOC. SEC. BULL., Aug. 1972, at 24. The study found that 21% of the black population, but only 11% of whites, were severely disabled, and that the median education level for the disabled population is ten years, compared to 12 years for the nation at large. *Id.* Moreover, 42% of the disabled failed to attend school past the eighth grade; whereas only 22% of the nation at large failed to attend school past the eighth grade. *Id.* at 25. Minority group members are also more likely to be receiving Social Security Disability benefits—27 per 1,000 insured minority workers received such benefits compared to 19 per 1,000 insured white workers. Goff, *Disabled-Worker Beneficiaries Under OASDHI: Regional & State Patterns*, 36 SOC. SEC. BULL., Sept. 1973 at 3, 7.

In 1971, 1.4 million whites and 240,000 blacks received Social Security Disability benefits. SOC. SEC. BULL., ANNUAL STATISTICAL SUPP., 1971 table 67. The percentage of

determinations, separate representation of the agency would, in the interest of fairness, virtually demand publicly provided claimant representation.⁴⁷ The costs of such an adversary procedure probably render it unacceptable. No federal social welfare system currently provides representation for claimants as a matter of right,⁴⁸ nor does it seem likely that a public program for providing attorneys (or other types of representatives) for all social welfare claimants at hearings could be instituted at a budget figure low enough to make the program attractive to agencies,⁴⁹ legislatures,⁵⁰ or the courts.⁵¹

blacks beginning to receive Social Security Disability increased from 10.9% in 1957 to 14.7% in 1966. Goff, *Disabled Beneficiary Population 1957-66*, 34 Soc. SEC. BULL., July 1971, at 32, 33.

Nearly 30% of the recipients of Aid to the Blind in 1970 were black, and only 25.2% of Aid to the Blind recipients attended school beyond the eighth grade. U.S. Dep't of Health, Education & Welfare, Findings of the 1970 AB Study Sept. 1972, at 5, 7 (NCSS Report AB-1).

Recipients of Medicare and Social Security retirement benefits appear to be a more representative cross section of the nation's population than recipients of the above cited programs. In July 1970, nearly 90% of the Medicare recipients were white (West, *Five Years of Medicare—A Statistical Review*, 34 Soc. SEC. BULL., Dec. 1971, at 17, 18. In 1971, 12.8 million whites and 1.0 million blacks received Social Security retirement benefits. Soc. SEC. BULL., ANNUAL STATISTICAL SUPP., 1971 table 67.

For comparison with the above racial and educational figures, approximately 11% of the nation's population is black. U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES table 31 (1973). Moreover, of the nation's population 25 years of age or older, 23% attended at least some college, and an additional 35% graduated from high school. *Id.* table 173.

⁴⁷ See, e.g., JOINT ECONOMIC COMM., STUDIES IN PUBLIC WELFARE, ISSUES IN WELFARE ADMINISTRATION: WELFARE—AN ADMINISTRATIVE NIGHTMARE, 92d Cong., 2d Sess. (1972) [hereinafter cited as ISSUES IN WELFARE ADMINISTRATION]; Dixon, *supra* note 11, at 701-09.

⁴⁸ See note 26 *supra*.

⁴⁹ Prior to *Goldberg v. Kelly*, 397 U.S. 254 (1970), HEW issued regulations which would have required the provision of representation in public assistance fair hearings as of July 1, 1969 (33 Fed. Reg. 17,853 (1968); 34 Fed. Reg. 1354, 1356 (1969)), but the effective date later was changed to July 1, 1970. 34 Fed. Reg. 13,595 (1969). After the *Goldberg* decision and prior to the regulation's effective date, the mandatory representation provision was deleted from the final regulations. 35 Fed. Reg. 10,591 (1970); see 45 C.F.R. § 205.10(a)(3)(iii) (1973).

⁵⁰ See Wash. Post, Oct. 5, 1973, § A, at 9, col. 1. (outlining efforts of District of Columbia's superior court judges to stretch their inadequate budget for representation of indigent criminal defendants). Congress has authorized a limited use of government-provided counsel under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.G. § 939 (Supp. II, 1972).

⁵¹ *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970), recognized the usefulness, and arguably even the necessity, of counsel at pretermination AFDC hearings, but refused to require appointment of free counsel. Similarly, several district courts have noted that lack of counsel has contributed to poor development of a claimant's disability case, but they have remanded cases to the hearing examiner for better development rather than appoint counsel. *Crowder v. Gardner*, 249 F. Supp. 678 (D.S.C. 1966); *Ihnen v. Celebrezze*, 223 F. Supp. 157 (D.S.D. 1963); *Hall v. Celebrezze*, 217 F. Supp. 905 (M.D.N.C. 1963).

Other disadvantages may also attend a fully adversary-type of proceeding. It is unlikely, for example, that adversary proceedings would accelerate the process of decision. Adversariness almost necessarily has a strong association with formal procedure and with a punctilious regard for procedural rights. Formality and punctiliousness take time—time that can have harsh consequences for the social welfare claimant who is awaiting a decision.

This is not to say that present nonadversary hearing procedures are faultless or that adversary procedure would produce no gains. It is only to suggest that before imposing formal adversary procedures for the adjudication of social welfare claims there should be no doubt that the benefits in accuracy and fairness which might thereby be achieved would outweigh the attendant administrative costs to the public and delay to claimants. But there is little evidence to substantiate the proposition that increased formality or adversariness would improve social welfare adjudications. No controlled experiments have been conducted; the data on the effects of representation in claims adjudications is highly ambiguous,⁵² and there is some evidence from the AFDC program that the implementation of formal procedures may be resisted in systems which are already under stress and therefore are suspected of making a large number of errors.⁵³

C. Conclusions

Two conclusions would seem to follow from this discussion: First, providing procedural safeguards or opportunities for appeal may be of limited value in ensuring fairness, accuracy, and timeliness in social welfare claims adjudications; and second, because increased or continued reliance on formal adversary procedure has limited value in this context, the assurance of accuracy, fairness, and timeliness should be pursued by other available means.

⁵² Regardless of the existence or nonexistence of a correlation between representation and "success," (see note 26 *supra*) it seems impossible to show a cause-and-effect relationship between representation and favorable decisions. Too many other variables are present. For example, claimants having "strong" cases may see a greater possibility of recovery and, in an effort to protect that possibility, obtain counsel. On the other hand, claimants having a lesser chance of recovery may refrain from obtaining counsel because they want to avoid the out-of-pocket expenses which would follow denial of their claims. Alternatively, it could be argued that claimants with less substantial claims are more likely to obtain counsel on the basis that claimants with supposedly stronger claims may expect to win without counsel. See Dixon, *supra* note 11, at 720-22. As Dixon points out, there are several possible explanations for "success" rates being dependent, to some extent, upon legal representation. *Id.* at 720, n.185.

⁵³ See note 98 and accompanying text *infra*.

Numerous additional safeguards for claimants' interests may, of course, be imagined. Fairness is sometimes thought to be promoted by presumptions which skew the cases in the direction of positive determinations and which, therefore, reallocate the burden of proof so that lack of technical or financial resources will not bar some otherwise valid claims. Accuracy might be promoted by better training of personnel, by simpler or clearer substantive rules, or by increased emphasis on developing evidence relating to relevant facts.

Which of these techniques would most improve the quality of claims adjudications in particular programs will not be determined here. Instead, this Article will describe a comprehensive strategy for managing the process of adjudication to assure a high-quality adjudicative product. A decision to take specific corrective action is the final step in such a quality assurance system.

II

QUALITY ASSURANCE IN ADJUDICATION AS A MANAGEMENT TECHNIQUE

A system for monitoring the performance of personnel and the quality of end products is such an obvious necessity in any large business enterprise that the failure to employ some method of quality control would be considered desperately poor, if not irresponsible, management. Moreover, a quality control system can be adapted to virtually any type of enterprise or end product for it involves merely the development of standards, the evaluation of performance against those standards, and action to upgrade sub-standard performance.

As straightforward and sensible as such a management device might appear, quality control programs having all these attributes⁵⁴ have been used in only two federally funded or administered social welfare programs—the Social Security System (OASDI) and veterans' benefits programs. The experience⁵⁵ in these programs pro-

⁵⁴ All the social welfare programs funded or administered by the federal government do some monitoring of claims adjudication performance. This monitoring, however, ranges from the very systematic, comprehensive and continuous programs in SSA and VA to systems like that in the Longshoremen's and Harbor Workers' Compensation program, which merely involve being on the alert to review dispositions which appear peculiar because of a large settlement or the withdrawal of a claim after hearing.

⁵⁵ This experience is reported on the basis of information contained in the quality control manuals for these programs, the review of selected output of the quality control

vides a basic model for a quality control or quality assurance program and permits identification of the problems and limitations inherent in quality control techniques.

A. Standards and Techniques for Evaluation

1. What is an Error?

Development of standards and methods for the evaluation of accuracy, timeliness, and fairness in adjudication is not a simple matter. Several extremely serious issues surround the question of accuracy. It might be said that decisions are accurate if facts are correctly found and an appropriate application of relevant program policy is made to those facts. However, the correctness of fact-finding and the appropriateness of policy application often involve questions of judgment. For example, the apparently simple determination of a claimant's age for purposes of Social Security retirement benefits may, in the absence of official birth records, involve the weighing of contradictory evidence from numerous sources. An evaluation of the correctness of the adjudicator's ultimate finding of fact with respect to age, therefore, will involve a determination of the soundness of the adjudicator's judgment. Such second-guessing is not very meaningful in terms of program performance.

A slightly different problem concerning the determination of accuracy involves the question of whether one is interested in correct fact-finding on the record that was before the adjudicator or in "correctness" in some more objective sense. To continue the previous Social Security example, a finding that a claimant is of a

systems, and extensive interviews with the persons in charge of the quality control efforts in SSA and VA.

The quality control procedures of the Veterans' Administration are described in Department of Veterans Benefits, Evaluation System, July 1, 1969 (Manual M20-3). The quality control system used in the Bureau of Disability Insurance of the Social Security Administration is described, in part, in the following SSA publications and transmittals: Social Security Administration, Specifications for End-of-Line Appraisal Process, Aug. 1968; Social Security Administration, Disability Insurance Letter No. 11-37, March 1, 1972; Social Security Administration, DOM Transmittal No. 180, May 31, 1972; Social Security Administration, Evaluation and Measurement System, Report on Policies and Procedures for Establishing Initial Entitlement to RSDI Benefits, Aug. 1972.

The author has discussed the scope and operation of the management techniques used to assure quality adjudications with the person having overall responsibility for the claims adjudication process and, if different, the person in charge of quality assurance activities for the Veterans' Administration, Social Security Disability, federally supported public assistance, FECA, Longshoremen's and Harbor Workers' Compensation, and Civil Service Disability programs.

particular age may appear correct given the evidence compiled from family sources, but records from public school departments might have contradicted that evidence had they been secured. A review based on the record would classify the determination as correct, whereas a review *de novo* could find an error.

The problem of second-guessing cannot be completely eliminated, but there are strategies for dealing with it which ameliorate its impact on the reliability of the evaluation system. One such strategy is to refine the evaluation format so that it differentiates between relatively clear errors and what might be termed "judgment deficiencies." A second is to attempt to force agreement between the initial adjudicator and the evaluator on whether an error has occurred. As explained below, the VA uses both strategies.

The program of Veterans' Pensions and Compensation, the largest of the federal disability programs, has only two administrative decisional stages and no court review. At the initial level, the important eligibility questions—the determination of the extent of disability and the determination for compensation purposes of whether a disability is "service connected"—are decided by a Rating Board consisting of one doctor and two legal specialists sitting in the VA regional office. Case development work is done for the Rating Boards by other regional office personnel. Decisions are made largely on the basis of documentary evidence, although informal conferences between the claimant or his representative and the Rating Board are available. In difficult cases, a VA doctor makes an examination and submits a report to the Board. Nonunanimous Rating Board decisions are referred to the regional supervisor.

The claimant may appeal initial decisions to the independent Board of Veterans' Appeals (BVA). When an appeal is filed, the initial level decisionmakers review the file to prepare a statement of the case (SOC) explaining the decision, and in the course of this review may allow the claim. The statement of the case is sent to the claimant, and if he fails to respond, the case is closed. Only one-half of the cases in which initial appeals are filed become formal appeals, largely because the appellant fails to respond to the SOC. In cases formally appealed, BVA gives *de novo* consideration and an opportunity for oral evidentiary hearings.

As the internal checks in this system suggest, a substantial amount of judgment is exercised in determining such questions as what percentage of vocational disability a claimant has suffered

because of a particular disease or injury. And, of course, "service connection" can raise questions equal in difficulty to those often associated with "scope of employment" in workmen's compensation systems. To a certain degree, these issues are simplified by the use of standard formulae (*e.g.*, loss of a limb equals x percent disability) and by presumptions of coverage. Nevertheless, a considerable potential for inaccurate adjudication of claims remains, and the VA attempts to monitor program performance through the use of a Statistical Quality Assurance System.

The System operates as follows: There is a daily first-line review of the total work product of most adjudication units. A random sample of all claims on which any action was taken by the unit on a given day is reviewed for both procedural and substantive error. The reviewer, who is attached to the regional office, corrects any error found, whether it involves the particular action on a claim taken that day (*e.g.*, adding a new dependent to a veteran's file) or any action taken previously which comes to his attention (*e.g.*, the initial determination that a veteran had been honorably discharged and was therefore eligible for benefits). He also enters the numbers and types of errors found into a monthly report to the regional office. The report is then sent both to the national Office of Appraisal and back to the regional office.

The Office of Appraisal monitors these monthly reports, looking for trends. While the national office does not conduct a separate statistical review of a region's monthly output, it does review in depth the total operation of a regional station. As part of this review, the national office conducts another random sampling of the station's work product, looking for the same types of errors that the station checked for each day. The findings in the station's monthly quality control reports are then checked against the results of the national office's own review. In this way the office in effect reviews the station's statistical quality control (SQC) operations. If the variation between results of the office sample review and the findings expressed in the station's monthly report is statistically significant, that fact becomes part of the national office's report on the management performance of the regional station.

The portion of the first-line and national office reviews which is relevant for present purposes is the qualitative review. Each case which is selected for review is evaluated for: (1) substantive error (errors leading to an incorrect result), (2) judgment deficiency (errors in the development of a claim file and cases in which the reviewer thinks a different result more tenable than the one

reached), and (3) procedural discrepancies (errors which do not affect basic entitlement). Each of these categories is broken down on a standard form into a series of subheadings and specific inquiries. For example, the quality reviewer may assign a substantive error when he finds an underevaluation of disability resulting in no or a decreased pension. However, when the situation is not clear, a judgment deficiency may be assigned, which simply states that the rating evaluation was questionable and may have resulted in inappropriately denying or restricting benefits.

For purposes of identifying adjudication units which seem to be having difficulty applying the rating schedule, the type of error assigned is not very important. If a pattern of errors begins to appear, the situation requires investigation. Moreover, the reliability of these patterns as indicators of trouble spots, rather than indicators of a reviewer's errors or eccentricities, is increased by requiring that each file containing an error be returned to the initial adjudicator. That person must then agree or disagree with the finding of error. If there is disagreement, the question goes to higher authority for resolution. Hence, although the problem of second-guessing judgments is not eliminated, a quality assurance system like the VA's has the capacity to identify variance from the institutional judgment of the agency. And within a closed system, uniformity and accuracy tend to merge.

A variation on this approach may also help to deal with the possible divergence between record and objective reality. The categories of errors available for assignment by VA quality reviewers under the rubric of judgment deficiency include such things as failure to request a needed medical examination or piecemeal development of the claims record. In short, the reviewer is saying that for one or several reasons the case record has been so inadequately developed that a substantive error may well have occurred. This sort of evaluation can be done without a costly and time-consuming *de novo* development of the case by the reviewer.

The agency should not be wholly content with this sort of record review. An attempt should be made by the agency to validate its claims policies and procedures by checking actual claims adjudication performance against an external standard. This approach is embodied in the Social Security Administration's Evaluation and Measurement System. Each month 1,000 recently completed adjudications are assigned to specially trained personnel who redevelop the claims and seek out the best available evidence on every issue involved in eligibility. These determinations are then

compared with the initial routine decisions to see if any significant differences appear. If so, this is an indication that an investigation should be made into means by which the record reality as determined by the usual claims process might be made more consonant with objective reality as determined by the much more intensive redevelopment. For example, experience with problems unearthed by reviews involving a complete redevelopment of cases may suggest that the agency instructions to adjudicators be amended to specify the kinds of development effort necessary in identified types of cases. And, of course, these new procedures or routines will then become the subject of record reviews which may assign errors for poor case development should the instructions not be heeded.

2. *How Many "Inaccuracies" Are Too Many?*

Standards for accuracy, such as "permissible errors per hundred cases," are also difficult to develop. Ideally, every system should establish minimum levels of adequate performance as well as goals for optimum adjudicative performance. But how are they to be set? Zero errors can be the target, but because that goal is unrealistic in any large program it is of limited value as a management tool. The VA uses a goal and a minimum acceptable level of errors per 100 cases. For example, the goal in substantive errors by Rating Boards is 1.5 per 100 cases while the minimum acceptable level of performance is 4.0 per 100 cases. These numbers are simply based on experience, that is, what the program professionals believe well-trained adjudicators can produce within acceptable resource and time constraints. A moving target such as the mean or median number of errors per adjudication unit during the previous reporting period can also be used to provide feedback on how various districts, regions, or individuals stack up against the system as a whole. This is the approach taken by the Social Security Administration. Regardless of approach, the important point is that supervisory personnel must have accurate information on error rates and types of errors before they can identify problems and take action to make improvements.

3. *The Evaluation of Fairness*

Fairness as a criterion of system performance involves many of the same considerations as accuracy. If findings of fact are correct and application of policy is appropriate, decisions should be fair.

However, the shortcomings of accuracy evaluations as a means of determining whether the claimant got precisely that to which he was entitled have already been mentioned. When adjudications in a particular program involve marginal cases or matters of judgment, and when quality assurance evaluations are made solely on the basis of record evidence, management evaluation and control of accuracy are necessarily tenuous. Fairness in these contexts must be appraised by an independent evaluation of the process elements of adjudication. A supplementary check on fairness should be directed at those adjudicatory procedures and routines which are meant to place the relevant facts, policies, and arguments before the adjudicator and to facilitate sound decisionmaking—things such as case development effort, articulation of the bases for decisions, adequate notification of actions to the claimant, and explanation of opportunities for appeal.

The Bureau of Disability Insurance in the Social Security Administration, for example, tends to stress case development in its quality assurance evaluations. This is a highly realistic emphasis for a program in which all-or-nothing judgments based on abstract medical and vocational criteria proliferate. Case development is the first aspect of quality reviewed, and a failure to find adequate evidence for a decision in the file is treated as a substantive deficiency. However, failure to send adequate notices to the claimant is treated as a technical deficiency—that is, one which is not likely to affect the outcome of the case. This is perhaps a reflection of the general lack of reliance placed on claimant initiative in assuring correct determinations. It also highlights the special meaning of the ideal of fairness in the context of a social welfare program. This program perceives fairness not as a perfect opportunity to participate or to contest, but rather as an opportunity to have one's claim decided on the basis of all the relevant information.

4. *Timeliness as a Quality Factor*

Timeliness is obviously of great importance to most claimants for public benefits or compensation. It is also highly susceptible to mathematical expression, reporting, and standard setting. Programs which do not have sophisticated formal quality assurance procedures will generally gather some information for budgetary purposes on time spent in claims processing. The VA has a rather highly developed set of timeliness standards for processing pension

and compensation claims which are based on prior program experience. For example, the standard for adjudicating (*i.e.*, time spent by personnel in the adjudication section) an initial disability claim is 2.38 man-hours. There are also overall timeliness standards for processing various end products. For initial disability claims the guidelines are to process 50 percent within 60 days, 75 percent within 90 days, and 98 percent within six months.

Two problems related to timeliness evaluation bear mentioning. The first is the potential for efficiency to be perceived as of paramount importance if timeliness evaluations are used to make judgments about individual adjudicators. The second is the potential impact of timeliness evaluations on other adjudicative goals, such as substantive quality or first-in-first-out processing of claims. These problems are similar to those recently ventilated in congressional hearings involving charges that Internal Revenue Service agents were evaluated on the amount of deficiencies collected from taxpayers.⁵⁶ The possibility of creating incentives for speedy but otherwise poor quality adjudications is obvious. However, this is a problem which can be dealt with by formulating a sensible and sensitive personnel policy, by adopting an evaluation system which reviews all the elements of adjudication quality, accuracy, fairness, and speed, and by refining the statistical analysis of processing time so that it reveals "creaming" of easy cases to meet timeliness goals.

B. *Continuous Evaluation*

1. *Statistical Reporting Systems*

Because effective management requires the ability to perceive trends in adjudication performance and to relate quality data to program changes and exogenous factors which influence program performance, positive case load management implies a continuous monitoring function. Occasional collection and evaluation of data will not provide the representative sample of performance necessary for effective action. Of course, the periods with respect to which data should be collected (month, quarter, year, or irregular interval) will depend upon the program, its resources,

⁵⁶ Hearings on Taxpayer Assistance and Compliance Programs Before the Subcomm. on the Department of the Treasury, U.S. Postal Service, and General Government Appropriations of the Senate Comm. on Appropriations, 93d Cong., 1st Sess., 34, 41-46, 423, 680-81 (1973). See Wash. Post, Mar. 2, 1973, § A, at 3, col. 1; *id.*, Apr. 10, 1974, § A, at 16, col. 7.

and the type of information sought. Moreover, the monitoring function cannot be performed effectively without relatively detailed information. Information can be provided on a continuous basis by the introduction of a statistical quality assurance reporting system.

Statistical quality control, or statistical quality assurance, simply refers to a regular program using statistical techniques, which may include sampling, wherein data are compiled to yield an objective measurement of quality. When properly employed, statistical sampling improves a quality assurance program. Sampling reduces the cost of continuously monitoring quality and tends to focus attention on important concerns, *e.g.*, the delineation of distinct elements in the adjudication process and the contribution of each element to high quality end products.⁵⁷ The assembly of sample data discloses patterns of errors and permits the agency to distinguish random and essentially uncontrollable errors from recurrent errors of a similar type or made by a particular adjudication unit.

Obviously, the more detailed the data provided the more useful it will be in pinpointing problems and suggesting reasons for their existence. Hence, in setting forth a model quality assurance system it is useful to mention briefly several types of information that seem to be required on a continuing basis for effective quality assurance.

a. *Cases and Issues Adjudicated.* Information should be available which reflects differences in the types of cases and types of issues adjudicated. "Type of case" refers to the program to which the claim relates. The Bureau of Hearings and Appeals (BHA) in the Social Security Administration, for example, processes retirement and survivors' insurance cases, disability cases, and Medicare cases and has processed "black lung" benefit claims. For BHA's statistical data to reveal anything useful, classification by program is required, however, agencies should go considerably farther in devising useful case categories. Continuing this example, BHA collects timeliness data which reveal whether the case was dismissed for technical reasons, involved a claimant-initiated postponement, was a "no-hearing" case, or was a case in which agency development of missing facts prior to hearing was required. These data indicate to the agency how timeliness information within a general category of claims should be evaluated, because the agency

⁵⁷ The purpose of statistical sampling is analysis and evaluation as a basis for process improvement, a purpose which may be considered of secondary importance when an agency reviews 100% of its initial decisions for correctness.

knows something about the contribution to processing time of dismissals, claimant postponement of hearings, the hearing itself, and agency development of additional facts.

"Type of issue" refers to the specific statutory or regulatory criteria and the factual issues involved in determinations. For example, the VA breaks down issues into two major categories—rating of disability and payments authorization. Disability rating may be subdivided into a determination of whether the disability is service connected and a determination of the extent of disability from the rating schedule. These issues may again be subdivided into sub-issues which respond to the criteria for service connection and the evaluation of the extent of disability. Obviously, a notation that an error involves an incorrect application of the rating schedule is considerably more meaningful for management purposes than a simple notation that the case contains an error. Information that the case was a "back case" or a "nervous disorder" is even more useful in identifying the source of the problem. A pattern of similar errors would suggest, for example, that there is need for improvement in the schedule or in the instructions for its use.⁵⁸

b. *Responsible Individual Adjudicator.* Information is needed which identifies the management unit or when appropriate, the responsible individual adjudicator, so that effective action may be taken to reinforce success and to improve performance. Obviously, corrective or reinforcing action cannot be taken unless the supervisory staff knows where to direct its interest. Normally, sampling will not produce reliable information on individuals; hence it can be used only to evaluate units, such as regional or district offices, which produce a large number of decisions. However, most statistical quality assurance (SQA) evaluation routines should also include the return of sample files for redetermination when errors show up in the SQA review. There is certainly value in having errors brought to the attention of individual adjudicators when files are returned, therefore, information concerning who made the erroneous decision should be available. Moreover, at some levels of the claims process, *e.g.*, at the appeals board level, the review sample may include 100 percent

⁵⁸ Detailed information can, of course, overwhelm administrators and impede rather than aid management. One solution to this problem is to reduce detail as information is reported up through the supervisory system. The immediate supervisor of an adjudication unit in a district office needs, and can manage, much more detailed information than the bureau or administration director in the central office.

of the decisions. In this situation, compilation of individual adjudicator performance is clearly reliable and appropriate.

c. *Adjudicatory Procedures.* The need for continuous information on both the substantive accuracy of adjudications and the adequacy of claims processing is apparent from prior discussion. Yet, the procedural elements of claims adjudication—procedural regularity and agency case development effort—should be underlined as requiring special attention in an adequate statistical quality assurance system. Obviously, both procedural regularity and case development bear on the accuracy and timeliness of substantive decision. Accurate, and hence (in one sense) fair decisions may result despite inadequate case development and irregular procedure; but such lapses certainly do not promote the goal of substantive accuracy. Moreover, poor case development and procedural irregularity may produce claims records which support the accuracy of judgments which would be considered inaccurate were the record more complete. As previously noted, this appearance of accuracy may be reflected in a quality assurance review based on the record. Thus, lapses in the decision process may not only produce error, but also effectively hide it.

d. *Decisionmaking Functions of the Adjudicatory Staff.* Information is also needed which enables separate evaluation of particular functions in the decisionmaking process, e.g., issue statement or evaluation of evidence in substantive decisionmaking. Analysis in terms of functions is a means for making more specific the evaluation of substantive decisionmaking, case development, and procedural regularity. Each of these aspects of claims adjudication can be broken down into the operations that should be carried out by the adjudication staff. Under case development, for example, the operations might be broken down into items such as collecting medical records, obtaining vocational evidence, scheduling necessary medical examinations, taking appropriate follow-up action, and so on. The possibilities for further classification are virtually endless and obviously require the exercise of management judgment in determining what level of detail in quality assurance information is worth the cost of collecting it.

2. *Special Studies*

A well-designed statistical quality assurance system can provide a continuous flow of information concerning the quality of

adjudications. But the system cannot provide all the information necessary for effective management of the adjudicatory process. For one thing, the data collected by such sampling techniques must often be assembled by computer. Hence, the information must be limited to that which can easily be encoded. This is likely to produce tabulations of the incidence of error but little information on its causes. Hence, the SQA system often merely alerts the agency to apparent problems which must be investigated further in order to determine whether a problem is real and if so, what should be done about it.

Moreover, the reliability of sample data decreases with the size of the sample. For example, a sample that is drawn to generate reliable information concerning a regional office may be unreliable with respect to a particular adjudication unit within that region. Similarly, statistical quality control data on state public assistance determinations may be reliable for the state as a whole, but highly unreliable as an indicator of performance in the individual welfare offices which make the adjudications. Behind the error rate for the state may lie some county offices which have nearly perfect performance and others whose records are disastrous. Periodic audits or field reviews which deal in depth with smaller adjudication units must be used along with statistical quality control procedures to provide adequate information for proper oversight of the adjudicatory process.

The Social Security Administration's use of special studies to validate its case development procedures and reveal errors which are effectively hidden when reviewing only the case record has already been described. A similar issue that should be of concern to agencies is whether inaccuracies, unfairness, and tardiness are randomly distributed among claimants. Although agencies accept a responsibility for assisting in claims development, there is nevertheless considerable reliance placed upon initiation and development of claims by the claimant in all benefit and compensation systems. One might wonder, therefore, about the extent to which agency assistance in developing claims neutralizes factors such as the claimant's educational level or access to independent technical assistance. Are those who are less well-endowed educationally and financially, or who are the objects of social prejudice, at a disadvantage in the claims process? Because the information necessary for statistical correlations which would begin to answer these questions is not routinely collected in case files, SQA reviews are not satisfactory vehicles for obtaining the

answers. Nor could all of the requisite information be routinely collected when processing cases without suggesting to claimants that facts which are not relevant to the adjudication of claims are indeed relevant. The only technique for analyzing this aspect of adjudication quality is the special study.

C. *The Use of Quality Assurance Information*

There are two major requisites for a successful quality assurance program. The first is that the collection of information on the quality of adjudications not be subject to the control of the adjudicators whose product is being evaluated. The second is that the information be developed in such a way that it is useful to and used by those in charge of improving adjudicative performance. These considerations suggest that considerable care must be taken to ensure the independence of the quality assurance staff without pushing them into a detached position in the agency from which they, and their evaluations, have little influence on policy.

Two principles may be of some use in dealing with this structural problem. The first is that while measurements or data collection must be handled through procedures which will assure independence from those responsible for adjudication, the development of policy concerning the collection of information and the interpretation of results must be carried out in conjunction with those who have the adjudicatory responsibility. A second is that the evaluator should always report his findings at least to the supervisory level above the level whose performance he is evaluating, and make the information available to the evaluated unit as well. Unless both of these principles are observed, evaluation may be unsound or irrelevant, or, alternatively, sound and relevant analysis may go unheeded.

The structure of the quality assurance program in the Bureau of Disability Insurance (BDI) in the Social Security Administration again provides an attractive model. Statistical quality assurance reviewers in the Bureau are independent of the line adjudicative staff and have no adjudicative responsibilities. Sampling is done in a fashion which effectively camouflages the cases that will be drawn for review. And questions of policy on what data is to be collected, what standards are to be set for the various quality criteria, and what action is to be taken on the basis of information revealed by SQA reviews are committed to a Quality Assurance Council composed of the representatives of the five major divisions in BDI, including Quality Assurance. Validation of the Bureau's policies

through the Evaluation and Measurement System is committed to a separate staff in the Office of Research and Statistics which reports directly to the Commissioner.

D. *The Inherent Limitations of Due Process Through Quality Control*

Although a range of devices might be employed to deal with discovered defects in the adjudicatory process, the available alternatives include both major policy change, and simply doing nothing. Management programs designed to make the adjudication of claims fairer, more accurate, and more expeditious ultimately depend for their success upon the will of the agency to act. Moreover, because quality control procedures are directed toward systemic problems rather than the correction of individual errors, the management side of due process can never wholly supplant the need for the more traditional protection afforded by procedural safeguards and appellate review.

Quality assurance programs may have two somewhat contrasting impacts on the judicial evaluation of more or less traditional due process claims. First, a well-constructed quality assurance program may lessen the judicial perception of the need for increased formality in agency adjudication. Second, a focus on the management side of due process could also convince reviewing courts that the provision of formal procedural safeguards and appeal rights is inadequate in some contexts unless bolstered by a sound internal quality assurance program.

III

QUALITY CONTROL AND THE CONSTITUTION

A. *The Potential Effects of Good Management on the Requirements of Due Process*

The watershed cases on procedural due process in social welfare claims adjudications are *Goldberg v. Kelly*⁵⁹ and its companion *Wheeler v. Montgomery*.⁶⁰ In these cases the Supreme Court required that opportunity for a hearing encompassing all the traditional elements of a trial-type proceeding—specific notice, opportunity to appear in person or through counsel and to argue orally, opportunity to present oral testimony and to confront and cross-examine adverse witnesses, a neutral adjudicator, and a

⁵⁹ 397 U.S. 254 (1970).

⁶⁰ 397 U.S. 280 (1970).

written decision based exclusively on the hearing record—be provided prior to the termination of certain public assistance benefits. A number of factors seemed to influence the Court's judgment that trial-type procedures were constitutionally required. The most influential of these factors seemed to be the desperately needy condition of persons wrongfully deprived of public assistance⁶¹ and the feeling that the possibilities for error⁶² in public assistance determinations were too great.

However, since the *Goldberg-Wheeler* watershed, it has become increasingly difficult to determine the direction in which the tributaries are running. Oddly enough, the Court has not applied the principles enunciated in *Goldberg* to other types of social welfare claims.

In *Richardson v. Wright*,⁶³ for example, the claimant's Disability Insurance benefits had been terminated without hearing on the basis of wage postings which the Social Security Administration took as evidence that the claimant had regained the capacity to engage in substantial gainful activity. The district court found that termination without any hearing was unconstitutional, but required only that the recipient be given notice of the proposed action and an opportunity to provide rebutting documentary evidence prior to a decision to terminate.⁶⁴ Both the claimant and the Secretary appealed. Shortly before oral argument in the Supreme Court, HEW promulgated new regulations which substantially complied with the district court order.⁶⁵ Consequently, the Court vacated the district court judgment and ordered the Secretary to reprocess the claims under the new regulations. In so doing, the Court commented: "In the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise."⁶⁶

Similar reticence has marked the approach to a number of cases involving the application of *Goldberg* to the termination of unemployment benefits. In *California Department of Human Resources Development v. Java*,⁶⁷ the Supreme Court affirmed an injunction requiring a pretermination hearing, but limited its ruling to statutory grounds. Then, in a cryptic summary affirmance of *Torres v.*

⁶¹ 397 U.S. 254, 264 (1970).

⁶² *Id.* at 266.

⁶³ 405 U.S. 208 (1972).

⁶⁴ *Wright v. Finch*, 321 F. Supp. 383, 386-87 (D.D.C. 1971).

⁶⁵ See 20 C.F.R. § 404.1539 (1973).

⁶⁶ 405 U.S. at 209.

⁶⁷ 402 U.S. 121 (1971).

New York State Department of Labor,⁶⁸ the Court approved termination of unemployment benefits to a worker without a prior hearing. Although the underlying facts might permit distinguishing the case from *Goldberg* on the ground that there were no disputed issues of fact to be determined at a hearing,⁶⁹ the Court did not do so explicitly. When faced with the unemployment compensation issue most recently in *Indiana Employment Security Division v. Burney*,⁷⁰ the Court skirted the problem by remanding the case to the district court for a determination of whether it had become moot.

Justice Brennan, dissenting at length in *Richardson v. Wright*,⁷¹ could find no ground upon which to avoid the application of *Goldberg* to terminations of Social Security Disability claims; nor, presumably, could the dissenters in *Torres* when considering unemployment insurance, for they stated that the Court should have accepted jurisdiction and reversed the district court on the basis of *Goldberg*. Apparently, the majority could find a distinction, although the decisions themselves give no hint of what the distinction might be, beyond the general reticence expressed in *Wright* about constitutionalizing the procedure of complex administrative programs.

However, a major factor which may have been at work in *Goldberg*, but was probably lacking in *Wright* and *Torres*, was a judicial suspicion that the administrative system for determining claims was not trustworthy. Prior to *Goldberg* the Court had seen several public assistance cases which hardly inspired confidence in state administration of AFDC.⁷² And there was ample indication in the legal literature of the error proneness, not to mention the arbitrariness, of public assistance determinations.⁷³ On the other hand, the Court, in its previous exposure to the Social Security Disability claims process, had given a substantial vote of confidence to the administrative system by noting that the "vast workings" of

⁶⁸ 405 U.S. 949 (1972).

⁶⁹ See, *Developments in Welfare Law—1973*, 59 CORNELL L. REV. 859, 944-45 (1974).

⁷⁰ 409 U.S. 540 (1973). The Court's apparent desire to restrict the reach of *Goldberg* has not been overlooked by the lower courts. See, e.g., *Crow v. California Dep't of Human Resources*, 325 F. Supp. 1314 (N.D. Cal. 1970), *cert. denied*, 408 U.S. 924 (1972).

⁷¹ 405 U.S. at 212-27.

⁷² See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969); *King v. Smith*, 392 U.S. 309 (1968). These cases were adverted to by the Court in *Goldberg*, 397 U.S. at 256 n.1.

⁷³ Comment, *Due Process and the Right to a Prior Hearing in Welfare Cases*, 37 FORDHAM L. REV. 604, 610-11 (1969) (mentioned in *Goldberg*, 397 U.S. at 264 n.12). A considerable amount of additional secondary authority was available on these points. See, e.g., *Handler, Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479 (1966); Note, *Eligibility Determinations in Public Assistance: Selected Problems and Proposals for Reform in Pennsylvania*, 115 U. PA. L. REV. 1307 (1967).

the Social Security system tended to create impartiality and lent circumstantial probity to its findings.⁷⁴ And in *Java*, the Court had been exposed both to statistics⁷⁵ suggesting that the unemployment insurance scheme was weighted toward finding for the claimant and to a process for claims determinations which seemed strongly supportive of the claimant's interests.⁷⁶

The Court also may have perceived differences between the neediness of the AFDC and OAA client population and that of persons served by unemployment insurance and disability insurance. But nevertheless, a major reason for the contrast between the Court's felt need to participate actively in the development of the hearing process in public assistance and its reticence in other areas may well be its confidence or lack of confidence in the integrity of the underlying administrative process.⁷⁷ Hence, it does not seem unreasonable to suggest that proof of the existence or nonexistence of a sound quality control mechanism should be influential when a court is called upon to balance claimant need for the protections of trial-type hearings against the costs of imposing adversary process at a particular stage of a social welfare claims process. The availability of the alternative protection of good management, which should, of course, show up in the error rate identified by the quality control mechanism, both lessens the need for the protections afforded by a hearing and tends to substantiate the administrative claim that the use of adversary process is an unnecessary, and a potentially costly and time-consuming addition to a process which is already carefully structured to implement a positive program for the protection of the claimants' substantive economic interests.

Of course, to the extent that the reliability of the social welfare claims process is or becomes a factor in constitutional decisionmaking, one would hope that the Court would explicitly identify it as

⁷⁴ *Richardson v. Perales*, 402 U.S. 389, 403 (1971).

⁷⁵ According to the statistics made available in *Java*, two-thirds of the initial claims for unemployment insurance are granted. 402 U.S. at 128 n.4. Employers who challenge grants are successful 50% of the time whereas claimant-appellants win only one-third of their appeals. 402 U.S. at 129 n.7.

⁷⁶ 402 U.S. at 126-27.

⁷⁷ In another context, Judge Leventhal of the Court of Appeals for the District of Columbia Circuit, has described a reviewing court's function as encompassing a determination of whether the totality of agency practice, policy, and procedure is consonant with "basic requirements of the Rule of Law." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-53 (D.C. Cir. 1970). As a part of that review, Judge Leventhal envisions a judicial alertness to a "combination of danger signals" which may bear on the integrity of the agency decision process. *Id.* at 851. That all judicial review of agency decisionmaking is informed by similar, but largely unarticulated premises seems highly likely.

such and would analyze the management system and its adjudicatory product with some care. As the previous discussion has indicated, quality control systems have a number of problematic aspects. The manner in which a particular management system deals with those problems—both in its paper or manual description and operationally—can easily make the difference between substantial assurance of accuracy and fairness and a facade of statistical and administrative routines which justifies little confidence in the regularity of determinations. Yet, there seems to be no reason to ignore the impact of a program's internal management system on the quality of the claims process because of difficulties with judicial evaluation of procedures outside a court's customary domain. The judiciary is forced to deal with much that is complex and technical, and within the context of the evaluation of a particular program a firm basis for determining the adequacy of agency attempts at quality assurance may emerge.

For example, a serious look in *Goldberg* and *Wheeler* at the quality control program in AFDC or OAA should not have convinced the Court that HEW's prescribed quality control program provided strong circumstantial guarantees of the trustworthiness of the public assistance claims process. The quality control system employed by the Assistance Payments Administration (APA) in HEW for Aid to Families with Dependent Children (and formerly OAA) has several features which distinguish it from systems in the larger federally administered programs like Veterans' Pensions and Compensation or Social Security. The basic difference is that the principal interest in quality control in public assistance is not the assurance of accuracy, fairness, and timeliness in all adjudications, but rather the protection of the federal treasury from incorrect state-authorized payments. This interest is not insignificant or improper, but it results in both a methodology and a focus in quality control reviews which fail to yield significant protections for claimants.

The major failing of the system is its emphasis on positive errors, that is, payments to ineligible and overpayments to eligible recipients. Under applicable regulations,⁷⁸ only positive errors must be reported to HEW; only positive errors need be included in a state's schedule for reducing the incidence of error; and the sanction of withholding matching funds is made applicable only to excessive positive errors. This is not to say that negative errors are

⁷⁸ 45 C.F.R. §§ 205.40, .41 (1973).

not monitored—they are required to be included in an approvable state quality control plan⁷⁹ and are in fact reported to HEW, although less frequently than positive errors. But the omission of statistics on improper denials in the most recent release of semi-annual data from the national compilation of state quality control (QC) reports⁸⁰ is again suggestive of HEW's limited interest in the negative error rate.

The policy of focusing on positive errors is justified by the argument that appeals are designed to take care of improper negative determinations. And the Secretary has stated that corrective action by the states directed toward overpayments will also aid in eliminating errors which result in underpayments.⁸¹ These positions are untenable. Appeals in the AFDC program (the only money payments program which is currently state-administered with federal grant-in-aid funds) are, as will be discussed shortly,⁸² a very imperfect safeguard against error. And the notion that at least some of the more obvious means for guarding against overpayments, *e.g.*, requiring more detailed proof by claimants of their income and resources, will also reduce underpayments is simply ludicrous.

In short, the current QC system for AFDC is almost certain to have serious skewing effects. Because there is an interest in, and sanctions for, positive errors, such errors are the ones that administrators and claims personnel will seek to avoid. That negative errors will thereby be *increased* seems unavoidable. Additionally, and strangely, given the statutory requirement of promptness,⁸³ the QC reviews do not look at the timeliness of claims actions. An emphasis on avoiding positive errors without a similar interest in timeliness will almost certainly slow down claims processing for persons who by definition are dependent and needy.

There are also serious gaps in the Assistance Payments Administration's quality control system. Sample sizes are sufficient to provide reasonably reliable statewide or nationwide data on the incidence of errors, but that data does not provide a basis for evaluating the performance of individual welfare offices.⁸⁴ Nor is

⁷⁹ See U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, QUALITY CONTROL IN PUBLIC ASSISTANCE (QC MANUAL) V-1 (1972) [hereinafter cited as MANUAL].

⁸⁰ U.S. Dep't of Health, Education & Welfare, HEW News, Dec. 20, 1973 (press release, on file at the Cornell Law Review).

⁸¹ *Id.*

⁸² See text accompanying notes 89-108 *infra*.

⁸³ 42 U.S.C. § 602(a)(10) (1970); 45 C.F.R. § 206.10(a)(3) (1973).

⁸⁴ MANUAL at VI-1 to -5, app. A. The largest sample size for a state is 800 actions, but a

this failure remedied by requirements for audits or record keeping at the state level which would reveal whether particular offices were substandard.⁸⁵ Another deficiency is the failure to institute a serious program of special studies to validate the information-gathering techniques used in the program or to determine the types of case development and evidentiary principles which would prevent errors.⁸⁶ And finally, the quality control program has not been applied to hearings. As a consequence, there is very little systematic data on how the hearing process is functioning.

B. *Quality Control as a Judicial Remedy to Ensure Due Process of Social Welfare Law: Emphasis on AFDC*

If, as seems sensible, the underlying integrity of the social welfare claims process should have a bearing on the need for trial-type hearings as a means for assuring "fundamental fairness" to claimants, it seems equally sensible to suggest that the realistic prospects that such hearings or appeals will protect claimants should also affect the appreciation of what due process requires in the context of social welfare programs. *Goldberg v. Kelly* made much of the critical situation of the claimants and emphasized the need to tailor the hearing process to their capacities.⁸⁷ The logical and limited extension of that principle is that when due process cannot be assured by trial-type hearings, additional or different techniques for assuring fairness become appropriate. Therefore, if hearings cannot provide reasonable assurance of accurate adjudication of claims in a social welfare program—and in AFDC there is substantial reason to believe that they cannot—then there should be judicial imposition of a comprehensive quality assurance program

state may operate through several hundred individual city and county offices. On the general problem of variations in approach among local welfare offices, see Mashaw, *supra* note 11.

⁸⁵ The only requirements for states are those set out in 45 C.F.R. § 205.120 (1973). This regulation merely requires that the state make "regular visits" to local offices and use reports, controls, or other necessary methods. And HEW's audits and other reviews are notoriously ineffective. See, e.g., ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATUTORY AND ADMINISTRATIVE CONTROLS ASSOCIATED WITH FEDERAL GRANTS FOR PUBLIC ASSISTANCE (1964); M. DERTHICK, THE INFLUENCE OF FEDERAL GRANTS (1970); Tomlinson & Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600, 621-29 (1972).

⁸⁶ Tomlinson & Mashaw, *supra* note 85, at 623-24. The quality control procedures for active cases involve full field investigations, and the reasons for errors are set down in coded form. Thus, some information leading to validation of the eligibility determination process can be gleaned from the QC process itself. However, negative cases do not have a field review unless, for unstated reasons, the reviewer feels it necessary. MANUAL III-4 to -10.

⁸⁷ 397 U.S. at 264.

to bolster that program's capacity for high quality adjudicative performance.

1. *The Limited Value of Trial-Type Hearings to AFDC Claimants*

There is very little systematic and reliable information on the value of trial-type hearings to AFDC claimants. However, the value of hearings in this program must be discounted at least by the general considerations previously rehearsed which make appeals a limited check on the fairness and accuracy of social welfare claims adjudications. The information which is available on the AFDC program should substantially decrease our confidence that the procedural rights afforded recipients in *Goldberg v. Kelly* provide substantial assurance of fairness and accuracy.

The first bit of troubling evidence has been mentioned previously: The appeal rate is very low.⁸⁸ Indeed, if one subtracts the aberrational number of appeals in a few states⁸⁹ from the statistics, the number of appeals in AFDC is negligible. There is always the difficulty of determining how many appeals represent an appropriate number in relation to any series of initial adjudications. But in a program which is reasonably well-known for its error rate, which has a very complex set of standards to apply, and which involves decisions of great importance to its claimants, a negligible appeal rate is troubling. It suggests that there are disincentives to appeal in the system which limit the value of an opportunity for hearing.

One deterrent to appeal may be the combined characteristics of the claimant population and the program itself. Claimant educational levels are low,⁹⁰ and the eligibility requirements and grant computations involved are quite complex.⁹¹ Although general information about AFDC may be widespread, specific knowledge which would suggest a challenge to bureaucratic judgments is not widely held. Moreover, to the extent that potential appellants would complain merely of underpayments, there are significant disincentives to making a request for a hearing. When administrators make continual, highly discretionary decisions about one's basic necessities, *e.g.*, whether to grant funds for a new mattress, a

⁸⁸ See notes 32-35 and accompanying text *supra*.

⁸⁹ For the period January-June 1972, for example, California, New York, and Texas accounted for 44,000 of a total of 68,000 appeals. U.S. Dep't of Health, Education & Welfare, Fair Hearings in Public Assistance, January-June 1972, April 23, 1973, table 5, (NCSS Report E-8).

⁹⁰ See note 46 *supra*.

⁹¹ See ISSUES IN WELFARE ADMINISTRATION, *supra* note 47, at 1-2.

telephone, or an additional hearing allowance, it is not sensible to take an adversary posture unless the issue is very important and the prospects for success very high.⁹² Nor is it realistic to view a claimant who may be chronically dependent as prepared to fight city hall even when basic entitlement to benefits is at issue.⁹³

A related consideration which bears on the value of an opportunity for hearing is the degree to which administrators are able to construct a hearing system which will stimulate legitimate appeals and have them effectively pursued by the claimant.⁹⁴ For example, a seemingly simple function, such as giving adequate notice, is quite complex to administer. A careful oral explanation with an opportunity for questions by the claimant might be the most effective system. But tracking down claimants and providing such notice would be time-consuming and very expensive in a program which requires a pretermination hearing.⁹⁵ Moreover, the possibilities for misunderstanding also argue in favor of written notice even if oral notice is also provided.

But what sort of written notice should be provided if we recognize as a starting point that notice of termination or reduction may be such an overpowering event for the recipient that his response is unpredictable?⁹⁶ Indeed, even without the complicating

⁹² Handler, *supra* note 73, at 494-99; Handler & Hollingsworth, *supra* note 27, at 1172-79.

⁹³ See Wedemeyer & Moore, *The American Welfare System*, 59 CALIF. L. REV. 326, 342 (1966).

⁹⁴ See Comment, *supra* note 27, at 247-53.

⁹⁵ In *Goldberg v. Kelly*, the Court mentions with approval a New York system of written notice plus an oral conference. 397 U.S. at 268. However, the Court there referred to a provision in the New York City manual for caseworkers which instructed them to discuss doubts about eligibility with the client prior to recommending that a case be closed. State law did not require this conference (see *Kelly v. Wyman*, 294 F. Supp. 893, 897 n.7 (S.D.N.Y. 1968)) and it was not designed to explain a proposed action or to discuss appeal rights. Moreover, the provision applied only if the caseworker was in doubt about the facts.

HEW regulations now provide that to be adequate, notice must be in writing (45 C.F.R. § 205.10(4)(i)(B) (1973)), and although some states may advise the client in the written notice that he may request an agency conference to explain the proposed action, the time within which to file an appeal which will stay the proposed action until after the hearing begins to run from the date of written notice. See, e.g., 2 Virginia Manual of Policy and Procedure § 802.4 (Supp. 1972).

An additional method of dealing with the notice problem would be to provide representation to all claimants and to rely on the representative to explain the action and its grounds, the client's right to a hearing, and the prospects for success. But this system would certainly be as costly as oral notice, and it would also require the assignment of representatives to clients prior to notification of a proposed action. Otherwise, there would be no guarantee that the claimant would contact a representative for an explanation.

⁹⁶ That this factor may be the major problem in giving notice of a right to hearing was suggested to the author by Mitchell I. Ginsburg, Dean of the Columbia University School of Social Work and former Commissioner of Social Services for the City of New York.

factor that a notification deals with a claimant's basic sustenance, we have no firm basis for predicting the effects of the specificity of notice on recipient response. Concise notice designed to satisfy minimum legal requirements may be too uninformative to stimulate questions by some, but it may galvanize others into seeking an oral explanation which fully informs them of the agency's position. Detailed statements of proposed actions, their reasons and supporting data may provide a solid basis for judgment about whether to appeal, or it may seem to indicate a final agency position which would make any appeal superfluous.

Arguably, these difficulties with the notice aspects of hearings are overdrawn, and to a degree, that is conceded. But the other elements of the hearing process are quite capable of posing similar conundrums. How, for example, can one be certain that the claimant understands what is to transpire at a hearing: what evidence is relevant to the issues in contention, what information in the agency's possession is the most critical or important for an eventual decision, or even that the decision will be made wholly independently of the prior decision of the caseworker? Agreement that any or all of these possibilities for misapprehension may exist is enough to support the limited argument made here that developing a hearing system which would give assurance that disappointed claimants had experienced fair and accurate determinations of their claims is quite a subtle and expensive business.

Additionally, the agencies which administer AFDC have not by and large demonstrated great progress in the development of workable basic hearing systems, much less systems which are tailored to the needs of claimants in subtle or sophisticated ways. Prior to *Goldberg*, state hearing regulations were not in substantial compliance with even the basic requirements of the HEW regulations on fair hearings.⁹⁷ And the only systematic study that seems to have been made of the compliance of agency practice with post-*Goldberg* fair hearing regulations found that the New York City public welfare agencies failed to provide a procedurally regular hearing in a significant number of cases.⁹⁸ Based on a random sample of appeals filed in October 1972, the New York evaluation found, among many other defects, the following conditions which are directly relevant to *Goldberg*'s constitutional requirements: (1) 5 percent of the appellants had received no notice of a proposed

⁹⁷ See generally Scott, *supra* note 38, at 301-52.

⁹⁸ D. Kirchheimer, Community Evaluation of Fair Hearing Procedures Available to Public Assistance Recipients, May 1973, at 5, 6 (on file at New York City Human Resources Administration).

adverse action; (2) 25 percent did not receive timely notice; (3) two-thirds of all notices failed to give an adequate statement of what action was proposed and what the factual and policy bases for the action were; (4) in 15 percent of the cases aid had not been continued as required pending appeal; (5) only 25 percent of the appellants who requested access to relevant agency files prior to appeal were given such access; and (6) in only 7 percent of the cases was an opportunity for cross-examination afforded by having opposing witnesses present.⁹⁹

These conditions are not really surprising. The same overworked and undertrained welfare staff which handles initial or continuing eligibility determinations also must issue notices, handle requests for appeal, and assemble documents and witnesses. If the program is in general an "administrative nightmare,"¹⁰⁰ the hearing process will partake of that quality. Of course, New York may be a special case. But there is also evidence of a fairly serious breakdown in the hearing process in other states.¹⁰¹ Moreover, there is reason to believe that few public welfare staffs are likely to consider hearings important items in their workload,¹⁰² and that failure is likely to color the quality of their efforts toward making hearings available and meaningful to recipients.¹⁰³ There are also at least some instances in which a breakdown in the hearing process partakes of a more widespread pattern of official lawlessness in welfare administration.¹⁰⁴

The apparent antipathy of state agencies for the fair hearing process and the unwillingness of HEW to actively support the

⁹⁹ *Id.* at 9-26.

¹⁰⁰ ISSUES IN WELFARE ADMINISTRATION pt. I, at 2.

¹⁰¹ The California hearing system has been criticized in a congressional study. See Sitkin, *Welfare Law: Narrowing the Gap Between Congressional Policy and Local Practice*, in ISSUES IN WELFARE ADMINISTRATION pt. II, at 36, 38-51. The Supreme Court has summarily affirmed a district court injunction prohibiting California's use of the fact-policy distinction set forth in *Goldberg* as a basis for distinguishing between cases which must and those which need not have a pretermination hearing because of the state's inability to apply the distinction properly. *Yee-Litt v. Richardson*, 353 F. Supp. 996 (N.D. Cal.), *aff'd sub nom. Carleson v. Yee-Litt*, 412 U.S. 924 (1973).

Litigation asserting and often proving improprieties in the hearing process has involved other states as well. See, e.g., *Jeffries v. Swank*, 337 F. Supp. 1062 (N.D. Ill. 1971) (failure to comply with 60-day hearing rule); *Banner v. Smolenski*, 315 F. Supp. 1076 (D. Mass. 1970). See also *Pevar*, *supra* note 11, at 69-74; *Scott*, *supra* note 38, at 351, 357-63.

¹⁰² See *Scott*, *supra* note 11, at 743-44. Although *Scott's* study design is unscientific and his conclusions ambivalent, it seems reasonable a priori to believe that caseworkers would take the sensible attitude that most of their other functions are more important than cutting square corners with respect to hearings or putting extra effort into their preparation.

¹⁰³ *Handler, Justice for the Welfare Recipient: Fair Hearings in AFDC—The Wisconsin Experience*, 43 SOC. SERV. REV. 12 (1969).

¹⁰⁴ *Mashaw*, *supra* note 11, at 830-37.

hearing requirement further weakens the value of hearings. An interesting example of these attitudes is the state reaction to HEW's proposals in December 1972¹⁰⁵ to withhold payments from states based on the rate of overpayments and payments to ineligible discovered in state caseloads. The states immediately responded by charging that certain HEW policies, including the fair hearing requirements, contributed to the erroneous payments. And in the course of negotiations,¹⁰⁶ HEW agreed to amend the fair hearing requirements in ways which reduce the likelihood of the development of a uniform,¹⁰⁷ high quality hearing process and which possibly violate *Goldberg's* pretermination hearing requirement.¹⁰⁸ This is a decidedly peculiar response since fair hearings have no discernible relationship to the overpayment and ineligibility problems that called forth the initial HEW proposal.

To summarize, hearings protect claimants against unfair and inaccurate decisions only on the assumptions: (1) that the claimant is aggressive, knowledgeable about the program, and skillful in developing and presenting facts (or has access to those who are); and (2) that the hearing system works. Neither of these assumptions has proven to be realistic with respect to AFDC hearings, and there are reasons to have grave doubts about both. If these doubts have substance, due process requirements which seek to provide fair opportunities for claimant-initiated challenges to agency determinations are focusing on only a small part of the problem. As *Goldberg* recognized, the process which is due in social welfare determinations should be that process which responds to the supportive purposes of the program involved when viewed in the light of realistic assumptions about its dependent clients. But, the difficulties of providing meaningful hearings may be much more significant than the Court was called upon to recognize in *Goldberg*. The question is not so much when recipients can best avail themselves of a hearing, as it is whether the adversary hearing is such a chimerical protection in the AFDC context that due process requires more.

2. *Judicial Imposition of Management-Oriented Remedies*

Due process should require greater protection for the claimant, and such protection should include the application of

¹⁰⁵ 37 Fed. Reg. 25,853 (1972).

¹⁰⁶ For a discussion of background, see NLSP Center on Social Welfare Policy & Law, Comments on Proposed Regulations Re: Methods of Determining Eligibility, Fair Hearings and Recoupment of Overpayments, May 1973, at viii-xiii.

¹⁰⁷ 45 C.F.R. § 205.10(1)(ii) (1973).

¹⁰⁸ *Id.* §§ 205.10(4)(ii)(A)-(H).

systematic management techniques which will discover errors, identify their causes and implement corrective action. This is suggested, not only by the inadequacies of the hearing process, but also by the protective purposes of AFDC and other social welfare programs. There is, indeed, a sense in which the imposition of a basic quality control program as a part of due process might be viewed as a lesser constraint on legislative and executive judgments concerning the administration of these programs than is the imposition of judicially delineated hearing requirements. The former remedy is at least consonant with the avowedly paternalistic objectives of the program, suggests solutions that are managerial rather than legalistic, and avoids adversary postures that are generally considered inappropriate by program professionals.

Nevertheless, there is certain to be reluctance on the part of the judiciary to instruct administrators in the management of their program. In part this reluctance will result from the novelty of thinking about due process in terms of the management functions which are relevant to adjudication. Moreover, one may suspect that it is the "expertise" of judges in dealing with adversary proceedings which undergirds their willingness to impose adversary hearings on administrators who must be presumed to have thought those procedures less than worthwhile. Judicial feelings of expertise born of familiarity will not support the imposition of quality control. Finally there will be reluctance to find that affirmative action of a rather complex sort is required of administrators, because affirmative orders require monitoring and imply a continued judicial role in overseeing program operations.

Strong facts and good advocacy have leaped higher hurdles, however, and there is already some precedent for a more active judicial role in assuring that the promises made in *Goldberg* are not broken through administrative mismanagement of the hearing process. In *Yee-Litt v. Richardson*,¹⁰⁹ for example, the Supreme Court summarily affirmed an injunction which prohibited the State of California from distinguishing between cases raising issues of fact and those raising only issues of policy when deciding which cases required a pretermination hearing. Although *Goldberg* did not include policy disputes in its requirement of pretermination hearings,¹¹⁰ the district court found that California's administration

¹⁰⁹ 353 F. Supp. 996 (N.D. Cal.), *aff'd sub nom.* Carleson v. Yee-Litt, 412 U.S. 924 (1973).

¹¹⁰ The Court left aside the question of whether oral as well as written submissions might be required as a matter of due process when policy issues were concerned. *See* 397

of its facially valid regulations, which denied pretermination hearings on policy issues, resulted in denials of hearings to persons who, under *Goldberg*, should have received them.¹¹¹ The decision contained somewhat contradictory findings concerning whether the problem lay in state administration or in the inherent difficulty of making the fact-policy distinction.¹¹² But the court, on the basis of statistical reports submitted to it, clearly held that a failure to obtain consistently accurate results in making the distinction justified enjoining its use when the effect of its operation was to deny due process to some claimants.¹¹³

Yee-Litt suggests that at some point a court will be willing to examine questions of whether poor practices or management are a serious impediment to the realization of constitutional rights and to take action which limits administrative discretion about the effectiveness of program policies. Although the judicial response in *Yee-Litt* merely reinforced the traditional requirement of trial-type hearings, courts have been more management-oriented when reviewing the performance of welfare program functions other than fair hearings. Judicial orders have, for example, required the development of affirmative action plans or procedures to deal with the loss or theft of welfare checks,¹¹⁴ to advise clients of their rights under the NOLEO provisions,¹¹⁵ to eliminate sexual discrimination in the Work Incentive program (WIN),¹¹⁶ and to prevent delayed delivery of welfare checks.¹¹⁷

Considering the recent history surrounding constitutional adjudication, such remedial developments in welfare cases certainly are not surprising. Remedial innovation has been the order of the day in areas such as racial discrimination,¹¹⁸ reapportion-

U.S. at 268 n.15. But there can be little doubt that other aspects of an adversary proceeding would not be required in the case of a pure policy dispute. See *Merriweather v. Burson*, 325 F. Supp. 709 (N.D. Ga. 1970), *aff'd in part*, 439 F.2d 1092 (5th Cir. 1971).

¹¹¹ 353 F. Supp. at 999-1000.

¹¹² *Id.* at 999-1001.

¹¹³ *Id.* at 1001.

¹¹⁴ *Santana v. Sugarman*, 7 CLEARINGHOUSE REV. 181 (N.Y. Sup. Ct. 1973).

¹¹⁵ *Doe v. Carleson*, 356 F. Supp. 753 (N.D. Cal. 1973). Notice to Law Enforcement Officers (NOLEO), 42 U.S.C. § 602(a)(11) (1970), requires, as a condition to AFDC eligibility, that claimants divulge to the state welfare department the name of the deserting father, so that he can be located by law enforcement officials.

¹¹⁶ *Thorn v. Richardson*, 6 CLEARINGHOUSE REV. 113 (W.D. Wash. 1971).

¹¹⁷ *Adens v. Sailer*, 312 F. Supp. 923 (E.D. Pa. 1970).

¹¹⁸ *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1, 15 (1971) (recognizing that "a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies"; district courts have power to order busing); *Griffin v. County School Bd.*, 377 U.S. 218, 233 (1964) (district court "may, if necessary to prevent

ment,¹¹⁹ and constitutional criminal procedure.¹²⁰ In those areas, attempts at broad formulation of principles have consistently failed to effect the desired remedial ends, and the courts have therefore become ever more closely involved in policy choice, approval of administrative programs and the specification of required managerial or executive operations.

Recently, federal courts have become involved in litigation resulting from what might be called the prisoners' rights movement.¹²¹ In the process of adjudicating claims of violations of the eighth and fourteenth amendments, the courts have been exposed to the detailed working of prisons, youth correction centers and even homes for the mentally retarded.¹²² Moreover, having once found custodial care in these institutions to be inadequate or improper under the Constitution's broad prohibitions against cruel and unusual punishment or the denial of due process and equal protection, the district courts have issued orders of remarkable scope and specificity.¹²³

In *Jones v. Wittenberg*,¹²⁴ for example, the district court further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system"); *Johnson v. Capital City Lodge No. 74*, 477 F.2d 601, 603 (4th Cir. 1973) (remedying racial discrimination in a police benevolent society); *Erie Human Relations Comm'n v. Tullio*, 357 F. Supp. 422 (W.D. Pa. 1973) (remedying prior racial discrimination in police hiring); *Adams v. Richardson*, 351 F. Supp. 636, 641 (D.D.C. 1972) (ordering HEW to commence its statutory enforcement duties against insufficiently desegregated higher education systems).

¹¹⁹ *Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964) (sustaining district court order reapportioning both houses of Alabama legislature as "an appropriate and well-considered exercise of judicial power"). But see *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 199 (1972) (holding that district court exceeded its powers in reapportioning state legislature by reducing number of legislative seats 25%-40%; "the remedial powers of an equity court must be adequate to the task, but they are not unlimited").

¹²⁰ See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 469 (1966) (requiring warning before in-custody interrogation "to insure that the individual knows he is free to exercise the privilege [against self-incrimination] at that point in time"); *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending exclusionary evidence rule to evidence illegally seized by state officers for use in state proceedings). See also *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (implying right to damages against federal officers for violation of fourth amendment).

¹²¹ See, e.g., *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (habeas corpus action arising in context of conditional-release program); *Wilwording v. Swenson*, 404 U.S. 249 (1971) (habeas corpus action arising under civil rights acts); *Houghton v. Schafer*, 392 U.S. 639 (1968) (civil rights action by prisoner whose legal materials were confiscated).

¹²² See generally Comment, *Beyond Attica: Prison Reform in New York State 1971-1973*, 58 CORNELL L. REV. 924 (1973).

¹²³ See generally Note, *Equitable Remedies Available to a Federal Court After Declaring an Entire Prison System Violates the Eighth Amendment*, 1 CAPITAL U.L. REV. 101 (1972).

¹²⁴ 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom. Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972).

required that the following procedures and policies, among others, be instituted in order to reform county jails: a reduction of the inmate population to no more than two per cell, a county-financed study to investigate the increased use of pretrial release, better lighting, the hiring of additional guards, completion of training courses by certain officers, submission of a plan for psychological testing of guards, immediate improvement of food services, the virtual abolition of isolation cells and the presentation of a plan for rehabilitative programs. And although other courts have taken a less swashbuckling remedial approach,¹²⁵ the requirement of the submission of a plan for reform and the retention of jurisdiction to ensure that the plan is carried out have become increasingly commonplace.¹²⁶

Wittenberg is far from unique. In *Martarella v. Kelley*,¹²⁷ a federal district court in New York imposed requirements on the New York City Juvenile Detention Centers which included: educational and training standards for personnel, standards for in-service training programs, counselor-juvenile and recreation worker-juvenile ratios for institutions, detailed procedures for evaluating the needs of individual children and ensuring that treatment appropriate to those needs was provided, specific daily periods of structured recreation, and the employment of an ombudsman to deal with children's grievances. The court in *Martarella* grounded its decree in what it termed "minimally good professional practice," and the necessity of providing by judicial decree requirements which would not be subject to political pressures and changes in the responsible administrators.¹²⁸

The custodial care cases which employ detailed remedial orders are not limited exclusively to institutions for criminal or quasi-criminal incarceration. *Association for Retarded Children, Inc. v.*

¹²⁵ See *Wright v. McMann*, 460 F.2d 126, 131 (2d Cir. 1972) (reversing district court order that prison officials submit proposed rules and regulations governing disciplinary hearings and psychiatric observance cells because "of concern for the respective roles and responsibilities of federal courts and state officials" in prison administration); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), cert. denied, 405 U.S. 978 (1972) (reversing district court order that prison administrators submit within 90 days proposed rules and regulations governing political literature and disciplinary hearings). More drastic remedies, e.g., ordering prisoners released, are not unknown. See *Curley v. Gonzales*, Civil No. 8372 (D.N.M., July 29, 1970), discussed in Note, *supra* note 123, at 107-08.

¹²⁶ See, e.g., *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972); *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); *Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972); *United States v. Alsbrook*, 336 F. Supp. 973 (D.D.C. 1971); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

¹²⁷ 359 F. Supp. 478 (S.D.N.Y. 1973).

¹²⁸ *Id.* at 482-83.

*Rockefeller*¹²⁹ required the immediate employment of 85 additional nurses, 30 additional therapists, and 15 additional physicians; the accomplishment of a 1:9 attendant-patient ratio; the use of judicially prescribed minimum salaries for physical therapists; and the submission of periodic reports on compliance from a state school for the mentally retarded, some of whose inmates were in residence voluntarily.

The similarities between the *Wittenberg-Martarella-Rockefeller* situations and the administration of AFDC are striking. Program performance is widely considered to be much below par; constitutional rights of a "basic decency" or "fundamental fairness" sort are involved; the programs are viewed as reformatory or supportive, and their performance evaluated in terms of those purposes; and administrative attempts at reform have failed to deal with the special conditions of the populace which is served by the program. Moreover, in the custodial care cases, the courts are taking a remedial approach which has much in common with a quality control system. They are requiring that certain management functions be routinely carried out by qualified staff as a means for ensuring a continuous program performance which is up to minimal professional standards. And in some cases, the decrees call for studies and recommendations on problems about which too little is known to formulate immediate guidelines.

Assuming that innovative remedial responses are possible, the outline of a lawsuit requesting the imposition of standards of administration which have a reasonable prospect of producing fair and accurate results in AFDC eligibility determinations might look something like this: (1) demonstrate the tendency of the program to make a substantial number of errors; (2) establish a duty to avoid those errors; (3) demonstrate that current management practices are inadequate in light of the error rate and the administrative duty; and (4) propose remedial requirements which will help alleviate the problem. The following paragraphs cursorily fill in the outline.

First, the error proneness of AFDC administration is a matter which may be appropriate for judicial notice. This inclination toward error was specifically commented upon by the Supreme Court in *Goldberg v. Kelly*.¹³⁰ There is, of course, the delicate question: how many errors are too many? A perfect system will

¹²⁹ 357 F. Supp. 752 (E.D.N.Y. 1973).

¹³⁰ 397 U.S. at 264 n. 12.

never be achieved. However, in a program which deals with "brutal need," the courts should not require a demonstration of total collapse before agreeing that agencies must do better if they feasibly can do so.

Second, the duty of HEW and state agencies to assure accuracy and fairness is relatively easily demonstrated. It has been argued above that due process in the social welfare context should include standard requirements covering program management as well as the opportunity for adversary hearing. Moreover, and this may be particularly important to judges wary of the rigidities of constitutionalizing even hearing procedures,¹³¹ there are statutory bases for a claim for good program management. HEW has been given authority to prescribe methods of administration which are adequate to the tasks of the AFDC program.¹³² On a demonstration that under current methods of administration the program falls far short of that accurate decisionmaking which will provide benefits to "all eligible individuals,"¹³³ the administrative power to impose adequate methods of administration could become a duty.¹³⁴ This should be true particularly where, as here, a dependent population is involved, and the administrative failure has constitutional implications.

A state duty to decide claims fairly and accurately may also be found in the due process clause and in the Social Security Act's requirement that states provide aid to all eligible individuals.¹³⁵ Moreover, a duty on the part of states to ensure that there are no systemic failures which result in different treatment of claims among the various city, county, or regional offices of the state is

¹³¹ For some extreme efforts to find statutory grounds for decisions which would otherwise rely on constitutional due process, see *Thompson v. Washington*, Civil No. 71-2049 (D.C. Cir., Dec. 10, 1973); *Marshall v. Lynn*, Civil No. 71-1786 (D.C. Cir., Dec. 10, 1973).

¹³² 42 U.S.C. § 602(a)(10) (1970). The Secretary has broad authority to make rules "reasonably related" to the purposes of the statute. *Lewis v. Martin*, 397 U.S. 552 (1970). The Secretary may, for example, prescribe a 15-day advance notice of termination even though no hearing is required in a particular type of case. *Rochester v. Baganz*, 479 F.2d 603 (3d Cir. 1973).

¹³³ 42 U.S.C. § 602(a)(10) (1970).

¹³⁴ See, e.g., *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971); *American Pub. Health Ass'n v. Veneman*, 349 F. Supp. 1311 (D.D.C. 1972) (detailed order in *Veneman* is published in [1970-1973 Transfer Binder] CCH F.D. COSM. L. REP. ¶ 40,749). See also *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970).

¹³⁵ 42 U.S.C. §§ 302(a)(8), 602(a)(10), 1202(a)(11), 1352(a)(10) (1970). But see 42 U.S.C. § 802(a)(10) (Supp. II, 1972).

implied by the Social Security Act's requirement that the state operate a statewide system.¹³⁶

Third, given the statutory duty to provide aid to all eligible individuals, and the constitutional duty to provide fundamental fairness in the context of the program's goals and the realities of its beneficiaries' needs, it would appear that only administration which conforms to high professional standards should pass muster. It is doubtful that such standards of administration can be found in many state AFDC programs. The deficiencies of the quality control efforts applicable to AFDC have already been outlined, and it is likely that other evidence can be readily assembled to demonstrate generally poor administration which affects the capacity of the administrative system to produce fair and accurate results.¹³⁷

Fourth, the same professional standards of administration which provide the yardstick for measuring current administrative practices also may provide the remedy for current ills. The previous description of the practices of the Veterans' and Social Security Administrations provides a reasonable checklist of administrative methods for assuring quality in social welfare adjudications. Further information can be developed from the experience of private concerns which perform similar functions as a part of their administrative routine.¹³⁸ There is no reason to

¹³⁶ 42 U.S.C. § 602(a)(1) (1970).

¹³⁷ For example, HEW listed 72 compliance issues with respect to public assistance money payments programs for the quarter ended September 30, 1972. Dep't of Health, Education & Welfare, Summary of Compliance Issues by Program, Report for Quarter Ending September 30, 1972 (chart SRS-OFO-4) (on file at the *Cornell Law Review*). Listed compliance issues vastly understate the instances in which state law or practice is not in compliance with federal requirements. See Tomlinson & Mashaw, *supra* note 85, at 622-23. And the Joint Economic Committee of Congress has reported that states and localities find the public assistance programs virtually unmanageable. See ISSUES IN WELFARE ADMINISTRATION, *supra* note 47, pt. I, at 1-2.

Timeliness, or the lack of it, is also a persistent cause of complaint and litigation. See, e.g., *Like v. Carter*, 448 F.2d 798 (8th Cir. 1971) (average processing time 56 to 93 days despite 30-day requirement); *Newsom v. Friend*, 7 CLEARINGHOUSE REV. 360 (M.D. Tenn. 1973) (third suit against defendants in three years asserting noncompliance with time limitations for processing applications for various federal programs); *Boyens v. Madigan*, 7 CLEARINGHOUSE REV. 117 (D.S.D. 1973) (applications for Aid to Disabled unprocessed for six months, despite 60-day time limit on processing); *Jordan v. Swank*, CCH Pov. L. REP. ¶ 1045.05 (N.D. Ill. 1971) (preliminary injunction requiring defendants to make determination of eligibility under Aid to the Aged, Blind, and Disabled within 30 days of application for aged and blind and within 60 days for disabled); *Rodriguez v. Swank*, 318 F. Supp. 289 (N.D. Ill. 1970), *aff'd mem.* 403 U.S. 901 (1971) (allegation of failure to comply with 30-day processing limitation in AFDC); *Langley v. Born*, 4 CLEARINGHOUSE REV. 228 (N.D. Cal. 1970) (claim that San Francisco administration of Aid to Permanently and Totally Disabled takes six months to process applications); see Pevar, *supra* note 11, at 69-74.

¹³⁸ See Berkwitz, *Quality Control: The Newest Executive*, 100 DUN'S REV., Dec. 1972, at 93

believe that administrative systems designed to discover, analyze, and correct the causes of errors will not provide advances in accuracy and fairness beyond systems which are not so designed. Nor is there reason to believe that a court, with the aid of expert testimony, with the monitoring of performance provided by complaining parties, and with the manipulation of its full range of remedial options, could not provide remedies on the management side of due process which hold out at least as significant a prospect for regularizing the process of adjudication in AFDC as did the procedural safeguards imposed in *Goldberg*.

CONCLUSION

It may properly be objected that this Article looks at management solutions to problems of adjudication and the prospects for their judicial imposition on wayward administrative agencies through rose-tinted glasses. Even so, there are a number of advantages in thinking about due process in social welfare systems in management terms.

The first advantage is that such thinking begins to focus attention on the realities of the protection that can be expected from hearings. The legal advance, made explicit in *Goldberg*, from thinking about public assistance as a gratuity to thinking of it as a property interest subject to due process protection is significant. But the protections provided by viewing the requirements of due process wholly in adversary procedural terms may be functionally insignificant. Needs for protection which are identified as constitutionally significant should not be met by an insignificant response.

Additionally, viewing due process as potentially requiring a management system for assuring the quality of social welfare claims adjudications begins to translate the legal issue of fundamental fairness into terms which are meaningful to the people who administer social welfare programs. Their lament has continually been that adversary process does not make sense in a program dealing with a large volume of claims and an essentially dependent clientele. In the view of social welfare professionals, adversariness

(outlining increased importance of quality control in business and industry); Kuttner, *Quality Control by Computer for Insurance Operations*, 71 NAT'L UNDERWRITERS, April 7, 1967, at 1, 21 ("A potential diminishment of complaints, plus a reduction of costs, should make quality control a priority project for the progressive insurance company"). As with the proposed quality control system for social welfare programs, Kuttner proposed a two-tiered process: detection of "errors" plus their correction. See generally Welch, *Professional Standards Review Organizations—Problems and Prospects*, 289 NEW ENG. J. MED. 291 (1973).

tends to subvert the supportive role that the administrator must play with respect to the claimant in order to carry out the true intent of the program.

Finally, a management approach to due process suggests that the arguments against the introduction of adversary procedure in social welfare claims systems do not necessarily lead to the conclusion that the judiciary should treat these claims processes as peculiarities which do not respond to constitutional commands for due process. Rather, those arguments may lead to evaluation of what process is due the social welfare claimant in the social welfare system's own terms. If an informal management process is due, then surely that process should respond to the supportive purposes of the relevant program. And, if the management of the claims process fails to carry through those supportive purposes by assuring fair, accurate, and timely adjudication of claims, the judiciary should insist that management be restructured to provide reasonable assurance that social justice is done.

In a perceptive and cogent article written in 1958,¹³⁹ Harry Jones posed the problem of due process in the welfare state in the following terms:

Mass-produced goods rarely have the quality of goods made in far smaller quantity by traditional hand craftsmanship; an analogous problem challenges the welfare state. In an era when rights are mass produced, can the quality of their protection against arbitrary official action be as high as the quality of the protection afforded in the past to traditional legal rights less numerous and less widely dispersed among the members of society?¹⁴⁰

In my view the answer is yes, provided we are willing to reorient our thinking about due process in a way which recognizes the full implications of the changed context implied by "mass-produced" rights. That we should do so seems imperative. For as Jones also said:

In the welfare state, the private citizen is forever encountering public officials of many kinds: regulators; dispensers of social services, managers of state-operated enterprises. It is the task of the rule of law to see to it that these multiplied and diverse encounters are as fair, as just, and as free from arbitrariness as are the familiar encounters of the right-asserting private citizen with the judicial officers of the traditional law.¹⁴¹

¹³⁹ Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143 (1958).

¹⁴⁰ *Id.* at 155-56.

¹⁴¹ *Id.* at 156.